

**THE PROVISIONS OF THE SOUTH AFRICAN COMPETITION ACT 89 OF 1998
RELATING TO SMALL AND MEDIUM-SIZED ENTERPRISES**

By

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DECLARATION OF ORIGINALITY

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ABSTRACT

Small and medium-sized enterprises (SMEs) play a vital role in a country's economy. While their contribution to the economy is widely recognised, such contribution depends on a number of factors. One of the factors is the SMEs' ability to compete effectively and fairly participate in the market. This study critically analyses the provisions of the South African *Competition Act* 89 of 1998, as amended (the *Competition Act* or the Act), relating to SMEs to consider whether these provisions adequately ensure that SMEs have an equitable opportunity to participate in the economy.

Prior to the 2018 amendments to the *Competition Act*, SMEs' interests were only specifically mentioned in the purpose section of the *Competition Act*, the exemption provisions and the public interest grounds of merger consideration. There was no express mention of SMEs in the prohibited practice provisions. The *2018 Competition Amendment Act* changed this position by reinforcing references to equal opportunity for SMEs. The existence of these provisions would, however, be meaningless unless properly interpreted.

The objective of promoting SMEs has always been part of the South African competition law. However, this objective was not effectively realised, seemingly due to, among others, the influence of foreign law pursuing different competition law goals, the lack of clear prohibited practice provisions protecting SMEs, or the absence of a standard of competition harm that could fulfil the specific objective of promoting SMEs under the Act. In this regard, this study compared the treatment of SMEs under the South African competition law with that of the United States (US) and the European Union (EU), which have well-established competition law frameworks that significantly predate the current South African competition law framework. However, unlike South Africa, these jurisdictions do not expressly afford a special place for SMEs in their legislative framework. It is, therefore, submitted that a specific mention of promoting SMEs as a competition goal in the South African competition legislation has the effect of forcing the competition authorities to consider this objective in matters involving SMEs. It also compels competition authorities to accord SMEs a special place in competition considerations. Accordingly, an adequate competition law framework for SMEs in South Africa should be one that considers not only international best

practices, but also the socio-economic realities of South Africa. This calls for an application of the law that promotes transformation and provides a purposive interpretation of the provisions related to SMEs. This thesis, accordingly, submits that the efficiency paradigm “*protect competition and not competitors*” should not apply rigidly, but it should consider the “transformative context” of the purpose of the Act, which includes the promotion of SMEs.

Keywords: Best practices and SMEs; EU Competition law and SMEs; public interest; small and medium-sized enterprises; SME; SMME; South African Competition Act; US Antitrust law and SMEs.

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Chapter One: Background

1.1. Introduction

Small and medium-sized enterprises (SMEs)¹ play a very important role in a country's economy.² While their contribution to the economy is widely recognized,³ such contribution depends on a number of factors.⁴ One of the factors is the SMEs' ability to compete effectively and fairly participate in the market. This study will entail a critical analysis of the provisions of the Competition Act 89 of 1998, as amended (the Competition Act),⁵ dealing with SMEs in order to consider whether these provisions are adequate to promote the ability of SMEs to compete effectively and fairly from a competition law perspective.⁶

1.2. Definition of SMEs

There is no global standard definition of small and medium-sized enterprise (SME).⁷ The definition of SMEs differs from one country to another.⁸ SMEs are defined based

¹ In this study, the terms SMEs, small firms, small businesses and small enterprises are used interchangeably to indicate small, medium and micro enterprises. Church "Aspects of the interface between the promotion of small and medium enterprises (SMEs) and statutory competition law" (2018) THRHR 194 fn 4.

² OECD "Enhancing the contributions of SMEs in a global and digitalized economy", a document prepared for the Meeting of the OECD Council at ministerial level (Paris, 7-8 June 2017), available at <https://www.oecd.org/mcm/documents/C-MIN-2017-8-EN.pdf> (accessed on 9 March 2019) at 5, para 3.

³ The Banking Association of South Africa "What does the SME landscape in South Africa look like", available at <https://www.banking.org.za/what-we-do/sme> (accessed on 9 March 2019).

⁴ OECD "Enhancing the contributions of SMEs in a global and digitalized economy" (2017) 5, para 3.

⁵ The Competition Act 89 of 1998 (GN1392 in GG19412 of 30 October 1998), as amended by Competition Amendment Act 35 of 1999 (GN513 in GG1981 of 30 April 1999), Competition Act 15 of 2000 (GN528 in GG21234 of 26 May 2000), Competition Second Amendment Act 39 of 2000 (GN1354 in GG21880 of 13 December 2000), Competition Amendment Act 1 of 2009 (GN875 in GG32533 of 28 August 2009), Competition Amendment Act 18 of 2018 (GN175 in GG42231 of 14 February 2019).

⁶ This study uses the terms "competition law" and "antitrust law" interchangeably to refer to the law that regulates and seeks to maintain or promote competition in the market. However, "antitrust law" is mainly associated with United States competition law, while "competition law" is used worldwide. Bradford, Chilton, Linos and Weaver "The global dominance of European competition law over American antitrust law" (2019) *Journal of Empirical Legal Studies*, Vol. 16, Issue 4, 731.

⁷ OECD "Enhancing the contributions of SMEs in a global and digitalized economy" (2017) 4.

⁸ *Ibid.* See also Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 6.

on different factors. Such factors generally include the number of employees,⁹ the turnover and the sector in which the SME operates.¹⁰

The Organisation for Economic Cooperation and Development (OECD)¹¹ defines SMEs as “*non-subsidiary, independent firms which employ fewer than a given number of employees.*”¹² This number of employees varies across countries, but the most frequent maximum number is between 200 and 250 employees.¹³ Small firms employ a smaller number of employees, generally less than 50 employees, while micro-enterprises have a maximum of 5 to 10 employees.¹⁴ The turnover of the SME and the sector in which it operates are also characteristics used to define SMEs.¹⁵

1.3. Role of SMEs in an economy

The OECD duly acknowledges the important role that SMEs play in an economy.¹⁶ According to the OECD, they promote inclusive and economic growth by generating employment and contributing to sustainable industrialisation and innovation.¹⁷ SMEs also contribute to the reduction of income irregularities.¹⁸

The OECD further indicates that SMEs “*are key actors for promoting more inclusive and sustainable growth, increasing economic resilience and improving social cohesion. They are critical partners for building a better future.*”¹⁹ SMEs’ contribution to job creation includes employing people across all skill levels, including employing

⁹ OECD “Enhancing the contributions of SMEs in a global and digitalized economy” (2017) 4, the OECD reports that “[F]or statistical purposes, the OECD refers to SMEs as the firms employing up to 249 persons, with the following breakdown: micro (1 to 9), small (10 to 49) and medium (50-249).”

¹⁰ Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 6-7.

¹¹ The OECD is an international organisation that, among others, encourages governments to have well-designed competition laws, effective enforcement, and competition-based economic policies to enhance consumer welfare and economic growth. It encourages governments to promote competition in their markets. It also provides a knowledge hub for data, analysis and best practices in public policy. Available at <https://www.oecd.org/en/about.html> and <https://www.oecd.org/en/topics/policy-issues/competition.html> (accessed on 25 July 2024).

¹² OECD “Small and Medium-sized Enterprises: Local Strength, Global Reach” (2000) *OECD Policy Brief*, available at <https://www.oecd.org/cfe/leed/1918307.pdf> (accessed on 9 March 2019) 2.

¹³ *Ibid.* The OECD also reports that the United States of America (USA) considers the maximum number of employees that defines an SME to be up to 500 employees.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ OECD “Enhancing the contributions of SMEs in a global and digitalized economy” (2017) 5.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ OECD “OECD SME and Entrepreneurship Outlook 2019” (2019) *OECD Policy Highlights*, available at https://www.oecd.org/industry/smes/Policy_highlights_SME_Final.pdf (accessed on 20 August 2019) 3.

unskilled or low-skilled workers.²⁰ SMEs are also recognised as value-added contributors in that they add value to existing products or services,²¹ and also develop new business models.²²

Notably, SMEs' promotion of innovation includes innovating in areas or business activities that have not been explored by large established firms before.²³ In this regard, SMEs perform a number of important functions, which include, as observed by Qaqaya: *"introducing new ideas and processes, claiming niche markets or simply providing goods and services in socially important contexts."*²⁴

The OECD also notes SMEs' leading role on the digital and knowledge front and observes in this regard that *"SMEs operating in information and communication technologies (ICT) activities are particularly well placed to reap the benefits of digitalisation."*²⁵ The OECD further notes that *"Specialised high-skilled SMEs can outperform large firms. This is notable in France, Sweden and the United Kingdom, where micro and small firms in professional, scientific and technical services are more productive than large enterprises."*²⁶

The OECD further highlights that particularly in emerging economies, SMEs contribute to a large portion of employment and the GDP.²⁷ In emerging or low-income countries, SMEs contribute to the alleviation of poverty by creating jobs and adding value.²⁸ It is recognized that in emerging economies, SMEs create the opportunity for marginalized or previously disadvantaged groups to participate in the economy.²⁹ They have a more direct contact with consumers and disrupt markets which are characterised by monopoly.³⁰

²⁰ OECD "Enhancing the contributions of SMEs in a global and digitalized economy" (2017) 8 paras 14–15.

²¹ OECD "Enhancing the contributions of SMEs in a global and digitalized economy" (2017) 6-7.

²² *Ibid.*

²³ OECD "Enhancing the contributions of SMEs in a global and digitalized economy" (2017) 7.

²⁴ Qaqaya "The application of competition law to small-and-medium enterprises: lessons from selected APEC countries" (n.d.) An UNCTAD Research Partnership Platform project coordinated by Hassan Qaqaya.

²⁵ OECD "OECD SME and Entrepreneurship Outlook 2019" (2019) 8.

²⁶ *Ibid.*

²⁷ OECD "Enhancing the contributions of SMEs in a global and digitalized economy" (2017) 6.

²⁸ *Idem* 8 para 15.

²⁹ *Idem* 9 para 17.

³⁰ *Ibid.*

1.4. Reasons for protecting SMEs: Role and challenges

Given their critical importance for economic growth, it is clear that SMEs need to be supported and their contribution enhanced.

However, while SMEs' contribution to an economy is widely recognized,³¹ they generally face a number of challenges. Some of these challenges include: access to funding;³² restrictive government regulations (license/permits; tax/tariffs);³³ labour laws inhibiting SMEs growth;³⁴ access to markets: sometimes markets/industries are extremely competitive;³⁵ government not providing enough support;³⁶ access to technology or being unskilled in using technology;³⁷ crime and corruption;³⁸ lack of appropriate technology and low production capacity (includes access to electricity);³⁹ a lack of management skills and inadequate skilled labour;⁴⁰ finance and obtaining credit;⁴¹ access to markets and developing relationships with customers;⁴² Regulatory compliance, etc.⁴³

The challenges faced by SMEs from a competition perspective, in particular, include broadly SMEs' ability to compete effectively and fairly participate in the market. Schaper identifies the following specific challenges:⁴⁴ (i) limited geographical area, in that SMEs are generally based in one or two working locations; (ii) the limited product and service range; (iii) the small market share; (iv) the limited number of key customers SMEs depend on, for example, having only one or two key customers; (iv) SMEs easily exit the market; (v) SMEs face higher cost of compliance compared to

³¹ The Banking Association of South Africa "What does the SME landscape in South Africa look like" available at <https://www.banking.org.za/what-we-do/sme> (accessed on 9 March 2019).

³² SME South Africa "2018/2019 SME South Africa's SME landscape survey results" (28 November 2018), available at <https://www.bizcommunity.com/Article/196/713/184864.html> (accessed on 10 November 2019).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ The Banking Association of South Africa "What does the SME landscape in South Africa look like", available at <https://www.banking.org.za/what-we-do/sme/> (accessed: 10 November 2019).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ International Labour Organization "SME Promotion Agencies: Is there a best set-up? A quest for good practices" 2016, available at [wcms_532833.pdf \(ilo.org\)](https://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/publications/-/wcms_532833.pdf) (accessed on 21 November 2019).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Schaper "Competition Law, enforcement and the Australian small business sector" (2010) *Small Enterprise Research* 9-10.

large firms, in their responsibility to ensure regulatory compliance; (vi) SMEs face challenges with different information they received, namely “*information asymmetry*” and “*imperfect information*”;⁴⁵ (vii) SMEs are unlikely to have access to established suppliers; (viii) they are generally *unincorporated*;⁴⁶ (ix) they have limited finances; and (x) they have limited access to expert advice.⁴⁷

These factors are also used to compare small and large firms and consider the competitive dynamics in which SMEs operate compared to large firms.⁴⁸ For example, large firms are likely to have a significant market share, substantial financial resources, and better access to established suppliers than SMEs, enabling them (large firms) to be more competitive.⁴⁹

As observed, there is a clear need to support SMEs in order to ensure that they fulfil their role in the economy and contribute to economic growth.

1.5. Protection of SMEs

There are generally various pieces of legislation in a country that promote SMEs growth.⁵⁰ These include consumer laws, banking laws, tax laws, etc. In South Africa, the Consumer Protection Act no. of 2008 protects small businesses, which are also considered as “consumers” for purposes of the Act where they have an annual turnover of less than R 2 million.⁵¹ Small businesses that meet the monetary threshold to qualify for protection under the Consumer Protection Act therefore enjoy the same rights that individual consumers have in terms of the said Act.⁵²

⁴⁵ Own emphasis.

⁴⁶ Own emphasis.

⁴⁷ Schaper “Competition Law, enforcement and the Australian small business sector” (2010) *Small Enterprise Research* 9-10.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Department of Small Business Development “Comparative analysis of SMME legislation from eight countries to the national Small Business Act no 102 of 1996, as amended in 2003 and 2004 final report” (October 2017), available at www.dsbd.gov.za/sites/default/files/reports/report-on-smme-legislation.pdf (accessed on 21 November 2019) 14.

⁵¹ A consumer under the Consumer Protection Act 68 of 2008 includes small businesses. In this regard, any juristic person whose asset value or annual turnover at the time of the transaction is less than R2m is also treated as a consumer under the Consumer Protection Act. This information is available at <https://www.fin24.com/Entrepreneurs/Resources/The-CPA-and-small-businesses-20130314> (accessed on 21 November 2019).

⁵² *Ibid.*

As part of the arsenal of laws that promote the interests of SMEs in South Africa, the National Small Business Act 102 of 1996, as amended, is of particular significance.⁵³

In South Africa, the National Small Business (NSB) Act provides for the establishment of the Small Enterprise Development Agency (SEDA).⁵⁴ SEDA's objectives are to "(a) *design and implement development support programmes; (b) promote a service delivery network that increases the contribution of small enterprises to the South African economy and promotes economic growth, job creation and equity; and (c) generally, strengthen the capacity of (i) service providers to support small enterprises, and (ii) small enterprises to compete successfully domestically and internationally.*"⁵⁵

The US also has a *Small Business Act*⁵⁶ which seeks to "*aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise.*"⁵⁷

In the European Union (EU), SMEs are considered as the "*backbone of Europe's economy*".⁵⁸ The European Commission (EC) reports that in 2017, SMEs represented about 99% of all businesses in the EU.⁵⁹ They created around 85% of new jobs and 57 % of total value added.⁶⁰ The EC considers SMEs and entrepreneurship as key to ensuring economic growth, innovation, job creation, and social integration in the EU.⁶¹

⁵³ National Small Business Act 102 of 1996, as amended, available at https://www.gov.za/sites/default/files/gcis_document/201409/act102of1996.pdf (accessed on 21 November 2019).

⁵⁴ The National Small Business Act 102 of 1996 was amended several times. The latest amendment was through the National Small Business Amendment Act, no. 29 of 2004, which provided for the establishment of the Small Enterprise Development Agency (SEDA). It also amended the name of the principal Act from National Small Business Act to the National Small Enterprises Act. See: International Labour Organization "SME Promotion Agencies: Is there a best set-up? A quest for good practices" (2016) 49.

⁵⁵ Department of Small Business Development "Comparative analysis of SMME legislation from eight countries to the national Small Business Act no 102 of 1996, as amended in 2003 and 2004 final report" (October 2017).

⁵⁶ Small Business Act of 1958 [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023).

⁵⁷ *Idem*, section 2 of Small Business Act of 1958.

⁵⁸ European Commission "Entrepreneurship and small and medium-sized enterprises (SMEs)", available at https://ec.europa.eu/growth/smes_en (accessed on 21 November 2019). See also European Parliament "SMEs and better regulation" (2020) At a glance plenary – February 2020, European Parliamentary Research Service, available at [SMEs and Better Regulation \(europa.eu\)](https://www.europa.eu/press-communication/infographic/smes-and-better-regulation) (accessed on 13 June 2023) 1.

⁵⁹ European Parliament "SMEs and better regulation" (2020) At a glance plenary – February 2020, European Parliamentary Research Service, available at [SMEs and Better Regulation \(europa.eu\)](https://www.europa.eu/press-communication/infographic/smes-and-better-regulation) (accessed on 13 June 2023) 1.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

In 2008, the EU developed a framework for the EU policy on SMEs called the “Small Business Act”.⁶² The EU “Small Business Act” is not a piece of legislation, but actually a guideline that sets out principles for the conception and implementation of policies at the EU and member states level, which should ensure the growth and effective participation of SMEs in the market.⁶³ The EU “Small Business Act” aims *“to improve the approach to entrepreneurship in Europe, simplify the regulatory and policy environment for SMEs, and remove the remaining barriers to their development.”*⁶⁴

As can be seen from the above pieces of legislation or guidelines, the main objective in protecting SMEs is to enable their fair participation in the economy in order to increase their critical contribution to the economy through job creation, innovation and social development.⁶⁵ Competition law also embeds this objective, as it aims to maintain competition in a market by ensuring, *inter alia*, the fair and efficient participation of all economic players in the market, including SMEs.⁶⁶ For example, in South Africa, one of the objectives of the Competition Act is *“to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.”*⁶⁷ It is submitted that competition law is clearly a suitable mechanism to drive the protection of SMEs in a market.

1.6. The interaction between competition law and SMEs in South Africa

The state of the South African economy before 1994 was characterised by a legacy of domination by big businesses, constrained competition and unequal distribution of income and wealth.⁶⁸

⁶² *Ibid.*

⁶³ European Commission “Think Small First’ A ‘Small Business Act’ for Europe” (2008) COMP(2008)394 final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0394> (accessed on 17 June 2023) 4.

⁶⁴ European Parliament “SMEs and better regulation” (2020) At a glance plenary – February 2020, European Parliamentary Research Service, available at [SMEs and Better Regulation \(europa.eu\)](https://www.europarl.europa.eu/press/media/infographic/2020-02-10-sme-and-better-regulation) (accessed on 13 June 2023) 1.

⁶⁵ Department of Small Business Development “Comparative analysis of SMME legislation from eight countries to the national Small Business Act no 102 of 1996, as amended in 2003 and 2004 final report” (October 2017) 14.

⁶⁶ OECD “Competitive and fair markets”, available at <https://www.oecd.org/en/topics/sub-issues/competitive-and-fair-markets.html> (accessed on 26 July 2024).

⁶⁷ Section 2(e) of the Competition Act 89 of 1998, as amended.

⁶⁸ Department of Trade and Industry “White Paper on National Strategy for the Development and Promotion of Small Business in South Africa” (20 March 1995) Notice 213 of 1995, para 2.2.3.

Post the 1994 democratic elections, the South African government realised that there were high levels of market concentration, centralised ownership and control of the economy, which were threatening the interests of SMEs and new market entrants.⁶⁹ As a result, the building of an inclusive, equitable and sustainable economy, through job creation and social development, became key.⁷⁰ Government recognised that it needed partners to redress the economy.⁷¹ SMEs were identified as key partners that could contribute to economic growth and inclusivity, as they were seen as businesses that could generate employment, restore an equitable income distribution, activate competition, exploit niche markets, assist marginalized groups to survive and drive black economic empowerment.⁷² The strategy was to foster the participation of efficient SMEs in the economy so that they could effectively contribute to boosting the South African economy.⁷³

The result of this renewed focus on the role of SMEs in the South African economy led to, *inter alia*, specific measures for their protection in the Competition Act, which was adopted shortly after South Africa's transition to democracy. One of the core elements of the Government's approach to competition policy was market access of SMEs.⁷⁴ "*Ease of access by SMEs to the economy*" was identified as one of the specified economic and social objectives of the Competition Bill of 1998.⁷⁵ The Bill required its interpretation to be with reference to, *inter alia*, this objective.⁷⁶

In promulgating the Competition Act, the South African government recognized that there was a need to create an environment where businesses could compete effectively.⁷⁷ Hence the introduction of a provision in the Competition Act which aims to enable SMEs to compete effectively and fairly in the market.⁷⁸ In particular, section 2(e) states:

⁶⁹ Explanatory Memorandum to Competition Bill, 1998, GN841 in GG18913 of 22 May 1998.

⁷⁰ Department of Trade and Industry "White Paper on National Strategy for the Development and Promotion of Small Business in South Africa" (20 March 1995) Foreword

⁷¹ *Ibid.*

⁷² Department of Trade and Industry "White Paper on National Strategy for the Development and Promotion of Small Business in South Africa" (20 March 1995) para 2.2.3 and 2.2.5

⁷³ *Idem* Foreword. See also OECD "Competition Law and Policy in South Africa" (May 2003) *An OECD Peer Review* 15.

⁷⁴ Explanatory Memorandum to Competition Bill, 1998, 63.

⁷⁵ *Idem* 65.

⁷⁶ *Ibid.*

⁷⁷ Preamble to the Competition Act 89 of 1998, as amended, GN1392 in GG19412 of 30 October 1998.

⁷⁸ Section 2(e) of the Competition Act, 89 of 1998, as amended.

“The purpose of this Act is to promote and maintain competition in the Republic in order –

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.”

The concept of “equitable opportunity” is not defined in the Act. However, the Collins Dictionary defines “equitable” as *“something that is fair and reasonable in a way that gives equal treatment to everyone.”*⁷⁹ “Equitable opportunity” in the context of section 2(e) of the Act would, therefore, intend “equal” or “fair” opportunity. In this regard, the preamble to the Act refers to providing *“all South Africans equal opportunity to participate fairly in the national economy”*. This will include equal and fair participation of SMEs in the economy. “Equitable opportunity” would, therefore, involve promoting a level playing field for all economic players, including SMEs, to work efficiently.⁸⁰

Before the *Competition Amendment Act 18 of 2018*,⁸¹ the *Competition Act* already contained various provisions that give effect to this objective. Below is a summary of some of the provisions.

1.6.1 Section 9 – Price discrimination

Section 9 prohibited a dominant firm from discriminating between its customers on the basis of price, discount, the provision or payment of services, if such conduct is likely to substantially harm competition.⁸² In *Nationwide Poles v Sasol Oil Ltd* (hereinafter *Nationwide Poles*),⁸³ the Competition Tribunal (Tribunal) remarked that section 9 reflected the legislature's desire to promote market access for SMEs.⁸⁴

⁷⁹ Collins COBUILD Advanced Learner's English Dictionary (4th Ed.) (2003).

⁸⁰ OECD “Competitive and fair markets”, available at <https://www.oecd.org/en/topics/sub-issues/competitive-and-fair-markets.html> (accessed on 26 July 2024).

⁸¹ GN175 in GG42231 of 14 February 2019.

⁸² As discussed below, following the *2018 Competition Amendment Act*, section 9 has been amended to add another circumstance under which price discrimination may be prohibited. Section 9(1)(a)(ii) has been introduced to prohibit price discrimination by a dominant firm “if it is likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively

⁸³ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT) (hereafter *Nationwide Poles* (2005)) para 85.

⁸⁴ *Idem* para 81 – 89.

1.6.2 Section 10(3)(b)(ii), as amended

Section 10⁸⁵ allows a firm to apply to the Competition Commission for an exemption of a restrictive agreement or practice.⁸⁶ Exemption may only be granted if the agreement or practice concerned contribute to, amongst others, the “*promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons.*”⁸⁷

1.6.3 Section 12A(3)(c), as amended

This section⁸⁸ requires the Competition Commission to consider certain “public interest” grounds when assessing a merger. These public interest grounds include the ability of small and medium businesses to effectively enter into, participate in, and expand within a market.

It would, however, appear that after 20 years of its existence, the *Competition Act* had not achieved its objective of promoting SMEs. This was probably due to, amongst others, the persisting high level of economic concentration in the hands of a few large dominant firms.⁸⁹ This led the government to realise that a more rigorous transformation was required to achieve the *Competition Act*’s purpose of promoting SMEs. This resulted in the promulgation of the *Competition Amendment Act 18 of 2018* (the *2018 Amendment Act*).⁹⁰ In this *2018 Amendment Act*, the legislature reiterates the promotion of SMEs as one of the public interest issues to be pursued.⁹¹ The legislature notes the object of the *2018 Amendment Act* as addressing “*the high levels of economic concentration in the economy and skewed ownership profile of the economy*”.⁹² This seems to suggest that the historical patterns⁹³ had not been

⁸⁵ Section 10(b)(ii) has been amended and now reads: “(ii) *promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons;*” – Commencement of certain sections of the Competition Act, 2018 – Proclamation no. 46 of 2019 (12 July 2019)

⁸⁶ Restrictive practices include restrictive horizontal and vertical practices prohibited under Chapter 2 of the Competition Act.

⁸⁷ Section 10(b)(ii) of the Competition Act.

⁸⁸ Section 12A(3)(c) has been amended and now reads: “(c) the ability of *small and medium businesses, or firms* controlled or owned by historically disadvantaged persons, to effectively enter into, *participate* in or expand within the market”.

⁸⁹ “The Competition Amendment Bill and Small and Medium Businesses – a bold step towards economic inclusion” – Author unknown.

⁹⁰ GN175 in GG42231 of 14 February 2019.

⁹¹ Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) – clause 1.2

⁹² *Idem* clause 2.1.

⁹³ OECD “Competition Law and Policy in South Africa” (May 2003) *An OECD Peer Review* 9.

remedied through the existing SMEs provisions in the *Competition Act*, and that more stringent measures needed to be taken in order to ensure the fair participation of SMEs in markets, and as a result their effective contribution to the economy as a whole.

Of significant importance for this thesis is that the *2018 Competition Amendment Act* seeks to pay particular attention to anti-competitive conduct affecting SMEs. The notion of “*equitable treatment*”⁹⁴ of SMEs has now been reinforced. In particular, the amended abuse of dominance provisions give more protection to SMEs.⁹⁵ For example, the *2018 Amendment Act* introduces section 8(4), which prohibits a dominant firm, in a sector designated by the Minister, from requiring or imposing on a supplier that is a small and medium business, unfair prices or trading conditions.⁹⁶ The test under this section seems to be “fairness”.

Similarly, section 9 which prohibits price discrimination, introduces a new sub-section that clearly indicates the legislature’s intention to protect small businesses.⁹⁷ Section 9(1)(a)(ii) states that price discrimination by a dominant firm is prohibited “*if it is likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively.*”⁹⁸ This element is an alternative to showing adverse effect on competition (which is provided for under section 9(1)(a)(i)). The test under this section would, therefore, be whether the conduct impedes the ability of SMEs or HDIs to participate effectively.⁹⁹

The above provision now clearly shows that the purpose of section 9 is to protect small enterprises.¹⁰⁰

1.7. Rationale for the study

As indicated above, SMEs play a crucial role in an economy, especially in developing countries. This is because, as pointed out by the OECD, SMEs promote inclusive and

⁹⁴ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT) para 89.

⁹⁵ Competition Bill, 2018 and Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018).

⁹⁶ Section 5 of the Competition Amendment Act 18 of 2018, substituting section 8 of the Competition Act 89 of 1998.

⁹⁷ Section 9(1)(a)(ii) of the Competition Act. See also *Nationwide Poles* (2005) para 88.

⁹⁸ Author’s emphasis.

⁹⁹ Author’s emphasis.

¹⁰⁰ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 28 and 51 (hereafter *Sasol Oil* (2006)).

sustainable economic growth.¹⁰¹ They create jobs, foster innovation, and reduce income inequalities and poverty.¹⁰²

As discussed above, the South African government has recognised the important role SMEs play in the economy and has paid specific attention to SMEs through various policy and legal instruments, which include the Competition Act. The Competition Act contains provisions specifically aimed at promoting SMEs.¹⁰³ The question, however, is whether the South African Competition Act adequately deals with SMEs to ensure their fair and effective entry and participation in the market?

The application of the Competition Act in the context of SMEs has often encountered challenges, such as a consideration of the well-known principle “*protect competition and not competitors*.”¹⁰⁴ The interpretation of this paradigm seems to undermine the objective of ensuring fair and effective entry and participation of SMEs into markets.¹⁰⁵

In *Nationwide*, the Tribunal remarked that “*the mantra ‘protect competition, not competitors’ is usually invoked by those seeking to deny small business a special place in antitrust consideration*.”¹⁰⁶ However, it also noted that the paradigm holds some truth when considering competitors who might be opportunistic and oppose their competitors’ pro-competitive conduct.¹⁰⁷ Ncube and Paramoer identify these two approaches as being a conflict between social objectives and economic efficiency.¹⁰⁸ Kampel describes this interplay as an “*inherent tension between the pro-competition versus the pro-competitor debate*.”¹⁰⁹

Given these two seemingly conflicting views, namely one which seems to “*deny SMEs a special place in antitrust consideration*”,¹¹⁰ and the other which seems to empower

¹⁰¹ OECD “Enhancing the contributions of SMEs in a global and digitalized economy” (2017) 5.

¹⁰² *Idem* 5 and 8.

¹⁰³ *Nationwide Poles* (2005) para 83 and 88.

¹⁰⁴ *Idem* para 85

¹⁰⁵ Section 2(e) of the Competition Act 89 of 1998, as amended.

¹⁰⁶ *Nationwide Poles* (2005) para 85.

¹⁰⁷ *Ibid.*

¹⁰⁸ Ncube and Paramoer “Competition policy in SA and small business: A review of enforcement cases” (2009).

¹⁰⁹ Kampel “Competition law and SMEs: exploring the competitor/competition debate in a developing democracy” (2004).

¹¹⁰ *Nationwide Poles* (2005) para 85.

SMEs to the detriment of consumer welfare,¹¹¹ a number of questions, as set out in more detail below, come to mind.

1.8. Research statement

Although SMEs are pivotal to the growth of any economy, there are, however, various factors which make SMEs vulnerable and which impede and restrain their ability to enter and remain competitive in the markets in which they seek to operate. The central hypothesis of this thesis is that competition law, if appropriately designed, may be an effective vehicle by means of which to contribute to the growth and sustainability of SMEs in an economy by enabling them to participate fairly and effectively in markets.

1.9. Research objectives

South Africa, as a developing country and emerging market, gives recognition to the crucial function of SMEs in the country's economy and the Competition Act seeks to entrench this recognition by various provisions relating to SMEs. This thesis will consider whether these provisions are adequate and if not, how they can be aligned with best practices in SME protection from a competition law perspective.

Accordingly, the thesis will address the following research questions:

- a) How effective are the SMEs provisions in the Competition Act, as most recently amended in 2018, in ensuring that SMEs fairly participate in the economy?
- b) Is there a conflict between the mantra "*protect competition, and not competitors*" and the Competition Act's objective of ensuring SMEs equitable participation in the market?
- c) How does the interaction between the mantra "*protect competition and not competitors*" and the objective of ensuring SMEs' fair participation support SME's greater market access?
- d) How have the South African courts interpreted the Competition Act's provisions dealing with SMEs?

¹¹¹ *Nationwide Poles* (2005) para 85.

- e) What is the standard of harm to be applied in assessing competitive effects in cases involving SMEs?¹¹² Consumer welfare, foreclosure of competitors or a different/special harm?
- f) Are there international standards or best practices in dealing with SMEs from which South Africa can take guidance in providing greater competition protection to SMEs?

1.10. Research Methodology

In order to meet these objectives, the research will consider available and relevant policy documents, reports, legislation, case law, and literature, as well as academic studies, books, and journal articles relating to the treatment of SMEs within the context of competition law. The study aims to critically analyse the treatment of SMEs under the South African competition law and conduct a comparative analysis with the position of other specific jurisdictions on this aspect.

The study refers to international benchmarks and best practices, which will provide a backdrop against which the South African treatment of SMEs will be measured and weighed.

A comparative study will be undertaken by investigating the treatment of SMEs in the United States of America and the European Union (EU). Notably the Competition Act provides for the consideration of foreign and international law when interpreting it. Section 1(3) of the Act authorises any person interpreting or applying this Act to consider appropriate foreign and international law.¹¹³

1.11. Selection of comparative jurisdictions

To select the jurisdictions for comparative research, this study has used the criteria used by the Department of Small Business Development in its comparative analysis

¹¹² Kampel "Competition law and SMEs: exploring the competitor/competition debate in a developing democracy" (2004) 8 and 22. See also Ncube and Paramoer "Competition policy in SA and small business: A review of enforcement cases" (2009) 8.

¹¹³ Section 1(3) of the Competition Act: "Any person interpreting or applying this Act may consider appropriate foreign and international law."

of SMME legislation from eight countries to the national Small Business Act no. 102 of 1996, as amended.¹¹⁴ These criteria included: (i) the selection of countries within four regions, namely Africa, East and South Asia, Europe and the Americas, (ii) the countries selected had to fall within the high, middle and low-income categories, and (iii) the availability of original legislation or a translation of it in English.¹¹⁵

The thesis considered the above and selected the US and the EU as the appropriate comparative jurisdictions because of their well-established competition law frameworks, and their experience and knowledge of competition law and its interaction with SMEs.

1.11.1 United States of America (US)

In the US, small businesses are reported as an important constituency that helped to pass the Sherman Act in 1890.¹¹⁶ Small businesses were concerned that certain essential facilities, such as railroads were characterised by regional monopolies and charging anti-competitive and discriminatory shipping rates.¹¹⁷ Small businesses were also concerned about the tactics of certain trusts that controlled, among others, the fuel oil, sugar, tobacco, cotton seed oil, and whiskey markets.¹¹⁸ The trusts were engaging in predatory conduct against small businesses and drove out entrepreneurs with coercive threats of "sell or be ruined."¹¹⁹

¹¹⁴ Department of Small Business Development "Comparative analysis of SMME legislation from eight countries to the national Small Business Act no 102 of 1996, as amended in 2003 and 2004 final report" (October 2017).

¹¹⁵ *Idem* 9.

¹¹⁶ Golodner "Antitrust, innovation, entrepreneurship and small business" (2000) Speech made at the SBA conference on industrial organisation, available at <https://www.justice.gov/atr/speech/antitrust-innovation-entrepreneurship-and-small-business> (accessed on 24 November 2019).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* Predatory pricing occurs when a firm (generally a dominant firm) prices below a certain measure of cost in order to exclude its competitors from the market.

As mentioned above, the Sherman Act was passed in 1890.¹²⁰ It was the first antitrust law in the US.¹²¹ Later on, in 1914, two additional antitrust laws were passed, namely: the Federal Trade Commission Act, which created the Federal Trade Commission (FTC), and the Clayton Act.¹²²

The Sherman Act prohibits "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."¹²³ The Federal Trade Commission Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."¹²⁴ The Clayton Act deals with mergers and interlocking directorates.¹²⁵ The Clayton Act was amended by the Robinson-Patman Act of 1936.¹²⁶ It prohibits certain discriminatory prices, services, and allowances in dealings between merchants.¹²⁷ The Clayton Act was also amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance.¹²⁸ The Clayton Act also provides for treble damages action by private parties when they have been harmed by conduct that infringes either the Sherman or the Clayton Act, and to obtain a court order prohibiting the anticompetitive practice in the future.¹²⁹

The thesis has selected the US, as a comparative jurisdiction, as US antitrust laws are amongst the oldest competition laws in the world, with more than 100 years of experience in this field. The US has a wealth of knowledge and experience in dealing

¹²⁰ The Sherman Act is amongst the first antitrust legislation in the world, preceded by the Canadian Anti-Combines Act of 1889, which dealt with maintaining competition and preventing industrial cartels and monopolies. Hoffman "A reappraisal of the Canadian Anti-Combines Act 1889", (2013) 39:1 *Queen's LJ*, available at <https://journal.queenslaw.ca/sites/qjwww/files/Issues/Vol%2039%20i1/6.%20Hoffman.pdf> (accessed 26 July 2024) 128; Bliss "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910" (1973) *The Business History Review*, Vol. 47, No. 2, pp. 177-188, available at https://www.jstor.org/stable/pdf/3113401.pdf?refreqid=fastly-default%3A2d2f95b8eb31aabe61789801afb7b308&ab_segments=&origin=&initiator=&acceptTC=1 (accessed on 26 July 2024) 177.

¹²¹ Federal Trade Commission "The antitrust laws", available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed on 24 November 2019)

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* Interlocking directorates refer to a situation where the same person makes business decisions for competing companies.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

with anti-competitive conduct, especially those affecting SMEs. South African Courts have often relied on US antitrust laws and competition case law to interpret certain sections of the South African Competition Act.¹³⁰

1.11.2 European Union (EU)

Small businesses are considered crucially important to the European economy as is evident from the 2017 Report titled *Think Small First: A Small Business Act for Europe*.¹³¹ Issues of small businesses in Europe are regulated under the Small Business Act, which as pointed out above, is actually not legislation but a guideline.¹³² The European 'Small Business Act' aims to, amongst other, promote SMEs' growth by helping them tackle challenges which hamper their development.¹³³

Similar to South Africa, the European competition law seeks to promote and maintain competition within the European market by regulating anti-competitive conduct by companies and preventing cartels and monopolies that would harm society.¹³⁴ In Europe competition is regulated under articles 101 to 109 of the Treaty on the Functioning of the European Union (TFEU),¹³⁵ as well as a series of Regulations and Directives.¹³⁶

Certain principles of the EU competition law have been adopted in the South African Competition Act.¹³⁷

¹³⁰ *Nationwide Poles* (2005). See also *Sasol Oil* (2006) para 90.

¹³¹ Department of Small Business Development "Comparative analysis of SMME legislation from eight countries to the national Small Business Act no 102 of 1996, as amended in 2003 and 2004 final report" (October 2017) 16.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ European Commission "Antitrust" Competition Policy, available at https://ec.europa.eu/competition/antitrust/overview_en.html (accessed on 25 November 2019)

¹³⁵ Consolidated version of the Treaty on the Functioning of the European Union (7 June 2016) C202/47 Official Journal of the European Union, 88 – 93, available at https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0006.01/DOC_3&format=PDF (accessed on 17 June 2023)

¹³⁶ *Ibid.*

¹³⁷ Department of Small Business Development "Comparative analysis of SMME legislation from eight countries to the national Small Business Act no 102 of 1996, as amended in 2003 and 2004 final report" (October 2017) 16.

1.11.3 Canada and Australia for best practices

Although the US and the EU have been selected as the main comparative jurisdictions, the study has also considered Canada and Australia for the specific purpose of determining best practices in dealing with SMEs.

Canada's Competition Act¹³⁸ has a similar purpose to that of the South African Competition Act regarding the promotion of SMEs, namely to maintain and encourage competition in Canada to, among other things, "*ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy.*"¹³⁹ This provision is similar to section 2(e) of the South African Competition Act.¹⁴⁰ Canada also provides best practices in treating SMEs in the context of competition law. This is discussed in Chapter Two below.¹⁴¹

Australia has a competitive law framework that specifically seeks to promote SMEs. This jurisdiction with its competition legislation, the *Competition and Consumer Act 2010*,¹⁴² also provides best practices for treating SMEs in the context of competition law, which is discussed in Chapter Two below.¹⁴³

1.12. Delimitation

Little research has been done on SMEs and competition law in South Africa, especially in the context of assessing whether the provisions of the Competition Act dealing with SMEs achieve the purpose of the Competition Act, which is to ensure SMEs' fair and effective entry and participation in the economy. Therefore, this research will extensively rely on international literature and local SMEs experts.

Whilst the recent 2018 Competition Amendment Act has introduced a number of provisions protecting SMEs, these provisions have not yet been tested. There is consequently uncertainty as to how these provisions will be enforced. This research

¹³⁸ Competition Act R.S.C., 1985, c. C-34. Available at <https://laws-lois.justice.gc.ca/eng/acts/c-34/fulltext.html> (accessed on 30 March 2024).

¹³⁹ Canada Competition Act R.S.C., 1985, c. C-34, 1.1 Purpose of the Act, available at <https://laws-lois.justice.gc.ca/PDF/C-34.pdf> (accessed on 30 March 2024).

¹⁴⁰ See above 1.6. The interaction between competition law and SMEs in South Africa.

¹⁴¹ Chapter Two: An overview of SMEs and best practices in dealing with SMEs.

¹⁴² Competition and Consumer Act 2010, No. 51, 1974. Available at <https://www.legislation.gov.au/C2004A00109/latest/text> (accessed on 26 July 2024).

¹⁴³ Chapter Two: An overview of SMEs and best practices in dealing with SMEs, 2.7.2 Specific provisions dealing with SMEs in competition legislation – The Australian example.

will investigate whether similar provisions exist in the competition law of other jurisdictions and what guidance can be taken from them.

The research will, however, not cover: (i) the level of knowledge of SMEs on competition law; and (ii) civil actions by SMEs against dominant firms for abuse of a dominant position. As far as South Africa is concerned, the research will only consider the decisions of the Competition Appeal Court (CAC),¹⁴⁴ and the Constitutional Court. This is to limit the ambit of the study to competition matters decided by the superior courts,¹⁴⁵ whose decisions constitute the ultimate precedents in the competition law jurisprudence.¹⁴⁶

1.13. Chapter outline

Chapter One

Chapter One is the roadmap to the study. It contextualises the study by providing background and setting out the research statement and research questions that will be addressed. It further sets out the research methodology, selection of comparative jurisdictions, delimitations of the study and the chapter lay-out.

Chapter Two

Chapter Two will provide an overview of international standards or best practices in dealing with SMEs. As pointed out, SMEs face several challenges that affect their ability to compete and grow in the market. This chapter will look at the importance of SMEs in the economy and the various challenges affecting SMEs' growth. The chapter will then consider best practices in dealing with those aspects and best practices in dealing with SMEs in the context of competition law.

Chapter Three

¹⁴⁴ The Competition Appeal Court is a specialist court established in terms of section 36 of the Competition Act, to review any decision of the Competition Tribunal (the Tribunal) and appeals from the Tribunal. See Sutherland and Kemp *Competition Law of South Africa* (Last updated September 2022) para 11.5.

¹⁴⁵ Section 1 of Superior Courts Act 10 of 2013 defines "Superior Courts" as "the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court".

¹⁴⁶ This is not to say that the decisions of the Tribunal cannot stand as precedents in substantive competition law, as it is regarded as an adjudicative body with special expertise in competition law matters. In this regard, the Constitutional Court in *Competition Commission of South Africa v Group Five Construction Ltd* [2022] ZACC 36 recognised that "The specialist nature of the Tribunal and the Competition Appeal Court is important for the purposes of substantive analysis and decision making ..." para 125.

Chapter Three will consider the current measures in the South African Competition Act that deal with SMEs. In this chapter, the thesis will consider the history of the South African Competition legislation, the *2018 amendments to the Competition Act*, the provisions of the Competition Act dealing with SMEs; and the treatment of SMEs under the South African competition law jurisprudence – seminal cases. This will be done to consider how the interplay between the *pro-competition* mantra and the *pro-SMEs* has been applied in South African jurisprudence.

Chapter Four

Chapter Four will deal with the comparative study of the US and the EU. This chapter will first consider the treatment of SMEs under the US competition law (or antitrust law) and will then consider the treatment of SMEs under the EU competition law. Under each chapter, the study will briefly explore the history of competition law, the scope and purpose of the legislation regulating competition, the treatment of SMEs under the respective laws. It will then consider a few cases that specifically dealt with SMEs in the context of competition law in those jurisdictions.

Chapter Five

Chapter Five will be the final chapter of the thesis. It will set out the study's conclusions regarding the research questions and further capture the recommendations made regarding to reform of the South African Competition Act's approach to SMEs.

Chapter Two: An overview of SMEs and best practices in dealing with SMEs

2.1 Introduction

This chapter provides an overview of best practices or international standards for dealing with SMEs.

First, SMEs are defined. Second, the importance of SMEs in the economy is discussed. Third, various factors affecting SMEs' growth in the economy are discussed. Fourth, an overview of best practices in dealing with the challenges faced by SMEs is provided, and finally, best practices in dealing with SMEs in the context of competition law are considered.

2.2 Definition of SMEs

As pointed out in Chapter One,¹⁴⁷ there is no standard definition of an SME. Certain criteria are generally used to determine whether an entity or business is an SME: the number of employees, the annual turnover and the sector in which the entity operates. In this regard, the OECD defines an SME as “*a non-subsidiary independent entity that employs fewer than a given number of employees*”.¹⁴⁸ The number of employees is generally between 5 to 10 employees for micro enterprises, less than 50 employees for small enterprises and between 200 and 250 employees for medium-sized enterprises.¹⁴⁹

In South Africa, in the context of competition law, the Minister of Trade, Industry and Competition has defined an SME as “*a separate and distinct enterprise, with its branches or subsidiaries (if any) including cooperative enterprises, managed by one or more owners, and which operates in any sector of the economy and satisfies specific criteria to be considered as an SME*”.¹⁵⁰ These criteria are the total number of

¹⁴⁷ Chapter One, 1.2. Definition of SMEs.

¹⁴⁸ OECD “Small and Medium-sized Enterprises: Local Strength, Global Reach” (2000) *OECD Policy Brief*, available at <https://www.oecd.org/cfe/leed/1918307.pdf> (accessed on 9 March 2019) 2.

¹⁴⁹ OECD “Small and Medium-sized Enterprises: Local Strength, Global Reach” (2000) *OECD Policy Brief*, available at <https://www.oecd.org/cfe/leed/1918307.pdf> (accessed on 9 March 2019) 2.

¹⁵⁰ Notice in terms of section 1 of the Competition Act, 1998 (Act no. 89 of 1998), GN987 in GG42578 of 12 July 2019. Available at <https://www.ellipsis.co.za/wp-content/uploads/2019/02/Notice-in-terms-of-section-1-of-the-Competition-Act-12-July-2019.pdf> (accessed on 8 July 2023). Sakata “Small and medium-sized enterprises – their place in antitrust: Does the Competition Amendment Act, 2018 effectively bring more protection to SMEs?” (August 2019) Paper presented at the 13th Annual Competition Law, Economics and Policy Conference, available at https://www.compcom.co.za/wp-content/uploads/2020/12/CompCom-Special-Edition-Newsletter_s.pdf (accessed on 19 September 2021) (hereafter Sakata (2019)) 50.

paid employees and the enterprise's total annual turnover.¹⁵¹ As can be expected, these factors differ per sector of the economy.¹⁵²

In the US, the US Small Business Act of 1953¹⁵³ defines a small business as “an independently owned and operated non-dominant firm in its area of business”.¹⁵⁴ The criteria used to determine whether an entity is a small business include the number of employees, dollar volume of the business, net worth, and net income of the business.¹⁵⁵

In the EU, the *EU Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises* (“the EU Recommendation on SME definition”)¹⁵⁶ defines an SME¹⁵⁷ as “any entity engaged in economic activity, irrespective of its legal form, including self-employed persons, family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity, which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million”.¹⁵⁸ In particular, a small enterprise is defined as “an

¹⁵¹ Notice in terms of section 1 of the Competition Act, 1998 (2019), Columns 3 and 4 of the Schedule to the Notice; Sakata (2019).

¹⁵² *Ibid.*

¹⁵³ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170; The Small Business Act of 1953, 67 Stat. 233 (1953), available at <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg230.pdf> (accessed on 18 December 2023) was amended by the Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023).

¹⁵⁴ Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023) section 3(a)(1) which states: “For the purposes of this Act, a small business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.”

¹⁵⁵ The Small Business Act of 1953, 67 Stat. 233 (1953), available at <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg230.pdf> (accessed on 18 December 2023) was amended by the Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023) section 3(a)(2)(B);

MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170.

¹⁵⁶ EU Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Article 1.

¹⁵⁷ The definition refers to micro, small and medium-sized enterprises.

¹⁵⁸ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at

enterprise which employs less than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million”.¹⁵⁹ A micro-enterprise is defined as “an enterprise which employs less than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million”.¹⁶⁰

SMEs are, thus, defined by considering two main criteria, namely the staff number and the financial criteria.¹⁶¹ The study acknowledges that this definition of SMEs is primarily based on the abovementioned statutes.

2.3 Importance of SMEs in the economy

Quartey aptly points out that SMEs play an important role in a country’s economy,¹⁶² particularly in developing countries, where they play a developmental role.¹⁶³ SMEs are channels through which several developmental goals are achieved, including economic growth, poverty alleviation, economic participation and job creation.¹⁶⁴

SMEs’ contribution to economic growth, particularly during periods of crisis, has also been recognised.¹⁶⁵ For example, in the context of the COVID-19 pandemic, the International Trade Center notes that governments worldwide have realised that “SMEs act as a lynchpin connecting the pandemic to broader economic recession.”¹⁶⁶

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Articles 1 and 2(1).

¹⁵⁹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Article 2(2).

¹⁶⁰ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Article 2(3).

¹⁶¹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 36, para 4.

¹⁶² Quartey “Regulation, competition and small and medium enterprises in developing countries” (2001) Centre on Regulation and Competition – Working paper series, University of Manchester (UK), available at <https://scholar.google.com/scholar?q=Regulation%2C+competition+and+small+and+medium+enterprises+in+developing+countries&inst=3850658151283745516> (accessed on 28 June 2020) 7.

¹⁶³ *Idem* 5.

¹⁶⁴ *Idem* 7.

¹⁶⁵ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 5, para 1.1.2.

¹⁶⁶ International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) SME Competitiveness Outlook, available at <https://intracen.org/media/file/413> (accessed on 19 September 2020) 35.

Similarly, Kellezi *et al* confirm that SMEs largely contribute to employment.¹⁶⁷ SMEs create two-thirds of employment and are the main source of new jobs.¹⁶⁸ In the US, for example, Kellezi *et al* stated in 2014 that SMEs contribute to 99% of all business employers.¹⁶⁹ Ten years later, this percentage is still confirmed. The US Chambers of Commerce confirms that 99.9% of US businesses are small businesses.¹⁷⁰ It also confirms that small businesses constitute approximately 43,5% of the US's gross domestic product (GDP). In this regard, Quartey observes that SMEs have contributed to employment and economic growth faster than large firms.¹⁷¹

SMEs are also key to the South African economy, as a developing country.¹⁷² The *National Integrated Small Enterprises Development* (NISED) highlights the importance of SMEs in economic growth, job creation and transformation in South Africa.¹⁷³ Abor and Quartey also point out that SMEs contribute between 52 to 57% to GDP and contribute about 61% to employment.¹⁷⁴ Enaifoghe and Ramsuraj also note that the South African government has identified the SME sector as a tool to achieve economic growth.¹⁷⁵ Govuzela and Mafini also remark that the importance of SMEs in South Africa has become more crucial to achieve social stability by creating jobs to solve the high unemployment rate.¹⁷⁶

¹⁶⁷ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 5, para 1.1.2.

¹⁶⁸ *Ibid.*

¹⁶⁹ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 5.

¹⁷⁰ US Chamber of Commerce "Small Business Data Center", available at <https://www.uschamber.com/small-business/small-business-data-center> (accessed on 23 August 2024).

¹⁷¹ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 6.

¹⁷² National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 198.

¹⁷³ National Integrated Small Enterprises Development (NISED) Strategic Framework as the National Small Business Support Strategy, GN3054 in GG48063 of 17 February 2023, available at https://www.gov.za/sites/default/files/gcis_document/202302/48063gon3054.pdf (accessed on 28 April 2024) 12.

¹⁷⁴ Abor and Quartey "Issues in SME Development in Ghana and South Africa" 2010 International Research Journal of Finance and Economics 224 - 225, available at [Issues-in-SME-Development-in-Ghana-and-South-Africa.pdf \(researchgate.net\)](https://www.researchgate.net/publication/311111111_Issues_in_SME_Development_in_Ghana_and_South_Africa) (accessed on 17 August 2020) 219, 223.

¹⁷⁵ Enaifoghe and Ramsuraj "Examining the Function and Contribution of Entrepreneurship through Small and Medium Enterprises as Drivers of Local Economic Growth in South Africa" (2023) *African Journal of Inter/Multidisciplinary Studies* 4.

¹⁷⁶ Govuzela and Mafini "Organisational agility, business best practices and the performance of small to medium enterprises in South Africa" (2019) *South African Journal of Business Management* 50(1), a1417, 2 available at <https://doi.org/10.4102/sajbm.v50i1.1417> (accessed on 17 August 2020).

However, the ability of SMEs to realise these economic and developmental goals depends on several factors, as discussed below.¹⁷⁷

2.4 Factors affecting SMEs growth

Abor and Quartey point out that several studies have shown that various factors affect SMEs' growth.¹⁷⁸ These factors include: access to finance or capital; a lack of managerial skills and training; inadequate equipment and access to appropriate technology; restrictive laws, regulations, and rules; and limited access to international markets.¹⁷⁹ In a report that examines, among other things, the importance of SMEs and the challenges they face, the OECD identifies five areas in which SMEs encounter challenges: financing, business environment, technology, management capabilities, and access to markets.¹⁸⁰ UNCTAD also identifies four main areas that affect SMEs' growth, namely: transnational corporation and small business linkages (TNC-SME Linkages); financing technology for SMEs; technology development and mastery; and promoting SMEs' export competitiveness.¹⁸¹

SMEs' ability to compete internationally also forms an integral part of their competitiveness. UNCTAD lists a number of challenges that affect small enterprises' ability to enter global value chains (GvCs) both in developed and developing countries.¹⁸² These obstacles include: (a) upgrading technology and innovation capacity; (b) lacking adequate finance and human capital for technology upgrades; (c) struggling to meet standards and certification requirements; (d) managing intellectual assets and adequately protecting intellectual property rights (IPRs); (e) SMEs' difficulty

¹⁷⁷ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 7.

¹⁷⁸ Abor and Quartey "Issues in SME Development in Ghana and South Africa" 2010 International Research Journal of Finance and Economics 224 - 225, available at [Issues-in-SME-Development-in-Ghana-and-South-Africa.pdf \(researchgate.net\)](https://www.researchgate.net/publication/312222222_Issues_in_SME_Development_in_Ghana_and_South_Africa) (accessed on 17 August 2020).

¹⁷⁹ *Ibid.*

¹⁸⁰ OECD "Small businesses, job creation and growth: facts, obstacles and best practices" (n.d.) 5-6, available at [2090740.pdf \(oecd.org\)](https://www.oecd.org/dataoecd/20/95/2090740.pdf) (accessed on 13 September 2020).

¹⁸¹ UNCTAD "Improving the competitiveness of SMEs through productive capacity" (2005) Document from the Proceedings of Four Expert Meetings. Preface at iii and iv, available at [UNCTAD/ITE/TEB/2005/1](https://unctad.org/Document/ITE/TEB/2005/1) (accessed on 14 September 2020).

¹⁸² UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) Report by the UNCTAD Secretariat, available at [diaeed20095_en.pdf \(unctad.org\)](https://unctad.org/Document/Diaeed20095_en.pdf) (accessed on 17 September 2020).

in bargaining with large contractors; and (f) diversifying goods or services to reduce reliance on a small number of customers.¹⁸³

UNCTAD has further identified several factors that hamper enterprises' growth in least-developed countries (LDCs).¹⁸⁴ These are "*entry regulations, formalization procedures and costs; access to finance; access to energy; digital connectivity; and gender-based constraints.*"¹⁸⁵ However, the OECD has further identified factors that give businesses an equal opportunity to compete.¹⁸⁶ In particular, effective product and labour market regulations; taxation; competition; insolvency regimes; contract enforcement; civil justice systems and public governance are regarded as factors that encourage entrepreneurs to take risks and boost business investment.¹⁸⁷

During the COVID-19 pandemic, SMEs have also requested government support in the following areas: financial programmes; tax waivers or temporary tax breaks; support for self-employed individuals; rent subsidies; employment programmes; cash transfers; and tariff reductions on imported inputs.¹⁸⁸ These factors relate to the financial assistance that SMEs required during the COVID-19 pandemic. As will be discussed in more detail below, access to finance is considered one of the major challenges that SMEs face, which hampers SMEs' ability to compete effectively.

2.4.1 Regulation as one of the main challenges

From the above challenges, authors such as Quartey consider "regulation" as the main issue confronting SMEs in developing countries and affecting their competitiveness.¹⁸⁹ In particular, economic, social and administrative regulations are considered costly for SMEs.¹⁹⁰ Quartey states that regulations reduce SMEs' competitiveness and impede entry and/or the formation of new businesses.¹⁹¹ Regulations in a particular sector may

¹⁸³ *Idem* 17.

¹⁸⁴ UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) The Least Developed Countries Report 2018 Chapter 4, 86.

¹⁸⁵ *Ibid.*

¹⁸⁶ OECD "SME and Entrepreneurship Outlook 2019" (2019) OECD Publishing, Paris 93, available at <https://doi.org/10.1787/34907e9c-en> (accessed on 11 July 2020).

¹⁸⁷ *Ibid.*

¹⁸⁸ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) 36, Fig.29

¹⁸⁹ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 16.

¹⁹⁰ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 17.

¹⁹¹ *Ibid.*

also lower profit and, as a result, negatively affect employment, income and economic growth.¹⁹² In this regard, entry regulations often involve costs that discourage new firms (start-ups).¹⁹³ UNCTAD also indicates that high entry costs are widely regarded as deterring the formation of firms in many developing countries.¹⁹⁴ Other restrictive entry regulations include additional procedures that women must follow in some least-developed countries when starting a business.¹⁹⁵

The regulatory burden on firms can thus negatively affect their entry, performance and growth.¹⁹⁶ This, in turn, may affect SMEs' contribution to economic growth.¹⁹⁷ The OECD further notes that regulatory burdens such as "*regulatory inefficiencies, complexities and high compliance costs*" adversely affect new firms and SMEs in obtaining legal remedies compared to large firms.¹⁹⁸

2.4.2 Access to finance as a major challenge

Access to finance also constitutes another major challenge to SMEs' growth. It is observed that SMEs in the informal sector experience more setbacks than those in the formal sector, especially regarding access to finance.¹⁹⁹ In this regard, firms in the informal sector (informal firms) receive very limited funds from formal lenders.²⁰⁰ As a result, the major source of funding for informal firms, which are likely to be SMEs, in the least developed countries is self-funding, credit and loans from friends or relatives.²⁰¹ In rural areas, limited access to finance hinders the productivity and survival of firms, especially for farmers and non-farmers.²⁰² In a report highlighting the

¹⁹² *Ibid.*

¹⁹³ "The term startup refers to a company in the first stages of operations. Startups are founded by one or more entrepreneurs who want to develop a product or service for which they believe there is demand." Available at

<https://www.investopedia.com/terms/s/startup.asp#:~:text=The%20term%20startup%20refers%20to,they%20believe%20there%20is%20demand>. (accessed on 22 January 2021). See also UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) 88.

¹⁹⁴ UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) 88.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ OECD "SME and Entrepreneurship Outlook 2019" (2019) 93.

¹⁹⁹ UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) 89.

²⁰⁰ *Idem* Figure 4.5

²⁰¹ *Idem* 89.

²⁰² *Ibid.*

conditions under which SMEs can survive and thrive in the post-COVID-19 pandemic universe,²⁰³ the International Trade Centre has observed that informal businesses did not benefit from most COVID-19 support programmes, because they were not formally registered.²⁰⁴

2.4.3 Anti-competitive conduct, a major setback for SMEs

In the context of competition law, anti-competitive conduct is the main factor that negatively affects SMEs.²⁰⁵ Competition law plays a central role in maintaining a competitive market, which greatly benefits small businesses.²⁰⁶ However, Golodner notes specifically that anti-competitive practices, such as price fixing, market allocation and abuse of market power, negatively affect SMEs.²⁰⁷ It is also noted that mergers that result in price increases or restrict innovation may particularly harm SMEs.²⁰⁸

The OECD confirms that competitive conditions are crucial to an efficient economy.²⁰⁹ It further observes that regulatory restrictions and anti-competitive practices that prevent market entry and result in market distortion can weaken business agility and hinder innovation.²¹⁰ These restrictions substantially affect SMEs, which face greater challenges than large firms in defending their businesses and claiming damages against contraventions of competition law.²¹¹

2.5 Best practices in dealing with the challenges faced by SMEs

2.5.1 Definition of best practices

²⁰³ International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) 42.

²⁰⁴ *Idem* 37.

²⁰⁵ Golodner “Antitrust, Innovation, Entrepreneurship and Small Business” (2001) Small Business Economics, Feb., 2001, Vol. 16, No. 1, Special Issue: The Invisible Part of the Iceberg: Research Issues in Industrial Organization and Small Business 32, available at [Antitrust, Innovation Entrepreneurship and Small Business on JSTOR](#) (accessed on 22 August 2020).

²⁰⁶ *Idem* 32.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ OECD “SME and Entrepreneurship Outlook 2019” (2019) 95.

²¹⁰ *Ibid.*

²¹¹ OECD “SME and Entrepreneurship Outlook 2019” (2019) 95.

The Oxford English dictionary defines “best practices” as *“commercial or professional procedures that are accepted or prescribed as being correct or most effective”*.²¹² A best practice is also defined by Rouse as *“an industry-wide agreement that standardises the most efficient and effective way to accomplish a desired outcome. A best practice generally consists of a technique, method, or process. The concept implies that if an organisation follows best practices, a delivered outcome with minimal problems or complications will be ensured. Best practices are often used for benchmarking and represent an outcome of repeated and contextual user actions.”*²¹³

UNCTAD explains that best practices are *“a learning tool rather than a normative concept. Their identification involves determining what works in a given situation, what lessons can be learned and what is replicable.”*²¹⁴

According to Govuzela and Mafini *“business best practices are considered to be those approaches that are widely acknowledged as effective in producing superior results in commercial organisations.”*²¹⁵

From the above, it is thus clear that best practices are industry-wide approaches, methods or techniques recognised to be effective and efficient in achieving the best results in an industry or on a specific topic or issue.

The following sections provide best practices (for addressing the abovementioned challenges) primarily based on approaches taken in the EU and US, which serve as the main comparative jurisdictions in this study.²¹⁶ As explained in Chapter One above, the study also considers Canada and Australia for the specific purpose of determining best practices in dealing with SMEs.²¹⁷ Further, the sections below outline South African approaches that align with the definition of best practices in the context

²¹² Oxford Dictionary – Retrieve from <https://www.bing.com/search?q=what+does+best+practice+mean&form=EDGSPH&refid=4fd9e1cd5146430bb9bd2d00a6b8a0fc&mkt=en-za&msnews=1&PC=DCTS&sp=-1&pq=what+does+best+practice+mean&sc=7-28&qs=n&sk=&cvid=4fd9e1cd5146430bb9bd2d00a6b8a0fc> (accessed on 2 August 2020).

²¹³ Rouse “Best practice” 2012 Techopedia.com, available at <https://www.techopedia.com/definition/14269/best-practice#:~:text=Definition%20-%20What%20does%20Best%20Practice%20mean%3F%20A,generally%20consists%20of%20a%20technique%2C%20method%2C%20or%20process> (accessed on 2 August 2020).

²¹⁴ UNCTAD “Improving the competitiveness of SMEs through productive capacity” (2005) 65.

²¹⁵ Govuzela and Mafini “Organisational agility, business best practices and the performance of small to medium enterprises in South Africa” (2019) South African Journal of Business Management 50(1), a1417, 2 available at <https://doi.org/10.4102/sajbm.v50i1.1417> (accessed on 17 August 2020).

²¹⁶ See Chapter One, para 1.11.3 Canada and Australia for best practices.

²¹⁷ *Ibid.*

of competition law. This suggests that certain aspects of how SMEs are treated under South African competition law can be considered best practices (as defined above) and do not require any changes.

Nevertheless, the benchmarking exercise that the study seeks to conduct is to identify areas where the approach to SMEs under the South African competition law can be improved. This comparison is presented in Chapter Five, where the treatment of SMEs under South African competition law is assessed vis-à-vis the EU and the US approaches.

2.5.2 Best practices in dealing with the identified challenges for SMEs

The above review has identified several areas in which SMEs face challenges. The most common obstacles identified by various studies include restrictive regulations, access to finance, the business environment, access to technology, management capability, skills development, access to markets, and anti-competitive practices. It is thus necessary to consider the best practices or international standards concerning these areas.

2.5.2.1 Regulatory Framework

2.5.2.1.1 Regulations affect SMEs

Regulations are set out by government to control individuals' and firms' activities. They include the laws of the country. In the business context, they may be defined as a government action to control prices, quantities and the quality of products or services.²¹⁸ Government uses regulation to manage the economy in order to realise its economic and social goals.²¹⁹ Quartey identifies three categories of regulations: economic, social and administrative regulations. These regulations govern business start-ups, business activities, labour practices, payroll changes, health and safety standards, taxation, and foreign trade.²²⁰

²¹⁸ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 3-4.

²¹⁹ *Ibid.*

²²⁰ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 8.

As discussed above, regulatory burdens are one of the challenges that SMEs face.²²¹ Regulatory burdens include regulatory costs (such as the cost of registration or certification)²²² and high start-up costs (such as licensing and registration requirements).²²³ SMEs often experience high regulatory costs, such as registration or certification costs, which may also create barriers to entering a Global Value Chain (GvC).²²⁴

Similarly, Abor and Quartey note that regulatory burdens may negatively affect SMEs' development.²²⁵ These include high start-up costs, such as licensing and registration requirements.²²⁶ There are also transaction costs which can affect SMEs competitiveness.²²⁷

Regulations may be harmful to SMEs because of the cost of administration in complying with the regulations.²²⁸ In this regard, the cost and time of regulatory compliance can be significantly high and regulations directly affect the way SMEs conduct their businesses.²²⁹ The cost of complying with tax regulations is also regarded as a regulatory burden on SMEs in developing countries.²³⁰

However, Quartey remarks that regulations may also have positive effects on SMEs.²³¹ Contrary to the view that regulatory burdens affect SMEs' freedom to conduct business, the ITC reports that regulations can encourage innovation by creating a more secure environment,²³² and keep new technologies alive when consumers no longer see their value.²³³ Regulations are also seen to assist SMEs, for example, reducing the cost of doing business for the private sector.²³⁴

²²¹ See above Chapter One, at 1.4.

²²² UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 21.

²²³ Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 224.

²²⁴ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 21.

²²⁵ Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 224.

²²⁶ *Ibid.*

²²⁷ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 8.

²²⁸ *Idem* 3.

²²⁹ *Idem* 8.

²³⁰ *Idem* 15.

²³¹ *Idem* 8.

²³² International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 82.

²³³ *Ibid.*

²³⁴ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 8.

Thus, as much as regulations may be restrictive, they also have some benefits, such as providing a stable environment for firms, stimulating investment, creating certainty, promoting research and development and innovation, and facilitating exit and restructuring.²³⁵ As observed by Quartey, a regulatory regime should promote competition, the fair treatment of SMEs, as well as foster technology and innovation.²³⁶ This will stimulate business competitiveness, job creation and economic growth.²³⁷

There are best practices for regulations to promote SMEs' sustainability and competitiveness. Some of the best practices are discussed below in different contexts: regulations in the context of digital platforms, regulations regarding integrating informal businesses in the formal and global sectors, and regulations on cost, standards and certification.

2.5.2.1.2 Best practices in dealing with regulatory burdens affecting SMEs

The OECD observes that since 2000, a number of actions have been taken to deal with regulatory barriers that SMEs face.²³⁸ These regulatory barriers include legal barriers to entry, administrative burdens on start-ups, regulation complexity and the costs of regulatory compliance in different areas (e.g. environment, labour legislation, product standards and certification).²³⁹

Implementing a policy on standards and certification in developing countries is considered one of the best practices for SMEs to deal with regulatory challenges.²⁴⁰ This is found to avoid reliance on expensive experts and certification institutes in developed countries.²⁴¹ It is recommended by UNCTAD that governments establish a regulatory framework that promotes competition and reduces the price of certification services.²⁴²

2.5.2.1.3 Best practices in the context of regulations for informal businesses

²³⁵ *Idem* 3.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ OECD "SME and Entrepreneurship Outlook 2019" (2019) 96.

²³⁹ *Ibid.*

²⁴⁰ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 21.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

UNCTAD also recommends that government policies strive to integrate the informal sector into the formal sector and close the gaps between SMEs' and external companies' productivity.²⁴³ In this regard, Quartey notes that there are "negative" costs involved in operating in the informal sector, such as payments made to avoid detection of non-compliance or bribes to government officials.²⁴⁴

In the context of developing countries, particularly Ghana and South Africa, Abor and Quartey observe that regulatory solutions to assist informal enterprises integrating into the formal framework include the development of national legislation in Ghana that would define what constitutes an SME and SMEs' legal and tax obligations.²⁴⁵ It also includes limiting the legal burdens SMEs face when doing business in both Ghana and South Africa.²⁴⁶

2.5.2.1.4 Best practices in the context of regulations on digital platforms

Market concentration on digital platforms and anti-competitive practices by some platforms may affect the competitiveness of SMEs in developing countries, and reduce their profitability and force them to exit.²⁴⁷ The ITC remarks that a way of addressing these challenges would be through appropriate regulations for digital platforms, in the form of competition policies and data protection.²⁴⁸ In this regard, the G20, UNCTAD, the International Competition Network (ICN) and the European Commission (EC) have developed initiatives to monitor and address anti-competitive behaviour and data protection rules.²⁴⁹

The ITC also notes that on the digital platform, strong and proactive quality infrastructure bodies that set standards and assess the conformity of digital goods may assist SMEs, especially regarding cybersecurity and data privacy.²⁵⁰ The ITC found that "[N]ational quality organizations can adopt international standards and recognize

²⁴³ UNCTAD "Improving the competitiveness of SMEs through productive capacity" (2005) 182.

²⁴⁴ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 8.

²⁴⁵ Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 225-226.

²⁴⁶ *Idem* 226.

²⁴⁷ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) 45.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 82.

competent testing authorities outside of the country, while also participating in regional and international standard-setting bodies."²⁵¹ The ITC recommends that regulators use international standards developed by organisations, such as the International Organization for Standardization (ISO).²⁵² On this point, the ITC states that it is important that governments develop regulations that consider not only SMEs' and consumers' interests but also the need to promote innovation and technology.²⁵³

Another way of developing efficient regulations for business on digital platforms is through partnerships with the private sector.²⁵⁴ Partnerships between the private and public sectors ensure not only quality assurance in the digital era, but also assist in setting regulations and standards that allow business processes to function efficiently.²⁵⁵ There needs to also be partnerships with the private sector regarding technology innovation.²⁵⁶ The ITC has listed some actions and best practices that quality assurance institutions could adopt to build trust in the digital economy:²⁵⁷

- Facilitating the adoption of technology, particularly among women, the youth and SMEs in remote locations;
- Involving new players from the start and prioritise international standards;
- Balancing governance and innovation in a rapidly changing environment;
- Promoting privacy, safety and interoperability; and
- Establishing and maintaining trustworthy technology through quality assurance and certification.²⁵⁸

2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs

The OECD points out that in Canada, it is recognised that there is a need for effective policy coordination, which could be strengthened through clear leadership in SME and

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 82-83.

²⁵⁸ *Ibid.*

entrepreneurship policies within the federal government.²⁵⁹ This would entail the establishment of a government department which will assist other government departments.²⁶⁰ This department or the “*lead body*” will be responsible for, amongst others, developing a comprehensive and integrated strategy document for SMEs.²⁶¹ It will also develop an entrepreneurship policy in collaboration with other governments, non-governmental organisations (NGOs) and business sector stakeholders.²⁶²

The OECD identifies the following key recommendations on the strategic policy framework and delivery system in Canada:²⁶³

- Developing a national SME and entrepreneurship policy strategy document that will state the federal government’s vision, objectives, priorities and proposed actions in assisting SMEs and entrepreneurship. This strategy document will also allocate tasks to other government departments;²⁶⁴
- Having one government department that will take leadership of the strategy, and that will lead the drafting of the strategy, coordinate its implementation across institutions, and monitoring and evaluating in order to guide policy decisions;²⁶⁵
- Improving the availability and access to statistical data on SMEs and entrepreneurship policy development;
- Conducting an analysis of federal program expenditures, activities and impacts. This is to identify gaps in policy support and material deviations in policy effectiveness and efficiency. This will be used as evidence in adjusting the overall SME and entrepreneurship program, such as tax and direct program expenditures;²⁶⁶
- Making the Canada Revenue Agency’s business number a standard business identifier for the government. This is to facilitate transactions between

²⁵⁹ OECD “SME and Entrepreneurship Policy in Canada” (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ OECD “SME and Entrepreneurship Policy in Canada” (2017) 31.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

government and businesses, to keep a record of companies who have received government support and to encourage the evaluation of public support programmes;²⁶⁷

- Increasing awareness of the Canada Business Network to entrepreneurs and SME managers through more advertising, more cooperation with intermediary organisations, and the use of a common and recognisable brand for the program across Canada.²⁶⁸

Similarly, the OECD notes a need to coordinate regulatory policies to achieve harmony and avoid discrepancies, overlaps or contradictions.²⁶⁹ Such coordination mechanisms may include intergovernmental platforms for dialogue, mutual recognition policies among governments, regulatory harmonisation agreements, and strict regulatory uniformity agreements.²⁷⁰ Further, the OECD observes that the majority of OECD countries have established formal inter-governmental coordination mechanisms, or processes that require the national government to consult the relevant department that would be affected by national regulations before they are issued.²⁷¹ Inter-departmental coordination is also achieved through the technical support that national agencies may offer to local administrations to improve the quality of regulations.²⁷²

The idea of inter-departmental coordination in setting regulations is also encouraged at the international level. The OECD observes that the rapid digital transformation of economies and societies necessitates international cooperation on regulatory aspects.²⁷³

2.5.2.1.6 Developing “Smart regulations” and proper policy-making processes

UNCTAD indicates that government interventions are crucial in countries where strict regulations (*“institutional rigidities”*) have resulted in market failures.²⁷⁴

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ OECD “SME and Entrepreneurship Outlook 2019” (2019) 98.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ OECD “SME and Entrepreneurship Outlook 2019” (2019) 99.

²⁷⁴ UNCTAD “Improving the competitiveness of SMEs through productive capacity” (2005) 98.

In this regard, the OECD has remarked that “*Smart regulations*”,²⁷⁵ which are responsive to different market players and regulated situations, reduce burdens on SMEs. Smart regulations require public consultation to promote transparency and engage stakeholders throughout the policy cycle.²⁷⁶ The ITC aptly remarks that SMEs’ views must be considered throughout the negotiations and policy-making processes.²⁷⁷

The OECD reports that governments have promoted the integration of SMEs considerations in policies, including the whole policy cycle from rationale to design, implementation, monitoring and evaluation.²⁷⁸ Governments also develop regulations that can reduce the costs for SMEs.²⁷⁹ The OECD further observes that in addressing the regulatory burden problem, governments may consider the introduction of the “*stockflow linkage*” rules, namely the “one-for-one rule” (or “one-in-one out” rule), which recommends the removal of a rule every time a new one that imposes an administrative burden on business is introduced.²⁸⁰

The OECD also highlights the *EU Better Regulation Guidelines* (2015),²⁸¹ which set out various stakeholder engagement methods over a policy’s entire lifecycle (this applies to public consultation).²⁸² The various stages of engagement include: “*inception impact assessments at the initial stage of policy development, a consultation strategy under individual initiatives, and consultation mechanisms on Commission proposals and their impact assessments once they are put forward to the European Parliament and the Council.*”²⁸³ This is to ensure that firms affected by the policy are adequately consulted.

²⁷⁵ The OECD explains that “‘*Smart regulation*’ aims to ensure that regulatory settings are responsive to the diversity of actors and instances that are regulated, strengthening the evidence base to regulation and assessment tools, reducing burdens as to deliver the desired result in the most efficient and effective way, enhancing transparency, and engaging stakeholders throughout the policy cycle.” OECD “SME and Entrepreneurship Outlook 2019” (2019) 104.

²⁷⁶ *Ibid*

²⁷⁷ International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) 50.

²⁷⁸ OECD “SME and Entrepreneurship Outlook 2019” (2019) 104.

²⁷⁹ *Ibid*.

²⁸⁰ *Ibid*.

²⁸¹ European Commission “Better regulation for better results – An EU agenda” 2015 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0215 (accessed on 11 June 2023)

²⁸² OECD “SME and Entrepreneurship Outlook 2019” (2019) 105.

²⁸³ *Ibid*.

It also emphasizes that the policy-making process should not only consider regulatory goals and compliance, but also the development of SMEs.²⁸⁴

2.5.2.2 Access to finance by SMEs

2.5.2.2.1 Challenges in SMEs financing

It is acknowledged that access to finance is one of the major challenges SMEs face. For example, Abor and Quartey recognise that SMEs often lack capital and have limited access to adequate financial resources.²⁸⁵ A 1995 World Bank study on five African countries (Ghana, Malawi, Mali, Senegal, and Tanzania) found that approximately 90% of SMEs identified access to credit as a major constraint to new investment.²⁸⁶ In 2019, the World Bank acknowledged that access to finance remains one of the most cited constraints to SMEs' growth and productivity in emerging markets and developing countries.²⁸⁷

A number of SMEs in South Africa have also identified access to funds as a major constraint to their development.²⁸⁸ Green *et al* remark that “*finance is the ‘glue’ that holds together all the diverse aspects involved in small business start-up and development.*”²⁸⁹ The majority of SMEs find that access to finance is the greatest challenge to their growth and development.²⁹⁰

The ITC²⁹¹ notes that inadequate access to finance may affect SMEs' competitiveness in the context of the digital platform, especially in developing countries where finance

²⁸⁴ *Idem* 104.

²⁸⁵ Abor and Quartey “Issues in SME Development in Ghana and South Africa” (2010) 224.

²⁸⁶ Parker, Riopelle, and Steel “Small Enterprises Adjusting to Liberalisation in Five African Countries” 1995 World Bank Discussion Paper, No 271, African Technical Department Series, The World Bank, Washington DC 60, available at <https://documents1.worldbank.org/curated/en/594161468283188409/pdf/multi-page.pdf> (accessed on 12 June 2023). See also Abor and Quartey “Issues in SME Development in Ghana and South Africa” (2010) 224.

²⁸⁷ World Bank “Small and Medium Enterprises (SMEs) Finance - Improving SMEs' access to finance and finding innovative solutions to unlock sources of capital” (Last Updated: 16 October 2019), available at <https://www.worldbank.org/en/topic/sme/finance> (accessed on 28 August 2024).

²⁸⁸ Abor and Quartey “Issues in SME Development in Ghana and South Africa” (2010) 225.

²⁸⁹ Green, Kimuyu, Manos and Murinde “How do Small Firms in Developing Countries Raise Capital? Evidence from a Large-Scale Survey of Kenyan Micro and Small Scale Enterprises” 2002 Finance and Development Research Programme Working Paper Series, Paper No. 47 Loughborough University, 1. See also Abor and Quartey “Issues in SME Development in Ghana and South Africa” (2010) 225.

²⁹⁰ Abor and Quartey “Issues in SME Development in Ghana and South Africa” (2010) 225.

²⁹¹ International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018).

or capital is not readily available for SMEs.²⁹² Notably, the ITC remarked in 2018 that about 38% of SMEs in low-income countries have identified access to finance as a major constraint compared to 14% of SMEs in high-income countries.²⁹³ About half of the SMEs and informal businesses in developing countries are “*unserved and undeserved*” by formal financial institutions, such as banks.²⁹⁴

As pointed out by Quartey, SMEs face high start-up costs, including registration and licensing costs, the cost of seeking legal redress and the delay in court proceedings.²⁹⁵ For example, Aryeetey *et al* have found that the process of starting a business in developing countries, in particular registering a business and obtaining a manufacturing license, can be very demanding.²⁹⁶ Several monetary and credit policies also affect SMEs, including policies related to inflation and money supply, interest rates, exchange rate, capital control and access to credit.²⁹⁷

Other financial aspects that affect SMEs in developing countries, especially in Africa, include the exchange rate devaluation, ceilings on bank lending or credit ceilings, trade regulations on import and export which increase SMEs’ transaction costs, the volume of paperwork, delays and bribes occasioned by corruption that absorb resources of SMEs who rely on international trade for importing and exporting products.²⁹⁸

2.5.2.2.2 Best practices for SMEs in the context of access to finance

The following best practices for being able to access good finance have been identified in the financing areas: ²⁹⁹ (a) reducing the risk and costs of private equity finance; (b) developing the private capital industry; (c) offering equity financing to start-ups SMEs;

²⁹² *Idem* 15.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ Quartey “Regulation, competition and small and medium enterprises in developing countries” (2001) 9.

²⁹⁶ Aryeetey, Baah-Nuakoh, Duggleby, Hettige, Steel “Supply and Demand for Finance of Small Enterprises in Ghana” 1994 World Bank Discussion Paper No. 251, 14, available at https://www.academia.edu/50785516/Supply_and_Demand_for_Finance_of_Small_Enterprises_in_Ghana (accessed on 12 June 2023). See also Quartey “Regulation, competition and small and medium enterprises in developing countries” (2001) 9.

²⁹⁷ Quartey “Regulation, competition and small and medium enterprises in developing countries” (2001) 9-11.

²⁹⁸ *Ibid.*

²⁹⁹ OECD “Small businesses, job creation and growth: facts, obstacles and best practices” (n.d.).

and (d) relieving SMEs from tax burdens.³⁰⁰ In a nutshell, proper financing and less tax.³⁰¹

SMEs may develop in the economy through financial support through loans, credits, grants, etc. and non-financial support through information, mentorship, training, etc.³⁰² Government support may also be given to specific entrepreneurs (for e.g. historically disadvantaged individuals in South Africa) or specific types of SMEs.³⁰³ Abor and Quartey suggest that access to finance or credit can be improved by forming cooperatives amongst entrepreneurs.³⁰⁴ They note that financial institutions believe that the risk of default will be reduced through the cooperative's peer pressure.³⁰⁵

UNCTAD further notes that better access to finance, especially from the formal financial sector, encourages the informal sector to formalise.³⁰⁶ It is therefore suggested that LDCs should prioritise the development of a banking sector capable of properly assisting formal SMEs.³⁰⁷ This could also motivate the formalisation of informal firms.³⁰⁸

According to UNCTAD, best practices to improve SMEs' access to finance include banks as a source of technology financing, equity and venture capital, and government intervention.³⁰⁹ With regard to banks as a source of technology financing, UNCTAD has recommended future policy actions to incentivise lending to SMEs.³¹⁰ Regarding equity and venture capital, UNCTAD has identified factors that can contribute to the establishment of a successful venture capital industry. These include encouraging foreign investors, granting tax incentives to individuals or companies investing in venture capital funds, and banks providing working capital, etc.³¹¹

³⁰⁰ *Ibid.*

³⁰¹ OECD "Small businesses, job creation and growth: facts, obstacles and best practices" (n.d.) 5.

³⁰² OECD "SME and Entrepreneurship Outlook 2019" (2019) 131.

³⁰³ *Idem* 130, Table 3.1. Helping SMEs go global: Selected examples of mainstreamed approaches.

³⁰⁴ Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 225.

³⁰⁵ *Idem* 225-226.

³⁰⁶ UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) 90.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ UNCTAD "Improving the competitiveness of SMEs through productive capacity" (2005) 97-98.

³¹⁰ *Idem* 97. These policy actions include: (i) removal of interest rate caps; (ii) grant of tax incentives (i.e. lower rate of tax on banks' SME income); (iii) a legal system that allows financial institutions to obtain and enforce security; and (iv) partial loan guarantee programmes in which the government and banks share the risk in SME lending.

³¹¹ UNCTAD "Improving the competitiveness of SMEs through productive capacity" (2005) 97-98. The specific factors that UNCTAD has identified for establishing a successful venture capital industry are:

Quartey also notes that taxation has a major impact on SMEs.³¹² Best practices to address SMEs' challenges in relation to tax, in the context of developing countries, include investment and tax incentives, special taxes applying to start-ups, and import duties to limit foreign competition.³¹³

Further, the US initiatives of “set-asides”, which reserve funds for SMEs, may also be regarded as a model to follow in addressing the SMEs’ challenge of access to finance.³¹⁴ Another way of addressing SMEs’ challenge of access to finance is through providing funds to “special groups”, which include socially disadvantaged people or people located in disadvantaged areas.³¹⁵

2.5.2.2.3 SMEs access to finance on digital platforms

According to the ITC, stringent requirements for granting credit, such as high interest rates and long timeframes on loan decisions, discourage SMEs from seeking credit.³¹⁶ Information and communications technology (ICT)- enabled tools that utilise digital platforms to facilitate SMEs' access to finance. The ITC is of the view that newly emerging ICT-enabled finance solutions on digital platforms have changed SMEs’ financial landscape.³¹⁷ ICT-enabled tools have generally improved SMEs access to finance and have assisted SMEs in circumventing some of the challenges faced in applying for traditional finance tools.³¹⁸

ICT-enabled tools include mobile phone payments which assist SMEs in their business transactions.³¹⁹ In this regard, the ITC reports that about 9% of micro-small and medium enterprises (MSMEs) surveyed in developing countries depend on mobile

(i) Provision of a definite policy framework with the respective government choosing between an intervention and a non-intervention approach; (ii) regulatory framework with guidelines; (iii) encouragement of foreign investors; (iv) grant of tax incentives to individuals, corporate entities, and insurance companies for making investments in venture capital funds; (v) provision of working capital by banks; and (vi) strengthening of synergies with research and development

³¹² Quartey “Regulation, competition and small and medium enterprises in developing countries” (2001) 14-15.

³¹³ *Idem* 15.

³¹⁴ OECD “Small businesses, job creation and growth: facts, obstacles and best practices” (n.d.) 53.

³¹⁵ *Ibid.*

³¹⁶ International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018) 15.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018) 16.

phone payments for their e-commerce international transactions, compared to a smaller percentage in developed countries.³²⁰ About 22% of MSMEs surveyed in Africa confirmed using mobile money to complete e-commerce transactions.³²¹

The ITC also observes that the use of digital platforms can assist SMEs in addressing some of the challenges faced. The availability of digital platforms has significantly reduced the costs of international transfer fees.³²² It has also boosted the use of ICT-enabled credit scoring tools, which facilitate lending and investments.³²³

The use of digital platforms is regarded as a best practice for SMEs to increase their competitiveness in local, regional or international markets.³²⁴ On this, the best practices would include the increased use of digital platforms for a better understanding of consumer needs, and better adaptation of products/services to such needs, or use digital platforms to access funds or pay service providers or employees.³²⁵

The availability of digital platforms and data increases access to finance for SMEs.³²⁶ Digital platforms have also revolutionised alternative “platform-based finance”, especially through “crowdfunding”³²⁷ and “peer-to-peer” transactions.³²⁸ These platforms offer a win-win situation for both SMEs and investors. On one hand, SMEs have the advantage of a quicker timeframe in receiving funding compared to the timeframe it takes to process loans from traditional banks. On the other hand, lenders/investors also benefit from having a diversified portfolio of investments.³²⁹

The ITC remarks that micro-finance is an alternative mode of funding, which is widely used in Africa and the Middle East, especially in the agriculture, food and beverages

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018) 16-17.

³²⁵ *Ibid.*

³²⁶ International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018) 17.

³²⁷ Crowdfunding platforms offer a digital platform on which SMEs may pitch their business ideas to the public, who may offer funding or investment in exchange for a share in the start-up business. These are small individual investments that come from a large “crowd” of people (International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018)) 17.

³²⁸ Peer-to-peer (P2P) platforms offer a data-based risk assessment, connecting lenders to borrowers. International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018) 17.

³²⁹ *Ibid.*

sectors.³³⁰ It reports that about 90% of money lent in Africa came from international platforms. In this regard, the ITC recommends that African platforms could tailor their offering to the specific African country.³³¹

2.5.2.2.4 Favourable tax regimes for SMEs

Best practices in dealing with SMEs' financial challenges include the Canadian Tax system, which offers a favourable tax regime to SMEs.³³² In 2015, the average corporate tax rate in Canada was slightly above the OECD average of 25%, but lower than the average of other G7 countries.³³³ After a small deduction of the first CAD (Canadian \$) 500 000 of federal corporate income, the average tax was lowered to about 10,5% in 2016.³³⁴

In Canada, SMEs also benefit from additional tax deductions offered by provincial and territorial authorities.³³⁵ This offers SMEs preferential tax rates without them having to change their business models or make new investments.³³⁶

2.5.2.2.5 Financial support programs for SMEs

Best practices of SME support may also be found in Canada which promotes support programs for SMEs that wish to participate in growth projects. These programs include support for innovation, export or skills development.³³⁷

The OECD reports that the World Bank *Doing Business* survey ranks Canada among the top countries worldwide that facilitate the start of a business.³³⁸ This is measured by the time and cost of establishing a limited company.³³⁹ From this, the best practice

³³⁰ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 20.

³³¹ *Idem* 21.

³³² OECD "SME and Entrepreneurship Policy in Canada" (2017).

³³³ *Idem* 24. The OECD report states that: "*The average corporate tax rate (combining federal and provincial/territorial taxes) in Canada was 26.3% in 2015 (26.7% in 2016), slightly above the OECD average of 25% for 2015 but lower than the average of other G7 countries (31.8%)*"

³³⁴ OECD "SME and Entrepreneurship Policy in Canada" (2017) 24-25.

³³⁵ *Idem* 25.

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ OECD "SME and Entrepreneurship Policy in Canada" (2017) 25. World Bank Group "Doing Business 2015 Going Beyond Efficiency", available at <https://archive.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf> (accessed on 1 May 2024) 146.

³³⁹ *Ibid.*

is to follow the Canadian example in terms of quick turnaround, low cost and ease in registering a business.³⁴⁰

The OECD identifies financial programmes³⁴¹ that enhance government loans for small businesses and socially disadvantaged groups including women, youth and indigenous communities.³⁴² These financial programmes also seek to promote business angel investments in small businesses through tax rebates and incentives to individuals or business angel groups investing in small businesses.³⁴³ These programmes also seek to improve the financial literacy of small business owners and managers.³⁴⁴

2.5.2.2.6 SMEs and Finance Technology

UNCTAD³⁴⁵ identifies several issues related to financing technology that affect SME growth. These include:³⁴⁶

- The lack of suitable government policies for financing SMEs;
- The existence of information gaps between finance and the SME sector;
- SMEs' creditworthiness;
- Banks' apprehension to service SMEs who are regarded high risks;
- The absence of financial and fiscal incentives for loans and equity capital; and
- The rigidity of international or national requirements for financing technology.³⁴⁷

The ITC points out that the use of finance technology may benefit SMEs, especially those who are in the business of supplying their goods on credit.³⁴⁸ But this requires funding, especially when doing business in remote regions.³⁴⁹ According to the ITC

³⁴⁰ *Ibid.*

³⁴¹ OECD "SME and Entrepreneurship Policy in Canada" (2017) 36.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ OECD "SME and Entrepreneurship Policy in Canada" (2017) 36.

³⁴⁵ UNCTAD "Improving the competitiveness of SMEs through productive capacity" (2005).

³⁴⁶ *Idem* 97.

³⁴⁷ *Ibid.*

³⁴⁸ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 85.

³⁴⁹ *Ibid.*

Numerous global policy documents have acknowledged that funding usually calls for private-sector finance.³⁵⁰

The ITC further recommends public-private partnerships where businesses may benefit from the private sector's capital/funds and its know-how, and save on high regulatory costs.³⁵¹ Public-private partnerships are also recognised to result in lower prices and higher quality and promote the growth of transport and ICT networks.³⁵²

2.5.2.3 SMEs and access to energy

Access to energy, especially in remote regions of developing countries, is another aspect that affects SMEs' productivity and profitability.³⁵³ Lack of access to energy, particularly unreliable power supplies, affects micro and small enterprises' production, productivity and profitability, as they have to incur additional costs to source energy.³⁵⁴ Limited access to modern, affordable, reliable and efficient energy affects SMEs' competitiveness in local and global markets.³⁵⁵ Lack of access to energy also affects the growth of agro-business and agro-value chains in rural areas, as well as female participation in entrepreneurial activities and structural transformation.³⁵⁶

Best practices addressing the challenge of access to energy in least developing countries (LDCs) include "*transformational energy access*".³⁵⁷ UNCTAD describes transformational energy access as "*sufficient, reliable and affordable energy for all types of productive use*".³⁵⁸ This kind of energy access promotes sustainable development and growth.³⁵⁹

2.5.2.4 Business environment for SMEs

³⁵⁰ *Ibid.*

³⁵¹ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 85.

³⁵² *Ibid.*

³⁵³ UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) 90-91.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) 91.

³⁵⁷ *Ibid.*

³⁵⁸ UNCTAD "The Least Developed Countries Report 2017: Transformational energy Access" (2017) UNCTAD Policy Brief No. 55, available at https://unctad.org/system/files/official-document/presspb2017d4_en.pdf (accessed on 24 June 2023) 1.

³⁵⁹ *Ibid.*

2.5.2.4.1 A conducive environment is key

UNCTAD indicates that a conducive business environment is key for SMEs to integrate into the global market or the global value chain (GvC).³⁶⁰ In this regard, it states that a fair and transparent application of laws and regulations, as well as efficient administrative procedures create a conducive business environment for SMEs.³⁶¹ Such a business environment is based on macroeconomic policies, such as competition, international trade and investment, finance, labour and education policies.³⁶²

According to UNCTAD, this beneficial business environment requires different institutions to coordinate.³⁶³ This is because the nature and configuration of global markets, particularly global value chains (GvCs), would not permit one single government department to handle the integration of SMEs into GvCs. In addition, developing and implementing these policies would require the collaboration of the private sector and civil society.³⁶⁴

As mentioned above, SMEs competitiveness depends on the business environment in which they conduct business, whether it is locally or internationally. SMEs also face challenges in relation to entry and growth in international markets. The OECD has also found that large distances, remote global markets and the concentration of businesses in a few urban areas affect an enabling environment for SMEs' competitiveness and innovation.³⁶⁵

2.5.2.4.2 Best practices for an SME conducive business environment

Some of the best practices on the challenge of entry and growth in the global value chain (GvC), include targeted assistance programmes that would build capacity in SMEs.³⁶⁶

³⁶⁰ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 18.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

The OECD has identified the following best practices in relation to business environment for SMEs:³⁶⁷

1. New regulations should be systematically examined;
2. Implementing a Business Impact System to audit and monitor new legislation;
3. Eliminating regulations that result in higher compliance costs than benefits;
4. Introducing legislation with a fixed period of time – known as “*sunsetting principle*”;
5. Enhancing the use of information technology. It is proposed that enterprises use a single number in all their dealings with government.”³⁶⁸

OECD³⁶⁹ identifies the following key recommendations on the business environment for SMEs and entrepreneurship:³⁷⁰

- (a) Addressing market failures affecting SMEs and start-ups through specific targeted programs, instead of continuous tax reductions. Accordingly, there must be an assessment as to whether a reduction in SMEs' tax rate addresses market failures that affect SMEs;
- (b) Encouraging bank lending to SMEs by expanding loan guarantee programs at the federal and provincial levels;
- (c) Enhance direct government lending, in the form of small business loans, to groups that are unlikely to be served by commercial banks, such as socially disadvantaged entrepreneurs (e.g. women, youth and indigenous communities) or innovative projects;³⁷¹
- (d) Improve the training system for SMEs by having a closer integration of practical and theoretical training. This can be done by offering training online or having collaborative training, where SMEs could cooperate with each other or other specialised training institutions in offering apprenticeship;

³⁶⁷ OECD “Small businesses, job creation and growth: facts, obstacles and best practices” (n.d.).

³⁶⁸ *Idem* 47-48

³⁶⁹ OECD “SME and Entrepreneurship Policy in Canada” (2017).

³⁷⁰ *Idem* 29.

³⁷¹ OECD “SME and Entrepreneurship Policy in Canada” (2017) 86.

- (e) Introduce a system of dual-studies at the tertiary education level, where studies at specialised colleges or Universities are combined with paid on-the-job apprenticeship in companies;
- (f) Create learning programs for integration in a new job. Increase funding for existing programs that provide internships in innovation-oriented SMEs to post-secondary students; and
- (g) Enhance the promotion of Foreign Direct Investment (FDI) in strategic knowledge-based sectors and reduce regulatory barriers to allow FDI flows in Canada.³⁷²

Furthermore, enhanced collaboration between international organisations, business support organisations and the public sector, provides SMEs with an enabling business environment.³⁷³

The ITC reports that international organisations could provide guidelines, assessment kits and training materials on international standards, which can be customised by business support organisations.³⁷⁴ The public sector must also ensure that there is an enabling business environment where firms compete fairly.³⁷⁵

Several countries around the world have also tried to ensure an enabling environment for the fair and effective participation of SMEs in the economy markets.³⁷⁶ For example, to promote competition in the retail and professional services sectors, Austria has revised a number of regulations and administrative rules.³⁷⁷ In this regard, small facilities in the retail sector have been exempted from “*authorisation procedures*.”³⁷⁸

2.5.2.5 Access to technology by SMEs

³⁷² *Idem* 29.

³⁷³ International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) 48.

³⁷⁴ *Idem* 49.

³⁷⁵ *Idem* 49.

³⁷⁶ OECD “SME and Entrepreneurship Outlook 2019” (2019) 134.

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

Technology development is an essential aspect of SMEs' growth and competitiveness. Unfortunately, SMEs are often challenged by the lack of access to technology.³⁷⁹

The ITC points out that access to appropriate technology promotes business sustainability and inclusivity.³⁸⁰ It builds resilience in SMEs doing business during this digital era or a time of crisis, such as during the COVID-19 pandemic period.³⁸¹ SMEs are, therefore, encouraged to upgrade their technology to remain competitive and ahead of their competitors.³⁸²

2.5.2.5.1 SMEs and online/digital platforms

According to the ITC, SMEs' access to technology also means increased use of digital or online platforms, which has enabled better interaction between customers and sellers (such as SMEs).³⁸³ Online platforms provide customers' information through online reviews, ratings and feedback, enabling the seller to better understand its customers' demands and expectations.³⁸⁴ Such feedback can also be used in the business' research and development to improve or create new products. It also enables SMEs to better assess and understand customers' demand for specific products, as well as ensure the quality of their products or services and remain competitive.³⁸⁵ Online platforms that give SMEs access to the global market enable SMEs to do business on international markets without being physically present in those markets.³⁸⁶

However, cyber-attacks and data security can also be a challenge for SMEs. The ITC observes that there is a need for strong institutional support and regulations on data privacy to counter the misuse of state measures for contact tracing, early warning surveillance and social control.³⁸⁷ The ITC, therefore, regards it as imperative for

³⁷⁹ OECD "Small businesses, job creation and growth: facts, obstacles and best practices" (n.d.) 5-6, available at [2090740.pdf \(oecd.org\)](#) (accessed on 13 September 2020).

³⁸⁰ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) 47.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 14.

³⁸⁴ *Idem* 14-15.

³⁸⁵ *Idem* 14-15.

³⁸⁶ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 14.

³⁸⁷ *Idem* 43.

developing countries to improve the quality and reliability of local internet connections, as well as to expand internet diffusion and levels of computer literacy.³⁸⁸

2.5.2.5.2 Access to information and emerging technologies

Access to information on the local and international markets is critical for SMEs to remain competitive.³⁸⁹

The use of emerging technologies has assisted in overcoming barriers to entering a market.³⁹⁰ These new innovative technologies include the use of drones to deliver goods, the use of balloons to provide internet access, etc.³⁹¹ The ITC observes that these new technologies may act as “*leapfrog technologies*” that may be introduced, through enabling legislation, in areas lacking a stable online network.³⁹²

In a report summarizing the conclusions and recommendations on technology development and mastery,³⁹³ UNCTAD considered the factors that contributed to technology development in Asia, Africa and Latin America.³⁹⁴ On the Asian experience, UNCTAD notes that the following aspects have contributed to the growth of the Asian economies: “*Vision and commitment of the respective governments; Provision of skills training; Attraction of export-oriented FDI (foreign direct investment); Support for local industry; Local technological efforts in terms of R&D (research and development).*”³⁹⁵

In identifying factors that could promote technology development in Africa and Latin America, UNCTAD recommends that governments should,³⁹⁶ amongst others, invest in business infrastructures, such as transport, energy, ICTs for the SME sector.³⁹⁷

³⁸⁸ *Ibid.*

³⁸⁹ OECD “Small businesses, job creation and growth: facts, obstacles and best practices” (n.d.) 51.

³⁹⁰ International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018).

³⁹¹ *Ibid.*

³⁹² International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018).

³⁹³ UNCTAD “Improving the competitiveness of SMEs through productive capacity” (2005) 139.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ UNCTAD “Improving the competitiveness of SMEs through productive capacity” (2005) 140.

³⁹⁷ *Ibid.*

UNCTAD identifies the following best practices in relation to technological upgrading for SMEs:³⁹⁸

- continuous technological upgrading to meet the firm and international standards;
- Incentivise SMEs to invest in appropriate technology by granting financial assistance; and
- Assist SMEs in developing their research and development capacity by strengthening national innovation systems at different levels of the economy.³⁹⁹

UNCTAD cites initiatives from the Egyptian government to support the ICT sector as informative best practices in dealing with SMEs in the ICT domain.⁴⁰⁰ These include:

- establishing “*High Tech Business Parks (The Smart Village)*” which provide high-quality and affordable infrastructure to businesses;
- providing financial subsidies to support training, marketing and technological development;
- concluding partnerships with leading/well-known ICT firms to train ICT engineering graduates;
- facilitating the provision of computers at reasonable cost; and
- the “Free Internet” initiative.⁴⁰¹

UNCTAD further refers to the Tokyo action statement that provides best practices for the development of innovation by SMEs.⁴⁰² These include:

- creating logistics technology centres to test new technology;

³⁹⁸ UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) 20.

³⁹⁹ *Ibid.*

⁴⁰⁰ Assad “A perspective on Egyptian companies contribution in the Global Value Chains in the information technology sector-experiences from Microsoft suppliers in Egypt” (2007) Paper prepared for UNCTAD (mimeo). UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) 20, Box 5 - Government initiatives to support the ICT sector in Egypt.

⁴⁰¹ UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) 20, Box 5 - Government initiatives to support the ICT sector in Egypt.

⁴⁰² OECD “Enhancing the role of SMEs global value chains” (2007) OECD Global Conference in Tokyo (31 May – 1 June 2007), available at <https://www.oecd.org/industry/smes/38774814.pdf> (accessed on 24 June 2023). See also UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) 20.

- upgrading the technology of products through access to the world's best technologies and financial support;
- developing partnerships between SMEs and world-leading companies in technology for the transfer of knowledge, products, processes or management practices.⁴⁰³

To improve SMEs' access to technology the ITC further recommends that:⁴⁰⁴

- SMEs' competitiveness can be enhanced through technology transfer of simple, affordable and compliant technology.⁴⁰⁵
- SMEs should adopt and implement effective and relevant technologies to become more agile, smart and resilient in the market.⁴⁰⁶
- Policy and regulatory reforms should be developed in information and technology services.⁴⁰⁷ This includes restoring information asymmetry.⁴⁰⁸
- A regulatory framework that ensures stability and certainty for investors should be developed. Such regulatory framework should also be flexible and transparent to enable firms to change or expand their range of products or services given the rapidly changing technology.⁴⁰⁹ The ITC notes that this regulatory framework will attract more investors, boost infrastructure development, and reduce costs.⁴¹⁰

2.5.2.6 Management capabilities for SMEs / Skills Development / Organisational learning / Lack of Managerial skills

Abor and Quartey further indicate that SMEs are also challenged by a lack of managerial skills, especially in developing countries.⁴¹¹ They state that using

⁴⁰³ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 20. See OECD "Enhancing the role of SMEs global value chains" (2007) 3.

⁴⁰⁴ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020).

⁴⁰⁵ Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 225-226.

⁴⁰⁶ Govuzela and Mafini "Organisational agility, business best practices and the performance of small to medium enterprises in South Africa" (2019) 9.

⁴⁰⁷ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) 47.

⁴⁰⁸ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 13.

⁴⁰⁹ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 85.

⁴¹⁰ *Ibid.*

⁴¹¹ Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 224.

management consulting firms may not be cost-effective, as they may not have adequate solutions for SMEs.⁴¹² In a study on SMEs in Ghana and Malawi, Kayanula and Quartey observed that training and advisory services do not fully address SMEs' difficulties in developing their skills.⁴¹³ Abor and Quartey believe this is attributed to the high cost of training services and SMEs' apathy in upgrading their workers' skills and satisfaction with their status quo.⁴¹⁴ A way of addressing this issue is through government tax incentives to training institutions or NGOs to offer SMEs training on record-keeping and managerial know-how.⁴¹⁵

Best practices for improving management capabilities include the promotion of government subsidies for training SMEs' owners/managers.⁴¹⁶ The subsidy schemes should clarify: (a) the objectives of the subsidy, (b) the situation of the subsidy; (c) and SMEs' feedback.⁴¹⁷

According to UNCTAD lack of skills development that SMEs face can also be addressed through the establishment of adequate training facilities by governments.⁴¹⁸ UNCTAD's view is that governments need to support the establishment of adequate skills development centres so that SMEs' employees are properly trained and skilled to serve the global market and remain competitive.⁴¹⁹

Notably, the South African example on "*the creation of sectoral training authorities*" has been identified as a good example of best practice in addressing the SMEs' challenge in skills development.⁴²⁰

⁴¹² *Ibid.*

⁴¹³ Kayanula and Quartey "The policy environment for promoting small and medium-sized enterprises in Ghana and Malawi" (2000) IDPM, University of Manchester, Finance and Development Research Programme Working Paper Series. Paper No. 15, available at https://www.researchgate.net/profile/Peter-Quartey/publication/266462579_THE_POLICY_ENVIRONMENT_FOR_PROMOTING_SMALL_AND_MEDIUM-SIZED_ENTERPRISES_IN_GHANA_AND_MALAWI/links/54b3a2a50cf26833efce9d5e/THE-POLICY-ENVIRONMENT-FOR-PROMOTING-SMALL-AND-MEDIUM-SIZED-ENTERPRISES-IN-GHANA-AND-MALAWI.pdf (accessed on 23 June 24), 13. See also Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 224.

⁴¹⁴ Abor and Quartey "Issues in SME Development in Ghana and South Africa" (2010) 224.

⁴¹⁵ *Idem* 226.

⁴¹⁶ OECD "Small businesses, job creation and growth: facts, obstacles and best practices" (n.d.) 50.

⁴¹⁷ *Idem* 50-51.

⁴¹⁸ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 19. Referring to the case study of car parts suppliers in South Africa.

⁴¹⁹ *Ibid.*

⁴²⁰ *Idem*, Box 4 - *The creation of sectoral training authorities in South Africa*.

In specialised industrial markets, such as the motor vehicle industry, UNCTAD points out that Mexico provides a way of addressing the challenge of skills development. UNCTAD emphasizes that SMEs need to constantly upgrade their workers' skills by providing on-the-job training to unskilled workers and having skilled workers who can work at competitive wages.⁴²¹

Best practice in skills development also includes the promotion of SMEs organisational agility through the creation, retention and transfer of knowledge within an organisation.⁴²² Organisational learning combined with a firm's agility has proven to be essential for a firm to survive in a competitive environment.⁴²³

Best practice in addressing the challenge of skills development is through not only the close collaboration between regulators and the private sector to develop "*smart regulations*", but also through the participation of training and higher learning institutions to provide training on skills required in the marketplace.⁴²⁴ This will however have to be based on trust to promote new technologies and change amongst businesses and societies.⁴²⁵

The ITC has proposed that the government develop policies that seek to improve SMEs' skills to strengthen their competitiveness and help them to adapt to a changing environment, including the new digital platform.⁴²⁶ The ITC observes that addressing SMEs skills development challenges in a digital economy is the responsibility of policymakers, education and training institutions, as well as "national quality infrastructure bodies".⁴²⁷ In this regard, the ITC recommend that policymakers develop guidelines for regulators of digital platforms and providers of internet certification.⁴²⁸

⁴²¹ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 19.

⁴²² Govuzela and Mafini "Organisational agility, business best practices and the performance of small to medium enterprises in South Africa" (2019) 9.

⁴²³ *Ibid.*

⁴²⁴ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 76.

⁴²⁵ *Ibid.*

⁴²⁶ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 50. Guy Ryder Director-General, International Labour Organization (ILO) - *Skills bolster SME competitiveness*.

⁴²⁷ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 81.

⁴²⁸ *Idem* 82.

Best practices to address SMEs' challenge of lack of managerial skills include entrepreneurship education through various education programmes.⁴²⁹ These include:

- (a) Establishing a national web portal offering information and resources on entrepreneurship courses in education institutions;⁴³⁰
- (b) Enhancing entrepreneurship education and create links between entrepreneurship education and publicly-supported business incubators and other initiatives, such as offering internships to students;⁴³¹
- (c) Introducing basic principles of entrepreneurship in apprenticeship/practical training;⁴³²
- (d) Federal support to introduce entrepreneurship education in education systems.⁴³³

The OECD recommends the following best practices in relation to the development of SMEs workforce skills:⁴³⁴

- (a) Introduce a national workplace training fund. Offer tax incentives or rebates to SMEs for their training activities;
- (b) Offer consultancy services to SMEs to identify the areas in which their employees need training.⁴³⁵

2.5.2.7 Access to markets and SMEs competitiveness

The OECD indicates that SMEs' access to international markets enhances their competitiveness.⁴³⁶

On this point, UNCTAD states that enhancing SMEs' export competitiveness needs to take place at three levels: (a) an enterprise's management, (b) the environment of a

⁴²⁹ OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD 37.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² *Ibid.*

⁴³³ OECD "SME and Entrepreneurship Policy in Canada" (2017) 37.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

⁴³⁶ OECD "Small businesses, job creation and growth: facts, obstacles and best practices" (n.d.) 53.

specific trade sector, and (c) the markets.⁴³⁷ The strategy of promoting SMEs' export competitiveness needs to go through the process of assessing the market and the prevailing situation, considering options and formulating a strategy.⁴³⁸

SMEs' competitiveness can also be enhanced through transnational corporation and small business (TNC-SME) linkages, value chains, and government collaboration, providing conducive business environments, lower taxes, logistics costs and procedural delays.⁴³⁹ SMEs' international competitiveness may also be enhanced further through diversifying the client base by connecting with firms worldwide.⁴⁴⁰

To increase SMEs' competitiveness, the Tokyo action statement recommended SMEs increase participation in global markets, in particular in global value chains (GvCs), through the following:⁴⁴¹

- (a) support industry groupings;
- (b) enhanced collaboration between universities, research institutes, laboratories and SMEs;
- (c) support technology groupings;⁴⁴² and
- (d) promote collaboration between TNCs and SMEs and develop supplier programs for SMEs, especially in design and production engineering.⁴⁴³

In the context of increasing SMEs competitiveness through their participation in the global market, UNCTAD⁴⁴⁴ reports that SMEs which successfully participate in global value chains (GvCs), or that successfully "*jump on board*", experience business expansion.⁴⁴⁵ In this regard, greater exposure and access to information, business practices and technologies may lead to the upgrading of technology and human

⁴³⁷ UNCTAD "Improving the competitiveness of SMEs through productive capacity" (2005) 181.

⁴³⁸ *Ibid.*

⁴³⁹ *Idem* 182.

⁴⁴⁰ *Ibid.*

⁴⁴¹ OECD "Enhancing the role of SMEs global value chains" (2007) 3; UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 23-24.

⁴⁴² UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 23.

⁴⁴³ OECD "Enhancing the role of SMEs global value chains" (2007) 3, 8; UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 24.

⁴⁴⁴ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010).

⁴⁴⁵ *Idem* 25.

capital, and eventually achieve business expansion.⁴⁴⁶ It is also recommended that governments build awareness to increase the participation of SMEs in GvCs.⁴⁴⁷

UNCTAD is of the view that Governments in developing countries should promote exports by SMEs and their participation in GvCs through an understanding of the realities and requirements of global markets.⁴⁴⁸ In this regard, national policies should prioritise the development of productive capacities.⁴⁴⁹ Policies that promote entrepreneurship and competition also enhance local industries and international production networks.⁴⁵⁰ Local suppliers or SMEs must also constantly upgrade and innovate when competing in global markets.⁴⁵¹

On the supply chain, which would also include the GVC, the ITC recommends assistance to supply chain actors, like SMEs, to create flexibility in the multilateral trading system by, for example, establishing supply chain councils.⁴⁵² These councils will promote the public-private partnership for better running of the supply chains.⁴⁵³

Some international standards for SMEs in relation to access to market include the following (OECD, Canada, 2017):⁴⁵⁴

- (a) Offer finance and insurance support to SMEs to export their products;
- (b) SME export consortia and networks;
- (c) Develop collaboration between foreign direct investment (FDI) and SMEs;
- (d) Training and mentoring for SMEs in supply chains and operations management and related digital technologies;⁴⁵⁵

⁴⁴⁶ *Ibid*

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 26.

⁴⁵² International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) 50.

⁴⁵³ *Ibid.*

⁴⁵⁴ OECD "SME and Entrepreneurship Policy in Canada" (2017) 37.

⁴⁵⁵ *Idem.*

2.5.2.7.1 Transnational corporations-SME partnership assists SMEs to compete globally

It is noted that SMEs who trade globally face tougher competition in international competition against larger firms with a global footprint.⁴⁵⁶ For SMEs to successfully compete in the global market, it is recommended that they partner with transnational corporations (TNCs).⁴⁵⁷ This is identified as the TNC-SME linkages.⁴⁵⁸ UNCTAD lists the following recommendations for the TNCs-SMEs linkages to benefit both sides:

- Target investors who could have a positive impact on and promote the local industry;
- Create a competitive environment and appropriate laws and regulations;
- Provide an infrastructure for the development of engineering and management skills;
- Issue TNCs and SMEs linkages policies to promote outsourcing, franchising, technology partnership or spill-over to the local industry;
- Help SMEs to invest in the relevant technology, and research and development; and
- Promote public-private partnerships through skill training centres.⁴⁵⁹

UNCTAD⁴⁶⁰ recommends compiling a list of best practices to promote competition through linkages between governments, transnational corporations (TNCs), SMEs and support institutions.⁴⁶¹

2.5.2.7.2 Public procurement programs

Government support for SMEs can also be seen through public procurement programs. In 2013, a survey named “*Sustainable public procurement: A global review*” conducted by the United Nations Environment Programme (UNEP) identified SME

⁴⁵⁶ UNCTAD “Improving the competitiveness of SMEs through productive capacity” (2005) 61.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ UNCTAD “Improving the competitiveness of SMEs through productive capacity” (2005) 61.

⁴⁶⁰ *Idem* 62.

⁴⁶¹ *Ibid.*

development and employment as top priorities in governments' sustainable public procurement policies.⁴⁶² In this regard, the OECD identifies the following best practices in relation to public procurement programs:

- Office of SMEs to review large procurement contracts and determine whether they could be broken into smaller contracts;
- Consider the pros and cons of introducing "set-aside" for SMEs in public procurement;
- To push governments to pay SMEs on time, within a period of at least 30 days.⁴⁶³

Other policy interventions recommended by the OECD on government support and public procurement include:⁴⁶⁴

- Developing framework strategies to increase the number of SMEs in public markets. This includes public procurement regulations that promote SMEs' fair participation in tender processes and the equal treatment of all bidders and suppliers. Some examples include simplified procedures, minimise selection criteria based on size, shorter payment periods, etc.;⁴⁶⁵
- Programmes that increase SME capacity to bid in public markets.⁴⁶⁶ Given that SMEs face resource/capacity constraints in public procurement, certain governments have developed support programmes for SMEs, such as financial and preferential programmes;⁴⁶⁷
- Government procurement policies that promote SMEs innovation;⁴⁶⁸
- Developing public procurement policies and strategies that incorporate broader socio-economic objectives. SMEs are encouraged to participate in government

⁴⁶² UNEP "Sustainable public procurement: A global review" (2013) Final report by the United Nations Environment Programme, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/8522/-Sustainable%20public%20procurement_%20a%20global%20review-2013Sustainable%20Public%20Procurement.pdf?sequence=3&isAllowed=1 (accessed on 25 June 2023) 14; OECD "SME and Entrepreneurship Outlook 2019" (2019) 133.

⁴⁶³ OECD "SME and Entrepreneurship Policy in Canada" (2017).

⁴⁶⁴ OECD "SME and Entrepreneurship Outlook 2019" (2019) 134.

⁴⁶⁵ OECD "SME and Entrepreneurship Outlook 2019" (2019) 134-135 and Table 3.5: Levelling the playing field in public procurement: selected country examples.

⁴⁶⁶ OECD "SME and Entrepreneurship Outlook 2019" (2019) 134.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

initiatives and projects related to the environment, social cohesion and gender-related issues.⁴⁶⁹

The OECD indicates that in Australia, in order to ensure the fair participation of all entities, “*common procurement rules*” include the principle of fair competition.⁴⁷⁰ Public entities are required to procure at least 10% of their goods or services from SMEs.⁴⁷¹

Other measures that support SMEs in the public procurement system include expediting payments for goods or services delivered.⁴⁷² Governments’ initiatives include promoting SMEs’ access to “lead” markets where there is a growing demand for innovative products that can potentially increase economic benefits, such as competitiveness and job creation, and fulfilling social needs.⁴⁷³

2.5.2.7.3 Government policies that enhance SMEs’ competitiveness

Government support plays an important role in enhancing SMEs’ competitiveness in the local and global markets.⁴⁷⁴ The OECD notes that governments should assist SMEs in accessing global markets as part of their national export strategies.⁴⁷⁵ Similarly, UNCTAD remarks that governments should support the development of local businesses.⁴⁷⁶ They state that governments could give funds to local development initiatives and promote capacity building activities of local SMEs.⁴⁷⁷

UNCTAD recommends public policies that can promote SMEs.⁴⁷⁸ These policies include: (a) policies on sectoral funds, raised by taxing transnational corporations (TNCs) or other large companies. These funds could be used as part of a collaboration between universities, large firms and SMEs in the domain of technology; (b) boost

⁴⁶⁹ *Ibid.*

⁴⁷⁰ OECD “SME and Entrepreneurship Outlook 2019” (2019) 134, Table 3.5: Levelling the playing field in public procurement: selected country examples.

⁴⁷¹ *Ibid.*

⁴⁷² International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) 45.

⁴⁷³ Edler “Demand-based innovation policy” (2007) Manchester Business School Working Paper, Vol. 529. See also OECD “SME and Entrepreneurship Outlook 2019” (2019) 136.

⁴⁷⁴ OECD “SME and Entrepreneurship Outlook 2019” (2019) 130.

⁴⁷⁵ *Ibid* and Table 3.1.

⁴⁷⁶ UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) 23.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ UNCTAD “Improving the competitiveness of SMEs through productive capacity” (2005) 182.

local demand through “*demand-side*” policy; (c) competition policy to protect both consumers and players in the market.⁴⁷⁹

Regarding public policies dealing with SMEs in least developed countries (LDCs), UNCTAD⁴⁸⁰ identifies the following policy frameworks:

- (a) Public policies that aim to improve access to finance and provide a conducive business environment by improving legal, regulatory, institutional and policy frameworks;⁴⁸¹
- (b) Develop the ICT sector, which can promote entrepreneurship and transform knowledge-based structures. This includes developing reliable internet and mobile telecommunications infrastructure. For example, Rwanda has prepared five-year policy plans on ICT infrastructure aimed at establishing the country as an ICT hub in the East African Community;⁴⁸²
- (c) LDCs’ strategic development plans and visions need to prioritize structural transformation. This can be achieved through greater coordination between development plans, industrial policies⁴⁸³ and entrepreneurship development policies;⁴⁸⁴
- (d) Build connections between SMEs and large firms to develop national and regional value chains;⁴⁸⁵
- (e) LDCs should have entrepreneurship development policies that include a monitoring and evaluation framework to assess outcomes against performance targets, as well as successes and failures, with the aim to integrate the results into policies;⁴⁸⁶

⁴⁷⁹ *Ibid.*

⁴⁸⁰ UNCTAD “Entrepreneurship in the least developed countries: Major constraints and current policy frameworks” (2018).

⁴⁸¹ *Idem* 100.

⁴⁸² *Ibid.*

⁴⁸³ Mandiriza, Sithebe and Viljoen “An ex-post review of the Wal-Mart/Massmart merger” (2016) Competition Commission Working Paper CC2016/03, 3 define industrial policy as “*government measures, typically policy instruments, which are applied to selected sectors or industries and through which resources are directed in order to afford industry participants some advantage.*”

⁴⁸⁴ UNCTAD “Entrepreneurship in the least developed countries: Major constraints and current policy frameworks” (2018) 102.

⁴⁸⁵ *Idem* 103.

⁴⁸⁶ *Idem* 104.

- (f) A better alignment of the timeframes of different policies to permit a proper monitoring and evaluation;⁴⁸⁷
- (g) Continuous public support throughout the life cycles of enterprises to ensure their growth and sustainability;⁴⁸⁸
- (h) Sustainable public support to enable business to grow and resist market cycle changes;⁴⁸⁹
- (i) Establishment of cost-sharing measures between the public and private sector to mitigate tax burden;⁴⁹⁰
- (j) A better coordination of mandates, competencies and responsibilities between all institutional partners and one entity that could ensure the implementation of entrepreneurship strategies. This harmonization could be through a public-private working group or advisory council, which could subsequently be turned into an institutionalised agency.⁴⁹¹

UNCTAD further reports that governments need to develop long-term measures to increase SMEs' competitiveness.⁴⁹² Government policies should also support technological upgrading by local suppliers or SMEs involved in GvCs to boost international competitiveness.⁴⁹³

Nevertheless, as much as there may be best practices to address challenges faced by SMEs, Govuzela and Mafini argue that SMEs must also be agile to improve their competitiveness.⁴⁹⁴ Their view is that SMEs also have their part of responsibility in contributing to economic growth.⁴⁹⁵ In this regard, the ITC remarks that public policies should encourage SMEs' resilience by, among others, subsidizing investments in technologies, promoting economic and trade diversification, and encouraging

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*

⁴⁹² UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) 26.

⁴⁹³ *Ibid.*

⁴⁹⁴ Govuzela and Mafini "Organisational agility, business best practices and the performance of small to medium enterprises in South Africa" (2019) 10.

⁴⁹⁵ *Ibid.*

partnerships, cooperatives and research for the development of agile new strategies.⁴⁹⁶

Further, in the context of enhancing SMEs' competitiveness, OECD⁴⁹⁷ makes the following recommendations:⁴⁹⁸

- (a) Promote measures to increase SMEs' productivity and access to international markets, encourage market entry and high-growth SMEs;⁴⁹⁹
- (b) Support lending to SMEs where there are market gaps, promote SMEs apprenticeship and training, harmonise foreign direct investment policies with SMEs development strategies;⁵⁰⁰
- (c) Establish one government entity that would develop and lead an integrated national SME and entrepreneurship strategy;⁵⁰¹
- (d) Foster federal programmes for SMEs and entrepreneurship in financing, innovation, etc;⁵⁰²
- (e) Promote local good practices, and increase cooperation among provinces for the development of internal trade, apprentice mobility and financial regulation;⁵⁰³
- (f) Promote financing of women entrepreneurs, and enhance gender diversity in public and private procurement;
- (g) Foster successful support programmes for local women entrepreneurship, and develop a women's enterprise strategy.⁵⁰⁴

Other general best practices in dealing with SMEs include programmes for entrepreneurship in disadvantaged and under-represented social groups.⁵⁰⁵

⁴⁹⁶ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) 43.

⁴⁹⁷ OECD "SME and Entrepreneurship Policy in Canada" (2017).

⁴⁹⁸ OECD "SME and Entrepreneurship Policy in Canada" (2017) 17.

⁴⁹⁹ OECD "SME and Entrepreneurship Policy in Canada" (2017) 17.

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*

⁵⁰⁴ OECD "SME and Entrepreneurship Policy in Canada" (2017) 17.

⁵⁰⁵ OECD "SME and Entrepreneurship Policy in Canada" (2017) 38.

- (a) Increase funding for more entry of SMEs and business development in rural areas;⁵⁰⁶
- (b) Facilitate the participation of social enterprises in government SME support programs;⁵⁰⁷
- (c) Facilitate the certification of social enterprises with non-profit organisations for access to social funding, participation in public procurement for social projects, public support programmes for social entrepreneurship;⁵⁰⁸
- (d) Support future entrepreneurs through long-term funding and the introduction of business succession support;⁵⁰⁹
- (e) Improve visa programmes for start-ups and enhance marketing activities in various countries for future entrepreneurs;⁵¹⁰
- (f) Increase awareness of indigenous entrepreneurship and SMEs support programmes;⁵¹¹
- (g) Enhance policies on the transfer of business ownership from retired owners, through information campaigns, and the development of succession processes.⁵¹²

2.5.2.7.4 Further public policy actions

In a report released in 2017 titled “*SME and Entrepreneurship Policy in Canada*” that examines key challenges that affect SMEs growth, such as dynamism, productivity and ability to export, the OECD⁵¹³ identifies actions that public policy could take.⁵¹⁴ It proposes developing a national strategy for SMEs and entrepreneurship, as well as increasing the range of programme interventions in areas such as financing,

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² OECD “SME and Entrepreneurship Policy in Canada” (2017) 38.

⁵¹³ *Idem* 15.

⁵¹⁴ *Ibid.*

innovation, internationalisation, entrepreneurship education, management advice, and workforce skills development.⁵¹⁵

2.6 Best practices related to SMEs in crisis (COVID-19)

The COVID-19 global pandemic is one of the disasters that shook the world and taught SMEs how to strive in times of crisis. The pandemic forced governments to develop innovative ways of assisting SMEs and developing best practices in dealing with SMEs during times of crisis.

Most governments have taken steps to tackle COVID-19 at the health and economic levels.⁵¹⁶ It is noted that the level of support given to firms during the COVID-19 pandemic depended on several factors, including a country's GDP per capita.⁵¹⁷ The ITC reports that firms in rich countries received more government support than SMEs in poorer countries.⁵¹⁸ The ITC states that this, unfortunately, might have affected SMEs' competitiveness in the global market.⁵¹⁹

During the COVID-19 global pandemic, government programmes that could assist SMEs included tax waivers, temporary tax relief and financial programmes.⁵²⁰ Custom fees could also be waived to promote trade and reduce local prices. Governments in several countries adopted various measures to reduce financial burdens on SMEs. These include reducing port fees, storage fees and parking fees at ports.⁵²¹

The ITC indicates that in Burkina Faso, the government suspended rent, security and parking fees for informal sector businesses in urban areas.⁵²² Reducing employment temporarily also assisted in dealing with COVID-19.⁵²³ SMEs were further encouraged to increase their online sales and online work.⁵²⁴

⁵¹⁵ *Ibid.*

⁵¹⁶ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020).

⁵¹⁷ *Idem* 35.

⁵¹⁸ *Idem* 35.

⁵¹⁹ *Ibid.*

⁵²⁰ International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) 36, Figure 29.

⁵²¹ *Idem* 36.

⁵²² *Idem* 37.

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

The ITC stated that SMEs could recover from the Covid 19- pandemic with the help of business support organisations.⁵²⁵ In this regard, the ITC recommended that there should be stronger links between resilient businesses to handle disruptions and future shocks caused by a pandemic.⁵²⁶ Consequently, the ITC found that the best practice was to strengthen the resilience of SMEs as well as the links SMEs have with supply chains.⁵²⁷

The ITC⁵²⁸ reports that making SMEs more resilient to shocks or crisis such as the COVID-19 pandemic, and reinforcing business connections between SMEs and their business ecosystem, will assist in facing another challenge.⁵²⁹ It also suggests the establishment of collaborative platforms to communicate, gather information and solve problems, in order to deal with natural crisis and shocks, and help create a resilient ecosystem and social forum.⁵³⁰

Fair, flexible and clear e-commerce rules could assist SMEs in developing countries recover from similar crises and benefit from digital trade.⁵³¹

2.7 Best practices in dealing with SMEs in the context of competition law

2.7.1 The new normal

In addition to the general challenges that SMEs face, there are the challenging circumstances brought about by the COVID-19 pandemic. During COVID-19, SMEs had to adapt to a situation that was different from what they experienced before. It was commonly referred to as the “new normal”.⁵³² In this regard, the ITC observes four long-term trends that will characterize the “new normal” as a result of the COVID-19 pandemic, namely: an emphasis on resilience to shocks, embracing of digitalization

⁵²⁵ International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) 41.

⁵²⁶ *Idem* 48.

⁵²⁷ *Ibid.*

⁵²⁸ International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020).

⁵²⁹ *Idem* 43.

⁵³⁰ *Ibid.*

⁵³¹ *Idem* 45.

⁵³² “New normal” is described as “a current situation, social custom, etc., that is different from what has been experienced or done before but is expected to become usual or typical.” Dictionary.com, available at <https://www.dictionary.com/browse/new-normal?s=t> (accessed on 23 June 2023).

opportunities, greater inclusiveness and sustainability.⁵³³ The ITC remarks that SMEs, as key economic players, would need to embrace these concepts to build this new reality.⁵³⁴

The ITC further observes that there will be new standards and rules regulating businesses, as enterprises recover post the COVID-19 pandemic.⁵³⁵ These regulations include: (a) regulations that enable firms to comply with new requirements and obligations; and (b) regulations relating to security, resilience and risk management.⁵³⁶ The first category of regulations includes “*management system standards on quality, food safety, occupational health and safety, social accountability and specific product standards.*”⁵³⁷ The second category of regulations includes “*business continuity management, emergency management, crisis management and supply chain security.*”⁵³⁸

2.7.2 Competition law and SMEs

Schaper remarks that competition law regulates the conduct of businesses in order to maintain a competitive market.⁵³⁹ Competition law prohibits anti-competitive conduct in the form of cartel conduct, restrictive vertical practices and abuse of dominance practices.⁵⁴⁰ It also establishes a framework for assessing merger transactions to determine whether they may adversely lessen competition, and in some countries, may include rules that seek to protect consumers (e.g. prohibitions of misleading or deceptive conduct).⁵⁴¹

As observed by Schaper, the benefits of competition policy are well recognised.⁵⁴² Competition provides greater choices and better products for the benefit of consumers.⁵⁴³ Competition regulation also promotes lower prices and higher product

⁵³³ International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) 42.

⁵³⁴ *Ibid.*

⁵³⁵ *Idem* 48.

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ Schaper “Competition regulation, open markets and small business” (2012) European Competition Law Review E.C.L.R. 33(8), 333-338.

⁵⁴⁰ South African Competition Act, 89 of 1998, as amended.

⁵⁴¹ Schaper “Competition regulation, open markets and small business” (2012) 31.

⁵⁴² *Idem* 28.

⁵⁴³ *Ibid.*

quality.⁵⁴⁴ Competitive markets enhance firms' efficiency which promotes economic growth. Competition further increases employment and business activities, and improves a nation's lifestyle.⁵⁴⁵ Further, competition encourages diversification and specialisation of products or services, which may result in more product choices and diversified markets.⁵⁴⁶

Competition is also beneficial to SMEs as it may reward SMEs which are agile, resilient and can quickly adapt to changing circumstances compared to large firms.⁵⁴⁷ Schaper observes that in some countries, such as the US, UK and Australia, an open competition policy is an important item on the national agenda for SMEs' growth and development.⁵⁴⁸

However, some authors believe that competition can be dangerous to small firms.⁵⁴⁹ SMEs have also questioned the effectiveness of competition policies and whether they are appropriate and fair.⁵⁵⁰ In this regard, a survey conducted in Australia in 2011 revealed that the majority of SMEs believed that competition law protects consumers, and a few SMEs were of the view that competition law adequately protects businesses.⁵⁵¹

The above ties in with the research question of this thesis, namely how effective are the SMEs provisions in the South African Competition Act, 89 of 1998, as amended, in ensuring that SMEs have an equitable opportunity to participate in the economy?⁵⁵²

In this regard, Quartey mentions the International Monetary Fund (IMF) and World Bank sponsoring economic reforms in developing countries.⁵⁵³ These economic reforms sought to enhance competition but resulted in the unintended exit of SMEs.⁵⁵⁴ Such economic reforms exposed SMEs to competition, through the removal of subsidies and protection from local industries, and also through the introduction of

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Idem* 29.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Idem* 30.

⁵⁵² Section 2 of the South African Competition Act, 89 of 1998, as amended.

⁵⁵³ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 15.

⁵⁵⁴ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001).

trade and exchange rate liberalisation policies.⁵⁵⁵ These policies resulted in the exit of inefficient firms that were challenged by local and import competition.⁵⁵⁶ This questions the objectives of certain policies, as to whether they seek to create a market with many players or a market with efficient players only.

On this point, Schaper observes that there is a need for a competitive market with strong laws that cater for the special needs of SMEs.⁵⁵⁷ He states that an example to consider is Australia which has a competition law framework that protects SMEs from anti-competitive conduct, levels the competitive playing field and promotes a free and fair competitive market.⁵⁵⁸

Schaper further remarks that very few competition authorities have specific policies or programs dealing with SMEs.⁵⁵⁹ He also states that global competition bodies, such as the ICN, do not specifically and properly deal with SMEs, and suggests that this should be rectified in the future.⁵⁶⁰

Nevertheless, according to Kellezi *et al* several national competition legislations have made or are making provisions for the protection of SMEs against the abuse of market power by large firms.⁵⁶¹ For example, the German Competition Act prohibits the abuse of market power by firms with superior market power that impedes SMEs directly or indirectly in an unfair manner.⁵⁶²

2.7.3 The effect of competition regulations on SMEs

Quartey⁵⁶³ states that the principal objective of competition regulation is to open up markets and protect consumers from anti-competitive practices, especially restrictive conduct by dominant firms with market power.⁵⁶⁴ In South Africa, competition

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ Schaper "Competition regulation, open markets and small business" (2012) 338.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 9.

⁵⁶² Gesetz gegen Wettbewerbsbeschränkungen – GWB: Competition Act in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 1 of the Act of 25 October 2023 (Federal Law Gazette I, p. 294), section 20(3). Available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf (accessed on 30 August 2024).

⁵⁶³ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001).

⁵⁶⁴ *Idem* 2.

regulations seek to promote, amongst others, the participation of SMEs in the economy.⁵⁶⁵

In this regard, Quartey remarks that there has been little research on the relationship between competition regulation and SMEs in developing countries.⁵⁶⁶ He criticises that the available research is based on a wrong methodology to only question whether entrepreneurs face competition and the general conclusions drawn from their answers.⁵⁶⁷ Similarly, Schaper notes that there has been little research on the link between competition policy and SMEs.⁵⁶⁸

Quartey thus suggests that when drafting competition regulations, governments should consider the size of the firms.⁵⁶⁹ This is because SMEs face competition differently than large firms, and often require protection from abusive anti-competitive practices by other firms, especially by large firms.⁵⁷⁰

Nevertheless, there does not seem to be any different treatment between SMEs and other entities when enforcing competition law in most jurisdictions.⁵⁷¹ In most countries, competition law applies to businesses of all sizes, including SMEs.⁵⁷² But, abuse of dominance provisions generally only apply to dominant firms. However, in South Africa during the COVID-19 pandemic, some of the SMEs were considered to be dominant in the market in which they operated. This was concluded after finding that SMEs may have market power during disaster conditions in respect of certain essential products, such as masks, sanitizers, etc.⁵⁷³

⁵⁶⁵ South African Competition Act 89 of 1998, as amended.

⁵⁶⁶ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 6.

⁵⁶⁷ *Idem* 16.

⁵⁶⁸ Schaper "Competition regulation, open markets and small business" (2012) 336; Schaper, Clear and Baker, "Competition Policy and Entrepreneurship Development: Some International Comparisons" (2010) 6 European Competition Law Review 226; Storey "The Competitive Experience of UK SMEs" (2010) 17(1) Small Enterprise Research 19.

⁵⁶⁹ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) 6.

⁵⁷⁰ *Ibid.*

⁵⁷¹ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 14.

⁵⁷² *Ibid.*

⁵⁷³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* 2020 2 CPLR 470 (CAC).

2.7.4 SMEs challenges in the context of competition law

Schaper points out that a competitive market can help the SME sector develop,⁵⁷⁴ but SMEs may also face challenges in that very same competitive environment.⁵⁷⁵

One of the main challenges that SMEs face in the context of competition law is the abuse of dominance by large firms. Abuse of dominance conduct includes the charging of excessive prices to the detriment of consumers or customers (including SMEs); engaging in anti-competitive exclusionary conduct (like predatory pricing which can force SMEs to exit the market); price discrimination or abuse of buying power.⁵⁷⁶

Exclusionary anti-competitive practices may also cause SMEs to exit and cause irreversible damages.⁵⁷⁷ SMEs may further fear retaliation, in the form of further exclusionary or discriminatory conduct, by dominant firms.⁵⁷⁸

Additionally, SMEs may face challenging conditions in the market, such as barriers to entry.⁵⁷⁹ High barriers to entry into a market are generally considered as one of the challenges that SMEs face in the context of competition law.⁵⁸⁰ In this regard, the lowering of barriers to entry opens markets and increases competition.⁵⁸¹ This exposes SMEs to more competition locally and internationally.⁵⁸² Increased competition is beneficial to consumers, but also requires SMEs to be innovative and develop strategies to become more competitive and grow.⁵⁸³

SMEs doing business globally are further facing the challenge of anti-competitive practices by multinational businesses and having to deal with the competition laws of

⁵⁷⁴ Schaper "Competition regulation, open markets and small business" (2012) 32.

⁵⁷⁵ *Ibid*

⁵⁷⁶ South African Competition Act 89 of 1998, as amended; Neuhoff (ed), Govender, Versfeld, Dingley *A practical guide to the South African Competition Act* (2017) (2nd Ed.) (hereafter Neuhoff *et al.* (2017)) 137, 178.

⁵⁷⁷ *Ibid*

⁵⁷⁸ Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 24.

⁵⁷⁹ Barriers to entry are described as "conditions that make it difficult for new firms to enter an industry or market and can include regulatory barriers to entry such as licenses." South African Competition Act 89 of 1998, as amended; Neuhoff *et al.* (2017) 144.

⁵⁸⁰ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018).

⁵⁸¹ *Ibid.*

⁵⁸² International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 29.

⁵⁸³ *Ibid.*

different jurisdictions. The OECD is of the view that it is therefore important for competition authorities around the world to have multilateral agreements and cooperation to ensure open and fair competition in global markets.⁵⁸⁴

Another challenge that SMEs face in competition law is the imposition of hefty administrative fines when they have contravened the law. However, on the positive side, SMEs' financial position is generally considered when determining a fine. For example, the US has proposed to accept the defence of a "failing firm" by SMEs, if the imposition of treble damages on SMEs risks driving them out of business.⁵⁸⁵

2.7.5 SMEs and various areas of competition law

2.7.5.1 SMEs, competition and the emergence of digital platforms

The recent emergence of online platforms has introduced a new stage for potential abuse of dominance, bringing a different form of challenge to SMEs.⁵⁸⁶ Online platforms, which are generally run by large firms, may potentially behave in an oligopolistic way and abuse their market power.⁵⁸⁷ Online platforms' potential oligopolistic behaviour may arise because of the large amount of personal and business data they possess.⁵⁸⁸ Online platforms tend to prefer their own offerings and thus exclude their competitors.⁵⁸⁹

The ITC notes that larger online platforms have increased their sizes by buying out smaller companies.⁵⁹⁰ This is the case with Apple, Google and Amazon. Amazon started as an online platform competing with book outlets. It then rapidly grew to "*an inventory-based book-selling platform*" pushing a number of SMEs in the US out of the market and negatively affecting local revenue.⁵⁹¹

⁵⁸⁴ OECD "SME and Entrepreneurship Outlook 2019" (2019) 99.

⁵⁸⁵ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014).

⁵⁸⁶ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 29.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

The ITC also reports that SMEs are concerned that large online platforms with a dominant position may negatively affect them by increasing the fee for using their online platform.⁵⁹² SMEs are also worried about market concentration in the online platform market as, for their global business, they often procure key services from external suppliers.⁵⁹³

Some online platforms' practices that can be harmful to online users, in particular SMEs, include: changing the terms and conditions without notice; limited negotiation opportunities by online businesses; removal of products or services; suspension of the business account; hidden discriminatory practices; lack of access to and portability of customer data; lack of grievance mechanisms.⁵⁹⁴

As a best practice, the ITC recommends regulations that encourage online platform behaviour that benefits SMEs and consumers and decreases the concentration of power and money.⁵⁹⁵

2.7.5.2 SMEs initiating civil damages

SMEs also face challenges in relation to claiming civil damages for competition law infringement.⁵⁹⁶ This process can be costly, time-consuming and complex as it requires expertise in the quantification of damages and involves price and cost analysis.⁵⁹⁷ Accordingly, SMEs are often discouraged from instituting civil claim damages because of their limited resources.⁵⁹⁸

SMEs also face challenges in gathering evidence to prove the facts (the anti-competitive harm) and substantiate their claim.⁵⁹⁹ In this regard, SMEs may struggle to access competition authorities' files when instituting civil damages claims.⁶⁰⁰

⁵⁹² *Ibid.*

⁵⁹³ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 30.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 24.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

SMEs have to also consider the costs of instituting civil claim damages, including the costs of litigation and the defendant's costs if they lose the legal action.⁶⁰¹ SMEs should also consider the fact that it could affect their relationship with good business partners.⁶⁰²

In the US, SMEs can institute class actions, but larger firms must file their own civil suits.⁶⁰³ SMEs also enjoy the same right as an individual to access a file or the record in a competition matter.⁶⁰⁴ Kellezi *et al.*, however, report that there is limited experience in class actions instituted by SMEs, in the context of contravention of competition law.⁶⁰⁵ In Germany and Italy, trade associations can institute civil damages claims on behalf of their members.⁶⁰⁶ In Europe, specific consumer bodies may represent their members.⁶⁰⁷

2.7.5.3 Exempting SMEs and Leniency policies

The EU competition law provides for safe harbours that exempt SMEs from the application of competition rules prohibiting certain types of anti-competitive practices.⁶⁰⁸ These safe harbours enable SMEs to conduct their business safely and avoid the risk of being accused of infringing competition law.⁶⁰⁹ The exemption does not, however, apply if SMEs are involved in “hard-core” prohibitions, such as cartel activities.⁶¹⁰

In the UK, competition rules provide for the immunity of firms that are parties to “*small agreements*”.⁶¹¹ “*Small agreements*” are agreements between firms whose combined turnover is less than GBP 20 million in the financial year prior to the agreement.⁶¹²

⁶⁰¹ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 25.

⁶⁰² *Idem* 24.

⁶⁰³ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 25.

⁶⁰⁴ *Idem* 24.

⁶⁰⁵ *Idem* 25.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Idem* 26.

⁶⁰⁸ *Idem* 15.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

⁶¹¹ *Ibid.*

⁶¹² *Ibid.*

Further best practices include the EU *de minimis* rule on SMEs with small turnover thresholds and the exemption for SMEs if the conduct does not have a substantial effect on trade in the EU.⁶¹³

Regarding leniency policies, there is no distinction between the types of firms that can apply for immunity. SMEs may apply for leniency like any other firms. However, it is observed that SMEs have limited resources to apply for immunity.⁶¹⁴ They nevertheless have direct access to competition authorities, since they do not have long bureaucratic processes to approach the authorities.⁶¹⁵

2.7.5.4 Determination of fines for SMEs

The question is whether sanctioning policies should consider the size of the firm.⁶¹⁶ In other words, whether sanctions should fit the size of the firm.⁶¹⁷ It is noted that all firms, no matter the size, are sanctioned for cartel conduct.⁶¹⁸

It is, however, noted that fines may harm SMEs and push them out of the market as they may adversely affect their financial position.⁶¹⁹

Kellezi *et al.* nevertheless note that appropriate sanctioning policy may ensure the effectiveness of the competition law enforcement system and enhance competition.⁶²⁰ Accordingly, there are views that sanctioning should equally apply to firms of all sizes.⁶²¹ It is, however, observed that the fines imposed on large firms are higher than those imposed on small firms.⁶²²

⁶¹³ *Ibid.* See also European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022). The study uses the terms “de minimis Notice” and “de minimis rule” interchangeably to refer to the notion in the *EU De Minimis Notice* that agreements that do not appreciably restrict competition or trade between EU members are exempt from competition scrutiny, except hardcore cartels.

⁶¹⁴ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 19-20.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Idem* 20 – para 1.3.4

⁶¹⁷ *Ibid.*

⁶¹⁸ *Idem* 20.

⁶¹⁹ *Ibid.*

⁶²⁰ *Idem* 21.

⁶²¹ *Ibid.*

⁶²² *Ibid.*

From the above, it can be concluded that there should be a balance in the sanctioning policy.⁶²³

2.7.6 Best practices in dealing with SMEs in competition law

The literature on best practices in dealing with SMEs in the context of competition law is still developing. Nevertheless, Këllezi *et al.* observed that there are programs specific to SMEs in the context of competition law.⁶²⁴ These include programs that raise awareness of competition laws and enforcement actions targeting competition law infringements by SMEs.⁶²⁵ For example, in 2005, the United Kingdom Office of Fair Trading (UK OFT) started an awareness campaign to inform SMEs about the benefits of competition law (the 2005 *Championing Competition* campaign).⁶²⁶ In 2011, the UK OFT conducted a study on businesses' level of awareness of competition law according to their number of employees. The study revealed that companies with a higher number of employees were more aware of competition law than small or micro businesses with a lesser number of employees.⁶²⁷ To raise SMEs' awareness, the German Competition Authority (*Bundeskartellamt*) developed an information brochure in 2007 about cooperation between SMEs, explaining the German *de minimis* rule,⁶²⁸

⁶²³ *Ibid.*

⁶²⁴ *Ibid.*

⁶²⁵ OECD "Promoting compliance with competition law 2011" (2012), a roundtable report from the OECD Competition Committee, available at <https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf> (accessed on 25 June 2023) at 211; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 10.

⁶²⁶ Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 10.

⁶²⁷ *Ibid.*

⁶²⁸ Notice no. 18/2007 of the Bundeskartellamt on the Non-Prosecution of Cooperation Agreements of Minor Importance¹ ("de minimis Notice") of 13 March 2007, para 6. The German *de minimis* Notice explains that the *de minimis* rule relates to the authority's discretion in not intervening against agreements between firms, decisions of associations, and concerted practices that have an insignificant effect on competition. Available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Bekanntmachungen/Notice%20-%20De%20Minimis.pdf?__blob=publicationFile&v=1 (accessed on 30 August 2024). See also Bundeskartellamt - Information leaflet of the Bundeskartellamt on the possibilities of cooperation for small and medium-sized enterprises. Available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Cooperation%20for%20SMUs.pdf?__blob=publicationFile&v=1 (accessed on 30 August 2024). This relates to section 3 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) against Restraints of Competition exempting agreements between competing SMEs if (i) the effect on competition in the market is insignificant and (ii) if the agreement seeks to enhance SMEs' competitiveness.

and providing guidance on the type of cooperation that is permitted and what is not permitted under the law.⁶²⁹

Këllezi *et al.* state that other programs include those that promote SMEs' compliance with competition law and that highlight the benefits of compliance rather than the imposition of high penalties for competition law infringements.⁶³⁰ Through these programmes, SMEs improve their knowledge of competition law.⁶³¹ Këllezi *et al.* further recommend that these programs should be developed in collaboration with industry associations and local and national governments.⁶³²

Kellezi *et al.* identify the following programmes or initiatives specifically for SMEs:

- compliance programmes for SMEs. Trade associations may organize these programmes. SMEs can confirm that they are complying with such programmes;
- “information point” or “information kit” online for SMEs;
- Trade associations could raise awareness of cartel conduct prohibition. They could inform SMEs on developments in international and regional forums. They could also provide training and general advice on compliance programmes and on avoiding collusive conduct.⁶³³

Notably Këllezi *et al.* state that clear and predictable competition rules are essential in SMEs' decision-making processes to avoid infringing the law and facing the ensuing consequences.⁶³⁴ UNCTAD believes that competition policies should also promote competition by preventing excessive pricing and providing competitive prices to consumers.⁶³⁵

⁶²⁹ Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 11.

⁶³⁰ *Ibid.*

⁶³¹ *Idem* 13.

⁶³² *Ibid.*

⁶³³ Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 13.

⁶³⁴ *Idem* 11.

⁶³⁵ UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) 24 ; See also the South African Competition Act 89 of 1998, as amended.

Kellezi *et al* observe that SMEs face more difficulties dealing with competition law than larger firms because of their limited human and financial resources. In order to redress this imbalance, they make the following policy recommendations:⁶³⁶

- (a) To keep anonymous an SME's identity when lodging complaints against anti-competitive infringements;⁶³⁷
- (b) To encourage SMEs to make use of the leniency or immunity program. This will assist SMEs in the race to be the first to inform competition authorities about a cartel (whistle-blower);⁶³⁸
- (c) The US doctrine on the "failing firm", which relates to a defence that a company may raise to conclude a merger transaction when the business is failing.⁶³⁹ This doctrine may assist in countering the exit of SMEs from the market;
- (d) According to the EC guidelines on fines, under exceptional circumstances, the EC may reduce the fine of a firm that shows that its financial position may be adversely affected by the fine.⁶⁴⁰ The authorities may consider a firm's specific circumstances;⁶⁴¹
- (e) As mentioned above, SMEs are likely to be affected by a fine more than a large firm.⁶⁴² Accordingly, the size and market position of a firm may have to be considered in determining a fine;⁶⁴³

⁶³⁶ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 22.

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

⁶³⁹ Blum defines the US doctrine on "failing firm" as "the doctrine that allows a company in grave probability of business failure to complete an otherwise illegal merger, provided no alternate good faith purchaser exists." Blum "The failing company doctrine" (1975) *Boston College Law Review* at 1, available at <https://heinonline-org.uplib.idm.oclc.org/HOL/Page?handle=hein.journals/bclr16&div=6&id=&page=&collection=journals> (accessed on 25 June 2023); Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 22.

⁶⁴⁰ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 22.

⁶⁴¹ *Idem* 23.

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

- (f) The determination of a fine on SMEs may also include the consideration of factors such as the firm's negligence or limited involvement in anti-competitive conduct.⁶⁴⁴

Kellezi *et al*⁶⁴⁵ further identify the following policy recommendations for discussion:

- (a) Establish processes to assist victims of anti-competitive practices, in particular SMEs, to institute claims of civil damages.⁶⁴⁶ In this regard, the UK is considering a fast-track process to assist SMEs in filing civil damage claims.⁶⁴⁷ The fast-track process will be designed to be quick, cheap and simple.⁶⁴⁸ It will be beneficial to both the SMEs and the defendant, in terms of reducing costs and approaching the courts, which will be able to issue their decisions faster.⁶⁴⁹
- (b) Governments or bar associations may establish legal aid tools to reduce litigation costs and inequality in proceedings between SMEs and large firms when;⁶⁵⁰
- (c) Bar associations and arbitration courts should introduce specialised competition law panels to reduce the costs of litigation and time to finalise a matter;⁶⁵¹
- (d) Trade associations could be allowed to represent their members to address the imbalance between all parties involved;⁶⁵²

Kellezi *et al.* report on the following recommendations adopted by the International League of Competition Law (LIDC):⁶⁵³

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Idem* 27, para 1.4.4 – Policy Recommendations for Discussion.

⁶⁴⁶ *Idem* 27.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Idem* 27.

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Idem* 27-28.

⁶⁵² Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 28.

⁶⁵³ *Idem* 28, para 1.5 : Resolution adopted by the LIDC. The International League for Competition Law (LIDC) is an international association which was created in 1930. The LIDC is composed of 18 national groups from France, Luxembourg, Belgium, Italy, Austria, Brazil, Czech Republic, Germany, the Iberian Region, Hong Kong, Japan, Hungary, Ukraine, Nordic Group, Poland, Romania, Switzerland and United-Kingdom. The LIDC studies competition law, intellectual property law and unfair competition law. The LIDC describes its objectives as: “to promote the principles of fairness and justice in competitive trade; to collect together information and documentation relating to (unfair) competition law and intellectual property law in various countries; to provide documentation and information on these

- There is no need for a “sector-specific legal definition” of SMEs in the context of competition law;
- Simple guidelines may assist in providing a simple and common definition of SMEs according to market realities;
- Promote competition and compliance programs for SMEs. Competition authorities should create awareness and promote SMEs’ knowledge of competition law. This can be done through help desks, website, standard compliance programs, etc.
- Competition authorities should guarantee the anonymity of SMEs that file complaints against prohibited practices and that request that their identities remain anonymous. There should therefore be processes in terms of which SMEs may claim anonymity, i.e. request that their identity be kept confidential when filing a complaint;
- Incentivise SMEs to use the leniency program;
- In determining a fine, competition authorities should consider mitigating circumstances and the firm’s ability to pay, in particular the size, financial and market position of the SME;
- Governments should adopt collective redress mechanisms and measures to reduce the financial and organisational obstacles that SMEs face in instituting civil damages actions;
- For hard-core infringement of competition law, the suffering of damages by SMEs should be a rebuttable presumption;
- Legal aid tools should be made available to SMEs to reduce litigation costs in competition matters.⁶⁵⁴

*subjects; to study and compare the legislation of the different member countries and to propose solutions for the problems faced in (unfair) competition and intellectual property law at both the national and the international level; to publish the principles formulated by the LIDC in the fields of competition law, intellectual property law and unfair competition; to research and defend the means of assuring freedom in commerce and business.” Available at <https://www.ligue.org/lidc/who-we-are/> (accessed on 28 January 2024). Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014).*

⁶⁵⁴ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 28.

Other best practices dealing with SMEs in the context of competition law include the insertion of abuse of dominance provisions that protect SMEs against dominant firms. Such provisions in competition legislation include “buyer power” provisions that prohibit dominant firms from requiring or imposing unfair prices or trading conditions on SME suppliers.⁶⁵⁵

The European Commission (EC) has sought to protect consumers’ interests and eradicate dominant firms’ conduct that adversely affects SMEs by fighting against their abuse of dominance.⁶⁵⁶ In this regard, the OECD reports on hefty fines that the EC imposed to punish anti-competitive practices.⁶⁵⁷ For example, the EC fined Google USD 5 billion in 2018 for abusing its dominant position on its digital platform by preferring its own applications on Android devices and abusing its mobile operating systems to make its search engines more popular.⁶⁵⁸

Kellezi *et al.* further point out that in Austria, dominant firms are prohibited from retaliating against complainants who would have lodged abuse of dominance complaints against them.⁶⁵⁹

SMEs as purchasers of goods or services are also generally victims of anti-competitive practices.⁶⁶⁰ However, Golodner reports that over the years, small businesses and the public *fiscus* have been prosecuted for several bid-rigging conspiracies that hurt consumers.⁶⁶¹

⁶⁵⁵ *Ibid.* see also Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 14.

⁶⁵⁶ OECD “SME and Entrepreneurship Outlook 2019” (2019) 132-133.

⁶⁵⁷ *Idem* 132-133.

⁶⁵⁸ *Idem* 132.

⁶⁵⁹ Austria *Federal Act against Cartels and other Restrictions of Competition* (Cartel Act 2005 – Kartellgesetz 2005), amended on 10 September 2021, available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf (accessed on 7 September 2024). Original version: Federal Law Gazette I No. 61/2005 (NR: GP XXII RV 926 AB 990 p. 112. BR: AB 7309 p. 723. Art. 6 reads: “Prohibition of retaliatory measures - § 6. Proceedings in order to terminate an abuse of a dominant position (§ 26) or a complaint to an official party (§ 40) regarding such an abuse must not be taken as a reason by the dominant undertaking to exclude an undertaking directly affected by such abuse from further supply or purchase on reasonable terms.” See also: Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 18.

⁶⁶⁰ Golodner “Antitrust, Innovation, Entrepreneurship and Small Business” (2001) 34.

⁶⁶¹ *Idem* 35.

Best practices also include divestiture as a condition of certain mergers.⁶⁶² Asset divestiture assists in countering anti-competitive mergers and benefits SMEs by exposing them to product choices and competitive prices.⁶⁶³ Other best practices in dealing with SMEs in the context of competition law include reducing legal barriers to entry and limiting exemptions.⁶⁶⁴ Advocacy activities in the form of competition authorities' guidelines can also assist SMEs in understanding competition law.⁶⁶⁵

2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example

As mentioned above, the Australian Competition and Consumer Act 2010 has specific provisions that deal with SMEs.⁶⁶⁶ One of these provisions includes the designation of a specific Commissioner responsible for SMEs. Section 10(1B) of the Australian Competition and Consumer Act 2010 provides for a “*Deputy Chairperson who has knowledge of, or experience in, small business matters*”.⁶⁶⁷ Such a mandate ensures a high level of knowledge of SME matters and perspective at the senior decision-making level.⁶⁶⁸

The Australian competition law regime also provides for “collective bargaining” in that corporations, such as SMEs, may form groups to jointly negotiate commercial matters,

⁶⁶² *Ibid.* A divestiture is a remedy that can be imposed in merger proceedings in which the merging parties may be ordered to sell any of their shares, interests or assets to remedy a merger that substantially lessens or prevents competition in a particular market. In terms of section 60 of the South African Competition Act 89 of 1998, as amended, a divestiture may also be imposed to remedy the harm caused by an anti-competitive practice. A divestiture may also be imposed after conducting a market inquiry, if the South African Competition Commission finds an adverse effect of competition on the relevant market and recommends to the Tribunal that a divestiture order be made. See also Neuhoof D (ed) *et al. A practical guide to the South African Competition Act* (2017) (2nd Ed.) 465-469.

⁶⁶³ Golodner “Antitrust, Innovation, Entrepreneurship and Small Business” (2001) 34.

⁶⁶⁴ Alemani, Klein, Koske, Vitale and Wanner “New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries” (2013) OECD Economics Department Working Papers, No. 1104, OECD Publishing, Paris, available at <https://dx.doi.org/10.1787/5k3ttg4r657h-en> (accessed on 25 June 2023) at 16; OECD “SME and Entrepreneurship Outlook 2019” (2019) 98-99.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 336.

⁶⁶⁷ Australia Competition and Consumer Act, 2010 (formerly known the Trade Practices Act No. 51 of 1974, as amended by Act 148 of 2010), Vol. 1 sec 10 (1B). available at <https://www.legislation.gov.au/C2004A00109/latest/text> (accessed on 30 March 2024). Also available at https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Australia_Competition%20and%20Consumer%20Act_C2011C00003VOL01.pdf (accessed on 8 September 2024). See also: Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 337.

⁶⁶⁸ Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 337.

such as access to supply, contracts, etc., with larger firms.⁶⁶⁹ Participants are thereby immune from prosecution of possible infringement of competition laws.⁶⁷⁰ According to Schaper, some SMEs that have applied for “collective bargaining” authorisation include chicken farmers, truck drivers, newsagents, etc.⁶⁷¹

The Australian competition law also prohibits “*unconscionable conduct*” that is “*harsh, unjust or unfair*” commercial behaviour.⁶⁷² This provision ensures that larger firms do not treat SMEs unfairly or in a reprehensible manner.⁶⁷³

Important to note is that the Australian Competition and Consumer Commission (ACCC) has a specific unit dealing with SMEs.⁶⁷⁴ Schaper explains that the aforesaid unit provides information and speakers to industry groups.⁶⁷⁵ It assists businesses in understanding the law, and the resultant rights and benefits. Industry groups and small business operators may obtain information through the dedicated national “*Small Business Helpline telephone service*”.⁶⁷⁶

The ACCC has also established a *Small Business and Franchising Consultative Committee* which provides a forum where industry and government can discuss and address competition and consumer law concerns in the small business and franchising sectors.⁶⁷⁷ This committee is made up of representatives from the SME sector, who meet to discuss issues of common concern and receive the ACCC’s feedback on its latest activities in the SME sector.⁶⁷⁸

⁶⁶⁹ Australia Competition and Consumer Act, 2010, Subdivision B - Collective Bargaining, sec 93AB(1A) and (1). See also: Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 337.

⁶⁷⁰ Australia Competition and Consumer Act, 2010, Subdivision D—Exceptions, sec 44ZZRL(1)(b). See also: Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 337.

⁶⁷¹ Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 337.

⁶⁷² *Ibid.*

⁶⁷³ Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 337.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

⁶⁷⁶ Schaper “Competition regulation, open markets and small business” (2012) 32.

⁶⁷⁷ Australian Competition & Consumer Commission “Small Business and Franchising Consultative Committee”, available at <https://www.accc.gov.au/inquiries-and-consultations/consultative-committees/small-business-franchising-consultative-committee#:~:text=The%20Small%20Business%20and%20Franchising,discussed%20by%20industry%20and%20government>. (accessed on 7 April 2023).

⁶⁷⁸ Schaper “Competition regulation, open markets and small business” (2012) *European Commission Law Review* 337.

Schaper further points out that another best practice in respect of SMEs in Australia includes alternative dispute resolution services, which can be used by SMEs.⁶⁷⁹ This is because it is costly for small firms to sue big firms.⁶⁸⁰

Schaper further indicates that Australian government departments operate the network of Small-Business Commissioners who provide mediation facilities, which may deal with disputes between businesses.⁶⁸¹ However, he remarks that the ACCC seems to support the notion that individual competitors should not be protected, but rather strive to remain competitive based on their own ability and efficiency.⁶⁸²

2.8 Conclusion – Summary of the best practices

Essentially, this study emphasizes SMEs' vital role in the economy.⁶⁸³ SMEs contribute to several social objectives, particularly economic growth, employment and poverty alleviation.⁶⁸⁴ SMEs are also vital economic players in times of crisis.⁶⁸⁵ However, their ability to achieve these objectives depends on various factors. These include lack of finance, capital, managerial skills, equipment and technology, regulatory issues, and access to international markets.

As discussed in this chapter, several studies have identified regulatory issues, access to finance or lack of capital, and anti-competitive practices as challenges SMEs face to operate effectively. Various best practices can address these challenges, as discussed in this chapter.

In the context of regulatory burden,⁶⁸⁶ constraints include high start-up costs, high costs of compliance, etc. However, as much as regulations may adversely affect SMEs, they also stimulate innovation and technology. This is because regulations also create an environment that provides some certainty and protection over a business' creation, innovation or technology, such as intellectual property (IP)

⁶⁷⁹ *Ibid.*

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid.*

⁶⁸³ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001); Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014).

⁶⁸⁴ *Ibid.*; International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020).

⁶⁸⁵ *Ibid.*

⁶⁸⁶ See above: 2.5.2.1.1 Regulations affect SMEs.

registration and protection. Through clear regulations protecting businesses' innovation, businesses are encouraged to innovate without fearing the risk of innovation theft. Accordingly, there must be a balance between supporting SMEs and fostering innovation and technology.⁶⁸⁷ Nevertheless, regulatory restrictions may be eased by adopting regulations that support SMEs. Governments should develop strategies that can achieve that goal. These include public consultation and a specific government department, which will lead an approach aimed at developing a policy that will ensure SMEs' efficient participation in the market.⁶⁸⁸ Engagement with stakeholders, especially SMEs, throughout the policy's lifecycle also ensures regulations that contribute to their growth.⁶⁸⁹

Regarding access to finance, proper financing and reduced tax have been identified as best practices for assisting SMEs.⁶⁹⁰ Best practices to improve SMEs' access to finance also include using digital platforms. In this regard, the ITC has observed that using information and communications technology (ICT) enabled tools that use digital platforms has improved SMEs' financial landscape.⁶⁹¹ Further, financial programmes that enhance government loans for SMEs and socially disadvantaged groups, including women, youth and indigenous communities, have also been regarded as best practices for SMEs access to finance.⁶⁹²

The Chapter further considered several other challenges, such as lack of access to energy, challenging business environment, lack of access to technology, lack of managerial skills, the challenges in accessing markets and precarious SME competitiveness.⁶⁹³ As discussed above, best practices dealing with these challenges include: accessing sufficient, reliable and affordable energy, eliminating regulations that burden SMEs, enhancing government lending through small business loans, encouraging SMEs to upgrade their technology and increasing their use of digital/online platforms to remain competitive, promoting government subsidies for

⁶⁸⁷ International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) 82.

⁶⁸⁸ OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

⁶⁸⁹ OECD "SME and Entrepreneurship Outlook 2019" (2019) 105

⁶⁹⁰ See above para 2.5.2.2.2 Best practices for SMEs in the context of access to finance. See also: OECD "Small businesses, job creation and growth: facts, obstacles and best practices" (n.d.) 5.

⁶⁹¹ *Ibid.*

⁶⁹² OECD "SME and Entrepreneurship Policy in Canada" (2017) 36.

⁶⁹³ See above, para 2.5.2 Best practices in dealing with the identified challenges for SMEs.

training SMEs owners and managers, encourage partnerships between transnational companies and SMEs, break large procurement contracts into smaller contracts to increase SMEs participation in public procurement.⁶⁹⁴

The Chapter also considered best practices related to SMEs in periods of crisis, particularly during the COVID-19 global pandemic.⁶⁹⁵ Fair, flexible and transparent e-commerce rules are considered as a way of assisting SMEs in developing countries recover from similar crises and benefit from digital trade.⁶⁹⁶

Finally, the Chapter considered best practices for SMEs in the context of competition law.⁶⁹⁷ One of the valuable best practices includes programs that raise awareness of competition laws, enforcement action targeting competition law infringement against SMEs, and compliance programs for SMEs.⁶⁹⁸

However, it is noted that competition law is not capable of addressing all of the challenges identified in this chapter.

The study will consider these best practices to make recommendations on how the South African Competition Act's objective of ensuring the effective participation of SMEs in the economy can be achieved.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ See above, para 2.6 Best practices related to SMEs in crisis (COVID-19).

⁶⁹⁶ OECD "SME and Entrepreneurship Policy in Canada" (2017) 45.

⁶⁹⁷ See above, para 2.7 Best practices in dealing with SMEs in the context of competition law.

⁶⁹⁸ See para 2.7 Best practices in dealing with SMEs in the context of competition law.

Chapter Three: The treatment of SMEs under the South African Competition Act

3.1 Introduction

This chapter considers the treatment of SMEs under the South African *Competition Act 89 of 1998*, as amended (“the *Competition Act*” or “the Act”). For this purpose, the chapter considers the definition of SMEs in terms of the *Competition Act*. It then considers a chronology of the developments of the South African competition legislation from 1907 up to the 2018 amendments to the *Competition Act*. The study shows that during the time leading up to the enactment of the 1998 *Competition Act*, the promotion of SMEs was already regarded as an important public interest factor to consider in promoting competition in South Africa. Nevertheless, it was in the 1998 *Competition Act* that the promotion of SMEs was specifically stated as one of the purposes of the South African competition legislation. The 2018 amendments to the *Competition Act*, as elaborated hereinafter, have reinforced the Act’s objective of protecting and stimulating SMEs’ growth in the economy by introducing the notion of promoting SMEs in several provisions of the Act that are discussed in this chapter.⁶⁹⁹ The chapter also analyses seminal competition cases that involved SMEs either as victims or perpetrators to provide a holistic overview of the nature and scope of the treatment of SMEs in the *Competition Act*.

3.2 Definition of SMEs under the South African Competition Act

In terms of the *Competition Act*, a small business is a “*small firm determined by the Minister by notice in the Gazette, or if no determination has been made, as set out in the National Small Business Act, 1996 (Act No.102 of 1996)*”.⁷⁰⁰ A medium-sized business is defined as a “*medium-sized firm as determined by the Minister by notice in the Gazette*.”⁷⁰¹

On 12 July 2019, the Minister of Trade and Industry issued a notice in the Government Gazette defining both “medium-sized business” and “small business” as “*a separate and distinct business entity, together with its branches or subsidiaries, if any, including cooperative enterprises, managed by one owner or more predominantly carried on in*”

⁶⁹⁹ Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.1.

⁷⁰⁰ Section 1(1)(xxxx) of the Competition Act 89 of 1998, as amended.

⁷⁰¹ Section 1(1)(xix) of the Competition Act 89 of 1998, as amended.

any sector or subsector of the economy (...); and satisfying the applicable criteria (...).⁷⁰²

The sectors listed in the notice are agriculture; mining and quarrying; manufacturing; electricity, gas and water; construction; retail, motor trade and repair services; wholesale; catering, accommodation and other trade; transport, storage and communication; finance and business services; and community, social and personal services.⁷⁰³ The criteria that a medium-sized business, a small or micro business must satisfy are also the factors that distinguish them. These are “*the total full-time equivalent of paid employees*” and the enterprise’s “*total annual turnover*”.⁷⁰⁴ These factors differ per sector. For example, in the electricity, gas and water sector, a medium-sized business is one that employs 51 to 250 full-time paid employees and has a total annual turnover equal or less than R180 million. In the same electricity, gas and water sector, a small business is one that employs 11 to 50 full-time paid employees and has a total annual turnover of R60 million or less, whilst a micro business is defined as employing 0 to 10 full-time paid employees and earns an annual turnover of R10 million or less.⁷⁰⁵

3.3 History of South African Competition Legislation

Competition law in South Africa is currently regulated under the *Competition Act 89 of 1998*, as amended (“the *Competition Act*”). However, competition law in South Africa was already introduced in the early 1900s. According to the *Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955* (also known as the Mouton Report), the first legislation to deal with monopolistic behaviour, although specific to the butchery sector, was the *Cape Meat Trade Act 15 of 1907*.⁷⁰⁶ According

⁷⁰² Own emphasis. Notice in terms of section 1 of the Competition Act, 1998 (Act no. 89 of 1998), GN987 in GG42578 of 12 July 2019. Available at <https://www.ellipsis.co.za/wp-content/uploads/2019/02/Notice-in-terms-of-section-1-of-the-Competition-Act-12-July-2019.pdf> (accessed on 8 July 2023). Sakata “Small and medium-sized enterprises – their place in antitrust: Does the Competition Amendment Act, 2018 effectively bring more protection to SMEs?” (August 2019) Paper presented at the 13th Annual Competition Law, Economics and Policy Conference, available at https://www.compcom.co.za/wp-content/uploads/2020/12/CompCom-Special-Edition-Newsletter_s.pdf (accessed on 19 September 2021) (hereafter Sakata (2019)) 50.

⁷⁰³ Notice in terms of section 1 of the Competition Act, 1998 (2019), Column 1 of the Schedule to the Notice; Sakata (2019).

⁷⁰⁴ *Idem*, Columns 3 and 4 of the Schedule to the Notice; Sakata (2019).

⁷⁰⁵ *Idem*, Columns 3 and 4 of the Schedule to the Notice; Sakata (2019).

⁷⁰⁶ Republic of South Africa “Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955” (March 1977) 148, para 4. This is also known as the Mouton Report, 1977 (hereafter Mouton Report (1977)).

to Sutherland and Kemp, apart from this Act, there was no specific competition regulation until at least 1923.⁷⁰⁷ In 1923, the *Board of Trade and Industries Act 28 of 1923*⁷⁰⁸ entrusted some competition advisory functions to the Board of Trade and Industries (“the Board”).⁷⁰⁹

In 1924, under the *Board of Trade and Industries Act 33 of 1924*, the Board was entrusted with more powers to deal with monopoly issues that needed to be regulated.⁷¹⁰ The Board was required to assess and advise the Government on “*combinations, trusts, monopolies and restraint of trade tending to the detriment of the general interest, especially by restricting production or maintaining or raising prices and the prevention thereof.*”⁷¹¹

In 1925, the *Customs and Excise Duties Act 36 of 1925* prohibited monopoly conduct.⁷¹² In this regard, section 4 of the *Customs and Excise Duties Act 36 of 1925* required the Minister to publish the Board’s report on any industry protected by tariff

⁷⁰⁷ Sutherland and Kemp *Competition Law of South Africa* (2020) (hereafter Sutherland and Kemp (2020)) 3-26, para 3.2.1.

⁷⁰⁸ The Board of Trade and Industries Act 28 of 1923, GN1074 in GG1330 of 30 June 1923 Vol LII, at lv.

⁷⁰⁹ In terms of section 1(1) of the Board of Trade and Industries Act 28 of 1923, the Board’s functions included enquiring into and reporting to the Minister of Trade and Industry on: “*the nature, extent and effect of agreements, arrangements, combinations, associations and trusts connected with or affecting commerce, finance, manufacture, mining, trade or transport in so far as they tend to the creation of monopolies or to the restraint of trade and submit to the Minister recommendations as to any action necessary or advisable for preventing such creation of monopolies or restraint of trade*”; see also Sutherland and Kemp (2020) 3-26, para 3.2.1.

⁷¹⁰ The Board of Trade and Industries Act 33 of 1924, Gazette Extraordinary No. 1422 of 10 September 1924. The Board of Trade and Industries Act 33 of 1924 was re-enacted in the Board of Trade and Industries Act 19 of 1944. See Mouton report (1977) para 7; see also Sutherland and Kemp (2020) 3-26, para 3.2.1.

⁷¹¹ Section 2(1)(f) of Board of Trade and Industries Act 33 of 1924 and section 9(1)(f) of Board of Trade and Industries Act 19 of 1944; Mouton report (1977) para 7.

⁷¹² In this regard, section 4(1) of Customs and Excise Duties Act 36 of 1925, GN1271 in GG1494 of 30 July 1925, lxxxiv, read: “*In any case in which the Board of Trade and Industries reports to the Minister that any industry protected by a duty appearing in the maximum duty column of the First Schedule to this Act- (a) is charging unduly high prices for any product; or (b) is acting in a manner which tends to such a restraint of trade or the establishment of such a monopoly as is injurious to the public interests; or (c) is maintaining unsatisfactory labour conditions, the Minister shall forthwith upon receipt of such report publish the same in the Gazette.*” Section 4 was later re-enacted in section 66 of Act 35 of 1944. Section 66(1) of the Customs Act 35 of 1944, GN898 in GG3351 of 5 June 1944 read: “*In any case in which the Board of Trade and Industries reports to the Minister that any industry protected by an intermediate or maximum rate of duty specified in the tariff- (a) is charging unduly high prices for any goods; or (b) is acting in a manner which tends to such a restraint of trade or the establishment of such a monopoly all is detrimental to the public interest; or (c) is maintaining unsatisfactory labour conditions, the Minister shall forthwith upon receipt of such report publish it in the Gazette.*”; See Mouton report (1977) para 10; see also Sutherland and Kemp (2020) 3-26, para 3.2.1.

which was, amongst others, charging unduly high prices for any product or engaging in restraint of trade or monopolistic conduct that harmed the public interests.⁷¹³

According to the *Mouton Report*, in 1943, the Minister of Economic Affairs requested the Board to investigate certain anti-competitive practices and monopolistic conduct.⁷¹⁴ The Board initially conducted a series of studies into specific industries and then investigated monopolies and monopolistic behaviour in the market.⁷¹⁵ In 1944, the *Board of Trade and Industries Act 19 of 1944*⁷¹⁶ was passed to amend the *Board of Trade and Industries Act 33 of 1924* and confirm the establishment and functions of the Board as an advisory body in, *inter alia*, competition law.⁷¹⁷ The *Mouton Report* notes that it was the first time that a separate, independent administrative body was empowered to investigate monopolistic behaviour and restrictive trade practices in the South African markets, as well as to determine whether specific monopolistic conduct was in the public interest.⁷¹⁸

In 1949, in anticipation of the Board's investigation report into monopolistic behaviours (requested by the Minister in 1943), the government passed the *Undue Restraint of Trade Act 59 of 1949*.⁷¹⁹ The *Undue Restraint of Trade Act* dealt with, *inter alia*, resale price maintenance⁷²⁰ and the Board's duties to investigate and report on what the Minister would direct, namely inquiries into:

“combination, trusts or monopolies or any method of or arrangement for fixing, maintaining or raising prices, or restricting production, distribution, sale or

⁷¹³ *Idem* section 4 of Customs and Excise Duties Act 36 of 1925, GN1271 in GG1494, of 30 July 1925, lxxxiv; Mouton report (1977) para 10.

⁷¹⁴ Mouton report (1977) 5, para 14; Sutherland and Kemp (2020) 3-26, para 3.2.1.

⁷¹⁵ Mouton report (1977) 5, para 14.

⁷¹⁶ Board of Trade and Industries Act 19 of 1944, GN571 in GG3326 of 6 April 1944, lxxxii.

⁷¹⁷ Section 9(1)(f) of the Board of Trade and Industries Act 19 of 1944 stipulated that: “*The board shall, subject to the directions of the Minister, enquire into and advise the Government in regard to all matters relating to the development of the economic resources of the Union and its trade and industries, and in particular in regard to- (f) combinations, trusts, monopolies and restraints of trade tending to the detriment of the general interest, especially by restricting production or maintaining or raising prices, and the prevention thereof*”; Sutherland and Kemp (2020) 3-26, para 3.2.1.

⁷¹⁸ Mouton report (1977) 3, para 8.

⁷¹⁹ Undue Restraint of Trade Act 59 of 1949, GN1369 in GG4201 of 8 July 1949, cxxxii; Mouton report (1977) 5, para 15.

⁷²⁰ Section 3(1)(a) of the Undue Restraint of Trade Act stated: “*3. (1) Any person engaged in the trade or occupation of selling a controlled article for re-sale shall be guilty of an offence if, by any means whatsoever, exercised directly or indirectly, he compels or induces or endeavours to compel or induce any person (a) to charge any specified price or specified minimum or maximum price for such controlled article sold by him.*” GN1369 in GG4201 of 8 July 1949, cxxxii.

*competition, or in any other manner tending to the restraint of trade and operation or likely to operate to the detriment of the public”.*⁷²¹

In order to deter monopolistic practices, the Minister could request the offending parties to stop their conduct if it was found to be harmful.⁷²²

According to the *Mouton Report*, in 1951, the Board published its report called the *BTI Report 327*.⁷²³ The *BTI Report 327* recommended the repeal of the *Undue Restraint of Trade Act* and the enactment of new legislation to regulate monopolistic behaviour.⁷²⁴ It highlighted the guiding principles and objectives that the new competition legislation had to adopt, namely: “(a) *the wholesale condemnation of monopolistic tendencies is unrealistic and not justified*; (b) *market structure is not in itself a measure of economic effect*; (c) *control should be entrusted to expert bodies rather than to the Courts*; (d) *restrictive agreements should be controlled, not prohibited*; (e) *large businesses or business groups should be subject to dissolution*; (f) *legal barriers to entry may cause monopolistic conditions and should be studied by the body responsible for administering trade practices policy*; (g) *state enterprises should be subject to the same monopoly control as private firms*.”⁷²⁵

In 1955, the BTI’s recommendation resulted in the enactment of the *Regulation of Monopolistic Conditions Act 24 of 1955*, which came into effect on 1 January 1956.⁷²⁶ As pointed out by Sutherland and Kemp, this legislation is considered to be the “*first comprehensive*” competition legislation in South Africa and was mainly based on the *BTI Report 327*.⁷²⁷ The *Regulation of Monopolistic Conditions Act* applied to a

⁷²¹ Section 5 of the Undue Restraint of Trade Act 59 of 1949 replaced section 9(1)(f) of the Board of Trade and Industries Act 19 of 1944. In particular, section 5(a) of the Undue Restraint of Trade Act stipulated: “5. *Section nine of the Board of Trade and Industries Act, 1944, is hereby amended (a) by the substitution for paragraph (j) of sub-section (1) of the following paragraph: “(f) combinations, trusts or monopolies or any method of or arrangement for fixing, maintaining or raising prices or restricting production, distribution, sale or competition, or in any other manner tending to the restraint of trade and operating or likely to operate to the detriment of the public: Provided that no report shall be made by the board in relation to a matter referred to in this paragraph unless it has afforded the person or combination of persons concerned a reasonable opportunity of being heard in relation to such practice, method, scheme or arrangement”* GN1369 in GG4201 of 8 July 1949, cxxxiv; Mouton report (1977) para 16.

⁷²² Mouton report (1977) para 16.

⁷²³ BTI Report 327 *Regulation of Monopolistic Conditions 1951* (17 April 1951); Mouton report (1977) 6 para 19; Sutherland and Kemp (2020) 3-27.

⁷²⁴ Mouton report (1977) para 21; Sutherland and Kemp (2020) 3-27.

⁷²⁵ Mouton report (1977) para 20(a) - (g).

⁷²⁶ Regulation of Monopolistic Conditions Act 24 of 1955, GN963 in GG5465 of 6 May 1955; Sutherland and Kemp (2020) 3-27.

⁷²⁷ Sutherland and Kemp (2020) 3-27.

“*monopolistic condition*” which included an agreement, arrangement, or understanding between two or more persons which, by directly or indirectly restricting competition, had an adverse effect on, *inter alia*, the output, disposal, production or distribution of any commodity, prices, the entry of new producers or distributors into any market, the development of any industrial sector.⁷²⁸ The *Regulation of Monopolistic Conditions Act* did, however, not specifically provide for merger regulation.⁷²⁹

In 1975, a Commission of Inquiry, initially chaired by Dr LC Steyn and subsequently by Dr DJ Mouton,⁷³⁰ was appointed by the State President to assess competition policy in South Africa.⁷³¹ In 1978, the Commission of Inquiry produced the *Mouton Report*.⁷³² It regarded public interest as key to competition assessment.⁷³³ In one of the Commission of Inquiry’s recommendations in the *Mouton Report* to effectively deal with the issue of economic concentration, it was recommended that the definition of “*monopolistic condition*” be expanded to provide for the investigation of conduct likely to restrict competition and negatively affect the public interest.⁷³⁴ Public interest was also regarded as an essential element in merger assessment.⁷³⁵ The *Mouton Report* recommended that the body responsible for the administration of the South African competition legislation be empowered to investigate mergers and, if found to be

⁷²⁸ Section 2(1) of the Regulation of Monopolistic Conditions Act 24 of 1955 defined “monopolistic condition” as: “(a) every agreement, arrangement or understanding, whether legally enforceable or not, between two or more persons; (b) every business practice or method of trading, including any method of fixing prices; (c) every act or omission on the part of any person, whether acting independently or in concert with any other person; and (d) every situation arising out of the activities of any person or class or group of persons, which, by directly or indirectly restricting competition, has or is calculated to have the effect of (i) restricting the output or disposal of any commodity; or (ii) limiting the facilities available for the production or distribution of any commodity; or (iii) enhancing or maintaining prices; or (iv) preventing the production or distribution of any commodity by the most efficient and economical means; or (v) preventing or retarding the development or introduction of technical improvements or the expansion of existing markets or the opening up of new markets; or (vi) preventing or restricting the entry of new producers or distributors into any branch of trade or industry; or (vii) preventing or retarding the adjustment of any branch of trade or industry to changing circumstances.”; see also Sutherland and Kemp (2020) 3-27.

⁷²⁹ Sutherland and Kemp (2020) 3-28; Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 16.

⁷³⁰ The State President initially appointed Dr Lucas Cornelius Steyn to chair the Commission of Inquiry. However, Dr LC Steyn passed away in July 1976 and was replaced by Dr Dav; d Johannes Mouton to continue chairing the Inquiry until the publication of the Mouton Report in 1978. See Mouton report (1977)(vii) Sutherland and Kemp (2020) 3-31, para 3.2.2.

⁷³¹ Sutherland and Kemp (2020) 3-31; Arnt Spandau “Competition policy in South Africa: further comments” 1975 SAJE 322–323.

⁷³² Sutherland and Kemp (2020) 3-31.

⁷³³ *Ibid.*

⁷³⁴ Mouton report (1977) (xii) para (a); The Antitrust Bulletin at 182.

⁷³⁵ Mouton report (1977) 64 para 139; The Antitrust Bulletin at 177.

against the public interest, recommend to the Minister that such mergers be prohibited or approved with conditions.⁷³⁶

In particular, the *Mouton Report* highlighted that the 1955 Act had not been enforced effectively.⁷³⁷ This was because the personnel of the previous Board entrusted with administering the 1955 Act were not adequately equipped to perform some of its functions.⁷³⁸ The Report found that “*the Act and the way it was implemented had but a modest impact as an instrument for ensuring competition in the South African economy.*”⁷³⁹ It recommended that the functions of the Board entrusted with the administration of the competition legislation should include “*policy coordination, general enquiry and research, enforcement and publicity*” and powers to investigate conduct that is against the public interest in any sector of the economy.⁷⁴⁰ The Report also recommended a quasi-judicial body to assess mergers and take-overs, namely “the Merger Tribunal”.⁷⁴¹ The *Mouton Report* consequently proposed new competition legislation.⁷⁴²

In 1979, based on the Mouton Commission’s recommendation, the President approved the *Maintenance and Promotion of Competition Act 96 of 1979*.⁷⁴³ The Act established the Competition Board, which was appointed by the Minister of Trade and Industry.⁷⁴⁴ Unlike its predecessor (the Board of Trade and Industry), the Competition Board had formal investigatory powers and could initiate an investigation on the

⁷³⁶ Mouton report (1977) 64 para 139; The Antitrust Bulletin at 177.

⁷³⁷ *Idem* 65 para 143; The Antitrust Bulletin at 178.

⁷³⁸ *Idem* 64 para 140; The Antitrust Bulletin at 178.

⁷³⁹ *Idem* 66 para 144; The Antitrust Bulletin at 179.

⁷⁴⁰ *Idem* (xiv) para (iii); The Antitrust Bulletin at 183-184.

⁷⁴¹ *Idem* (xv); The Antitrust Bulletin at 185.

⁷⁴² Sutherland and Kemp (2020) 3-32.

⁷⁴³ The Maintenance and Promotion of Competition Act 96 of 1979, GN1437 in GG6545 of 4 July 1979. This Act came into effect in 1980. See also Sutherland and Kemp (2020) 3-32. See also Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 17.

⁷⁴⁴ Sutherland and Kemp (2020) 3-34; OECD “Competition Law and Policy in South Africa: An OECD Peer Review” (May 2003) (hereafter OECD (May 2003)) 14, available at <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf>, accessed on 12 October 2021.

directions of the Minister.⁷⁴⁵ The Minister could only challenge an investigation initiated by the Board if it was against the public interest.⁷⁴⁶

As pointed out by Sutherland and Kemp, during that time, actions against restrictive practices could only be taken after considering the public interest.⁷⁴⁷ Public interest was thus an important consideration in determining harm to the market. Later, in 1990, the consideration of public interest also extended to acquisitions (mergers), in that, like restrictive practices, the Board's actions in respect of acquisitions needed to consider the public interest.⁷⁴⁸ In terms of section 6 of the *Maintenance and Promotion of Competition Amendment Act 88 of 1990*, if the Board was not satisfied that the restrictive practice or acquisition was justified in the public interest or that there were no circumstances justifying the restrictive practice or acquisition in the public interest, the Board would recommend to the Minister to, *inter alia*, declare such conduct or acquisition unlawful.⁷⁴⁹

⁷⁴⁵ Section 10(1) of the Maintenance and Promotion of Competition Act 96 of 1979 stipulated: "10. (1) Subject to the provisions of subsection (2), the board may on its own initiative and shall, on the directions of the Minister, make such investigations as it may consider necessary (a) into any restrictive practice which the board or the Minister, as the case may be, has reason to believe exists or may come into existence; (b) in order to ascertain (i) whether any acquisition has been, is being or is proposed to be made; (ii) the nature and extent of the controlling interest held and acquired, being acquired or proposed to be acquired; (e) into any particular type of business agreement, arrangement, understanding, business practice or method of trading in general or in relation to any particular commodity or any class or kind of commodity or any particular business or undertaking or any class or type of business or undertaking or any particular area which in the opinion of the board or the Minister, as the case may be, is commonly adopted for the purpose of or in connection with the creation or maintenance of restrictive practices."; Sutherland and Kemp (2020) 3-35-36; OECD (May 2003) 13.

⁷⁴⁶ Section 10(2) of the Maintenance and Promotion of Competition Act 96 of 1979 stipulated that: "An investigation referred to in subsection (1) (a), (b) or (e) shall not be made or proceeded with by the board on its own initiative, if in the opinion of the Minister such investigation is not in the public interest."; Sutherland and Kemp (2020) 3-36.

⁷⁴⁷ Sutherland and Kemp (2020) 3-33.

⁷⁴⁸ Section 6 of the Maintenance and Promotion of Competition Amendment Act 88 of 1990 amended section 12 of the Maintenance and Promotion of Competition Act 96 of 1979. Section 6 stated: "Section 12 of the principal Act is hereby amended- (a) by the substitution for paragraph (b) of subsection (2) of the following paragraph: "(6) is not satisfied that such restrictive practice or acquisition is justified in the public interest or is satisfied that such [acquisition or] monopoly situation is not justified in the public interest; and". Section 12 of Act 96 of 1979 stated: " (1) The board shall report to the Minister as to the result of any investigation made by it in terms of section 10 (1). (2) If after investigation in terms of section 10 (1) (a) or (b) the board (...) is not satisfied that there are circumstances which justify such restrictive practice in the public interest or is satisfied that circumstances exist which do not justify such acquisition in the public interest (...); the board shall recommend to the Minister that such action be taken under section 14 (1) as it may consider necessary in the circumstances."; Sutherland and Kemp (2020) 3-33.

⁷⁴⁹ Section 6 of the Maintenance and Promotion of Competition Amendment Act 88 of 1990 (cited above) was to be read with Section 7 of the Maintenance and Promotion of Competition Amendment Act 88 of 1990. Section 7 of the Maintenance and Promotion of Competition Amendment Act 88 of 1990 substituted section 14 of the Maintenance and Promotion of Competition Act 96 of 1979. It stipulated: "The following section is hereby substituted for section 14 of the principal Act: "Manner of

In 1986, the Minister declared unlawful the practice of:⁷⁵⁰ (a) resale price maintenance (RPM); (b) horizontal price collusion; (c) horizontal collusion on conditions of supply; (d) horizontal collusion on market sharing; or (e) collusive tendering.⁷⁵¹

In 1986, Naudé, the then Chairman of the Competition Board, highlighted the promotion of “private initiative and effective competition” as one of the goals in the South African Constitution 1983.⁷⁵² He confirmed that effective competition is crucial for the efficient functioning of the economy and should promote a market that reconcile with the public interest.⁷⁵³

Until 1990, pre-notification of a merger to the Board was not compulsory.⁷⁵⁴ As part of its functions, the Board could reach an agreement with the offender to rectify the impugned conduct or transaction, if the Board had found that there was a “*restrictive practice, acquisition or monopolistic situation*”.⁷⁵⁵ If settlement could not be reached and the public interest did not justify the restrictive practice, acquisition or monopolistic situation, the Board would recommend an action to the Minister.⁷⁵⁶ Such action could

dealing with restrictive practices, acquisitions and monopoly situations 14. (1) Whenever after consideration of a report by the board in terms of section 12 (1) as to the result of any investigation made by it in terms of section 10 (1) (a), (b) or (d), the Minister is of opinion that a restrictive practice exists or may come into existence or that an acquisition has been or is being made or is proposed and is not satisfied that such restrictive practice or acquisition is justified in the public interest, or is of opinion that [an acquisition has been or is being made or is proposed or that] a monopoly situation exists or may come into existence and is satisfied that such [acquisition or] monopoly situation is not justified in the public interest, and has not confirmed any arrangement which may have been made in terms of section 11 (1) or 13 (1) (a) in respect of such restrictive practice, acquisition or monopoly situation- (...) (c) the Minister may by notice in the Gazette- (i) declare the said restrictive practice, acquisition or monopoly situation to be unlawful, and require any person who in the opinion of the Minister is concerned in the said restrictive practice or monopoly situation or who in his opinion is or was a party to the said acquisition, to take such action, including steps for the dissolution of any body corporate or unincorporate (...)

⁷⁵⁰ GN801 in GG10211 of 2 May 1986, 12; Sutherland and Kemp (2020) 3-33.

⁷⁵¹ Collusive tendering is a type of cartel conduct where competitors agree to collude on a tender by either agreeing on who should be the winner of the tender or agreeing on the price at which they should each bid for the tender so as to enable a specific bidder to win. This conduct is also known as bid rigging and is prohibited under section 4(1)(b) of the Competition Act.

⁷⁵² Republic of South Africa Constitution, Act 110 of 1983, GN2139 in GG8914 of 28 September 1983.

⁷⁵³ Naudé “South African Competition Policy: Challenges and pitfalls” (1986) MB, 77; See also Sutherland and Kemp (2020) 3-38 – 3-39.

⁷⁵⁴ Section 6(3) of the Maintenance and Promotion of Competition Act 96 of 1979 stated: “(3) *Nothing in this section contained shall be construed as requiring any party to a proposed acquisition to notify the board of, or to consult the board in connection with, the acquisition.*” Section 2 of the Maintenance and Promotion of Competition Amendment Act 88 of 1990 deleted section 6(3) of the 1979 Act. Section 2 of the Amendment Act of 1990 stipulated: “2. *Section 6 of the principal Act is hereby amended- (...) (c) by the deletion of subsection (3).*”; Sutherland and Kemp (2020) 3-35.

⁷⁵⁵ Section 11(1) of the Maintenance and Promotion of Competition Act 96 of 1979; Sutherland and Kemp (2020) 3-36.

⁷⁵⁶ Section 12(2) of the Maintenance and Promotion of Competition Act 96 of 1979; Sutherland and Kemp (2020) 3-36.

include the declaration that the relevant restrictive practice or acquisition was unlawful.⁷⁵⁷ The Minister had the final word on any action to be taken in terms of the Act.⁷⁵⁸

Brooks points out that between 1986 to 1994, the general approach to economic policy was to consider, amongst others, the effect of policy measures on small businesses.⁷⁵⁹ During this period, the Competition Board was also tasked with coordinating and developing the government's deregulation policy, which sought to facilitate entry and participation of all persons in the South African economy and promote effective competition through, amongst others, removing regulatory measures that adversely affected small businesses' competitiveness.⁷⁶⁰

In 1994, before the first democratic election in South Africa, the African National Congress (ANC) drafted the *Reconstruction and Development Programme* (RDP), which included the key economic objectives of the ANC and set out the new economic vision for South Africa.⁷⁶¹ The RDP noted that "*the South African economy is characterised by excessive concentration of economic power in the hands of a tiny minority of the population.*"⁷⁶² With regard to small businesses, the RDP highlighted that "*Smaller firms, especially if owned by black people, can rarely develop productive linkages with the large-scale sector. Most people in the informal sector lack productive and managerial skills plus access to business sites, capital and markets. They face an array of repressive regulations originally designed to undermine black business and farming.*"⁷⁶³ The RDP opposed economic concentration in South Africa and recommended a "*strict anti-trust legislation to create a more competitive and dynamic*

⁷⁵⁷ In terms of section 12(2) of the Maintenance and Promotion of Competition Act 96 of 1979, if the Board had found that a restrictive practice existed and that there were no circumstances justifying such restrictive practice in the public interest, the Board would recommend to the Minister that action be taken under section 14(1) of the Maintenance and Promotion of Competition Act 96 of 1979. Section 14(1) empowered the Minister, after consideration of the report by the Board, to, *inter alia*, declare the said restrictive practice or unjustified acquisition unlawful. See section 14(1)(c)(i).

⁷⁵⁸ Sutherland and Kemp (2020) 3-37.

⁷⁵⁹ Brooks "Redefining the objectives of South African Competition Law" (2001) *The Comparative and International Law Journal of Southern Africa*, 299. See also Sutherland and Kemp (2020) 3-39.

⁷⁶⁰ *Idem* 300.

⁷⁶¹ African National Congress "The Reconstruction and Development Programme (RDP)" (1994), available at https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf (accessed on 4 July 2023); Sutherland and Kemp (2020) 3-39.

⁷⁶² The Reconstruction and Development Program (1994) para 4.1.5.

⁷⁶³ *Idem* para 4.1.6.

*business environment.*⁷⁶⁴ The new legislation was to address, amongst others, economic concentration and anti-competitive practices.⁷⁶⁵ The RDP also recommended the establishment of a commission to, amongst others, investigate economic control and competition in the country and develop democratic solutions.⁷⁶⁶

The government's 1994 *White Paper on Reconstruction and Development* confirmed the RDP's position that competition law was to promote not only economic goals but also a broader social and political objective.⁷⁶⁷ The *White Paper* confirmed that competition policy would "*ensure that participation of efficient small and medium-sized enterprises in the economy is not jeopardised by anti-competitive structures and conduct.*"⁷⁶⁸ It is, therefore, noted that the promotion of SMEs' interests was one of the competition law's objectives even before the enactment of the *1998 Competition Act*. In other words, the Government had already contemplated promoting SMEs' interests during the time leading up to the promulgation of the *1998 Competition Act*.

On 27 November 1997, the Department of Trade and Industry published its *Proposed Guidelines for Competition Policy*.⁷⁶⁹ The guidelines emphasised that "*the catalyst to state intervention will have to be a clear violation of the public interest.*"⁷⁷⁰ The 1997 Proposed Guidelines defined "public interest" with respect to competitiveness and development.⁷⁷¹ Competitiveness was defined as ensuring that South Africa be more competitive by reducing costs throughout the entire value chain.⁷⁷² Development was defined as the willingness to address socio-economic disparities and the capacity to correct, over time, racial and gender differences in ownership and control within the private sector.⁷⁷³ In this regard, Lewis notes that business embodied the

⁷⁶⁴ The Reconstruction and Development Programme (1994) para 4.4.6.2; Sutherland and Kemp (2020) 3-40.

⁷⁶⁵ *Idem* par 4.1.5–4.1.6 & 4.4.6.2; Sutherland and Kemp (2020) 3-40.

⁷⁶⁶ *Idem* par 4.4.6.2; Sutherland and Kemp (2020) 3-40.

⁷⁶⁷ White Paper on Reconstruction and Development in GN1954 in GG16085 of 23 November 1994, para 3.8; Sutherland and Kemp (2020) 3-40.

⁷⁶⁸ *Idem*, para 3.8.2; Sutherland and Kemp (2020) 3-40.

⁷⁶⁹ Department of Trade and Industry "Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development" (27 November 1997); see also Sutherland and Kemp (2020) 3-40.

⁷⁷⁰ Department of Trade and Industry "Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development" (27 November 1997) para 1.3.1.

⁷⁷¹ *Idem* para 2.4.1.

⁷⁷² *Idem* para 2.4.2.

⁷⁷³ Department of Trade and Industry "Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development" (27 November 1997) para 2.4.3. See also Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 27.

competitiveness elements of the public interest, while labour represented the social aspect of the public interest, expressed as promotion of employment, black economic empowerment, small business and equitable regional spread of development.⁷⁷⁴ According to Sutherland and Kemp, the guidelines recognised that competition policy could promote not only market efficiency but also the developmental or distributional aspects of the economy, namely the public interest.⁷⁷⁵ They point out that competition policy could not be seen in isolation but had to be considered and integrated with other economic policies.⁷⁷⁶ This supports the argument that the promotion of SMEs' interests may be advanced by competition policy together with other industrial policies. All industrial policies, including competition policies, must be able to interact and integrate to promote and support the developmental side of the economy, such as the promotion of SMEs' interests.

The *1997 Guidelines* proposed effective and efficient competition authorities, including an inspectorate and a Competition Tribunal.⁷⁷⁷ The *Guidelines* further recommended that Ministerial intervention be removed from enforcing competition law.⁷⁷⁸ This was done to give the competition authorities more autonomy and allow them to enforce competition law more rigorously.⁷⁷⁹ It also eliminated the possibility of political interference with competition law enforcement by clearly defining the role of competition policy and its relationship to the Minister and government policy.⁷⁸⁰

In May 1998, the Department of Trade and Industry published the *Competition Bill of 1998*.⁷⁸¹ Sutherland and Kemp observed that the *Bill* recognised that the previous competition legislation was ineffective in addressing the high level of market concentration in South African markets.⁷⁸² The *Bill* further confirmed that the main

⁷⁷⁴ Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 37.

⁷⁷⁵ Department of Trade and Industry "Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development" (27 November 1997) para 1.3.2 and 1.3.3; see also Sutherland and Kemp (2020) 3-40 – 3-41.

⁷⁷⁶ Sutherland and Kemp (2020) 3-41; Department of Trade and Industry "Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development" (27 November 1997).

⁷⁷⁷ Department of Trade and Industry "Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development" (27 November 1997) paras 8.3.1 and 9.2.2; Sutherland and Kemp (2020) 3-42.

⁷⁷⁸ *Idem* para 8.3.1; Sutherland and Kemp (2020) 3-42-3-43.

⁷⁷⁹ Department of Trade and Industry "Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development" (27 November 1997) Executive Summary, para 7.

⁷⁸⁰ *Idem* para 8.3.1

⁷⁸¹ Competition Bill, 1998, GN841 in GG18913 of 22 May 1998; Sutherland and Kemp (2020) 3-43.

⁷⁸² Competition Bill, 1998, GN841 in GG18913 of 22 May 1998, 62; Sutherland and Kemp (2020) 3-43.

objective of competition policy was to promote competition in order to support, amongst others, market access of SMEs.⁷⁸³ Lewis confirms that South Africa's policy-makers and Parliament accorded SMEs a special status in the formulation and intended application of the Competition Act.⁷⁸⁴

On 20 October 1998, the President assented to the *Competition Act 89 of 1998*,⁷⁸⁵ which came into effect on 30 November 1998.⁷⁸⁶ The *Maintenance and Promotion of Competition Act 96 of 1979* and all its amendments were repealed.⁷⁸⁷

Over the years, several amendments to the *Competition Act 89 of 1998* have been made.⁷⁸⁸ These amendments include the *Competition Amendment Act 35 of 1999*,⁷⁸⁹ the *Competition Amendment Act 15 of 2000*,⁷⁹⁰ the *Competition Second Amendment*

⁷⁸³ Competition Bill, 1998, GN841 in GG18913 of 22 May 1998, 63, the Bill states: "... the core elements of Government's approach to competition policy, an approach enshrined in the accompanying Bill, may be summarised as follows: - the overriding objective of competition policy and its associated instruments is the promotion of competition in order to underpin economic efficiency and adaptability, international competitiveness, the market access of SMMs, diversification of ownership in favour of members of historically disadvantaged communities, and the creation of new employment opportunities."; Sutherland and Kemp (2020) 3-43.

⁷⁸⁴ Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 179.

⁷⁸⁵ Competition Act 89 of 1998, GN1392 in GG19412 of 30 October 1998.

⁷⁸⁶ Proclamation by the President of the Republic of South Africa, Competition Act, 1998 (Act No. 89 of 1998), RG6368 in GG19557 of 30 November 1998. Available at <https://archive.gazettes.africa/archive/za/1998/za-government-gazette-regulation-gazette-dated-1998-11-30-no-19557.pdf> (accessed on 17 December 2023).

⁷⁸⁷ Section 83 and Schedule 2 of the Competition Act 89 of 1998, GN1392 in GG19412 of 30 October 1998. Section 83(1) states: "Subject to Schedule 3, the laws specified in Schedule 2, and all proclamations, regulations or notices promulgated or published in terms of those laws, are repealed." Schedule 2 of the Competition Act 89 of 1998 sets out a table of the repealed laws, namely Maintenance and Promotion of Competition Act 96 of 1979, Maintenance and Promotion of Competition Amendment Act 58 of 1980, Maintenance and Promotion of Competition Amendment Act 62 of 1983, Maintenance and Promotion of Competition Amendment Act 12 of 1985, Maintenance and Promotion of Competition Amendment Act 5 of 1986, Maintenance and Promotion of Competition Amendment Act 96 of 1987, Maintenance and Promotion of Competition Amendment Act 88 of 1990; Sutherland and Kemp (2020) 3-45.

⁷⁸⁸ South African Government "Competition Act 89 of 1998" available at <https://www.gov.za/documents/competition-act> (accessed on 17 December 2023).

⁷⁸⁹ GN513 in GG1981 of 30 April 1999. The Competition Amendment Act 35 of 1999 aimed to make pre-merger notification mandatory in certain instances, provide for certain appeal matters and set out certain transitional arrangements. See the Preamble to this Competition Amendment Act 35 of 1999. Under this amendment, it was also confirmed that the Chairperson of the Competition Board contemplated in section 3 of the Maintenance and Promotion of Competition Act No. 96 of 1979 had to be regarded as referring to either the Competition Commissioner contemplated in section 22 of the Competition Act 89 of 1998 or the Chairperson of the Competition Tribunal contemplated in section 26 of the Competition Act 89 of 1998.

⁷⁹⁰ GN528 in GG21234 of 26 May 2000. The Competition Amendment Act 15 of 2000 sought to amend the Competition Appeal Court's (CAC) composition to have at least three judges appointed by the President on the advice of the Judicial Services Commission. The Amendment also introduced new provisions regarding the powers of appeal and review of the CAC, as well as the term of office for the CAC's judges.

Act 39 of 2000,⁷⁹¹ the *Competition Amendment Act 1 of 2009*,⁷⁹² and the *Competition Amendment Act 18 of 2018*.⁷⁹³ The major amendments were probably introduced by the 2009 and the 2018 amendments.⁷⁹⁴ The 2009 amendments, through the *Competition Amendment Act 1 of 2009*, introduced the criminalisation of cartel conduct⁷⁹⁵ and initiation of market inquiries.⁷⁹⁶ The criminalisation of cartel conduct means holding personally liable a director of a firm or a person having management authority in a firm that causes or permits a firm to engage in cartel conduct.⁷⁹⁷ The criminalisation of cartel conduct was introduced because of the egregious nature of cartel and in order to deter participation in cartel conduct. This is further discussed below.⁷⁹⁸

The *2018 amendments* (introduced by the *Competition Amendment Act 18 of 2018*) that mainly focused on SMEs, are pertinent to the focus of this study.

⁷⁹¹ GN1354 in GG21880 of 13 December 2020. The Competition Amendment Act 39 of 2000 sought to introduce certain definitions such as “acquiring firm”. The Amendment Act also amended the exemption provisions under section 10, including the exemption of agreements or practices relating to the exercise of Intellectual Property Rights, and the fact that the Commission may grant exemption for a specified term. The amendments also introduce provisions for the Minister’s authority to determine merger thresholds in consultation with the Competition Commission. The amendments also include provisions to regulate investigation and adjudication procedures and the enforcement of decisions, judgments, and orders of the Competition Commission, Competition Tribunal, and Competition Appeal Court. The amendments also sought to regulate the relationship between the Competition Commission and other agencies and provide for concurrent jurisdiction.

⁷⁹² GN875 in GG32533 of 28 August 2009. The Competition Amendment Act 1 of 2009 sought to, amongst others, clarify provisions of concurrent jurisdiction between the Commission and other regulatory authorities, introduce provisions on the initiation and conduct of market inquiries and provisions holding personally liable individuals that cause a firm to engage in cartel conduct, as well as empower the Commission to grant leniency to a respondent that assisted the Commission in detecting and investigating a cartel.

⁷⁹³ GN175 in GG42231 of 14 February 2019.

⁷⁹⁴ The *Competition Amendment Act 1 of 2009*, and the *Competition Amendment Act 18 of 2018*.

⁷⁹⁵ Cartel conduct refers to an agreement or concerted practices between competitors to fix prices and/or trading conditions, divide or allocate markets or rig tenders. It is prohibited under section 4(1)(b) of the Competition Act. See below 3.5.3.1.1. Section 4(1)(b). See <https://www.compcom.co.za/cartels/> (accessed on 9 October 2024). Also referred to as a collusive conduct or agreement. See below 3.5.3.1.2 SMEs – victims of prohibited horizontal practices.

⁷⁹⁶ Competition Amendment Act 1 of 2009, GN875 in GG32533 of 28 August 2009; also available at [https://www.comptrib.co.za/Content/Documents/competition-amendment-act-1-of-2009%20\(6\).pdf](https://www.comptrib.co.za/Content/Documents/competition-amendment-act-1-of-2009%20(6).pdf) (accessed on 2 November 2021). See also Sutherland and Kemp (2020) 3-45. Section 6 introduced the provisions on market inquiries, section 12 introduced the criminalisation provisions. Section 12 of the Competition Amendment Act 1 of 2009 only came into effect on 1 May 2016 under Proc. No. 25 in GG39952 of 22 April 2016.

⁷⁹⁷ Section 73A of the Competition Act 89 of 1998, as amended stipulates that “(1) A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person— (a) caused the firm to engage in a prohibited practice in terms of section 4(1)(b); or (b) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b).”

⁷⁹⁸ See below 3.5.3.1.2 SMEs – victims of prohibited horizontal practices.

3.4 The 2018 Amendments to the Competition Act

The *2018 amendments* (of which most of the provisions came into effect in 2020)⁷⁹⁹ seek to, amongst others, “*protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons*” in the economy.⁸⁰⁰ The term “Historically disadvantaged person” (HDP) is defined under section 3(2) of the Competition Act.⁸⁰¹

The *2018 amendments* have introduced substantive and procedural changes, as discussed below. The *Memorandum on the Objects of the Competition Amendment Bill 2018* explains that the *2018 amendments* were introduced to address “*two persistent structural constraints on the South African economy, namely, the high levels of economic concentration in the economy and the skewed ownership profile of the economy.*”⁸⁰² The Memorandum further explains that this objective is achieved through, amongst others, “*requiring special attention to be given to the impact of anti-competitive conduct on small and medium businesses and firms owned or controlled by historically disadvantaged persons*”.⁸⁰³

⁷⁹⁹ Certain sections of the 2018 Competition Amendment Act came into effect on 12 July 2019, namely sections 1 (except 1(d) defining “foreign acquiring firm”), 2, 5, 7(b) to (e), 8 to 13, 15 to 26, 29 to 32, 33 (except sections 8(4) and 9(1A)), 34, 35(b), 36 to 44, 45(b) and (d) to (i), 46. Commencement of certain sections of the Competition Act, 2018 (Act no. 18 of 2018), Proclamation No. 46 of 2019 in GG42578 of 12 July 2019, available at <https://www.comptrib.co.za/Content/Documents/Legislation%20And%20Forms/The%20Competition%20Act/Proclamation-of-the-commencement-of-certain-sections%20of-the-Competition-amendment-Act%202018.pdf> (accessed on 2 December 2023). The following sections of the 2018 Competition Amendment Act took effect on 13 February 2020: sections 5 (relating to section 8(4) of the Competition Act), 6, 27 to 28, 33(a) (relating to sections 8(4) - which prohibits abuse of buyer power by dominant firms against SMEs and HDPs in specific economic sectors - and 9(1A) of the Competition Act – which prohibits a dominant firm from avoiding or refusing to sell to an SME or HDP to circumvent section 9(1)(a)(ii), which prohibits a dominant seller from price discriminating if such discrimination is likely to impede the ability of SMEs or HDPs to participate effectively. Commencement of certain sections of the Competition Act, 2018 (Act No. 18 of 2018), Proclamation No. 10 of 2020 in GG43018 of 13 February 2020, available at https://www.gov.za/sites/default/files/gcis_document/202002/43018proc10.pdf (accessed on 2 December 2023).

⁸⁰⁰ Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.1.

⁸⁰¹ Section 3(2) of the Competition Act stipulates that: “*For all purposes of this Act, a person is a historically disadvantaged person if that person – (a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race; (b) is an association, a majority of whose members are individuals referred to in paragraph (a); (c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes; or (d) is a juristic person or association, and persons referred to in paragraph (a), (b) or (c) own and control a majority of its issued share capital or members’ interest and are able to control a majority of its votes.*”

⁸⁰² Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.1.

⁸⁰³ See above 3.4 The 2018 Amendments to the Competition Act. Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.2(b).

The *2018 amendments* are comprehensive and seek to strengthen and clarify certain provisions relating to horizontal and vertical restrictive practices; abuse of dominance; price discrimination, exemptions, merger control, market inquiries, investigation and adjudication procedures; and enforcement of the Competition Act.⁸⁰⁴ Several amended provisions deal with SMEs, from the purpose of the Act through to the penalty provisions. The impact of relevant amended provisions on SMEs is discussed below.

3.5 Provisions of the Competition Act dealing with SMEs

The promotion of SMEs is one of the numerous public interest issues that must be considered with the competition issues.⁸⁰⁵ In this regard, in 2018, the *Competition Act* was amended to strengthen its provisions regarding SMEs, among other things.

Before the *2018 amendments* to the *Competition Act*,⁸⁰⁶ the provisions of the *Competition Act* that specifically mentioned SMEs were sections 2(e), 10(3)(b)(ii) and 12A(3)(c):⁸⁰⁷

- Section 2(e) stated: *“The purpose of this Act is to promote and maintain competition in the Republic in order –*

.....

*(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.”*⁸⁰⁸

- Section 10(3)(b)(ii) stated: *“(3) The Competition Commission may grant an exemption in terms of subsection 2(a) only if –*

(...)(b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:

⁸⁰⁴ Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.2(a).

⁸⁰⁵ Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 1.2.

⁸⁰⁶ Competition Amendment Act 18 of 2018.

⁸⁰⁷ Section 12A(3) of the Competition Act deals with public interest grounds in a merger assessment.

⁸⁰⁸ The wording of section 2(e) remained the same with the 2018 amendments.

*(...)(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.*⁸⁰⁹

- Section 12A(3)(c) stated: *“(3) when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on – (c) the ability of small business or firms controlled or owned by historically disadvantaged persons, to become competitive.”*⁸¹⁰

Through the *2018 amendments*, the legislature introduced more provisions specifically providing for the promotion of SMEs, including sections 8(4), 9(1)(a)(ii), 43C(2) and 59(3)(d) of the *Competition Act* as examined in more detail below. This study also considers other provisions of the Competition Act, not specifically mentioning SMEs, but that could affect them. For this purpose, the section below considers the Preamble of the Competition Act as well as how the provisions on prohibited practices; merger control; market inquiries administrative penalties and civil damage claims affect SMEs.

3.5.1 Preamble of the Competition Act

The Preamble of an Act is defined as *“a brief introductory statement that sets out the guiding purpose and principles of the Act.”*⁸¹¹ Botha defines a Preamble as *“the circumstances and background of, and reasons for the legislation.”*⁸¹² The Preamble of the Competition Act recognizes that South Africa suffered from past discriminatory laws and practices (i.e. apartheid and the discrimination and inequality occasioned by it). These discriminatory laws and practices resulted in, amongst others, unjust

⁸⁰⁹ The wording of section 10(3)(b)(ii) changed after the 2018 amendments. It now reads: *“(3) The Competition Commission may grant an exemption in terms of subsection 2(a) only if – (...) (b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives: (...) (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons.”* (own emphasis added on the amendments).

⁸¹⁰ The wording of the section 12A(3)(c) changed after the 2018 amendments. It now reads: *“(3) when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on – (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market.”* (own emphasis added on the amendments).

⁸¹¹ The Department of Justice and Constitutional Development “Basic provisions of the Constitution”, available at <https://www.justice.gov.za/legislation/constitution/basicprov.html> (accessed on 4 August 2021).

⁸¹² Botha *Statutory Interpretation – An Introduction for Students* (2022) 6th ed. 37.

restrictions on full and free participation in the economy by all South Africans.⁸¹³ The Preamble also emphasizes the objective of providing all South Africans “*equal opportunity to participate fairly in the national economy*”,⁸¹⁴ restricting anti-competitive practices, and regulating the transfer of economic ownership with consideration of the public interest.⁸¹⁵ In *Competition Commission v Senwes*,⁸¹⁶ the Constitutional Court recognized in 2017 that “*some of the objectives of the Competition Act are directed at addressing the inequalities and imbalances which were created by the apartheid order.*”⁸¹⁷ The Constitutional Court also confirmed the Act’s objective of an inclusive economy in *Competition Commission v Pickfords Removals* in 2020.⁸¹⁸ It stated: “*...in its preamble, the Competition Act stridently declares that it seeks to achieve, amongst other objectives, equal opportunity to all citizens to participate fairly in the economy, to establish a more effective and efficient economy in our country and to restrain particular trade practices which undermine a competitive economy.*”⁸¹⁹

The Preamble confirms the objective of promoting SMEs' participation in the economy by means of the Competition Act.⁸²⁰ The Preamble, in fact, recognizes the importance

⁸¹³ Preamble of the Competition Act: “*The people of South Africa recognise: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans. IN ORDER TO - provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa; provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; create greater capability and an environment for South Africans to compete effectively in international markets; restrain particular trade practices which undermine a competitive economy; regulate the transfer of economic ownership in keeping with the public interest; establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.*”

⁸¹⁴ Preamble of the Competition Act.

⁸¹⁵ Preamble of the Competition Act.

⁸¹⁶ *Competition Commission of South Africa v Senwes Ltd* [2012] 7 BCLR 667 (CC) (hereafter *Senwes* (2012) (CC)), available at <http://www.saflii.org/za/cases/ZACC/2012/6.pdf> (accessed on 16 August 2021).

⁸¹⁷ *Senwes* (2012) CC, para 3; See also *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and others* 2015 1 CPLR 1 (CC) (hereafter *Pioneer HiBred* (2015) (CC)) para 12, fn7.

⁸¹⁸ *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] 1 CPLR 1 (CC) (hereafter *Pickfords* (2020) (CC)).

⁸¹⁹ *Pickfords* (2020) (CC), para 37.

⁸²⁰ *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC) (hereafter *Media 24* (2019) (CC)) para 169.

of the participation of every economic player in the economy. It also introduces the purpose of the Competition Act, which is set out under section 2.

3.5.2 Purpose of the Competition Act

Section 2 of the *Competition Act* sets out the purpose of the Act as promoting and maintaining competition in the Republic in order:

- (a) To promote the efficiency, adaptability and development of the economy;*
- (b) To provide consumers with competitive prices and product choices;*
- (c) To promote employment and advance the social and economic welfare of South Africans;*
- (d) To expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;*
- (e) To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;⁸²¹*
- (f) To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons;⁸²²*
- (g) To detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic.*

Section 2(e), stated above, specifically sets out the objective of promoting small and medium-sized enterprises (SMEs) and ensuring their equal and effective participation in the economy, in view of promoting and maintaining competition. This provision serves as the foundational yardstick against which to measure and interpret other provisions in the Competition Act dealing with SMEs and sets out the fundamental factors to consider when adjudicating competition law cases involving SMEs.

⁸²¹ Own emphasis.

⁸²² Section 2(a)-(f) of the Competition Act.

In *Competition Commission v Media 24*,⁸²³ the Constitutional Court's minority judgment remarked that the purpose of promoting SMEs implicated the right to equality safeguarded under section 9 of the Constitution.⁸²⁴ It also described the Competition Act as "*transformative legislation*".⁸²⁵ The Constitutional Court's minority judgment stated that:

*"Section 2(e) and (f) of the Competition Act states that part of the purpose of the Competition Act is to ensure that small and medium sized businesses have equitable opportunities to participate in the economy and to promote a greater spread of ownership in the economy by those who were disadvantaged by Apartheid. These purposes implicate the right of equality contained in section 9 of the Constitution. Section 9(2) enjoins the State to take legislative and other measures to advance the equality of previously disadvantaged people and section 2(e) and (f) of the Competition Act is a legislative measure of this kind."*⁸²⁶

Having considered the aforementioned purpose of the Act in relation to SMEs, the other provisions in the Act that deal with SMEs will now be discussed.

3.5.3 Prohibited practices

Prohibited practices under the *Competition Act* refer to practices that undermine competition in the market. They are proscribed under Chapter 2 of the *Competition Act*. Chapter 2 is divided in three parts: Part A, B and C.⁸²⁷

Part A of Chapter 2 deals with restrictive practices. These are restrictive horizontal practices, such as price fixing, market allocation and collusive tendering, prohibited under section 4, and restrictive vertical practices, such as agreements between a firm and its suppliers substantially lessening competition in the market and resale price maintenance, prohibited under section 5.

⁸²³ *Media 24* (2019) (CC).

⁸²⁴ **Constitution of the Republic of South Africa, 1996**, available at <https://justice.gov.za/constitution/pdf.html> (accessed on 6 October 2024). Previously "Constitution of the Republic of South Africa, Act 108 of 1996" (GN2083 in GG17678 of 18 December 1998, available at <https://housingfinanceafrica.org/app/uploads/Constitution-of-the-Republic-of-South-Africa-Act-108-of-1996.pdf> (accessed on 6 October 2024)), substituted by s. 1 (1) of the Citation of Constitutional Laws, 2005 (Act No. 5 of 2005).

⁸²⁵ *Media 24* (2019) (CC) 12 para 30.

⁸²⁶ *Idem* 12-13.

⁸²⁷ Competition Act 89 of 1998, as amended Chapter 2: A, B and C. See also *Senwes* (2012) (CC).

Part B of Chapter 2 of the *Competition Act* deals with abuse of dominance conduct, described under sections 6 to 9.⁸²⁸ This includes charging an excessive price,⁸²⁹ refusing to give a competitor access to an essential facility,⁸³⁰ engaging in an exclusionary act⁸³¹ and abusing buying power,⁸³² which are dealt with under section 8. Abuse of dominance also includes price discrimination by a dominant firm which is prohibited under section 9.

Part C provides for the exemptions of certain prohibited practices from the application of Chapter 2. This is specifically dealt with under section 10. In terms of section 10, a firm may apply to the Competition Commission (“the Commission”) to exempt an agreement or practice from the application of Chapter 2 if it meets the requirements of section 10(3) of the *Competition Act*.⁸³³

3.5.3.1 Restrictive horizontal practices

Restrictive horizontal practices refer to an agreement between, or concerted practice by, firms, or a decision by an association of firms in a horizontal relationship,⁸³⁴ that harm competition.⁸³⁵

⁸²⁸ Senwes (2012) (CC) 3 para 5.

⁸²⁹ Section 8(1)(a) of the Competition Act.

⁸³⁰ Section 8(1)(b) of the Competition Act.

⁸³¹ Section 8(1)(c) and (d) of the Competition Act. Before the Competition Amendment Act 18 of 2018 (the 2018 amendments), an “exclusionary act” was defined in the Competition Act as “*an act that impedes or prevents a firm from entering into, or expanding within, a market*”. Following the 2018 amendments, an “exclusionary act” is defined as “*an act that impedes or prevents a firm from entering into, participating in or expanding within a market.*” See Section 1(c) of the Competition Act 89 of 1998, as amended (section 1 of the Competition Amendment Act 18 of 2018).

⁸³² Section 8(4) of the Competition Act.

⁸³³ Senwes (2012) (CC) 5, para 6.

Section 10(3) of the Competition Act stipulates that: “*The Competition Commission may grant an exemption in terms of subsection (2) (a) only if— (a) any restriction imposed on the firms concerned by the agreement or practice concerned, or category of agreements or practices concerned, is required to attain an objective mentioned in paragraph (b); and (b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms by historically disadvantaged persons; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry; or (v) competitiveness and efficiency gains that promote employment or industrial expansion.*”

⁸³⁴ Section 1(1)(xv) of the Competition Act 89 of 1998, as amended, defines a horizontal relationship as “a relationship between competitors.”

⁸³⁵ Section 4(1) of the Competition Act; Competition Commission “Franchising Notice – The application of certain provisions of the Competition Act 89 of 1998, as amended to franchise agreements” (2017),

3.5.3.1.1 Section 4(1)(b)

Section 4(1)(b) of the *Competition Act* prohibits such agreement, concerted practice or decision if it involves price fixing, market allocation (division), or collusive tendering.

The elements of section 4(1)(b) are the same elements as section 4(1)(a), except that section 4(1)(b) does not require the showing of “substantial lessening of competition”⁸³⁶ or a balancing exercise between the anti-competitive and pro-competitive effects.

For this reason, the egregious restrictive practices under section 4(1)(b) are described as “*per se*” violations.⁸³⁷ This means that the said conduct is considered *per se* illegal if its nature is inherently so anti-competitive and harmful, that there is no need to show that the impugned conduct has anti-competitive effects.⁸³⁸ Efficiency or pro-competitive justification cannot be raised as a defence in relation to a section 4(1)(b) conduct.⁸³⁹ The mere engaging in conduct described in section 4(1)(b) is regarded as automatically undermining competition.⁸⁴⁰ Under section 4(1)(b), the complainant is only required to show the elements of the conduct,⁸⁴¹ namely price fixing, market allocation or collusive tendering.

available at <http://www.compcom.co.za/wp-content/uploads/2017/11/layout.pdf> (accessed on 11 Sep. 21) (hereafter Franchising Notice (2017)).

⁸³⁶ Kampel “Competition Law and SMEs: exploring the competitor/competition debate in a developing Democracy” (September 2004) Centre on Regulation and Competition WORKING PAPER SERIES (hereafter Kampel (2004)) 15.

⁸³⁷ Sutherland and Kemp (2020) 5-44 to 5-56, para 5.6.

⁸³⁸ *National Society of Professional Engineers v United States* 435 US 679 (1978) 692 “[t]here are . . . two . . . categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality they are illegal ‘per se’. In the second category are agreements whose competitive effect can only be evaluated by analysing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed”; *Venter v Law Society of the Cape of Good Hope* [2019] 1 CPLR 258 (CT) (Case no. 24/CR/Mar12 of 14/10/2013) paras 25 and 73-74: “[25] Section 4(1) prohibits two forms of horizontal conduct, sometimes referred to as the *per se* offence and the rule of reason offence. (...) [73] Restraints characterised under the *per se* rule, are those considered presumptively harmful and no evidence that they may not be, is permitted. In US law, those restraints on conduct treated in this way have developed over the years by way of case law so that a core of certainty has developed. In our Act we do not have to rely on case law the forms of conduct to be analysed as *per se* contraventions are set out expressly in section 4(1)(b). [74] In US law, in contrast to those restraints examined under the *per se* rule, those analysed under a rule of reason, are those ‘. . . whose competitive effects can only be evaluated by analysing the facts particular to the business, the history of the restraint, and the reason why it was imposed’.” see also Sutherland and Kemp *Competition Law of South Africa* (2020) 5-44 to 5-56, para 5.6.

⁸³⁹ Kampel (2004) 15; *A’Africa Pest Prevention CC and another vs Competition Commission of South Africa* [2019] 1 CPLR 122 (CAC) (hereafter *A’Africa Pest* (2019) (CAC)) para 3, available at <http://www.saflii.org/za/cases/ZACAC/2019/2.pdf> (accessed on 7 October 2021)

⁸⁴⁰ Sutherland and Kemp (2020) para 5.6.

⁸⁴¹ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT) para 96.

Notably, SMEs may be victims or perpetrators of restrictive horizontal practices. Foer aptly notes that “*many regulators, for example, overlook the fact that breaches of antitrust law can occur between competing small firms seeking to gain dominance over each other.*”⁸⁴²

3.5.3.1.2 SMEs – victims of prohibited horizontal practices

SMEs may be victims of restrictive horizontal practices when, for example, they are customers of companies that have engaged in collusive conduct (colloquially known as a “cartel”).⁸⁴³ Cartel conduct is generally regarded as the most damaging form of anti-competitive conduct.⁸⁴⁴ As mentioned above, the anti-competitive effects of cartel conduct are presumed to be automatically substantially harmful, and that is the reason why contraventions under section 4(1)(b) are regarded as “*per se*” contraventions.⁸⁴⁵ Cartel conduct is regarded as most egregious as it affects *both* consumers and businesses, in that it generally results in fewer product choices and higher prices.⁸⁴⁶

SMEs, as customers of businesses that have engaged in cartel conduct, may be specifically affected by such conduct. The cartelized products may become unaffordable to SMEs and thus render SMEs less competitive in their relevant market.⁸⁴⁷ Cartel conduct may also affect SMEs’ ability to expand in the market or

⁸⁴² Schaper “Competition law, and the Australian small business sector, Small Enterprise Research” (2010), available at <https://doi.org/10.5172/ser.17.1.7> (hereafter Schaper (2010)).

⁸⁴³ See above 3.3 The History of South African Competition Legislation.

⁸⁴⁴ Competition Commission South Africa “Corporate Leniency Policy” (2008) 2, para 2.3, available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021) (hereafter Corporate Leniency Policy (2008)).

⁸⁴⁵ Sutherland and Kemp (2020) para 5.6, at fn 295 citing *Venter v Law Society of the Cape of Good Hope 24/CR/Mar12 14/10/2013* par 73, available at <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 5 September 2021)

⁸⁴⁶ Corporate Leniency Policy (2008) 2, para 2.3.

⁸⁴⁷ A relevant market, in competition matters, relates to the product and geographic market in which competition takes place, may be affected or is assessed. The determination of the relevant market assists in determining whether a firm is dominant or has market power. In this regard, Neuhooff (ed) *et al.* describe the relevant market in competition matters as “*the area of competition that is relevant to the issue under investigation.*” See Neuhooff (ed), Govender, Versfeld and Dingley *A practical guide to the South African Competition Act* (2nd Ed) (2017) 30. Jones and Sufrin confirm the EU Commission’s position that “*market definition is a tool to identify and define the boundaries of competition between firms and serves to establish the framework within which the Commission applies competition policy.*” Jones and Sufrin *EU Competition Law – Text, Cases and Materials* (6th Ed.) (2016) (hereafter Jones and Sufrin (6th Ed.)) 59. In South Africa, dominance is determined by considering the market share of the firm in the relevant market. In terms of section 7 of the Act: “A firm is dominant in a market if- (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of a market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power. Section 1(1)(xviii) defines market power as “*the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.*”

force them to exit the market if the cartelized products become too expensive. Ntshalintshali notes that *“the collusive behaviour of major companies is not only causing prices of basic commodities used by the poor majority to escalate, but it also makes it impossible for SMEs to survive as they are pushed out of the market through these illegal practices”*.⁸⁴⁸

Another important aspect is that Schaper points out that it is problematic that generally SMEs also have a low level of awareness of competition law.⁸⁴⁹ They are often unaware that they have been victims of anti-competitive conduct, in particular of cartel conduct. This may affect the reporting of such cartel conduct to the competition authorities for prosecution and eventually affects the market as a whole if such conduct goes undetected. SMEs are also often not able to claim civil damages against the perpetrators of the cartel conduct because of lack of funds to institute legal action against the cartel members, and also the fact that legal actions are generally expensive and time-consuming.⁸⁵⁰ This may also be due to a lack of knowledge and understanding of competition law, which condemns cartel conduct.

Cartel conduct, due to its egregious nature, is widely recognized as having very disastrous effects on the markets in which they are perpetrated. The disdain for the egregious conduct of cartels and their negative impact on the markets caused Australian small businesses to lobby for the criminalization of cartel conduct.⁸⁵¹ Provisions of criminalization of cartel conduct were introduced mainly to deter serious

⁸⁴⁸ Ntshalintshali “Ten years of enforcement by the South African competition authorities – Unleashing Rivalry 1999 – 2009” (2009), available at <https://www.compcom.co.za/the-10-year-review/> (accessed on 5 September 2021) (hereafter Ntshalintshali (2009)) 35.

⁸⁴⁹ Schaper “Competition Law, Enforcement and the Australian Small Business Sector” (2010) Small Enterprise Research, available at <https://doi.org/10.5172/ser.17.1.7> (accessed on 25 August 2021).

⁸⁵⁰ *Ibid.*

⁸⁵¹ Australia’s *Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008*, which introduced the criminalization of serious cartel conduct, (available at [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4027_first/toc_pdf/Trade%20Practices%20Amendment%20\(Cartel%20Conduct%20and%20Other%20Measures\)%20Bill%202008_08228b01.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4027_first/toc_pdf/Trade%20Practices%20Amendment%20(Cartel%20Conduct%20and%20Other%20Measures)%20Bill%202008_08228b01.pdf;fileType=application%2Fpdf), accessed on 27 September 2024) preceded South Africa’s *Competition Amendment Act 1 of 2009* which introduced the criminalisation of cartel conduct in South Africa. Australia’s *Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008* was assented into law on 26 June 2009. See Parliament of Australia “Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2009”, available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4027 (accessed on 27 September 2024). The criminalization of cartel conduct in South Africa came into effect on 1 May 2016. See Parliamentary Monitoring Group “Competition Commission legislation implementation challenges” (29 November 2016), available at <https://pmg.org.za/committee-meeting/23749/> (accessed on 27 September 2024).

cartel conduct.⁸⁵² In South Africa, the Department of Trade and Industry (as it was then known – now called the Department of Trade, Industry and Competition) also confirmed that personal criminal liability for participating in cartel conduct was introduced to deter engagement in cartel activity.⁸⁵³

With regard to the criminalisation of cartel conduct and small business, Beaton-Wells notes that “*submissions in favour of criminalisation without qualification were mostly (8 or 66 percent) from small business or industry bodies representing the small business sector.*”⁸⁵⁴ This means that small businesses supported the criminalisation of cartel conduct, especially in cases where they were the victims of such cartel conduct. Beaton-Wells also observes that big businesses are most likely to be the perpetrators of this conduct and acknowledges “*the possibility that small businesses are often the ‘victims’ of collusion between their larger competitors or suppliers.*”⁸⁵⁵

However, Beaton-Wells notes, contrary to what one would expect, that during 2000-2007, most cartels uncovered in Australia involved SMEs.⁸⁵⁶ It may be because SMEs are less sophisticated in knowing the law against cartels or do not have compliance programmes in competition law that can teach them how not to breach competition law.

3.5.3.1.2.1 SMEs affected by the construction cartel in South Africa

An example of widespread cartel conduct that affected SMEs in South Africa was the “World Cup construction cartel”. During the time leading up to the 2010 FIFA World Cup tournament in South Africa, a number of South African construction companies engaged in cartel conduct by rigging tenders that the Government had issued for

⁸⁵² Commonwealth of Australia “Parliamentary Debates - House of Representatives Official Hansard” (No. 18, 2008). Available at <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=f871483b8422b3f1b295edf51690ada37c65d34c> (accessed on 27 September 2024) 12310. See also Caron Beaton-Wells “Australia’s criminalization of cartels will it be contagious?” (2009) *The 4th ASCOLA Conference*, available at https://law.unimelb.edu.au/_data/assets/pdf_file/0007/1676050/BeatonWellsASCOLApaper1406091.pdf (accessed on 27 September 2024) 3.

⁸⁵³ The Department of Trade and Industry Republic of South Africa “Competition Amendment Bill, 2008” Presentation dated 5 August 2008, available at <https://pmg.org.za/files/docs/080805dti.ppt> (accessed on 29 September 2024).

⁸⁵⁴ Beaton-Wells “Criminalising Cartels: Australia’s slow conversion” (2008) *World Competition Law & Economics Review* (Kluwer Law International, Kluwer Law International 2008, Vol. 31 Issue 2) 205-233, at 219.

⁸⁵⁵ *Idem* 220.

⁸⁵⁶ *Idem* 230

several construction projects, including the building of stadia, roads, railway lines, etc.⁸⁵⁷ This prompted the Competition Commission to initiate an investigation against the alleged widespread cartel conduct in the construction industry.⁸⁵⁸ Following an investigation into the construction industry,⁸⁵⁹ the Commission received a number of marker⁸⁶⁰ and leniency applications from several firms under the Commission's *Corporate Leniency Policy*.⁸⁶¹ In terms of the *Corporate Leniency Policy*, a firm that participates in a cartel may disclose information about the cartel to the Commission in exchange for immunity from prosecution.⁸⁶² Both large and small firms may apply for immunity.⁸⁶³ Accordingly, several firms disclosed their participation in collusive tendering in respect of a number of construction projects. The Commission assessed the said marker and leniency applications. It also investigated the different instances of collusion and found that collusive conduct was prevalent in the construction industry. This prompted the Commission to invite construction firms to settle through a "*Fast-Track Settlement Process*" on 1 February 2011.⁸⁶⁴ In terms of the *Fast-Track*

⁸⁵⁷ African Competition Forum "Competition - Challenges in African construction markets" (November 2019) A study across East and Southern Africa, available at <https://www.compcom.co.za/wp-content/uploads/2020/02/African-Competition-Forum-Competition-challenges-in-African-construction-markets-A-study-across-East-and-Southern-Africa.pdf> (accessed on 7 September 2021) (hereafter African Competition Forum (2019)).

⁸⁵⁸ *Ibid.*

⁸⁵⁹ Competition Commission of South Africa "Competition Commission invites construction firms to settle" (1 February 2011), Media Release available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> (accessed on 10 September 2021) (hereafter Competition Commission of South Africa (2011)) 1.

⁸⁶⁰ A "marker" is an application filed by a prospective leniency/immunity applicant that marks its place in the queue of leniency applications. Through the marker process, the prospective leniency applicant provides certain information about its involvement in a cartel conduct. This includes the alleged cartel conduct and its participants. The Commission has a discretion to grant the marker and gives a period of time to the marker applicant/the prospective leniency applicant to gather all the necessary information to meet the requirements of a leniency. Competition Commission of South Africa "Corporate Leniency Policy – Competition Commission South Africa" (2008), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021) 12, para 12.

⁸⁶¹ Competition Commission South Africa "Corporate Leniency Policy" (2008), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021).

⁸⁶² Competition Commission South Africa "Corporate Leniency Policy" (2008) 2, para 2.5, available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021).

⁸⁶³ Competition Commission of South Africa "Corporate Leniency Policy – Competition Commission South Africa" (2008), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021) 15, para 16.6.

⁸⁶⁴ African Competition Forum (2019) 46; Competition Commission of South Africa "Competition Commission invites construction firms to settle" (1 February 2011), Media Release available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> (accessed on 10 September 2021) 1.

Settlement Process, construction firms were incentivized to divulge their cartel conduct and settle with the Commission⁸⁶⁵ on favourable terms in order to put the construction industry back into a competitive trajectory.⁸⁶⁶ Although the criminalisation of cartel conduct had already been introduced by the *Competition Amendment Act 1 of 2009*, the criminalisation provisions only came into effect on 1 May 2016.⁸⁶⁷ Therefore, in 2011, cartel conduct disclosed under the *Fast-Track Settlement Process* could not be criminally prosecuted. Nevertheless, the Corporate Leniency Policy does not immunize a firm or person from criminal prosecution or from civil actions for damages caused by cartel conduct.⁸⁶⁸ Settlement agreements confirmed under section 49D may include an award of damages to the complainant.⁸⁶⁹

Following this process, in 2011 and 2012, the Commission concluded consent agreements with several medium and large construction companies.⁸⁷⁰ Some SMEs

⁸⁶⁵ Ratshisusu “Bid-Rigging and collusion in the construction industry” (2017) Presentation to Master Builders South Africa Congress 2017, available at <https://www.masterbuilders.org.za/images/downloads/BID-RIGGING-COLLUSION%20-CONSTRUCTION-INDUSTRY.pdf> (accessed on 8 September 2021) (hereafter Ratshisusu (2017)).

⁸⁶⁶ Invitation to the firms in the construction industry to a fast-track settlement process (1 February 2011)

⁸⁶⁷ See above 3.3. The History of South African Competition Legislation. Section 12 of the Competition Amendment Act 1 of 2009 only came into effect on 1 May 2016 under Proc. No. 25 in GG39952 of 22 April 2016.

⁸⁶⁸ Clause 5.9 of the Corporate Leniency Policy stipulates that: “*The immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Act.*” Clause 6.4 of the Corporate Leniency Policy stipulates that: “*Nothing in the CLP shall limit the rights of any person who has been injured by cartel activity in respect of which the Commission has granted immunity under the CLP to seek civil or criminal remedies.*” However, in terms of section 73A, the Commission may not seek the criminal prosecution of an individual who, according to the Commission, deserves leniency. Section 73A(4) states: “*The Competition Commission- (a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is deserving of leniency in the circumstances; and (b) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.*”

⁸⁶⁹ Section 49D(3) of the Competition Act states: “*With the consent of a complainant, a consent order may include an award of damages to the complainant.*”

⁸⁷⁰ African Competition Forum (2019); Ratshisusu (2017). A consent agreement is an agreement concluded between the Commission and the respondent in respect of a complaint against a prohibited practice or a market inquiry. In terms of the consent agreement, the Commission and the respondent would agree on certain terms, including the admission or non-admission of the involvement in the alleged prohibited practice, the payment of an administrative penalty (if the conduct attracts the imposition of an administrative penalty), the respondent’s undertakings, including compliance with the competition Act, and the confirmation that the settlement is in full and final settlement of the case against the respondent. The consent agreement is concluded in terms of section 49D of the Competition Tribunal and only becomes enforceable as a consent order once confirmed by the Tribunal as an order of the Tribunal. Section 49D(1) states: “*If, during, on or after the completion of the investigation of a complaint or a market inquiry, the Competition Commission and the respondent, or any person that is the subject of action by the Competition Commission in terms of section 43E, agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).*” Section 58(1)(b) states: “*In addition to its other powers*

were victims of this widespread collusive conduct, whilst others were among the perpetrators.⁸⁷¹ The collusive conduct was in the form of, amongst others, allocation of tenders.⁸⁷²

The fast-track settlement process explained above⁸⁷³ resulted in the imposition of an administrative penalty of approximately R1,46 billion on the implicated construction firms.⁸⁷⁴ Following this process, on 11 October 2016, Government also concluded a settlement agreement with seven large construction firms that were involved in the collusive conduct.⁸⁷⁵ The settlement was concluded to promote transformation and settle civil claims in relation to projects that were the subject of collusion.⁸⁷⁶ The settlement agreement with the Government is known as the “Voluntary Rebuilding Programme” (VRP).⁸⁷⁷ One of its components includes *“Commitments to promote transformation and black South African ownership and participation in the sector, through either equity transactions or by partnering with and developing smaller, black-owned construction companies that will result in black-owned companies with a market*

in terms of this Act, the Competition Tribunal may- (b) confirm a consent agreement in terms of section 49D as an order of the Tribunal.”

⁸⁷¹ African Competition Forum (2019) 46; Ratshisusu (2017).

⁸⁷² Competition Commission “Competition Commission invites construction firms to settle” (1 February 2011) Media Release, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf> (accessed on 10 September 2021) 1

⁸⁷³ Competition Commission of South Africa “Construction firms settle collusive tendering cases with R1,5 billion in penalties” (2013) Media release 24 June 2013, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Construction-Fast-Track-Settlement-Process-Media-Release.pdf> (accessed 9 September 2023) described the “Fast-track Settlement process” as a process that *“incentivised [construction] firms to make full and truthful disclosure of bid rigging in return for penalties lower than what the Commission would seek if it prosecuted these cases.”*

⁸⁷⁴ Each company was fined as follows: Aveng: R 306 576 143; Basil Read: R 94 936 248; Esorfranki: R 155 850; G Liviero: R 2 011 078; Giuricich: R 3 552 568; Haw&Inglis: R 45 314 041; Hochtief: R 1 315 719; Murray & Roberts: R 309 046 455; Norvo: R 714 897; Raubex: R 58 826 626; Rumdel: R 17 127 465; Stefanutti: R 306 892 664; Tubular: R 2 634 667; Vlaming: R 3 421 662; WBHO: R 311 288 311. The total fine was R 1 463 814 392. See Competition Commission of South Africa “Construction firms settle collusive tendering cases with R1,5 billion in penalties” (2013) Media release 24 June 2013, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Construction-Fast-Track-Settlement-Process-Media-Release.pdf> (accessed 9 September 2023); African Competition Forum (2019) 189.

⁸⁷⁵ The seven companies were: Murray & Roberts, Aveng, WBHO, Stefanutti, Raubex, Group 5 and Basil Read. See South African Forum of Civil Engineering Contractors (SAFCEC) “Government releases press statement on industry settlement agreement” (15 February 2017) News & Press: Industry News, available at <https://www.safcec.org.za24/news/331076/Government-releases-press-statement-on-industry-settlement-agreement.htm> (accessed on 7 September 2021).

⁸⁷⁶ *Ibid.*

⁸⁷⁷ South African Forum of Civil Engineering Contractors (SAFCEC) “Government releases press statement on industry settlement agreement” (15 February 2017) News & Press: Industry News, available at <https://www.safcec.org.za24/news/331076/Government-releases-press-statement-on-industry-settlement-agreement.htm> (accessed on 7 September 2021).

value of roughly R5b billion in 2024.”⁸⁷⁸ This programme aligned with the competition legislation’s objective of ensuring that small and medium-sized businesses equitably participate in the economy and was part of enforcing the applicable provisions of the Competition Act pertaining to cartel conduct.⁸⁷⁹

3.5.3.1.3 SMEs – offenders of restrictive horizontal practices

As indicated, SMEs may also be perpetrators of cartel conduct.⁸⁸⁰ However, as pointed out by Schaper, many SMEs are often unaware that participating in cartel conduct is illegal.⁸⁸¹ This is due to SMEs’ lack of, or limited knowledge of, competition law.⁸⁸² Schaper remarks that SMEs, due to limited funds, generally do not have in-house legal counsel or do not proactively seek legal advice on their conduct or business decisions in order to comply with the law.⁸⁸³

SMEs may also find themselves participating in a cartel after having bought a business that was already involved in a cartel prior to the acquisition thereof by the said SME. The acquiring SME may have bought the business without knowing that it participated in a cartel. Schaper remarks that this lack of or limited knowledge of the law may affect SMEs’ compliance with the law and can be costly for SMEs,⁸⁸⁴ as a guilty finding of participation in cartel conduct may result in the imposition of a hefty fine and imprisonment of the firm’s directors in terms of the cartel offence created by section 73A of the Competition Act.⁸⁸⁵

SMEs may also infringe section 4(1)(b) when they are part of an association that makes a decision to fix prices, allocate or divide markets, or rig tenders.⁸⁸⁶ This may

⁸⁷⁸ *Ibid.*

⁸⁷⁹ See above 3.5.2. Purpose of the Competition Act; Section 2(1)(e) of the Competition Act states: “*The purpose of this Act is to promote and maintain competition in the Republic in order- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy*”.

⁸⁸⁰ Schaper (2010) 7&15.

⁸⁸¹ Schaper (2010) 7.

⁸⁸² Schaper (2010) 10, 13&15.

⁸⁸³ Schaper (2010) 10&15.

⁸⁸⁴ Schaper (2010) 15.

⁸⁸⁵ See above, 3.3. The History of South African Competition Legislation.

⁸⁸⁶ Schaper (2010) 15. Sec 4(1) refers to “an association of firms in a horizontal relationship” which engages in restrictive horizontal prohibited practice. In terms of sec 4(1) of the Competition Act “*an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if- (a) it has the effect of Of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or (b) it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) dividing*

occur because of SMEs' lack of knowledge that such a decision may amount to cartel conduct. Notably, Kupka indicates that a defence for participating in a cartel that has been raised by SMEs has also been organizing themselves in a buyers' group in order to get bargaining power to counter the dominance of an upstream supplier.⁸⁸⁷

SMEs may further be used as a conduit to distribute the cartelized products to consumers, and thus perpetuate the cartel conduct.⁸⁸⁸ This may happen when the small enterprise is at the bottom of the value chain and supplies or merely passes-on the cartelized products directly to consumers.⁸⁸⁹

The participation of SMEs in cartel conduct may generally be seen in an industry where collusive conduct is prevalent.⁸⁹⁰ This was the case with the construction cartel, where the implicated firms were both medium and large firms.⁸⁹¹ The small business is generally "*a small fish in a big tank*" and just follow the rules of the cartel, often established by the larger or stronger firms. In most cases, the small business will continue being a member of the cartel due to fear of retaliation or punishment by the leaders of the cartel, who are generally larger firms. Boss, Joseph and Harrington are of the view that a strong competition policy and enforcement framework, however, often deters small businesses from joining a cartel.⁸⁹²

Regardless of whether the cartel conduct offender is a small or large business, Sutherland and Kemp reiterate that the anti-competitive effect of cartel conduct is

markets by allocating market shares, customers, suppliers, territories or specific types of goods or services; or (iv) collusive tendering."

⁸⁸⁷ Kupka "Challenging Anti-competitive behaviour by SMEs in the SA Manufacturing sector" (2011) Master Dissertation, University of Johannesburg 83.

⁸⁸⁸ Schaper (2010) 15; Ntshalintshali (2009) 35.

⁸⁸⁹ Schaper (2010) 15; Ntshalintshali (2009) 35.

⁸⁹⁰ Referring to the construction cartel in South Africa. See also Kupka "Challenging Anti-competitive behaviour by SMEs in the SA Manufacturing sector" (2011) Master Dissertation, University of Johannesburg 123.

⁸⁹¹ See above 3.5.3.1.3 SMEs – victims of prohibited horizontal practices: *SMEs affected by the construction cartel in South Africa*. See also Ratshisusu "Bid-Rigging and collusion in the construction industry" (2017) Presentation to Master Builders South Africa Congress 2017, available at <https://www.masterbuilders.org.za/images/downloads/BID-RIGGING-COLLUSION%20-CONSTRUCTION-INDUSTRY.pdf> (accessed on 8 September 2021).

⁸⁹² Bos, Joseph and Harrington "Competition Policy and cartel size" (2015) *International Economic Review*, available at https://www-jstor-org.uplib.idm.oclc.org/stable/pdf/24517890.pdf?ab_segments=0%252Fbasic_search_gsv2%252Fcontent&refreqid=excelsior%3Af161b3b54d1e65aa7580f7e9dec2ac3 (accessed on 19 August 2021) 141.

regarded as particularly egregious.⁸⁹³ Cartel conduct still results in harm to competition in the form of limited product choices and higher prices.

3.5.3.1.4 Section 4(1)(a)

Section 4(1)(a) of the *Competition Act* prohibits a kind of agreement,⁸⁹⁴ concerted practice⁸⁹⁵ or decision⁸⁹⁶ if it substantially prevents or lessens competition in a market unless it can be shown that such conduct results in technological, efficiency or other pro-competitive gains⁸⁹⁷ that outweigh the anti-competitive effect.

⁸⁹³ *American Natural Soda Ash Corporation v Competition Commission* 12/CAC/Dec01 30/10/2003 8, where cartel conduct was described as “egregious”; Sutherland and Kemp (2020) para 5.6, fn 296.

⁸⁹⁴ Section 1(1)(ii) of the Competition Act 89 of 1998, as amended, defines “agreement” as “*when used in relation to a prohibited practice, includes a contract, arrangement, or understanding, whether or not legally enforceable.*”

⁸⁹⁵ Section 1(1)(ii) of the Competition Act defines “concerted practice” as “*cooperative coordinated conduct between firms, achieve through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.*” In *Netstar (Pty) Ltd and others v Competition Commission and another* [2011] 1 CPLR 45 (CAC) para 25, the Competition Appeal Court distinguished between an agreement and a concerted practice: “*A concerted practice arises from the conduct of the parties and does not amount to an agreement. A possible example might be the type of cartel arrangement where a market leader signals a price increase by way of public announcement and, in accordance with longstanding practice in the industry, the other participants follow its lead. However, care must be taken not to confuse independent conduct with interdependent conduct. It suffices for present purposes to say that the emphasis is on the conduct of the parties. By contrast an agreement arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus. No doubt in many cases the same evidence may be relied upon as pointing towards either an agreement or a concerted practice. However, sight should not be lost of the fact that they are different. The definition of an agreement extends the concept beyond a contractual arrangement. However, what it requires is still a form of arrangement that the parties regard as binding upon both themselves and the other parties to the agreement. Absent such an arrangement there is no agreement even in the more extended sense embodied in the definition. By contrast a concerted practice examines the conduct of the parties to determine whether it is coordinated conduct or they are acting in concert. The absence of any arrangement between them or any belief that they are obliged to act in that fashion is immaterial.*”

⁸⁹⁶ “Decision” in section 4 of the Competition Act is not defined. However, it refers to “a decision by an association for firms who are competitors.”

⁸⁹⁷ “*Technological, efficiency or other pro-competitive gains*” refers to the justification that a party accused of being involved in a restrictive horizontal practice under section 4(1)(a), restrictive vertical practice under section 5(1) or abuse of dominance under section 8(1)(c) and 8(1)(d) of the Competition Act, may raise to justify the conduct and argue that such gain outweighs any anti-competitive effect resulting from the conduct. In this regard, section 4(1)(a) of the Competition Act stipulates: “*An agreement between, or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if- (a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect.*” Section 5(1) stipulates: “*An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.*” Section 8(1)(c) and (d) stipulates: “*It is prohibited for a dominant firm to- (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the*

The elements of section 4(1)(a) are thus: (i) an agreement, concerted practice or decision by an association of firms; (ii) the firms or parties to the agreement must be in a horizontal relationship;⁸⁹⁸ (iii) the agreement, concerted practice or decision must have the effect of substantially undermining competition; but (iv) a party to the agreement may show that the impugned conduct had technological, efficiency or pro-competitive gains that outweigh any anti-competitive effect.

Section 4(1)(a), other than section 4(1)(b), is colloquially known as a “rule of reason” provision as it involves establishing a substantial lessening or prevention of competition and balancing between the anti-competitive and any pro-competitive effects of the conduct.⁸⁹⁹ The “rule of reason” means that a party to the agreement may justify the conclusion of an agreement that results in anti-competitive effects, and show that the justification outweighs any anti-competitive effects. In other words, there may be a justification for such conduct, and there is a need to assess the anti-competitive effects of the conduct through the business circumstances, its history, and its justification.⁹⁰⁰ The “rule of reason” differs from the exemption provisions in section 10 of the Competition Act, which will be discussed further below.⁹⁰¹ The “rule of reason” allows a firm to justify its engagement in a restrictive horizontal agreement, whilst the exemption provisions deal with exempting, from the application of Chapter

anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive effect of its act-“. In the *Competition Commission of South Africa v Senwes* [2009] 1 CPLR 18 (CT), para 150, the Tribunal described the raising of “technological, efficiency or other pro-competitive gains” as the “efficiency defence” or “*the requirement of objective justification*”.

⁸⁹⁸ Section 1(1)(xv) of the Competition Act 89 of 1998, as amended, defines “horizontal relationship” as “a relationship between competitors.”

⁸⁹⁹ Sutherland and Kemp (2020) 5-44-5-56, para 5.6, available at <https://www.myllexisnexis.co.za/Index.aspx> (accessed on 17 August 2021).

⁹⁰⁰ *National Society of Professional Engineers v United States* 435 US 679 (1978) 692 “[t]here are . . . two . . . categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality they are illegal ‘per se’. In the second category are agreements whose competitive effect can only be evaluated by analysing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed”; *Venter v Law Society of the Cape of Good Hope* [2019] 1 CPLR 258 (CT) (Case no. 24/CR/Mar12 of 14/10/2013) paras 25 and 74: “[25] Section 4(1) prohibits two forms of horizontal conduct, sometimes referred to as the per se offence and the rule of reason offence. (...) [74] In US law, in contrast to those restraints examined under the per se rule, those analysed under a rule of reason, are those ‘. . . whose competitive effects can only be evaluated by analysing the facts particular to the business, the history of the restraint, and the reason why it was imposed’.” See also Sutherland and Kemp (2020) 5-44 - 5-56, para 5.6.

⁹⁰¹ See below 3.5.3.4 Exemption of prohibited practices.

2 of the Competition Act,⁹⁰² prohibited practices or agreements that contribute to achieving certain objectives, such as the promotion or expansion of SMEs in a market.

3.5.3.2 Restrictive vertical practices

Restrictive vertical practices are prohibited under section 5(1) of the *Competition Act*. They refer to “an agreement between parties in a vertical relationship⁹⁰³ that has the effect of substantially preventing or lessening competition in a market, unless the agreement has technological, efficiency or other pro-competitive gains that outweigh any anti-competitive effect.”

Section 5(2) prohibits the practice of minimum resale price maintenance (RPM) engaged in by parties in a vertical relationship. RPM refers to a practice in terms of which the supplier or producer of goods or services requires the reseller to resell the goods or services at a specific price or at no less than a specific price.⁹⁰⁴

In the context of SMEs, restrictive vertical practices may include franchise agreements⁹⁰⁵ or long-term exclusive agreements.⁹⁰⁶

Franchising is recognised as one of the best vehicles for SMEs to enter a market and one of the most effective ways of ensuring their participation in the economy.⁹⁰⁷ In this regard, Biggs argues that franchising is suited for the development of SMEs as it provides an established brand, initial and ongoing support, and an operation manual to the franchisee.⁹⁰⁸ Accordingly, franchisees are most likely to be SMEs. However, in a South African franchise agreement, the franchisor (being the owner of the business and brand) may require its franchisees to only supply goods obtained from a specific supplier.⁹⁰⁹ The Consumer Protection Act 68 of 2008 reinforces this

⁹⁰² See above 3.5.3 Prohibited practices.

⁹⁰³ Section 1(xxxv) of the Competition Act defines “vertical relationship” as “the relationship between a firm and its suppliers, its customers, or both.”

⁹⁰⁴ Section 5(2) of the Competition Act 89 of 1998.

⁹⁰⁵ Franchising Notice (2017) para 2.3.

⁹⁰⁶ Competition Commission South Africa “The Grocery Market Inquiry – Final Report Non-confidential” (25 November 2019) 33, para 58. Available at <https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf> (accessed on 14 October 2023).

⁹⁰⁷ Franchising Notice (2017) para 2.3 and 6.1.

⁹⁰⁸ Biggs *An evaluation of the impact of the Consumer Protection Act 68 of 2008 on the relationship between franchisors and franchisees* (PhD thesis 2016 Nelson Mandela Metropolitan University) 194-195.

⁹⁰⁹ Franchising Notice (2017) para 4.22.

principle.⁹¹⁰ This may result in the conclusion of exclusive agreements between the franchisor and its franchisees. The conclusion of exclusive agreements could prevent the SME/franchisee from supplying or obtaining other suppliers' goods at lower prices, thereby curtailing a larger customer base. It can also negatively impact the SME/franchisee's income if the franchisor forces it to buy more expensive products. However, the franchise issue is rather difficult because it is all about maintaining the quality of the franchisor's brand.

The franchisor may also require the franchisees to sell the products at a specific price or not below a specific price. This may amount to the prohibited practice of minimum resale price maintenance (RPM). In this regard, the Commission's *Franchising Notice* reports that in the context of a franchise agreement, RPM takes "*the form of price fixing that occurs when a franchisor imposes a minimum resale price on a franchisee, thereby limiting or even excluding a franchisee's ability to offer discounts or to sell at lower prices than what the franchisor imposes.*"⁹¹¹ In this regard, on 21 August 2003, the Tribunal imposed an administrative penalty of R3 million on Federal Mogul for engaging in the practice of resale price maintenance regarding its spare parts sold by franchise outlets.⁹¹² On 2 June 2004, the Tribunal also confirmed a consent agreement between the Commission and Toyota in terms of which Toyota admitted to have contravened section 5(2) and agreed to pay an administrative penalty of R12 Million for having engaged in RPM.⁹¹³

⁹¹⁰ Sec 1 of the Consumer Protection Act 68 of 2008 defines a "franchise agreement" as "an agreement between two parties, being the franchisor and franchisee, respectively – (c) that governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor or an associate of the franchisor". In terms of section 13(2) of the Consumer Protection Act "Except to the extent that any other law provides otherwise, in any transaction between a franchisee and franchisor in terms of their franchise agreement, it is a defence to an allegation that the franchisor, as supplier to the franchisee, has contravened this section if any goods or services that the franchisee was required to purchase from or at the direction of the franchisor are reasonably related to the branded products or services that are the subject of the franchise agreement." Consumer Protection Act 68 of 2008, GN 467 in GG 32186 of 29 April 2009, available at https://www.gov.za/sites/default/files/32186_467.pdf (accessed on 14 October 2023).

⁹¹¹ Franchising Notice (2017) para 4.6.

⁹¹² *The Competition Commission of South Africa v Federal Mogul Aftermarket SA (Pty) Ltd and others* (Case no. 08/CR/Mar01), <http://www.saflii.org/za/cases/ZACT/2003/43.pdf> (accessed on 7 October 2021); Franchising Notice (2017) para 4.8.

⁹¹³ Mail & Guardian "Tribunal confirms consent order against Toyota" (2004), available at <https://mg.co.za/article/2004-06-02-tribunal-confirms-consent-order-against-toyota/> (accessed on 11 September 2021).

Franchise agreements that can specifically also affect SMEs are those that allocate territories (market allocation) between the franchisor and its franchisees or between the franchisees.⁹¹⁴ This may happen when the franchisor designates a specific area within which the franchisee may operate or specific customers that it can service.⁹¹⁵ This type of agreements may affect intra-brand competition,⁹¹⁶ limit the ability of the franchisee/SME to expand and result in fewer product choices and higher prices for consumers.⁹¹⁷ However, the franchisor may raise an efficiency defence for concluding a franchise agreement that allocates territories.⁹¹⁸ The Franchising Notice issued by the South African Competition Commission explains that such defence could be the franchisor seeking to achieve efficiencies in distribution, for example, better information flows, in order to benefit consumers and enable the franchisor to be competitive.⁹¹⁹

The conclusion of exclusive agreements or the practice of imposing a minimum resale price on a franchisee, which is an SME, may thus significantly affect its ability to compete in the market.⁹²⁰ This can be the case if the franchise agreement forces the franchisee/SME by means of RPM to sell the franchisor's goods at high prices. The selling of high-priced goods may render the franchisee/SME less competitive in the market. Franchising agreements may therefore be frowned upon by the competition authorities when they restrict franchisees' ability to compete in the market.

Long-term exclusive agreements falling foul of the *Competition Act* may also affect SMEs. In the Commission's findings of the Grocery Retail Market Inquiry (GRMI),⁹²¹ the Commission found that long-term exclusive lease agreements concluded between the national supermarket chains and property developers were restrictive.⁹²² In

⁹¹⁴ Franchising Notice (2017) para 4.12

⁹¹⁵ Franchising Notice (2017) para 4.12

⁹¹⁶ This means that there will be no competition between the franchisees. Franchising Notice (2017) para 4.13.

⁹¹⁷ Franchising Notice (2017) para 4.13.

⁹¹⁸ Franchising Notice (2017) para 4.14.

⁹¹⁹ Franchising Notice (2017) para 4.14.

⁹²⁰ Franchising Notice (2017) para 4.6.

⁹²¹ Competition Commission South Africa "The Grocery Market Inquiry – Final Report Non-confidential" (25 November 2019), available at <https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf> (accessed on 14 October 2023).

⁹²² Competition Commission South Africa "The Grocery Market Inquiry – Summary of the findings and recommendations" (25 November 2019) 7 para 46, available at https://www.compcom.co.za/wp-content/uploads/2019/12/Grocery-Retail-Market-Inquiry-SUMMARY_.pdf (accessed on 15 October 2023).

particular, the Commission found that these long-term exclusive lease agreements excluded SMEs from the market and hindered their ability to effectively participate in the grocery market.⁹²³

The Grocery Retail Market Inquiry is discussed in more detail further below, under the part dealing with section 43 of the Competition Act, which provides for the initiation and conduct of market inquiries.

3.5.3.3 Abuse of dominance

Abuse of dominance is prohibited under sections 8 and 9 of the *Competition Act*. In terms of section 7 of the *Competition Act*, “a firm is dominant in a market if- (a) It has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power.”⁹²⁴

3.5.3.3.1 Section 8 – Abuse of dominance

Before the 2018 amendments,⁹²⁵ section 8 read:

“8. It is prohibited for a dominant firm to-

(a) charge an excessive price to the detriment of consumers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain;⁹²⁶ or

⁹²³ Competition Commission South Africa “The Grocery Market Inquiry – Summary of the findings and recommendations” (25 November 2019) 7 para 46, 10 para 58, available at https://www.compcom.co.za/wp-content/uploads/2019/12/Grocery-Retail-Market-Inquiry-SUMMARY_.pdf (accessed on 15 October 2023).

⁹²⁴ Section 7 of the Competition Act 89 of 1998, as amended.

⁹²⁵ See above, 3.4 The 2018 Amendments to the Competition Act.

⁹²⁶ For an explanation of “*technological, efficiency or other pro-competitive, gains*”, see above para 3.5.3.1.4 Section 4(1)(a).

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:

- (i) requiring or inducing a supplier or customer to not deal with a competitor;*
- (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible:*
- (iii) selling goods or services on condition that the buyer purchases separate goods or service unrelated to the object of a contract or forcing a buyer to accept a condition unrelated to the object of a contract;*
- (iv) selling goods or services below their marginal or average variable cost; or*
- (v) buying-up a scarce supply of intermediate goods or resources required by a competitor.”*

Following the 2018 amendments, section 8 now reads:

“(1) It is prohibited for a dominant firm to—

- (a) charge an excessive price to the detriment of consumers or customers;⁹²⁷*
- (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;⁹²⁸*

⁹²⁷ Section 8(1)(a) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018). Sections 8(2) and 8(3), which relate to excessive pricing and have been introduced by the 2018 amendments, state: “(2) *If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.* (3) *Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include— (a) the respondent’s price-cost margin, internal rate of return, return on capital invested or profit history; (b) the respondent’s prices for the goods or services— (i) in markets in which there are competing products; (ii) to customers in other geographic markets; (iii) for similar products in other markets; and (iv) historically; (c) relevant comparator firm’s prices and level of profits for the goods or services in a competitive market for those goods or services; (d) the length of time the prices have been charged at that level; (e) the structural characteristics of the relevant market, including the extent of the respondent’s market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent’s own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and (f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.”*

⁹²⁸ Section 8(1)(b) of the Competition Act 89 of 1998, as amended (section 5 of Competition Amendment Act 18 of 2018).

*(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain;*⁹²⁹ or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act—

*(i) requiring or inducing a supplier or customer to not deal with a competitor;*⁹³⁰

*(ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible;*⁹³¹

*(iii) 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;*⁹³²

*(iv) selling goods or services at predatory prices;*⁹³³

*(v) buying-up a scarce supply of intermediate goods or resources required by a competitor;*⁹³⁴ or

*(vi) engaging in a margin squeeze.”*⁹³⁵

⁹²⁹ Section 8(1)(c) of the Competition Act 89 of 1998, as amended (section 5 of Competition Amendment Act 18 of 2018)

⁹³⁰ Section 8(1)(d)(i) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018).

⁹³¹ Section 8(1)(d)(ii) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018).

⁹³² Section 8(1)(d)(iii) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018).

⁹³³ Section 8(1)(d)(iv) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018). Predatory pricing occurs when a firm (generally a dominant firm) prices below a certain measure of cost in order to exclude its competitors from the market.

⁹³⁴ Section 8(1)(d)(v) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018).

⁹³⁵ Section 8(1)(d)(vi) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018). In terms of section 1(e) of the Competition Amendment Act of 2018, margin squeeze “occurs when the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to participate effectively”.

In *Competition Commission of South Africa v Senwes Ltd* 2009 1 CPLR 18 (CT) para 117, the Competition Tribunal found that a useful definition of a margin squeeze is to be found in the work of O'Donoghue and Padilla who define margin squeeze as involving: “... situations in which a vertically integrated dominant firm not only engages in self-supply of an input used on a downstream market but also supplies independent third parties active on the downstream market, which are in competition with its own business.” O'Donoghue and Padilla explain that the squeeze occurs when “. . . a vertically integrated firm with a dominant position in an upstream market prevents its non vertically integrated

Before the 2018 amendments, an “exclusionary act” was defined in the Competition Act as “*an act that impedes or prevents a firm from entering into, or expanding within, a market*”. Following the 2018 amendments, an “exclusionary act” is “*an act that impedes or prevents a firm from entering into, participating in or expanding within a market*.”⁹³⁶

The 2018 amendments also introduce section 8(4),⁹³⁷ in terms of which a dominant firm in a sector designated by the Minister may not require from or impose unfair prices or trading conditions on SMEs or HDPs.⁹³⁸ The dominant firm may also not avoid or refuse to purchase goods or services from an SME to avoid the application of the above provision, namely the contravention of requiring or imposing unfair prices or trading conditions on SMEs.⁹³⁹ Section 8(4) is colloquially known as the “*buyer power*” provision. It states that:

“(a) it is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or firm controlled or owned by historically disadvantaged persons, unfair –

(i) Prices; or

(ii) Other trading conditions.

(b) it is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business or a firm controlled or owned by

downstream rivals from achieving an economically viable price cost margin.” O’Donoghue and Padilla *The Law and Economics of Article 82 EC* (2006) 303-304.

⁹³⁶ Section 1 (c) of the Competition Act 89 of 1998, as amended (section 1 of the Competition Amendment Act 18 of 2018).

⁹³⁷ The provisions of section 8(4) came into effect on 13 February 2020. Commencement of certain sections of the Competition Act, 2018 (Act No. 18 of 2018), Proclamation No. 10 of 2020 in GG43018 of 13 February 2020, available at https://www.gov.za/sites/default/files/gcis_document/202002/43018proc10.pdf (accessed on 2 December 2023).

See also Morphet and Sham (Hogan Lovells) “New sections of the Competition Amendment Act are now operational” (17 February 2020), available at <https://www.lexology.com/library/detail.aspx?g=9a47c591-f0ff-4254-b2cc-4544fade0667> (accessed on 7 October 2021).

⁹³⁸ Section 8(4)(a) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018). For the definition of “Historically disadvantaged person”, see above para 3.4 The 2018 Amendments to the Competition Act.

⁹³⁹ Section 8(4)(b) of the Competition Act 89 of 1998, as amended (section 5 of the Competition Amendment Act 18 of 2018).

historically disadvantaged persons in order to circumvent the operation of paragraph (a).

(c) if there is a prima facie case of a contravention of paragraph (a) or (b), the dominant firm alleged to be in contravention must show that –

(i) in the case of paragraph (a), the price or other trading condition is not unfair; and

(ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, goods or services from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).

(d) the Minister must, in terms of section 78, make regulations;

(i) designating the sectors, and in respect of firms owned or controlled by historically disadvantaged persons, the benchmarks for determining the firms, to which this subsection will apply; and

(ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair.⁹⁴⁰

Section 8(4) was introduced to give effect to section 2(e) which, as discussed above, deals with the objective of protecting and supporting SMEs in the economy in order to ensure their effective participation and to promote competition in the market. This objective was reiterated in the preamble of the Competition Amendment Bill, namely “to protect and stimulate the growth of small and medium businesses.”⁹⁴¹

In this regard, the *Memorandum on the Objects of the Competition Bill, 2018*, which explains the reason for introducing section 8(4) in the *2018 Competition Amendment Act*, stipulates the following:

“Section 8(4)(a) is introduced to protect suppliers to dominant firms, especially small and medium businesses or a firm owned or controlled by historically disadvantaged persons, from being required, through the abuse of dominance, to sell their goods or services at prices that impede their ability to participate effectively. This seeks to

⁹⁴⁰ Own emphasis.

⁹⁴¹ Competition Amendment Bill, 2018 (B 23B-2018).

address the problem of monopolies by making such conduct a prohibited practice. Section 8(4)(b) is introduced to make it a prohibited practice for a dominant firm in a sector designated by the Minister to avoid or refuse to purchase goods or services from a supplier that is a small or medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the provisions of section 8(4)(a). In order to foster clarity, consistency and certainty, the Minister is required in section 8(4) to make regulations, in terms of section 78, designating sectors to which section 8 will apply and setting out the relevant factors and benchmarks for determining whether the charging of predatory prices impedes the ability of a non-dominant firm, especially a small and medium business or a firm owned or controlled by historically disadvantaged persons to participate in a market.” (own emphasis)

The Commission also confirmed that *“the objective of the buyer power provisions is to enhance the participation of small and medium businesses (SMEs) and historically disadvantaged persons (HDP) firms in the economy by protecting these firms from unfair exploitation by dominant buyers of their products.”*⁹⁴²

The elements under section 8(4) are:

- For section 8(4)(a): (i) the buyer is a dominant firm;⁹⁴³ (ii) in a sector designated by the Minister;⁹⁴⁴ (iii) requiring from or imposing on; (iv) an SME or HDPs;⁹⁴⁵ (v) unfair prices or trading conditions;⁹⁴⁶
- For section 8(4)(b): (i) a dominant firm; (ii) in a sector designated by the Minister in terms of section 78 of the Competition Act;⁹⁴⁷ (iii) avoids purchasing or

⁹⁴² Competition Commission “Commission releases buyer power guidelines that give boost to small business” (18 May 2020) Press Release, available at <https://www.compcom.co.za/wp-content/uploads/2020/05/Commission-releases-buyer-power-guidelines-that-give-boost-to-small-business-1.pdf> (accessed on 16 September 2021) (hereafter Competition Commission (2020)).

⁹⁴³ In terms of section 7 of the Competition Act, a firm is dominant in a market if (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power.

“Market power” is defined under section 1(xiv) of the Competition Act as “the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”.

⁹⁴⁴ The Minister currently responsible is the Minister of Trade, Industry and Competition

⁹⁴⁵ HDPs refer to *firm controlled or owned by historically disadvantaged persons*

⁹⁴⁶ Regulations on buyer power made by the Minister under Competition Act, 1998, GN168 in GG43018 of 13 February 2020, available at https://www.gov.za/sites/default/files/gcis_document/202002/43018gon168.pdf (accessed on 17 September 2021) (hereafter Regulations on buyer power (2020)) 11, para 3.

⁹⁴⁷ The Minister currently responsible is the Minister of Trade, Industry and Competition. Section 78 of the Competition states that: “(1) The Minister, by notice in the Gazette, may make regulations that are

refuses to purchase; (iv) goods or services from a supplier that is an SME or HDI; (v) unfair; (vi) to circumvent the operation of section 8(4)(a) above.

From the above elements, the relevant test in determining whether a dominant firm has abused its buying power, is based on “*unfair prices or other trading conditions*”. In terms of section 8(4)(c), if it can be shown that the dominant firm in a designated sector is requiring or imposing “*unfair*” prices or trading conditions, there can be a *prima facie* case of abuse of buyer power against the dominant firm.⁹⁴⁸ The dominant firm will then have to show that the prices or trading conditions are not unfair.⁹⁴⁹

It is submitted that the introduction of the “buyer power” provision in the Competition Act raises uncertainty about how the competition authorities will apply it, especially on the question of what constitutes an unfair price or trading condition. As noted by Schaper, there is a need to assess “*the impact of competition policy changes on small business: When new competition dynamics are introduced into a specific industry sector (such as a new policy initiative that makes it easier for new firms to enter), how does this affect the existing SME population within that sector? Are particular types of small business more likely to survive, thrive or fail than other firms?*”.⁹⁵⁰

To guide how to determine whether prices or trading conditions imposed are unfair, the Minister of Trade and Industry issued the *Buyer Power Regulations* on 13 February 2020.⁹⁵¹

In terms of the *Buyer Power Regulations*, the factors and benchmarks to consider when determining whether the “prices” imposed or required by the dominant firm are “unfair” are:⁹⁵²

required to give effect to the purposes of this Act. (2) Before making the regulations referred to in sections 4, 5, 8 and 9, the Minister must consult the Competition Commission and publish a notice in the Gazette- (a) stating that draft regulations have been prepared; (b) specifying the place, which may include a website, where a copy of the draft regulations may be obtained; (c) inviting interested parties to submit written comments on the draft regulations within a reasonable period; and (d) consider any comments submitted within the period contemplated in paragraph (c).”

⁹⁴⁸ Section 8(4)(c) states that: “*If there is a prima facie case of a contravention of paragraph (a) or (b), the dominant firm alleged to be in contravention must show that- (i) in the case of paragraph (a), the price or other trading condition is not unfair; and (ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, goods or services from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).*”

⁹⁴⁹ *Ibid.*

⁹⁵⁰ Schaper (2010) 15.

⁹⁵¹ Regulations on buyer power (2020).

⁹⁵² Regulations on buyer power (2020) 12, para 4.

- (a) prices paid to suppliers of similar goods or services, outside of the designated sector;
- (b) the difference between the prices paid by suppliers in the designated sectors and the suppliers of similar goods or services in non-designated areas;
- (c) whether the reduction in the existing prices paid by the dominant firm to the supplier is directly or indirectly connected to the requirement or imposition of an unfair price;
- (d) whether the reduction in an existing purchasing price is retrospective, unilateral or unreasonable;
- (e) whether costs directly or indirectly imposed on, or required from, the supplier reduces its net price; or
- (f) whether costs directly or indirectly imposed on or required from the supplier are retrospective, unilateral or unreasonable.⁹⁵³

The factors and benchmarks to consider in determining whether a “trading condition” is “unfair” include the following:

- (a) the trading condition unreasonably transfers risks or costs on an SME or HDI supplier in a designated sector;
- (b) the trading condition is one-sided, onerous or unproportionate to the objective of the clause; or
- (c) the trading condition does not reasonably relate to the objective of the supply agreement.⁹⁵⁴

The Ministerial Regulations gave the example of “*unduly long payment terms*.”⁹⁵⁵

In terms of the Ministerial Regulations,⁹⁵⁶ the designated sectors to which the buyer power provisions apply are grocery wholesale and retail, agro-processing, and

⁹⁵³ Regulations on buyer power (2020) 12, para 4.

⁹⁵⁴ Regulations on buyer power (2020) 12, para 5.

⁹⁵⁵ Regulations on buyer power (2020) 12, para 5.

⁹⁵⁶ Regulations on buyer power (2020) 12, para 6.

eCommerce and online services.⁹⁵⁷ This means that a small business can only invoke section 8(4) if there has been abuse of buyer power in the above designated sectors.

From the *Memorandum on the objects of the Competition Bill, 2018*,⁹⁵⁸ mentioned above, it can be deduced that the element of “fairness” would be determined by looking at whether the imposed prices or trading conditions impede the ability of SMEs to participate effectively in the market.

Similar to the restrictive practices under sections 4 and 5 of the *Competition Act*, although in unusual or exceptional circumstances, an SME may be a perpetrator or offender of abuse of dominance if it meets the requirements of sections 6 and 7 of the Competition Act.⁹⁵⁹ This is where SMEs may have market power in times of crisis. Motta confirmed the fact that firms that may not be dominant in ordinary times, may sometimes be dominant in exceptional times.⁹⁶⁰ Exceptional times may be times of crisis where there may be excess demand for certain goods or services. In this regard, Motta explained that: “*when demand is much higher than capacity, even “small” firms may be endowed with significant market power, that is, they may be dominant.*”⁹⁶¹ Ramos refers to such a firm that is not a dominant firm under normal circumstances or has acquired its dominance by luck as a “lucky monopolist”.⁹⁶² Ramos remarks that “[T]he lucky monopolist can thus be a short-lived phenomenon or an entrenched outcome that is not dependent on superior efficiencies to maintain its randomly acquired position of market power.”⁹⁶³ In 2020, relying on the above sources, the South African Competition Appeal Court (CAC) found that an SME, Babelegi Workwear and Industrial Supplies CC (Babelegi),⁹⁶⁴ had contravened section 8(a) of

⁹⁵⁷ Competition Commission (2020).

⁹⁵⁸ Competition Amendment Bill, 2018 (B23B-2018), Memorandum on the Objects of the Competition Amendment Bill, 2018, available at https://juta.co.za/media/filestore/2018/10/B23B_2018.pdf (accessed on 18 September 2021) 26, para 3.3.8.

⁹⁵⁹ In terms of section 6, a firm will only be guilty of abuse of dominance if its annual turnover or assets in the Republic meet a threshold set by the Minister. Section 7 sets out the market share percentage at which a firm will be regarded as dominant in a market.

⁹⁶⁰ Motta “Price regulation in times of crisis can be tricky” (22 April 2020) Daily Maverick. Available at <https://www.dailymaverick.co.za/opinionista/2020-04-22-price-regulation-in-times-of-crisis-can-be-tricky/> (accessed on 17 October 2023).

⁹⁶¹ *Ibid.*

⁹⁶² Ramos “Firm dominance in EU Competition Law: The competitive process and the origins of market power” (2020), chap 7.

⁹⁶³ *Ibid.*

⁹⁶⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] 2 CPLR 470 (CAC) (hereafter *Babelegi* (2020) (CAC)) - The CAC found that Babelegi could be considered under the Competition Act as a small business insofar as it was treated as a wholesaler or a medium business if it was to be regarded as a manufacturer.

the Competition Act by charging excessive prices to consumers/customers for face masks during the early stage of the lockdown period following the declaration of National State of Disaster due to the COVID-19 outbreak in South Africa.⁹⁶⁵ This case was the first of its kind, as abuse of dominance provisions generally apply to large firms. The *Babelegi* case is discussed under the section summarising seminal cases, further below.

3.5.3.3.2 Section 9 – Price discrimination

Section 9 prohibits a dominant firm from discriminating between purchasers in terms of, *inter alia*, prices, discounts, rebates, provision of services, payment of services, etc.⁹⁶⁶ Section 9 is one of the sections that were amended under the 2018 Competition Amendment Act to introduce provisions protecting SMEs against price discrimination conduct by a dominant firm.

Before the 2018 amendments, section 9(1) stipulated: “(1) *An action by a dominant firm as the seller of goods or services is prohibited price discrimination, if- (a) it is likely to have the effect of substantially preventing or lessening competition; (b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and (c) it involves discriminating between those purchasers in terms of – (i) the price charged for the goods or services; (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services; (iii) the provision of services in respect of the goods or services; or (iv) payment for services provided in respect of the goods or services.*”

Under the original section 9 prior to its amendment, the main elements for establishing price discrimination⁹⁶⁷ were: (i) a dominant firm; (ii) as the seller of goods or services; (iii) likelihood of substantially lessening or preventing competition; (iv) equivalent transactions; (v) goods or services of like grade and quality to different purchasers; (vi) discrimination on prices, discount, allowance, rebate or credit, the provisions of services, payment for services.

⁹⁶⁵ *Babelegi* (2020) (CAC) para 2 and 3

⁹⁶⁶ Section 9 of the Competition Act, 89 of 1998

⁹⁶⁷ Price discrimination is not specifically defined in the Act, but it involves the discrimination by a dominant firm between its purchasers on the basis of amongst others price, discount, allowance, rebate, etc.

The test of harm to competition was the likelihood of substantially lessening or preventing of competition.⁹⁶⁸ This was the subject of much debate by the Competition Tribunal and the Competition Appeal Court in the seminal *Nationwide Pole* case, that is discussed further below.⁹⁶⁹

The amended provisions of section 9 now read as follows:

“9. Price discrimination by dominant firm as seller prohibited

(1) An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if –

(a) it is likely to have the effect of—

(i) substantially preventing or lessening competition; or

(ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively.”

Price discrimination can thus now be found in either the likelihood of prevention or lessening of competition, or the likelihood of impeding the ability of SMEs or HDPs to participate effectively. Although the word “*unfair*” has not been used in section 9(1)(a)(ii) (as found in section 8(4), discussed above), this study submits that “*impeding the ability of SMEs to participate effectively*” could be regarded as a description of the term “*unfair*” found in section 8(4). Accordingly, the description of what constitutes “*unfair*”, namely “*impeding the ability of SMEs or HDPs to participate effectively*”, has been used in section 9. This is confirmed in the *Memorandum on the*

⁹⁶⁸ Section 9(1)(a) of the Competition Act 89 of 1998, as amended.

⁹⁶⁹ *Nationwide Poles* (2005); *Sasol Oil* (2006). *Nationwide Poles* was decided under the old section 9(1) of the Competition Act which stipulated: “(1) An action by a dominant firm as the seller of goods or services is prohibited price discrimination, if- (a) it is likely to have the effect of substantially preventing or lessening competition; (b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and (c) it involves discriminating between those purchasers in terms of – (i) the price charged for the goods or services; (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services; (iii) the provision of services in respect of the goods or services; or (iv) payment for services provided in respect of the goods or services.” This section was amended by section 6 (b) of the 2018 Competition Amendment Act GN175 in GG42231 of 14 February 2019, which stipulated: “6. Section 9 of the principal Act is hereby amended— (...); (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph: “(a) it is likely to have the effect of— (i) substantially preventing or lessening competition; or (ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively;”.

Objects of the Competition Amendment Bill, 2018,⁹⁷⁰ which explains the insertion of section 8(4)(a) in the Competition Act. As discussed above, section 8(4)(a) uses the “*unfair prices or trading conditions*” as the relevant test to determine whether a dominant firm has abused its buyer power. In this regard, the *Memorandum on the Objects of the Competition Amendment Bill, 2018* explains the meaning of “*unfair prices*” in this context by referring to prices that impede the ability of the relevant supplier to participate effectively.⁹⁷¹ The *Memorandum* states that “*Section 8(4)(a) is introduced to protect suppliers to dominant firms, especially small and medium businesses or a firm owned or controlled by historically disadvantaged persons, from being required, through the abuse of dominance, to sell their goods or services at prices that impede their ability to participate effectively*”.⁹⁷² (own emphasis)

It can, therefore, be argued that the test used in section 8(4) to determine whether there has been an abuse of buyer power against SMEs, namely the test of “*unfair prices or other trading conditions*”, which is described above as prices that impedes the ability of SMEs to participate effectively, is the same test applied in section 9(1)(a)(ii), namely the likelihood of impeding the ability of SMEs to participate effectively.

In respect of price discrimination, the *Memorandum on the Objects of the Competition Amendment Bill, 2018* explains that:⁹⁷³

“To prove price discrimination, it requires the complainant to prove, amongst others, that the price discrimination is “likely to have the effect of substantially preventing or lessening competition” (section 9(1)(a)). The inclusion of the word “substantially” has meant that small and medium businesses are often unable to show prohibited price discrimination because the effect on small businesses is not considered to be “substantial” prevention of lessening competition. This means that at present, section 9 favours complainants that are large firms because they can more easily demonstrate a substantial effect. Therefore, the Bill proposes the addition of a section 9(1)(a)(ii) to

⁹⁷⁰ Competition Amendment Bill (B23B-2018) and Memorandum on the Objects of the Competition Amendment Bill (2018) 26-27, clause 3.4.2.

⁹⁷¹ Competition Amendment Bill and Memorandum on the Objects of the Competition Amendment Bill (2018) 26, clause 3.3.8.

⁹⁷² Own emphasis. Competition Amendment Bill and Memorandum on the Objects of the Competition Amendment Bill (2018) 26, clause 3.3.8.

⁹⁷³ Competition Amendment Bill and Memorandum on the Objects of the Competition Amendment Bill (2018) 26-27, clause 3.4.2.

provide for the complainant to be able to prove that the price discrimination is “likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged person to participate effectively.”⁹⁷⁴

Under section 9(1)(a)(ii), the harm to competition appears to be the impediment/restriction on SMEs’ ability to participate effectively. This is, if the complainant can show that the dominant firm’s conduct impedes the ability of SMEs to effectively participate in the market, the complainant would have shown that harm to competition has occurred. Accordingly, it can be argued that in the context of section 9(1)(a)(ii), harm to competition would be harm to SMEs, or at least “harm to SMEs ability to effectively participate”. This seems to be more of a social objective than an efficiency/economic objective of the Competition Act.

The further question is what exactly will be considered to determine whether a dominant firm’s price differentiation has hindered the ability of SMEs to participate effectively. Guidance in this regard may be obtained from the *Regulations on Price Discrimination* issued by the Minister of Trade and Industry, on 13 February 2020 (the Price Discrimination Regulations).⁹⁷⁵

The *Price Discrimination Regulations* apply to section 9(1)(a)(ii). In the context of SMEs, the *Price Discrimination Regulations* set out the relevant factors and benchmarks for determining whether a dominant firm’s conduct amounts to price discrimination that impedes SMEs’ effective participation in a market.⁹⁷⁶ These factors include: (a) *the extent of the difference in respect of price or other factors outlined in section 9(1)(c)⁹⁷⁷ of the Act relative to other purchasers in the same market or in markets in which the purchaser in the designated class is a potential competitor; (b) the significance of the input in the cost structure of the purchaser in the designated class of purchaser or as a driver of sales in the downstream market for the purchaser*

⁹⁷⁴ Own emphasis. Competition Amendment Bill and Memorandum on the Objects of the Competition Amendment Bill (2018) clause 3.4.2.

⁹⁷⁵ Regulations on Price Discrimination Made by the Minister Under Competition Act, 1998. GN 169 in GG 43018 Government Gazette of 13 February 2020 (hereafter Regulations on Price Discrimination (2020)).

⁹⁷⁶ *Idem* 15-16.

⁹⁷⁷ Section 9(1)(c) states: *An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if – (...) (c) it involves discriminating between those purchasers in terms of – (i) the price charged for the goods or services; (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services; (iii) the provision of services in respect of the goods or services; or (iv) payment of services provided in respect of the goods or services.*

*in the designated class of purchaser; (c) the duration and timing of the price differential; (d) the likelihood that the differential treatment would result in the purchaser in the designated class of purchaser facing decreased demand for its goods or services in the downstream market; and (e) the likelihood that the differential treatment would result in decreased investment by the purchaser in the designated class.*⁹⁷⁸

It is noted that the above factors refer to the impediment on the affected purchaser, in singular, whilst section 9(1)(a)(ii) refers to the impediment on the ability of “*small and medium businesses*” in plural. Given that regulations are subordinate to the primary legislation, a complainant SME would thus still have to show that the price discrimination impedes the ability of several small or medium-sized enterprises within the relevant market, before it can successfully invoke section 9(1)(a)(ii).⁹⁷⁹

From the *Memorandum on the Objects of the Competition Amendment Bill, 2018*, the test of “*impeding the ability of SMEs*” is still an effect-based test, as it uses the words “likely to have the effect of impeding ...” (own emphasis). This means that the complainant will still have to show effect, at least the likely effect, that the price discrimination conduct may have on the ability of SMEs or HDPs to effectively participate in the market.

3.5.3.4 Exemptions of prohibited practices

Section 10 deals with exemptions of certain prohibited practices from the application of Chapter 2 of the Competition Act.⁹⁸⁰ It allows a firm to apply for exemption, from the application of chapter 2, of an agreement or practice that meets the requirements set out under section 10(3).⁹⁸¹

⁹⁷⁸ Regulations on Price Discrimination (2020) 17, para 4.

⁹⁷⁹ Sakata (2019) 50.

⁹⁸⁰ Chapter 2 of the Competition Act deals with prohibited practices.

⁹⁸¹ Section 10(3) states: “*The Competition Commission may grant an exemption in terms of subsection (2)(a) only if— (a) any restriction imposed on the firms concerned by the agreement or practice concerned, or category of agreements or practices concerned, is required to attain an objective mentioned in paragraph (b); and (b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms by historically disadvantaged persons; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry; or (v) competitiveness and efficiency gains that promote employment or industrial expansion.*”

Under the old provisions of the Competition Act prior to their amendment by the 2018 Amendment Act, section 10(3)(b)(ii) stated that the Competition Commission “may exempt” a prohibited agreement or practice only if the restriction imposed on the firm is required to achieve, amongst others, the objective of:

“promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.”

The standard or requirement under this old provision was *“the ability of small businesses to become competitive.”*

The objective of the agreement or practice sought to be exempted under section 10(3)(b)(ii) has now been amended under the 2018 Competition Amendment Act to:

*“the promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons.”*⁹⁸²

The elements of the test or the standard under this new provision are now “effective entry, participation or expansion”. “Participate” is defined in section 1 of the Competition Act as *“the ability of or opportunity for firms to sustain themselves in the market.”* “Participation” is defined as having a “corresponding meaning” to “participate”.⁹⁸³

In 2020, following the global outbreak of the COVID-19 pandemic, the South African Government declared a National State of Disaster on 15 March 2020 in terms of the Disaster Management Act, 2002.⁹⁸⁴ In order to support the Government’s programs to fight the pandemic, the Minister of Trade and Industry issued regulations exempting certain agreements or practices in the healthcare sector, the retail property sector and the banking sector from the application of sections 4 and 5 of the Competition Act.⁹⁸⁵

⁹⁸² Own emphasis.

⁹⁸³ Section 1 of the Competition Amendment Act 18 of 2018.

⁹⁸⁴ Declaration of a National State of Disaster, Disaster Management Act, 2002, GN313 in GG43096 of 15 March 2020, available at https://www.gov.za/sites/default/files/gcis_document/202003/43096gon313.pdf (accessed on 20 September 2021).

⁹⁸⁵ COVID- 19 Block Exemption for the Healthcare Sector, 2020, GN R.349 in GG43114 of 19 March 2020, available at https://www.gov.za/sites/default/files/gcis_document/202003/4311419-3dti.pdf (accessed on 20 September 2021) (hereafter COVID-19 Block Exemption for the Healthcare Sector (2020)); Naidu and Nxumalo (Baker McKenzie) “South Africa: Competition Law Exemptions and Regulations applicable during COVID-19” (25 March 2020) *SA Financial Regulation Journal*, available

In relation to the healthcare sector, on 19 March 2020, the Minister issued the *COVID-19 Block Exemption for the Healthcare sector, 2020*.⁹⁸⁶ The purpose of the regulations were specifically to (i) *promote concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster*; and (ii) *promote access to healthcare, preventing exploitation of patients, enabling the sharing of healthcare facilities, management of capacity and reduction of prices*.⁹⁸⁷ In terms of these regulations, the Minister exempted categories of agreements or practices undertaken at the request of, or in coordination with, the Department of Health.⁹⁸⁸ The agreement or practice had to respond to the COVID-19 pandemic national disaster.⁹⁸⁹ Such agreement or practice could not be in relation to prices, unless specifically authorised by the Minister of Health.⁹⁹⁰ The category of agreements or practices exempted related to hospitals and healthcare facilities,⁹⁹¹ medical suppliers,⁹⁹² medical specialists and radiologists,⁹⁹³ pathologists and laboratories,⁹⁹⁴ pharmacies,⁹⁹⁵ healthcare funders,⁹⁹⁶ agreements to support the public healthcare sector,⁹⁹⁷ as well as agreements on cost reduction measures.⁹⁹⁸ Clearly these exemptions also affected SMEs, as various SMEs are also involved in the supply chain of essential goods.⁹⁹⁹

In relation to the retail property sector, the Minister issued the *COVID-19 Block Exemption for the Retail Property Sector, 2020*.¹⁰⁰⁰ In terms of these regulations,

at <http://financialregulationjournal.co.za/2020/03/25/south-africa-competition-law-exemptions-and-regulations-applicable-during-covid-19/> (accessed on 25 August 2021).

⁹⁸⁶ COVID- 19 Block Exemption for the Healthcare Sector, 2020, GN R.349 in GG43114 of 19 March 2020, available at https://www.gov.za/sites/default/files/gcis_document/202003/4311419-3dti.pdf (accessed on 20 September 2021).

⁹⁸⁷ COVID-19 Block Exemption for the Healthcare Sector (2020).

⁹⁸⁸ *idem* 5.

⁹⁸⁹ *Ibid.*

⁹⁹⁰ *Ibid.*

⁹⁹¹ COVID-19 Block Exemption for the Healthcare Sector (2020) 5-6, para 3.1.1 – 3.1.7.

⁹⁹² *Idem* 6, para 3.2.1-3.2.2.

⁹⁹³ *Idem* 6, para 3.3.1 – 3.3.4.

⁹⁹⁴ *Idem* 7, para 3.4.1-3.4.3.

⁹⁹⁵ *Idem* 7, para 3.5.1-3.5.3.

⁹⁹⁶ *Idem* 7, para 3.6-3.7.

⁹⁹⁷ *Idem* 8, para 4.

⁹⁹⁸ *Idem* 8, para 5.

⁹⁹⁹ ENS Africa “Government issues urgent exemption for suppliers of essential goods to prevent shortages” (2021) *ENSight*, available at https://www.ensafrica.com/news/detail/4515/government-issues-urgent-exemption-for-suppli?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed on 25 August 2021) (hereafter ENS Africa (2021)).

¹⁰⁰⁰ COVID- 19 Block Exemption for the Retail Property Sector, 2020, GNR.358 in Government Gazette 43134 of 24 March 2020, available at

certain agreements or practices “*between designated retail tenants and the retail property landlords*” were exempted from the application of sections 4 and 5 of the Act. The purpose of these regulations was specifically to: “(i) *promote concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the economic and social effects of the national disaster*; and (ii) *enable the retail property sector to minimise the negative impact on the ability of designated retail tenants, including small independent retailers, to manage their finances during the national disaster and be in a position to continue normal operations beyond the national disaster*”.¹⁰⁰¹

The category of agreements or practices that could be exempted only included those concluded or engaged in, to respond to the COVID-19 pandemic national disaster.¹⁰⁰² They excluded communication, agreement or practice related to prices, unless authorised by the Department of Trade and Industry.¹⁰⁰³ The relevant agreements or practices had to relate to: “(i) *payment holidays and/or rental discounts for tenants*; (ii) *limitations on the eviction of tenants*; or (iii) *the suspension or adjustment to lease agreement clauses that restrict the designated retail tenants from undertaking reasonable measures required to protect viability during the national disaster*”.¹⁰⁰⁴ As a requirement to obtain an exemption, the relevant agreements or practices had to “*extend to all South African retail tenants in the designated retail lines, including small, independent retailers, unless otherwise authorised by the Minister or the Competition Commission*.”¹⁰⁰⁵ The designated retail lines were (i) clothing, footwear and home textile retailers; (ii) personal care services; and (iii) restaurants.¹⁰⁰⁶

The above regulations were specifically aimed at supporting tenants of retail properties, which also include small independent retailers.¹⁰⁰⁷ In this regard, the regulations sought to exempt agreements or practices which sought to ensure the “*survival of tenants of retail properties during the COVID-19 national disaster*.”¹⁰⁰⁸

https://www.gov.za/sites/default/files/gcis_document/202003/43134rg11059gon358.pdf (accessed on 21 September 2021) (hereafter COVID- 19 Block Exemption for the Retail Property Sector (2020)).

¹⁰⁰¹ COVID- 19 Block Exemption for the Retail Property Sector (2020) 5, para 2.

¹⁰⁰² *Idem* 3, para 3.

¹⁰⁰³ *Ibid.*

¹⁰⁰⁴ *Idem* 4, para 3.1.1-3.1.3.

¹⁰⁰⁵ *Idem* 4, para 3.2.)

¹⁰⁰⁶ *Idem* 6, para 1, Annexure A.

¹⁰⁰⁷ *Idem* 3 para 2.2, p.3; 4, para 3.2.

¹⁰⁰⁸ *Idem* 4, para 3.1.

These regulations on block exemptions may therefore be considered as regulations that sought to achieve the purpose of promoting SMEs' participation in the economy during a time of crisis.

The Minister of Trade and Industry also issued regulations for the *Covid-19 Block Exemption for the Banking Sector, 2020*.¹⁰⁰⁹ These regulations sought to exempt a certain category of agreements or practices in the banking sector with the objective to: “(i) *promote concerted conduct to prevent an escalation of the national disaster and to alleviate, contain and minimise the effects of the national disaster*; (ii) *enable the banking sector to minimise the negative impact on the ability of customers, including both business and private individuals, to manage their finances during the national disaster, and be in a position to continue normal operations beyond the national disaster*; and (iii) *enable the banking sector to manage the banking infrastructure, including the payment infrastructure, ATMs and branches*.”¹⁰¹⁰ The category of agreements or practices sought to be exempted related to *payment systems* and *debtor and credit management*.¹⁰¹¹ The purpose of exempting these types of agreements was to ensure the continuous operation of essential payment systems during the COVID-19 crisis, failing which financial stability in South Africa could be compromised.¹⁰¹² This included the continued availability of banknotes in ATMs and the availability of electronic payments systems.¹⁰¹³ The exemption on *debtor and credit management* related to agreements or practices that facilitate (i) *payment holidays and debt relief for business and individual debtors subject to financial stress*; (ii) *limitations set on asset reposessions of business and individual debtors subject to financial stress*; and (iii) *the extension of credit lines to individuals and businesses subject to financial stress*.¹⁰¹⁴

Evidently, SMEs could be the subject of these exemptions, as several SMEs faced financial difficulties during the lockdown period, following the COVID-19 outbreak.

¹⁰⁰⁹ COVID- 19 Block Exemption for the Banking Sector, GN R.355 in GG43127 of 23 March 2020, available at https://www.gov.za/sites/default/files/gcis_document/202003/43127rg11058gon355.pdf (accessed on 21 September 2021) (hereafter COVID- 19 Block Exemption for the Banking Sector (2020)).

¹⁰¹⁰ COVID- 19 Block Exemption for the Banking Sector (2020) 2-3, para 2.

¹⁰¹¹ *Idem* 3, para 3.

¹⁰¹² *Idem* 5, para 3.

¹⁰¹³ *Idem* 6, para 3.1.1-3.1.3.

¹⁰¹⁴ *Idem* 6 para 3.2.1-3.2.3.

On 16 July 2021, following widescale violent riots in South Africa, which resulted in the shortage and disruption in the supply chains of essential goods in certain parts of the country, the Minister of Trade, Industry and Competition issued the *Block exemption for the security of supply of essential goods regulations* to exempt certain categories of agreements or practices in the supply chain of essential goods from the application of sections 4 and 5 of the Competition Act.¹⁰¹⁵ The main purpose of the regulations was to: “(i) *prevent critical shortages of essential goods within the country*; and (ii) *promoting the equitable distribution of scarce essential goods across the country to consumers, especially poorer households, and customers, including small businesses.*”¹⁰¹⁶

The category of agreements or practices exempted were those related to the value chain of essential goods in the production, distribution and retail levels.¹⁰¹⁷ The exempted communication included communication on the loss of stock or capacity, or on the availability of stock, to determine the extent of the shortage, the extent of demand for essential goods, the overall capacity for supply, and the firms’ ability to supply.¹⁰¹⁸ The exempted coordination included coordination on the allocation of inputs across producers of essential goods; coordination on the distribution of essential goods to various parts of the country.¹⁰¹⁹ This was “*to ensure an equitable distribution of essential goods across the country to consumers, and especially poorer households, and customers, including small businesses.*”¹⁰²⁰

Quite understandably, the regulations did, however, not exempt any price fixing or collusive tendering on essential goods and inputs used in the production of essential goods.¹⁰²¹

¹⁰¹⁵ Block Exemption for the security of supply of essential goods, GN633 of GG44869 of 16 July 2021, available at http://www.thedtic.gov.za/wp-content/uploads/Exemption_regulationsJuly2021.pdf (accessed on 22 September 2021) (hereafter Block Exemption for the security of supply of essential goods (2020)) 3; ENS Africa (2021).

¹⁰¹⁶ Block Exemption for the security of supply of essential goods (2021) 4, para 2.1 and 22.

¹⁰¹⁷ *Idem* 4-5, par 3.

¹⁰¹⁸ *Idem* 5, 3.1-3.3.

¹⁰¹⁹ *Idem* 5-6, para 3.4-3.5, p.5-6

¹⁰²⁰ Own emphasis. *Idem* 5, para 3.5.

¹⁰²¹ *Idem* 6, para 4.

These regulations thus supported the objective of the Competition Act of safeguarding the participation of SMEs in the economy, by seeking to ensure an equitable distribution of essential goods to, amongst others, small businesses.¹⁰²²

3.5.3.4.1 Block Exemption Regulations for Small, Micro and Medium-sized Businesses, 2024

On 3 June 2024, the Minister of Trade, Industry and Competition (DTIC) published the *Block exemption regulations for small, micro and medium-sized businesses* (“the SMEs Block exemption regulations” or “Regulations”).¹⁰²³ The SMEs Block exemption regulations arise from the concerns that many businesses, particularly SMEs, which suffered from the ravages of the COVID-19 pandemic, could exit the market.¹⁰²⁴

The SMEs Block exemption regulations form part of the *Economic Reconstruction and Recovery Plan* (ERRP) which seeks to promote inclusive growth and employment in the country.¹⁰²⁵ The SMEs Block exemption regulations seek to exempt certain agreements or practices among SMEs from the application of sections 4(1) and 5(1) of the Competition Act.¹⁰²⁶ This enables collaboration among SMEs that would have otherwise infringed the Act.¹⁰²⁷

The aim is to stimulate SMEs' growth and participation in the economy, which is one of the objectives of the Competition Act.¹⁰²⁸

The following categories of agreements and practices among SMEs are exempted from the application of sections 4(1) and 5(1) of the Competition Act:¹⁰²⁹

- (a) Research and Development (R&D) agreements, including outsourcing R&D to third parties or collaboration to conduct R&D;¹⁰³⁰

¹⁰²² *Idem* 5, para 3.5.

¹⁰²³ Block exemption regulations for small, micro and medium-sized businesses, 2024, GN2538 in GG50748 of 3 June 2024.

¹⁰²⁴ SMEs Block exemption regulations 2024, para 2.

¹⁰²⁵ SMEs Block exemption regulations 2024, para 4.

¹⁰²⁶ SMEs Block exemption regulations 2024, para 5. See Chapter Three, para 3.5.3.1 Restrictive horizontal practices, para 3.5.3.2 Restrictive vertical practices.

¹⁰²⁷ SMEs Block exemption regulations 2024, para 5.

¹⁰²⁸ SMEs Block exemption regulations 2024, para 6. See Chapter Three, para 3.5.2 Purpose of the Competition Act; Section 2(e) of the Competition Act.

¹⁰²⁹ SMEs Block exemption regulations 2024, para 9.

¹⁰³⁰ SMEs Block exemption regulations 2024, para 9.1.

- (b) Production or toll manufacturing agreements that do not remove a competitor from the market;¹⁰³¹
- (c) Joint purchasing agreements, including collective buying from a category of firms in a market;¹⁰³²
- (d) Joint selling agreements to and through intermediaries or other customers by a category of firms in a market;¹⁰³³
- (e) Commercialisation agreements, including cooperation on selling, distributing or promoting products. Such agreements may encompass all commercial aspects or focus on specific areas such as distribution, after-sales services or advertising.¹⁰³⁴
- (f) Agreements on standardisation concerning technical or quality compliance requirements for products, production processes, services or methods. These standards may relate to technical specifications, environmental performance, grades or sizes of products, or approval terms set by a regulatory body;¹⁰³⁵
- (g) Collective negotiations regarding the terms and conditions of buying or supplying with large buyers or suppliers.¹⁰³⁶

SMEs wishing to conclude or engage in the above type of agreements or practices must apply in writing for the Commission's approval of the agreement or practice before implementation.¹⁰³⁷ The Commission may, in writing, approve with or without condition the SMEs' application if the relevant agreement or practice falls under the category of agreements or practices described above.¹⁰³⁸ Alternatively, the Commission can, in writing, reject the application if the relevant agreement or practice does not fall under the category of agreements or practices described above.¹⁰³⁹ The

¹⁰³¹ SMEs Block exemption regulations 2024, para 9.2.

¹⁰³² SMEs Block exemption regulations 2024, para 9.3.

¹⁰³³ SMEs Block exemption regulations 2024, para 9.4.

¹⁰³⁴ SMEs Block exemption regulations 2024, para 9.5.

¹⁰³⁵ SMEs Block exemption regulations 2024, para 9.6.

¹⁰³⁶ SMEs Block exemption regulations 2024, para 9.7.

¹⁰³⁷ SMEs Block exemption regulations 2024, para 10.

¹⁰³⁸ SMEs Block exemption regulations 2024, para 11.1, referring to para 9.

¹⁰³⁹ SMEs Block exemption regulations 2024, para 11.2, referring to para 9.

relevant agreement or practice cannot be implemented unless the Commission approves it.¹⁰⁴⁰

Within 30 business days of receipt of an exemption application in terms of the Regulations, the Commission must decide whether to approve or refuse the exemption application¹⁰⁴¹ If the Commission does not decide within the above period, the application will be deemed approved.¹⁰⁴²

The Commission may revoke its approval if the parties breach the conditions imposed by the Commission;¹⁰⁴³ the cooperation between the SMEs exceeds the scope of the exemption granted;¹⁰⁴⁴ the approval was granted based on false information;¹⁰⁴⁵ the reasons for granting the exemption are no longer present.¹⁰⁴⁶

The SMEs Block exemption regulations do not exempt price fixing and collusive tendering.¹⁰⁴⁷ The Regulations only apply to SMEs,¹⁰⁴⁸ in relation to the type of agreements or practices described above,¹⁰⁴⁹ and for the sole purpose of promoting SMEs growth and participation in the economy.¹⁰⁵⁰ The Minister can expand or narrow the areas of collaboration that can be exempted by notice in the Government Gazette.¹⁰⁵¹ The Regulations are valid for 10 years, but this period can be extended by the Minister.¹⁰⁵²

3.5.4 Merger regulations

Section 12A of the Competition Act deals with the consideration of mergers. It states that whenever the Competition Authorities consider a merger, they must first determine whether the merger is likely to substantially prevent or lessen competition. If they find that the merger is likely to substantially harm competition, they must determine whether the merger (i) is likely to result in any technological, efficiency or

¹⁰⁴⁰ SMEs Block exemption regulations 2024, para 12.

¹⁰⁴¹ SMEs Block exemption regulations 2024, para 13.

¹⁰⁴² SMEs Block exemption regulations 2024, para 14.

¹⁰⁴³ SMEs Block exemption regulations 2024, para 15.1.

¹⁰⁴⁴ SMEs Block exemption regulations 2024, para 15.2.

¹⁰⁴⁵ SMEs Block exemption regulations 2024, para 15.3.

¹⁰⁴⁶ SMEs Block exemption regulations 2024, para 15.4.

¹⁰⁴⁷ SMEs Block exemption regulations 2024, para 16.

¹⁰⁴⁸ SMEs Block exemption regulations 2024, para 17.

¹⁰⁴⁹ SMEs Block exemption regulations 2024, para 9.

¹⁰⁵⁰ SMEs Block exemption regulations 2024, para 5, 6 and 18.

¹⁰⁵¹ SMEs Block exemption regulations 2024, para 19.

¹⁰⁵² SMEs Block exemption regulations 2024, para 25.

other pro-competitive gain which outweighs the anti-competitive effects of the merger;¹⁰⁵³ and (ii) can or cannot be justified on substantial public interest grounds.¹⁰⁵⁴

Before the 2018 amendments, the competition assessment of a merger took precedence over the public interest assessment. In other words, a merger had to first be assessed to determine whether it would substantially adversely affect competition. If it was, the competition authorities were required to determine whether the merger would result in any pro-competitive gain that would offset the anti-competitive effect and whether the merger could or could not be justified on public interest grounds.¹⁰⁵⁵ Alternatively, the merger had to be assessed on public interest grounds. Put simply, the public interest assessment was conducted only if the merger was deemed anti-competitive or as an alternative to the competition assessment.¹⁰⁵⁶

Following the 2018 amendments, competition and public interest assessments are on equal footing.¹⁰⁵⁷ The 2018 amendments have introduced Section 12A(1A), which stipulates that the competition authorities must assess the merger on public interest grounds, despite the competition assessment.¹⁰⁵⁸

¹⁰⁵³ Section 12A(1)(a)(i).

¹⁰⁵⁴ Memorandum on the Objects of the Competition Amendment Bill (2018).

¹⁰⁵⁵ Section 12A(1) before the 2018 amendments stated: “*Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and – (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine – (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition, that may result or likely to result from the merger, and would not likely be obtained if the merger is prevented; and (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).*” (own emphasis)

¹⁰⁵⁶ See the old section 12A(1)(b) cited above.

¹⁰⁵⁷ Revised Public Interest Guidelines Relating to Merger Control, GN4544 in GG50323 of 20 March 2024, available at https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (accessed on 10 October 2024) 22.

¹⁰⁵⁸ Section 12A(1) after the 2018 amendments states: “(1) *Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine— (a) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and (b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3). (1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).*” (own emphasis)

In assessing the merger on public interest grounds, the Competition Authorities are required to consider the effect of the merger on certain factors, which include:

Before the 2018 amendments:

“[12A(3)](a) *a particular industrial sector or region;*

(b) employment;

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

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

After the 2018 amendments:

“[12A(3)](a) *a particular industrial sector or region;*

(b) employment;

*(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in, or expand within the market;*¹⁰⁵⁹

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

*(e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.”*¹⁰⁶⁰

In the merger between *Joyson KSS and Takata Corporation* (in 2019), the Tribunal recognised that section 12A(3) was not a closed list and had a wide ambit.¹⁰⁶¹

Similar to the Competition Act provisions specifically dealing with SMEs, the amendments to section 12A(3)(c) were introduced to promote the growth of SMEs.¹⁰⁶²

In this regard, the *Memorandum on the Objects of the Competition Amendment Bill of 2018*, states that:

¹⁰⁵⁹ Own emphasis.

¹⁰⁶⁰ Section 12A(3) of the Competition Act.

¹⁰⁶¹ *Joyson KSS Holdings No. 2 S.A.R.L. and others vs the Competition Commission* (Case no. SM325Mar18) paras 71 and 107. The Competition Tribunal relied on its previous finding in *Industrial Development Corporation v Anglo American Holdings* (Case No. 45/LM/Jun02).

¹⁰⁶² Memorandum on the Objects of the Competition Amendment Bill (2018) 28, clause 3.7.3.

*“The proposed amendments to subsection (3) (referring to section 12A(3)) seek to explicitly create public interest grounds in merger control that deal with ownership, control and the support of small and medium businesses and firms owned or controlled by historically disadvantaged persons as well as the ownership in firms by workers in those firms.”*¹⁰⁶³

As observed by Klaaren *et al.*,¹⁰⁶⁴ the South African competition authorities’ approach to public interest remedies in merger regulation was initially more conservative. However, as the years progressed, the authorities’ approach to public interest remedies in merger proceedings became more interventionist.¹⁰⁶⁵ This is noted not only in merger cases where remedies were imposed to address public interest concerns,¹⁰⁶⁶ but also in the public interest guidelines first issued by the Commission in 2016 and then revised in 2024, which highlight the importance of public interest considerations in merger assessment. The guidelines on public interest are discussed below.

Nevertheless, before the 2018 amendments, on 2 June 2016, the Competition Commission issued *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998* (“2016 Public Interest Guidelines”).¹⁰⁶⁷ On 20 March 2024, the Commission published its *Revised Public Interest Guidelines Relating to Merger Control* (“Revised Public Interest Guidelines”).¹⁰⁶⁸

¹⁰⁶³ Memorandum on the Objects of the Competition Amendment Bill (2018) 28, clause 3.7.3.

¹⁰⁶⁴ Klaaren, Padayachi and Shedi “The impact of competition law remedies on public interest” (2025) *Development Southern Africa*. Available at <https://doi.org/10.1080/0376835X.2025.2503147> (accessed on 4 June 2025) 4.

¹⁰⁶⁵ *Ibid.*

¹⁰⁶⁶ These include *Anheuser-Busch InBev SA/NV v SABMiller plc* (LM211Jan16) [2016] ZACT 72 South Africa Competition Tribunal South Africa 4 August 2016 and *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* (LM243Mar15) [2016] ZACT 68 (10 May 2016). The Tribunal approved AB InBev/SAB Miller merger subject to public interest conditions which included, *inter alia*, supporting small businesses and emerging farmers through a R1 billion supplier development fund. See also Church “Aspects of the interface between the promotion of small and medium enterprises (SMEs) and statutory competition law” (2018) THRHR 216, fn 186.

¹⁰⁶⁷ Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998, GN309 in GG40039 of 2 June 2016, available at <https://www.compcom.co.za/wp-content/uploads/2017/11/Gov-Gazette-Public-Interest-Guidelines.pdf> (accessed on 24 September 2021).

¹⁰⁶⁸ Revised Public Interest Guidelines Relating to Merger Control, GN4544 in GG50323 of 20 March 2024, available at https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (accessed on 10 October 2024).

3.5.4.1 2016 Public Interest Guidelines

The guidelines were issued in terms of section 79(1) of the Competition Act, which empowered the Commission to prepare non-binding guidelines to indicate the Commission's policy approach on any matter within its jurisdiction.¹⁰⁶⁹ The Commission was concerned that parties to merger proceedings often provided insufficient information regarding public interest grounds.¹⁰⁷⁰ This regularly resulted in delays in obtaining the required information to make informed decisions.¹⁰⁷¹ The guidelines, therefore, set out the Commission's approach in assessing the merger's likely effect on public interest grounds.¹⁰⁷² This includes guidance on the type of information that the Commission may request in considering the public interest grounds in terms of section 12A(3) of the Competition Act.¹⁰⁷³ As mentioned above, in terms of the Competition Act, the Competition authorities are required to analyse the effect of the merger on competition and public interest grounds.¹⁰⁷⁴ After considering the merger and its effects on the relevant market, the Competition authorities may approve the merger with or without conditions or prohibit it.¹⁰⁷⁵

In assessing the effect that the merger will have on "*the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive*" (as stipulated under the old provisions of section 12A(3)(c)), the 2016 guidelines indicated that the Commission would follow this general approach:

"(i) *Step 1: determine the likely effect on the ability of SMEs and HDIs to become competitive;*

(ii) *Step 2: determine whether any likely effect on the ability of SMEs and HDIs to become competitive is specific to the proposed merger;*

¹⁰⁶⁹ Section 79 of the Competition Act states: "(1) *The Competition Commission may prepare guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of the Act. (2) A guideline prepared in terms of section (1) – (a) must be published in the Gazette; but (b) is not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective discretion, or their interpretation of this Act.*"

¹⁰⁷⁰ Guidelines on the Assessment of Public Interest (2016) 8, para 3.5.

¹⁰⁷¹ *Ibid.*

¹⁰⁷² Guidelines on the Assessment of Public Interest (2016) 6.

¹⁰⁷³ *Idem* 7.

¹⁰⁷⁴ *Idem* 9, para 5.2.

¹⁰⁷⁵ Section 14(1)(b) and section 14A(1)(b) of the Competition Act; Guidelines on the Assessment of Public Interest (2016) 9, para 5.2.

(iii) *Step 3: determine whether the likely effect of the merger on the ability of SMEs and HDIs to become competitive is substantial;*

(iv) *Step 4: in the first line of enquiry referred to above, substantiate any likely positive effects to justify the approval of the merger or determine whether any likely negative effect in the second line of enquiry referred to above can be justified which may lead to the approval of the merger, with or without conditions; and*

(v) *Step 5: consider possible remedies to address the substantial negative effect on the ability of SMEs and HDIs to become competitive.*"¹⁰⁷⁶

In step one, the Commission would consider whether the merger affects, amongst others, conditions, opportunities and barriers to enter and expand in a market.¹⁰⁷⁷

In step two, the Commission would determine whether the effects of the merger on SMEs or HDIs arise from the merger.¹⁰⁷⁸

In step three, the Commission would consider, amongst others, whether the affected SMEs were prevented or allowed to compete in the market to the extent that dynamic competition, innovation and growth in the market are restrained or enhanced.¹⁰⁷⁹ The effect of a merger would be regarded as substantial: (i) where the merger would significantly prevent or allow SMEs whose expansion would pose a competitive constraint in the market; or (ii) where the merger would significantly prevent or enhance SMEs' expansion in adjacent markets and/or leading to other public interest issues.¹⁰⁸⁰

In Step four, the merging parties would be allowed to substantiate any positive effects on the public interest grounds or justify any substantial adverse effects on the ability of SMEs to participate or grow in the market.¹⁰⁸¹ Some examples of the justification for the merger's adverse effects on SMEs' ability to participate or expand in the market included the likelihood that the merger would lower prices for consumers, expand into

¹⁰⁷⁶ Guidelines on the Assessment of Public Interest (2016) 25, para 9.1.

¹⁰⁷⁷ *Idem* 26, para 9.1.1.1.

¹⁰⁷⁸ *Idem* 26, para 9.1.2.1.

¹⁰⁷⁹ Guidelines on the Assessment of Public Interest (2016) 26, para 9.1.3.1.

¹⁰⁸⁰ *Idem* 27, para 9.1.3.2.

¹⁰⁸¹ *Idem* 27, para 9.1.4.1.

new product lines, provide more choices for consumers, and invest in new plant, local industry or region.¹⁰⁸²

In step five, the Commission would consider possible remedies on the case's merits. Examples of remedies include creating a fund for the development, technical and financial support of SMEs; setting up programs for skills development and training; and/or requiring parties to maintain access and supply.¹⁰⁸³ The competition authorities could also request the divestiture of shares, interest, or other assets of one of the merging parties as a remedy if the merger results in a highly concentrated market. Divestiture happens when a firm sells any of its shares, interest or other assets. In terms of section 60 of the Competition Act, if a merger is implemented without notifying the Commission or without obtaining approval from the competition authorities,¹⁰⁸⁴ the Tribunal may order a party to the merger to sell the shares, interest or other assets acquired through such merger.¹⁰⁸⁵

3.5.4.2 Revised Public Interest Guidelines, 2024

The *Revised Public Interest Guidelines*¹⁰⁸⁶ consider the transformation principles set out in the Preamble of the Competition Act¹⁰⁸⁷ and as reiterated in *Mediclinic*.¹⁰⁸⁸

The *Revised Public Interest Guidelines* were also issued in terms of section 79(1) of the Competition.¹⁰⁸⁹ The guidelines further confirmed that following the 2018 amendments, the competition and public interest assessments are on equal

¹⁰⁸² *Idem* 27, para 9.1.4.3.

¹⁰⁸³ *Idem* 28, para 9.1.5.1.

¹⁰⁸⁴ Section 13A(3) states that: “*The parties to an intermediate or larger merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2) or the Competition Appeal Court in terms of section 17.*”

¹⁰⁸⁵ Section 60(1)(a) stipulates that: “*If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger.*”

¹⁰⁸⁶ Revised Public Interest Guidelines Relating to Merger Control, GN4544 in GG50323 of 20 March 2024, available at https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (accessed on 10 October 2024) 22-23.

¹⁰⁸⁷ See above 3.5.1 Preamble of the Competition Act.

¹⁰⁸⁸ See below 3.6.5.3 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2023] 1 CPLR 2 (CC).

¹⁰⁸⁹ See above 3.5.4.1 2016 Public Interest Guidelines.

footing.¹⁰⁹⁰ Competition authorities must consider all mergers on both competition and public interest factors.¹⁰⁹¹

The guidelines state that the public interest assessment will follow this general approach:¹⁰⁹²

- (1) Determine the merger's likely effect on each public interest ground;¹⁰⁹³
- (2) Determine the effect is substantial;¹⁰⁹⁴
- (3) Consider possible remedies, if the merger has an adverse substantial effect;¹⁰⁹⁵
- (4) If no remedy can address the merger's substantial negative effect, the Commission will consider on a case-by-case basis, other similar public interest grounds that can be tendered as conditions.¹⁰⁹⁶

The guidelines explain that in considering the impact of the merger on SMEs' ability to enter, expand and participate in the market, the Commission will assess whether the merger affects the following:¹⁰⁹⁷ opportunities and barriers to enter and expand in a market;¹⁰⁹⁸ pricing and supply conditions relating to volume discount and quality;¹⁰⁹⁹ imposing private standards;¹¹⁰⁰ merging parties continuing to sell to or supply SMEs post-mergers;¹¹⁰¹ training and skills development in an industry;¹¹⁰² funding business development.¹¹⁰³ The guidelines also indicate that the Commission will also consider the following factors: whether the merger would prevent SMEs from entering, participating or expanding in a market;¹¹⁰⁴ whether SMEs depend on the supply of key

¹⁰⁹⁰ Revised Public Interest Guidelines Relating to Merger Control, GN4544 in GG50323 of 20 March 2024, available at https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (accessed on 10 October 2024) 28, para 4.1.

¹⁰⁹¹ Revised Public Interest Guidelines Relating to Merger Control, GN4544 in GG50323 of 20 March 2024, available at https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (accessed on 10 October 2024) 28, para 4.1.

¹⁰⁹² Revised Public Interest Guidelines Relating to Merger Control 30, para 5.4.

¹⁰⁹³ Revised Public Interest Guidelines Relating to Merger Control 30, para 5.4.1.

¹⁰⁹⁴ Revised Public Interest Guidelines Relating to Merger Control 30, para 5.4.2.

¹⁰⁹⁵ Revised Public Interest Guidelines Relating to Merger Control 30, para 5.4.3.

¹⁰⁹⁶ Revised Public Interest Guidelines Relating to Merger Control 30, para 5.4.4.

¹⁰⁹⁷ Revised Public Interest Guidelines Relating to Merger Control 39, para 6.3.1.

¹⁰⁹⁸ Revised Public Interest Guidelines Relating to Merger Control 39, para 6.3.1.1.

¹⁰⁹⁹ Revised Public Interest Guidelines Relating to Merger Control 39, para 6.3.1.2.

¹¹⁰⁰ Revised Public Interest Guidelines Relating to Merger Control 39, para 6.3.1.2.

¹¹⁰¹ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.1.3.

¹¹⁰² Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.1.4.

¹¹⁰³ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.1.5.

¹¹⁰⁴ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.2.1.

inputs from the target firm;¹¹⁰⁵ whether the target firm is a key customer of the SME;¹¹⁰⁶ whether the merger will negatively affect the terms and conditions of the supply between the target firm and the SME;¹¹⁰⁷ whether any of the merger effects on SME affect other public interest grounds such as employment, industrial sector, etc.¹¹⁰⁸

To address any adverse effect of the merger on SMEs' ability to compete effectively, the Commission may consider the following remedies:¹¹⁰⁹ creating a supplier development fund to provide technical or financial assistance to SMEs;¹¹¹⁰ enabling and sustaining SMEs' integration into the value chain of the merging parties;¹¹¹¹ requiring that procurement of goods or services from SMEs continue;¹¹¹² creating or enhancing skills development and training program;¹¹¹³ supplying from SMEs on non-discriminatory terms and conditions.¹¹¹⁴

Klaaren *et al.* observed that the interventionist trend of the competition authorities in their approach to public interest consideration in merger proceedings is likely to continue with the 2018 amendments to the Act, which emphasise a consideration of public interest issues.¹¹¹⁵

3.5.5 Market inquiries – section 43

The provisions in Chapter 4A of the Competition Act dealing with market inquiries are also relevant to SMEs. The new Chapter 4A, as amended by the 2018 Amendment Act, consists of sections 43A to 43G.¹¹¹⁶

¹¹⁰⁵ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.2.2.

¹¹⁰⁶ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.2.3.

¹¹⁰⁷ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.2.4.

¹¹⁰⁸ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.2.5.

¹¹⁰⁹ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.3.

¹¹¹⁰ Revised Public Interest Guidelines Relating to Merger Control 40, para 6.3.3.2.2.

¹¹¹¹ Revised Public Interest Guidelines Relating to Merger Control 41, para 6.3.3.3. The establishment of supplier development fund will consider the following: the fund should improve any pre-merger fund to SME; the funds may be given through grants, preferential or low-interest loans; monitoring and evaluation mechanisms must be put in place; administration or preferential fees must not reduce the fund value. See Revised Public Interest Guidelines Relating to Merger Control 41, paras 6.3.3.2.1 to 6.3.3.2.5.

¹¹¹² Revised Public Interest Guidelines Relating to Merger Control 41, para 6.3.3.4.

¹¹¹³ Revised Public Interest Guidelines Relating to Merger Control 41, para 6.3.3.5.

¹¹¹⁴ Revised Public Interest Guidelines Relating to Merger Control 41, para 6.3.3.6.

¹¹¹⁵ Klaaren, Padayachi and Shedi "The impact of competition law remedies on public interest" (2025) *Development Southern Africa*. Available at <https://doi.org/10.1080/0376835X.2025.2503147> (accessed on 4 June 2025) 7.

¹¹¹⁶ Section 43A of the Competition Act inserted by section 6 of Competition Amendment Act 1 of 2009, GN875 in GG32533 of 28 August 2009, available at https://www.gov.za/sites/default/files/gcis_document/201409/32533875.pdf (accessed on 24 October 2023), and substituted by section 23 of Competition Amendment Act 18 of 2018, GN175 in GG42231

Section 43A defines a “*market inquiry*” as “*a formal inquiry in respect of the general state of competition, the levels of concentration in and structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm.*”¹¹¹⁷

Section 43B stipulates that the Competition Commission may initiate and conduct a market inquiry if it suspects that any feature,¹¹¹⁸ or combination of features, of a market impedes, distorts, or restricts competition. The Commission may also conduct a market inquiry to achieve the purposes of the Competition Act.¹¹¹⁹ As discussed above, one of the purposes of the Competition Act is to ensure the effective participation of SMEs in the economy.¹¹²⁰ A market inquiry may therefore be conducted to achieve this purpose.

In terms of section 43C, the Commission must decide: (a) whether any feature of the market, including the structure of the market and levels of concentration, negatively affects competition; and (b) on the procedures the market inquiry must follow.¹¹²¹ In

of 14 February 2019, available at https://www.gov.za/sites/default/files/gcis_document/201902/competitionamendment-act18of2018.pdf (accessed on 24 October 2023); section 43B inserted by section 6 of Competition Amendment Act 1 of 2009 and substituted by section 24 of Competition Amendment Act 18 of 2018; sections 43C to 43G inserted by section 26 of Competition Amendment Act 18 of 2018 .

¹¹¹⁷ Section 43A of the Competition Act.

¹¹¹⁸ Section 43A states that a “feature of a market for goods or services”, includes—

- (a) the structure of that market or any aspect of that structure, including:
 - (i) the level and trends of concentration and ownership in the market;
 - (ii) the barriers to entry in the market, the regulation of the market, including the instruments in place to foster transformation in the market and past or current advantage that is not due to the respondent’s own commercial efforts or investment, such as direct or indirect state support for a firm or firms in the market;
- (b) the outcomes observed in the market, including—
 - (i) levels of concentration and ownership;
 - (ii) prices, customer choice, the quality of goods or services and innovation;
 - (iii) employment;
 - (iv) entry into and exit from the market;
 - (v) the ability of national industries to compete in international markets;
- (c) conduct, whether in or outside the market which is the subject of the inquiry, by a firm or firms that supply or acquire goods or services in the market concerned;
- (d) conscious parallel or coordinated conduct by two or more firms in a concentrated market without the firms having an agreement between or among themselves; or
- (e) conduct relating to the market which is the subject of the inquiry of any customers of firms who supply or acquire goods or services.

¹¹¹⁹ Section 43B of the Competition Act. See above 3.5.2 Purpose of the Competition Act.

¹¹²⁰ See above 3.5.2 Purpose of the Competition Act; Section 2(e): “*to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy*”.

¹¹²¹ Section 43C:“(1) *In a market inquiry, the Competition Commission must decide— (a) whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market; and (b) on the procedures to be followed at the market inquiry.*”

assessing whether any feature of the relevant market restricts competition, the Commission must consider the impact of this adverse effect on SMEs and HDIs.¹¹²² The market inquiries provisions have therefore also provided for the protection of SMEs, as any inquiry into a market must consider whether any impediment to the market adversely affects SMEs.

In terms of section 43D, the Commission may remedy, mitigate or prevent the adverse effect on competition.¹¹²³ Further below, the study considers the remedial actions recommended by the online intermediary platforms market inquiry (OIPMI) conducted by the Commission in 2021 to 2023. Any of these actions taken must be reasonable and practicable.¹¹²⁴ The action must also consider various factors, including the nature and extent of the adverse effect on competition.¹¹²⁵ This would include the impact of such adverse effect on SMEs.¹¹²⁶

Section 43E provides that when the Commission has completed the market inquiry, it must publish and submit a report on the inquiry to the Minister.¹¹²⁷ The report must include a recommendation, which may include “*recommendations for new or amended policy, legislation or regulations*”.¹¹²⁸ Following the market inquiry, and based on the information from the inquiry, the Commission may, amongst others, initiate a complaint and conclude a consent agreement with the respondent, or refer the matter directly to the Competition Tribunal without any further investigation.¹¹²⁹

In terms of section 43F, any person materially and negatively affected by the outcome of the Commission’s findings in the inquiry may appeal such finding to the Competition

¹¹²² Section 43C(2): “*In making its decision in terms of subsection (1)(a), the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons.*”

¹¹²³ Section 43D(1): “*Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.*”

¹¹²⁴ Section 43D(4): “*Any action in terms of subsection (1) must be reasonable and practicable, taking into account relevant factors, including—(a) the nature and extent of the adverse effect on competition.*”

¹¹²⁵ *Idem*, section 43D(4)(a).

¹¹²⁶ See section 43C(2) above.

¹¹²⁷ Section 1(1)(xxi) defines the “Minister” as “*the Minister responsible for the administration of this Act*”. At the time of finalising this thesis (2023), the responsible Minister was the Minister of Trade, Industry and Competition.

¹¹²⁸ Section 43E(1)(a): “*43E. (1) Upon completing a market inquiry, the Competition Commission must publish a report of the inquiry in the Gazette, and must submit the report to the Minister with recommendations, which may include, but are not limited to— (a) recommendations for new or amended policy, legislation or regulations*”.

¹¹²⁹ Section 43E(3) of the Competition Act..

Tribunal.¹¹³⁰ Further, section 43G provides that SMEs are allowed to participate in the inquiry, if they compete in the market that was the subject of the inquiry.¹¹³¹ In addition, the Commission must ensure the participation of SMEs, “*who have a material interest in the inquiry and are, in the opinion of the Competition Commission, not adequately represented.*”¹¹³²

Any market inquiry conducted by the Commission will, therefore, have to consider the position of SMEs in the relevant market that is the subject of the inquiry.¹¹³³ In this regard, a market inquiry that particularly considered the effect of competition in a market where SMEs are active, is the market inquiry that the Commission conducted in the grocery retail sector, as discussed below.

3.5.5.1 The Grocery Retail Market Inquiry

On 30 October 2015, the Commission initiated a market inquiry in the grocery retail sector in terms of section 43B(2)¹¹³⁴ of the Competition Act.¹¹³⁵ The Commission had observed that SMEs were facing challenges which negatively impacted their

¹¹³⁰ Section 43G of the Competition Act.

¹¹³¹ Section 43G(1)(a): “*In accordance with the procedures adopted by the inquiry, the following persons may participate in a market inquiry— (a) firms, including small and medium businesses, in the market that is the subject of the inquiry.*”

¹¹³² Section 43G(2): “*The Competition Commission must take reasonable steps to promote the participation of small and medium businesses, who have a material interest in the inquiry and are, in the opinion of the Competition Commission, not adequately represented.*”

¹¹³³ A relevant market, in competition matters, relates to the product and geographic market in which competition takes place, may be affected or is assessed. The determination of the relevant market assists in determining whether a firm is dominant or has market power. In this regard, Neuhoﬀ (ed) et al. describe the relevant market in competition matters as “*the area of competition that is relevant to the issue under investigation.*” Neuhoﬀ (ed), Govender, Versfeld and Dingley *A practical guide to the South African Competition Act* (2nd Ed) (2017) 30. Jones and Surfin confirm the EU Commission’s position that “*market definition is a tool to identify and define the boundaries of competition between firms and serves to establish the framework within which the Commission applies competition policy.*” Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 59. In South Africa, dominance is determined by considering the market share of the firm in the relevant market. In terms of section 7 of the Act: “A firm is dominant in a market if- (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of a market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power. Section 1(1)(xviii) defines market power as “*the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.*”

¹¹³⁴ Section 43B(2): “*The Competition Commission must, at least 20 business days before the commencement of a market inquiry, publish a notice in the Gazette announcing the establishment of the market inquiry, setting out the terms of reference for the market inquiry and inviting members of the public to provide written representations to the market inquiry.*”

¹¹³⁵ Competition Commission of South Africa - The Grocery Retail Market Inquiry – Final Report – Non-confidential (25 November 2019) <https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf> (accessed on 15 September 2021) (hereafter Competition Commission Grocery Retail Market Inquiry final report (2019)).

participation in the South African grocery retail sector.¹¹³⁶ A panel was then established to assess the competitive dynamics of the grocery retail sector in order to make recommendations to promote competition and the objectives of the Competition Act in this sector.¹¹³⁷ Some of the objectives of the Inquiry included: assessing the impact of the expansion; diversification and consolidation of national supermarket chains on small retailers in non-urban areas¹¹³⁸ and informal markets;¹¹³⁹ and the impact of long-term exclusive lease agreements, generally concluded between the large/major supermarkets and landlords of shopping malls, on competition in the grocery retail sector.¹¹⁴⁰

The Inquiry Panel found that the long-term lease agreements concluded by the national supermarket chains prevented the entry of small grocery retailers in large malls and shopping centres. This conduct was viewed as contrary to the achievement of the purpose of the Competition Act to promote the effective participation of SMEs in a market. The panel remarked that long-term lease agreements also impeded competition by limiting consumer choice and alternative grocery retail suppliers in malls or shopping centres.¹¹⁴¹

The Inquiry found three main areas of concern: the long-term exclusive lease agreements concluded between the national supermarket chains and property developers, and buyer power;¹¹⁴² the effect on the competitiveness of small and independent retailers; and the regulatory environment.¹¹⁴³ The Inquiry found that the long-term exclusive leases in shopping centres had the effect of, amongst others, hindering the entry of small and independent retailers and thus depriving the retail market of crucial competition.¹¹⁴⁴ In addition, it found that the long-term exclusive leases significantly prevented challenger retailers from emerging, and hindered small independent retailers from effectively participating in the grocery retail sector, resulting

¹¹³⁶ Competition Commission of South Africa “The Grocery Retail Market Inquiry – Final Report – Non-confidential” (25 November 2019), available at <https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf> (accessed on 15 September 2021) 22.

¹¹³⁷ Competition Commission Grocery Retail Market Inquiry final report (2019) 22.

¹¹³⁸ Non-urban areas in this context refer to “townships, peri-urban and rural areas”. See Competition Commission Grocery Retail Market Inquiry final report (2019) 24, para 4.1.

¹¹³⁹ *Ibid*

¹¹⁴⁰ Competition Commission Grocery Retail Market Inquiry final report (2019) 24, para 4.1-4.2.

¹¹⁴¹ Competition Commission Grocery Retail Market Inquiry final report (2019) 23.

¹¹⁴² See above 3.4 The 2018 Amendments to the Competition Act. See also 3.5.3.3.1 Section 8 – Abuse of dominance.

¹¹⁴³ *Idem* 25.

¹¹⁴⁴ *Idem* 30.

in only four major national supermarket chains in the market, namely Shoprite, Pick n Pay, Spar and Woolworths.¹¹⁴⁵ As a result, the Inquiry was concerned that the exclusion of small retailers from shopping malls significantly restricted their growth and competitive ability.¹¹⁴⁶ In this regard, several small retailers confirmed that they could not lease premises in shopping malls because of the long-term exclusive lease agreements.¹¹⁴⁷ The national supermarket chains justified the conclusion of long-term exclusive lease agreements as necessary given the commitment to a long-term agreement, risk factors and investment made.¹¹⁴⁸

Following the Inquiry findings, the Commission concluded consent agreements¹¹⁴⁹ with Shoprite and Pick n Pay Retailers Proprietary Limited, separately, agreeing, amongst others, to stop enforcing the exclusivity provisions vis-à-vis SMEs with immediate effect.¹¹⁵⁰ In announcing the signing of a consent agreement with Pick n Pay on the GRMI, former Competition Commissioner, Tembinkosi Bonakele commented that *“the agreement reached with Pick n Pay is a further significant step in removing barriers to entry and participation for SMMEs and historically disadvantaged individuals in the South African grocery retail sector. The immediate removal of these barriers is critical in light of the need to rebuild the economy and set it on a sustainable and inclusive growth path. The increase in choice as a result of this agreement is not only good for consumers but also the retail property sector as*

¹¹⁴⁵ *Idem* 31, para 46-47.

¹¹⁴⁶ *Idem* 31.

¹¹⁴⁷ *Idem* 31.

¹¹⁴⁸ *Idem* 32.

¹¹⁴⁹ A consent agreement is an agreement concluded between the Commission and the respondent in respect of a complaint against a prohibited practice or a market inquiry. In terms of the consent agreement, the Commission and the respondent would agree on certain terms, including the admission or non-admission of the involvement in the alleged prohibited practice, the payment of an administrative penalty (if the conduct attracts the imposition of an administrative penalty), the respondent's undertakings, including compliance with the competition Act, and the confirmation that the settlement is in full and final settlement of the case against the respondent. The consent agreement is concluded in terms of section 49D of the Competition Tribunal and only becomes enforceable as a consent order once confirmed by the Tribunal as an order of the Tribunal. Section 49D(1) states: *“If, during, on or after the completion of the investigation of a complaint or a market inquiry, the Competition Commission and the respondent, or any person that is the subject of action by the Competition Commission in terms of section 43E, agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).”* Section 58(1)(b) states: *“In addition to its other powers in terms of this Act, the Competition Tribunal may- (b) confirm a consent agreement in terms of section 49D as an order of the Tribunal.”*

¹¹⁵⁰ The Competition Tribunal confirmed the Shoprite consent agreement on 9 October 2020 and the Pick n Pay consent agreement on 11 June 2021.

*tenant diversity in shopping centres allows for a more stable and commercially sustainable environment.”*¹¹⁵¹

3.5.6 Administrative penalties

In terms of the amendments to the Competition Act introduced by the 2018 Competition Amendment Act,¹¹⁵² section 59 now empowers the Tribunal to impose an administrative penalty, which is colloquially known as a “fine”, for an infringement of sections 4(1), 5(1) and (2), 8(1), 8(4), 9(1) or 9(1A).¹¹⁵³ Prior to the 2018 amendments,¹¹⁵⁴ the Tribunal could only impose a penalty for a contravention of section 4(1)(b), 5(2) or 8(a), (b) or (d) for a “first-time” offence.¹¹⁵⁵ An administrative

¹¹⁵¹ Competition Commission South Africa “The Competition Commission refers consent agreement with Pick n Pay to the Competition Tribunal for confirmation” (20 October 2020) Press Release, available at <https://www.compcom.co.za/wp-content/uploads/2020/10/THE-COMPETITION-COMMISSION-REFERS-CONSENT-AGREEMENT-WITH-PICK-N-PAY-TO-THE-COMPETITION-TRIBUNAL-FOR-CONFIRMATION.pdf> (accessed on 11 January 2023).

¹¹⁵² Section 33 of the Competition Amendment Act 18 of 2018, GN175 in GG42231 of 14 February 2019 available at <https://www.mylexisnexis.co.za/Library/Document.ashx?domainID=pnqg&format=pdf&documentVersion=null&displayVersion=null> (accessed on 27 September 2021).

¹¹⁵³ Section 4(1) prohibits competitors from entering into an agreement, concerted practice or a decision by an association of such firms: (a) which substantially prevents or lessens competition in a market unless there are efficiencies which outweigh the anti-competitive effect; or (b) which involves price fixing; market allocation or collusive tendering. Section 5(1) prohibits a firm and its suppliers, its customers or both from entering into an agreement that substantially prevents or lessens competition in a market there are efficiencies or pro-competitive benefits that outweigh the anti-competitive effects. Section 5(2) prohibits the practice of minimum resale price maintenance. Section 8(1) prohibits a dominant firm from (a) charging an excessive price to the detriment of consumers or customers; (b) refusing to give a competitor access to an essential facility when it is economically feasible to do so; (c) engaging in an exclusionary act that has an anti-competitive effect that outweighs any efficiencies or pro-competitive benefits; (d) engaging in certain exclusionary acts, namely requiring or inducing a supplier or customer not to deal with a competitor, refusing to supply scarce goods to a competitor when it can be done, tying or bundling, charging predatory prices, buying-up a scarce supply of intermediate goods, margin squeeze, unless there are efficiencies or pro-competitive benefits that outweigh the anti-competitive effect of the act. Section 8(4) prohibits a dominant firm from requiring or imposing unfair prices or other trading conditions on a supplier that is an SME or HDP in a sector designated by the Minister. Section 9(1) prohibits a seller that is a dominant firm from price discriminating. Section 9(1A) prohibits a dominant firm from avoiding or refusing to sell to a purchaser that is an SME or HDP to circumvent the operation of section 9(1)(a)(ii), which prohibits a dominant firm from price discriminating if it is likely that the effect of such discrimination will impede the ability of SMEs or HDPs to participate effectively.

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ Section 4(1)(b) prohibits competitors from entering into an agreement, concerted practice or a decision by an association of such firms which involves price fixing, market allocation or collusive tendering. Section 5(2) prohibits the practice of minimum resale price maintenance. Section 8(a) prohibited a dominant firm from charging an excessive price to the detriment of consumers. Section 8(b) prohibited a dominant firm from refusing to give a competitor access to an essential facility when it is economically feasible to do so. Section 8(d) prohibited a dominant firm from engaging in certain exclusionary acts, namely requiring or inducing a supplier or customer not to deal with a competitor, refusing to supply scarce goods to a competitor when it can be done, tying or bundling, selling at a marginal or average variable cost, or buying-up a scarce supply of intermediate goods needed by a

penalty could only be imposed in respect of a contravention of sections 4(1), 5(1), 8(c) or 9(1), if the contravening firm was “substantially repeating” the same conduct that had previously been found to be a prohibited practice by the Competition Tribunal.¹¹⁵⁶

SMEs may also be subjected to administrative fines in terms of section 59, as they may find themselves on the wrong side of the law when engaging in prohibited practices, as discussed above.¹¹⁵⁷

In terms of section 59(2), the imposed administrative penalty may not exceed 10% of the firm’s annual turnover in the Republic and its exports in the firm’s preceding financial year.¹¹⁵⁸ In terms of the new section 59(2A), if the impugned conduct is substantially a repeat by the same firm of a conduct previously found to be a prohibited practice by the Tribunal, the administrative penalty imposed may now go up to 25% of the firm’s annual turnover in the Republic and its exports in the firm’s preceding financial year.¹¹⁵⁹

Section 59(3) outlines the factors the Tribunal must consider when determining an appropriate administrative penalty. These factors include:

*“(a) the nature, duration, gravity and extent of the contravention; (b) any loss or damage suffered as a result of the contravention; (c) the behaviour of the respondent; (d) the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons; (e) the level of profit derived from the contravention; (f) the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; (g) whether the respondent has previously been found in contravention of this Act; and (h) whether the conduct has previously been found to be a contravention of this Act or is substantially the same as conduct regarding which Guidelines have been issued by the Competition Commission in terms of section 79.”*¹¹⁶⁰

competitor, unless there are efficiencies or pro-competitive benefits that outweigh the anti-competitive effect of the act.

¹¹⁵⁶ Section 59(1)(b) of the Competition Act (prior to the Competition Amendment Act, No.18 of 2018).

¹¹⁵⁷ See above 3.5.3 Prohibited practices.

¹¹⁵⁸ Section 59(2) of the Competition Act. *Southern Pipeline Contractors v Competition Commission* [2011] 2 CPLR 239 (CAC); *Competition Commission v Aveng (Africa)* (84/CR/Dec09) [2012] ZACT 32.

¹¹⁵⁹ Section 59(2A) of the Competition Act.

¹¹⁶⁰ Own emphasis. Section 59(3) of the Competition Act.

The 2018 amendments to the Act have thus introduced the requirement to consider the impact of the contravention on SMEs and HDIs when determining an appropriate penalty.¹¹⁶¹ This is an addition that supports the objective of the amendments to the Competition Act, namely, to protect and enhance SMEs.¹¹⁶²

The 2018 Competition Amendment Act has also introduced section 59(3A) which stipulates that, in determining the penalty amount, the Tribunal may also consider the turnover of the firm(s) that controls the respondent, where the controlling firm(s) “*knew or should reasonably have known*” that the respondent was infringing the Act.¹¹⁶³ In addition, in terms of this provision, the Tribunal may notify the controlling firm(s) and order that it/they will be held liable, jointly and severally, for the payment of the administrative penalty imposed.¹¹⁶⁴

Notably, this provision may thus affect parent companies of SMEs who have engaged in prohibited conduct. The parent company may be held jointly and severally liable with the offender SME for the payment of the fine if the parent company knew or should have known about the contravention.

To date,¹¹⁶⁵ the Commission has issued two guidelines on the determination of administrative penalties in relation to the enforcement of the Competition Act. One for prohibited practices and the other for failure to notify mergers and implementation of mergers contrary to the Competition Act.¹¹⁶⁶

¹¹⁶¹ Section 59(3)(d) of the Competition Act amended by section 33(d) of the Competition Amendment Act 18 of 2018.

¹¹⁶² Competition Amendment Bill, 2018 states: “*to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons.*”

¹¹⁶³ Section 59(3A) of the Competition Act amended by section 33(e) of the Competition Amendment Act 18 of 2018. Section

¹¹⁶⁴ Section 59(3A) of the Competition Act amended by section 33(e) of the Competition Amendment Act 18 of 2018. Section 59(3A)(a) states that: “*In determining the extent of the administrative penalty to be imposed, the Competition Tribunal may- (a) increase the administrative penalty referred to in subsection (2) and (2A) to include the turnover of any firm or firms that control the respondent where the controlling firm or firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct.*”

¹¹⁶⁵ May 2024.

¹¹⁶⁶ Competition Commission South Africa “Guidelines for the determination of administrative penalties for prohibited practices” (effective 1 May 2015), GN323 in GG38693 of 17 April 2015, available at https://www.gov.za/sites/default/files/gcis_document/201504/38693gon323.pdf (accessed on 14 October 2024) (hereafter Guidelines for the determination of administrative penalties for prohibited practices (2015)); Competition Commission South Africa “Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act No. 89 of 1998, as amended” GN473 in GG 42337 of 29 March 2019, available at https://www.gov.za/sites/default/files/gcis_document/201903/42337gon473.pdf (accessed on 28

3.5.6.1 Guidelines for the Determination of Administrative Penalties for Prohibited Practices

The *Guidelines for the Determination of Administrative Penalties for Prohibited Practices* became effective on 1 May 2015¹¹⁶⁷ (“the prohibited practices fining guidelines”). The guidelines were prepared in terms of section 79(1) of the Act,¹¹⁶⁸ following a growing demand from the Competition Tribunal, the Competition Appeal Court and stakeholders, to the Commission to provide guidance on the determination of appropriate penalties for the conclusion of consent or settlement agreements,¹¹⁶⁹ or recommendation of a fine in a complaint referral to the Competition Tribunal.¹¹⁷⁰

The guidelines are essentially an endorsement of the Tribunal's six-step methodology developed in *Competition Commission vs Aveng and others*,¹¹⁷¹ for the determination of an appropriate administrative penalty that a firm will be liable to pay if it has engaged in prohibited conduct.¹¹⁷² The six steps are:

“Step 1: Determination of the affected turnover in the base year;¹¹⁷³ Step 2: Calculation of the base amount¹¹⁷⁴ being that proportion of the affected turnover¹¹⁷⁵ relied upon;

September 2021) (hereafter Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019)).

¹¹⁶⁷ Guidelines for the determination of administrative penalties for prohibited practices (2015).

¹¹⁶⁸ Section 79(1) of the Competition Act empowers the Commission to issue guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act; Guidelines for the determination of administrative penalties for prohibited practices (2015) 6, para 4.1.

¹¹⁶⁹ In terms of section 49D and 58(1)(b) of the Act, the Commission and the respondent may agree on the terms of a consent or settlement order which may include the payment of an administrative penalty; Guidelines for the determination of administrative penalties for prohibited practices (2015) 7, para 4.4.

¹¹⁷⁰ In terms of section 27(1) of the Act, the Tribunal is empowered to impose any remedy, including imposing an administrative penalty on the offending firm, if it finds that a prohibited practice has occurred; Guidelines for the determination of administrative penalties for prohibited practices (2015) para 4.5 p.7.

¹¹⁷¹ *Competition Commission v. Aveng (Africa) Limited t/a Steeleedale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09. The Tribunal's six-step methodology was confirmed by the Competition Appeal Court in *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) Ltd v. Competition Commission* 119 & 120/CAC/May2013.

¹¹⁷² Guidelines for the determination of administrative penalties for prohibited practices (2015) 7, para 5.1.

¹¹⁷³ The “Base year” refers to “the most recent financial year in which there is evidence that the firm participated in the contravention”. See Guidelines for the determination of administrative penalties for prohibited practices (2015) para 1.1.5.

¹¹⁷⁴ The “Base amount” means “a proportion of the affected turnover determined in accordance with the methodology” stated in the Guidelines. See Guidelines for the determination of administrative penalties for prohibited practices (2014) para 1.1.4

¹¹⁷⁵ The “Affected turnover” means “the annual turnover of the firm in the Republic and exports from the Republic in the line of business in which the contravention has taken place”. See Guidelines for the determination of administrative penalties for prohibited practices (2015) para 1.1.3.

*Step 3: Multiplying the amount obtained in Step 2 by the duration of the contravention; Step 4: Rounding off the figure obtained in Step 3 if it exceeds the cap provided for by section 59(2) of the Act; Step 5: Considering factors that might mitigate and/or aggravate the amount reached in Step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it; and Step 6: Rounding off this amount if it exceeds the cap provided for in section 59(2) of the Act.*¹¹⁷⁶

The guidelines further provide for settlement discounts, where appropriate, and the consideration of a firm's inability to pay, which may result in favourable payment terms.¹¹⁷⁷

The guidelines also provide for the liability of a holding or parent company for payment of the fine imposed on its subsidiary, if the holding or parent company owned the subsidiary; controlled or exercised decisive or material influence over the subsidiary; knew about the subsidiary's contravention of the Act; and derived benefits from the subsidiary's activities.¹¹⁷⁸ This provision is now embodied in section 59(3A) of the Act which, as discussed above, stipulates that in determining the amount of the fine, the Tribunal may increase the fine by including the turnover of the firm controlling the respondent, *if* the controlling firm knew or should reasonably have known that the respondent was infringing the Act.¹¹⁷⁹ The Tribunal may hold the controlling firm jointly and severally liable for the payment of the fine.¹¹⁸⁰ As discussed above, this may be applicable to controlling firms of SMEs who are in a group of companies and who have engaged in prohibited conduct.

More precisely on SMEs, the guidelines stipulate in Step 2 that the determination of the base amount will consider, amongst others, *"the effect of the contravention on competitors and third parties including the likely impact on small and medium-sized enterprises and the likely impact on low-income consumers."*¹¹⁸¹ This is now embodied in the new section 59(3)(d) which states that, in determining an appropriate

¹¹⁷⁶ Guidelines for the determination of administrative penalties for prohibited practices (2015) para 5.1.

¹¹⁷⁷ Guidelines for the determination of administrative penalties for prohibited practices (2015) paras 5.2 & 7.4.

¹¹⁷⁸ Guidelines for the determination of administrative penalties for prohibited practices (2015) para 8.1.

¹¹⁷⁹ Section 59(3A)(a) of the Competition Act.

¹¹⁸⁰ Section 59(3A)(b) of the Competition Act.

¹¹⁸¹ Guidelines for the determination of administrative penalties for prohibited practices (2015) 10, para 5.11.5.

administrative penalty, the Tribunal must consider, amongst others, “*the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons.*”¹¹⁸²

The penalty provisions and the guidelines may therefore affect SMEs, as SMEs can infringe the law, by engaging in prohibited conduct. In that case, SMEs may be liable for payment of an administrative penalty. SMEs’ size may play a role in the determination of a penalty, as the turnover of a firm in the relevant market or in the line of business in which the contravention has taken place will be used to determine the fine.¹¹⁸³ As SMEs may also be victims of prohibited conduct, a determination of the administrative penalty in such event will have to consider the impact of the contravention on SMEs.¹¹⁸⁴

3.5.6.2 Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act

On 29 March 2019, the Commission issued the *Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act No. 89 of 1998, as amended*,¹¹⁸⁵ (“the prior implementation fining guidelines”). These guidelines were prepared to indicate the Commission’s policy approach on the determination of an appropriate penalty in cases of failure to notify a “notifiable merger” to the Competition authorities or the implementation of a merger contrary to the law or prior to the Competition authorities’ approval.¹¹⁸⁶ In terms of section 13A(1) of the Competition Act, a party to an intermediate or large merger is required to notify the Commission of that merger in the prescribed manner and form.¹¹⁸⁷ Section 13A(3) further prohibits a party to a merger

¹¹⁸² Own emphasis. Section 59(3)(d) of the Competition Act.

¹¹⁸³ See above Guidelines for the determination of administrative penalties for prohibited practices (2014); Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 36.

¹¹⁸⁴ Section 59(3)(d) of the Competition Act.

¹¹⁸⁵ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019).

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ *Ibid.*

to implement the merger until the Competition authorities have approved the merger with, or without, conditions.¹¹⁸⁸

The guidelines also seek to be transparent and objective in indicating the Commission's calculation of a fine that will deter firms from implementing a merger prematurely and will motivate it to comply with merger regulations.¹¹⁸⁹ The Commission decided to prepare separate prior implementation fining guidelines to the *prohibited practices fining guidelines*, because of the different considerations in assessing mergers.¹¹⁹⁰ The methodology that the Commission will follow in determining an administrative penalty for failure to notify and prior implementation cases involve the following five steps:

*“(i) Step 1: Determination of the nature or type of contravention; (ii) Step 2: Determination of the base amount; (iii) Step 3: Duration of the contravention; (iv) Step 4: Consideration of factors that might mitigate and/or aggravate the amount reached in Step 3, and (v) Step 5: Rounding off this amount if it exceeds the cap provided for in section 59(2) of the Act.”*¹¹⁹¹

Similar to the Guidelines on the determination of administrative penalties for prohibited practices, the Guidelines for the determination of administrative penalties for prior implementation cases also provide for a settlement discount and the consideration of a firm's inability to pay the fine.¹¹⁹² The Commission may consider settling the case

¹¹⁸⁸ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 8, para 3.3; Section 13A(3) of the Act is to be read with sections 14(1)(b), 16(2) and 17 of the Competition Act. Section 14(1)(b) empowers the Competition Commission to approve a merger with or without conditions, or prohibit a merger, after having considered the merger in terms of section 12A. Section 16(2) enjoins the Competition Tribunal to approve the merger with or without conditions, or prohibit the merger, after having considered the merger in terms of section 12A. Section 17 stipulates that if the Competition Appeal Court (CAC) sets aside the Competition Tribunal's decision in respect of a merger, the CAC must either approve the merger with or without condition, or prohibit the implementation of the merger.

¹¹⁸⁹ Competition Commission South Africa – *Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act No. 89 of 1998, as amended* (March 2019) (Government Notice No.473, Government Gazette 42337). Para 2.2, p.6 https://www.gov.za/sites/default/files/gcis_document/201903/42337gon473.pdf (accessed on 28 September 2021)

¹¹⁹⁰ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 7, para 2.4.

¹¹⁹¹ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 10, para 4.2.

¹¹⁹² Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 23, para 6&7.

on favourable payment terms if the merging parties approach the Commission to settle the case earlier on during the investigation.¹¹⁹³

A consideration of the firm's inability to pay may arise in exceptional circumstances.¹¹⁹⁴ The Commission will then consider the financial position of the relevant firm, as well as the market circumstances.¹¹⁹⁵ This is to avoid putting the firm in a precarious financial difficulty, which may result in the firm exiting the market and reducing competition in the market, as a result,¹¹⁹⁶ especially when it is an effective competitor that exited the market.

Although the guidelines do not describe the market circumstances that the Commission may consider in assessing the guilty firm's inability to pay, it is submitted that an SME's inability to compete in the market because of the fine will probably be considered. This is given the Competition Act's imperatives to ensure the growth and participation of SMEs in the economy.¹¹⁹⁷

In addition, the *prior implementation fining guidelines* stipulate that the liability to pay the fine will generally be on both the acquiring firm and the seller, jointly and severally.¹¹⁹⁸ However, depending on the circumstances, the Commission may also elect to hold either the acquiring firm, or the seller, or the target firm, or the holding company of the acquiring firm and the seller, liable for payment of the administrative penalty.

SMEs may also be affected by these guidelines if the SME is one of the merging parties and fails to notify a notifiable merger, prematurely implements a merger or implements a merger contrary to the Competition authorities' decision.¹¹⁹⁹

¹¹⁹³ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 22, para 6.

¹¹⁹⁴ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 23, para 7.1.

¹¹⁹⁵ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 23, para 7.

¹¹⁹⁶ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 23, para 7.1.

¹¹⁹⁷ Competition Amendment Bill (2018).

¹¹⁹⁸ Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers (2019) 24, para 8.1.

¹¹⁹⁹ Section 59(1)(d) of the Competition Act.

3.5.7 Civil claim for damages

In terms of section 65(6) of the Competition Act, a person who has suffered loss or damages arising from a prohibited practice is entitled to claim damages from the offending firm.¹²⁰⁰ The right to bring a claim for damages becomes effective when the Competition Tribunal (Tribunal) or the Competition Appeal Court (CAC) has decided that prohibited conduct was engaged in.¹²⁰¹ In this regard, an affected person may only commence an action for damages in a civil court if it has received a certificate from the Tribunal or the CAC has confirmed that the impugned conduct constitutes a prohibited practice.¹²⁰² This certificate is conclusive proof of its contents and binding on any civil court meaning that it will not be necessary to lead evidence again that the conduct is indeed a prohibited practice.¹²⁰³

Section 65 may also apply to SMEs, as this section does not identify a specific category of claimants that are allowed to institute civil damages actions.¹²⁰⁴ Section 65 merely states that “*a person who has suffered loss or damage as a result of a prohibited practice*”.¹²⁰⁵ An SME may, therefore, be a person who has suffered loss or damage because of a prohibited practice. For example, in an abuse of dominance case, the affected SME may bring an action for damages against the dominant firm, if the Tribunal or CAC has confirmed that the dominant firm’s conduct amounts to an abuse of dominance in contravention of the Competition Act. However, this will be mainly for the affected firm’s personal retribution or compensation as opposed to compensating the public for any loss or damage suffered.¹²⁰⁶ An SME may, however, also be involved in cartel conduct¹²⁰⁷ and be the firm against whom the damages claim is brought. Consumers may therefore elect to invoke section 65 to claim damages against the perpetrators of the cartel, including the offending SME.

¹²⁰⁰ Section 65(6) of the Competition Act.

¹²⁰¹ Section 65(9) of the Competition Act.

¹²⁰² Section 65(6)(b) of the Competition Act.

¹²⁰³ Section 65(7) of the Competition Act.

¹²⁰⁴ Ratz “Damages Arising from Contraventions of Competition Act 89 of 1998” (2019) *PER / PELJ* 2019(22) – DOI, available at <http://www.saflii.org/za/journals/PER/2019/26.pdf> (accessed on 4 October 2021) (hereafter Ratz (2019)) 25.

¹²⁰⁵ Section 65(6) of the Competition Act.

¹²⁰⁶ Ratz (2019).

¹²⁰⁷ Discussed under 3.5.3.1.4 above.

The section below considers seminal cases that have dealt with SMEs in the competition law jurisprudence.

3.6 Competition law Jurisprudence – Seminal cases on small and medium-sized enterprises (SMEs)

This section reviews some of the seminal competition law cases that involved SMEs. It considers how the courts have applied the prohibited practices provisions of the Competition Act in cases involving SMEs either as offenders¹²⁰⁸ or victims¹²⁰⁹ of the prohibited practice. Although there are various competition law cases that have dealt with SMEs since the inception of the Competition Act, the focus of this review is on cases that were heard by the appeal courts, namely the Competition Appeal Court (CAC) and the Constitutional Court. The section only deals with decided complaint referrals¹²¹⁰ and selected merger cases that may have affected SMEs. The cases selected are thus only those that were decided on the merits. In other words, on whether the implicated firms engaged in prohibited practices. Accordingly, the review below does not include consent agreements, interlocutory or interim relief applications. The period selected is on cases that were decided during 2011 and 2021. This is because this period reflected the courts' approach before the 2018 Competition Amendment Act came into force.¹²¹¹ The study notes that since the enactment of the 2018 Competition Amendment Act¹²¹² and the Constitutional Court's decision in *Mediclinic* on 15 October 2021,¹²¹³ the South African competition authorities have sought to interpret the Act more purposively.

The study notes that during 2022 and 2024, there have also been cases dealing with SMEs, but more on consent agreements, interim relief applications and market inquiry.

¹²⁰⁸ The parties who were alleged to have contravened the Competition Act.

¹²⁰⁹ The parties that were affected by the contravention.

¹²¹⁰ A complaint referral is a matter that is referred to the Competition Tribunal ("Tribunal") for adjudication on the merits of the case. In other words, after the Commission has investigated a complaint in terms of section 49B, and if the Commission finds that a prohibited practice has taken place, the Commission may refer the complaint to the Tribunal in terms of section 50. This is done in terms of rules 14 and 15 of the Rules for the Conduct of Proceedings in the Competition Tribunal.

¹²¹¹ Most of the provisions came into effect on 12 July 2019 (Proclamation No. 46 of 2019 in GG42578 of 12 July 2019) and 13 February 2020 (Proclamation No. 10 of 2020 in GG43018 of 13 February 2020). See Chapter Three, para 3.3 "The 2018 Amendments to the Competition Act" above.

¹²¹² Most of the provisions came into effect on 12 July 2019 (Proclamation No. 46 of 2019 in GG42578 of 12 July 2019) and 13 February 2020 (Proclamation No. 10 of 2020 in GG43018 of 13 February 2020). See 3.3 "The 2018 Amendments to the Competition Act" above.

¹²¹³ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2023] 1 CPLR 2 (CC).

In 2024, the notable development was the Commission's publication of the *Block Exemption Regulations for small, micro and medium-sized businesses, 2024*.¹²¹⁴ This was discussed above.¹²¹⁵

Although, as mentioned above, the focus of this study was on complaint referrals decided by the CAC or the Constitutional Court, the last section of this chapter considers, further below, a few cases where the objective of promoting SMEs' participation in the economy was raised during 2022 to 2024 to show how the competition authorities are enforcing this objective, post the 2018 Competition Act amendments.

There are also some seminal cases that were heard before the selected period, such as the *Nationwide Poles* and *Senwes* cases. These cases will also be considered as they provide important insights into the treatment of SMEs under the Competition Act. It also shows how the 2018 amendments have improved the position of SMEs as opposed to the position in terms of *Nationwide Poles* and *Senwes*.

For purposes of chronological context, this section consequently first reviews the *Nationwide Poles v Sasol* case ("Nationwide"),¹²¹⁶ as it is one of the seminal cases that discusses the application of competition law on SMEs. It merits analysing both the Tribunal and CAC decisions.

3.6.1 *Nationwide Poles v Sasol* – The Tribunal's decision

In *Nationwide Poles v Sasol (Oil) (Pty) Ltd*,¹²¹⁷ Nationwide Poles CC ("Nationwide"), a small producer of treated wooden poles based in the Eastern Cape province (in South Africa) accused Sasol (Oil) Pty Ltd ("Sasol") of discriminating between its customers by offering large customers higher discounts compared to its small customers.¹²¹⁸ Nationwide alleged that Sasol engaged in price discrimination in contravention of section 9 of the Competition Act.¹²¹⁹ The Competition Tribunal ("Tribunal") had to

¹²¹⁴ *Block Exemption Regulations for small, micro and medium-sized businesses, 2024*, GN2538 in GG50746 of 3 June 2024.

¹²¹⁵ Chapter Three, para 3.5.3.4.1 Block Exemption Regulations for Small, Micro and Medium-sized Businesses, 2024.

¹²¹⁶ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT) (hereafter *Nationwide Poles* (2005)).

¹²¹⁷ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT) (hereafter *Nationwide Poles* (2005)).

¹²¹⁸ *Nationwide Poles* (2005) paras 1, 4.

¹²¹⁹ *Nationwide Poles* (2005) para 5.

determine: (i) the relevant market; (ii) whether Sasol was dominant in terms of the Act; (iii) whether Sasol's alleged practice met the elements of prohibited price discrimination under section 9(1)(a),(b) and (c), and (iv) whether Sasol had successfully invoked the defences of section 9(2).¹²²⁰

The Tribunal found that the relevant market was the market for creosote.¹²²¹ The Tribunal then found that Sasol was dominant not only based on Sasol's market share, which was above 45%,¹²²² but also based on Sasol's market power.¹²²³ The Tribunal also found that Sasol was pricing creosote independent of the competitive behaviour of its customers or competitors.¹²²⁴

The Tribunal then considered the elements of price discrimination under section 9(1).¹²²⁵ In this regard, the Tribunal debated the impact of price discrimination on competition and the nature of the test in section 9(1)(a), namely the likelihood of substantial lessening of competition.

For purposes of this thesis, consideration is given only to the Tribunal's analysis of section 9(1)(a) dealing with the requirement of "*likely to have the effect of substantially preventing or lessening competition.*" This is because one of the research questions in this thesis explores the appropriate test to assess harm to competition in cases involving SMEs.¹²²⁶

¹²²⁰ *Nationwide Poles* (2005) paras 21 – 26.

¹²²¹ Creosote is a wood preservative utilised for, amongst others, the treatment of wooden poles. See *Nationwide Poles* paras 2 and 52. The Collins Dictionary defines creosote as "a thick dark liquid made from coal tar which is used to prevent wood from rotting." Collins COBUILD Advanced Learner's English Dictionary (4th Ed.) (2003) 331.

¹²²² See above 3.5.5 Market Inquiries. In terms of section 7 of the Act: "A firm is dominant in a market if- (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of a market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power. Section 1(1)(xviii) defines market power as "*the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers*".

¹²²³ *Nationwide Poles* (2005) para 71.

¹²²⁴ *Nationwide Poles* (2005) para 70.

¹²²⁵ *Nationwide Poles* (2005) para 72-74.

¹²²⁶ See Chapter 1: 1.5 Research objectives, "e) What is the standard of harm to be applied in assessing competitive effects in cases involving SMEs? Consumer welfare, foreclosure of competitors or a different/special harm?".

The Tribunal first considered the place of price discrimination in antitrust.¹²²⁷ It noted that price discrimination offends the principles and objectives of antitrust,¹²²⁸ and that price discrimination threatens the underlying competitive structure of the market.¹²²⁹

The Tribunal was of the view that the legislator introduced price discrimination provisions to ensure the entry of new entrants and enable them to compete effectively against larger and well-established incumbents.¹²³⁰ In this regard, the Tribunal remarked that price discrimination provisions were introduced to enable SMEs to enter new markets and to enable them to compete effectively on the merits.¹²³¹ Accordingly, price discrimination provisions were introduced to, amongst others, protect SMEs and ensure their effective participation in markets.¹²³² The Tribunal, considering that the US is hailed as the jurisdiction where modern antitrust law originated, highlighted that the US Robinson-Patman Act¹²³³ was influenced by SMEs related considerations. It observed that similarly in South Africa, the Competition Act is concerned with the development of SMEs, as confirmed in section 2(e) of the Competition Act which provides for the fair treatment of SMEs, as one of the purposes of the Competition Act.¹²³⁴

The Tribunal remarked that there should be considerations of “fairness” in assessing prohibited conduct against SMEs,¹²³⁵ or that the concept of “fairness” is not foreign or alien to the Competition Act or jurisprudence.¹²³⁶ By way of example, the Tribunal referred to the public interest provisions in the merger provisions (section 12A(3)),¹²³⁷ and the exemption provisions (section 10) of the Competition Act,¹²³⁸ which refer to SME considerations.¹²³⁹ The Tribunal noted that these provisions envisage considerations of “equity” or “fairness”.¹²⁴⁰ The Tribunal further remarked that

¹²²⁷ *Nationwide Poles* (2005) para 75 – 90. “Antitrust” is the US term for competition law.

¹²²⁸ *Nationwide Poles* (2005) para 75.

¹²²⁹ *Nationwide Poles* (2005) para 76.

¹²³⁰ *Nationwide Poles* (2005) para 81.

¹²³¹ *Nationwide Poles* (2005) para 81.

¹²³² *Nationwide Poles* (2005) para 81.

¹²³³ Robinson-Patman Act 15 U.S. code 13: Discrimination in price, services or facilities, 19 June 1936, ch.592 SS1, 49 Stat. 1526.

¹²³⁴ *Nationwide Poles* (2005) para 81.

¹²³⁵ *Nationwide Poles* (2005) para 83.

¹²³⁶ *Nationwide Poles* (2005) para 83.

¹²³⁷ See above 3.1.1 Merger regulations.

¹²³⁸ See above 3.5.3.4 Exemptions of prohibited practices.

¹²³⁹ *Nationwide Poles* (2005) para 83.

¹²⁴⁰ *Nationwide Poles* (2005) para 83.

although the concept of “equity” or “fairness” could be perceived as contrary to an antitrust approach that supports a “*pure*” consumer welfare standard, namely output reduction or price increases, the legislator’s express objective of ensuring SMEs’ equitable participation shows that “equity/fairness” should be considered in competition analysis.¹²⁴¹ In other words, although equity considerations may not conform with *competition economics orthodoxy*, one should not ignore the legislature’s express desire that equity or fairness considerations play a role in competition analysis.¹²⁴²

The Tribunal subsequently discussed the “*special place*” that SMEs have in competition law.¹²⁴³ In this regard, it noted that the mantra “*protect competition, not competitors*”¹²⁴⁴ seeks to deny the special place that SMEs have in competition law.¹²⁴⁵ The Tribunal also noted that the promoters of this mantra find support in a narrow and focused view of the meaning of competition, namely that it is only about output choices and competitive prices.¹²⁴⁶ The Tribunal was, however, of the view that competition law enforcement should be concerned with anti-competitive behaviour that negatively affects the market structure.¹²⁴⁷

It remarked that the Competition Act reflects the legislature’s intention to promote market access and equality of opportunities, especially for SMEs.¹²⁴⁸ In this regard, the concept of “equality of opportunities” is mentioned in the Preamble of the Act.¹²⁴⁹ The promotion of SMEs is also mentioned in sections 2(e),¹²⁵⁰ 10(3)(b)(ii),¹²⁵¹ and 12A(3)(c) of the Act.¹²⁵² The Tribunal also referred to the *Explanatory Memorandum*

¹²⁴¹ *Nationwide Poles* (2005) para 83. Own emphasis.

¹²⁴² *Nationwide Poles* (2005) para 83.

¹²⁴³ *Nationwide Poles* (2005) para 84.

¹²⁴⁴ See above 1.7. Rationale for the study.

¹²⁴⁵ *Nationwide Poles* (2005) para 85.

¹²⁴⁶ *Nationwide Poles* (2005) para 85-86.

¹²⁴⁷ *Nationwide Poles* (2005) para 87.

¹²⁴⁸ *Nationwide Poles* (2005) para 88.

¹²⁴⁹ *Nationwide Poles* (2005) para 88.

¹²⁵⁰ *Nationwide Poles* (2005) para 88.

¹²⁵¹ *Nationwide Poles* (2005) para 88.

¹²⁵² *Nationwide Poles* (2005) para 88. Prior to the 2018 amendments to the Competition Act,¹²⁵² sections 2(e), 10(3)(b)(ii) and 12A(3)(c) stated as follows: Section 2(e): “*The purpose of this Act is to promote and maintain competition in the Republic in order – (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.*” section 10(3)(b)(ii): “(3) *The Competition Commission may grant an exemption in terms of subsection 2(a) only if – (b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives: (...) (ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.*” section 12A(3)(c): “(3) *when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or*

to the 1998 Competition Bill,¹²⁵³ which sets out the policy-makers' intention to support SMEs development through the Competition Act.¹²⁵⁴

The Tribunal confirmed that the Act seeks to promote SMEs access to markets by providing for their "equitable treatment".¹²⁵⁵ It noted that price discrimination is contrary to "equitable treatment" and not part of the general category of exclusionary practices.¹²⁵⁶ The Tribunal further remarked that the Competition Act specifically proscribed price discrimination because of its negative effect on the market structure and small businesses.¹²⁵⁷ Accordingly, the Tribunal found that the provisions of price discrimination had specifically been included to protect SMEs against inequitable practices by dominant firms.¹²⁵⁸

The Tribunal then analysed section 9(1)(a) which required the showing of "*likely effect of substantially preventing or lessening competition*".¹²⁵⁹ The Tribunal found that section 9 was not structured to require the anti-competitive test of actual harm to consumer welfare.¹²⁶⁰ It further found that the legislature could have not intended for the complainant, who was most likely to be a small business and thus a victim of price discrimination, to establish an anti-competitive effect of the conduct.¹²⁶¹ In this regard, the Tribunal agreed with Nationwide's argument that "*a small business is the most likely complainant in a price discrimination case*" and that "*on a consumer welfare test small business will always fail, precisely because it is not able to correlate harm that is inflicted upon it to harm that is inflicted on the broader market. A small firm will always be met with the response that its troubles are, in relation to the market as a whole, 'de minimus', that is, that they have little, if any, effect on competition in the market as a whole.*"¹²⁶²

the Competition Tribunal must consider the effect that the merger will have on – (c) the ability of small business or firms controlled or owned by historically disadvantaged persons, to become competitive."

¹²⁵³ Explanatory Memorandum to Competition Bill, 1998, GN841 in GG18913 of 22 May 1998. Available at https://www.gov.za/sites/default/files/gcis_document/201409/18913.pdf (accessed on 8 October 2024).

¹²⁵⁴ *Nationwide Poles* (2005) para 88.

¹²⁵⁵ *Nationwide Poles* (2005) para 89.

¹²⁵⁶ *Nationwide Poles* (2005) para 89.

¹²⁵⁷ *Nationwide Poles* (2005) para 89.

¹²⁵⁸ *Nationwide Poles* (2005) para 89.

¹²⁵⁹ *Nationwide Poles* (2005) para 91.

¹²⁶⁰ *Nationwide Poles* (2005) para 91 and 97.

¹²⁶¹ *Nationwide Poles* (2005) para 99.

¹²⁶² *Nationwide Poles* (2005) para 100.

Accordingly, the Tribunal found that section 9 was enacted to protect small businesses who would need remedies against price discrimination, which excludes them from the market or impedes their ability to compete in the market.¹²⁶³

Specifically, the Tribunal found that with respect to section 9(1)(a), the legislator intended not to create a competitive harm threshold (in the form of harm to consumer welfare) but a *competitive relevance* threshold.¹²⁶⁴ The Tribunal also found that the legislator did not intend for SMEs to face an evidential burden they could not meet or would fail to establish, immediately after passing the first hurdle of dominance.¹²⁶⁵

The Tribunal noted that, if section 9 did not include the requirement of likelihood of substantial lessening of competition, as contained in section 9(1)(a), section 9 would have been “consumer protection legislation”.¹²⁶⁶ Accordingly, the Tribunal found that section 9(1)(a) requires a “*competition relevance*”¹²⁶⁷ and that section 9(1)(a) does not require proof of standard of harm to consumer welfare.¹²⁶⁸ The Tribunal remarked that, by using the word “likely”, the legislature requires the adjudicators “*to situate the complaint as one relevant to competition*”, whilst “*substantial*” was described as distinguishing “*trivial*” from “*weightier*”.¹²⁶⁹ In applying this test of “*competition relevance*”, the Tribunal found that Nationwide Poles (the complainant) was a competing producer of treated poles, where creosote was a crucial input and the subject of the price discrimination.¹²⁷⁰ In this regard, Sasol’s price discrimination placed small customers, like Nationwide Poles, at an ongoing disadvantage compared to other competing producers of creosote treated poles.¹²⁷¹ The Tribunal found that Nationwide Poles had met the element of “likely” by showing that Sasol’s discriminatory act was relevant to competition.¹²⁷² The Tribunal also found that the effect of the price discrimination was likely to be substantial, as the price of creosote formed a significant input cost into Nationwide’s production cost.¹²⁷³ Such significant cost was likely to put Nationwide at a competitive disadvantage vis-à-vis its

¹²⁶³ *Nationwide Poles (2005)* para 101.

¹²⁶⁴ *Nationwide Poles (2005)* para 102.

¹²⁶⁵ *Nationwide Poles (2005)* para 102.

¹²⁶⁶ *Nationwide Poles (2005)* para 103.

¹²⁶⁷ *Nationwide Poles (2005)* para 103.

¹²⁶⁸ *Nationwide Poles (2005)* para 103.

¹²⁶⁹ *Nationwide Poles (2005)* para 103.

¹²⁷⁰ *Nationwide Poles (2005)* para 104.

¹²⁷¹ *Nationwide Poles (2005)* para 104.

¹²⁷² *Nationwide Poles (2005)* para 104.

¹²⁷³ *Nationwide Poles (2005)* para 105.

competitors.¹²⁷⁴ The Tribunal stated further that “*likely substantial lessening of competition*” in section 9(1)(a) was “*about removing the irrelevant and the trivial.*”¹²⁷⁵ It found that the test in section 9(1) was not about setting a requirement that the complainant, who is likely to be a small firm, will not meet.¹²⁷⁶ It also found that Sasol intended to discriminate against Nationwide and that the evidence of such intention supported the argument that the anti-competitive effect was likely.¹²⁷⁷

The Tribunal then considered the evidence and found that Sasol’s conduct placed Nationwide at a disadvantage compared to its major competitors.¹²⁷⁸ However, Sasol argued that the price discrimination could not have negatively affected the competitive structure of the market, as the effect of the conduct was insignificant.¹²⁷⁹ Competition in the market would have thus not be substantially affected.¹²⁸⁰ In relying on the mantra “*protect competition, not competitors*”, Sasol argued that “*the Tribunal’s concern should not be with the fortunes of a few competitors, but rather with the intensity of competition in the pole market.*”¹²⁸¹ The Tribunal, however, found that Sasol was only interested in satisfying its large customers, by offering them higher discounts than what it gave to smaller customers in the pole market.¹²⁸² Sasol’s interest to restrict small players’ competitiveness was even greater given Sasol larger customers’ fear of new entry.¹²⁸³ The Tribunal found that Sasol’s conduct enhanced the larger producers’ competitiveness and that this was not competition on the merits, as such conduct excluded small competitors from the market or limited their ability to compete effectively in the market.¹²⁸⁴

The Tribunal concluded that if small firms’ competitiveness is suppressed, it will affect the competitive structure of the market, and will likely substantially harm competition in the market.¹²⁸⁵

¹²⁷⁴ *Nationwide Poles (2005)* para 105.

¹²⁷⁵ *Nationwide Poles (2005)* para 109.

¹²⁷⁶ *Nationwide Poles (2005)* para 109.

¹²⁷⁷ *Nationwide Poles (2005)* para 110.

¹²⁷⁸ *Nationwide Poles (2005)* para 117.

¹²⁷⁹ *Nationwide Poles (2005)* para 118.

¹²⁸⁰ *Nationwide Poles (2005)* para 118.

¹²⁸¹ *Nationwide Poles (2005)* para 118.

¹²⁸² *Nationwide Poles (2005)* para 121.

¹²⁸³ *Nationwide Poles (2005)* para 123.

¹²⁸⁴ *Nationwide Poles (2005)* para 124.

¹²⁸⁵ *Nationwide Poles (2005)* para 126.

Thus the Tribunal found that Sasol engaged in price discrimination in contravention of section 9 and did not justify its conduct.¹²⁸⁶

3.6.2 *Sasol v Nationwide Poles* – The CAC’s decision

Sasol appealed the Tribunal’s decision to the Competition Appeal Court (CAC) in *Sasol Oil (Pty) Ltd v Nationwide Poles CC*.¹²⁸⁷

The CAC had to consider, amongst others, the question regarding the interpretation and application of section 9(1)(a).¹²⁸⁸ In dealing with that question, the CAC considered and summarized the Tribunal’s interpretation of section 9(1)(a) as: *“the legislature intended section 9(1)(a) to create a legal means by which small enterprises, in particular, would have a remedy against conduct that might exclude them from access to a market or limit their ability to compete on the merits in that market. For this reason, section 9(1)(a) provides that a complainant may establish a competitive relevance to its complaint which does not require proof of a standard of harm as contended for by appellant. When the legislature asks, is it “likely”, it is asking the court to enquire as to whether the complaint is relevant to competition in the applicable market. When it asks is it ‘substantial’, it invites the court to distinguish the trivial effect from weighty.”*¹²⁸⁹

In turn, Sasol argued during the appeal that a test of competitive relevance had not been provided for in the wording of section 9(1)(a).¹²⁹⁰

The CAC then asked whether the test of competitive relevance did justice to the wording of section 9(1)(a) of the Act.¹²⁹¹ It noted that the Tribunal sought to rely on comparative law, the purpose of the Act and an approach to price discrimination similar to that of the United States (US).¹²⁹² In this regard, the CAC analysed the US Law. The CAC noted that price discrimination is prohibited under the Robinson-Patman Act of 1936.¹²⁹³ Section 2(a) of the Robinson-Patman Act specifically prohibits a seller from *“discriminating in price between its competing buyers in the sale of goods or*

¹²⁸⁶ *Nationwide Poles* (2005) para 140.

¹²⁸⁷ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) (hereafter *Sasol Oil v Nationwide Poles* (2006)).

¹²⁸⁸ *Sasol Oil v Nationwide Poles* (2006) 44.

¹²⁸⁹ *Sasol Oil v Nationwide Poles* (2006) 45.

¹²⁹⁰ *Sasol Oil v Nationwide Poles* (2006) 45.

¹²⁹¹ *Sasol Oil v Nationwide Poles* (2006) 45.

¹²⁹² *Sasol Oil v Nationwide Poles* (2006) 45.

¹²⁹³ *Sasol Oil v Nationwide Poles* (2006) 45.

*services of like grade and quality where the effect of the discrimination may substantially lessen competition in any line of commerce”.*¹²⁹⁴

The CAC, however, pointed out that there are differences between the US legislation and the South African Competition Act’s wording of the proscription of price discrimination.¹²⁹⁵ Some of the differences included the fact that price discrimination under the Robinson-Patman Act is not only applicable to dominant firms,¹²⁹⁶ and that there are several exceptions to the prohibition of price discrimination in the Robinson-Patman Act. The CAC, nevertheless, also noted some similarities in the defences provided in the US and the South African provisions of price discrimination.

The CAC further examined the US judgment in *FTC v Morton Salt Company*,¹²⁹⁷ as Nationwide Poles had urged the CAC to consider this judgment despite the textual differences between the South African and US provisions of price discrimination.¹²⁹⁸ The facts of the aforesaid case was that Morton Salt company had sold its blue label table salt to wholesalers and large retail chain customers using a standard quantity discount system.¹²⁹⁹ Some large retail chain customers managed to buy large quantities of the product. They were then able to resell the Blue Label table salt at cheaper prices than wholesalers’ prices to independent retailers, who competed with the local outlets of the large retail chain stores.¹³⁰⁰ The case ended up before the US Supreme Court.¹³⁰¹ Of particular importance to this thesis is the CAC’s note of the US Supreme Court’s remarks on the protection of small businesses. The CAC pointed out that the majority of the US Supreme Court held that:

*“in determining the effect of price discrimination, the Act was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots.”*¹³⁰²

¹²⁹⁴ *Sasol Oil v Nationwide Poles* (2006) 46.

¹²⁹⁵ *Sasol Oil v Nationwide Poles* (2006) 46.

¹²⁹⁶ *Sasol Oil v Nationwide Poles* (2006) 46.

¹²⁹⁷ *FTC v Morton Salt Company* 334 US 37 at 42 (1948).

¹²⁹⁸ *Sasol Oil v Nationwide Poles* (2006) 46.

¹²⁹⁹ *Sasol Oil v Nationwide Poles* (2006) 46-47.

¹³⁰⁰ *Sasol Oil v Nationwide Poles* (2006) 47.

¹³⁰¹ *Sasol Oil v Nationwide Poles* (2006) 47.

¹³⁰² Own emphasis. *Sasol Oil v Nationwide Poles* (2006) 47 – CAC citing the US Supreme Court in *FTC v Morton Salt Company* 334 US 37 at 42 (1948) para 49.

The majority judgment of the US Supreme Court further held that what was sufficient to trigger the operation of the discrimination provision under the Robinson-Patman Act was “a reasonable possibility of harm to competition.”¹³⁰³ In this regard, it held that:

*“it would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is “a reasonable possibility” that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell these goods to the competitors of these customers.”*¹³⁰⁴

The CAC, however, also noted the minority judgment of the US Supreme Court which cautioned against the adoption of the test of “reasonable possibility”.¹³⁰⁵

The CAC then considered the Tribunal’s interpretation of the Preamble of the Competition Act 89 of 1998, as amended (“the Act”) and section 2(e) of the Act. As discussed above, the Tribunal had highlighted that one of the purposes of the Act was to promote SMEs.¹³⁰⁶ The Tribunal had also referred to the *Explanatory Memorandum to the 1998 Competition Bill*,¹³⁰⁷ which reflected the legislature’s intention to, amongst others, support SMEs through the instruments and principles of the Act.¹³⁰⁸ As mentioned, the Tribunal also remarked that the victims of price discrimination were most likely to be small customers.¹³⁰⁹

The CAC remarked that the Tribunal had used the Preamble and section 2(e) of the Act to interpret section 9(1)(a).¹³¹⁰ It indicated that this interpretation sought to render section 9(1)(a) consistent with the purpose of promoting and protecting SMEs. The CAC, however, found that the Tribunal’s test of “competitive relevance” was a low threshold of harm to competition that SMEs had to prove in price discrimination cases.¹³¹¹

¹³⁰³ *Sasol Oil v Nationwide Poles* (2006) 47

¹³⁰⁴ *Sasol Oil v Nationwide Poles* (2006) 47 - CAC citing the US Supreme Court in *FTC v Morton Salt Company* 334 US 37 at 42 (1948) para 50.

¹³⁰⁵ *Sasol Oil v Nationwide Poles* (2006) 47.

¹³⁰⁶ *Nationwide Poles v Sasol Oil* (2005) para 88, fn 62.

¹³⁰⁷ See above 3.2.1 *Nationwide Poles v Sasol* – The Tribunal’s decision.

¹³⁰⁸ *Nationwide Poles v Sasol Oil* (2005) para 88, fn 62.

¹³⁰⁹ *Nationwide Poles v Sasol Oil* para 89.

¹³¹⁰ *Sasol Oil v Nationwide Poles* (2006) 48.

¹³¹¹ *Sasol Oil v Nationwide Poles* (2006) 48.

The CAC then went on to analyse the Tribunal's reliance on the Robinson Patman Act, the preamble and section 2 of the Act, to conclude that the test for SMEs is "*competitive relevance*". The CAC, however, noted that there are two lines of enforcement under the Robinson-Patman Act: the primary and secondary lines. The primary line of enforcement concerns "*discrimination that threatens to injure competition between sellers*." The secondary line of enforcement concerns "*discrimination that threatens to injure competition between buyers*." This is in terms of section 2(a) and 2(f) of the Robinson-Patman Act, respectively.

The CAC further noted the US Supreme Court's ruling in *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation*,¹³¹² where the US Supreme Court held that the primary line of enforcement seeks to promote consumer welfare and not to protect small businesses.¹³¹³ Regarding the secondary line of enforcement, the CAC noted that this usually seeks to promote small sellers who may struggle to defend themselves against price discrimination.¹³¹⁴

The CAC also looked at *Coastal Fuels of Puerto Rico, Inc v Caribbean Petroleum Corporation*¹³¹⁵ where the First Circuit remarked that the US Supreme Court in the *Brooke* case did not overrule the *Morton Salt* decision, as the US Supreme Court did not confirm that *actual harm* to competition must always be established in the secondary line of enforcement.¹³¹⁶

The CAC also considered the American Antitrust Institute Working group's comments on the Robinson-Patman Act (July 1, 2005) on the legislative reform of secondary line enforcement.¹³¹⁷ The working group recommended a refocus of secondary line price

¹³¹² *Sasol Oil v Nationwide Poles* (2006) 49 citing *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation* 509 US 209 (1993) 224.

¹³¹³ *Sasol Oil v Nationwide Poles* (2006) 49 citing *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation* 509 US 209 (1993) 221.

¹³¹⁴ *Sasol Oil v Nationwide Poles* (2006) 49 citing *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation* 509 US 209 (1993).

¹³¹⁵ *Coastal Fuels of Puerto Rico, Inc v Caribbean Petroleum Corporation* 79 F. 3d 182 (1st Cir) at 191–193, cert denied 117 S. Ct 294 (1996).

¹³¹⁶ *Sasol Oil v Nationwide Poles* (2006) 49.

¹³¹⁷ The American Antitrust Institute "The Robinson-Patman Act should be reformed, not repealed" (2005) Comments of the American Antitrust Institute Working Group on the Robinson-Patman Act; *Sasol Oil v Nationwide Poles* (2006) 49.

discrimination to protect small firms from price discrimination that gives buying power, as opposed to cost savings, to dominant firms.¹³¹⁸

The CAC also considered European Union (EU) law, in particular Article 82(c) of the EC Treaty,¹³¹⁹ which deals with price discrimination that affects competition in a downstream market.¹³²⁰ This is where a customer of the dominant firm is the subject of discrimination that affects its ability to compete with its rivals at the downstream level.¹³²¹ The CAC referred to the case of *Hoffman-La Roche and Co AG v Commission of the European Communities*,¹³²² where the EU court ruled that abusive conduct is conduct that has: “*the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*”¹³²³

The CAC also further the court’s decision in *NV Nederlandsche Banden Industrie Michellin v Commission*,¹³²⁴ where the European Court of Justice stated that “*Article 82 covers practices which were likely to affect the structure of a market have the effect of hindering the maintenance or development with the level of competition still existing on the market.*”¹³²⁵

The CAC remarked that these dicta helped interpret section 9(1)(a), namely the likelihood of substantial harm to competition. This is because, at the time, EU competition law aimed to safeguard the competitive structure and dynamic of the market.¹³²⁶ The CAC quoted the famous Professor Fox, who commented on the EU’s view of harm to competition at the time.¹³²⁷ Fox noted that the EU’s legislation

¹³¹⁸ The American Antitrust Institute “The Robinson-Patman Act should be reformed, not repealed” (2005) Comments of the American Antitrust Institute Working Group on the Robinson-Patman Act, at 7; *Sasol Oil v Nationwide Poles* (2006) 49.

¹³¹⁹ Article 82(c) of the EC Treaty stipulated: “*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”. See below Chapter 4, 4.2.2 A brief history of the EU Competition law.

¹³²⁰ *Sasol Oil v Nationwide Poles* (2006) 49.

¹³²¹ *Sasol Oil v Nationwide Poles* (2006) 49.

¹³²² *Hoffman-La Roche and Co AG v Commission of the European Communities* [1979] ECR 461; *Sasol Oil v Nationwide Poles* (2006) 49.

¹³²³ *Sasol Oil v Nationwide Poles* (2006) 49 – CAC citing the European Court in *Hoffmann-La Roche and Co AG v Commission of the European Communities* para 89.

¹³²⁴ *NV Nederlandsche Banden Industrie Michellin v Commission* [1983] ECR 3461 para 70

¹³²⁵ *Sasol Oil v Nationwide Poles* (2006) 50.

¹³²⁶ *Sasol Oil v Nationwide Poles* (2006) 50.

¹³²⁷ *Sasol Oil v Nationwide Poles* (2006) 50; Fox “What is harm to competition? Exclusionary Practices and Anti Competitive Effect” (2002) Antitrust Law Journal Vol. 70, No. 2 (hereafter Fox (2002)) at 392.

*“protects openness of and access to markets, and the right of market actors not to be fenced out by dominant firm strategies that are not based on competitive merits.”*¹³²⁸

The CAC found that the Tribunal correctly highlighted the importance of prohibiting price discrimination in the competition legislation.¹³²⁹ It indicated that this approach supports the legislative interpretation that condemns harm to the competitive structure of the South African market.¹³³⁰ The CAC, however, reiterated that price discrimination under section 9 prohibits a dominant firm from charging discriminatory prices to its customers of its goods or services if such discrimination was likely to substantially lessen or prevent competition.¹³³¹

The CAC also quoted the remarks of the Chairman of the Competition Advisory Board for the Korean Fair Trade (in 1997) chair, Kyu-Uck Lee, on the dual role of competition policy, namely enabling underprivileged economic agents to effectively participate in the competition process and establish the rules of fair and free competition.¹³³² The CAC noted Lee’s remarks that:

*“If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are used and protected through import restrictions. This will give rise to public dissatisfaction since the game itself has not been played in a socially acceptable fair manner.”*¹³³³

Notably, the CAC, however, found that section 9(1)(a) had to be interpreted according to the words used by the legislature to achieve its purpose.¹³³⁴ It observed that *“The wording of section 9(1)(a) may be open textured but a court is still required to engage with the text and justify the meaning.”*¹³³⁵

The CAC noted that the wording of section 9(1)(a) did not show that this section was enacted to protect small businesses as opposed to protecting the competitive process and that section 2 of the Act could not justify an interpretation different from a plain

¹³²⁸ *Sasol Oil v Nationwide Poles* (2006) 50 fn 88; Fox (2002) 392.

¹³²⁹ *Sasol Oil v Nationwide Poles* (2006) 50.

¹³³⁰ *Sasol Oil v Nationwide Poles* (2006) 50.

¹³³¹ Own emphasis. *Sasol Oil v Nationwide Poles* (2006) 50.

¹³³² *Sasol Oil v Nationwide Poles* (2006) 50.

¹³³³ *Sasol Oil v Nationwide Poles* (2006) 50-51; Fox (2002) 407 referring to Lee “A ‘Fairness’ Interpretation of Competition Policy with Special Reference to Korea’s Laws” (1997) KFTC, essay presented at The Symposium in Commemoration of the 50th Anniversary of the Founding of the Fair Trade Commission in Japan, Competition Policy for the 21st Century at 61 (on file with author).

¹³³⁴ *Sasol Oil v Nationwide Poles* (2006) 51.

¹³³⁵ *Sasol Oil v Nationwide Poles* (2006) 51.

interpretation of section 9(1)(a).¹³³⁶ It noted that the “*likely effect*” mentioned in section 9(1)(a) does not require proof of “*actual harm to consumer welfare*” but suggested a “*probabilistic inquiry*”.¹³³⁷ The CAC further remarked that the majority judgment in the *Morton Salt* case used a test that was more sensitive to the purpose of the Act and section 9. This is the test of whether there is a “reasonable possibility” that competition may be negatively affected by a dominant firm’s practice of selling its goods at a cheaper price to some customers to the detriment of others.¹³³⁸ Accordingly, the test that the CAC adopted in interpreting “likely substantial effects on competition” was “*whether there is a reasonable possibility*” that the price discrimination practice would have substantially affected competition.¹³³⁹ The CAC was of the view that this interpretation was consistent with the wording of section 9(1)(a) and gave effect to the purposes of section 2, especially the protection of SMEs and the treatment of price discrimination in the Act.¹³⁴⁰

As evidence to show that Sasol’s discount schedule was likely to substantially lessen competition, Nationwide Poles showed the effect of this practice on its own cost structure.¹³⁴¹ Nationwide Poles contended that the large customers of Sasol had an incentive to suppress competition from small pole producers.¹³⁴² Nationwide Poles also submitted that the price discrimination affected the entry into the market and thus affected competition.¹³⁴³ It further submitted that a number of smaller treatment plants had exited the market.¹³⁴⁴ The CAC, however, found that the evidence relied upon to argue that there was a pattern of exit from the market was not clear.¹³⁴⁵ The CAC also looked at the role of Sasol’ largest competitor, Suprachem.¹³⁴⁶ Sasol argued that the demand for creosote from Suprachem had increased.¹³⁴⁷ The CAC found that

¹³³⁶ The CAC invited Mr Maenetje as “*amicus*”. The CAC stated that the “*amicus*” had contended that “*there is nothing in the text of section 9 which shows that the purpose of the section was to protect small enterprises as opposed to protecting the competitive process or, in the words of the Tribunal, “the underlying competitive structure of the market”*” and submitted that “it was doubtful that section 2 of the Act which sets out the purposes of the Act justifies departure from the ordinary meaning of the words used in section 9(1)(a).” *Sasol Oil v Nationwide Poles* (2006) 51.

¹³³⁷ *Sasol Oil v Nationwide Poles* (2006) 51.

¹³³⁸ *Sasol Oil v Nationwide Poles* (2006) 51.

¹³³⁹ *Sasol Oil v Nationwide Poles* (2006) 51.

¹³⁴⁰ *Sasol Oil v Nationwide Poles* (2006) 51.

¹³⁴¹ *Sasol Oil v Nationwide Poles* (2006) 51.

¹³⁴² *Sasol Oil v Nationwide Poles* (2006) 52.

¹³⁴³ *Sasol Oil v Nationwide Poles* (2006) 52.

¹³⁴⁴ *Sasol Oil v Nationwide Poles* (2006) 53.

¹³⁴⁵ *Sasol Oil v Nationwide Poles* (2006) 53.

¹³⁴⁶ *Sasol Oil v Nationwide Poles* (2006) 53.

¹³⁴⁷ *Sasol Oil v Nationwide Poles* (2006) 53.

Suprachem was a significant alternative supplier of creosote in the market.¹³⁴⁸ It remarked that Suprachem would acquire an additional segment of the market if Sasol's pricing policy was discriminative. The CAC, nevertheless, noted that there was no evidence on how Suprachem would behave if Sasol would no longer price differentiate.¹³⁴⁹

In conclusion, the CAC found that the important question in this case was to determine whether there was a reasonable possibility that Sasol's pricing structure was likely to substantially affect competition in the market in which Nationwide Poles operated.¹³⁵⁰ The CAC found that there needed to be evidence to support any allegation that there was a reasonable possibility that Sasol's pricing structure would substantially harm competition in the market in which Nationwide Poles operated.¹³⁵¹ It relied on its judgments in *Mondi Ltd/Kohler Cores & Tubes v Competition Tribunal*,¹³⁵² and *Schumann Sasol (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd*,¹³⁵³ to confirm that evidence was key in determining whether there was a likelihood of substantial lessening of competition.¹³⁵⁴ The CAC eventually held that the evidence:

- demonstrated that Nationwide Poles was able to compete and continue to operate in the relevant market;¹³⁵⁵
- indicated that small players in the relevant market were able to compete against their large competitors;¹³⁵⁶
- was insufficient regarding the nature of the small firms' cost structures. Such evidence would have assisted in determining the impact of Sasol's pricing or discount structures on the small firms' ability to effectively compete in the market;¹³⁵⁷

¹³⁴⁸ *Sasol Oil v Nationwide Poles* (2006) 54.

¹³⁴⁹ *Sasol Oil v Nationwide Poles* (2006) 55.

¹³⁵⁰ *Sasol Oil v Nationwide Poles* (2006) 55.

¹³⁵¹ *Sasol Oil v Nationwide Poles* (2006) 55.

¹³⁵² *Mondi Ltd/Kohler Cores & Tubes v Competition Tribunal* 2003 1 CPLR 25(CAC) para 38.

¹³⁵³ *Schumann Sasol (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd* 2001-2002 CPLR 84 (CAC) (27 June 2002).

¹³⁵⁴ *Sasol Oil v Nationwide Poles* (2006) 55.

¹³⁵⁵ *Sasol Oil v Nationwide Poles* (2006) 56.

¹³⁵⁶ *Sasol Oil v Nationwide Poles* (2006) 56.

¹³⁵⁷ *Sasol Oil v Nationwide Poles* (2006) 56.

- was lacking on how small firms sought to adapt to the market;¹³⁵⁸
- was inconclusive on whether there had been exit from the market because of Sasol's discount structure.¹³⁵⁹
- was insufficient regarding the nature of Suprachim's operation, its pricing policy and capacity or willingness to respond to a changing pricing structure.¹³⁶⁰

The CAC found that the only evidence was a cost increase imposed on Nationwide Poles of between 3,6% to 4% because of Sasol's discount policy.¹³⁶¹ The CAC added that if it were provided with evidence on the operations of the other small businesses in the market as well as Suprachim's operation, it would have been able to find that there was a reasonable possibility that Sasol's discount structure would substantially lessen or prevent competition in the market in which Nationwide Pole operated.¹³⁶² It then held that, based on the evidence, it could not conclude that there was a reasonable possibility that competition had been substantially affected.¹³⁶³ At best for Nationwide Poles, the CAC found that it had suffered a cost disadvantage because of Sasol's pricing policy.¹³⁶⁴ It stated that "competition law does not protect the competitor, it protects competition. Evidence which goes no further than suggesting that one competitor may be prejudiced is insufficient to bring the impugned conduct within the scope of section 9(1)(a)."¹³⁶⁵

Reading from the CAC's judgement, one can remark that there was an issue with the evidence presented before the CAC. The test that the CAC applied to interpret the "*likelihood of substantial lessening and preventing*" of competition was a "*reasonable possibility*" that the impugned conduct would substantially affect competition. This is a matter of evidence. In this regard, the CAC remarked that the evidence brought before it could not support the Tribunal's decision that Sasol had price discriminated in contravention of section 9 of the Competition Act.¹³⁶⁶

¹³⁵⁸ *Sasol Oil v Nationwide Poles* (2006) 56.

¹³⁵⁹ *Sasol Oil v Nationwide Poles* (2006) 56.

¹³⁶⁰ *Sasol Oil v Nationwide Poles* (2006) 56.

¹³⁶¹ *Sasol Oil v Nationwide Poles* (2006) 56.

¹³⁶² *Sasol Oil v Nationwide Poles* (2006) 56.

¹³⁶³ Own emphasis. *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁶⁴ *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁶⁵ Own emphasis. *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁶⁶ *Sasol Oil v Nationwide Poles* (2006) 57.

On the protection of SMEs under the Competition Act, the CAC remarked that “*our decision does not seek to minimize the particular weight which the legislature has given to price discrimination nor the need to ensure that small and medium businesses are able to use the Act to protect their ability to compete freely and fairly.*”¹³⁶⁷ This confirms that the CAC recognises that SMEs may use the Competition Act to protect their ability to compete in the market.¹³⁶⁸ However, the CAC reiterated the lack of evidence of the allegedly adverse conduct on other small businesses in the creosote market.¹³⁶⁹ It was also not clear how Sasol’s main competitor would have reacted if Sasol were to change its pricing/discount structure.¹³⁷⁰ Accordingly, the CAC dismissed Nationwide Poles’ complaint mainly because it could not demonstrate that Sasol’s pricing structure would substantially harm the creosote market.¹³⁷¹

3.6.2.1 Relevance of the Nationwide Poles cases – Tribunal and CAC’s decisions

The above cases are relevant to this thesis, which researches the appropriate test to assess harm to competition in cases involving SMEs.¹³⁷² In this regard, the Tribunal interpreted section 9(1)(a) as inviting the complainant to establish a “competitive relevance” to his complaint.¹³⁷³ The Tribunal found that it does not require proof of some standard of harm.¹³⁷⁴ The CAC, however, found that the relevant test is “a reasonable possibility” that the dominant firm’s conduct is likely to have a substantial effect on competition in the market where the complainant is located.¹³⁷⁵ Ultimately, the outcome of this case was based on pure competition considerations, in that Nationwide Poles could not demonstrate that Sasol’s pricing structure would substantially harm the creosote market. It was about the efficiency of the competition in the market, which is similar to the Chicago School’s approach,¹³⁷⁶ which views the protection of consumer welfare and economic efficiency as the ultimate goals of

¹³⁶⁷ Own emphasis. *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁶⁸ *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁶⁹ *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁷⁰ *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁷¹ *Sasol Oil v Nationwide Poles* (2006) 57.

¹³⁷² See Chapter One, 1.9. Research objectives; Kampel “Competition law and SMEs: exploring the competitor/competition debate in a developing democracy” (2004) 22. See also Ncube and Paramoer “Competition policy in SA and small business: A review of enforcement cases” (2009) 8.

¹³⁷³ *Nationwide Poles* (2005) para 102.

¹³⁷⁴ *Nationwide Poles* (2005) para 103.

¹³⁷⁵ *Sasol Oil v Nationwide Poles* (2006) 37.

¹³⁷⁶ See Chapter Four below, 4.1.4.2.4 Chicago School (From about 1970).

competition law. This is discussed further in Chapter Four below.¹³⁷⁷ In this regard, Lewis criticised the CAC for adopting orthodox approaches by largely following US scholars and prosecutors without considering the national imperatives set out in the Competition Act.¹³⁷⁸

The position is now changing with the introduction of section 9(1)(a)(ii) by the 2018 amendments, which brings a public interest consideration and fairness as the basis on which a price discrimination complaint may be brought. It is submitted that “fairness” may be a threshold to assess an infringement of the price discrimination provision because, as mentioned above, the test used in section 8(4) to determine “unfair prices or other trading conditions” is described as prices that impede the ability of SMEs to participate effectively. This is the same threshold set out in section 9(1)(a)(ii), namely the “likelihood” of impeding the ability of SMEs to participate effectively.

The section below will now consider some cases which implicated SMEs either as the perpetrators or the victims of prohibited conduct.

3.6.3 Case law on restrictive horizontal practices (cartel conduct)

3.6.3.1 *MacNeil Agencies (Pty) Ltd v Competition Commission*

In *MacNeil Agencies (Pty) Ltd v Competition Commission*,¹³⁷⁹ MacNeil Agencies (Pty) Ltd (“MacNeil”) (although not necessarily an SME as defined under section 1 of the Competition Act but a company with an extremely small market share)¹³⁸⁰ appealed the Tribunal’s findings that it engaged in cartel conduct with its competitors in the market for the manufacture and supply of polyvinylchloride (PVC) and high-density polyethylene (HDPE) pipe products in South Africa (“pipe products market”).¹³⁸¹

MacNeil and its competitors had allegedly fixed the prices and allocated tenders in the pipe products market. It was alleged that the collusion started before 1998 and

¹³⁷⁷ Chapter Four, 4.1.4.2.4 Chicago School (From about 1970).

¹³⁷⁸ Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 180.

¹³⁷⁹ *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] 2 CPLR 416 (CAC) (hereafter *MacNeil Agencies v Competition Commission* (2013)).

¹³⁸⁰ MacNeil was not necessarily an SME as defined under section 1 of the Competition Act read with Notice in terms of section 1 of the Competition Act, 1998 (Act no. 89 of 1998), GN987 in GG42578 of 12 July 2019. See above 2.2 Definition of SMEs. But MacNeil was described in the judgment as “a newcomer to the market with an extremely small market share.” See paras 32, 71, 81 and 88.

¹³⁸¹ *MacNeil Agencies v Competition Commission* (2013) para 2.

continued until 2007.¹³⁸² Following the Commission's investigation into the alleged conduct, DPI (Pty) Ltd ("DPI") was granted conditional leniency, whilst Marley Pipe Systems (Pty) Ltd ("Marley"), Swan Plastics ("Swan") and Flo-Tek Pipes & Irrigation (Pty) Ltd ("Flo-Tek") settled their cases with the Commission.¹³⁸³ MacNeil, Andrag (Pty) Ltd and Gazelle Plastics (Pty) Ltd denied their participation in the collusive conduct.¹³⁸⁴ Petzetakis and Amitech admitted having participated in the collusive conduct, but argued that the extent of their participation did not justify a high penalty.¹³⁸⁵

The Tribunal found that MacNeil participated in the cartel conduct and imposed on it an administrative penalty of R2 Million.¹³⁸⁶ Andrag was also found to have contravened the Act, but no penalty was imposed on it. Gazelle was found not guilty.¹³⁸⁷ Amitech and Petzetakis were fined R11,1 million and R9,92 million respectively.¹³⁸⁸

MacNeil appealed the Tribunal's findings on the merits as well as the quantum of the administrative penalty imposed on it.¹³⁸⁹

The evidence showed that the cartel was initially constituted of DPI, Petzetakis and Marley.¹³⁹⁰ In 2006, MacNeil entered the PVC piping market in the Western Cape.¹³⁹¹ Subsequently, MacNeil joined the PVC piping cartel and colluded in price-fixing with DPI, Petzetakis and Flo-Tek.¹³⁹² It was alleged that MacNeil attended several meetings in 2007 where cartel activity was discussed.¹³⁹³ MacNeil contended that it attended the collusive meetings because, as a new player in the PVC piping market, it wanted to meet the other manufacturers.¹³⁹⁴ It also argued that its participation in the meetings was "passive".¹³⁹⁵

¹³⁸² *MacNeil Agencies v Competition Commission* (2013) para 2.

¹³⁸³ *MacNeil Agencies v Competition Commission* (2013) para 3.

¹³⁸⁴ *MacNeil Agencies v Competition Commission* (2013) para 4.

¹³⁸⁵ *MacNeil Agencies v Competition Commission* (2013) para 4.

¹³⁸⁶ *MacNeil Agencies v Competition Commission* (2013) para 4.

¹³⁸⁷ *MacNeil Agencies v Competition Commission* (2013) para 4.

¹³⁸⁸ *MacNeil Agencies v Competition Commission* (2013) para 4.

¹³⁸⁹ *MacNeil Agencies v Competition Commission* (2013) para 5.

¹³⁹⁰ *MacNeil Agencies v Competition Commission* (2013) para 6.

¹³⁹¹ *MacNeil Agencies v Competition Commission* (2013) para 6.

¹³⁹² *MacNeil Agencies v Competition Commission* (2013) para 6.

¹³⁹³ *MacNeil Agencies v Competition Commission* (2013) paras 8, 11 and 19.

¹³⁹⁴ *MacNeil Agencies v Competition Commission* (2013) para 34.

¹³⁹⁵ *MacNeil Agencies v Competition Commission* (2013) para 34.

The CAC found that MacNeil did not give any “external manifestation” of its disagreement with the collusive arrangement.¹³⁹⁶

MacNeil admitted that it attended a meeting in late 2007, in which it refused to be confrontational at DPI’s remarks that MacNeil’s prices were “too cheap”.¹³⁹⁷ MacNeil contended that it did not agree with DPI’s proposal of a “suggested” price list and discount structure, the keeping of a tender register and allocation of tenders.¹³⁹⁸ MacNeil also contended that it did not implement DPI’s proposals.¹³⁹⁹ MacNeil further argued that DPI’s proposals were DPI trying to impose its requirements on MacNeil, and that it did not agree with them.¹⁴⁰⁰

After assessing DPI’s evidence, the CAC concluded that, at the 2007 meetings, the respondents, including MacNeil, had agreed with the proposed prices and discount structures.¹⁴⁰¹

On appeal, the CAC had to decide on whether there was “consensus” to fix prices at the 2007 meetings that MacNeil attended.¹⁴⁰² The CAC endorsed the passage in *Aalborg Portland A/S v Commission of the European Communities*,¹⁴⁰³ that the Tribunal also relied on: “(82) *The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.*”¹⁴⁰⁴

The CAC also confirmed a cartel member’s duty to publicly distance itself, as enunciated in the EU’s decision in *DKKK Kaisha & Others v European Commission*:¹⁴⁰⁵ “*A party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its*

¹³⁹⁶ *MacNeil Agencies v Competition Commission* (2013) para 36.

¹³⁹⁷ *MacNeil Agencies v Competition Commission* (2013) para 39.

¹³⁹⁸ *MacNeil Agencies v Competition Commission* (2013) para 39.

¹³⁹⁹ *MacNeil Agencies v Competition Commission* (2013) para 39.

¹⁴⁰⁰ *MacNeil Agencies v Competition Commission* (2013) para 40.

¹⁴⁰¹ *MacNeil Agencies v Competition Commission* (2013) para 49.

¹⁴⁰² *MacNeil Agencies v Competition Commission* (2013) para 57.

¹⁴⁰³ *Aalborg Portland A/S v Commission of the European Communities* [2005] 4 CMLR 251.

¹⁴⁰⁴ *MacNeil Agencies v Competition Commission* (2013) para 58.

¹⁴⁰⁵ *Denki Kagaku Kogyo Kabushiki Kaisha v European Commission* (Case T-83/08) judgment of the General Court (7th Chamber) 2 February 2012. Available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=119005&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4210682> (accessed on 29 October 2023).

discovery...".¹⁴⁰⁶ The CAC accepted the US and EU principles that passive attendance without public distancing, as amounting to participation in the impugned conduct, is recognised in the South African law.¹⁴⁰⁷

It subsequently found that, on a balance of probabilities, the evidence indicated that MacNeil, by not publicly distancing itself at the 2007 meetings, had created the impression to the other cartel members that it was agreeing to the collusive agreement.¹⁴⁰⁸

Regarding the penalty, the CAC found that a fine of R2 Million was too excessive, given that MacNeil was a new entrant with a small market share. Further, MacNeil priced aggressively and did not implement the discussed prices.¹⁴⁰⁹ The CAC, after evaluating MacNeil's mitigating circumstances, consequently decided to reduce the penalty to R1,25 million.¹⁴¹⁰

3.6.3.1.1 Relevance of this case for the thesis

MacNeil was a small/medium business in the construction sector (pipe market). It was invited to join the cartel when it entered the market of PVC piping. To use the parlance of *Southern Pipeline and Another v the Competition Commission*,¹⁴¹¹ it can be said that MacNeil, as a small player, was "*bullied by a large player*"¹⁴¹² to join the cartel when it entered the PVC piping market. In *Southern Pipeline*, the Tribunal observed that "*a small player that has been bullied by a large player who is also the leader of the cartel cannot be treated in a same way as small player who may hide behind its relatively small size when faced with sanction but whom with knowledge of unlawfulness and with full comprehension, was an active participant of cartel arrangements.*"¹⁴¹³ This seems to happen to small businesses who are novices in the market and are lured by other players in the market to engage in illegal conduct to keep the market as it is. Small businesses who enter a market are often viewed as disruptors, and incumbent firms may ask them to play "by the rules of the game", if

¹⁴⁰⁶ *MacNeil Agencies v Competition Commission* (2013) para 59.

¹⁴⁰⁷ *MacNeil Agencies v Competition Commission* (2013) para 63.

¹⁴⁰⁸ *MacNeil Agencies v Competition Commission* (2013) para 70.

¹⁴⁰⁹ *MacNeil Agencies v Competition Commission* (2013) para 88.

¹⁴¹⁰ *MacNeil Agencies v Competition Commission* (2013) para 88.

¹⁴¹¹ *Competition Commission v Southern Pipeline Contractors and another* [2015] JOL 33964 (CT).

¹⁴¹² *Competition Commission v Southern Pipeline Contractors and another* para 43. Own emphasis. In *MacNeil Agencies v Competition Commission* (2013) paras 6, 15 and 31: DPI was one of the leaders of the cartel.

¹⁴¹³ *The Competition Commission v Southern Pipeline Contractors* para 43.

those small businesses want to remain in the market. This case also shows that the CAC applied the law as is, without a special consideration that MacNeil was a small player, in that as far as the merits are concerned, the CAC applied the law by the letter. MacNeil was not exonerated by its ignorance of the law or for having been “coerced” to passively participate in cartel conduct. The law, as far as the merits were concerned, was applied to MacNeil, irrespective of its status as a small firm. There was no special test or special consideration applied to MacNeil as a small player to determine the merits of this case. As pointed out, the status of MacNeil and its passive participation in the cartel were somewhat considered in the determination of the penalty.

3.6.3.2 *Omnico (Pty) Ltd and another v Competition Commission and Others*

In *Omnico (Pty) Ltd and another v Competition Commission and Others*,¹⁴¹⁴ Omnico (Pty) Ltd (“Omnico”) and Coolheat Cycle Agencies (Pty) Ltd (“Coolheat”) were SMEs¹⁴¹⁵ that were accused of having participated in cartel activity in the bicycle market. Omnico and Coolheat were amongst the wholesalers who attended a meeting of the bicycle industry on 10 September 2008 (“the September meeting”),¹⁴¹⁶ where the way in which bicycle retailers could improve their margins was discussed.¹⁴¹⁷ The retailers and wholesalers had agreed that the wholesalers should increase the recommended resale price (RRP) for bicycles and accessories to enable retailers to increase their margins.¹⁴¹⁸ Omnico and Coolheat contended that they did not actively participate in the collusive discussions,¹⁴¹⁹ and that the meetings did not amount to

¹⁴¹⁴ *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC) (hereafter *Omnico (Pty) Ltd and another v Competition Commission and others* (2016)).

¹⁴¹⁵ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 69. Omnico’s 2009 entire turnover is reported to amount to R92 548 238. 2009 was the year in which the collusive meetings took place. In terms of the *Notice in terms of section 1 of the Competition Act, 1998 (Act no. 89 of 1998)*, GN987 in GG42578 of 12 July 2019, a firm is a medium-sized enterprise in the wholesale sector if its turnover is equal or less than R220 Million. A firm is a small enterprise in the wholesale sector if its turnover is equal or less than R80 Million. Coolheat’s turnover for the financial year ended June 2014 was R71 983 454. Omnico would then be regarded as a medium-sized enterprise, whilst Coolheat would be regarded as a small enterprise in terms of Ministerial Notice above.

¹⁴¹⁶ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 3. The collusive meeting took place on 10 September 2008.

¹⁴¹⁷ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 2.

¹⁴¹⁸ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 2.

¹⁴¹⁹ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 3.

cartel agreement.¹⁴²⁰ The Tribunal, however, found that they participated in collusive conduct in contravention of section 4(1)(b)(i) of the Act.¹⁴²¹

Omnico and Coolheat subsequently appealed the Tribunal's decision to the CAC. The issue before the CAC was whether Omnico and Coolheat's "silent participation" at a meeting where cartel activity was discussed amounted to collusive conduct in contravention of section 4(1)(b)(i).¹⁴²²

Omnico and Coolheat contended that "silent participation" could not be regarded as a test to find that collusion had occurred.¹⁴²³ They also argued that it had to be proven that the other competitors regarded any discussion as a binding agreement.¹⁴²⁴ They further contended that the penalty that the Tribunal imposed on them was not appropriate.¹⁴²⁵

The CAC found that consensus had been reached amongst the wholesalers and retailers on the increase of the recommended retail price (RRP) on certain bicycles and bicycle accessories by wholesalers, at the September 2008 meeting.¹⁴²⁶ The CAC also found that neither Omnico nor Coolheat publicly distanced themselves from the collusive agreement to increase the RRP.¹⁴²⁷ They had also not proven that the subsequent increased RRP was the product of an independent decision.¹⁴²⁸ In confirming that Omnico and Coolheat had participated in the cartel, the CAC remarked that "*silence within a specialised context can never equal non-participation*".¹⁴²⁹ The CAC found that, just like in the EU, there is a duty to speak up and to publicly distance oneself from the anti-competitive conduct.¹⁴³⁰ It stated that: "*there is a duty to speak or to report to authorities or publicly distance oneself from any uncompetitive behaviour*."¹⁴³¹ The CAC further confirmed that the fact that a firm did not abide by the collusive agreement does not mean that it was exonerated if it did not publicly distance

¹⁴²⁰ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 11.

¹⁴²¹ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 67.

¹⁴²² *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 1.

¹⁴²³ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 17.

¹⁴²⁴ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 18.

¹⁴²⁵ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 19.

¹⁴²⁶ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) paras 2 and 47.

¹⁴²⁷ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 57.

¹⁴²⁸ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 57.

¹⁴²⁹ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 59.

¹⁴³⁰ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 61.

¹⁴³¹ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 61.

itself from the conduct.¹⁴³² This is because by not publicly distancing itself, the firm created the impression to the other cartel members that it agreed with what was discussed and would comply with the collusive agreement.¹⁴³³

The CAC then found that both Omnico and Coolheat failed to (i) distance themselves from the collusive agreement; (ii) indicate to the other cartel participants that they did not agree and would neither respect the agreement reached at the meeting to increase the RRP, nor increase the RRP, as agreed; and (iii) adduce evidence showing that their increase of the RRP on 1 October 2008 was the product of an independent decision rather than compliance with the anti-competitive agreement.¹⁴³⁴ The CAC thus confirmed that the respondents had contravened section 4(1)(b)(i) of the Act, as found by the Tribunal.

The CAC applied the *Aveng* 6-step methodology to determine an appropriate administrative penalty.¹⁴³⁵ Omnico was fined approximately R1 million,¹⁴³⁶ whilst Coolheat was fined approximately R4 million.¹⁴³⁷

3.6.3.2.1 Relevance of this case for this thesis

This case is important not only for small businesses, but it confirms what a collusive agreement may amount to. It further confirms competition jurisprudence that passive attendance or participation in a collusive meeting would still be regarded as participation in the impugned collusive agreement.¹⁴³⁸ Passive participation in a cartel does not exonerate a firm from liability in respect of cartel conduct. The case also confirmed the principle that parties must publicly distance themselves when voicing to other cartel members their disaccord in being part of a cartel.

¹⁴³² *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 61.

¹⁴³³ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 61.

¹⁴³⁴ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 67

¹⁴³⁵ This is the methodology that the Tribunal set out in *Competition Commission v. Aveng (Africa) Limited t/a Steeleedale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09. The methodology consists of six steps to calculate an administrative penalty in terms of section 59 of the Competition Act. See above: 3.5.6.1 Guidelines for the determination of administrative penalties for prohibited practices.

¹⁴³⁶ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 77. Omnico was fined R1 925 366.

¹⁴³⁷ *Omnico (Pty) Ltd and another v Competition Commission and others* (2016) para 80. Coolheat was fined R R4 250 612.

¹⁴³⁸ See above 3.3 The History of South African Competition Legislation; See also 3.5.3.1.2 SMEs – victims of prohibited horizontal practices.

The case is thus significantly relevant in the analysis of the treatment of SMEs under the Competition Act, in that it shows that SMEs' lack of knowledge of competition law often leads to them infringing the law. It also shows that SMEs often tend to infringe competition law when they are part of an association or group of other firms and just "follow the masses" without being aware or realising the negative consequences or repercussions of their conduct. The trend seems to be attributable to SMEs' lack of knowledge of competition law, SMEs being influenced by large firms to engage in cartel conduct or SMEs blindly following other firms in the industry.

3.6.3.3 *Competition Commission v Stanley's Removals CC*

In *Competition Commission v Stanley's Removals CC*,¹⁴³⁹ Stanley's Removals CC ("Stanley") and Cape Express Removals (Pty) Ltd ("Cape Express"),¹⁴⁴⁰ who competed in the market for furniture removal services,¹⁴⁴¹ were accused of having engaged in collusive tendering or bid rigging in ten instances for about four years in contravention of section 4(1)(b)(iii) of the Competition Act.¹⁴⁴² Stanley and Cape Express colluded through "cover pricing. "Cover pricing is a form of bid rigging arrangement in which the parties agree that the party who wishes to win the tender (the intended winner) would give to its competitors, who do not intend to win (the losers), an inflated price at which they should tender so that the intended winner would win the tender.¹⁴⁴³ The objective of the "cover price" is thus to ensure that the intended winner wins the tender. The cartel operates on the basis that each member gets to be a winner of some tenders in return for being a loser in respect of others.

During the Tribunal's proceedings, Stanley accepted that it had engaged in collusive tendering in respect of 8 instances and that it was the winner of the tender in 5 of these

¹⁴³⁹ *Competition Commission v Stanley's Removals CC* [2017] 2 CPLR 505 (CAC) (hereafter *Competition Commission v Stanley's Removals CC* (2017)) para 6, Stanley's turnover was R15 757 152 < R140 Million in the transport industry. See also para 23, in 2012, Stanley's total turnover was R12 835 572 < R140 Million. Stanley was therefore a small business.

¹⁴⁴⁰ Cape Express had concluded a settlement agreement with the Commission – See *Competition Commission v Stanley's Removals CC* (2017) para 13.

¹⁴⁴¹ *Competition Commission v Stanley's Removals CC* (2017) para 1.

¹⁴⁴² *Competition Commission v Stanley's Removals CC* (2017) para 2-3.

¹⁴⁴³ *Competition Commission v Stanley's Removals CC* (2017) para 3, the CAC describes "cover pricing" as "whereby a firm who wishes to win a tender would pre-provide a price to a competitor firm who did not wish to win that tender, enabling the latter, disinterested firm to submit an inflated tender, so that the former, interested firm would walk the tender."

instances.¹⁴⁴⁴ The Tribunal imposed an administrative penalty of R450 000 on Stanley.¹⁴⁴⁵

The Commission appealed the Tribunal's decision on the quantum of the penalty.¹⁴⁴⁶ In particular, it challenged the Tribunal's decision not to apply the six-step methodology developed in the *Aveng* case.¹⁴⁴⁷ The Commission contended that applying the *Aveng* methodology would have resulted in a penalty of R1 575 715,20 on Stanley for each of the eight instances of cover pricing, namely a total penalty of R12 605 721,60.¹⁴⁴⁸

Notably, when the matter was heard before the Tribunal, the Tribunal held that there was no scientific approach to determining the penalty but that the overriding principle was "fairness and proportionality."¹⁴⁴⁹ This was because there was a dispute on whether the Commission's proposed penalty was appropriate.¹⁴⁵⁰ The Tribunal previously highlighted the principle of "fairness and proportionality" in *Competition Commission v Isipani Construction*,¹⁴⁵¹ which followed the CAC's finding in *Competition Commission v Southern Pipelines*.¹⁴⁵² In *Southern Pipelines*, the CAC held that the severity of a penalty should be proportional to the offending party's wrongdoing, the nature of the offence and its impact on the South African economy and consumers.¹⁴⁵³ The CAC confirmed that a penalty should not only aim to deter people from engaging in a prohibited practice but also be fair to the offending party.¹⁴⁵⁴

¹⁴⁴⁴ *Competition Commission v Stanley's Removals CC* (2017) para 4.

¹⁴⁴⁵ *Competition Commission v Stanley's Removals CC* (2017) para 5.

¹⁴⁴⁶ *Competition Commission v Stanley's Removals CC* (2017) para 6.

¹⁴⁴⁷ *Competition Commission v Aveng (Africa) Limited t/a Steeleedale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd, and BRC Mesh Reinforcing (Pty) Ltd*. See above: 3.5.6.1 Guidelines for the determination of administrative penalties for prohibited practices.

¹⁴⁴⁸ The Tribunal noted that after applying the 6 step-methodology, the Commission's calculations led to a proposed penalty of R1 575 715,20 for each of the eight contraventions, totalling R12 605 721,60. *Competition Commission v Stanley's Removals CC* (2017) para 6 and 21.

¹⁴⁴⁹ *Competition Commission v Stanley's Removals CC* (2017) para 22. See also *Competition Commission v Stanley's Removals CC and another* [2016] 2 CPLR 531 (CT) para 22.

¹⁴⁵⁰ *Competition Commission v Stanley's* (2016) (CT) para 23.

¹⁴⁵¹ *Competition Commission v Isipani Construction (Pty) Ltd and another* [2016] 2 CPLR 516 (CT) para 20, where the Tribunal said "However, we have the discretion based on the facts of each case in the interest of fairness and the doctrine of proportionality to decide how to levy an appropriate administrative penalty pursuant to section 59(3) of the Act." (own emphasis)

¹⁴⁵² *Southern Pipeline Contractors and another v Competition Commission* [2011] 2 CPLR 239 (CAC).

¹⁴⁵³ *Southern Pipeline* (2011) CAC para 9.

¹⁴⁵⁴ *Southern Pipeline* (2011) CAC para 9.

It should not put the offending party out of business.¹⁴⁵⁵ This is the principle that the Tribunal followed.

In determining a penalty of R450 000, the Tribunal compared Stanley's involvement in the eight instances of collusion to the numerous instances in which the other furniture removal cartelists participated.¹⁴⁵⁶ The Tribunal found that Stanley had been involved in the lowest number of instances, namely eight.¹⁴⁵⁷ The Tribunal also considered the administrative penalties on which the other contravening firms had settled.¹⁴⁵⁸ For example, involvement in 548 instances of collusion attracted a penalty of 10% of the turnover and a penalty of R454 127.¹⁴⁵⁹

In assessing the matter, the CAC reiterated its previous decisions that it can only interfere with the Tribunal's exercise of a discretion, if "*the discretion was exercised capriciously or upon wrong principle, or where it has not brought an unbiased judgment to bear on the question, or where it has not acted for substantial reasons.*"¹⁴⁶⁰ The CAC remarked that it has limited power in interfering with the Tribunal's decision regarding a penalty, and it could only do so if there was "*some misdirection, or fundamental error in the methodology of arriving at the decision*".¹⁴⁶¹ The CAC, however, found that even if the penalty imposed was fair and proportionate, it could still be rejected, if the exercise of the discretion was erroneous.¹⁴⁶² It subsequently analysed the Tribunal's reasoning in arriving at the penalty to determine whether the exercise of the discretion was capricious or biased, or based on wrong principles.¹⁴⁶³

It could, however, not find any capricious or biased exercise of the Tribunal's discretion in determining the penalty.¹⁴⁶⁴ It found that the Tribunal had considered all of the

¹⁴⁵⁵ *Southern Pipeline* (2011) CAC para 9.

¹⁴⁵⁶ *Competition Commission v Stanley's Removals CC* (2017) para 15.

¹⁴⁵⁷ *Competition Commission v Stanley's Removals CC* (2017) para 15 and 24.

Furniture removal firms, who had settled with the Commission, were reported to have been involved in numerous instances of collusion and to have paid the following fines: involvement in 12 instances of collusion was settled on 5% of turnover, R150 582; 24 instances of collusion, 5% of turnover, R188 064; 59 instances of collusion, 7% of turnover, R607 492; 113 instances of collusion, 8% of turnover, R249 616; 192 instances of collusion, 8% of turnover, R159 205; 548 instances of collusion, 10% of turnover, R454 127; 1774 instances of collusion, 10% of turnover, R645 710; and 3487 instances of collusion, 10% of turnover, R4 273 060.

¹⁴⁵⁸ *Competition Commission v Stanley's Removals CC* (2017) para 15 and 24.

¹⁴⁵⁹ *Competition Commission v Stanley's Removals CC* (2017) para 24.

¹⁴⁶⁰ *Competition Commission v Stanley's Removals CC* (2017) para 25.

¹⁴⁶¹ *Competition Commission v Stanley's Removals CC* (2017) para 30.

¹⁴⁶² *Competition Commission v Stanley's Removals CC* (2017) para 31.

¹⁴⁶³ *Competition Commission v Stanley's Removals CC* (2017) para 32.

¹⁴⁶⁴ *Competition Commission v Stanley's Removals CC* (2017) para 46.

section 59(3) factors and did not exercise its discretion capriciously, or with bias or applying wrong principles.¹⁴⁶⁵ The CAC also approved the Tribunal's reliance on fairness and proportionality as the overriding principles in determining a penalty.¹⁴⁶⁶ As part of the fairness consideration, the Tribunal had found that a higher penalty would have crippled Stanley.¹⁴⁶⁷ Application of the Commission's guidelines or the 6-step *Aveng* methodology was considered inappropriate in the circumstances.¹⁴⁶⁸ The CAC also accepted the Tribunal's findings that applying the *Aveng* 6-step methodology would have resulted in a high discrepancy between what Stanley was proposing (a very low fine) and what the Commission had proposed (which would have pushed Stanley out of business).¹⁴⁶⁹ The CAC, therefore, found that the Tribunal's reasons for not applying the *Aveng* 6-step methodology were not capricious, biased or based on wrong principles.¹⁴⁷⁰ This case suggests that when applying the 6-step methodology, it is important to consider that imposing heavy fines could drive SMEs out of the market. Nevertheless, the Commission's *Guidelines for the determination of administrative penalties for prohibited practices (2015)* cater for the inability to pay a fine that could push a firm out of the market.¹⁴⁷¹ As discussed above, the guidelines provide for settlement discounts, where appropriate, and for a firm's inability to pay, which may call for favourable payment terms.¹⁴⁷²

The CAC approved the Tribunal's approach of using settlements with the other parties as "*useful in determining a yardstick for settling the level of a penalty . . .*"¹⁴⁷³ The CAC, however, recognised that this should not underestimate the "*carrot and stick principle*", in that parties who approach the Commission to settle the matter early

¹⁴⁶⁵ *Competition Commission v Stanley's Removals CC* (2017) para 46.

¹⁴⁶⁶ *Competition Commission v Stanley's Removals CC* (2017) para 47.

¹⁴⁶⁷ *Competition Commission v Stanley's Removals CC* (2017) para 48.

¹⁴⁶⁸ This is the methodology that the Tribunal set out in *Competition Commission v. Aveng (Africa) Limited t/a Steeleedale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09. The methodology consists of six steps to calculate an administrative penalty in terms of section 59 of the Competition Act. See above: 3.5.6.1 Guidelines for the determination of administrative penalties for prohibited practices.

¹⁴⁶⁹ *Competition Commission v Stanley's Removals CC* (2017) para 50.

¹⁴⁷⁰ *Competition Commission v Stanley's Removals CC* (2017) para 58.

¹⁴⁷¹ See above, 3.5.6.1 Guidelines for the Determination of Administrative Penalties for Prohibited Practices (2015) paras 7.2.

¹⁴⁷² Guidelines for the determination of administrative penalties for prohibited practices (2015) paras 5.2 & 7.4.

¹⁴⁷³ *Competition Commission v Stanley's Removals CC* (2017) para 59.

should obtain a lenient fine, whilst those who delay should face the consequences.¹⁴⁷⁴ But due regard must be given to fairness and proportionality.¹⁴⁷⁵

The CAC thus dismissed the Commission's appeal and found that the Tribunal's exercise of its discretion to impose a penalty of R450 000 on Stanley could not be faulted.¹⁴⁷⁶

3.6.3.3.1 Relevance of this case for this thesis

Although the status of Stanley as a small firm was neither considered at the Tribunal nor on appeal (on the merits of the case), this case merely illustrates the CAC's decision on the administrative penalty imposed, where an SME was involved. Notably, the size of the firm as a small firm did not seem to have been considered at the Tribunal or the CAC in determining the penalty,¹⁴⁷⁷ as no reference was made to its size being considered in such determination. However, the decision reiterates the overriding principles of "proportionality and fairness" when determining a penalty. Arguably, "proportionality" would mean having regard to the size of the firm, the size of the penalty and the fact that a too large administrative penalty could drive an SME out of the market. "Fairness" is a concept now considered under the amended provisions of the Competition Act that deal with SMEs, specifically section 8(4), discussed above.¹⁴⁷⁸ As mentioned above,¹⁴⁷⁹ "fairness" may be determined by considering

¹⁴⁷⁴ *Competition Commission v Stanley's Removals CC* (2017) para 60.

¹⁴⁷⁵ *Competition Commission v Stanley's Removals CC* (2017) para 60.

¹⁴⁷⁶ *Competition Commission v Stanley's Removals CC* (2017) para 61.

¹⁴⁷⁷ The Tribunal's predominant consideration was "fairness and proportionality." The Tribunal said in para 26: "*While we have no difficulty with the carrot and stick principle applied by the Commission in settlement negotiations, it cannot be without regard to fairness and proportionality.*" In para 28 and 29, the Tribunal added: "*In our view, neither the Commission's guidelines nor the Aveng methodology serves as an appropriate template to come to an appropriate and proportional penalty, on the facts of this case. The latter is appropriate in circumstances of a long standing and on-going overarching agreement over an extended period of time. While the Commission's guidelines deal with once-off bid-rigging, Stanley's conduct does not entirely fit this category either. This is because the bid-rigging was not once-off but recurred over a period of four years (with no evidence, however, that it formed part of a broader single, overarching conspiracy). For that reason, we have decided the penalty on the facts of this case, taking into account proportionality and fairness.*" [2016] 1 CPLR 531 (CT), 537-538, paras 28 and 29.

¹⁴⁷⁸ See above 3.5.3.3.1 Section 8 – Abuse of dominance.

¹⁴⁷⁹ *Ibid.* See Competition Amendment Bill, 2018 (B23B-2018), Memorandum on the Objects of the Competition Amendment Bill, 2018, available at https://juta.co.za/media/filestore/2018/10/B23B_2018.pdf (accessed on 18 September 2021) 26, para 3.3.8.

whether a certain conduct impede the ability of SMEs to participate effectively in the market.¹⁴⁸⁰

3.6.3.4 *A'Africa Pest Prevention CC and another v Competition Commission of South Africa*

In *A'Africa Pest Prevention CC and another v Competition Commission of South Africa*,¹⁴⁸¹ A'Africa Pest Prevention CC ("A'Africa") and Mosebetsi Mmoho Professional Services CC ("Mosebetsi") (the respondents/appellants)¹⁴⁸² were small close corporations conducting business in the pest industry.¹⁴⁸³ They were accused of having engaged in price fixing and collusive tendering in contravention of section 4(1)(b)(i) and (ii) of the Competition Act.¹⁴⁸⁴ It was alleged that they had colluded on a tender for fumigation services of the Hertzogville Magistrates' Office for the Department of Public Works ("the Department").¹⁴⁸⁵ A'Africa and Mosebetsi both quoted the Department an amount of R 2 640 for fumigation services.¹⁴⁸⁶ They submitted identical prices for the tender and their tender forms were completed and signed by the same person.¹⁴⁸⁷

The Tribunal found that they had contravened section 4(1)(b). A'Africa and Mosebetsi contended that: (1) they were part of a single economic entity; (2) properly characterised, their conduct could not be regarded as a contravention of section 4(1)(b)(i) and (iii); and (3) they were not in a horizontal relationship, but in a vertical relationship.¹⁴⁸⁸

The issues before the CAC were: (1) whether the Tribunal had properly interpreted section 4(5) of the Competition Act,¹⁴⁸⁹ (2) whether the parties were in a horizontal

¹⁴⁸⁰ Own emphasis.

¹⁴⁸¹ *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* [2019] 1 CPLR 122 (CAC) (hereafter *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019)).

¹⁴⁸² A'Africa and Mosebetsi were both the Respondents when the matter was before the Tribunal, and later became the Appellants when they appealed the matter to the CAC.

¹⁴⁸³ *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 26.

¹⁴⁸⁴ *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* para (2019) 5.

¹⁴⁸⁵ *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 5.

¹⁴⁸⁶ *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 5.

¹⁴⁸⁷ *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 15.

¹⁴⁸⁸ *A'Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 19.

¹⁴⁸⁹ Section 4(5) of the Competition ACT states: "(5) The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by— (a) a company, its wholly owned

relationship; and (3) whether their conduct had properly been characterised.¹⁴⁹⁰ In other words, the CAC considered whether the respondents were part of a single economic entity or a structure similar to that of a holding company and a wholly-owned subsidiary contemplated in section 4(5),¹⁴⁹¹ and whether the Tribunal had properly characterised the conduct of the respondents.¹⁴⁹²

On the issue of whether the respondents constituted a single economic entity, after considering the US and EU jurisprudence,¹⁴⁹³ the wording of section 4(5) and the relevant provisions on the structure of a holding company and wholly-owned subsidiary,¹⁴⁹⁴ the CAC concluded that the A’Africa and Mosebetsi were not a single economic entity as contemplated in section 4(5).¹⁴⁹⁵ On the characterisation issue,¹⁴⁹⁶ the CAC highlighted the principle that individuals are the “actual role players” behind the firms accused of engaging in a prohibited practice.¹⁴⁹⁷ It, accordingly, found that Ms Labuschagne, the person who had completed the quotation/tender forms for both companies and had no colluding partner, could not have colluded with herself.¹⁴⁹⁸

The CAC held that A’Africa and Mosebetsi did not contravene section 4(1)(b) and set aside the Tribunal’s decision.

3.6.3.4.1 Relevance of this case for this thesis

This is another illustration of an alleged collusive tendering case that involved two small firms. Some of the pertinent issues that the adjudicators are grappling with, such as “single economic entity” and “characterisation”, were interpreted without any

subsidiary as contemplated in section 1 (5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or (b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a)."

¹⁴⁹⁰ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 24.

¹⁴⁹¹ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 4.

¹⁴⁹² *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 19.

¹⁴⁹³ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) paras 27-32.

¹⁴⁹⁴ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) paras 34-61.

¹⁴⁹⁵ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 61.

¹⁴⁹⁶ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) paras 62-72.

¹⁴⁹⁷ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 72.

¹⁴⁹⁸ *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 72.

special consideration that the parties involved were SMEs. In this regard, the CAC remarked that “*While I question whether this is a proper test case, owing to the small amounts and sizes of the firms involved, it is true that this Court is yet to grapple with a case where the section 4(5)(b) exemption is raised as a defence to an alleged violation of section 4(1)(b).*”¹⁴⁹⁹ This confirms that whether the accused firm is a small or large firm, every player would face the force of the law, without any special consideration that the implicated firms were small players and could have acted out of ignorance of the law. In any event, the fact remains that they were not found to have contravened the Competition Act, *not because of their small size*, but because of the characterisation of the conduct concerned.

3.6.3.5 Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub (Pty) (Ltd)

In the *Stuttafords* case,¹⁵⁰⁰ the Tribunal found that the respondents, Stuttafords Van Lines Gauteng Hub (Pty) (Ltd) (“Stuttafords”) and its competitors, had contravened section 4(1)(b) of the Act, but that the opportunity to initiate a complaint in respect of the impugned conduct had “prescribed” in terms of section 67(1).¹⁵⁰¹ The Tribunal found that on 22 January 2014, Stuttaford and its competitors in the furniture removal market, had discussed the charging of electronic tolling (e-toll) at a meeting of the Northern Region of the Professional Movers Association (“Northern Region of the PMA”).¹⁵⁰² The Tribunal found that at this meeting the respondents had agreed to pass on the e-tolls by implementing a general “administration type of fee” that did not truly reflect the cost of the e-tolls.¹⁵⁰³ The Tribunal, however, further found that the impugned conduct had stopped three years before the Commission initiated its complaint against the respondents.¹⁵⁰⁴ According to the Tribunal, the Commission’s

¹⁴⁹⁹ Own emphasis. *A’Africa Pest Prevention CC and another v Competition Commission of South Africa* (2019) para 26.

¹⁵⁰⁰ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub (Pty) (Ltd)* [2020] 2 CPLR 548 (CAC) (hereafter *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020)).

¹⁵⁰¹ *Competition Commission v Stuttaford Van Lines Gauteng Hub (Pty) Ltd and others* [2019] 2 CPLR 589 (CT) paras 72-74; Section 67(1) of the Competition Act (before the 2018 amendments) stipulates that: “a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.”

¹⁵⁰² *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 1.

¹⁵⁰³ *Competition Commission v Stuttaford Van Lines Gauteng Hub (Pty) Ltd and others* [2019] 2 CPLR 589 (CT) paras 72-74 and 84; *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 22.

¹⁵⁰⁴ *Competition Commission v Stuttaford Van Lines Gauteng Hub (Pty) Ltd and others* [2019] 2 CPLR 589 (CT) para 112.

complaint had, therefore, prescribed in terms of section 67(1).¹⁵⁰⁵ The Commission appealed the Tribunal's finding on section 67(1), and the respondents cross-appealed the Tribunal's finding of a contravention of the Act.¹⁵⁰⁶ On appeal, the CAC dealt with the question of whether an agreement had been reached at the January 2014 meeting. The CAC did not consider the prescription issue as it found that there was no "agreement" within the meaning of section 4(1)(b), as explained below, thus no prohibited cartel conduct. Hence there was no need to consider whether the complaint had prescribed.¹⁵⁰⁷

The CAC found no agreement had been reached at the aforesaid meeting between the implicated firms as there was no consensus amongst the industry players on the cost of e-tolls.¹⁵⁰⁸ The CAC also found that given the significant differences between the respondents in terms of, *inter alia*, their size, areas of operation, fleet size, etc. "*the probabilities suggest that there could have been no consensus on the adoption of a common approach in relation to the recovery of e-toll costs.*"¹⁵⁰⁹ It inferred from the respondents' conduct, following the implementation of the e-toll, that no consensus was reached at the January meeting on how to recover the e-toll costs.¹⁵¹⁰ In this regard, the CAC found that the firms that elected to recover the e-toll costs from their customers did so independently of any of the January 2014 discussions.¹⁵¹¹ Consequently, the CAC found that the mere discussions on, or mention of, prices during the meeting, although unwise, was not sufficient to amount to a consensus.¹⁵¹² It held that what had to be established was that there was consensus among the parties to be bound by the understanding reached at the meeting but that such consensus was not established.¹⁵¹³

¹⁵⁰⁵ *Competition Commission v Stuttaford Van Lines Gauteng Hub (Pty) Ltd and others* [2019] 2 CPLR 589 (CT) para 112; *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 1.

¹⁵⁰⁶ See *Competition Commission v Stuttaford Van Lines Gauteng Hub (Pty) Ltd and others* [2019] 2 CPLR 589 (CT) paras 72-74 and 112; See also *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 1

¹⁵⁰⁷ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 24 and 56.

¹⁵⁰⁸ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 44.

¹⁵⁰⁹ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 46.

¹⁵¹⁰ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 48.

¹⁵¹¹ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 48.

¹⁵¹² *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 51.

¹⁵¹³ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 51.

Based on the evidence presented, the CAC found that the Tribunal erred in finding that there was an agreement between the furniture removal firms to fix prices in contravention of section 4(1)(b), in that there was no consensus between them to fix the e-toll cost.¹⁵¹⁴ Accordingly, the CAC dismissed the Commission's appeal on the prescription issue and upheld the respondents' cross-appeal that there was no breach of section 4(1)(b).

3.6.3.5.1 Relevance of this case to the thesis

This is another illustration of the court's (the CAC) application of the law in a case involving SMEs (furniture removal companies). There was, however, no special consideration of the size of the enterprises involved as their size was not a consideration in determining the merits of the case. The law applied according to the competition law jurisprudence on the finding of an "agreement", namely that there must be "*consensus that the parties regard as binding upon themselves and one another*".¹⁵¹⁵ The fact that it was SMEs that were involved in the alleged conduct did not result in a special consideration of their status or special treatment being afforded to them. But this case possibly also shows that firms, especially small firms, reach decisions without knowing or realising that they may contravene the Act. It may illustrate how SMEs may form part of trade associations, making decisions that may fall foul of the Competition Act, but without knowing that they may contravene the Act by being part of these types of discussions.

¹⁵¹⁴ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 57.

¹⁵¹⁵ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub* (2020) para 56. In *Netstar (Pty) Ltd and others v Competition Commission of South Africa and another* [2011] 1 CPLR 45 (CAC) para 25, the CAC held: "[A]n agreement arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus." See also *Reinforcing Mesh Solutions (Pty) Ltd and others v Competition Commission and others* [2013] 2 CPLR 455 (CAC) paras 18, 19, 30 and 31; *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] ZACC 3 para 56; *Novartis SA (Pty) Ltd and another v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 35; *Videx Wire Products (Pty) Ltd v Competition Commission* [2017] 2 CPLR 589 (CAC) para 14; *Competition Commission v Primedia (Pty) Ltd t/a Ster Kinekor Theatres* [2019] 1 CPLR 165 (CAC) para 38.

3.6.4 Case law on abuse of dominance (sec 8)

3.6.4.1 *Competition Commission of South Africa v Senwes Ltd*

This matter concerned Senwes Ltd's ("Senwes") conduct as a dominant player in the grain storage market.¹⁵¹⁶ Senwes, owner of concrete silos, was accused of abusing its dominant position by charging storage tariffs that excluded its competitors in the downstream market for grain trading.¹⁵¹⁷

The complaint against Senwes essentially revolved around a "differential" tariff that was charged by Senwes to farmers and traders from May 2003. The "differential" tariff was a "capped storage fee" that was initially offered to all customers of silos owners, irrespective of whether they were farmers or traders.¹⁵¹⁸ In terms of the "capped storage fee" offering, a daily storage fee would be charged for up to 100 days. Thereafter, Senwes would charge a capped fee "at the cost of 100 days of storage". At the end of that period, the farmer could store for free until the end of the season.¹⁵¹⁹ In May 2003, Senwes decided to offer this capped fee only to farmers who would store in Senwes' silos.¹⁵²⁰ This facility was no longer available to traders, who were also competing with Senwes on the supply of grains to millers.¹⁵²¹ The capped fee was referred to as the "differential" fee as it differentiated between farmers and traders.¹⁵²²

The Commission investigated the complaint against Senwes and decided to refer the matter to the Tribunal. The Commission's referral alleged that Senwes had engaged in an "inducement" and "margin squeeze" abuse.¹⁵²³ The inducement abuse entailed

¹⁵¹⁶ *Competition Commission of South Africa v Senwes Ltd* [2009] 1 CPLR 18 (CT) (hereafter *Competition Commission of South Africa v Senwes Ltd* (2009) para 1.

¹⁵¹⁷ *Competition Commission of South Africa v Senwes Ltd* (2009) para 1.

¹⁵¹⁸ *Competition Commission of South Africa v Senwes Ltd* (2009) para 31.

¹⁵¹⁹ *Competition Commission of South Africa v Senwes Ltd* (2009) para 30.

¹⁵²⁰ *Competition Commission of South Africa v Senwes Ltd* (2009) para 32.

¹⁵²¹ *Competition Commission of South Africa v Senwes Ltd* (2009) para 32.

¹⁵²² *Competition Commission of South Africa v Senwes Ltd* (2009) para 32.

¹⁵²³ *Competition Commission of South Africa v Senwes Ltd* para 42. "Inducement" in the context of competition law refers to a situation where a dominant firm induces, persuades or requires a customer or supplier not to deal with a competitor. This conduct is prohibited under section 8(1)(d)(i) of the Competition. In *Competition Commission of South Africa v Senwes Ltd* para 43, the Tribunal explained that "[T]he Commission alleges that the inducement abuse comes about because Senwes has induced farmers not to trade with trader rivals by making representations concerning storage costs. The inducement itself took different forms. In the first place it was alleged that the annual cap was only available to farmers if they sold to Senwes. If they sold to a third party after the period when the annual cap became operative, essentially after grain had been stored more than 100 days, the farmer would have to pay storage at the daily tariff for the full period. Thus if on day 150 a farmer elected to sell his grain to a trader other than Senwes, that farmer would pay 150 days storage costs, because by not selling to Senwes he would forfeit the entitlement to the annual cap. If, on the other hand, the farmer chose instead on day 150, to sell to Senwes he would be entitled to the annual cap and hence only be

Senwes inducing farmers not to trade with traders (who were also Senwes' competitors), by using the "capped storage fee".¹⁵²⁴ The Commission alleged that such conduct was in contravention of section 8(d)(i), 8(d)(iii) or 8(c).¹⁵²⁵ The Commission also alleged that the charging of a "differential" tariff to farmers, which tariff was not offered to traders, for long-term storage, amounted to price discrimination in contravention of section 9.¹⁵²⁶

It further alleged that the differential tariff amounted to a "margin squeeze" by an integrated, dominant Senwes in the upstream grain storage market, in that Senwes excluded its non-integrated competitors, the traders, in the trading market.¹⁵²⁷ The margin squeeze conduct was alleged to be in contravention of section 8(d) or 8(c) of the Competition Act.¹⁵²⁸

The Tribunal found that Senwes had more than 80% of the market share of the grain storage market in the areas surrounding Senwes silos ("the Senwes area"), and thus agreed with the Commission that Senwes was dominant in that market.¹⁵²⁹ Regarding the downstream market where the effects of the abuse were felt, the Tribunal agreed with the Commission that the downstream market was the market for the physical trading of grain.¹⁵³⁰ The Tribunal also confirmed that the market was national, but that the competitive advantage was local.¹⁵³¹ It was accepted that Senwes was not

liable to pay for 100 days storage. In addition the Commission alleges, even before the 100day period, farmers were told that if they sold to Senwes in they would receive a reduced storage charge and hence that Senwes could make them a more competitive offer for their grain even pre-cap if they sold to Senwes." In respect of "margin squeeze", see above 3.5.3.3.1 Section 8 - Abuse of dominance, in *Competition Commission of South Africa v Senwes Ltd* para 117, the Competition Tribunal found that a useful definition of a margin squeeze is to be found in the work of O'Donoghue and Padilla who define margin squeeze as involving: "... situations in which a vertically integrated dominant firm not only engages in selfsupply of an input used on a downstream market but also supplies independent third parties active on the downstream market, which are in competition with its own business." O'Donoghue and Padilla explain that the squeeze occurs when "... a vertically integrated firm with a dominant position in an upstream market prevents its nonvertically integrated downstream rivals from achieving an economically viable pricecost margin." O'Donoghue and Padilla *The Law and Economics of Article 82 EC* (2006) 303-304.

¹⁵²⁴ *Competition Commission of South Africa v Senwes Ltd* (2009) para 43.

¹⁵²⁵ *Competition Commission of South Africa v Senwes Ltd* (2009) para 44.

¹⁵²⁶ *Competition Commission of South Africa v Senwes Ltd* (2009) para 44.

¹⁵²⁷ *Competition Commission of South Africa v Senwes Ltd* (2009) para 45.

¹⁵²⁸ *Competition Commission of South Africa v Senwes Ltd* (2009) para 46.

¹⁵²⁹ *Competition Commission of South Africa v Senwes Ltd* (2009) paras 58, 59 and 61.

¹⁵³⁰ *Competition Commission of South Africa v Senwes Ltd* (2009) para 69.

¹⁵³¹ *Competition Commission of South Africa v Senwes Ltd* (2009) para 72.

dominant in the downstream market.¹⁵³² But, Senwes was leveraging its dominance in the grain storage market to exclude players in the downstream trading market.¹⁵³³

The Tribunal then examined the inducement- and margin squeeze abuses. Senwes rejected the accusations that it “*induced farmers not to trade with rival traders by denying the benefit of the capped storage to any farmer who sold his grain to a third party trader.*”¹⁵³⁴ However, during the hearing, witnesses testified that the annual cap benefit was not available to farmers who sold to third parties.¹⁵³⁵

The Tribunal recognised that the concept of margin squeeze was relatively new in the competition law jurisprudence. The Commission's case on the aspect of margin squeeze was summarised as: “*Senwes is a vertically integrated firm that supplies an essential input (storage), in a market in which it is dominant, to its downstream rivals (traders who trade in the physical market for grain) at price that prevents them (from) earning a viable price cost margin in the market for longterm storage (post 100 days) in the Senwes area.*”¹⁵³⁶

The Tribunal found that the margin squeeze conduct that Senwes was alleged to have engaged in, amounted to an exclusionary act¹⁵³⁷ in that it prevented Senwes' rival traders from competing with Senwes' trading arm downstream.¹⁵³⁸ Senwes' conduct of enticing or persuading customers to only deal with Senwes and no other traders was found to have constituted “clear-cut” inducement in terms of section 8(d)(i).¹⁵³⁹ Margin squeeze was, however, not found to constitute inducement, but an exclusionary act in terms of section 8(c).¹⁵⁴⁰ The Tribunal then confirmed that section 8 requires a finding of the anti-competitive effect of the conduct that outweighs its technological, efficiency or other pro-competitive gains.¹⁵⁴¹

¹⁵³² *Competition Commission of South Africa v Senwes Ltd* (2009) para 73.

¹⁵³³ *Competition Commission of South Africa v Senwes Ltd* (2009) para 75.

¹⁵³⁴ *Competition Commission of South Africa v Senwes Ltd* (2009) para 82.

¹⁵³⁵ *Competition Commission of South Africa v Senwes Ltd* (2009) para 97.

¹⁵³⁶ *Competition Commission of South Africa v Senwes Ltd* (2009) para 118.

¹⁵³⁷ See above 3.5.3 Prohibited practices. Before the Competition Amendment Act 18 of 2018 (the 2018 amendments), an “exclusionary act” was defined in the Competition Act as “*an act that impedes or prevents a firm from entering into, or expanding within, a market*”. Following the 2018 amendments, an “exclusionary act” is defined as “*an act that impedes or prevents a firm from entering into, participating in or expanding within a market.*” See Section 1(c) of the Competition Act 89 of 1998, as amended (section 1 of the Competition Amendment Act 18 of 2018).

¹⁵³⁸ *Competition Commission of South Africa v Senwes Ltd* (2009) para 151.

¹⁵³⁹ *Competition Commission of South Africa v Senwes Ltd* (2009) para 164.

¹⁵⁴⁰ *Competition Commission of South Africa v Senwes Ltd* (2009) paras 165 and 168.

¹⁵⁴¹ *Competition Commission of South Africa v Senwes Ltd* (2009) para 170.

The Tribunal further found that Senwes failed to advance a plausible pro-competitive justification for both the margin squeeze and the inducement conduct.¹⁵⁴² The Tribunal reiterated the “test for effects”, as set out in *The Competition Commission v South African Airways (Pty) Ltd (SAA)*,¹⁵⁴³ namely either “actual harm to consumer welfare” or “substantial or significant foreclosure of the market to rivals”.¹⁵⁴⁴ Several traders, including small trading firms,¹⁵⁴⁵ had testified that Senwes’ differential tariff had adverse effects on their trading business in the Senwes area.¹⁵⁴⁶

In conclusion, the Tribunal found that in the post-cap period, rival traders experienced exclusionary conduct from Senwes. In the post-cap period, rival traders’ volumes declined in the Senwes area, whilst Senwes’ volumes increased to even surpass its pre-cap volumes.¹⁵⁴⁷ Harm to consumer welfare was experienced on the buying side by farmers who received too little for their grains, and on the selling side by processors/customers who paid too much for the grains.¹⁵⁴⁸

¹⁵⁴² *Competition Commission of South Africa v Senwes Ltd* (2009) 61 paras 205 and 207.

¹⁵⁴³ *The Competition Commission v South African Airways (Pty) Ltd* [2005] 2 CPLR 303 (CT). In the SAA case, Nationwide Airlines Group (“Nationwide”) complained that South African Airways (Pty) Ltd (SAA) engaged in several prohibited practices, including schemes with travel agents and reward schemes for travel agents employees, which excluded Nationwide from the market for domestic scheduled airline travel. In this case, the Tribunal set out the legal standard for the assessment of abuse of dominance in contravention of section 8(c) and 8(d)(i), namely first to establish whether the conduct is exclusionary in nature (for section 8(c), the conduct must meet the definition of an exclusionary act and for 8(d), it must meet the description of the conduct set out under section 8(d)), and second to enquire whether the exclusionary act has anti-competitive. In this regard, the Tribunal set out the test as: evidence of actual harm to consumer welfare, or substantial or significant foreclosure of the market to rivals. Applying these principles, the Tribunal found that the travel agents were incentivised to direct more business to SAA to maintain and improve their profits. The Tribunal also found that the travel agents were financially incentivised and were able to move customers away from SAA’s competitors and towards SAA. The Tribunal found that the practical effect of the schemes was that they induce suppliers (in this case, the travel agents) not to deal with competitors of SAA. The Tribunal did not find that there was efficiency or pro-competitive gains outweighing the anti-competitive effect.

¹⁵⁴⁴ *Competition Commission of South Africa v Senwes Ltd* (2009) 62 para 210 referring to *The Competition Commission v South African Airways (Pty) Ltd* [2005] 2 CPLR 303 (CT) para 132 where the Tribunal sets out the anti-competitive test as follows: “If the conduct meets the requirements of the definition, we then enquire whether the exclusionary act has an anticompetitive effect. This question will be answered in the affirmative if there is: (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion is partly factual and partly based on reasonable inferences drawn from proven facts. If the answer to that question is yes, we conclude that the conduct will have an anticompetitive effect. Whichever species of anticompetitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scales with a concept capable of being measured against the alleged efficiency gain.”

¹⁵⁴⁵ *Competition Commission of South Africa v Senwes Ltd* (2009) paras 217, 222, 227.

¹⁵⁴⁶ *Competition Commission of South Africa v Senwes Ltd* (2009) para 213.

¹⁵⁴⁷ *Competition Commission of South Africa v Senwes Ltd* (2009) para 263.

¹⁵⁴⁸ *Competition Commission of South Africa v Senwes Ltd* (2009) para 263.

The Tribunal further noted that Senwes' margin squeeze affected mainly small traders.¹⁵⁴⁹ It remarked that the inducement abuse had mainly been targeted at smaller traders, or that it was more credible to direct the abuse against smaller firms.¹⁵⁵⁰ However, the Tribunal found that there was insufficient evidence of anti-competitive effect to find inducement in contravention of section 8(d)(i).¹⁵⁵¹ The Tribunal further found that there was no evidence of foreclosure in the period when the daily tariff applies to all, namely to both farmers and traders.¹⁵⁵²

In conclusion, the Tribunal found that Senwes had engaged in margin squeeze in contravention of section 8(c). There was no contravention of section 8(d), as there was no evidence of the anti-competitive effect of the inducement.¹⁵⁵³ The Tribunal also found that there was no price discrimination in terms of section 9.¹⁵⁵⁴

3.6.4.1.1 Relevance of this case to the thesis

The Senwes decision clearly illustrates how conduct of dominant players in a market may affect small firms. However, although a number of small traders were affected by Senwes' conduct, no special anti-competitive test was applied to determine the anti-competitive effect of Senwes' exclusionary act on these small firms. The test that the Tribunal applied was the test it used in the SAA case,¹⁵⁵⁵ namely the determination of whether the exclusionary conduct engaged in by the dominant firm harmed consumer welfare, or whether it substantially or significantly foreclosed the market to rivals. Nevertheless, although the size of the victims of Senwes' conduct was not a major determinant in applying the anti-competitive test of substantial foreclosure of rivals, it was recognised that the firms most affected by Senwes' abusive conduct were smaller traders.¹⁵⁵⁶

¹⁵⁴⁹ *Competition Commission of South Africa v Senwes Ltd* (2009) para 264.

¹⁵⁵⁰ *Competition Commission of South Africa v Senwes Ltd* (2009) para 264.

¹⁵⁵¹ *Competition Commission of South Africa v Senwes Ltd* (2009) para 265.

¹⁵⁵² *Competition Commission of South Africa v Senwes Ltd* (2009) para 264.

¹⁵⁵³ *Competition Commission of South Africa v Senwes Ltd* (2009) paras 271-272.

¹⁵⁵⁴ *Competition Commission of South Africa v Senwes Ltd* (2009) para 278.

¹⁵⁵⁵ Discussed above *The Competition Commission v South African Airways (Pty) Ltd* [2005] 2 CPLR 303 (CT) para 132.

¹⁵⁵⁶ *Competition Commission of South Africa v Senwes Ltd* (2009) para 264.

3.6.4.2 Computicket (Pty) Ltd v Competition Commission of South Africa

In the *Computicket* case,¹⁵⁵⁷ Computicket appealed against the Tribunal's decision, which found that Computicket had contravened section 8(1)(d) of the Act.¹⁵⁵⁸ Computicket was found to have abused its dominance in the market for the provision of outsourced ticket distribution services (OTDs) to inventory providers for entertainment events from 2005 to 2010 for concluding exclusive agreements with inventory providers that require them to only use Computicket's ticket distribution services, and not the services of Computicket's rivals.¹⁵⁵⁹ The Tribunal ordered Computicket to pay an administrative penalty of R20 000 000 for this contravention.¹⁵⁶⁰

This case emanated from complaints filed with the Commission by several small players in the market,¹⁵⁶¹ namely Strictly Tickets cc; Soundalite Artslink, KZN Entertainment News and others, in 2008 and 2009 against Computicket.¹⁵⁶² The complainants accused Computicket of having concluded exclusivity agreements with inventory providers, which agreements excluded other players in the market.¹⁵⁶³ Computicket was providing OTD services to inventory providers, which included theatre owners, theatre producers, promoters, and festival organisers in the entertainment industry and sport events.¹⁵⁶⁴ Computicket was thus described as a "ticketing agent".¹⁵⁶⁵

The factual background to this case reveals that in 1998 TicketWeb entered the OTD services market to compete against Computicket.¹⁵⁶⁶ Few years later, in 2002, Computicket merged with TicketWeb.¹⁵⁶⁷ In 2004, the Shoprite group opened Ticketshop to compete against Computicket.¹⁵⁶⁸ In 2005, Shoprite acquired

¹⁵⁵⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) (hereafter *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019)).

¹⁵⁵⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 1.

¹⁵⁵⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 1 and 7.

¹⁵⁶⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 1.

¹⁵⁶¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 6, 31, 66, 70, 71, 78, 80.

¹⁵⁶² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 2.

¹⁵⁶³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 2.

¹⁵⁶⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 3.

¹⁵⁶⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 3.

¹⁵⁶⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 4.

¹⁵⁶⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 4.

¹⁵⁶⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 5.

Computicket, and Ticketshop was absorbed by Computicket.¹⁵⁶⁹ During 2004 to 2009, other players, including a few small players, entered the OTD services market. These players included Strictly Tickets in 2004 (which introduced a paperless ticketing solution), Webtickets in 2007 (which used Pick n' Pay, as its retail outlet), Ticket Connection in 2008 (which was sponsored by Mr Price) and Ticket Space in 2009.¹⁵⁷⁰

Computicket's exclusivity agreements with the inventory providers started as far back as 1999.¹⁵⁷¹ These exclusivity agreements were, however, for a shorter duration and limited in scope, namely up to four months and for single events.¹⁵⁷² In 2005, the scope, duration and coverage of the exclusivity provisions increased to a minimum of three years, with an indefinite annual renewal clause and this extended to all events organised by the inventory providers.¹⁵⁷³ The exclusivity provisions were included in all of Computicket's contracts with the inventory providers.¹⁵⁷⁴ Inventory providers that did not adhere to the exclusivity provisions would face cancellation of the contract, removal of Computicket equipment and sometimes damage claims.¹⁵⁷⁵ Computicket rejected requests for non-exclusivity contracts¹⁵⁷⁶ and at that time it was dominant in the outsourced distribution market with a 90% market share.¹⁵⁷⁷

The Tribunal found that Computicket's agreements were "*facially exclusive*", in that they prevented Computicket's customers, the inventory providers, from using the services of Computicket's competitors without its written consent.¹⁵⁷⁸ The Tribunal thus found that Computicket had contravened section 8(d)(i) of the Competition Act.¹⁵⁷⁹ On the issues of dominance and market definition, it was accepted that Computicket held 95% of the outsourced ticketing services market, in relation to entertainment events between 2005 and 2009.¹⁵⁸⁰

¹⁵⁶⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 5.

¹⁵⁷⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 6.

¹⁵⁷¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 7.

¹⁵⁷² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 7.

¹⁵⁷³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 8.

¹⁵⁷⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 8.

¹⁵⁷⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 9.

¹⁵⁷⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 9.

¹⁵⁷⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 10.

¹⁵⁷⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 10.

¹⁵⁷⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 10.

¹⁵⁸⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 15.

On the assessment of Computicket's conduct, the CAC looked at the requirements of an exclusionary conduct in terms of section 8(d).¹⁵⁸¹ The CAC acknowledged the Tribunal's approach in *SAA*.¹⁵⁸² First, it must be determined whether the conduct is exclusionary in nature. That is, if a complainant alleges a contravention of section 8(d), it must merely show that the impugned conduct meets the requirements of the conduct set out in sections 8(d)(i) to (vi).¹⁵⁸³ For 8(d)(i), the complainant must merely prove that the dominant firm requires or induces its customers not to deal with a competitor.¹⁵⁸⁴ The complainant does not need to show that the conduct impedes or prevents a firm from entering or expanding within a market (as per the definition of an "exclusionary act").¹⁵⁸⁵ On this element, the CAC found that Computicket's conduct met the description of the conduct in section 8(d)(i).¹⁵⁸⁶ The CAC, nevertheless, confirmed that the Commission still had to prove that the conduct had an anti-competitive effect, and if established, the onus would shift to the respondent (Computicket) to justify the anti-competitive effect on efficiency grounds.¹⁵⁸⁷

The CAC then considered the requirement of showing anti-competitive effects.¹⁵⁸⁸ It reaffirmed the Tribunal's test on anti-competitive effects set out in *SAA*,¹⁵⁸⁹ as

¹⁵⁸¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 16.

¹⁵⁸² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 16, citing *The Competition Commission v South African Airways (Pty) Ltd* [2005] 2 CPLR 303 (CT) paras 103-105. See a summary of the *SAA* case above: 3.6.4.1. *Competition Commission of South Africa v Senwes Ltd*.

¹⁵⁸³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 16.

¹⁵⁸⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 16.

¹⁵⁸⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 16.

¹⁵⁸⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 17.

¹⁵⁸⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 17.

¹⁵⁸⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 18.

¹⁵⁸⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) paras 17-18, fn 6 and 7, citing *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01) [2005] ZACT 50 (28 July 2005) at para 132.

endorsed by the Tribunal in *Nationwide*¹⁵⁹⁰ and the CAC in *SAA/Comair*.¹⁵⁹¹ The courts stated that the anti-competitive effects may be established by either showing actual harm to consumer welfare or substantial/significant foreclosure of the market to competitors.¹⁵⁹² In *SAA/Comair*, the CAC went further and stated that “section 8(d)(i) did not require showing of actual harm. It was sufficient if there was evidence that the exclusionary practice was substantial or significant or it had the potential to foreclose the market to competition. (...) If it creates, enhances or preserves the market power of the dominant firm it will be assumed to have an anti-competitive effect.”¹⁵⁹³ The CAC reiterated its approach in *SAA/Comair* that the showing of anti-competitive effects in terms of section 8 includes the consideration of a substantial foreclosure of the market to rivals.¹⁵⁹⁴ This is established either through evidence of actual competitive harm or evidence that the exclusionary conduct is “*substantially significant*”, in that it has “*the*

¹⁵⁹⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* para 19, fn. 8, citing *Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Ltd* (80/CR/Sept06) [2010] ZACT 13 (17 February 2010) at paras 143&183, where the Tribunal confirmed: “Hence an anti-competitive effect could manifest in two ways. Either there is direct evidence of an adverse effect on consumer welfare or evidence that the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. The latter criterion is partly factual and partly based on reasonable inferences drawn from proven facts.” The *Nationwide* case concerned SAA’s incentive schemes in 2001, which incentivised travel agents to sell SAA airline tickets at the expense of SAA’s competitors in that through these schemes, travel agents were paid according to a commission structure that rewarded them for meeting SAA’s targets. Like in the *SAA* case (which concerned incentive schemes from September/October 1999 to 31 May 2001 – see paras 2-6 of *Nationwide*), the Tribunal also found that SAA’s 2001 incentive schemes induced travel agents not to deal with SAA’s rivals and substantially foreclosed them from the domestic airline market.

¹⁵⁹¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* para 19, fn. 9, citing *South African Airways (Pty) Ltd v Comair Ltd and Another* 2012 (1) SA 20 (CAC) at paras 105-106. In this *Comair* case, SAA appealed the Tribunal’s decision in *Nationwide v SAA* (2010) to the CAC. As discussed above, the Tribunal had found that SAA’s override incentive agreements/schemes induced travel agents not to deal with SAA’s rivals and that SAA’s conduct substantially foreclosed the domestic airline market to SAA’s rivals in contravention of section 8(d)(i) of the Competition Act. The CAC confirmed the Tribunal’s decision that SAA’s conduct contravened section 8(d)(i) of the Competition Act. In assessing the anti-competitive effect of SAA’s conduct, the CAC considered the test used by the Tribunal to determine whether the conduct has anti-competitive effects. The CAC stated that: “[105] *In the Nationwide case the Tribunal set out its approach to section 8 (d)(i) and which it subsequently endorsed and followed in the present matter. It stated that the anti-competitive effects for the purposes of section 8(d)(i) can be established either by evidence of: 1. actual harm to consumer welfare; or 2. if the exclusionary act is substantial or significant in terms of its foreclosing the market to rivals. [106] The Tribunal stressed that section 8(d)(i) did not require the showing of actual harm. It was sufficient if there was evidence that the exclusionary practice is substantial or significant or it has the potential to foreclose the market to competition. If it is substantial or significant, it may be inferred that it creates, enhances or preserves the market power of the dominant firm. If it creates, enhances or preserves the market power of the dominant firm it will be assumed to have an anti-competitive effect.*”

¹⁵⁹² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 18.

¹⁵⁹³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 19, fn. 9, citing *South African Airways (Pty) Ltd v Comair Ltd and Another* 2012 (1) SA 20 (CAC) at paras 105-106.

¹⁵⁹⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 23.

potential to foreclose the market to competition".¹⁵⁹⁵ Such anti-competitive effect can be inferred.¹⁵⁹⁶

The CAC then set out the elements to prove abuse of dominance under section 8(d), namely a "defined exclusionary act" and an "evaluation of effects".¹⁵⁹⁷ That is the weighing of harm and gains, meaning that the conduct is a contravention when the harm outweighs the gains. The harm is the anti-competitive effect of the exclusionary act, and the gains are the technological, efficiency or other pro-competitive gains.¹⁵⁹⁸ The CAC confirmed that there must be a causal relationship between the impugned conduct and the effects of that conduct, in that the conduct must cause the harm.¹⁵⁹⁹ The CAC then asked: "*what is the anti-competitive effect that must be shown to have been caused by the exclusionary act?*"¹⁶⁰⁰

- First, the CAC remarked that the wording of section 8(d) refers to anti-competitive effect of a "defined exclusionary act", whilst sections 4 and 5 refer to "the effect of substantially lessening of competition in a market".¹⁶⁰¹
- Second, the CAC analysed "what effects" must be considered in the "evaluation of effects" under section 8(d).¹⁶⁰² It noted the courts' findings in the SAA cases.¹⁶⁰³ In these matters, the courts found that absent actual harm to consumer welfare, one can still show that the exclusionary act is substantial or significant in foreclosing the market to rivals.¹⁶⁰⁴ The courts found that the foreclosure could be actual or potential.¹⁶⁰⁵ The emphasis was on the substantiality of the foreclosure.¹⁶⁰⁶ The CAC, however, found that a substantial effect on the market was not a requirement to establish abuse of dominance.¹⁶⁰⁷

¹⁵⁹⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 23.

¹⁵⁹⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 23.

¹⁵⁹⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 25.

¹⁵⁹⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 25.

¹⁵⁹⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 26.

¹⁶⁰⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 27.

¹⁶⁰¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 28.

¹⁶⁰² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 28.

¹⁶⁰³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 28.

¹⁶⁰⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 29.

¹⁶⁰⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 29.

¹⁶⁰⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 29.

¹⁶⁰⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 29.

- Third, the CAC held that foreclosure (i.e. the anti-competitive effect) is about *“whether the dominant firm’s rivals are rendered less effective competitors by reason of the exclusionary conduct of the dominant firm.”*¹⁶⁰⁸ In this regard, the CAC noted that *“rivalry may be diminished because a small firm plays an important role in constraining the dominant firm in a part of the market, whether as to the product or territory. An effect of this kind is not ousted from consideration. (...) The aggregative judgment is made in weighing the effects. It is not made by insisting that what can count as a gain or a harm must itself meet some criterion of sufficiency or can only be counted if it is an actual rather than a potential harm or must be a market-wide effect.”*¹⁶⁰⁹

The CAC, nevertheless, recognised that a small adverse effect will be outweighed by pro-competitive gains.¹⁶¹⁰ But the ultimate consideration is whether the dominant firm’s exclusionary conduct has in a *“non-trivial way”* (i.e. substantially) reduced competitive constraints.¹⁶¹¹

The CAC found that substantiality can be inferred from existing or proven facts.¹⁶¹² It emphasised that the harm that must be established is the harm that strengthens the dominant firm’s position in such a way that competitors are substantially impeded or likely to be impeded by the dominant firm’s exclusionary conduct.¹⁶¹³ Such harm may be actual or potential.¹⁶¹⁴ The CAC further accepted that the assessment of the effects of the exclusionary act is usually done by comparing the actual or likely future situation of the market with the appropriate counterfactual.¹⁶¹⁵

¹⁶⁰⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 30.

¹⁶⁰⁹ Own emphasis. *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 31.

¹⁶¹⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 32.

¹⁶¹¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 32.

¹⁶¹² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 33.

¹⁶¹³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 36.

¹⁶¹⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 33.

¹⁶¹⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 37. A “counterfactual” refers to a scenario or market circumstances where the alleged prohibited conduct is absent, in that it answers the question as to what the market or competition in a market would have been absent the alleged prohibited conduct. The CAC adopted the description of a counterfactual as contained in the EC guidelines on the European Commission’s enforcement priorities in applying Article 102 at para 21 which states: *“This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.”* (own emphasis) European Commission “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” (2009/C 45/02) Available at

The CAC then applied the above principles to the facts of the case. It found that post 2005, Computicket's entire client base was subject to exclusivity agreements.¹⁶¹⁶ This constituted about 95% of the total market.¹⁶¹⁷ The CAC found that it was not clear whether what remained of the market was sufficient for Computicket's rivals to compete.¹⁶¹⁸ On the incumbency and economies of scale,¹⁶¹⁹ the CAC found that Computicket had built a strong brand.¹⁶²⁰ New entrants would therefore need to overcome significant entry barriers and incur significant costs to overcome reputational barriers to entry.¹⁶²¹ The CAC also found that Computicket strictly enforced the exclusivity provisions, in that one could face legal action for breaching the exclusivity provisions.¹⁶²² Computicket also rejected requests for non-exclusive agreements.¹⁶²³ A refusal of an exclusive agreement meant "no agreement".¹⁶²⁴ The CAC further found that Computicket's "*all or nothing*" policy harmed consumers.¹⁶²⁵

The merger between Computicket and TicketWeb in 2002 was regarded as a removal of a formidable (effective) competitor (TicketWeb) from the market, in that there was fierce competition between Computicket and TicketWeb before the merger.¹⁶²⁶ The CAC found that the period of competition between Computicket and TicketWeb in 1999 to 2001 (before the merger), was the best period for applying the

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)) (accessed on 12 November 2023).

¹⁶¹⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 46.

¹⁶¹⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 46.

¹⁶¹⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 50.

¹⁶¹⁹ Economies of scale occur when the average cost of production decreases as more outputs are produced. See Jones and Surfin (2016) 6 where they explain: "*Economies of scale occur when the average cost of producing a commodity falls as more is produced. If a widget factory produces only one widget that one widget must bear the whole cost of establishing and running the factory. If it produces 100,000 widgets, however, the costs are spread over 100,000 widgets.*" Maunders, Myers, Wall and Miller 'Economics explained' (1995) (3rd Ed.) 357 and 383 describe economies of scale as a situation where the average cost decreases as output increases or the cost increases less than relative to the output increase. They explain: "*When the long-run average cost curve slopes downwards it means that average costs decrease as output increases. Whenever this happens the firm is experiencing economies of scale. (...) When economies of scale exist, costs increase less than proportionately to the increase in output. If the long-run average cost curve continues to fall as output increases, then a situation of natural monopoly might arise.*"

¹⁶²⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* para 52. Stigler "The Economies of Scale" (1958) 1 JL & Econ 54.

¹⁶²¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 52.

¹⁶²² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 53.

¹⁶²³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 53.

¹⁶²⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 53.

¹⁶²⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 55.

¹⁶²⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 62.

counterfactual,¹⁶²⁷ in that such period reflected a period when there was competition in the market, through the successful entry of TicketWeb, and such period was the least affected by Computicket's exclusive provisions.¹⁶²⁸ The CAC considered the demise of Ticket Connection.¹⁶²⁹ Ticket Connection exited the market because it could not expand and get new inventory providers, as the inventory providers were tied down to exclusivity contracts.¹⁶³⁰ Computicket was also sending threatening legal letters to its customers who would attempt to deal with its competitors.¹⁶³¹ The CAC also considered the position of Strictly Ticket, a small start-up, which was the first to introduce paperless ticketing in the world.¹⁶³² The CAC noted that during the hearing, Strictly Ticket had testified that it would have grown greater without the exclusive agreements.¹⁶³³ The CAC eventually found that Strictly Ticket was prevented from growing in the relevant market and was forced out of the market because of Computicket's exclusive contracts.¹⁶³⁴ To Computicket's argument that Strictly Ticket was a small and inefficient competitor, the CAC remarked that "*size and efficiency of a competitor are not determinant factors in establishing likely competitive effects.*"¹⁶³⁵ The CAC found that Computicket's conduct likely impeded "the rise of efficient competitors" and "foreclosed the emergence of competition."¹⁶³⁶ The CAC also found that the foreclosure of Strictly Ticket affected inventory providers, who would have used other ticketing agents to increase their sales.¹⁶³⁷ The conduct ultimately also affected customers.¹⁶³⁸

¹⁶²⁷ See the definition of "counterfactual" above, namely a situation characterised by "*the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.*" European Commission "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" (2009/C 45/02) Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)) (accessed on 12 November 2023) para 21.

¹⁶²⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 64

¹⁶²⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 69

¹⁶³⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 69

¹⁶³¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 69

¹⁶³² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 71-72

¹⁶³³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 79. The CAC noted that: "[I]n cross-examination, when it was put to Mr Charne that the business grew despite the presence of exclusivity agreements, as the hard financial facts showed, he suggested that it would have become even more viable and a greater business without the presence of the exclusivity agreements."

¹⁶³⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 78

¹⁶³⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 80

¹⁶³⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 80

¹⁶³⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 81

¹⁶³⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 81

The CAC confirmed that to establish an anti-competitive effect, the exclusive conduct does not need to completely drive competitors out of the market or completely foreclose them.¹⁶³⁹ It is enough to show that competitors were prevented or impeded from entering the market.¹⁶⁴⁰

On the pricing effects, the CAC considered Computicket's price increases following the merger with TicketWeb. It found that there was a cumulative price increase between 33% and 100% between 2002 and 2003.¹⁶⁴¹ The real booking fee had increased and the price increases were profitable to Computicket.¹⁶⁴²

The CAC concluded that Computicket's exclusive contracts were likely to have resulted in anti-competitive effects between mid-2005 to 2010, in that Computicket's conduct substantially impeded its rivals' viability and growth in the market, and entrenched Computicket's dominance in the market.¹⁶⁴³

On the efficiency defence, the CAC considered whether Computicket's claimed efficiencies (protection of general investment and against free riding, and recoupment of costs) could not be achieved through less restrictive means.¹⁶⁴⁴ The CAC also considered whether the efficiencies outweigh the anti-competitive effects.¹⁶⁴⁵ It found that there was no risk of free-riding that would require exclusivity.¹⁶⁴⁶ It stated that if Computicket wanted to protect its investment, it would have introduced the exclusivity provisions long before.¹⁶⁴⁷ Computicket had raised the concern that the split in distributing tickets between two or more ticket distributors could lead to double-booking, system errors and possible reputational risks.¹⁶⁴⁸ The CAC found that the

¹⁶³⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 87.

¹⁶⁴⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 87. The CAC referred to *Competition Commission v Telkom SA Ltd* (11/CR/Feb04) para 99, where the Tribunal held: "*In order to show harm for purposes of section 8(d)(i) it is not necessary to show that competitors must first exit a market or even that they lost market share before harm. All that is required to be shown is that Telkom's conduct was likely to result in preventing or lessening competition which would include the impeding of competition.*"

¹⁶⁴¹ The CAC refers to "the first half of 2002 and the second half of 2003."

¹⁶⁴² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 92.

¹⁶⁴³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 96.

¹⁶⁴⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 97.

¹⁶⁴⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 100.

¹⁶⁴⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 106.

¹⁶⁴⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 106.

¹⁶⁴⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 108.

alleged problems associated with this inventory splitting could not justify exclusivity provisions for all events.¹⁶⁴⁹

The CAC then concluded that Computicket's exclusive act was substantial in terms of foreclosing the market to rivals.¹⁶⁵⁰ There was also actual harm to consumers, although it was not necessary to prove it.¹⁶⁵¹ Further, Computicket did not establish pro-competitive efficiencies.¹⁶⁵²

The CAC thus confirmed the penalty of R20 000 000 imposed by the Tribunal.¹⁶⁵³

3.6.4.2.1 The relevance of this case to the thesis

In *Computicket*, the complainants or affected firms were small businesses.¹⁶⁵⁴ The CAC clarified the test to establish the anti-competitive effect of the dominant firm's exclusionary act under section 8(d). This case assists in debating one of the thesis questions, namely, *what standard of harm must be applied to assess competitive effects in cases involving SMEs, as victims*.

According to the CAC's decision in *Computicket*, the anti-competitive effect that must be proved to emanate from the exclusionary conduct¹⁶⁵⁵ is not actual foreclosure of a rival or a market-wide effect.¹⁶⁵⁶ Absent actual harm to consumer welfare, the anti-competitive effect of the exclusionary conduct that must be shown is the substantial effect on the competitive rivalry.¹⁶⁵⁷ In other words, the anti-competitive effect to prove, is the substantial or significant foreclosure of the market to rivals.¹⁶⁵⁸ The CAC confirmed that ultimately the test to assess harm to competition in abuse of dominance cases, absent proof of actual harm to consumer welfare, is whether "*the dominant firm's rivals are rendered less effective competitors*" because of the exclusionary conduct.¹⁶⁵⁹ Put differently, whether the exclusionary act has substantially affected competitors' ability to effectively compete in the market.

¹⁶⁴⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 108.

¹⁶⁵⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 111.

¹⁶⁵¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 111.

¹⁶⁵² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 111.

¹⁶⁵³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 114.

¹⁶⁵⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) paras 70, 71, 78, 80.

¹⁶⁵⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 27.

¹⁶⁵⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 27.

¹⁶⁵⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 29.

¹⁶⁵⁸ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 29.

¹⁶⁵⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 30.

The focus of this test seems to be on the competitors. In light of this, it would seem that the paradigm “*competition law protects competition and not competitors*” may not necessarily find application when assessing harm to competition in cases involving SMEs. SMEs affected by an abuse of dominance conduct may show that the alleged exclusionary conduct rendered them “less effective” competitors.¹⁶⁶⁰ A small firm that poses an important competitive constraint on the dominant firm may argue that rivalry is diminished as result of the dominant firm’s exclusionary conduct.¹⁶⁶¹

The *Computicket*-test in assessing harm to competition may well be regarded as a test or standard that gives effect to section 2(e) of the Act, which seeks to promote the equitable participation of SMEs in the economy. This is because the focus of the test, absent actual harm to consumer welfare, is on competitors’ ability to effectively compete, namely whether the foreclosure rendered them “less effective”.¹⁶⁶² These competitors may be small firms.¹⁶⁶³ As the CAC noted: “*size and efficiency of a competitor are not determinant factors in establishing likely competitive effects.*”¹⁶⁶⁴ The *Computicket* CAC’s decision thus somewhat echoes the objective of the 2018 Amendment Act, which is to, amongst others, give *special attention to the impact of anti-competitive conduct on small and medium businesses.*¹⁶⁶⁵

3.6.4.3 Competition Commission of South Africa v Media 24 (Pty) Ltd

In *Media 24*,¹⁶⁶⁶ the Commission appealed the CAC’s decision to the Constitutional Court (“the ConCourt”). The CAC had dismissed the Tribunal’s decision which found that Media 24 had engaged in predatory pricing in contravention of section 8(c) of the Competition Act.¹⁶⁶⁷

This case emanates from a complaint submitted by Gold Net News (“GNN”), a small competitor of Media 24 (Pty) Limited (“Media 24”). GNN competed with Media 24’s two newspapers, Vista and Forum, in Welkom (the Goldfields area) during 2004 to 2009. In January 2009, GNN exited the market and nine months later, Media 24

¹⁶⁶⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 30.

¹⁶⁶¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 31.

¹⁶⁶² *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) paras 29-30.

¹⁶⁶³ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 31, 80.

¹⁶⁶⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 80.

¹⁶⁶⁵ Memorandum on the objects of the Competition Amendment Bill (2018) para 2.2(b).

¹⁶⁶⁶ *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC) (hereafter *Competition Commission of South Africa v Media 24* (2019)).

¹⁶⁶⁷ *Competition Commission of South Africa v Media 24* (2019) 27.

closed Forum.¹⁶⁶⁸ Vista was left as the only newspaper in the region. GNN alleged that it exited the market because of Media 24's predatory conduct, in that Media 24 had priced Forum below cost in order to push GNN out of the market and use Vista as the remaining brand in the region.¹⁶⁶⁹

The Commission investigated the matter and in October 2011, it referred the complaint against Media 24 to the Tribunal. In its referral, the Commission alleged that Media 24 had engaged in predatory pricing in contravention of section 8(d)(iv), alternatively 8(c) by pricing Forum below cost to push GNN out of the market.¹⁶⁷⁰ It was alleged that Forum was operated as "a fighting brand".¹⁶⁷¹

In summary, the Tribunal found that the Commission had failed to show that Media 24 priced below the "standard average variable cost"¹⁶⁷² or "marginal cost"¹⁶⁷³ as set out in section 8(d)(iv).¹⁶⁷⁴ The Tribunal found that Media 24 had engaged in predatory pricing in contravention of section 8(c) by pricing below the "average total cost" (ATC).¹⁶⁷⁵ The Tribunal found that ATC was an appropriate cost standard to find predation as a contravention of section 8(c) when there is additional evidence of predation.¹⁶⁷⁶ The additional evidence included Media 24's direct or subjective intention to undercut GNN and use Forum to take business away from GNN.¹⁶⁷⁷ In other words, the intention to predate GNN could be distilled from the witness

¹⁶⁶⁸ *Competition Commission of South Africa v Media 24* (2019) para 9.

¹⁶⁶⁹ *Competition Commission of South Africa v Media 24* (2019) para 10.

¹⁶⁷⁰ *Competition Commission of South Africa v Media 24* (2019) para 20.

¹⁶⁷¹ *Competition Commission of South Africa v Media 24* (2019) para 20.

¹⁶⁷² *Competition Commission of South Africa v Media 24* (2019) para 16. The Constitutional Court described the average variable cost as "*the sum of the firm's variable costs (labour, electricity, et cetera) divided by the number of units produced. Variable costs are costs that vary as output increases, as opposed to fixed costs, which do not. If a firm charges a price which does not cover its variable costs, it intentionally suffers a loss on every sale and is presumed to be participating in predatory pricing.*" See also O'Donoghue and Padilla *The Law and Economics of Article 82 EC* (2006) Hart Publishing, Oxford, 237, 240 and 245.

¹⁶⁷³ *Competition Commission of South Africa v Media 24* (2019) para 15. The Constitutional Court described marginal cost as "*a comparison between the cost of producing an additional unit of output and the price that the firm is charging per unit of output.*" Regarding marginal cost as a standard for determining whether prices charged are predatory, the Constitutional Court added: "*If the price exceeds marginal cost, then it makes sense to produce an additional unit. If it costs more to produce a unit of output than the firm can charge, then the rational firm would not produce that unit. Consequently, if a firm prices below marginal cost it is presumed to be participating in predatory pricing.*" See also O'Donoghue and Padilla *The Law and Economics of Article 82 EC* (2006) Hart Publishing, Oxford, 237.

¹⁶⁷⁴ *Competition Commission of South Africa v Media 24* (2019) para 20.

¹⁶⁷⁵ *Competition Commission of South Africa v Media 24* (2019) para 20.

¹⁶⁷⁶ *Competition Commission of South Africa v Media 24* (2019) para 21.

¹⁶⁷⁷ *Competition Commission of South Africa v Media 24* (2019) para 22.

statements.¹⁶⁷⁸ The additional evidence also included indirect intention. This included Forum (Media 24's newspaper) making a consistent loss for 9 years before closing down.¹⁶⁷⁹ The circumstances around the closing down of Forum, 9 months after GNN exited the market, were also considered.¹⁶⁸⁰ The Tribunal further found that Media 24's newspaper, Vista, had increased its prices by 17% since GNN exited the market.¹⁶⁸¹ Despite Media 24's contention that GNN had exited the market because it was not an "equally efficient competitor", the Tribunal found that GNN was indeed efficiently run.¹⁶⁸² After considering that Media 24 had priced below the ATC and the additional evidence in the form of direct and indirect intention to predate GNN, the Tribunal found that Media 24 had engaged in predatory pricing in contravention of section 8(c).¹⁶⁸³

Media 24 appealed the Tribunal's decision to the CAC. The CAC found for Media 24 and dismissed the Tribunal's decision. It found that the appropriate cost standard in this particular case was "average avoidable cost "(AAC).¹⁶⁸⁴ The CAC found that the test under section 8(c) was an objective test of whether a specific conduct amounts to an exclusionary act.¹⁶⁸⁵ It thus held that subjective evidence of intent could not be used to determine predatory pricing.¹⁶⁸⁶ Accordingly, the CAC rejected the Tribunal's test of ATC plus intent.¹⁶⁸⁷

The Commission subsequently appealed the CAC's judgment to the Constitutional Court and also requested clarity on the appropriate cost threshold to use in a predatory pricing case.

¹⁶⁷⁸ *Competition Commission of South Africa v Media 24* (2019) para 22.

¹⁶⁷⁹ *Competition Commission of South Africa v Media 24* (2019) para 23.

¹⁶⁸⁰ *Competition Commission of South Africa v Media 24* (2019) para 23.

¹⁶⁸¹ *Competition Commission of South Africa v Media 24* (2019) para 24.

¹⁶⁸² *Competition Commission of South Africa v Media 24* (2019) para 25.

¹⁶⁸³ *Competition Commission of South Africa v Media 24* (2019) para 26.

¹⁶⁸⁴ *Competition Commission of South Africa v Media 24* (2019) para 29. The Constitutional Court described average avoidable cost as "the average costs that the firm could have avoided if it had not produced particular units of output. This includes variable costs and any fixed costs that are specifically incurred in the production of the particular product being examined. Average avoidable cost is generally equal to average variable cost plus product-specific fixed costs." *Competition Commission of South Africa v Media 24* (2019) para 17. See also O'Donoghue and Padilla *The Law and Economics of Article 82 EC* (2006) Hart Publishing, Oxford, 241.

¹⁶⁸⁵ *Competition Commission of South Africa v Media 24* (2019) para 28.

¹⁶⁸⁶ *Competition Commission of South Africa v Media 24* (2019) para 28.

¹⁶⁸⁷ *Competition Commission of South Africa v Media 24* (2019) para 29.

In terms of section 167 of the South African Constitution, the Constitutional Court consists of the Chief Justice, the Deputy Chief Justice and nine other judges.¹⁶⁸⁸ This makes eleven (11) Constitutional Court judges. A case presented to the Constitutional Court must be heard by a minimum of eight (8) judges.¹⁶⁸⁹ In *Media 24*, the Constitutional Court comprised ten (10) judges.¹⁶⁹⁰ The quorum was, therefore, constituted. The judges had different views, which resulted in four judgments.¹⁶⁹¹

3.6.4.3.1 *Competition Commission v Media 24* - First judgment

The Constitutional Court's first judgment, written by Goliath J and concurred in by Mogoeng CJ and Dlodlo AJ,¹⁶⁹² found that the appeal raised a constitutional issue and an arguable point of law of general public importance, and that leave to appeal should be granted.¹⁶⁹³ On the merits, the first judgment found that the CAC limited the Commission's prosecutorial powers and disregarded the dominant firm's predatory intention as being irrelevant.¹⁶⁹⁴ The first judgment found that the Commission should be empowered to use whatever cost benchmark to prove predatory pricing, including ATC, where it can be shown that the dominant firm lowered its price without any reason but only to push a competitor out of the market.¹⁶⁹⁵

In finding that the matter raises a constitutional issue, the first judgment confirmed that the Competition Act was "*transformative legislation*."¹⁶⁹⁶ It referred to section 2(e) and (f) which states two of the purposes of the Act, namely "*ensuring that small and medium-sized businesses have equitable opportunities to participate in the economy*" and "*promoting a greater spread of ownership in the economy by those who were disadvantaged by Apartheid*."¹⁶⁹⁷ The Constitutional Court's first judgment highlighted that these purposes implicate the right to equality enshrined in section 9 of

¹⁶⁸⁸ Constitution of the Republic of South Africa, 1996, as amended. Available at https://www.concourt.org.za/images/phocadownload/the_text/english-2013.pdf (accessed on 4 November 2024).

¹⁶⁸⁹ Constitution of the Republic of South Africa, 1996, as amended, section 167(2).

¹⁶⁹⁰ Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J. CJ stands for Chief Justice, AJ stands for Acting Judge, J stands for Judge.

¹⁶⁹¹ *Competition Commission of South Africa v Media 24* (2019), paras 1-4.

¹⁶⁹² *Competition Commission of South Africa v Media 24* (2019) para 1. J stands for Justice, CJ stands for Chief Justice and AJ stands for Acting Justice.

¹⁶⁹³ *Competition Commission of South Africa v Media 24* (2019) para 30-35.

¹⁶⁹⁴ *Competition Commission of South Africa v Media 24* (2019).

¹⁶⁹⁵ *Competition Commission of South Africa v Media 24* (2019).

¹⁶⁹⁶ *Competition Commission of South Africa v Media 24* (2019) para 30.

¹⁶⁹⁷ *Competition Commission of South Africa v Media 24* (2019) para 30.

the Constitution.¹⁶⁹⁸ It remarked that the State is required to ensure and promote the equality of previously disadvantaged people through legislative and other measures, and that section 2(e) and (f) of the Competition Act were the kind of legislative measures that seek to ensure equality.¹⁶⁹⁹ The minority judgment also remarked that section 8 is important to achieve the objectives contained in section 2(e) and (f) of the Competition Act. In this regard, the first judgment states:

“Section 8 of the Competition Act is an important component for the achievement of the purposes contained in section 2(e) and (f). Section 8 prohibits dominant firms from abusing their power to the detriment of the market and consumers. Consumer welfare lies at the heart of the matter before us. The prohibition of abuses of dominance is recognition of the fact that dominant firms attained this status due to our exclusionary history. The protection section 8 provides applies specifically to small and medium sized firms which are at the greatest risk of being excluded from the market by abuses of dominance or monopolies. Consequently, when a court interprets the extent of the protection contained in section 8, it must do so in line with the purpose of the Competition Act and the Constitution as abuses of dominance and the resultant monopolies have the potential to perpetuate historic patterns of exclusion and inequality.”¹⁷⁰⁰

3.6.4.3.2 Competition Commission v Media 24 - Second judgment

The Constitutional Court’s second judgment written by Cameron J, Froneman J and Khampepe J, and concurred in by Petse AJ,¹⁷⁰¹ however, criticized the above approach, namely “to make the interpretation and application of the entire Competition Act a constitutional matter for purposes of the jurisdiction” of the Constitutional

¹⁶⁹⁸ *Competition Commission of South Africa v Media 24* (2019) para 30. Section 9 of the Constitution states: “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

¹⁶⁹⁹ *Competition Commission of South Africa v Media 24* (2019) para 30.

¹⁷⁰⁰ Own emphasis. *Competition Commission of South Africa v Media 24* (2019) para 31.

¹⁷⁰¹ *Competition Commission of South Africa v Media 24* (2019) para 2.

Court.”¹⁷⁰² This judgment found that the Competition Act did not automatically raise a constitutional matter like the Promotion of Administrative Justice Act (PAJA)¹⁷⁰³ and the Labour Relation Act (LRA), which “*give legislative expression to fundamental rights in the Constitution*”.¹⁷⁰⁴ It found that the Competition Act is not the legislation mandated by the Constitution to give effect to the right to equality, like PAJA and the LRA give effect to the rights to just administrative action and fair labour rights, respectively.¹⁷⁰⁵ It stated that “*the Competition Act is just legislation. It has no elite constitutional allure*.”¹⁷⁰⁶ Further, the second judgment found that the Commission’s investigative powers were not affected by a court’s findings on the type of evidence required to prove breaches of Chapter 2 of the Competition Act.¹⁷⁰⁷ It found that any evidential matter could not become a constitutional legality issue.¹⁷⁰⁸

In summary, the second judgment rejected the leave to appeal on the ground that it was not in the interests of justice for the Constitutional Court to debate on the predatory pricing benchmarks.¹⁷⁰⁹ The second judgment found that this matter did not raise “a purely legal issue, but a mixed one of fact and law”, and thus the Constitutional Court’s jurisdiction could not be engaged.¹⁷¹⁰

The second judgment dismissed the leave to appeal, and eventually the appeal.

3.6.4.3.3 Competition Commission v Media 24 - Third judgment

The Constitutional Court’s third judgment, written by Theron J and concurred in by Basson AJ,¹⁷¹¹ found that the matter did not raise a constitutional issue.¹⁷¹² But, it agreed with the first judgment that the matter raised an arguable point of law of general

¹⁷⁰² *Competition Commission of South Africa v Media 24* (2019) para 127.

¹⁷⁰³ Act 3 of 2000.

¹⁷⁰⁴ *Competition Commission of South Africa v Media 24* (2019) para 127.

¹⁷⁰⁵ *Competition Commission of South Africa v Media 24* (2019) para 128.

¹⁷⁰⁶ *Competition Commission of South Africa v Media 24* (2019) para 128.

¹⁷⁰⁷ *Competition Commission of South Africa v Media 24* (2019) para 132.

¹⁷⁰⁸ *Competition Commission of South Africa v Media 24* (2019) para 132.

¹⁷⁰⁹ *Competition Commission of South Africa v Media 24* (2019) para 124.

¹⁷¹⁰ *Competition Commission of South Africa v Media 24* (2019) para 134.

¹⁷¹¹ See *Competition Commission of South Africa v Media 24* (2019) para 3. Theron J agreed with the first judgment that the appeal raised an arguable point of law of general public importance within this Constitutional Court’s jurisdiction and that leave to appeal should be granted. However, Theron J held that the appeal should be dismissed. Basson AJ agreed with Theron J’s judgment.

¹⁷¹² *Competition Commission of South Africa v Media 24* (2019) para 142.

public importance and that it was in the interests of justice to grant the leave to appeal.¹⁷¹³

The third judgment found that the point of law in this matter was whether it is appropriate to use the standard of Average Total Cost (ATC) plus the intention to predate to determine whether a firm has engaged in predatory pricing.¹⁷¹⁴ It found that the ATC standard was not an appropriate measure to determine predatory pricing for four reasons.¹⁷¹⁵ First, according to the third judgment, a firm could price below the ATC, but still act competitively.¹⁷¹⁶ Second, using the ATC to determine prohibited predatory pricing would make the ATC the “price floor,” i.e., the minimum price charged by a firm.¹⁷¹⁷ To avoid being charged for violating section 8(c) exclusionary conduct, a firm would just price above the ATC.¹⁷¹⁸ The firm would then increase its prices, which is contrary to the Competition law objective of charging competitive prices.¹⁷¹⁹ Third, a multi-product firm can easily manipulate the ATC measure.¹⁷²⁰ This is because it has different products sharing fixed costs.¹⁷²¹ The multi-product firm can apportion the fixed costs in any way it wants, by allocating all common costs to one product and not the other, thereby avoiding competition regulation scrutiny.¹⁷²² Fourth, the ATC measure pushes multi-product firms to overlook the benefits of economies of scale.¹⁷²³ As discussed above, economies of scale occur when the average cost of production decreases as more outputs are produced.¹⁷²⁴ The ATC standard would ignore economies of scale because multi-product firms which add new

¹⁷¹³ *Competition Commission of South Africa v Media 24* (2019) para 140 and 142.

¹⁷¹⁴ *Competition Commission of South Africa v Media 24* (2019) para 144.

¹⁷¹⁵ *Competition Commission of South Africa v Media 24* (2019) para 175-180.

¹⁷¹⁶ *Competition Commission of South Africa v Media 24* (2019) para 176. The Third judgment explained: “For example, where the price is sufficient to cover the avoidable cost for producing the unit, the firm may still be acting competitively by producing that unit even if the price is less than the average total cost. To hold otherwise would prevent firms from producing new products in circumstances where they would be deriving more benefits than costs from such production.”

¹⁷¹⁷ *Competition Commission of South Africa v Media 24* (2019) para 177.

¹⁷¹⁸ *Ibid.* See 3.5.3.3.1 Section 8 – Abuse of dominance. Section 8(1)(c), which amended section 8(c) under section 5 of Competition Amendment Act 18 of 2018, states: “(1) It is prohibited for a dominant firm to—

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.”

¹⁷¹⁹ *Ibid.* See 3.5.2 Purpose of the Competition Act. Section 2(b) of the Competition Act states: “The purpose of this Act is to promote and maintain competition in the Republic in order – (b) to provide consumers with competitive prices and product choices”.

¹⁷²⁰ *Competition Commission of South Africa v Media 24* (2019) para 178.

¹⁷²¹ *Ibid.*

¹⁷²² *Ibid.*

¹⁷²³ *Competition Commission of South Africa v Media 24* (2019) para 179.

¹⁷²⁴ See above 3.6.4.2 Computicket (Pty) Ltd v Competition Commission of South Africa.

products to their line would likely price them at or close to marginal or average avoidable costs, as the other existing products would be financing the fixed costs.¹⁷²⁵ The Third judgment found that such lowering of price would benefit consumers.¹⁷²⁶

The third judgment also found that the dominant firm's intent was irrelevant in determining predatory pricing.¹⁷²⁷ It concluded that a firm's intention is an unreliable way of proving predation.¹⁷²⁸ This is because intention does not help assess the potential economic effects of a dominant firm's decision to price below a specific cost measure.¹⁷²⁹ It eventually dismissed the Commission's appeal.¹⁷³⁰

3.6.4.3.4 Competition Commission v Media 24 - Fourth judgment

The Constitutional Court's fourth judgment, written by Mhlantla J,¹⁷³¹ agreed with the third judgment on the jurisdiction issue and the leave to appeal issue, in that leave to appeal should be granted.¹⁷³² It also agreed with the first judgment on the merits that the appeal should succeed.¹⁷³³

3.6.4.3.5 The effect of the four judgments

The effect of the above judgments¹⁷³⁴ is that:

- (a) Six judges¹⁷³⁵ of the Constitutional Court found that the appeal "*raised an arguable point of law of general public importance*"; it would be in the interest of justice for the Constitutional Court to hear the appeal;¹⁷³⁶ the Constitutional Court's jurisdiction was thus engaged, and leave to appeal was granted.¹⁷³⁷
- (b) However, six judges¹⁷³⁸ of the Constitutional Court did not uphold the appeal on the merits.¹⁷³⁹ Accordingly, the appeal was dismissed.¹⁷⁴⁰

¹⁷²⁵ *Competition Commission of South Africa v Media 24* (2019) para 179.

¹⁷²⁶ *Ibid.*

¹⁷²⁷ *Competition Commission of South Africa v Media 24* (2019) para 184.

¹⁷²⁸ *Ibid.*

¹⁷²⁹ *Ibid.*

¹⁷³⁰ *Competition Commission of South Africa v Media 24* (2019) para 187.

¹⁷³¹ *Competition Commission of South Africa v Media 24* (2019) para 3.

¹⁷³² *Competition Commission of South Africa v Media 24* (2019) para 189.

¹⁷³³ *Competition Commission of South Africa v Media 24* (2019) para 192.

¹⁷³⁴ *Competition Commission of South Africa v Media 24* (2019) para 4.

¹⁷³⁵ Goliath AJ, Mogoeng CJ, Dlodlo AJ, Theron J, Basson AJ and Mhlantla J.

¹⁷³⁶ *Competition Commission of South Africa v Media 24* (2019) para 4, 34 and 51.

¹⁷³⁷ *Competition Commission of South Africa v Media 24* (2019) para 34.

¹⁷³⁸ Cameron J, Froneman J, Khampepe J, Petse AJ, Theron J and Basson AJ.

¹⁷³⁹ *Competition Commission of South Africa v Media 24* (2019) para 4.

¹⁷⁴⁰ *Competition Commission of South Africa v Media 24* (2019) para 4.

3.6.4.3.6 Relevance of this case for the thesis

The relevance of this case for this thesis lies in the granting of the leave to appeal and the first judgment's finding that the matter indeed raised a constitutional issue. Although the second judgment rejected the first judgment (which granted leave to appeal), the first judgment indicates that promoting SMEs and HDPs reflects the constitutional imperative of enhancing the right to equality, enshrined in section 9 of the Constitution. As indicated above, the first judgment observed that abuses of dominance can perpetuate historic patterns of exclusion and inequality.¹⁷⁴¹ Hence, it is crucial to ensure that SMEs have an equal opportunity to participate in the economy. With the 2018 amendments to the Competition Act, one could use such a “transformative” interpretation in cases involving SMEs. This transformative interpretation can be used when dealing with sections of the Competition Act, specifically dealing with SMEs. These sections include the new section 8(4) which deals with buyer power¹⁷⁴² and section 9(1)(a)(ii)¹⁷⁴³ that deals with price discrimination. Price discrimination now includes discrimination that is likely to impede the ability of SMEs or HDPs to participate effectively.¹⁷⁴⁴ Accordingly, it may be argued that these sections implicate the right to equality contained in section 9 of the Constitution, as they seek to provide equal opportunity for SMEs to participate in the economy.¹⁷⁴⁵ These sections achieve the Competition Act's objectives contained in sections 2(e) and (f).¹⁷⁴⁶ Sections 8(4) and 9(1)(a)(ii) seek to ensure that small businesses are fairly treated. This, it is submitted, in a way, shows some form of “pursuit for equality”.

¹⁷⁴¹ *Competition Commission of South Africa v Media 24* (2019) para 31.

¹⁷⁴² See above 3.5.3.3.1 Section 8 – Abuse of dominance.

¹⁷⁴³ See above 3.5.3.3.2 Section 9 – Price discrimination.

¹⁷⁴⁴ See above 3.5.3.3.2 Section 9 – Price discrimination.

¹⁷⁴⁵ *Competition Commission of South Africa v Media 24* (2019) para 30. See above 3.5.1 Preamble of the Competition Act.

¹⁷⁴⁶ See above 3.5.2 The purpose of the Competition Act. Sec 2(e) To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; Sec 2(f) To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

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

In the *Babelegi* case,¹⁷⁴⁷ in March 2020, following the President's declaration on 15 March 2020 of a National State of Disaster occasioned by the COVID-19 outbreak,¹⁷⁴⁸ the Commission received complaints against Babelegi Workwear and Industrial Supplies cc ("Babelegi").¹⁷⁴⁹ The complainants alleged that Babelegi had charged very high prices on FFP1 masks ("face masks").¹⁷⁵⁰ The Commission investigated the matter and found that Babelegi had charged excessive prices on face masks during the period 31 January to 5 March 2020 to the detriment of consumers and customers in contravention of section 8(1)(a) of the Competition Act.¹⁷⁵¹ Babelegi's mark-up increased from 23% before 31 January 2020 to a mark-up of 122% on 31 January 2020, 107% on 4 February 2020, 754% on 10 February 2020, and up to 1120% on 5 March 2020.¹⁷⁵²

The Commission referred the matter to the Tribunal. The Tribunal considered the complaint referral under sections 8(1)(a), 8(2) and (3) of the Act.¹⁷⁵³ In assessing section 8(1), the first element that the Tribunal considered was dominance. Given that the Commission had not relied on sections 7(a) and (b) to confirm Babelegi's dominance, but had relied on section 7(c),¹⁷⁵⁴ the Tribunal's key question in relation to dominance was whether Babelegi was dominant in terms of section 7(c), namely whether it had market power.¹⁷⁵⁵ To determine whether Babelegi had market power,

¹⁷⁴⁷ *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] 2 CPLR 470 (CAC) (hereafter

Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)).

¹⁷⁴⁸ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 3.

¹⁷⁴⁹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 7.

¹⁷⁵⁰ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 7.

¹⁷⁵¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) paras 3 & 9. Section 8(1)(a) prohibits a dominant firm from (a) charging an excessive price to the detriment of consumers or customers. See above 3.5.3.3.1 Section 8 – Abuse of dominance.

¹⁷⁵² *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 14.

¹⁷⁵³ See above 3.5.3.3.1 Section 8 – Abuse of dominance. See also *Competition Commission v Babelegi Workwear and Industrial Supplies CC* [2020] 1 CPLR 152 (CT) para 41; *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 20.

¹⁷⁵⁴ *Competition Commission v Babelegi Workwear and Industrial Supplies CC* [2020] 1 CPLR 152 (CT) para 53. In terms of section 7 of the Competition Act, a firm is dominant in a market if (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power. See above 3.5.3.3 Abuse of dominance and 3.5.3.3.1 Section 8 – Abuse of dominance.

¹⁷⁵⁵ *Competition Commission v Babelegi Workwear and Industrial Supplies CC* [2020] 1 CPLR 152 (CT) para 64. "Market power" is defined under section 1(xiv) of the Competition Act as "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its

the Tribunal had to define the relevant market.¹⁷⁵⁶ The Tribunal found that a market definition in a crisis period becomes problematic because the relevant market “*has been disrupted or distorted by that crisis.*”¹⁷⁵⁷

The Tribunal in particular found that “*as a matter of economics, in a crisis period such as Covid 19, the actual conduct of the firm can be used as a proxy to assess its market power.*”¹⁷⁵⁸ It found that Babelegi “*had the ability to effect material price and markup increases suddenly, from 31 January 2020 and successively for the remainder of the Complaint Period, without providing any cost justification for these increases.*”¹⁷⁵⁹ It then concluded from this that, “*one can reasonably infer that Babelegi had market power during the Complaint Period since it behaved to an appreciable extent independently of its competitors, customers, or suppliers.*”¹⁷⁶⁰

Regarding the impugned prices charged by Babelegi during the complaint period, the Tribunal found that they bore no reasonable relation to the prices charged and mark-up earned during the period prior to the COVID-19 pandemic.¹⁷⁶¹ The Tribunal found that the pre-COVID 19 prices were an appropriate and reasonable benchmark for “*what competitive prices and mark-ups would be under competitive conditions of normal and effective competition.*”¹⁷⁶² The Tribunal then concluded that the Commission had shown a *prima facie* case of excessive pricing and the onus to disprove the case shifted to Babelegi, in terms of section 8(2).¹⁷⁶³ The Tribunal thereupon had to determine whether the difference between the impugned price and the competitive price was unreasonable.¹⁷⁶⁴ It found that the prices charged during the complaint period (namely, the impugned prices) were unreasonable and exploitative.¹⁷⁶⁵ The Tribunal also found that Babelegi’s excessive prices were to the

competitors, customers or suppliers”. See above 3.5.3.3 Abuse of dominance and 3.5.3.3.1 Section 8 – Abuse of dominance.

¹⁷⁵⁶ For a discussion on the relevant market see above 3.5.3.1.3 SMEs – victims of prohibited horizontal practices; 3.5.5 Market Inquiries – section 43.

¹⁷⁵⁷ *Competition Commission v Babelegi Workwear and Industrial Supplies CC* [2020] 1 CPLR 152 (CT) para 86; *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 30.

¹⁷⁵⁸ *Competition Commission v Babelegi Workwear and Industrial Supplies CC* [2020] 1 CPLR 152 (CT) para 92; *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 22

¹⁷⁵⁹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 22.

¹⁷⁶⁰ *Competition Commission v Babelegi Workwear and Industrial Supplies CC* [2020] 1 CPLR 152 (CT) para 152; *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 22.

¹⁷⁶¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 23.

¹⁷⁶² *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 23.

¹⁷⁶³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 23.

¹⁷⁶⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 24.

¹⁷⁶⁵ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 24.

detriment of consumers and customers.¹⁷⁶⁶ It held that Babelegi had taken advantage of customers' increased demand for face masks during the COVID-19 crisis.¹⁷⁶⁷

The Tribunal confirmed that Babelegi had contravened section 8(1)(a) of the Act by charging an excessive price to the detriment of consumers and imposed an administrative penalty of R76 040 on Babelegi.¹⁷⁶⁸

Babelegi appealed the Tribunal's decision to the CAC.¹⁷⁶⁹ On appeal, Babelegi contended that it increased its prices in anticipation of cost increases from the suppliers.¹⁷⁷⁰ It argued that the costs of masks had increased drastically following the COVID-19 outbreak.¹⁷⁷¹ During the complaint period of 31 January to 5 March 2020, Babelegi sold 496 boxes of 20 masks per box. Of these boxes, 76 were sold to external customers, and the rest was sold to Babelegi's sister company.¹⁷⁷²

The Commission argued that Babelegi's conduct needed to be assessed within the context of the COVID-19 pandemic and the increased demand for face masks.¹⁷⁷³ The Commission argued that Babelegi took advantage of the vulnerability of consumers and customers to charge high prices for its face masks.¹⁷⁷⁴ The Commission further argued that during a crisis period, such as the Covid-19 pandemic, price increases are highly detrimental to poor people and small businesses, which are the most vulnerable during this period.¹⁷⁷⁵ It argued that exorbitant price increases of essential goods deprived poor people of protection against the virus and imposed high costs on small businesses trying to protect their employees.¹⁷⁷⁶

¹⁷⁶⁶ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 25.

¹⁷⁶⁷ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 25.

¹⁷⁶⁸ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 11.

¹⁷⁶⁹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 11.

¹⁷⁷⁰ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 15.

¹⁷⁷¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 15.

¹⁷⁷² *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 16.

¹⁷⁷³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 17.

¹⁷⁷⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 17.

¹⁷⁷⁵ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 17.

¹⁷⁷⁶ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 18.

On appeal to the CAC, Babelegi argued that the Tribunal failed to properly define the market and erred on the determination of dominance.¹⁷⁷⁷ Babelegi argued that the Tribunal had conflated market power¹⁷⁷⁸ and excessive pricing.¹⁷⁷⁹

The CAC confirmed that excessive pricing in contravention of section 8(1)(a) can only be established if the accused firm is dominant in the market.¹⁷⁸⁰ In evaluating Babelegi's conduct, the CAC remarked that excessive pricing is challenging for competition authorities, as it requires them to somewhat act as "price regulators."¹⁷⁸¹ The CAC confirmed that *"In order to determine whether a price is excessive, a yardstick has to be established in order to establish a competitive price with which to assess whether the impugned price is excessive as compared to the yardstick price."*¹⁷⁸² In other words, the determination of an excessive price entails the determination of a yardstick price, which is the competitive price against which the impugned price will be compared.¹⁷⁸³ The CAC, nevertheless, recognised that this case had to be assessed in the context of the COVID-19 outbreak.¹⁷⁸⁴ It further noted that the case had to be assessed against the new provisions of excessive pricing that were introduced by the 2018 amendments,¹⁷⁸⁵ which provisions were not intended to be used under the circumstances of a pandemic.¹⁷⁸⁶

The CAC noted further that it was common cause that Babelegi had increased its price of face masks by 888% and had earned a mark-up of 1119% during the complaint period.¹⁷⁸⁷ It found that the issues to be determined were: (i) whether the conditions brought about by the COVID-19 pandemic had resulted in Babelegi's market power as contemplated under section 7 of the Competition Act; (ii) whether Babelegi was a dominant firm with market power; (iii) whether the increased prices were reasonable;

¹⁷⁷⁷ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 26.

¹⁷⁷⁸ "Market power" is defined under section 1(xviii) of the Competition Act as *"the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers"*. See above 3.5.3.3 Abuse of dominance and 3.5.3.3.1 Section 8 – Abuse of dominance.

¹⁷⁷⁹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 30.

¹⁷⁸⁰ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 21.

¹⁷⁸¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 41.

¹⁷⁸² *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 41.

¹⁷⁸³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 41.

¹⁷⁸⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 41.

¹⁷⁸⁵ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 10; See also above 3.5.3.3.1 Section 8 – Abuse of dominance

¹⁷⁸⁶ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 43.

¹⁷⁸⁷ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 44.

(iv) whether Babelegi's conduct was to the detriment of consumers; and (v) whether the penalty imposed on Babelegi was appropriate.¹⁷⁸⁸

The CAC noted the Commission's and Tribunal's reliance on an article written by the internationally renowned Professor Massimo Motta, where he observed that *"(...) firms that may be accused of price gouging might not necessarily be dominant in ordinary times. However, they may well be in out [sic] exceptional times. (...) But during a period of confinement, people are obliged to buy their shopping next door, thus becoming captive of local shops. Even if they have very little market share in a 'normal times' market, these shops may be dominant during the crisis. (...) In cases of excess demand, even a small firm may have considerable market power. (...) In other words, when demand is much higher than capacity, even 'small' firms may be endowed with significant market power, that is, they may be dominant."*¹⁷⁸⁹ Prof Motta's view is supported by Jorge Ramos who discussed the concept of the *"lucky monopolist"*.¹⁷⁹⁰ The CAC explained that the lucky monopolist is not dominant in the traditional way of dominance, for example through power from the state, or natural efficiencies or substantial investment or great management capabilities.¹⁷⁹¹ The dominance of the lucky monopolist comes from luck.¹⁷⁹² The CAC thus found that in a time of crisis, such as the one occasioned by the COVID-19 pandemic, *"one needs to use a somewhat different conceptual framework from what ordinarily would be employed in an excessive pricing case"*.¹⁷⁹³ Given that Babelegi would have had less than 5% of the market for the supply of face masks nationally, the CAC considered Babelegi's market power by looking at *"the cost, prices and markups before, during and after the complaint period"*.¹⁷⁹⁴ The CAC found that during the complaint period, Babelegi did not experience cost increases. It sold its pre-COVID 19 stock. Accordingly, the price increase of 888% could have only been the result of acting independently of its competitors, customers, or suppliers.¹⁷⁹⁵ The CAC found that Babelegi was a *"lucky*

¹⁷⁸⁸ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 46.

¹⁷⁸⁹ Own emphasis. *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 47.

¹⁷⁹⁰ Jorge Ramos *"Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power"* (2020) Chapter 7; *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 48.

¹⁷⁹¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 48.

¹⁷⁹² *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 48.

¹⁷⁹³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 50.

¹⁷⁹⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 50

¹⁷⁹⁵ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 51.

monopolist", in that it had the power to control its prices without being concerned that a competitor's countervailing power would counter its high prices during the complaint period.¹⁷⁹⁶

However, the CAC found that "durability" must be considered.¹⁷⁹⁷ This is to determine whether the difference between the impugned charged price and the competitive price is unreasonable, in terms of section 8(3) of the Act.¹⁷⁹⁸ Section 8(3) of the Act deals with the factors to consider in determining if a price is excessive.¹⁷⁹⁹

Section 8(3) of the Act states:

"Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—

(a) the respondent's price-cost margin, internal rate of return, return on capital invested or profit history;

(b) the respondent's prices for the goods or services—

(i) in markets in which there are competing products;

(ii) to customers in other geographic markets;

(iii) for similar products in other markets; and

(iv) historically;

(c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;

(d) the length of time the prices have been charged at that level;

(e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial

¹⁷⁹⁶ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 51.

¹⁷⁹⁷ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 53.

¹⁷⁹⁸ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 53.

¹⁷⁹⁹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 53.

efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and

(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.”

The CAC found that to determine the issue of durability, the relevant question was when will the market “*work sufficiently to impose discipline on a rent seeker?*”¹⁸⁰⁰ It found that the context matters, and that in this matter, the market circumstances had been affected by an unprecedented pandemic.¹⁸⁰¹ Consequently the CAC found that Babelegi acted as a monopolist and extracted the maximum price during a period when customers were the most vulnerable at the dawn of the COVID-19 pandemic.¹⁸⁰² Based on the available evidence, the CAC further found that Babelegi’s ability to charge excessive prices confirmed its market power which it had obtained under the unprecedented conditions of the COVID-19 pandemic.¹⁸⁰³

In determining that Babelegi’s prices during the complaint period were excessive, the CAC considered Babelegi’s prices of face masks before the COVID-19 pandemic, which were significantly lower than the prices charged during the complaint period. The CAC also considered Babelegi’s price increases during the complaint period and following the pandemic which significantly cost customers and consumers.¹⁸⁰⁴

In a nutshell, the CAC found that Babelegi’s impugned price was significantly higher than the yardstick price, namely the price that would have been charged under competitive conditions, before the outbreak of the COVID-19 pandemic (i.e. the competitive price).¹⁸⁰⁵

The CAC then assessed whether the price charged was unreasonable in terms of section 8(3).¹⁸⁰⁶ Babelegi’s only explanation for the exorbitant price increases was that it anticipated a rise in the cost of obtaining more face masks, once the existing

¹⁸⁰⁰ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 53

¹⁸⁰¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 58.

¹⁸⁰² *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 56.

¹⁸⁰³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 57.

¹⁸⁰⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 58.

¹⁸⁰⁵ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 59.

¹⁸⁰⁶ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 59.

ones were finished.¹⁸⁰⁷ There were, however, no evidence that any cost increase would be closer to Babelegi's price hike of 888%.¹⁸⁰⁸

The CAC found that "*there is no correlation whatsoever between the contents of the supplier notices and the extent and timing of appellant's frequent price increases during the complaint period.*"¹⁸⁰⁹ The CAC thus found that Babelegi's explanation did not rebut the prima facie case of excessive pricing as required by section 8(2).¹⁸¹⁰

Regarding the requirement of detriment to consumers or customers as stated in section 8(1)(a), the CAC found that face masks were an essential product during the COVID-19 crisis, and excessive prices on this critical commodity acted to the detriment of consumers in the country.¹⁸¹¹

On the penalty, the CAC found that firms should not take advantage of the difficult conditions caused by the COVID-19 pandemic, especially in respect of essential products, such as face masks, that are needed by consumers to protect their health.¹⁸¹² The CAC, however, found it regrettable that the first case brought under the amended excessive pricing provisions of section 8(1)(a) related to a small or medium-sized firm whose ability to participate effectively in the market the Competition Act specifically seeks to promote.¹⁸¹³ The CAC found that only 76 boxes of 20 masks per box were affected by Babelegi's excessive price during the complaint period.¹⁸¹⁴ It also found that some of the increases were *de minimis*,¹⁸¹⁵ in that the 1120% mark-

¹⁸⁰⁷ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 60.

¹⁸⁰⁸ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 62.

¹⁸⁰⁹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 65.

¹⁸¹⁰ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 65.

¹⁸¹¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 67.

¹⁸¹² *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 75.

¹⁸¹³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 77&79, referring to section 2 of the Competition Act.

¹⁸¹⁴ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 78

¹⁸¹⁵ This was *de minimis* in the sense that the contravention did not cause substantial harm in that it affected only a few or a minimal number of masks. For the *de minimis* concept, see also Chapter 4.2 European Competition Law – Treatment of SMEs, below discussing the *EU De Minimis Notice*, which exempts from the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) agreements that do not appreciably affect trade between member states. Article 101 of the TFEU prohibits agreements and concerted practices between two or more firms, and decisions by associations of firms, which may affect trade between EU Member States, and which may prevent, restrict or distort competition in the internal market.

up only applied to 3 boxes of masks.¹⁸¹⁶ There were also minimal sales during the complaint period.¹⁸¹⁷

The CAC therefore found that this was a *de minimis* breach of section 8(1) as it was committed by a small firm which had sold very few masks at an exorbitant price.¹⁸¹⁸ The CAC, however, found that it needed to “*show fidelity to the Act*” by applying the law as set out in section 8(1) to the facts of the case.¹⁸¹⁹ It then concluded that:

*“When the de minimis character of the offence is compared to the costs incurred by appellant in defending itself against the full force of the litigation by the respondent, the minimal harm caused as a result of the small amount of sales and the short duration of the complaint period, justice, in my view, would best be served by a decision not to impose a penalty on appellant, a small firm, the actions of which during the complaint period have already caused it significant harm.”*¹⁸²⁰

The CAC eventually dismissed the appeal.¹⁸²¹ Babelegi was thus found guilty of contravening section 8(1)(a), but no penalty was imposed on it because, as mentioned above, of the *de minimis* character of the offence, in that very few masks were affected by the contravention, the cost already incurred by Babelegi in defending this case, the minimal harm caused by the contravention and its short duration.¹⁸²²

3.6.4.4.1 Relevance of this case for the thesis

In this case, the perpetrator of the impugned conduct was an SME. The case is relevant as it shows that an SME, despite being a small firm, may actually be dominant under certain circumstances. In this case, Babelegi, although a small or medium-sized firm, was found to be dominant because of the crisis that the COVID-19 pandemic had caused and its ability to supply much-needed face masks. The CAC relied on Prof Motta’s view, which confirms that SMEs may be dominant in times of crisis when there is excess demand. A small firm may become a lucky monopolist in some instances. The case is also relevant in respect of the penalty determination. Although the CAC found that it needed to apply the law, as is, to the facts of the case, i.e. “show fidelity

¹⁸¹⁶ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 78.

¹⁸¹⁷ *Ibid.*

¹⁸¹⁸ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 79.

¹⁸¹⁹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 79.

¹⁸²⁰ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 80.

¹⁸²¹ *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 82.

¹⁸²² *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 80.

to the Act”,¹⁸²³ and although it did not use section 2(e) to depart from the strict application of the law, given that the perpetrator was an SME, the CAC considered the size of the firm (being a small or medium firm) and the fact that the affected sales were minimal, in the determination of the penalty. The CAC found that this case did not justify a penalty. Babelegi is still in business.¹⁸²⁴

This confirms the thesis’ review of the case law involving SMEs, in that the courts and the CAC, in particular, have applied the law by the letter, and it has shown “*fidelity to the Act*”.¹⁸²⁵ The fact that the implicated firm was small or medium did not influence the assessment of the merits of the case. The size of the firm seems to, however, have been considered in the determination of the penalty.

3.6.5 Review of Merger case law affecting SMEs – section 12

3.6.5.1 *Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another*

The above case concerns the merger between Walmart Stores Inc (“Walmart”) and Massmart Holdings (“Massmart”).¹⁸²⁶ This was an appeal of the Tribunal’s decision to the CAC by SACCWU, one of the Trade Unions that had intervened during the Tribunal’s proceedings.¹⁸²⁷ Three Ministers (the Minister of Economic Development, the Minister of Trade and Industry and the Minister of Agriculture, Forestry and Fisheries) sought to review the Tribunal’s proceedings, contending that they did not have a fair hearing.¹⁸²⁸

¹⁸²³ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 79.

¹⁸²⁴ See <https://www.babelegi.co.za/> (accessed on 14 October 2024).

¹⁸²⁵ *Babelegi Workwear and Industrial Supplies CC v Competition Commission* (2020) para 79.

¹⁸²⁶ *Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another* [2012] 1 CPLR 6 (CAC) (hereafter *Walmart* (2012) (CAC)).

¹⁸²⁷ *Walmart Stores Inc / Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT) para 128; *Walmart* (2012) (CAC) para 4.

¹⁸²⁸ *Walmart* (2012) (CAC) para 4.

The Tribunal found that the merger was unlikely to substantially harm competition, but that it raised certain public interest concerns.¹⁸²⁹ It approved the merger with conditions to remedy these concerns.¹⁸³⁰

In its decision, the Tribunal confirmed its findings in the *Harmony Gold/Goldfields*¹⁸³¹ merger that the public interest inquiry was linked to the competition inquiry and that the public interest findings had to be justified by the competition findings.¹⁸³² In *Harmony Gold/Goldfields*, the Tribunal explained that the public interest inquiry was not a separate and distinct inquiry from the outcome of the competition inquiry but was justified by it.¹⁸³³ In other words, if the competition inquiry concluded that the merger was substantially anti-competitive, such a merger could be justified on substantial public interest.¹⁸³⁴ However, if the competition inquiry concluded that the merger did not raise substantial anti-competitive concerns, it could still be rejected because of its negative impact on public interests.¹⁸³⁵ In *Walmart*, referring back to *Harmony Gold/Goldfields*,¹⁸³⁶ the Tribunal reiterated that the competition and public interest inquiries had to have regard for each other.¹⁸³⁷

One of the contentious public interest issues was the procurement of products, including groceries and general merchandise, from local producers.¹⁸³⁸ The Ministers and the Unions were concerned that the merger would result in a significant shift in buying from local manufacturers towards foreign low-cost Asian producers.¹⁸³⁹ The

¹⁸²⁹ *Walmart Stores Inc / Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT) para 128; *Walmart* (2012) (CAC) 6.

¹⁸³⁰ *Walmart* (2012) (CAC) para 1.

¹⁸³¹ *Harmony Gold Mining Company Limited/Gold Fields Limited* [2005] 2 CPLR 484 (CT).

¹⁸³² *Harmony Gold Mining Company Limited/Gold Fields Limited* [2005] 2 CPLR 484 (CT) para 56. See *Walmart* (2012) (CAC) para 14.

¹⁸³³ *Harmony Gold Mining Company Limited/Gold Fields Limited* [2005] 2 CPLR 484 (CT) para 56.

¹⁸³⁴ See above 3.5.4 Merger regulations. Section 12A(1) before the 2018 amendments stated: “Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and – (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine – (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or likely to result from the merger, and would not likely be obtained if the merger is prevented; and (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).” (own emphasis)

¹⁸³⁵ *Ibid.*

¹⁸³⁶ *Harmony Gold/Goldfields* para 56.

¹⁸³⁷ *Walmart Stores Inc / Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT) para 36.

¹⁸³⁸ *Walmart* (2012) (CAC) paras 8 and 22.

¹⁸³⁹ *Walmart* (2012) (CAC) para 22.

concern was that this would significantly affect SMEs in South Africa and result in job losses.¹⁸⁴⁰ The Tribunal noted this concern but found that the potential job losses had to be weighed against the potential benefits of low prices for consumers and job creation at Massmart.¹⁸⁴¹ The Tribunal found that the appropriate remedy for the procurement concern was the merging parties' proposal "*to establish a programme aimed exclusively at the development of local South African supplies, including small and medium size enterprises and funded in the fixed amount of R100 million to be contributed by the merged entity over a three year period.*"¹⁸⁴²

SACCAWU raised several public interest concerns, including the allegation that 574 employees had been retrenched in anticipation of the merger.¹⁸⁴³ The CAC was concerned that the Tribunal had accepted the merging parties' proposed conditions without sufficiently interrogating their effect on local manufacturers, employment, and SMEs' ability to compete globally.¹⁸⁴⁴ The CAC partly upheld the appeal and strengthened the conditions of the merger.¹⁸⁴⁵

In evaluating the merger, the CAC confirmed that the public interest inquiry in the Walmart merger focused on the public interest grounds set out in section 12A(3)(a), (b) and (c) (as they were before the 2018 Amendment Act came into operation).¹⁸⁴⁶ Before the 2018 amendments, section 12A(3) stipulated that "*when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on – (a) a particular industrial sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.*"¹⁸⁴⁷

The CAC considered section 12A which deals with the "consideration of mergers" and found that the Act requires the Tribunal to first assess the merger against a "*traditional consumer welfare standard*", namely assessing whether the merger is likely to

¹⁸⁴⁰ *Walmart (2012)* (CAC) para 22.

¹⁸⁴¹ *Walmart (2011)* (CT) para 99 ; *Walmart (2012)* (CAC) para 23.

¹⁸⁴² Own emphasis. *Walmart (2012)* (CAC) para 26. See also *Walmart (2011)* (CT) para 119.

¹⁸⁴³ *Walmart (2012)* (CAC) para 137.

¹⁸⁴⁴ *Walmart (2012)* (CAC) para 165.

¹⁸⁴⁵ *Walmart (2012)* (CAC) 51.

¹⁸⁴⁶ *Walmart (2012)* (CAC) para 13.

¹⁸⁴⁷ See also above 3.5.4 Merger regulations.

substantially harm competition in terms of section 12A(2).¹⁸⁴⁸ Thereafter, the Tribunal is required to establish whether the merger can or cannot be justified on public interest grounds set out in section 12A(3).¹⁸⁴⁹ In this regard, the CAC accepted the merging parties' argument that a test or standard other than the "consumer welfare standard" would complicate the application of the Act, because of the difficulty in accurately calculating the total welfare of a merger transaction.¹⁸⁵⁰

The CAC then looked at the weight to be given to public interest factors¹⁸⁵¹ in order to determine whether they could trump a finding based on consumer welfare considerations.¹⁸⁵² It held that this question should be answered by balancing the consumer welfare interests and the public interest considerations.¹⁸⁵³ The CAC stated that "an engagement with an exercise of proportionality is then required to determine how to balance the competing arguments" that favour consumer welfare and those that favour employment and SMEs interests.¹⁸⁵⁴ It added that "a proportionality exercise requires evidence which would enable the exercise, justify the calculation which flows therefrom and permit a balance to be struck between the competing issues of consumer welfare, employment and small business."¹⁸⁵⁵

The CAC remarked that whether consumer benefits offset job losses depended on the available evidence.¹⁸⁵⁶ In other words, the determination of whether the importation of goods would result in more consumer benefits than job losses, depended on the evidence.¹⁸⁵⁷

Nevertheless, the CAC accepted that the public interest inquiry is a separate inquiry to determine whether to approve a merger.¹⁸⁵⁸ However, it noted that the Act does not provide guidance on the weight to give to the public interest grounds set out in section 12A(3), but it merely refers to "substantial" public interest grounds.¹⁸⁵⁹ The CAC thus

¹⁸⁴⁸ *Walmart (2012)* (CAC) para 97.

¹⁸⁴⁹ *Walmart (2012)* (CAC) para 97. It is, however, noted that this inquiry has changed with the 2018 amendments and the Tribunal's decision in the Burger King merger.

¹⁸⁵⁰ *Walmart (2012)* (CAC) para 99.

¹⁸⁵¹ Section 12 A(3).

¹⁸⁵² Section 12A(2); *Walmart (2012)* (CAC) para 99.

¹⁸⁵³ *Walmart (2012)* (CAC) para 100.

¹⁸⁵⁴ *Walmart (2012)* (CAC) para 100.

¹⁸⁵⁵ Own emphasis. *Walmart (2012)* (CAC) para 100.

¹⁸⁵⁶ *Walmart (2012)* (CAC) para 105.

¹⁸⁵⁷ *Walmart (2012)* (CAC) para 105.

¹⁸⁵⁸ *Walmart (2012)* (CAC) para 113.

¹⁸⁵⁹ *Walmart (2012)* (CAC) para 113 referring to section 12A(1)(b).

confirmed that such public interests must be “*considerable*” for a merger, which does not raise competition concerns, to be prohibited on negative public interest findings.¹⁸⁶⁰

Accordingly, the CAC found that the merger may only be rejected on adverse public interest grounds, if the negative effects on public interests are “substantial”.¹⁸⁶¹ This must be established through evidence.¹⁸⁶² The CAC stated that “*where the evidence shows that the merger may, on the probabilities, have a detrimental effect, for example, on employment or the ability of small and medium sized business to be competitive, the court will need to engage in the necessary balancing exercise which entails an embrace of, broadly, the normative framework advocated by SACCAWU, as qualified in this judgment.*”¹⁸⁶³ Accordingly, if the evidence shows that the adverse effect on public interest is substantial, then the public interest inquiry should be done separately.

The CAC noted further that some of Wal-Mart’s plans regarding the merger would affect SMEs whose interests are protected under section 12A(3).¹⁸⁶⁴ Accordingly, the CAC found it appropriate to consider a condition that would enhance the participation of South African SMEs producers in global value chains where Wal-Mart was dominant.¹⁸⁶⁵ It found that such remedy would prevent job losses and increase both employment and economic activity of, amongst others, SMEs.¹⁸⁶⁶

In summary, the CAC found that based on the available evidence neither a prohibition nor a blanket approval was justified.¹⁸⁶⁷ It ordered that a study be conducted to investigate the implications of the Wal-Mart merger for SMEs and to guide the formulation of the framework for a fund that would benefit SMEs.¹⁸⁶⁸ Accordingly, the CAC directed that a committee comprised of the representatives of SACCAWU, Wal-Mart and the government compile a report within three months of the CAC’s judgment.¹⁸⁶⁹ It found that the study would enable the court to devise a proper

¹⁸⁶⁰ *Walmart (2012)* (CAC) para 113.

¹⁸⁶¹ *Walmart (2012)* (CAC) para 114.

¹⁸⁶² *Walmart (2012)* (CAC) para 113.

¹⁸⁶³ *Walmart (2012)* (CAC) para 114.

¹⁸⁶⁴ *Walmart (2012)* (CAC) para 162.

¹⁸⁶⁵ *Walmart (2012)* (CAC) para 162.

¹⁸⁶⁶ *Walmart (2012)* (CAC) para 162.

¹⁸⁶⁷ *Walmart (2012)* (CAC) para 164.

¹⁸⁶⁸ *Walmart (2012)* (CAC) para 167.

¹⁸⁶⁹ *Walmart (2012)* (CAC) para 168.

investment remedy and a program to empower local producers.¹⁸⁷⁰ The CAC further specified that “*the study shall canvass the best means by which South African small and medium-sized suppliers can participate in Wal-Mart's global value chain training programmes that might be established to train local South African suppliers on how to conduct business with the merged entity and Wal-Mart and the costs which would reasonably be incurred in so far as the development of such a programme is concerned.*”¹⁸⁷¹

In conclusion, the CAC dismissed the Minister's review application and partly set aside the Tribunal's decision by amending the merger conditions.¹⁸⁷²

3.6.5.1.1 Relevance of this case to this thesis

The CAC's decision in *Wal-Mart* is specifically relevant to the thesis as it deals with public concerns about, *inter alia*, protecting small local producers in the wholesale/retail industry. In this merger, the CAC recognised that the merger would have adverse effects on SMEs whose interests are protected under section 12A(3).¹⁸⁷³ It found that it was appropriate to consider a condition that would enhance the participation of South African SMEs producers in global value chains where Wal-Mart was dominant.¹⁸⁷⁴ As observed by Mandiriza *et al.* the merger highlighted the issue of globalisation within the context of industrial policy and the necessity to properly respond to the potential effects of the merger on South African suppliers as a result of global value chains.¹⁸⁷⁵ This emphasised the need for existing small suppliers to reorient themselves to feed into the global value chain and grab the opportunities presented through globalisation.¹⁸⁷⁶ Mandiriza *et al.* also noted the CAC's caution to not substitute competition law for industrial or trade policy.¹⁸⁷⁷ They, accordingly, remarked that the CAC's considerations of the conditions were confined to address

¹⁸⁷⁰ *Walmart (2012)* (CAC) para 2.1.4 of the CAC Order.

¹⁸⁷¹ *Walmart (2012)* (CAC) para 2.1.4 of the CAC Order.

¹⁸⁷² *Walmart (2012)* (CAC) 7.

¹⁸⁷³ *Walmart (2012)* (CAC) para 162.

¹⁸⁷⁴ *Walmart (2012)* (CAC) para 162.

¹⁸⁷⁵ Mandiriza, Sithebe and Viljoen “An ex-post review of the Wal-Mart/Massmart merger” (2016) Competition Commission Working Paper CC2016/03, 9.

¹⁸⁷⁶ *Idem*, 9-10.

¹⁸⁷⁷ *Walmart (2012)* (CAC) para 154.

the merger-specific risks of the transaction, particularly the effect on local producer SMEs and their interactions with the global value chain of the merged entity.¹⁸⁷⁸

This case indicates how the competition authorities considered the public interest of promoting the ability of small businesses to become competitive (section 12(3)(c)). Although a special test was not applied in this merger, which affected SMEs, conditions were imposed to ensure that small local producers could still participate in the market. So, the plight of SMEs in the sector was considered. This case merely illustrates how the competition authorities (the CAC, in this case) have considered public interest grounds relating to SMEs. The CAC's interpretation and application of section 12A was that it involves a two-pronged inquiry and that, on the wording of the section, the public interest inquiry constituted a separate inquiry. A balancing exercise between consumer welfare and the relevant public interest grounds was, however, required. Further, public interest grounds that would either reject a pro-competitive merger or approve an anti-competitive merger would have to be substantial or "considerable".

3.6.5.2 *Pioneer Hi-Bred International Inc. and another v the Competition Commission and another*

In this case,¹⁸⁷⁹ Pioneer Hi-Bred International Inc. (Pioneer) and Pannar Seed (Pty) Ltd. (Pannar) appealed against the Tribunal's decision to prohibit their merger in terms of section 16(2)(c).¹⁸⁸⁰ Pannar was in decline in the market for the hybrid maize seed breeding in South Africa.¹⁸⁸¹ The CAC acknowledged that the merger would reduce

¹⁸⁷⁸ Mandiriza, Sithebe and Viljoen "An ex-post review of the Wal-Mart/Massmart merger" (2016) Competition Commission Working Paper CC2016/03, 10.

¹⁸⁷⁹ *Pioneer Hi-Bred International Inc. and another v the Competition Commission and another* (113/CAC /Nov11) (28 May 2012) (hereafter *Pioneer Hi-Bred v the Competition Commission* (2012) (2012) (CAC)).

¹⁸⁸⁰ Section 16(2)(c) states that: "upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or a request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A, and the recommendation or request, as the case may be, and within the prescribed time- (c) prohibit implementation of the merger." *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 1.

¹⁸⁸¹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 2. Although Pannar was in decline it could not be regarded as a failing firm as the merging parties did not categorise Pannar as a failing firm. In this regard, the CAC stated: "This case cannot however be disposed of in terms of the concept of a failing firm, as it was accepted by all of the parties, that Pannar did not fall into this category." *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 3.

the number of players in the hybrid maize seed market from three (namely Monsanto Pty (Ltd), Pioneer and Pannar) to two, namely Monsanto and Pioneer.¹⁸⁸²

The Tribunal had found that Pannar's germplasm¹⁸⁸³ would not become obsolete as it could conclude other strategic partnerships with other global seed companies.¹⁸⁸⁴ The other potential suitable buyers were Syngenta Crop Protection AG (Syngenta) and Dow Agro Sciences LLC ("Dow").¹⁸⁸⁵ The CAC remarked that any strategic partnership would have to be with a player whose germplasm was compatible with Pannar's germplasm.¹⁸⁸⁶ Regarding a possible merger between Syngenta and Pannar, the CAC found that such a merger would not have succeeded, as their respective germplasm did not complement or were incompatible.¹⁸⁸⁷

Regarding a possible merger between Pannar and Dow, Pannar's representative testified that the Dow germplasm was "probably 'less of a fit' than the Syngenta germplasm."¹⁸⁸⁸ The CAC also found very little complementarity between Dow's germplasm and Pannar's germplasm.¹⁸⁸⁹

The CAC rejected the Tribunal's finding that Pannar's business could be "preserved and exploited" through a partnership with an international seed firm, such as Syngenta or Dow.¹⁸⁹⁰ There were, however, complementarities between Pioneer's germplasm and Pannar's germplasm.¹⁸⁹¹ The CAC found that the public interest objective of maintaining competition in the market could not justify a prohibition of the merger.¹⁸⁹² It further found that a prohibition of the merger would have resulted in the loss of

¹⁸⁸² *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 3.

¹⁸⁸³ Merriam-Webster dictionary defines germplasm as "germ cells and their precursors serving as the bearers of heredity" or "the genetic material of germ cells". Available at <https://www.merriam-webster.com/dictionary/germplasm> (accessed on 10 November 2024). See also *Pioneer Hi-Bred International Inc. and another v the Competition Commission* (81/AM/Dec2010) (CT) (2011) para 34 where the Tribunal explained germplasm as follows: "hybrid breeding puts a premium on maize seed producer having access to diverse pool maize inbreds from which to cross-breed the hybrid varieties. The industry came to refer to these inbreds as "germplasm", also referred to as "genetics". Germplasm contains the genetic code that express the different characteristics or traits of the maize plant. Today, the term germplasm refers to the genetic pool of seed material from which maize varieties may be bred or developed."

¹⁸⁸⁴ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 4.

¹⁸⁸⁵ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 4.

¹⁸⁸⁶ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 5.

¹⁸⁸⁷ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 12.

¹⁸⁸⁸ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 14.

¹⁸⁸⁹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 19.

¹⁸⁹⁰ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 13 & 19.

¹⁸⁹¹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 20.

¹⁸⁹² *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 22.

Pannar's local pool of germplasm.¹⁸⁹³ The CAC also rejected the Tribunal's finding on the counterfactual.¹⁸⁹⁴ The Tribunal had found that absent the merger, Pannar could have concluded "*a viable commercial arrangement with another international seed breeder*" to prevent its demise.¹⁸⁹⁵ It also found that the relevant counterfactual against which the merger should be assessed was the status quo, namely absent the merger with Pioneer, Pannar would consider other business partners or even a merger.¹⁸⁹⁶ In contrast, the CAC found that the relevant counterfactual was Pannar's continued decline, its ultimate exit from the market, and the resulting loss of its local germplasm.¹⁸⁹⁷ Accordingly, two firms would still be left in the market, dominated by Monsanto.¹⁸⁹⁸ It then concluded that it was important to ensure that Pannar's germplasm was "*preserved and effectively exploited in the public interest*".¹⁸⁹⁹ The CAC accordingly held that the merger accomplished this goal.¹⁹⁰⁰

Notwithstanding the CAC's above conclusion, it assessed the unilateral price increases that could arise from the merger.¹⁹⁰¹ It disagreed with the Tribunal's findings that the merger would result in high unilateral price increases.¹⁹⁰²

On the efficiencies, the Tribunal had found that the benefits flowing from the (then) current joint trials of the merging parties were not merger-specific.¹⁹⁰³ It added that "*efficiencies must be achieved within a relatively short period of time to prevent a proposed merger from causing harm to consumers*".¹⁹⁰⁴

The CAC found that the merger would likely affect consumer welfare as new hybrids would be introduced in the market.¹⁹⁰⁵ However, the CAC found that the unilateral anti-competitive effects of the merger were outweighed by the dynamic efficiencies.¹⁹⁰⁶

¹⁸⁹³ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 24.

¹⁸⁹⁴ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 27.

¹⁸⁹⁵ *Pioneer Hi-Bred International Inc. and another v the Competition Commission* (81/AM/Dec2010) (CT) (2011) para 262; *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 27.

¹⁸⁹⁶ *Pioneer Hi-Bred International Inc. and another v the Competition Commission* (81/AM/Dec2010) (CT) (2011) paras 261 and 265; *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 27.

¹⁸⁹⁷ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 28.

¹⁸⁹⁸ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 28.

¹⁸⁹⁹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 30.

¹⁹⁰⁰ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 30.

¹⁹⁰¹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 31.

¹⁹⁰² *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 35.

¹⁹⁰³ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 48.

¹⁹⁰⁴ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 49.

¹⁹⁰⁵ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 51.

¹⁹⁰⁶ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 52.

This was after considering the incentive to innovate and the effect of innovation on the market post-merger.¹⁹⁰⁷ The CAC also considered the benefits that would be passed onto the farmers.¹⁹⁰⁸ It found that the joint trials conducted were merger-specific as they predicted the future benefits to consumers that would flow from the merger.¹⁹⁰⁹

Regarding coordinated effects, the Tribunal found that the merger would result in a duopoly, which raised suspicions about tacit coordination.¹⁹¹⁰ The CAC, however, found that it was unlikely that Monsanto and Pioneer would tacitly collude because the competition between them was innovation competition.¹⁹¹¹

The CAC then considered the remedies proposed by the merging parties, including the "*licensing of plant materials to third parties*". The purpose of such remedy was to facilitate entry and compensate for the loss of Pannar as a competitor in the market.¹⁹¹² The CAC rejected the Tribunal's finding that a new entrant would require a minimum of 10% market share to compensate for the loss of Pannar as a result of the merger.¹⁹¹³ It reiterated that the market was one "*dominated by innovation competition*".¹⁹¹⁴ The CAC further found that the requirement to give a 10% market share to a new entrant, which was similar to a divestiture, was "*unrealistic and incapable of being fulfilled*".¹⁹¹⁵ It found that "*any licensing remedy standing alone, could never satisfy sustainable entry*".¹⁹¹⁶

The CAC also considered the concerns of small-scale farmers.¹⁹¹⁷ It was alleged that the merger would increase hybrid seed prices, which would have a negative effect on subsistence and small-scale farmers.¹⁹¹⁸ The Tribunal had found that the merger would likely significantly affect the maize seed prices, which in turn would affect maize farmers in South Africa, including small-scale commercial and subsistence farmers.¹⁹¹⁹ To address this concern, the merging parties had proposed a pricing

¹⁹⁰⁷ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 52.

¹⁹⁰⁸ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 53.

¹⁹⁰⁹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 53.

¹⁹¹⁰ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 56.

¹⁹¹¹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 60.

¹⁹¹² *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 61.

¹⁹¹³ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 63.

¹⁹¹⁴ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 63.

¹⁹¹⁵ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 64.

¹⁹¹⁶ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 65.

¹⁹¹⁷ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 72.

¹⁹¹⁸ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 72.

¹⁹¹⁹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 73.

remedy in terms of which there would be no price increases on some of the products sold by Pannar to small-scale commercial, developing and subsistence farmers.¹⁹²⁰ The proposed remedy also included a pricing cap on these products and a continued offering of these products to small-scale commercial and developing farmers.¹⁹²¹ The Tribunal found that the merging parties' proposed remedy was of limited duration and could only be meaningful if it was combined with a long-term structural remedy.¹⁹²² The CAC agreed with the merging parties' proposed cap to any price increase on maize seed sold to small-scale commercial, developing and subsistence farmers for a specified period.¹⁹²³ It was satisfied that the price cap remedy was adequate.¹⁹²⁴

The CAC concluded that absent the proposed merger, Pannar would continue to decline as a competitive force in the market and would eventually exit the market.¹⁹²⁵ This would result in the loss of a valuable local resource, being Pannar's pool of local germplasm.¹⁹²⁶ The CAC further found that the merger would increase competition in the form of Pioneer and Pannar against Monsanto, who was the market leader.¹⁹²⁷ It concluded that such competition would improve seed quality and lower prices, benefiting both maize farmers and consumers.¹⁹²⁸

The CAC then approved the merger with conditions and set aside the Tribunal's prohibition of the merger.¹⁹²⁹ The conditions included, *inter alia*, a price cap, the establishment by Pioneer of an International Research and Technology Centre in South Africa,¹⁹³⁰ and conditions to address some of the concerns raised by the small scale and developing farmers.¹⁹³¹

¹⁹²⁰ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 74. The relevant products were the seven hybrids and two open pollinated varieties (OPV's) and replacement products sold by Pannar to small-scale commercial, developing and subsistence farmers.

¹⁹²¹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 74.

¹⁹²² *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 76.

¹⁹²³ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 77.

¹⁹²⁴ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 79.

¹⁹²⁵ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 87.

¹⁹²⁶ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 87.

¹⁹²⁷ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 87.

¹⁹²⁸ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 87.

¹⁹²⁹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 87.

¹⁹³⁰ The International Research and Technology Centre was to be completed by 2016.

¹⁹³¹ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) at para (c) of the CAC's Order

3.6.5.2.1 Relevance of the case to the thesis

The relevance of this case to the thesis is that the court considered the potential effect of the merger on small-scale farmers.¹⁹³² As mentioned above, it accepted that a remedy in the form of a price cap on maize sold to small-scale commercial, developing, and subsistence farmers would be adequate.¹⁹³³ Similar to the *Walmart* case discussed above, this indicated the court's consideration of small businesses' plight in the context of merger proceedings. This could be interpreted as the court's appreciation of the objective of the Act to protect SMEs in the context of a merger.¹⁹³⁴

3.6.5.3 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another*

In this case,¹⁹³⁵ the Commission applied for leave to appeal to the Constitutional Court against the CAC's judgment on a proposed merger between Mediclinic Southern Africa (Pty) Ltd (Mediclinic) and Matlosana Medical Health Services (Pty) Ltd ("Matlosana") in the private healthcare services sector.¹⁹³⁶ Mediclinic intended to acquire Matlosana. The CAC had set aside the Tribunal's prohibition of the merger and approved the merger with conditions.¹⁹³⁷

In deciding this case, the Constitutional Court considered the Preamble of the Competition Act.¹⁹³⁸ It reiterated the purpose of the Act, which includes "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy."¹⁹³⁹ In this regard, the Constitutional Court stated that "*The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or*

¹⁹³² *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) para 72.

¹⁹³³ *Pioneer Hi-Bred v the Competition Commission* (2012) (CAC) paras 77, 79.

¹⁹³⁴ Section 2(e), see above 3.5.2 Purpose of Competition Act; Section 12A(3)(c), see also 3.5.4 Merger regulations.

¹⁹³⁵ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2023] 1 CPLR 2 (CC); *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) and Another* [2021] ZACC 35 (hereafter *Competition Commission v Mediclinic* (2021)).

¹⁹³⁶ *Competition Commission v Mediclinic* (2021) para 1.

¹⁹³⁷ *Competition Commission v Mediclinic* (2021) para 1.

¹⁹³⁸ *Competition Commission v Mediclinic* (2021) para 5.

¹⁹³⁹ *Competition Commission v Mediclinic* (2021) para 6.

*favourably, must always be allowed to enjoy their pre-ordained and necessary pre-eminence.*¹⁹⁴⁰

Some of the issues that the Constitutional Court considered were whether: (a) the merger would contribute towards ownership and control in the private healthcare sector; (b) the merger would facilitate greater entry into the market; (c) free and fair competition would be promoted or reduced; (d) consumers' access to the private healthcare market would be affected; (e) the high costs of private healthcare services in South Africa and whether the competition authorities were applying the law consistent with the constitutional imperatives to discourage mergers that would cause tariff hikes for essential goods or services, such as healthcare services.¹⁹⁴¹ The Constitutional Court emphasised that it is incumbent, in terms of section 39(2) of the Constitution,¹⁹⁴² on any court interpreting the law or developing the jurisprudence to promote the spirit, purport and objects of the Bill of Rights.¹⁹⁴³ It held that the Preamble and purpose of the Competition Act enjoin the Tribunal and the CAC to promote, protect, respect and fulfil the rights in the Bill of Rights.¹⁹⁴⁴

The factual background to this case was that there are three large corporate hospital groups in South Africa, namely Netcare, Life and Mediclinic. The National Health

¹⁹⁴⁰ Own emphasis. *Competition Commission v Mediclinic* (2021) para 7.

¹⁹⁴¹ *Competition Commission v Mediclinic* (2021) para 8.

¹⁹⁴² Section 39(2) of the Constitution states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." The Constitution of South Africa, 1996. Available at [saconstitution-web-eng.pdf \(justice.gov.za\)](https://www.saconstitution-web-eng.pdf (justice.gov.za)) (accessed on 23 November 2023).

¹⁹⁴³ *Competition Commission v Mediclinic* (2021) para 9. The Constitutional Court emphasised that section 39(2) of the Constitution must be considered when interpreting legislation implicating a right in the Bill of Rights. The Bill of Rights is set out in Chapter 2 of the Constitution of South Africa. It sets out the fundamental rights that the state must respect, protect, promote and fulfil. In this regard, section 7 of the Constitution states: "(1) *This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.* (2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights.* (3) *The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*" The Constitution of South Africa, 1996. Available at [saconstitution-web-eng.pdf \(justice.gov.za\)](https://www.saconstitution-web-eng.pdf (justice.gov.za)) (accessed on 23 November 2023). The rights in the Bill of Rights include rights to: equality (sec 9), human dignity (sec 10), life (sec 11), freedom and security of the person (sec 12), not to be subjected to slavery, servitude and forced labour (sec 13), privacy (sec 14), freedom of religion, belief and opinion (sec 15), freedom of expression (sec 16), assembly, demonstration, picket and petition (sec 17), freedom of association (sec 18), political rights (sec 19), citizenship (sec 20), freedom of movement and residence (sec 21), freedom of trade, occupation and profession (sec 22), labour relations (sec 23), environment (sec 24), property (sec 25), housing (sec 26), health care, food, water and social security (sec 27), rights of children (sec 28), education (sec 29), language and culture (sec 30), cultural, religious and linguistic communities (sec 31), access to information (sec 32), just administrative action (sec 33), access to courts (sec 34), rights of arrested, detained and accused persons (sec 35).

¹⁹⁴⁴ *Competition Commission v Mediclinic* (2021) para 10.

Network (NHN) is a non-profit company that comprises many independent hospitals.¹⁹⁴⁵ Matlosana is part of the NHN.¹⁹⁴⁶ Many years ago, the NHN was granted an exemption to negotiate tariffs and benefits for its affiliated hospitals with the medical schemes.¹⁹⁴⁷ In November 2018, the exemption was extended to include procurement services.¹⁹⁴⁸

Through the proposed transaction, post-merger, Mediclinic would own Mediclinic Potchefstroom, Matlosana's Wilmed Park Private Hospital and Sunningdale Hospital, which were all multi-disciplinary hospitals, and all located in the Northwest Province.¹⁹⁴⁹

The Tribunal, however, found that the proposed transaction would result in a significant increase in tariffs at the Matlosana's hospitals, as they would have to change from the NHN tariff to the Mediclinic tariff, which was higher than the NHN tariff.¹⁹⁵⁰ The Tribunal found that this would negatively affect uninsured patients at the target hospitals as they would stop benefitting from the lower tariffs of the NHN and would be unable to switch to cheaper hospitals, which would be under the Mediclinic group post-merger.¹⁹⁵¹ It further found that absent the merger, the procurement costs at Matlosana's hospitals would significantly decrease, because of NHN's position to negotiate benefits for its members, following the exemption.¹⁹⁵² The Tribunal also found that the merging parties had failed to prove that the claimed efficiencies would outweigh the adverse increase in tariff and other anti-competitive effects.¹⁹⁵³ Certain medical schemes had raised concerns about the proposed transaction.¹⁹⁵⁴

The Tribunal further found that Mediclinic would become the dominant player with about 63% market share for the provision of private multi-disciplinary acute inpatient hospital services in the "MaJB" area.¹⁹⁵⁵ The Tribunal further found that the medical aid members on the various low-cost options were an important group from a public

¹⁹⁴⁵ *Competition Commission v Mediclinic* (2021) para 15.

¹⁹⁴⁶ *Competition Commission v Mediclinic* (2021) para 16.

¹⁹⁴⁷ *Competition Commission v Mediclinic* (2021) para 16.

¹⁹⁴⁸ *Competition Commission v Mediclinic* (2021) para 16.

¹⁹⁴⁹ *Competition Commission v Mediclinic* (2021) para 18.

¹⁹⁵⁰ *Competition Commission v Mediclinic* (2021) para 19.

¹⁹⁵¹ *Competition Commission v Mediclinic* (2021) para 21.

¹⁹⁵² *Competition Commission v Mediclinic* (2021) para 23.

¹⁹⁵³ *Competition Commission v Mediclinic* (2021) para 23.

¹⁹⁵⁴ *Competition Commission v Mediclinic* (2021) para 24.

¹⁹⁵⁵ *Competition Commission v Mediclinic* (2021) para 24. The MaJB" area consisted of the Ditsobotla, City of Matlosana and JB Marks local municipalities.

interest perspective.¹⁹⁵⁶ This was because such customers are vulnerable to the high costs of private healthcare.¹⁹⁵⁷ In addition, the Tribunal held that the proposed merger would negatively impact consumers outside of the defined relevant geographical market.¹⁹⁵⁸ The merging parties' proposed remedies did not address the competition concerns.¹⁹⁵⁹ They were of a short duration and were also inappropriate or inadequate.¹⁹⁶⁰ The Tribunal also found that it would be difficult for the Commission to monitor and enforce the merging parties' proposed behavioural conditions.¹⁹⁶¹

The Tribunal held that the merger adversely affected the public interest in terms of section 12A(3)(a).¹⁹⁶² In this regard, the Tribunal found that the merger would have significant negative effects on the healthcare costs of both insured and uninsured patients in the affected area, being Potchefstroom/Klerksdorp, where Matlosana provided healthcare services at a tariff cheaper than Mediclinic.¹⁹⁶³ The Tribunal reiterated that the proposed merger would substantially increase the tariff at the target hospitals for both insured and uninsured patients.¹⁹⁶⁴

The Constitutional Court considered: whether to grant leave to appeal; whether the CAC was entitled to interfere with the Tribunal's findings; whether the CAC considered the Constitution, the Preamble, purpose and relevant provisions of the Competition Act, as well as the high costs in the private healthcare sector and the impact of the merger on consumers; and whether the merger was likely to substantially prevent or lessen competition; and finally, the appropriate remedy in this instance.¹⁹⁶⁵

¹⁹⁵⁶ *Competition Commission v Mediclinic* (2021) para 25.

¹⁹⁵⁷ *Competition Commission v Mediclinic* (2021) para 25.

¹⁹⁵⁸ *Competition Commission v Mediclinic* (2021) para 26.

¹⁹⁵⁹ *Competition Commission v Mediclinic* (2021) para 28.

¹⁹⁶⁰ *Competition Commission v Mediclinic* (2021) para 28.

¹⁹⁶¹ One of the conditions proposed by the merging parties was a pricing remedy in the form of a post-merger discount off the Mediclinic tariffs. See *Mediclinic Southern Africa Proprietary Limited / Matlosana Medical Health Services Proprietary Limited* [2019] 2 CPLR 805 (CT) para 18; See *Competition Commission v Mediclinic* (2021) para 28.

¹⁹⁶² Section 12A(3)(a) states: "When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on – (a) a particular industrial sector or region."

¹⁹⁶³ *Competition Commission v Mediclinic* (2021) para 30.

¹⁹⁶⁴ *Competition Commission v Mediclinic* (2021) para 30.

¹⁹⁶⁵ *Competition Commission v Mediclinic* (2021) para 33.

The Constitutional Court emphasised that the granting of leave to appeal depended on two important considerations: (1) whether the matter falls within the Constitutional Court's jurisdiction; and (2) whether it is in the interests of justice to grant the leave.¹⁹⁶⁶

On the jurisdiction aspect, the Constitutional Court confirmed that it must raise a constitutional issue, in that it is "*about the interpretation, protection or enforcement of constitutional rights and obligations*."¹⁹⁶⁷ It can also be where "*the matter raises an arguable point of law of general public importance which ought to be considered by [this] Court*".¹⁹⁶⁸ The Constitutional Court confirmed that the proposed merger was in the healthcare sector, and the main issue was about whether the merger would affect access to private healthcare services.¹⁹⁶⁹ It found that this matter implicated the constitutional right of access to health care services, as enshrined in section 27 of the Bill of Rights.¹⁹⁷⁰ It held that the case also involved the obligation on the State to promote the right of access to healthcare and on the Court to interpret the law in a manner that promotes the spirit, purport and object of the Bill of Rights.¹⁹⁷¹

The Constitutional Court held that the competition issues in the healthcare sector, the test under section 12A, and the circumstances under which the CAC may interfere with the Tribunal's findings are arguable points of law and of general public importance, as they implicate the macro-economics of the healthcare sector.¹⁹⁷² It held that these issues related to the need for South Africans to increase their participation and ownership in the health care sector and the need for access to, or affordability of, private health care services.¹⁹⁷³

The Constitutional Court further held that its jurisdiction was triggered when a matter raises an arguable point of law of general public importance, even if the litigants do not raise such point.¹⁹⁷⁴ It emphasised that the circumstances under which the CAC may interfere with the Tribunal's findings fall squarely within the Constitutional Court's

¹⁹⁶⁶ *Competition Commission v Mediclinic* (2021) para 35.

¹⁹⁶⁷ *Competition Commission v Mediclinic* (2021) para 35.

¹⁹⁶⁸ *Competition Commission v Mediclinic* (2021) para 35.

¹⁹⁶⁹ *Competition Commission v Mediclinic* (2021) para 36.

¹⁹⁷⁰ *Competition Commission v Mediclinic* (2021) para 35.

¹⁹⁷¹ *Competition Commission v Mediclinic* (2021) para 36.

¹⁹⁷² *Competition Commission v Mediclinic* (2021) para 37.

¹⁹⁷³ *Competition Commission v Mediclinic* (2021) para 37.

¹⁹⁷⁴ *Competition Commission v Mediclinic* (2021) para 38.

jurisdiction.¹⁹⁷⁵ It concluded that the Commission had reasonable prospects of success and that it was in the interest of justice to grant the leave to appeal.¹⁹⁷⁶

The Constitutional Court then considered the Tribunal's power on mergers in terms of section 12A.¹⁹⁷⁷ The Tribunal had found in this matter that there were high barriers to entry at the regulatory level as well as capital expenditure for a new establishment in the private healthcare sector. It found that this would hamper entry of HDPs and SMEs aspiring to enter this sector.¹⁹⁷⁸ The Tribunal had also considered the impact of the merger on the private healthcare sector and its effect on the promotion of a greater spread of ownership by a greater number of South Africans as set out in the Preamble and the purpose of the Competition Act as stated in section 2(f) of the Act.¹⁹⁷⁹ The Tribunal subsequently concluded that the merger could not be justified on substantial public interest grounds, given the possible high tariff increases that the merger would occasion, the impact on the consumers' choices for cheaper options and the constitutional right of access to healthcare services.¹⁹⁸⁰

The CAC had set aside the Tribunal's decision.¹⁹⁸¹ The question was, therefore, whether the CAC was legally empowered to do so.¹⁹⁸² The Constitutional Court confirmed that the CAC does not have unrestricted power to interfere with the Tribunal's decisions.¹⁹⁸³ It emphasised that appellate courts will only interfere with the trial court's factual findings if there has been a misdirection and a clearly wrong decision and for the sole purpose of achieving justice.¹⁹⁸⁴ Applying this principle, the

¹⁹⁷⁵ *Competition Commission v Mediclinic* (2021) para 39.

¹⁹⁷⁶ *Competition Commission v Mediclinic* (2021) para 39.

¹⁹⁷⁷ *Competition Commission v Mediclinic* (2021) para 40.

¹⁹⁷⁸ *Competition Commission v Mediclinic* (2021) para 41.

¹⁹⁷⁹ *Competition Commission v Mediclinic* (2021) para 42. Sec 2(f) of the Act states: "*The purpose of this Act is to promote and maintain competition in the Republic in order- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.*"

¹⁹⁸⁰ *Competition Commission v Mediclinic* (2021) para 42.

¹⁹⁸¹ *Competition Commission v Mediclinic* (2021) para 43.

¹⁹⁸² *Competition Commission v Mediclinic* (2021) para 43.

¹⁹⁸³ *Competition Commission v Mediclinic* (2021) para 44.

¹⁹⁸⁴ *Competition Commission v Mediclinic* (2021) para 45. The Constitutional Court relied on *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) (Bernert) at para 106 where it held that: "*Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.*" The Constitutional Court's aforementioned statement in *Bernert* was supported in *Makate*,¹⁹⁸⁴ where it reconfirmed that an appeal court will only interfere with the trial court's factual findings if "*the trial court misdirected itself on the facts or that it came to a wrong conclusion.*" *Competition Commission v Mediclinic* (2021) para 46; *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) para 40.

Constitutional Court found that the Tribunal had not misdirected itself nor was it clearly wrong in its factual findings or policy issues.¹⁹⁸⁵

It then considered certain key aspects of the Tribunal's findings, namely: whether the merger substantially lessened competition; the local geographic market; the regional dominance; the likelihood of harm and the substantial effect on the public interest (considering the constitutional right of access to healthcare services) and whether a prohibition was the appropriate remedy to impose.¹⁹⁸⁶

It held that the CAC had failed to properly consider the purpose of the Act set out in section 2(b).¹⁹⁸⁷ The Constitutional Court also found that the CAC had misdirected itself in its interpretation of section 12A(1)(a) (which enjoins the competition authorities to determine whether the merger results in efficiencies greater than anti-competitive effects) and 12A(2) (which sets out the factors to consider in determining whether the merger was likely to substantially lessen competition), by requiring that it be shown that a post-merger price increase is the result of an "*enhancement of market power*".¹⁹⁸⁸ It found that section 12A(1)(a) and (2) does not require an assessment of "enhancement of market power", which is also not a factor listed in section 12A(2).¹⁹⁸⁹ The Constitutional Court criticised the CAC for using the "enhancement of market power" as the yardstick for assessing whether the merger would substantially harm competition.¹⁹⁹⁰ It found that all that section 12A requires is a determination of a substantial lessening or prevention of competition (SLC), through a potential price increase, and that "enhancement of market power" is not the test to apply.¹⁹⁹¹ It found that the lower tariffs at the target hospitals compared to Mediclinic Potchefstroom, correctly reflected a competitive environment demanded by the Preamble and purpose of the Act, and the constitutional right of access to health care services.¹⁹⁹²

On the issue of the Constitution and substantial public interest, the Constitutional Court re-emphasised the fundamental human right of access to health care services as

¹⁹⁸⁵ *Competition Commission v Mediclinic* (2021) para 48.

¹⁹⁸⁶ *Competition Commission v Mediclinic* (2021) para 51.

¹⁹⁸⁷ *Competition Commission v Mediclinic* (2021) para 53; Section 2(b) of the Competition Act states: "*The purpose of this Act is to promote and maintain competition in the Republic in order – (b) to provide consumers with competitive prices and product choices.*"

¹⁹⁸⁸ *Competition Commission v Mediclinic* (2021) para 53.

¹⁹⁸⁹ *Competition Commission v Mediclinic* (2021) para 53.

¹⁹⁹⁰ *Competition Commission v Mediclinic* (2021) para 53.

¹⁹⁹¹ *Competition Commission v Mediclinic* (2021) para 54.

¹⁹⁹² *Competition Commission v Mediclinic* (2021) para 69.

provided for in section 27 of the Constitution.¹⁹⁹³ It reiterated that the CAC should have considered section 39(2) of the Constitution in interpreting section 12A, the Preamble and the purpose of the Act,¹⁹⁹⁴ and it should also have had regard to section 7 of the Constitution which enjoins the State to give effect to the rights in the Bill of Rights.¹⁹⁹⁵ The Constitutional Court pointed out that both the Tribunal and the CAC are organs of State and are required to uphold the Constitution.¹⁹⁹⁶ In exercising their obligations to promote the spirit, purpose and objects of the right of access to health care services, the Tribunal and the CAC would have considered the pre-existing difficulty to enter the market and the significant increase in tariffs for consumers of medical services in the private sector.¹⁹⁹⁷

The Constitutional Court found that, given the context of a country with huge inequalities and a distressed economy, the CAC should not have considered Mediclinic's post-merger tariff hike lightly.¹⁹⁹⁸ When considering a merger, authorities must factor in consumer choice regarding essential services and the challenges faced by financially vulnerable individuals.¹⁹⁹⁹ The Constitutional Court was thus concerned with the CAC's findings on the implications of this judgment on the right of access to health care services and the interests of the public.²⁰⁰⁰

¹⁹⁹³ *Competition Commission v Mediclinic* (2021) para 71.

¹⁹⁹⁴ *Competition Commission v Mediclinic* (2021) para 71.

¹⁹⁹⁵ The Constitutional Court found further that the CAC had failed to consider sections 7(2) (stipulating that the State must respect the Bill of Rights) and 39(2) (enjoining every court to promote the Bill of Rights when interpreting any legislation) of the Constitution, and thereby failed to uphold the purpose of the Act and to promote the spirit, purport and object of section 27 of the Constitution, which enshrines the right to access to health care services. Section 7(2) states: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." The Constitution of South Africa, 1996. Available at [saconstitution-web-eng.pdf \(justice.gov.za\)](#) (accessed on 23 November 2023). Section 39(2) of the Constitution states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." The Constitution of South Africa, 1996. Available at [saconstitution-web-eng.pdf \(justice.gov.za\)](#) (accessed on 23 November 2023). *Competition Commission v Mediclinic* (2021) para 55. Sec 27 states: "(1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment."

¹⁹⁹⁶ *Competition Commission v Mediclinic* (2021) para 71.

¹⁹⁹⁷ *Competition Commission v Mediclinic* (2021) para 72.

¹⁹⁹⁸ *Competition Commission v Mediclinic* (2021) para 73.

¹⁹⁹⁹ *Competition Commission v Mediclinic* (2021) para 73.

²⁰⁰⁰ *Competition Commission v Mediclinic* (2021) para 74.

The Constitutional Court approved the Tribunal's findings on the public interests²⁰⁰¹ that *"the private hospital market is of public importance in South Africa with serious concerns about rising private health care costs in our country and will be prejudiced if the proposed behavioural conditions failed to remedy the likely substantial prevention or lessening of competition (SLC)."*²⁰⁰²

On the remedy, the Constitutional Court agreed with the Tribunal's findings that the merger would likely substantially harm competition and that the conditions tendered by the merging parties would not adequately address the substantial harm to competition.²⁰⁰³ The Constitutional Court found that the harm that would be caused by a tariff hike, the already high and ever-rising costs in the private healthcare services sector and the constitutional imperative to promote the right of access to healthcare services justified a prohibition of the merger.²⁰⁰⁴ It also agreed with the Tribunal's findings that the proposed merger would harm the "constitutionally-inspired public interest" rather than promote it.²⁰⁰⁵

The Constitutional Court found that the Tribunal's decision to prohibit the merger as a remedy was not a material misdirection that justified the CAC's interference.²⁰⁰⁶ It concluded that the CAC was only entitled to set aside the Tribunal's decision if it had committed a material misdirection since the Tribunal did not do that. The CAC's decision was set aside and the Tribunal's decision reinstated.²⁰⁰⁷

3.6.5.3.1 Relevance of this case

The relevance of this case is that the Constitutional Court has reaffirmed the need to consider the Preamble and the purpose of the Act, which set out the fundamental issues that the Act and competition authorities seek to address, including "excessive concentrations of ownership and control in the national economy, inadequate

²⁰⁰¹ *Competition Commission v Mediclinic (2021)* para 77. The Tribunal had considered the adverse effect of the merger on the uninsured patients' choice between high tariffs and the cheaper options offered by the target hospitals, which the merger would have eliminated. The Constitutional Court noted that *"the Tribunal grappled with a pertinent public interest concern that there is already a high and historical concentration of ownership and control in the private hospital sector which would be somewhat exacerbated by the proposed merger, and that Mediclinic would have regional dominance which would have an impact on bargaining dynamics in negotiating for discounts."*

²⁰⁰² *Competition Commission v Mediclinic (2021)* para 78.

²⁰⁰³ *Competition Commission v Mediclinic (2021)* para 80.

²⁰⁰⁴ *Competition Commission v Mediclinic (2021)* para 81.

²⁰⁰⁵ *Competition Commission v Mediclinic (2021)* para 81.

²⁰⁰⁶ *Competition Commission v Mediclinic (2021)* para 82.

²⁰⁰⁷ *Competition Commission v Mediclinic (2021)* para 85.

restraints against anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.”²⁰⁰⁸ It urged competition authorities to always consider the challenges that the Act seeks to remedy in their decision-making process.²⁰⁰⁹ In this regard, the Constitutional Court highlighted the importance of promoting HDPs and SMEs by giving them equal opportunities to enter, remain and operate in a market that enables them to compete freely and favourably.²⁰¹⁰ The Constitutional Court further enjoined the competition authorities to give effect to the rights in the Bill of Rights in interpreting the Act.²⁰¹¹

In this case, the Constitutional Court confirmed the importance of public interest considerations in merger assessment. Although the likely significant increase in tariffs that consumers of medical services would face in the private sector was the main harm to competition in this case,²⁰¹² the Constitutional Court noted that it would be difficult

²⁰⁰⁸ *Competition Commission v Mediclinic (2021)* para 5, the Constitutional Court stated: “Sight must therefore never be lost of the central purpose for the enactment of that Act and for the investigative and adjudicatory structures that it gave birth to. To sharply channel the focus to where it belongs, to remind all of us and ensure that the fundamental challenges sought to be remedied through this Act and allied institutions are never left out of consideration, it is necessary that the Preamble to the Act be quoted in its entirety.” The Preamble reads: “The people of South Africa recognise: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices. and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law are necessary for an efficient functioning economy. That an efficient, competitive economic environment. balancing the interests of workers, owners and consumers and focused on development will benefit all South Africans. IN ORDER TO– provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa; provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; create greater capability and an environment for South Africans to compete effectively in international markets; restrain particular trade practices which undermine a competitive economy; regulate the transfer of economic ownership in keeping with the public interest; establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.” Section 2 sets out the purpose of the Act which reads: “(1) The purpose of this Act is to promote and maintain competition in the Republic in order- (a) to promote the efficiency, adaptability and development of the economy; (b) to provide consumers with competitive price and product choices; (c) to promote employment and advance the social and economic welfare of South Africans; (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic; (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”

²⁰⁰⁹ *Competition Commission v Mediclinic (2021)* para 7.

²⁰¹⁰ *Competition Commission v Mediclinic (2021)* para 7.

²⁰¹¹ *Competition Commission v Mediclinic (2021)* para 71.

²⁰¹² *Competition Commission v Mediclinic (2021)* para 72.

for HDPs and SMEs to enter the private healthcare sector because of the capital expenditure that is required to build a new establishment.²⁰¹³

The Constitutional Court also called for a purposive interpretation of the Act, which promotes the spirit and objectives of the Act, namely to promote competition not only for protecting consumer welfare but also for safeguarding the public interests.²⁰¹⁴ In effect, this case can be regarded as the authority for a purposeful interpretation of the Act, with the aim of promoting its objectives. This would mean that in assessing competition cases that involve SMEs (even in the case of the provisions of the Act that do not explicitly mention SMEs), it would be important to consider the public interest objective of promoting SMEs in interpreting the Act.

3.6.6 Developments (2022-2024)

As indicated above,²⁰¹⁵ the study only considered a number of the CAC and Constitutional Court's decided complaint referrals and selected mergers involving SMEs from 2011 to 2021. This is because this period reflects the courts' approach before the 2018 Competition Amendment Act came into force.²⁰¹⁶ In this regard, since the enactment of the 2018 Competition Amendment Act²⁰¹⁷ and the Constitutional Court's decision in *Mediclinic*,²⁰¹⁸ the South African competition authorities have sought to interpret the Act more purposively. The study has, therefore, also considered some of the groundbreaking cases or developments relating to SMEs during 2022 and 2024. One of the notable developments in 2024 was the Commission's publication of the *Block Exemption Regulations for small, micro and medium-sized businesses, 2024*, discussed under the exemption provisions above.²⁰¹⁹

²⁰¹³ *Competition Commission v Mediclinic* (2021) para 41.

²⁰¹⁴ *Competition Commission v Mediclinic* (2021) paras 5-8.

²⁰¹⁵ See 3.6 "Competition law Jurisprudence – Seminal cases on small and medium-sized enterprises (SMEs)".

²⁰¹⁶ Most of the provisions came into effect on 12 July 2019 (Proclamation No. 46 of 2019 in GG42578 of 12 July 2019) and 13 February 2020 (Proclamation No. 10 of 2020 in GG43018 of 13 February 2020). See 3.3 "The 2018 Amendments to the Competition Act" above.

²⁰¹⁷ Most of the provisions came into effect on 12 July 2019 (Proclamation No. 46 of 2019 in GG42578 of 12 July 2019) and 13 February 2020 (Proclamation No. 10 of 2020 in GG43018 of 13 February 2020). See 3.3 "The 2018 Amendments to the Competition Act" above.

²⁰¹⁸ on 15 October 2021.

²⁰¹⁹ *Block Exemption Regulations for small, micro and medium-sized businesses, 2024*, GN2538 in GG50746 of 3 June 2024. See Chapter Three, para 3.5.3.4.1 Block Exemption Regulations for Small, Micro and Medium-sized Businesses, 2024.

3.6.6.1 *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa*

In this case,²⁰²⁰ *Life Wise (Pty) Ltd t/a Eldan Auto Body* (“Eldan”) was a small business²⁰²¹ that concluded a consent agreement²⁰²² with the Commission where it admitted to engaging in collusive conduct in the provision of auto body repairs in contravention of section 4(1)(b) of the Act.²⁰²³ The Tribunal had confirmed the consent agreement as a consent order.²⁰²⁴ However, subsequently, Eldan asked for the consent order to be varied by removing the admission clause from the consent agreement.²⁰²⁵ This was because Mercedes Benz, Eldan’s largest client, had terminated Eldan’s accreditation as one of its repairers, owing to Eldan’s infringement of section 4(1)(b) of the Act.²⁰²⁶ Following this, other businesses, including insurance companies, also terminated their business with Eldan.²⁰²⁷

At the Tribunal and the CAC, Eldan argued that the consent agreement had resulted in unforeseen consequences and caused great hardship to the business.²⁰²⁸ It argued that the termination of its business by its clients would exclude it from the market.²⁰²⁹ It contended that its status as a small and HDIs-owned²⁰³⁰ business constituted a public interest ground that merited consideration. In particular, it argued that the competition policy goal of inclusion of small and HDI-owned businesses justified the excision of the admission clause from the consent agreement.²⁰³¹

The Tribunal rejected Eldan’s plea,²⁰³² particularly the argument that the cancellation of its business contracts amounted to “exceptional circumstances”.²⁰³³ The Tribunal found that it was expected that customers would cancel contracts with a firm involved

²⁰²⁰ *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* [2022] 1 CPLR 3 (CAC) (hereafter *Life Wise v Commission* (2022)).

²⁰²¹ *Life Wise v Commission* (2022) para 2.

²⁰²² See 3.5.3.1.3 SMEs – victims of prohibited horizontal practices and 3.5.3.1.3.1 SMEs affected by the construction cartel in South Africa above.

²⁰²³ *Life Wise v Commission* (2022) para 4. Section 4(1)(b) of the Act prohibits agreements between, or concerted practice by, or a decision by an association of, competitors, if it involves price fixing, market allocation or collusive tendering.

²⁰²⁴ *Life Wise v Commission* (2022) para 5.

²⁰²⁵ *Life Wise v Commission* (2022) para 21.

²⁰²⁶ *Life Wise v Commission* (2022) para 22.

²⁰²⁷ *Life Wise v Commission* (2022) para 23.

²⁰²⁸ *Life Wise v Commission* (2022) para 24.

²⁰²⁹ *Life Wise v Commission* (2022) para 25.

²⁰³⁰ Historically disadvantaged individuals.

²⁰³¹ *Life Wise v Commission* (2022) para 25.

²⁰³² *Life Wise v Commission* (2022) para 27.

²⁰³³ *Life Wise v Commission* (2022) para 28.

in collusion.²⁰³⁴ The Tribunal also rejected Eldan's public interest argument.²⁰³⁵ It found that there was no clear evidence that Eldan would exit the market and that competition could equally be served by another SME or HDI firm.²⁰³⁶

In confirming the Tribunal's findings, the CAC stressed that the competition goal of inclusiveness should distinguish between promoting SMEs (which seeks to protect SMEs from exclusionary anti-competitive conduct) and ensuring that SMEs face the consequences of their anti-competitive conduct.²⁰³⁷ In this regard, the CAC stated:

*"But it is important not to confuse two issues. The public policy in the Act to promote small and HDI businesses is aimed at preventing such firms from being excluded by anticompetitive behaviour. It is entirely a different matter to argue that this policy of inclusiveness justifies ameliorating the consequences of anti-competitive behaviour of firms that fall into this class."*²⁰³⁸

3.6.6.1.1 Relevance of this case to the thesis

In this case, the CAC has essentially confirmed that the public interest goal of protecting SMEs is to prevent such firms from being excluded by anti-competitive behaviour. It is not to be used as a defence to justify anti-competitive conduct.

The public interest goal of promoting SMEs applies mainly when SMEs are the victims of anti-competitive behaviour, such as restrictive vertical practices or abuse of dominance. SMEs cannot use public policy of promoting SMEs or inclusiveness as a defence to engage in anticompetitive conduct. Accordingly, when considering whether the application or interpretation of the Act has given effect to that public policy, one should pay particular attention to cases dealing with abuse of dominance.

Accordingly, this case suggests that where SMEs are perpetrators of anti-competitive conduct, they should not hide behind the public interest goal of promoting or protecting SMEs to justify their conduct.

²⁰³⁴ *Life Wise v Commission* (2022) para 30.

²⁰³⁵ *Life Wise v Commission* (2022) para 33.

²⁰³⁶ *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* [2021] 2 CPLR 228 (CT) para 79; *Life Wise v Commission* (2022) para 33.

²⁰³⁷ *Life Wise v Commission* (2022) para 34.

²⁰³⁸ *Life Wise v Commission* (2022) para 34.

3.6.6.2 *eMedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another*

In this case,²⁰³⁹ eMedia Investments (Pty) Ltd (“eMedia”) appealed to the CAC the Tribunal’s refusal to grant it an interim relief in terms of section 49C of the Act.²⁰⁴⁰ eMedia’s interim relief was against Multichoice (Pty) Ltd’s (“Multichoice”) decision to remove eMedia’s channels from Multichoice’s broadcasting platform (DSTV).²⁰⁴¹ eMedia argued that Multichoice was abusing its dominance by refusing to supply scarce goods or services to a competitor in contravention of section 8(1)(d)(ii) and 8(1)(c) of the Act.²⁰⁴²

The CAC reaffirmed that the Preamble and purpose of the Act serve as guidelines that the competition authorities must follow when applying the Act.²⁰⁴³ The CAC described this as a transformative constitutional approach that must consider the context and purpose of the Act.²⁰⁴⁴ It emphasised that such transformative approach was necessary to eradicate historical wealth inequalities.²⁰⁴⁵ The CAC followed the Constitutional Court’s transformative approach in *Mediclinic*, which stressed that SMEs should be given the opportunity to survive, compete and succeed in the market.²⁰⁴⁶

The CAC further found that smaller firms had no other platforms, except Multichoice, on which to broadcast their channels. Accordingly, Multichoice’s removal of eMedia’s channels from Multichoice’s DSTV platform constituted an exclusionary act at this

²⁰³⁹ eMedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another [2022] 2 CPLR 23 (CAC) (hereafter eMedia v Multichoice 2022)).

²⁰⁴⁰ In terms of section 49C, a complainant may apply to the Tribunal for an interim order in respect of an alleged prohibited practice at any time whether or not a hearing has started in respect of the alleged practice. The Tribunal may grant the interim relief order if it is reasonable and just to do so after considering the evidence on the alleged prohibited practice, the possible serious or irreparable damage to the applicant and the balance of convenience. If the Tribunal refuses to grant the interim order, the applicant may appeal such a refusal to the Competition Appeal Court (CAC).

²⁰⁴¹ The relevant channels were eToonz, eMovies, eMovies Extra and E.tv Extra.

²⁰⁴² 8(1)(c) and 8(1)(d)(ii) states: “It is prohibited for a dominant firm to: (c) engage in exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act- (ii) requiring or inducing a supplier or customer to not deal with a competitor.”

²⁰⁴³ eMedia v Multichoice (2022) para 84.

²⁰⁴⁴ eMedia v Multichoice (2022) para 84.

²⁰⁴⁵ eMedia v Multichoice (2022) para 84.

²⁰⁴⁶ eMedia v Multichoice (2022) paras 33 and 87, referring to paras 3 and 7 of the Constitutional Court’s decision in *Competition Commission v Mediclinic*, discussed above.

interim relief stage.²⁰⁴⁷ It further held that, at the interim stage, the Tribunal ought to consider a dominant firm's conduct which could cause irreparable harm to a smaller firm where access to sufficient satellite space by smaller firms is limited.²⁰⁴⁸ In this regard, the CAC noted that neither eMedia nor smaller firms could duplicate the number of channels Multichoice had on its DSTV platform.²⁰⁴⁹ It thus granted interim relief to eMedia.

3.6.6.2.1 Relevance of this case to the thesis

This case shows how the competition courts are now adopting a transformative approach in interpreting the Act to give effect to the purpose of the Act.

This confirms that the competition authorities are adopting a more purposive interpretation of the Competition Act. This interpretation would not only consider the four corners of a specific section of the Competition Act but will interpret a section with due consideration of the Preamble and the purpose of the Act.

In this study, it is noted that this is not only a transformative approach in the sense of transforming the economy from a concentrated to a more inclusive one but also a transformation in the way competition authorities are expected to approach conduct that affects SMEs.

3.6.6.3 The Commission's Online Intermediary Platforms Market Inquiry

On 19 May 2021, the Commission initiated the online intermediary platforms market Inquiry (OIPMI)²⁰⁵⁰ to assess the general state of competition in the online intermediary platforms market and to, amongst others, ensure that SMEs and HDPs²⁰⁵¹ participate in these markets.²⁰⁵² The assessment was conducted on the following Intermediary platforms: Google search, travel and accommodation (online travel agencies), eCommerce, software application stores (app stores), online

²⁰⁴⁷ eMedia v Multichoice (2022) para 103.

²⁰⁴⁸ eMedia v Multichoice (2022) para 116.

²⁰⁴⁹ eMedia v Multichoice (2022) para 116.

²⁰⁵⁰ The final report was released in July 2023. The Competition Commission of South Africa "Online Intermediary Platforms Market Inquiry – Summary of Final Report Findings and Remedial Actions" (July 2023), available at https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Summary-of-Findings-and-Remedial-action.pdf (accessed on 3 December 2023). See also the final report at https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf (accessed on 3 December 2023).

²⁰⁵¹ Historically disadvantaged persons (HDPs). For a definition of HDPs, see above 3.5 Provisions of the Competition Act dealing with SMEs.

²⁰⁵² OIPMI Summary Report, 1.

classifieds (property/automotive classifieds), Food Delivery, and insurance comparator sites.²⁰⁵³

The *OIPMI* found that large platforms have the means to dominate search results and that this was detrimental to small platforms that lack the capital to increase visibility and attract customers.²⁰⁵⁴

In e-Commerce, for example, the Inquiry found that smaller businesses highly depend on Takealot to conduct online business.²⁰⁵⁵ This is because of Takealot dominant position and being considered as the market leader in the South African online intermediary marketplace.²⁰⁵⁶ Business users, including small businesses, sell more on the Takealot platforms than on other intermediation platforms.²⁰⁵⁷ They, therefore, depend on the Takealot marketplace to reach their online customers.²⁰⁵⁸ The Inquiry reported that Takealot has market power over these business users.²⁰⁵⁹

In the real estate market, smaller agents face discrimination due to advertising and market fees that affect their visibility on online platforms. These agents cannot list their properties on these platforms due to the high cost.²⁰⁶⁰ The Inquiry also found that SMEs' competitiveness is likely to be affected by the lack of transparent advertising on online platforms.²⁰⁶¹ This is because paid listings are more likely to have a better chance of attracting more consumers, whereas SMEs are less likely to have visibility because of lack of funds to pay for their listings.²⁰⁶²

The Inquiry subsequently recommended remedial actions to increase the visibility and exposure of SMEs for paid and organic search.²⁰⁶³ The recommended remedial actions included:

²⁰⁵³ OIPMI Summary Report, 1.

²⁰⁵⁴ OIPMI Summary Report, 3.

²⁰⁵⁵ OIPMI Summary Report, 4.

²⁰⁵⁶ Online Intermediation Platforms Market Inquiry – Final Report and decision (July 2023) 51, para 127.

²⁰⁵⁷ Online Intermediation Platforms Market Inquiry – Final Report and decision (July 2023) 52, para 128.

²⁰⁵⁸ Online Intermediation Platforms Market Inquiry – Final Report and decision (July 2023) 52, para 130.

²⁰⁵⁹ Online Intermediation Platforms Market Inquiry – Final Report and decision (July 2023) 52, para 128.

²⁰⁶⁰ OIPMI Summary Report, 8.

²⁰⁶¹ OIPMI Summary Report, 11.

²⁰⁶² OIPMI Summary Report, 11.

²⁰⁶³ OIPMI Summary Report, 3.

- (1) Regarding Google search: enhancing the visibility of smaller South African platforms in relation to paid and organic results.²⁰⁶⁴ Google also had to stop self-preferencing its own products as it distorts competition.²⁰⁶⁵
- (2) Regarding travel and accommodation: requiring Booking.com to refrain from preventing hotels and accommodations from charging a lower price on their websites for online bookings.²⁰⁶⁶
- (3) Regarding advertising on online platforms: transparent advertising on online platforms in that they are required to insert the words “promoted”, “sponsored” or “ad” for paid listings.²⁰⁶⁷
- (4) Existing government funding programmes from the Department of Trade, Industry and Competition (DTIC) and the Department of Small Business Development (DSBD) should be allocated to assist SMEs and HDPs in investing in online presence.²⁰⁶⁸
- (5) Regarding the property and automotive online platforms: I these platforms’ listing and promotion fees should be lowered to small agents and dealers to enable them to compete with large agents and dealers.²⁰⁶⁹ For example, Property 24, one of the largest online platforms for property listings, was required to introduce a “Small Independent Business Package”(SIBP), which entails reduced listing prices for businesses with 30 leads or less, which could be categorised as small businesses.²⁰⁷⁰

The Inquiry highlighted the following benefits which would result from the remedial actions:

- (1) Small South African platforms will be more visible and have the opportunity to attract customers, grow and compete with larger platforms;²⁰⁷¹

²⁰⁶⁴ OIPMI Summary Report, 3.

²⁰⁶⁵ OIPMI Summary Report, 3.

²⁰⁶⁶ OIPMI Summary Report, 3.

²⁰⁶⁷ OIPMI Summary Report, 11.

²⁰⁶⁸ OIPMI Summary Report, 12.

²⁰⁶⁹ OIPMI Summary Report, 8.

²⁰⁷⁰ OIPMI Summary Report, 8-9.

²⁰⁷¹ OIPMI Summary Report, 13.

- (2) More competition on the platform will eventually lead to more choice, lower prices and innovation for consumers and business listing on these platforms;²⁰⁷²
- (3) Small businesses on these platforms are given a level playing field through fairer pricing and more visibility and customer acquisition;²⁰⁷³
- (4) A more inclusive digital economy is developed by funding black-owned South African businesses to enable their effective participation and competition on online platforms.²⁰⁷⁴

3.6.6.3.1 Relevance of this Inquiry to the thesis

The *OIPMI* indicates a growing focus on supporting SMEs and HDPs in the economy, ensuring that technology and digital markets, including online platforms, remain accessible to SMEs. This Inquiry implements the objective of ensuring greater participation of SMEs in the economy. This indicates that the provisions in the Competition Act seeking to promote SMEs may only be effective if implemented.²⁰⁷⁵ Accordingly, the proposed remedial actions will only benefit SMEs if implemented.

3.6.6.4 *The Competition Commission v Waco Africa (Pty) Ltd and others*

In this case,²⁰⁷⁶ the CAC had to decide whether the arrangement between Waco Africa (Pty) Ltd, operating through its local operating division, SGB-Cape, and its joint venture (JV) partners, Tedoc Industries (Pty) Ltd (“Tedoc”), Superfecta Trading 159 CC (“Superfecta”) and Mtsweni Corrosion Control (Pty) Ltd (“Mtsweni”) amounted to price fixing and collusive tendering in respect of a tender issued by Eskom in 2015 for scaffolding and insulation services,²⁰⁷⁷ in contravention of section 4(1)(b) of the Competition Act.²⁰⁷⁸ Both Tedoc and Superfecta were black women owned businesses specialised in labour and payroll administration.²⁰⁷⁹ Mtsweni was a black youth-owned business with no technical experience in scaffolding but which offered

²⁰⁷² OIPMI Summary Report, 13.

²⁰⁷³ OIPMI Summary Report, 13.

²⁰⁷⁴ OIPMI Summary Report, 13-14.

²⁰⁷⁵ See above Chapter 1, 1.9 Research objectives, which set out as one of the research questions: “*How effective are the SMEs provisions in the Competition Act, as most recently amended in 2018, in ensuring that SMEs fairly participate in the economy?*”

²⁰⁷⁶ *The Competition Commission v Waco Africa (Pty) Ltd and others* (Case No. 246/CAC/Jun23).

²⁰⁷⁷ Waco (2024), para 9.

²⁰⁷⁸ Waco (2024), paras 2 and 121.

²⁰⁷⁹ Waco (2024), para 8.

labour and transportation services.²⁰⁸⁰ Waco/SGB-Cape believed that tenders from three different JVs would give Eskom the opportunity to empower three black industrialists.²⁰⁸¹ SGB-Cape unilaterally completed the tender documents for itself and all three JVs.²⁰⁸² Accordingly, the bids essentially contained the same technical and commercial documents.²⁰⁸³ However, the JV partners did not participate in the preparation of the tender, neither for the pricing nor for the labour services.²⁰⁸⁴ They were not aware of the prices or rates.²⁰⁸⁵

The Tribunal held that the respondents (SGB-Cape and the three JVs)²⁰⁸⁶ were not guilty because they were not competitors and thus not in a horizontal relationship.²⁰⁸⁷ The Tribunal found that SGB-Cape was the controlling mind in submitting the bids for itself and the JVs and could, thus, not be found to collude with itself.²⁰⁸⁸ Further, the Tribunal found that the mandate to SGB-Cape's representative to price all the bids could not be characterised as collusion in contravention of section 4(1)(b)(iii) of the Competition Act.²⁰⁸⁹

On appeal, the minority judgment found a horizontal relationship,²⁰⁹⁰ but it found that the impugned conduct lacked the features of collusive tendering, and the alleged price fixing differed from the usual covert and illegal price fixing.²⁰⁹¹ In considering the nature and purpose of the impugned agreement, the CAC minority judgment remarked that the purpose of the impugned agreement (namely, to empower black industrialists) aligned with the objective of ensuring that SMEs have an equitable opportunity to participate in the economy and to promote a greater spread of ownership by HDIs.²⁰⁹² It pointed out that the bids had positive effects that aligned with the purpose of section

²⁰⁸⁰ Waco (2024), para 17.

²⁰⁸¹ Waco (2024), para 19.

²⁰⁸² Waco (2024), para 27.

²⁰⁸³ Waco (2024), para 28.

²⁰⁸⁴ Waco (2024), para 29.

²⁰⁸⁵ Waco (2024), para 29.

²⁰⁸⁶ The three JV's were Tedoc/SGB Cape JV ("the Tedoc JV"), Superfecta/SGB-Cape JV ("the Superfecta JV") and Mtsweni/SGB-Cape JV ("the Mtsweni JV"). See Waco (2024), para 1.

²⁰⁸⁷ Waco (2024), paras 4, 53 and 120.

²⁰⁸⁸ Waco (2024), para 120.

²⁰⁸⁹ Waco (2024), para 53.

²⁰⁹⁰ Waco (2024), para 74.

²⁰⁹¹ Waco (2024), para 123.

²⁰⁹² Waco (2024), para 92.

2, which was to promote opportunities for SMEs and a greater spread of ownership to HDIs.²⁰⁹³

The CAC majority judgment found that the JVs were separate independent entities.²⁰⁹⁴ It agreed with the Tribunal that the horizontal relationship element was missing in this case.²⁰⁹⁵ The CAC majority judgment simply found that the Commission did not establish the element of a horizontal agreement, which is a requirement for a finding of section 4(1)(b) contravention.²⁰⁹⁶

3.6.6.4.1 The relevance of this case for this thesis

This case shows how the courts are now considering the purpose of the Competition Act in their analysis of the impugned conduct. In this regard, in assessing the impugned conduct to determine whether it amounted to collusive conduct, the CAC minority judgment considered the purpose of the impugned agreement, i.e. to promote small black-owned enterprises as aligning with the purpose of promoting SMEs. This appears to give regard to the Constitutional Court's request that courts consider the purpose of the Act when interpreting or enforcing it.²⁰⁹⁷

However, the concern with using the purpose of promoting SMEs to characterise²⁰⁹⁸ collusive conduct is that cartel conduct by SMEs would be immune from competition scrutiny on the pretext that the purpose and nature of the agreement promote SMEs. This will contradict the well-established recognition that cartel conduct is *per se* illegal and that SMEs cannot hide behind their status to engage in this prohibited conduct. This was highlighted in *Eldan*, which was discussed above and

²⁰⁹³ Waco (2024), para 111.

²⁰⁹⁴ Waco (2024), para 121.

²⁰⁹⁵ Waco (2024), para 122.

²⁰⁹⁶ Waco (2024), para 124.

²⁰⁹⁷ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2023] 1 CPLR 2 (CC).

²⁰⁹⁸ Characterisation refers to the process of determining whether an impugned agreement falls to be considered under section 4(1)(b) which is so harmful that no justification may be given for engaging in such conduct or under section 4(1)(a) which permits an efficiency defence. The CAC explained: "*In American Natural Soda Ash Corporation and Another v Competition Commission of South Africa and Others*¹³, ("ANSAC") the Supreme Court of Appeal ("SCA") set out the approach to be followed for determining whether conduct falls within the scope of the prohibitions enacted by section 4(1)(b) of the Act. The starting point is to recognise that the juxtaposition of section 4(1)(a) to section 4(1)(b) means that section 4(1)(b) is aimed at imposing a *per se* prohibition in which the "efficiency defence" expressly contemplated by section 4(1)(a) cannot be raised. The essential enquiry is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of - this is a factual enquiry." See Waco (2024), para 80.

confirmed that SMEs must face the consequences of their anti-competitive conduct, especially cartel conduct.²⁰⁹⁹

3.7 Conclusion

This chapter shows that South Africa did not start out with a comprehensive competition law framework.²¹⁰⁰ Competition law in South Africa has significantly evolved from the early 1900s.²¹⁰¹ Initially, there were only fragments of competition rules dealing with monopolistic behaviour and restraint of trade.²¹⁰² However, in 1998, following the first democratic election in South Africa, a more comprehensive competition legislation was introduced, the *Competition Act 89 of 1998*.²¹⁰³ In 2018, the *Competition Amendment Act 18 of 2018*, further enhanced the promotion and protection of SMEs.²¹⁰⁴

As pointed out above, the South African *Competition Act* sets out, under its purpose, the promotion of SMEs' effective and fair participation in the economy as a specific objective of the Act.²¹⁰⁵ In addition, several provisions of the South African *Competition Act* specifically deal with SMEs.²¹⁰⁶ Of particular significance is the 2018 amendments to the South African *Competition Act* which have introduced the "buyer power" provisions that protect SMEs from the buying power of dominant firms in specific sectors.²¹⁰⁷ SMEs are also protected in the amended provisions of section 9, dealing with price discrimination; section 10, dealing with exemptions;²¹⁰⁸ and section 12, dealing with public interest grounds in the context of mergers.²¹⁰⁹

The evolution of the South African competition law in the treatment of SMEs can be gleaned from the seminal cases that have dealt with SMEs and the 2018 amendments to the Competition Act.²¹¹⁰ The *Nationwide Poles* matter (Tribunal and CAC

²⁰⁹⁹ *Life Wise v Commission* (2022) para 34.

²¹⁰⁰ See above, para 3.3 History of the South African Competition Legislation.

²¹⁰¹ 1907 and 1923, see above, para 3.3 History of the South African Competition Legislation.

²¹⁰² See above para 3.3 History of the South African Competition Legislation.

²¹⁰³ See above, para 3.3 History of the South African Competition Legislation.

²¹⁰⁴ See above, para 3.4 The 2018 Amendments to the Competition Act.

²¹⁰⁵ See above, para 3.5.2 Purpose of the Competition Act.

²¹⁰⁶ See above, para 3.5 Provisions of the Competition Act dealing with SMEs.

²¹⁰⁷ See above, para 3.5.3.3.1 Section 8 – Abuse of dominance.

²¹⁰⁸ See above, para 3.5.3.4 Exemptions of prohibited practices.

²¹⁰⁹ See above, para 3.5.4 Merger regulations.

²¹¹⁰ See above, para 3.4. The 2018 Amendments to the Competition Act.

decisions),²¹¹¹ heard several years before the introduction of the 2018 amendments,²¹¹² is the first case in which the principle “*protect competition and not competitors*” emerged in South Africa.²¹¹³ This principle adopted from the US *Brown Shoe* case²¹¹⁴ appeared to accord the efficiency or consumer welfare objective precedence over the public interest objective of promoting SMEs.²¹¹⁵ Nevertheless, in that case, the CAC also recognised the Competition Act’s objective of protecting SMEs’ ability to compete freely and fairly.²¹¹⁶ Following the 2018 amendments and the Constitutional Court’s decision in *Mediclinic*,²¹¹⁷ the purpose of promoting SMEs is now gaining prominence. This can be gleaned from, among others, the 2024 *Revised Public Interest Guidelines*,²¹¹⁸ the several market inquiries initiated by the Commission,²¹¹⁹ which highlight the importance of promoting SMEs, and the 2024 *SMEs Block exemption regulations*.²¹²⁰ The case law reviewed during the period of 2022 to 2024 also indicates an improved focus on the purpose of promoting SMEs. It would, however, appear that the courts are still grappling with the implementation of this purpose. It may be considered that the application of the purpose of promoting SMEs may vary depending on whether the SME in a particular case is a victim or a perpetrator of the prohibited conduct. As noted by the CAC in *Eldan*,²¹²¹ SMEs cannot use section 2(e) to justify their illegal conduct. SMEs must still face the consequences of their illegal conduct.²¹²² However, it is submitted that this may depend on the type of conduct, in that for cartel conduct, SMEs should face the consequences of their illegal conduct, but if found guilty of a vertical prohibited practice or abuse of

²¹¹¹ See above, para 3.6.1 *Nationwide Poles v Sasol* – The Tribunal’s decision; para 3.6.2 *Sasol v Nationwide Poles* – The CAC’s decision.

²¹¹² See above, para 3.6.1 *Nationwide Poles v Sasol* – The Tribunal’s decision.

²¹¹³ See above, para 3.6.1 *Nationwide Poles v Sasol* – The Tribunal’s decision; para 3.6.2 *Sasol v Nationwide Poles* – The CAC’s decision.

²¹¹⁴ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962). See below Chapter Four, para 4.1.6.3.

²¹¹⁵ as set out in section 2(e) of the Competition Act.

²¹¹⁶ *Sasol Oil v Nationwide Poles* 41.

²¹¹⁷ See above, para 3.6.5.3 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another*.

²¹¹⁸ See above, para 3.5.4.2 *Revised Public Interest Guidelines*, 2024.

²¹¹⁹ See above, para 3.5.5.1 *The Grocery Retail Market Inquiry*; para 3.6.6.3 *The Commission’s Online Intermediary Platforms Market Inquiry*.

²¹²⁰ See above, para 3.5.3.4.1 *Block Exemption Regulations for Small, Micro and Medium-sized Businesses*, 2024.

²¹²¹ See above, para 3.6.6.1 *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa*.

²¹²² See above, para 3.6.6.1 *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa. Life Wise v Commission (2022)* para 34.

dominance, like in *Babelegi*,²¹²³ the *de minimis* impact of their conduct should be considered in the determination of a fine.²¹²⁴ In other words, section 2(e) purpose may be used to mitigate the level of an administrative penalty (a fine) when the SME is the infringer. Further, section 2(e) may be used in the assessment of harm to competition when SMEs fall victim to an exclusionary or abuse of dominance conduct. This is not to say that the size and efficiency of SMEs as competitors should determine the ambit of the anti-competitive effect,²¹²⁵ but that the purpose of promoting SMEs should be considered in determining harm to competition.

²¹²³ See above, para 3.6.4.4 *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa*.

²¹²⁴ See above, para 3.6.4.4 *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa*. *Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* paras 79 and 80.

²¹²⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* (2019) para 80.

Chapter Four: Analysis of the Treatment of SMEs under the US and EU jurisdictions

4.1 US Antitrust Law and SMEs

This first part of Chapter 4 examines the treatment of small and medium-sized enterprises (SMEs) under the competition law of the United States of America (US), commonly known as the US antitrust law.

It first considers the description of “small business” by a few US authors. Second, it delves into the history of US antitrust law, particularly the role played by small businesses in US antitrust history. Third, it considers the various legislations forming part of the US antitrust law regiment. Fourth, it explores the various US antitrust goals, as interpreted by several authors, focusing on the goal of promoting or protecting small businesses. Fifth, the enforcement of US antitrust laws against SMEs is discussed. Finally, a few US antitrust cases are considered that illustrate the treatment of small businesses under US antitrust laws. Since most of the sources consulted use “small business” to refer to both small businesses and SMEs, this part will use these terms interchangeably.

4.1.1 US Definition and Importance of Small Business

Small business is not defined in the context of US antitrust law, but other sources provide guidance to identify and describe small businesses.

The US Small Business Act of 1953²¹²⁶ defines a small business as “an independently owned and operated non-dominant firm in its area of business”.²¹²⁷ The criteria that are used to determine whether an entity is a small business include the number of

²¹²⁶ The Small Business Act of 1953, 67 Stat. 233 (1953), available at <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg230.pdf> (accessed on 18 December 2023) was amended by the Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023); MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170.

²¹²⁷ Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023) section 3(a)(1) which states: “For the purposes of this Act, a small business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.”

employees, dollar volume of the business, net worth and net income of the business.²¹²⁸

Foer uses the term “small business” to include various players such as “*mom & pop’s, franchisees, professional service providers, independent farmers, even mid-sized companies which face very large, dominant competitors.*”²¹²⁹ Foer further explains that small businesses generally lack market power and are susceptible to being exploited or crushed by firms with market power.²¹³⁰

Chaffetz refers to a small business as “*the relatively small company which has several larger competitors, or, at least one that is very much larger.*”²¹³¹

MacIntyre also points to the US Small Business Act of 1953,²¹³² which describes a small business as an independently owned and operated non-dominant firm in its area of business and which is defined in terms of, *inter alia*, the number of employees and dollar volume business.²¹³³ MacIntyre reports that the Small Business Administration, a US organisation that assists small businesses to strive and participate equally in the economy,²¹³⁴ has followed the above description of “small business”, and for the purpose of financially assisting small businesses, it has used the number of employees and annual sales as criteria to classify “small companies”.²¹³⁵ The various antitrust

²¹²⁸ The Small Business Act of 1953, 67 Stat. 233 (1953), available at <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg230.pdf> (accessed on 18 December 2023) was amended by the Small Business Act of 1958, [15 V.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023) section 3(a)(2)(B).

MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170.

²¹²⁹ Foer “Small business and antitrust” (2001) *Small Business Economics* 17.

²¹³⁰ Foer “Small business and antitrust” (2001) *Small Business Economics* 17.

²¹³¹ Chaffetz “The Antitrust Laws and Small Business” (1953) 2 *ABA Antitrust Section* 77.

²¹³² MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170; The Small Business Act of 1953, 67 Stat. 233 (1953), available at <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg230.pdf> (accessed on 18 December 2023) was amended by the Small Business Act of 1958, [15 V.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023).

²¹³³ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170.

²¹³⁴ Small Business Administration available at <https://www.sba.gov/about-sba> (accessed on 1 December 2023).

²¹³⁵ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 171.

legislations, namely the *Sherman Act* of 1890,²¹³⁶ the *Clayton Act* of 1914,²¹³⁷ and the *Federal Trade Commission Act* of 1914 (the FTC Act),²¹³⁸ do not give specific criteria for big or small businesses.²¹³⁹

It is also acknowledged that small businesses contribute to creating employment in the US. In 1961, MacIntyre reported that more than four and a half million small businesses were conducting business and creating jobs for about 30 million people in the US, which accounted for 40% of the US's total business activity.²¹⁴⁰ MacIntyre viewed these figures as indicating the importance of small businesses for the US's economy and future growth, and the necessity of developing and implementing policies that protect small businesses.²¹⁴¹ He further emphasised the value of small business for effective competition and confirmed the necessity, for public interest, of antitrust legislation that caters for small business, as follows: "*Without the numerous small business firms in our various industries, we cannot hope for effective competition. It is trite to say that you must have competitors in order to have competition, but it is a fact, nevertheless. Thus, small business and antitrust legislation, including that part of the law directed against destructive price discriminations, are vital to the public interest.*"²¹⁴²

The aforementioned words by McIntyre rang true given the increased importance of small businesses in the US economy: , from 1995 to 2021, small businesses

²¹³⁶ Sherman Act of 2 July 1890, Chapter 647 of the 51st Congress; 26 Stat. 209. Available at <https://www.govinfo.gov/content/pkg/COMPS-3055/pdf/COMPS-3055.pdf> (accessed on 17 December 2023); also available at <https://www.archives.gov/milestone-documents/sherman-anti-trust-act#:~:text=Citation%3A%20Act%20of%20July%202,Record%20Group%2011%3B%20National%20Archives> (accessed on 18 December 2023). Section 305(a) of the Hart-Scott-Rodino Antitrust Improvements Act of 30 September 1976 states that the Sherman Act may be cited as "the Sherman Act", see Public Law 94-435 of the 94th Congress; 90 Stat. 1383. Available at <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg1383.pdf> (accessed on 17 December 2023).

²¹³⁷ Clayton Act of 15 October 1914, Chapter 323 of the 63rd Congress; 38 Stat. 730. Available at <https://www.govinfo.gov/content/pkg/COMPS-3049/pdf/COMPS-3049.pdf> (accessed on 17 December 2023). Section 305(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 30 September 1976 states the Clayton Act may be cited as the "Clayton Act", see Public Law 94-435 of the 94th Congress; 90 Stat. 1383. Available at <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg1383.pdf> (accessed on 17 December 2023).

²¹³⁸ Federal Trade Commission Act of 26 September 1914, Chapter 311 of the 63rd Congress; 38 Stat. 717. Available at <https://www.govinfo.gov/content/pkg/COMPS-388/pdf/COMPS-388.pdf> (accessed on 17 December 2023). Hereinafter referred to as the FTC Act.

²¹³⁹ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) 156.

²¹⁴⁰ MacIntyre "Small business and the antitrust laws (1961) *University of Detroit Law Journal* 179.

²¹⁴¹ MacIntyre "Small business and the antitrust laws (1961) *University of Detroit Law Journal* 179.

²¹⁴² MacIntyre "Small business and the antitrust laws (1961) *University of Detroit Law Journal* 180.

accounted for 63% (or 17.3 million) of new job creations.²¹⁴³ Notably, according to the US Chambers of Commerce, the number of small businesses in the US has reached 33.2 million in 2023.²¹⁴⁴ In 2024, the US Small Business Administration Office of Advocacy reported an increased number of 34.8 million small businesses in the US.²¹⁴⁵ This is based on the definition that a small business is a firm with less than 500 employees.²¹⁴⁶

It is then noteworthy to consider the US antitrust history in the context of small business. Specifically, to understand the development of US antitrust law in relation to SMEs, the treatment of SMEs under US antitrust law and SMEs' contribution to creating the law.

4.1.2 History of the US Antitrust Law

The US antitrust law, generally regarded as the origin of modern competition law, dates back to the 1800s. There have been several interpretations of the origin of the US antitrust law and its purpose.²¹⁴⁷ Some authors have argued that the development of the US antitrust law was triggered by small businesses, particularly small oil companies.²¹⁴⁸ Certain authors have explained that it is the "Granger or agrarian movement" that lobbied for antitrust laws.²¹⁴⁹ This is further discussed below under the discussion that focuses on the origin of the Sherman Act.²¹⁵⁰ Others have

²¹⁴³ U.S. Chamber of Commerce "The State of Small Business Now" (2023), available at: <https://www.uschamber.com/small-business/state-of-small-business-now> (accessed on 1 December 2023).

²¹⁴⁴ U.S. Chamber of Commerce "The State of Small Business Now" (2023), available at: <https://www.uschamber.com/small-business/state-of-small-business-now> (accessed on 1 December 2023). See also US Small Business Administration Office of Advocacy "Frequently Asked Questions" (March 2023), available at <https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf> (accessed on 23 November 2024).

²¹⁴⁵ US Small Business Administration Office of Advocacy – 2024 Small Business Profile. Available at https://advocacy.sba.gov/wp-content/uploads/2024/11/United_States.pdf (accessed on 23 November 2024).

²¹⁴⁶ United States Census Bureau – Small Business Week 2024: How Small Businesses Impact our Economy. Available at <https://www.census.gov/library/stories/2024/04/small-business-week-2024.html> (accessed on 23 November 2024).

²¹⁴⁷ May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review*, 35(4), 857-878, at 865; Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 15:4, 275–295, at 275.

²¹⁴⁸ Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 15:4, 275–295, at 275.

²¹⁴⁹ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 4; Stigler "The Origin of the Sherman Act" (1985) *The Journal of Legal Studies*, Jan. 1985, Vol.14, No.1 (Jan. 1985), pp.1-12, at 2 & 3; Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 337-358, at 340.

²¹⁵⁰ See below: 4.1.3.1.2 Origin of the Sherman Act.

attributed the origin of the US antitrust law to a reaction to the political and economic environment of the late 19th century, where there was a growing demand for equal distribution of wealth.²¹⁵¹

There is, nevertheless, consensus that the US's first antitrust legislation, the Sherman Act, was born from concerns over the perceived power of trusts to dominate the markets and make it very difficult for small businesses to sustain themselves in the markets.²¹⁵² Sawyer defines a trust as *"a legal device used to coordinate multiple property owners through a unified management structure. Business owners combine their interests into a single legal entity—the trust. The various owners appoint a trustee (or multiple trustees) to act in the interest of the collective owners, and the individual owners retain dividend shares in the trust."*²¹⁵³

Trusts were formed, in the 1880s,²¹⁵⁴ through several corporations joining their business forces to gain market control.²¹⁵⁵ This resulted in large corporations establishing trusts towards the end of the 19th century in an effort to gain more market share.²¹⁵⁶ These trusts started acquiring large market shares, allegedly pushing their small rivals out of the market.²¹⁵⁷ It is reported that smaller market participants and the government were unhappy about the trusts.²¹⁵⁸ This led to the passing of antitrust laws to regulate competition, with particular attention to coordination between companies and the abuse of dominance in the market.²¹⁵⁹

²¹⁵¹ May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 93-108, at 95 and 101.

²¹⁵² Wright, Dorsey, Klick and Rybnicek "Requiem for Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust" (2019) *Arizona State Law Journal*, 51(1), 293-370, at 299; Munyai *A critical review of the treatment of dominant firms in competition law – A comparative study* (PhD thesis 2016 UNISA) 37-39.

²¹⁵³ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2.

²¹⁵⁴ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2.

²¹⁵⁵ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2.

²¹⁵⁶ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2.

²¹⁵⁷ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2; Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives*, Vol. 33, No. 3 (Summer 2019) 94-117, at 96.

²¹⁵⁸ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2; Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives*, Vol. 33, No. 3 (Summer 2019) 94-117, at 96.

²¹⁵⁹ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2.

The trusts were regarded as inimical to competition and especially to small businesses. Carey reports that, in 1888, a committee established by the New York Senate found that the trusts' main goal was *"the aggregation of capital, the power of controlling the manufacture and output of various necessary commodities; the acquisition or destruction of competitive properties, all leading to the final and conclusive purposes of annihilating and enabling the industries represented in the combination to fix the price at which they purchase the raw material from the producer, and at which they would sell the refined product to the consumer."*²¹⁶⁰

An early example of a US trust is the Standard Oil Co. ("Standard Oil"), which was formed in 1882 and that was amongst the first trusts in the US to be prosecuted for anti-competitive practices.²¹⁶¹ Standard Oil's form of trust was followed by other large companies which established trusts in several other industries, such as sugar, whiskey, and cottonseed oil.²¹⁶²

However, certain authors have observed that, during the late 19th century, trusts also benefited consumers.²¹⁶³ Prices went down while wages went up.²¹⁶⁴ Bradley notes that the "Trust Age" was characterised by output expansion, decreasing prices, improvements in product quality and standardisation.²¹⁶⁵ Farmers actually benefited from the trusts era, as railroad practices stabilised and increased farmers' income.²¹⁶⁶ Bradley also mentions Congressional analysis suggesting that big businesses' practices likely resulted in economic benefits that antitrust law should not disturb.²¹⁶⁷ In the case of Standard Oil, Carey mentions that the granting of special rebates to

²¹⁶⁰ Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 337-358, at 339.

²¹⁶¹ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2; Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives*, Vol. 33, No. 3 (Summer 2019) 94-117, at 96; *Standard Oil Company of New Jersey et al. v The United States* 221 US 1, 106 (1910).

²¹⁶² Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives*, Vol. 33, No. 3 (Summer 2019) 94-117, at 98.

²¹⁶³ Millon "The First Antitrust Statute" (1990) Washington & Lee University School of Law Scholarly Commons 143.

²¹⁶⁴ Millon "The First Antitrust Statute" (1990) Washington & Lee University School of Law Scholarly Commons 143; Bradley "On the Origins of the Sherman Antitrust" (1990) *Gate Journal*, Vol. 9, No. 3 (Winter 1990) 739.

²¹⁶⁵ Bradley "On the Origins of the Sherman Antitrust" (1990) *Gate Journal*, Vol. 9, No. 3 (Winter 1990) 739.

²¹⁶⁶ Stigler "The Origin of the Sherman Act" (1985) *The Journal of Legal Studies*, Jan. 1985, Vol.14, No.1 (Jan. 1985) 1-12, 2; Bradley "On the Origins of the Sherman Antitrust" (1990) *Gate Journal*, Vol. 9, No. 3 (Winter 1990) 739.

²¹⁶⁷ Bradley "On the Origins of the Sherman Antitrust" (1990) *Gate Journal*, Vol. 9, No. 3 (Winter 1990) 739.

Standard Oil would have increased consumer welfare if the rebates originated from Standard Oil's "*efficiencies in handling large volumes of oil*" instead of its monopsony power.²¹⁶⁸ Monopsony refers to a market situation when there is only one single buyer of goods or services, who has the power to lower the prices of its suppliers by reducing the quantity of goods or services it purchases from them.²¹⁶⁹ Blair and Harrison describe monopsony power as the "*power on the buying side of the market*."²¹⁷⁰

Hence, certain authors have argued that the "big business"-phenomenon also benefited the market.²¹⁷¹ This has triggered a debate about the purpose of antitrust law.²¹⁷² Some authors have identified the protection of small businesses' interests as the main purpose of antitrust law,²¹⁷³ others have contended that protecting consumer welfare was the ultimate antitrust goal,²¹⁷⁴ whilst another set of authors believed that the antitrust goal was creating economic opportunity, wealth distribution and political freedom.²¹⁷⁵ This is discussed further below under the "US antitrust goals".²¹⁷⁶

Nevertheless, interpretations of antitrust law and the enforcement thereof have evolved with changing economic, environmental, political, and intellectual conditions.²¹⁷⁷ In this regard, May identifies four main periods in the US antitrust law

²¹⁶⁸ Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 337-358, at 345-346.

²¹⁶⁹ Blair and Harrison "Antitrust Policy and Monopsony" (1990-1991) 76(2) *Cornell Law Review*, 297-298.

Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 343.

²¹⁷⁰ Blair and Harrison "Antitrust Policy and Monopsony" (1990-1991) 76(2) *Cornell Law Review*, 297.

²¹⁷¹ Millon "The First Antitrust Statute" (1990) *Washington & Lee University School of Law Scholarly Commons* 143; Bradley "On the Origins of the Sherman Antitrust" (1990) *Gate Journal*, Vol. 9, No. 3 (Winter 1990) 739; Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 337-358, at 345-346.

²¹⁷² Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 337-358

²¹⁷³ Elzinga KG "Goals of antitrust: Other than competition and efficiency, what else counts" (1977) *University of Pennsylvania Law Review*, 125(6), 1191-1213, 1196; Stigler "The Origin of the Sherman Act" (1985) *The Journal of Legal Studies*, Jan. 1985, Vol. 14, No. 1 (Jan. 1985), pp. 1-12; Grandy "Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis" (1993) *Journal of Economic History*, 53: 359-376. Available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/530189BD64A3F36A8B99738B9304ECD2/S0022050700012973a.pdf/original-intent-and-the-sherman-antitrust-act-a-re-examination-of-the-consumer-welfare-hypothesis.pdf> (accessed on 18 December 2023).

²¹⁷⁴ Foer "Small business and antitrust" (2001) *Small Business Economics* 15; Bork "Legislative Intent and the Policy of the Sherman Act" (1966) *The Journal of Law & Economics*, Vol. 9, pp. 7-48, available at <https://www.jstor.org/stable/724991> (accessed on 14 January 2022) 40.

²¹⁷⁵ Thorelli *the Federal Antitrust Policy: Origination of an American Tradition* (1955) 570-572.

²¹⁷⁶ See 4.1.4 US Antitrust Goals.

²¹⁷⁷ May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 93-108, at 98.

history.²¹⁷⁸ First, the 19th century, known as the “common law era.”²¹⁷⁹ Second, the late 19th and early 20th centuries,²¹⁸⁰ known as the “formative” period, characterised by active legislative, executive and judicial responses to great economic changes.²¹⁸¹ Third, was a relatively calm period from the end of World War I to the 1970s.²¹⁸² Fourth, the current period is known as the “modern state antitrust revitalisation”.²¹⁸³

Sawyer, however, identifies five main periods in the US antitrust history.²¹⁸⁴ First, the 1880s to 1900, called the Formative Era, is known as the “Gilded Age Beginnings.”²¹⁸⁵ Second, from 1904 to 1929, known as the “Progressive Era Reforms”, saw the adoption of the *rule of reason* approach and “Building an Administrative State.”²¹⁸⁶ Thirdly, from 1933 to 1960, the “New Deal State” was known as a moment of pause in antitrust enforcement to introduce more “state intervention.”²¹⁸⁷ Fourthly, from the 1970s to the 1990s, the “Chicago School Revolution and Reform” was characterised as a period where the government was criticised for limiting its intervention in economic activities.²¹⁸⁸ Finally, from the 1990s to the present,²¹⁸⁹ the “Post-Chicago and the New Progressive Movement” is characterised as the realisation of the limitations of the Chicago school antitrust policy.²¹⁹⁰ This movement considers new economic models that identify market distortions and asks the courts to carefully

²¹⁷⁸ May “The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History” (1990) *Antitrust Law Journal*, 59(1), 93-108, at 97.

²¹⁷⁹ May “The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History” (1990) *Antitrust Law Journal*, 59(1), 93-108, at 97.

²¹⁸⁰ May “The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History” (1990) *Antitrust Law Journal*, 59(1), 93-108, at 97.

²¹⁸¹ May “The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History” (1990) *Antitrust Law Journal*, 59(1), 93-108, at 97.

²¹⁸² May “The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History” (1990) *Antitrust Law Journal*, 59(1), 93-108, at 97.

²¹⁸³ May “The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History” (1990) *Antitrust Law Journal*, 59(1), 93-108, at 97.

²¹⁸⁴ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110.

²¹⁸⁵ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 6-10.

²¹⁸⁶ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 10-14.

²¹⁸⁷ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 14-20.

²¹⁸⁸ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 18-21. See below 4.1.4.2.4 Chicago School.

²¹⁸⁹ Sawyer’s article was published in 2019. By stating “to present” the author is probably referring to the “New Brandeisians” movement. Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 22-24.

²¹⁹⁰ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 22-24.

assess abuse of dominant conduct, mergers and vertical restraints with anticompetitive effects.²¹⁹¹ Sawyer identifies the “New Progressive Movement” as the “New Brandeisians”²¹⁹² who actively advocate for the revival of antitrust enforcement against dominant firms, especially against the big techs²¹⁹³ or “tech trusts”.²¹⁹⁴

The Sherman Act was the first federal antitrust legislation passed by the US Congress in 1890.²¹⁹⁵ However, prior to the enactment of the Sherman Act, several US states had passed their own antitrust laws in the 1880s, reacting to the public outcry over the perceived abuse of market power by trusts.²¹⁹⁶ Notably, these states’ antitrust laws played a pivotal role in the passing of the federal antitrust legislation.²¹⁹⁷ However, in Millon’s view *“there was nothing revolutionary about such legislation.”*²¹⁹⁸ Millon further indicates that the states’ antitrust laws were seen as an extension of laws for *“the promotion of economic opportunity and the preservation of economic balance. In this respect, these laws were expressions of the states’ traditional policy power responsibility to protect the welfare of their citizens.”*²¹⁹⁹

The antitrust laws of various US states prohibited the creation of monopolies and the participation in anti-competitive conduct.²²⁰⁰ Millon points out that before the enactment of the Sherman Act, about twelve states had passed penal laws to deal with the trusts and “combinations in restraint of trade”.²²⁰¹ Some US states had

²¹⁹¹ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 22-24.

²¹⁹² See below, 4.1.4.2.6 New Brandeisians (from about 2000 to date).

²¹⁹³ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, 23.

²¹⁹⁴ Wu *The Curse of Bigness – Antitrust in the New Gilded Age* (2018) Columbia Global Reports 117-126.

²¹⁹⁵ Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics*, 15:4, 275–295, at 275; Stigler “The Origin of the Sherman Act” (1985) *The Journal of Legal Studies* 1.

²¹⁹⁶ Carey “The Sherman Act: What did Congress intend” (1989) *Antitrust Bulletin*, 34(2), 337-358, at 340; Millon “The First Antitrust Statute” (1990) Washington & Lee University School of Law Scholarly Commons 145-146; Stigler “The Origin of the Sherman Act” (1985) *The Journal of Legal Studies* 5.

²¹⁹⁷ Millon “The First Antitrust Statute” (1990) Washington & Lee University School of Law Scholarly Commons 149; May “The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History” (1990) *Antitrust Law Journal*, 59(1), 93-108, at 98.

²¹⁹⁸ Millon “The First Antitrust Statute” (1990) Washington & Lee University School of Law Scholarly Commons 145.

²¹⁹⁹ Millon “The First Antitrust Statute” (1990) Washington & Lee University School of Law Scholarly Commons 145.

²²⁰⁰ Millon “The First Antitrust Statute” (1990) Washington & Lee University School of Law Scholarly Commons 145; Stigler “The Origin of the Sherman Act” (1985) *The Journal of Legal Studies* 5.

²²⁰¹ The twelve states were Iowa (1889), Kansas (1889), Kentucky (1890), Maine (1889), Michigan (1889), Mississippi (1890), Missouri (1889), Nebraska (1889), North Dakota (1889), South Dakota (1889), Tennessee (1870) and Texas (1876). See Millon “The First Antitrust Statute” (1990)

constitutional provisions prohibiting monopolies and preventing firms from participating in anti-competitive combinations.²²⁰² Stigler reports that various US state

Washington & Lee University School of Law Scholarly Commons 145-146 listing the 12 states; and Stigler “The Origin of the Sherman Act” (1985) *The Journal of Legal Studies* 5-6 setting out the year of enactment of the respective antitrust laws.

²²⁰² North Carolina Constitution Dec. of Rights sec 23 (1776) stated: “That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.” Available at https://avalon.law.yale.edu/18th_century/nc07.asp (accessed on 27 December 2023); Tennessee Constitution art. XI sec 23 (1796) stated: “That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed.” Available at <https://tennesseefirearms.com/laws/tennessee-constitution/1796-tennessee-constitution/#article11> (accessed on 27 December 2023); Arkansas Constitution art. II, sec 19 (1836) stated: “That perpetuities and monopolies are contrary to the genius of a republic and shall not be allowed; nor shall any hereditary emoluments privileges or honors ever be granted or conferred in this state.” Available at <https://digitalheritage.arkansas.gov/constitutions/5/> (accessed on 27 December 2023); Florida Constitution art. I, sec 24 (1838) stated: “That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.” available at Florida State University (but unsecured link, 27 December 2023); Texas Constitution, art. 9, sec 18 (1845) stated: “Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.” Available at <https://tarlton.law.utexas.edu/constitutions/texas-1845-en/preamble-article-1-bill-rights> (accessed on 27 December 2023); Maryland Constitution art. I, sec 39 (1851) stated: “That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered”. Idaho Constitution art. 11, sec 18 (1889) stated: “COMBINATIONS IN RESTRAINT OF TRADE PROHIBITED. That no incorporated company or any association of persons or stock company, in the state of Idaho, shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people; and that the legislature be required to pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchise.” Available at https://sos.idaho.gov/elect/stcon/Idaho_State_Constitution.pdf (accessed on 27 December 2023); Montana Constitution art. 15, sec 20 (1889) stated: “No incorporation, stock company, person or association of persons in the state of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person, or persons, corporation, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, or in case of foreign corporations, prohibiting them from carrying on business in the state.” Available at <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1003&context=montanaconstitution> (accessed on 27 December 2023); North Dakota Constitution art. 7, sec 146 (1889) stated: “Any combination between individuals, corporations, associations or either, having for its object or effect the controlling of the price of any product of the soil or any article of manufacture, or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises heretofore granted or extended, or that may hereafter be granted or extended in this state, whenever the owner or owners thereof violate this article shall be deemed annulled and become void.”; South Dakota Constitution art. 17, sec 20 (1889) states: “Monopolies and trusts prohibited--Combinations in restraint of trade--Legislative powers. Monopolies and trusts shall never be allowed in this state and no incorporated company, copartnership or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any copartnership or association of persons, or in any manner whatever to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor. The Legislature shall pass laws for the enforcement of this section by adequate penalties and in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises.” Available at <https://sdlegislature.gov/Constitution/17-20> (accessed on 27 December 2023); Washington

antitrust laws, which sought to regulate railroad rates, were influenced by the Granger movement mentioned above.²²⁰³

Amongst state antitrust laws, the Kansas' antitrust statute is regarded as the first to have substantial provisions on antitrust.²²⁰⁴ It prohibited "*all arrangements, contracts, agreements, trusts or combinations designed or tending to prevent full and free competition' or to fix prices.*"²²⁰⁵

Although state antitrust laws may not have been regarded as revolutionary by Millon,²²⁰⁶ it is pointed out by May that US states' antitrust laws and enforcement activities have vastly contributed to the overall enforcement of antitrust laws in the US.²²⁰⁷ Various US states have enforced, and continue to enforce, their antitrust laws against both small enterprises and large corporations during the "formative" and "modern" periods of antitrust, respectively.²²⁰⁸ According to May, US states tackle

Constitution art. 12, sec 22 (1889) stated: "MONOPOLIES AND TRUSTS. Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises." Available at <https://leg.wa.gov/CodeReviser/Documents/WAConstitution.pdf> (accessed on 27 December 2023); Wyoming Constitution art. 1, sec 30 (1889) states: "Perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed. Corporations being creatures of the state, endowed for the public good with a portion of its sovereign powers, must be subject to its control." Available at https://ballotpedia.org/Article_1,_Wyoming_Constitution#:~:text=Section%2030,-Text%20of%20Section&text=Perpetuities%20and%20monopolies%20are%20contrary,be%20subject%20to%20its%20control. (accessed on 27 December 2023). Millon "The First Antitrust Statute" (1990) Washington & Lee University School of Law Scholarly Commons 145; Stigler "The Origin of the Sherman Act" (1985) *The Journal of Legal Studies* 5-6.

²²⁰³ Stigler "The Origin of the Sherman Act" (1985) *The Journal of Legal Studies* 1. The Granger movement, which is also identified as the "agrarian movement" (Stigler 1985, 2), was made up of farmers and existed between 1867 and 1873 (Stigler 1985, 1). It was among the groups that lobbied for the passing of antitrust laws (Stigler 1985, 1-2; Carey 1989, 340; Sawyer 2019, 4). It founded political parties which initiated "antimonopoly programs", later called "anti-monopoly" (Stigler 1985, 2). The agrarian movement initially opposed "railroad privileges" (Sawyer, 2019, p.4; Stigler 1985, 2), which were rebates that railroad companies offered to the trusts, in particular oil trusts, for their use of railroads for shipping their products (Carey, 1989, p340; Sawyer, 2019, p.4). The agrarian movement later opposed other monopolies (Stigler, 1985, p.2). They also opposed corporate capitalism (Sawyer, 4).

²²⁰⁴ Millon "The First Antitrust Statute" (1990) Washington & Lee University School of Law Scholarly Commons 146.

²²⁰⁵ Millon "The First Antitrust Statute" (1990) Washington & Lee University School of Law Scholarly Commons 146.

²²⁰⁶ Millon "The First Antitrust Statute" (1990) Washington & Lee University School of Law Scholarly Commons 145.

²²⁰⁷ May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 93-108, 99.

²²⁰⁸ May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 93-108, 99.

issues of "competition, efficiency, opportunity, wealth distribution, and political freedom."²²⁰⁹

4.1.3 US Antitrust Legislation

The US antitrust legislation framework includes the *Sherman Act*,²²¹⁰ the *Clayton Act*,²²¹¹ the *Federal Trade Commission (FTC) Act*,²²¹² the *Robinson-Patman Act*²²¹³ and the *Hart-Scott-Rodino Antitrust Improvements Act*.²²¹⁴ Two antitrust legislation

²²⁰⁹ May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 93-108, 99.

²²¹⁰ 26 STAT. 209 (1890) Fifty-first Congress Sess I Chap.647. Available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/26/STATUTE-26-Pg209a.pdf> (accessed on 12 September 2023). See also **Sherman Act**, Chapter 647 of the 51st Congress; 26 Stat. 209 [As Amended Through P.L. 108–237, Enacted June 22, 2004]. Available at <https://www.govinfo.gov/content/pkg/COMPS-3055/pdf/COMPS-3055.pdf> (accessed on 17 December 2023).

²²¹¹ 38 STAT. 730 (1914) Sixty-third Congress Sess. II Chap 323. Available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/38/STATUTE-38-Pg730.pdf> (accessed on 23 November 2024). See also Clayton Act, Chapter 323 of the 63rd Congress; 38 Stat. 730 [As Amended Through P.L. 108–237, Enacted June 22, 2004]. Available at <https://www.govinfo.gov/content/pkg/COMPS-3049/pdf/COMPS-3049.pdf> (accessed on 23 November 2024). See also 15 U.S.C. §§ 12-27, as amended. Available at <https://www.ftc.gov/legal-library/browse/statutes> (accessed on 12 September 2023).

²²¹² 38 STAT. 717 (1914), Sixty-third Congress Sess. II Chap. 311. Available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/38/STATUTE-38-Pg717.pdf> (accessed on 23 November 2023). See also Federal Trade Commission Act, Chapter 311 of the 63rd Congress, 38 Stat. 717, September 26, 1914 [As Amended Through Public Law 111–203, Enacted July 21, 2010]. Available at <https://www.govinfo.gov/content/pkg/COMPS-388/pdf/COMPS-388.pdf> (accessed on 23 November 2024). See also 15 U.S.C. §§ 41-58, as amended. Available at https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc_act_incorporatingus_safe_web_act.pdf (accessed on 12 September 2023).

²²¹³ 49 Stat. 1526 *et seq.*, available at <https://www.govinfo.gov/content/pkg/COMPS-12152/pdf/COMPS-12152.pdf> (accessed on 17 December 2023); See also Chaffetz "The Antitrust Laws and Small Business" (1953) 2 *ABA Antitrust Section* 77, 5; Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal* 2; U.S Department of Justice and Federal Trade Commission "Antitrust Guidelines for International Enforcement and Cooperation" (2017) at 7. Available at https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf (accessed on 25 November 2023); Federal Trade Commission "Antitrust Laws". Available at <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed on: 25 November 2023).

²²¹⁴ Hart-Scott-Rodino Antitrust Improvements Act of 30 September 1976, Public Law 94-435 of the 94th Congress; 90 Stat. 1383. Available at <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg1383.pdf> (accessed on 17 December 2023); Federal Trade Commission "Antitrust Laws". Available at <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed on: 25 November 2023).

that also dealt with SMEs but which were later repealed included the *Miller-Tydings Resale Price Maintenance Act* (RPM)²²¹⁵ and the *McGuire Act* in 1952.²²¹⁶

As discussed in more detail below, in 1890, the US Congress passed the *Sherman Act*. Subsequently, in 1914, the US Congress passed two additional antitrust laws, the Federal Trade Commission (FTC) Act and the Clayton Act.²²¹⁷ In 1936, the US Congress passed the Robinson-Patman Act.²²¹⁸ In 1937, the Miller-Tydings Act was passed to amend section 1 of the Sherman Act.²²¹⁹ In 1952, the McGuire Act was passed to amend the FTC Act of fair trade conduct.²²²⁰ These two laws were repealed in 1975/1976.²²²¹ In 1976, the US Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).²²²² The HSR Act introduced pre-merger notification and review by the Federal Trade Commission (the FTC) and the Assistant Attorney General responsible for the antitrust division of the Department of Justice.²²²³ This pre-merger notification involves an assessment by the FTC and the Assistant Attorney General on whether the proposed merger and acquisition will likely infringe the antitrust laws.²²²⁴

4.1.3.1 *The Sherman Act*

The *Sherman Act* was enacted on 2 July 1890.²²²⁵ Thorelli described the Sherman Act as portraying a philosophy of "economic egalitarianism" and reflecting the

²²¹⁵ 50 STAT. 693 (1937) Seventy-fifth Congress Sess. I Chap 690, Title VIII. Available at https://heinonline-org.uplib.idm.oclc.org/HOL/Page?lname=&public=false&collection=statute&handle=hein.statute/sal050&men_hide=false&men_tab=citation_tab&kind=citation&page=693 (accessed on 26 November 2024).

²²¹⁶ 66 STAT. 631, 15 U.S.C. § 45 (1952). Available at https://heinonline-org.uplib.idm.oclc.org/HOL/Page?public=true&handle=hein.statute/sal066&div=290&start_page=631&collection=statute&set_as_cursor=0&men_tab=srchresults (accessed on 26 November 2024).

²²¹⁷ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 10.

²²¹⁸ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 10; Federal Trade Commission "Antitrust Laws". Available at <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed on: 25 November 2023).

²²¹⁹ Stanley "Resale Price Maintenance" (1949) 3(1) *Vanderbilt Law Review*, 45. See also Walter "Resale Price Maintenance: Fact and Fancy" (1955) 64(7) *Yale Law Journal* 967.

²²²⁰ Walter "Resale Price Maintenance: Fact and Fancy" (1955) 64(7) *Yale Law Journal* 967- 968.

²²²¹ Verma "Regulation of Resale Price Maintenance" (1979) *Journal of the Indian Law Institute* 78, says that the Miller-Tydings Act and McGuire Act were repealed with effect from 12 March 1976.

²²²² Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 10; Federal Trade Commission "Antitrust Laws". Available at <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed on: 25 November 2023).

²²²³ Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

²²²⁴ Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976; Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 21.

²²²⁵ Carey "The Sherman Act. What Did Congress Intend?" (1989) *Antitrust Bulletin*, 34(2), 337-358, 342.

economic views of the 19th century.²²²⁶ The Sherman Act is also described as a “*comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.*”²²²⁷

The Sherman Act prohibits unlawful restraints of trade and monopoly conduct or attempts to monopolise markets.²²²⁸ Section 1 prohibits “*every contract, combination in the form of trust or otherwise, conspiracy*”²²²⁹ that restrains trade or commerce between the US states (interstate trade) and foreign countries. The Sherman Act initially stipulated that any person involved in such conduct may be found guilty of “misdemeanour”²²³⁰ or may be punished by fine, imprisonment, or both.²²³¹ Section 2 prohibits any monopoly conduct or attempt to monopolise any part of the trade or commerce between US states or with non-US countries. Section 2 also stipulated that a person who engages in such monopoly conduct will be deemed guilty of a “misdemeanour” and may be subjected to a fine or imprisonment. Sections 1 and 2 of the Sherman Act were amended to classify the offences described in these sections

²²²⁶ Thorelli *the Federal Antitrust Policy: Origination of an American Tradition* (1955) 564-572; May “Historical Analysis in Antitrust Law” (1990) *New York Law School Law Review*, 35(4), 857-878, 863.

²²²⁷ US Federal Trade Commission “The Antitrust Laws”, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed on 29 January 2022).

²²²⁸ Bradley “On the Origins of the Sherman Antitrust” (1990) *Gate Journal*, Vol. 9, No. 3 (Winter 1990) 737; Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, 8. These authors refer to sections 1 and 2 of the Sherman Act, *Fifty-first Congress. Sess. 1. Chs 646, 647. 1890*, at 209, available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/26/STATUTE-26-Pg209a.pdf> (accessed on 29 January 2022).

²²²⁹ *Fifty-first Congress. Sess. 1. Chs 646, 647. 1890*, at 209, available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/26/STATUTE-26-Pg209a.pdf> (accessed on 29 January 2022)

²²³⁰ According to the Collins Cobuild Advanced Learner’s English Dictionary, a “misdemeanor” in the context of US criminal law is “a less serious crime.” Remington “Legal Concepts of Misdemeanor and Felony” (1952) 1952 Yearbook, 67, describes a misdemeanour as a “conduct prohibited under a threat of fine or imprisonment or both.”

²²³¹ *Fifty-first Congress. Sess. 1. Chs 646, 647. 1890*, at 209, available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/26/STATUTE-26-Pg209a.pdf> (accessed on 29 January 2022)

as felonies.²²³² Section 7 of the Sherman Act provides further that any person harmed by prohibited conduct may institute a civil claim for treble damages.²²³³

The application of the Sherman Act has evolved through the jurisprudence of the courts, which has categorised certain conduct as *per se* illegal,²²³⁴ such as price fixing, market allocation, etc., and other conduct as one where a *rule of reason* standard is applied to determine whether the conduct is unlawful or not.²²³⁵ The US Supreme Court has occasionally described the *rule of reason* as a “burden-shifting framework” between the Plaintiff and the Defendant to distinguish between anti-competitive conduct harmful to consumers and pro-competitive conduct benefiting consumers.²²³⁶

²²³² Initially, the Sherman Act stated that a violation of sections 1 and 2 “*shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.*” (own emphasis) Following the 2004 amendment, the Sherman Act states that violations of sections 1 and 2 “*shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*” (own emphasis) See **Sherman Act**, Chapter 647 of the 51st Congress; 26 Stat. 209 [As Amended Through P.L. 108–237, Enacted June 22, 2004]. Available at <https://www.govinfo.gov/content/pkg/COMPS-3055/pdf/COMPS-3055.pdf> (accessed on 17 December 2023).

Remington “Legal Concepts of Misdemeanor and Felony” (1952) 1952 Yearbook, 67, describes a felony as “*a crime punishable by imprisonment for over a year.*” The LII Legal Information Institute defines a felony as a criminal offence categorised according to the seriousness of the crime and its punishment. Available at <https://www.law.cornell.edu/wex/felony> (accessed on 23 November 2024). The US Department of Justice describes felony and misdemeanour as follows: “*Criminal acts fall into two categories: felonies and misdemeanors. Felonies are offenses that may result in prison sentences of more than one year, while misdemeanors carry sentences of one year or less. The United States Congress sets the penalties for all federal criminal acts. Thus, Congress decides which criminal acts are felonies and which ones are misdemeanors. The State legislature makes those determinations for criminal acts that violate state law.*” Available at https://www.justice.gov/sites/default/files/usao-ri/legacy/2011/04/04/ri_federal_criminal_brochure.pdf (accessed on 23 November 2024).

²²³³ Fifty-first Congress. Sess.1. Chs 646, 647. 1890, at 209, available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/26/STATUTE-26-Pg209a.pdf> (accessed on 29 January 2022). Treble damages refer to an award of damages equivalent to three times the damage suffered by the injured person. See *Sherman Antitrust Act*, available at https://www.law.cornell.edu/wex/sherman_antitrust_act (accessed on 29 January 2022).

²²³⁴ See Chapter Three: The treatment of SMEs under the South African Competition Act, 3.5 Provisions of the Competition Act dealing with SMEs, 3.5.3 Prohibited practices, 3.5.3.1 Restrictive horizontal practices, 3.5.3.1.2 Section 4(1)(b). A conduct is considered *per se* illegal if its nature is inherently anti-competitive and harmful, without the need to show that the impugned conduct has anti-competitive effects.

²²³⁵ See Chapter Three: The treatment of SMEs under the South African Competition Act, 3.5 Provisions of the Competition Act dealing with SMEs, 3.5.3 Prohibited practices, 3.5.3.1 Restrictive horizontal practices, 3.5.3.1.1 Section 4(1)(a). The *rule of reason* applies when there may be a justification for the impugned conduct, and there is a need to assess the anti-competitive effect of the conduct through the business circumstances, the history of the conduct and its justification. See Sutherland and Kemp *Competition Law of South Africa* (2020), para 5.6.

²²³⁶ *National Collegiate Athletic Association v. Shawne Alston et al. and American Athletic Conference et al.* 594 U.S. 1 (2021) 24; 958 F. 3d 1239, available at: <https://www.law.cornell.edu/supct/pdf/20-512.pdf> (accessed on: 30 November 2023); Brief of *Amici Curiae* Antitrust Law and Business school Professors in Support of Petition for a Writ of Certiorari (18 November 2020) 3 in *National Collegiate Athletic Association v. Shawne Alston, et al. and American Athletic Conference et al.* 594 U.S. 1 (2021);

In *National Collegiate Athletic Association v. Shawne Alston et al.* and *American Athletic Conference et al.*,²²³⁷ the US Supreme Court explained that in evaluating an antitrust case engaging the *rule of reason*, the courts apply a three-step process of shifting the burden between the Plaintiff and the Defendant. This occurs as follows: (1) the Plaintiff bears the burden to prove the substantial anti-competitive effect of the conduct; (2) If it has done so, the burden shifts to the Defendant to prove that the conduct results in pro-competitive benefits; and (3) the burden will then shift back to the Plaintiff, who will have to prove that there is an alternative way that is equally effective, but less restrictive than the impugned anti-competitive conduct.²²³⁸

4.1.3.1.1 The “Architect” of the *Sherman Act*

Senator John Sherman (Sherman) from the US state of Ohio initiated the passing of the Sherman Act.²²³⁹ He is described as the “*architect*” of the first federal antitrust legislation in the US,²²⁴⁰ and “*the driving force behind*” US antitrust law.²²⁴¹ Senator Sherman introduced a Bill to the US Senate in 1890.²²⁴² Carey remarks that Senator Sherman wanted to extend the common law, already applied by US state courts, to a federal law²²⁴³ and acknowledged that the interpretation of the antitrust legislation should be left to the courts.²²⁴⁴

4.1.3.1.2 Origin of the *Sherman Act*

As mentioned above, various views exist on what triggered or who lobbied for antitrust legislation.²²⁴⁵ As pointed out above, some authors have argued that the

958 F. 3d 1239, available at: https://www.supremecourt.gov/DocketPDF/20/20-520/161068/20201118102959246_20-512%2020-520%20AntitrustLawAndBusinessSchoolProfessors.pdf (accessed on 29 November 2023).

²²³⁷ *National Collegiate Athletic Association v. Shawne Alston et al.* and *American Athletic Conference et al.* 594 U.S. 1 (2021); 958 F. 3d 1239.

²²³⁸ *National Collegiate Athletic Association v. Shawne Alston, et al.* and *American Athletic Conference et al.* 594 U.S. 1 (2021) 24; 958 F. 3d 1239.

²²³⁹ Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics* 276-277; Bradley “On the Origins of the Sherman Antitrust” (1990) *Gate Journal*.

²²⁴⁰ Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics* 276 & 291.

²²⁴¹ Bradley “On the Origins of the Sherman Antitrust” (1990) *Gate Journal*, 738.

²²⁴² Bill S.1 introduced at 21 Cong. Rec. 2456 (1890), available at https://appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf (accessed on 19 December 2023); Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2), 340-341.

²²⁴³ Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2), 344.

²²⁴⁴ Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2), 354.

²²⁴⁵ May “Historical Analysis in Antitrust Law” (1990) *New York Law School Law Review*, 865.

“Granger/agrarian” movement, which was a group of farmers, was amongst the first groups that lobbied for the passing of antitrust laws.²²⁴⁶

Other authors are of the view that the Sherman Act was born out of small business interests, particularly small oil companies’ concerns over the trusts in the oil industry.²²⁴⁷ In this regard, Troesken reports that Sherman specifically focused on the concerns of small oil refiners, rather than the concerns of other small businesses.²²⁴⁸ Small oil companies complained that the trusts, particularly Standard Oil Co., received unfair advantages from railroad companies (the railroads), in the form of rebates, for transporting their oil via tank cars.²²⁴⁹ The granting of special rebates to Standard Oil increased its monopoly power in the oil market.²²⁵⁰ In the 1870s, Standard Oil’s market share grew from 4% to about 90% of the US petroleum industry.²²⁵¹ Standard Oil’s business tactics, such as receiving secret discounts from railroads and inducing other refiners to sell out their oil at a lower price, allegedly excluded small competitors from the market.²²⁵² This alarmed small companies, as Standard Oil was acquiring control of most of the refining oil market.²²⁵³ As a result, small oil companies approached Senator Sherman to request him to introduce legislation prohibiting rebates to large oil companies for their use of tank cars.²²⁵⁴ This was the beginning of the concept of antitrust law, which at the time was mainly described as the “Anti-tank Car Bill”.²²⁵⁵

²²⁴⁶ See above: 4.1.2 History of the US Antitrust Law; Stigler “The Origin of the Sherman Act” (1985) *The Journal of Legal Studies*; Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955); Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2), 337-358; Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) *Harvard Business School Working Paper* 19-110.

²²⁴⁷ Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics*, 277-278.

²²⁴⁸ Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics*, 276-277; Bradley “On the Origins of the Sherman Antitrust” (1990) *Gate Journal* 2-3.

²²⁴⁹ Merriam Webster online dictionary defines a tank car as “a railroad car for transporting liquids or gases in bulk”, available at <https://www.merriam-webster.com/dictionary/tank%20car> (accessed on 17 December 2024). Troesken explained that: “railroads offered refiners who shipped their oil in refiner-owned tank cars significant rate reductions relative to those who continued to use barrels.” This was because barrels were expensive and posed a significant risk of accidental explosions. Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics*, 279-280.

²²⁵⁰ Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2), 345-346.

²²⁵¹ Lamoreaux “The Problem of Bigness” (2019) *The Journal of Economic Perspectives*, 96.

²²⁵² Lamoreaux “The Problem of Bigness” (2019) *The Journal of Economic Perspectives*, 96-99.

²²⁵³ Millon “The First Antitrust Statute” (1990) Washington & Lee University School of Law Scholarly Commons, 142; Lamoreaux “The Problem of Bigness” (2019) *The Journal of Economic Perspectives*, 96.

²²⁵⁴ Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics*, 280.

²²⁵⁵ Troesken “The Letters of John Sherman and the Origins of Antitrust” (2002) *The Review of Austrian Economics*, 280.

The "Anti-tank Car Bill" was, however, not passed.²²⁵⁶ As a result, the small oil companies then lobbied the government to take ownership of the railroads.²²⁵⁷

Small oil companies were not the only ones complaining about the trusts' "*cutthroat business strategies*".²²⁵⁸ Similar concerns over trusts were also raised in the meatpacking, steel, tobacco, whiskey, sugar, etc. industries.²²⁵⁹

Thus, views on the exact origin of the Sherman Act are divided. To name just a few authors, Lande believed that antitrust legislation was born out of congressional concern over wealth distribution, in particular, preventing unfair wealth transfers from consumers to dominant firms.²²⁶⁰ Troesken indicates that there are three schools of thought on the interpretation of the origin of the Sherman Act:²²⁶¹ the "Traditionalist" view that argues that consumers and populist farmers were the main proponents of antitrust legislation and not small businesses; the "Revisionist" view that believes that small businesses were the main group that lobbied for the passing of antitrust laws and supported antitrust legislation because of their concerns over the trusts' efficiency and economies of scale, and the "Hybrid" view, which finds that both consumers and small businesses lobbied for the passing of antitrust legislation.²²⁶² Wright confirms that concerns over "the great trusts" activated the passing of the Sherman Act.²²⁶³ Sawyer remarks further that the Sherman Act also originates in the common law doctrine of restraint of trade,²²⁶⁴ which was part of the US common law of contracts.²²⁶⁵

²²⁵⁶ Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 282.

²²⁵⁷ Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 282.

²²⁵⁸ Millon "The First Antitrust Statute" (1990) Washington & Lee University School of Law Scholarly Commons, 141.

²²⁵⁹ Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 282, 285-287.

²²⁶⁰ Lande "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged" (1982), *Hastings L.J.* 68; May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review*, 865.

²²⁶¹ Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 275.

²²⁶² *Ibid.*

²²⁶³ Wright *et al.* "Requiem for Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust" (2019) *Arizona State Law Journal*, 51(1), 298.

²²⁶⁴ Restraint of trade is a common law doctrine that restricts a party from engaging in certain business activities or operating in a particular geographical area for a defined or indefinite period. See Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School Working Paper* 19-110, 5.

²²⁶⁵ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School Working Paper* 19-110, 5.

4.1.3.2 The Clayton Act and FTC Act

The *Clayton Act* was enacted on 15 October 1914. Its purpose is set out as “an Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.”²²⁶⁶ It expanded the types of conduct that could infringe antitrust law, including abuse of dominance (monopolisation) conduct, such as tying contracts and price discrimination.²²⁶⁷ The *Clayton Act* thus prohibited price discrimination, exclusive dealings, and anti-competitive mergers that negatively affected competition.²²⁶⁸

The *Clayton Act* also allowed for private claims for injury caused by prohibited conduct under the antitrust laws.²²⁶⁹ This is commonly known as “*the private right of action*”, and the Clayton Act permits private parties to receive treble damages.²²⁷⁰

Notably, the *Federal Trade Commission Act* (“*FTC Act*”) was also enacted on 26 September 1914. It established the Federal Trade Commission (FTC) as an administrative body responsible for enforcing antitrust laws. The *FTC Act* prohibits “*unfair methods of competition in commerce*”.²²⁷¹ It consequently empowers the FTC to act against “unfair conduct”²²⁷² or unfair trade practices.²²⁷³ In 1938, the *FTC Act*

²²⁶⁶ 38 STAT. 730 (1914) Sixty-third Congress Sess. II Chap 323 [as amended Through P.L. 108–237, Enacted June 22, 2004]. Available at <https://www.ftc.gov/legal-library/browse/statutes> (accessed on 12 September 2023).

²²⁶⁷ Tying is a practice that requires a person to buy goods or services on condition that the buyer purchases separate goods or services unrelated to the main goods or services. Tying is often referred to in combination with Bundling. Bundling is a practice in terms of which the seller sells the products or services in a bundle, i.e. selling two goods together. See Salinger “Tying and Bundling in a Nearly Contestable Market” (2011) *Boston University School of Management*, available at <https://www.ftc.gov/system/files/attachments/bureau-economics-seminar-series-calendar-archive/111027salingerseminar.pdf> (accessed 14 April 2024), 1; See section 8(1)(d)(iii) of the South African Competition Act prohibits tying: “it is prohibited for a dominant firm to engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act- 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.” Price discrimination refers to a dominant firm discriminating between its customers in terms of price, discount, allowance, rebate, etc.; Lamoreaux “The Problem of Bigness” (2019) *The Journal of Economic Perspectives* 104.

²²⁶⁸ MacIntyre “Small business and the antitrust laws (1961) 176; Kintner “Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act” (1963) 4.

²²⁶⁹ Kintner “Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act” (1963) 5.

²²⁷⁰ Kintner “Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act” (1963) 5.

²²⁷¹ Lamoreaux “The Problem of Bigness” (2019) *The Journal of Economic Perspectives* 14-33

²²⁷² Chaffetz “The Antitrust Laws and Small Business” (1953) 2 *ABA Antitrust Section* 77, 5.

²²⁷³ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 176.

was amended to prohibit unfair and deceptive acts and practices in commerce.²²⁷⁴ The conduct of large firms and trade practices which undermined or discriminated against small businesses, were prohibited.²²⁷⁵

The *FTC Act* thus prohibits unlawful anti-competitive practices.²²⁷⁶ The FTC is empowered to enforce the *FTC Act*²²⁷⁷ whereas both the FTC and the Department of Justice are empowered to enforce the *Clayton Act*.²²⁷⁸ The US circuit courts are empowered to prevent and restrain infringements of the *Sherman Act*, and the Department of Justice (DOJ), through the Attorney-General office, is empowered to institute proceedings to prosecute infringement of the *Sherman Act*.²²⁷⁹

MacIntyre indicates that after signing the *FTC* and *Clayton Acts* into law, US President Wilson stated in a letter that: “*With similar purpose and in a like temper the Congress has sought, in the Trade Commission bill and in the Clayton bill, to make men in a small way of business as free to succeed as men in a big way, and to kill monopoly in the seed (...) It is our purpose to destroy monopoly and maintain competition as the only effectual instrument of business liberty.*”²²⁸⁰

²²⁷⁴ The Wheeler-Lea Act of 1938 Public Law 75-447 52 Stat. 111 (1938) (passed on 21 March 1938) amended section 5 of the FTC to prohibit “unfair methods of competition and unfair or deceptive acts and practices in commerce.” Address of Hon. R.E. Freer, Commissioner, Federal Trade Commission, before the annual convention of the Proprietary Association, 17 May 1938. Available at https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf (accessed on 19 December 2023). MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 176.

²²⁷⁵ The Wheeler-Lea Act of 1938 Public Law 75-447 52 Stat. 111 (1938) (passed on 21 March 1938) amended section 5 of the FTC to prohibit “unfair methods of competition and unfair or deceptive acts and practices in commerce.” Address of Hon. R.E. Freer, Commissioner, Federal Trade Commission, before the annual convention of the Proprietary Association, 17 May 1938. Available at https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf (accessed on 19 December 2023).

MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 176.

²²⁷⁶ Section 5 of the FTC Act states: “(a)(1) *Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*”; Kintner “Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act” (1963) 5.

²²⁷⁷ Section 5(a)(2) of the FTC Act empowers the FTC to prevent any person from engaging in any unfair anti-competitive practices.

²²⁷⁸ Sections 2 and 4C of the Clayton Act. See also section 201 of the Hart-Scott-Rodino Antitrust Improvements Act. Kintner “Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act” (1963) 5.

²²⁷⁹ Section 4 of the Sherman Act.

²²⁸⁰ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 176.

4.1.3.3 The Robinson-Patman Act

The *Robinson-Patman Act* was enacted on 19 June 1936.²²⁸¹ It amended section 2 of the *Clayton Act*.

Section 2 of the *Clayton Act* prohibited direct or indirect price discrimination between different purchasers of goods, where such discrimination could substantially lessen competition or tend to create a monopoly in any market.²²⁸² Price discrimination based on differences in the grade, quality or quantity of the goods sold, or on differences in selling or transportation costs was not prohibited.

The *Robinson-Patman Act* also prohibits price discrimination between different purchasers of goods of the same grade and quality, where such discrimination may substantially lessen competition or create a monopoly.²²⁸³ But it adds circumstances where the price discrimination may substantially injures, destroys, or prevents competition with a seller, a preferred customer, or either of their customers.²²⁸⁴ Further changes introduced by the *Robinson-Patman Act* are: (i) once price discrimination has been proven *prima facie*, the burden to rebut the *prima facie* case will be on the respondent unless it can justify its conduct;²²⁸⁵ (ii) paying, granting or receiving anything of value as a commission or brokerage by either party to the transaction or their agent is prohibited, except if paid for services rendered to either party to the transaction or their agent;²²⁸⁶ (iii) it is unlawful to discriminate in the

²²⁸¹ Robinson-Patman Antidiscrimination Act of 19 June 1936, Chapter 592 of the 74th Congress; 49 Stat. 1526 *et seq.*, available at <https://www.govinfo.gov/content/pkg/COMPS-12152/pdf/COMPS-12152.pdf> (accessed on 17 December 2023). See also <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/49/STATUTE-49-Pg1526.pdf> (accessed on 19 December 2023).

²²⁸² Section 2 of the Clayton Act, 38 STAT. 730 (1914).

²²⁸³ Section 2(a) of the Robinson-Patman Act, 49 Stat. 1526 *et seq.*

²²⁸⁴ Section 2 of the Robinson-Patman Act provides: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended in to read as follows: "SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."* (own emphasis); see also MacIntyre "Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 176.

²²⁸⁵ Section 2(b) of the Robinson-Patman Act.

²²⁸⁶ Section 2(c) of the Robinson-Patman Act.

payment of customers who are providing the same services;²²⁸⁷ (iv) it is prohibited to discriminate between purchasers of goods by furnishing services or facilities on different terms;²²⁸⁸ (v) it is prohibited to induce or receive a price that is discriminatory as set out in the above provisions.²²⁸⁹

Notably, the *Robinson-Patman Act* originated during the Great Depression²²⁹⁰ era and from concerns over the buying power of large chain grocery stores.²²⁹¹ Because of their ability to purchase large volumes of goods, these chain grocery stores could offer very low retail prices to their customers.²²⁹² Callaci and Vaheesan remark that large chains could also obtain advertising allowances and brokerage fees not granted to their small competitors.²²⁹³ This placed small independent stores in a less competitive position and affected their ability to compete against large chain stores.²²⁹⁴ The challenge was then whether to allow consumers to obtain goods at lower prices and benefit from the efficiencies and economies of large players' scale but at the expense of allowing large firms to develop and increase their market power and concentration.²²⁹⁵ These concerns led to the enactment of the *Robinson-Patman Act* as Congress wanted to deal with large firms' buyer power.²²⁹⁶

Kintner explains that *"on this basis, there was a broad public support for legislation which would compel suppliers to treat all buyers on a fair and equal basis in order that*

²²⁸⁷ Section 2(d) of the Robinson-Patman Act.

²²⁸⁸ Section 2(e) of the Robinson-Patman Act.

²²⁸⁹ Section 2(f) of the Robinson-Patman Act.

²²⁹⁰ According to Britannica.com, the Great Depression occurred between 1929 to 1939 [Great Depression | Definition, History, Dates, Causes, Effects, & Facts | Britannica](https://www.britannica.com/topic/great-depression) (accessed on 8 July 2022).

²²⁹¹ Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 8; Foer "Small business and antitrust" (2001) *Small Business Economics* 3.

²²⁹² Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 8; Callaci and Vaheesan "How an old US Antitrust law could Foster a Fairer Retail Sector" (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²²⁹³ Callaci and Vaheesan "How an old US Antitrust law could Foster a Fairer Retail Sector" (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²²⁹⁴ Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 8; Callaci and Vaheesan "How an old US Antitrust law could Foster a Fairer Retail Sector" (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²²⁹⁵ Callaci and Vaheesan "How an old US Antitrust law could Foster a Fairer Retail Sector" (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²²⁹⁶ Callaci and Vaheesan "How an old US Antitrust law could Foster a Fairer Retail Sector" (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

the small independents would not be prejudiced by their lack of purchasing power."²²⁹⁷

Foer also states that small businesses became "important supporter(s)" of the FTC during that time.²²⁹⁸

Callaci and Vaheesan indicate that Congressman Wright Patman's objective in proposing the *Robinson-Patman Act* was to "*protect the independent merchant, the public whom he serves, and the manufacturers from whom he buys, from exploitation by his chain competitor.*"²²⁹⁹ They also point out that laws like the *Robinson-Patman Act* helped black entrepreneurs, who started as small businesses with very modest capital, to compete on more equal terms with their white counterparts or chain stores.²³⁰⁰

According to Kintner, the *Robinson-Patman Act* focused more on the discrimination applied by a seller rather than a buyer.²³⁰¹ He also remarks that Congress was principally concerned with the buying power of the large stores.²³⁰² He further describes the two primary objectives of the *Robinson-Patman Act* as: "(1) to prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among buyers and; (2) to prevent unscrupulous buyers from using their economic power to exact discriminatory prices from suppliers to the disadvantage of other less powerful buyers."²³⁰³

In particular, section 2(a) of the *Robinson-Patman Act* prohibits sellers from discriminating in price amongst buyers, unless the seller can justify the discrimination based on, amongst others, cost factors, the need to meet competitors' low prices, etc.²³⁰⁴

²²⁹⁷ Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 8-9.

²²⁹⁸ Foer "Small business and antitrust" (2001) *Small Business Economics* 3.

²²⁹⁹ Callaci and Vaheesan "How an old US Antitrust law could Foster a Fairer Retail Sector" (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³⁰⁰ Callaci and Vaheesan "How an old US Antitrust law could Foster a Fairer Retail Sector" (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³⁰¹ Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 9.

²³⁰² Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 9.

²³⁰³ Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 10; Foer "Small business and antitrust" (2001) *Small Business Economics* 3.

²³⁰⁴ Kintner "Counselling Small Business under the Antitrust Laws and the Robinson-Patman Act" (1963) 10.

According to Callaci and Vaheesan, the *Robinson-Patman Act* was side-lined in the 1970s.²³⁰⁵ They report that the interpretation of antitrust law favoured the protection of consumer welfare,²³⁰⁶ which then became the centre of antitrust protection as opposed to the protection of producers.²³⁰⁷ Callaci and Vaheesan further remark that “*authors affiliated with the right-wing University of Chicago economics and law departments embraced a narrow consumerist worldview that treated low prices as almost always beneficial.*”²³⁰⁸

Callaci and Vaheesan also argue that “*the growth of giant retailers is a function of the non-enforcement and judicial narrowing of Robinson-Patman.*”²³⁰⁹ They contend that big retailers use their market power to negotiate significantly reduced wholesale prices, which enable them to gain an unfair advantage over their competitors.²³¹⁰ For example, according to them, Amazon has used a strategy that “price squeezed” the smaller and weaker book publishers which enhanced Amazon’s buyer power.²³¹¹ They argue that large retailers used their buyer power to “squeeze the margins”²³¹² of

²³⁰⁵ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³⁰⁶ The goal of protecting consumer welfare refers to protecting consumers which are regarded as those who are mostly affected by anti-competitive practices and should be protected by antitrust laws. See Foer “Small business and antitrust” (2001) *Small Business Economics* 15. According to Fox, the Chicago School defines consumer welfare as “*the sum of producers’ and consumers’ welfare, on the theory that consumers will be better off if producers make more money because producers will invest that money in things consumers want.*” Fox “The battle of the soul of antitrust” (1987) *California Law Review* 918-919, fn.7. Fox also describes “consumer welfare” as a standard to determine whether there has been harm to competition, in that a practice would only be regarded as “anticompetitive” if it “decreased aggregate consumer surplus.” Fox “We Protect Competition, You Protect Competitors” (2003) *World Competition Law and Economics Review*, Vol 26 Issue 2, 149-165, at 152.

²³⁰⁷ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³⁰⁸ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³⁰⁹ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³¹⁰ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³¹¹ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022). Buyer power refers to the power of a dominant firm to require or impose on a supplier unfair prices or other trading conditions. See section 8(4) of the Competition Act, which prohibits a dominant firm from requiring or imposing unfair prices or other trading conditions on a supplier that is an SME or HDP in a sector designated by the Minister. See Chapter three above.

²³¹² In *Pacific Bell Telephone v linkLine Communications* (555 U.S. 438 (2009) 449), the US Supreme Court defined a claim of margin squeeze as one related to unilateral conduct where “a firm “squeezes”

small suppliers, dominate small dependent satellite firms or impose “*restrictive contract terms on distributors, dealers and franchisees*.”²³¹³ According to them, neglecting and side-lining the Robinson-Patman Act has led companies like Amazon and Walmart to become dominant, which resulted in disempowering small suppliers in the value chain.²³¹⁴

Interestingly, concerns over buyer power and discrimination against smaller players are cropping up again, and the *Robinson-Patman Act* is resurfacing.²³¹⁵ On 9 July 2021, the Biden Administration issued an *Executive Order on Promoting Competition in the American Economy* for the interests of, *inter alia*, small businesses.²³¹⁶ The *Executive Order on Promoting Competition in the American Economy* recognises that attention must be given to practices that infringe the *Robinson-Patman Act*.²³¹⁷ The

the profit margins of its competitors. This requires the defendant to be operating in two markets, a wholesale ("upstream") market and a retail ("downstream") market. A firm with market power in the upstream market can squeeze its downstream competitors by raising the wholesale price of inputs while cutting its own retail prices. This will raise competitors' costs (because they will have to pay more for their inputs) and lower their revenues (because they will have to match the dominant firm's low retail price)."

Meisel also explains that the description of “margin squeeze” in the US antitrust law was first discussed in *United States v Aluminum Company of America* (148 F 2d 416 (2d Cir 1945) (“Alcoa”) where the conditions for unlawful margin squeeze were outlined as: “1. Alcoa possessed a monopoly over an upstream wholesale product (aluminium ingot); 2. Alcoa consistently sold the upstream product at so high a wholesale price that it was characterised by Judge Hand as a price higher than a “fair price”; 3. The upstream product (ingot) was required by stand-alone downstream competitors to produce the retail product (aluminium sheet) that was also supplied by Alcoa; and 4. Alcoa’s retail price for the retail product was priced so low that competitive sheet manufacturers could not make a “living profit” out of the retail price at which Alcoa itself sold sheet.” See Meisel “The Law and Economics of Margin Squeezes in the US Versus the EU” (2012) *European Competition Journal* 345.

²³¹³ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³¹⁴ Callaci and Vaheesan “How an old US Antitrust law could Foster a Fairer Retail Sector” (2022), available at <https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector> (accessed on 23 May 2022).

²³¹⁵ WLF Legal Pulse “The Robinson-Patman Act revival: Five considerations for businesses” (25 January 2023), available at <https://www.wlf.org/2023/01/25/wlf-legal-pulse/the-robinson-patman-act-revival-five-considerations-for-businesses/#:~:text=Now%2C%20with%20the%20FTC's%20renewed,is%20the%20Robinson%2DPatman%20Act?> (accessed on 19 December 2023); Khan “Amazon’s Antitrust Paradox” (1997) *The Yale Law Journal* 710-805, 717; FTC “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act” (10 November 2022) Commission File No. P221202. Available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf (accessed on 19 December 2023).

²³¹⁶ Executive Order on Promoting Competition in the American Economy (July 9, 2021) Presidential Actions. Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed on 20 May 2022). *Exec. Order No. 14036*, 86 F.R. 36987 (July 9, 2021).

²³¹⁷ *Ibid.*

Executive Order on Promoting Competition in the American Economy is discussed below.²³¹⁸

4.1.3.4 *The Miller-Tydings Resale Price Maintenance Act and McGuire Act*

A US antitrust law that has also affected small businesses and is worth mentioning is the *Miller-Tydings Resale Price Maintenance Act* (the *RPM Act*).²³¹⁹ This Act was lobbied by merchants and passed into law on 17 August 1937.²³²⁰ The Act exempted minimum resale price or resale price maintenance (RPM) from the application of the *Sherman Act*.²³²¹ Foer explains that this was carried further by the *McGuire Act*, which was passed into law on 14 July 1952.²³²² The *McGuire Act* also allowed contracts or agreements prescribing minimum or stipulated prices. Foer explains further that, despite the *RPM Act* restricting retailers from discounting (i.e. from pricing below the prescribed minimum or stipulated prices), small businesses appreciated this “fair trade” legislation as they could persuade manufacturers not to sell to discounters.²³²³ He, however, recounts that the *RPM Act* was heavily criticised by many antitrust advocates, as being “unintelligible”.²³²⁴ According to Foer, the RPM legislation was also attacked by economists and large businesses and was eventually repealed in

²³¹⁸ See 4.1.7 below. *Executive Order on Promoting Competition in the American Economy* (July 9, 2021) Presidential Actions. Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed on 20 May 2022).

²³¹⁹ 50 STAT. 693 (1937) Seventy-fifth Congress Sess. I Chap 690, Title VIII. Available at https://heinonline-org.uplib.idm.oclc.org/HOL/Page?Iname=&public=false&collection=statute&handle=hein.statute/sal050&men_hide=false&men_tab=citation_tab&kind=citation&page=693 (accessed on 26 November 2024). See also Foer “Small business and antitrust” (2001) *Small Business Economics* 4.

²³²⁰ Foer “Small business and antitrust” (2001) *Small Business Economics* 3; OECD “Roundtable on Resale Price Maintenance” Directorate for Financial and Enterprise Affairs Competition Committee (2008) 49 available at <https://www.oecd.org/daf/competition/43835526.pdf> (accessed 7 December 2023).

²³²¹ Foer “Small business and antitrust” (2001) *Small Business Economics* 3.

²³²² 66 STAT. 631, 15 U.S.C. § 45 (1952). Available at https://heinonline-org.uplib.idm.oclc.org/HOL/Page?public=true&handle=hein.statute/sal066&div=290&start_page=631&collection=statute&set_as_cursor=0&men_tab=srchresults (accessed on 26 November 2024). See also Foer “Small business and antitrust” (2001) *Small Business Economics* 4.

²³²³ Foer “Small business and antitrust” (2001) *Small Business Economics* 3.

²³²⁴ Foer “Small business and antitrust” (2001) *Small Business Economics* 4.

1975.²³²⁵ Verma confirms that these laws were officially repealed on 12 March 1976.²³²⁶

4.1.3.5 *The Small Business Mobilisation Act*

Notably, in 1941, the US Congress established a “Select Committee on Small Business of the House of Representatives” (“the House Small Business Committee”) to conduct a study on the US National Defence Program and its relationship with small business.²³²⁷ On 11 June 1942, realising the importance of small business to the national economy and security, Congress enacted the *Small Business Mobilisation Act*.²³²⁸ This legislation allowed small businesses to cooperate if required for “*the prosecution of the war*.”²³²⁹ In this regard, its purpose stated that this legislation was enacted to “*mobilize the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes*.”²³³⁰ MacIntyre reports that Congress was pleased with the achievements made under this legislation. Accordingly, when the war ended, Congress not only kept the “House Small Business Committee” but also established a similar body in the US Senate, namely the “Select Committee on Small Business of the United States Senate.”²³³¹

MacIntyre indicates that the Chairman of the US Senate Small Business Committee at the time (1941/1942), Senator James Murray, confirmed that the US “*intends to protect the small businessmen of our country (the US) and that it is the purpose of the congressional committees on small business to save the resources, manpower, and plant power of small enterprises as not only essential to the national security but also for the future of the free enterprise of America*.”²³³²

²³²⁵ Foer “Small business and antitrust” (2001) *Small Business Economics* 4; OECD “Roundtable on Resale Price Maintenance” Directorate for Financial and Enterprise Affairs Competition Committee (2008) 49 available at <https://www.oecd.org/daf/competition/43835526.pdf> (accessed 7 December 2023).

²³²⁶ Verma “Regulation of Resale Price Maintenance” (1979) *Journal of the Indian Law Institute* 78.

²³²⁷ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 169.

²³²⁸ Small Business Mobilisation Act 56 Stat. 351 (1942). Available at https://heinonline.org/uplib_idm.oclc.org/HOL/Page?lname=&public=false&collection=statute&handle=hein.statute/sal056&men_hide=false&men_tab=citation_tab&kind=citation&page=351 (accessed on 26 November 2024); MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 169.

²³²⁹ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 169.

²³³⁰ Small Business Mobilisation Act 56 Stat. 351 (1942).

²³³¹ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 169.

²³³² MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 169-170.

Of great importance to the focus of this thesis, the section below considers the goals of the US antitrust law to determine whether the promotion or protection of SMEs is a specific antitrust objective, like in South Africa.

4.1.3.6 *The Celler-Kefauver Act*

The *Celler-Kefauver Act*²³³³ amended sections 7 and 11 of the *Clayton Act*.

Before its amendment in 1950 (through the Celler-Kefauver Act of 1950), section 7 of the *Clayton Act* (which, as pointed out, was passed in 1914)²³³⁴ prohibited the acquisition by one corporation of the stock or share capital of another corporation where such acquisition would substantially lessen competition between the acquiring and the acquired firms, or restraint trade or create monopoly of any line of commerce.²³³⁵ Following the 1950 amendments,²³³⁶ section 7 of the *Clayton Act* prohibited the acquisition by one corporation of the stock or assets of another corporation, where in any line of commerce such acquisition may substantially lessen competition or tend to create monopoly.²³³⁷ The original section 7 of the *Clayton Act* prohibited the acquisition of stock or share capital, while the amended section 7 extended the prohibition to acquiring assets.²³³⁸ Through the deletion of “acquiring and acquired firms”, the amended section 7 does not only apply to mergers that substantially lessen competition between competitors (horizontal mergers), but the

²³³³ Celler-Kefauver Act of 29 December 1950, Public Law 899, Chap 1184 of the 81st Congress, 64 Stat. 1125 available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/64/STATUTE-64-Pg1125.pdf> (accessed on 21 December 2023); 15 U.S.C. 18 (Supp. 1951), available at <https://www.law.cornell.edu/uscode/text/15/18> (accessed on 21 December 2023).

²³³⁴ See above 4.1.3.2 The Clayton Act and FTC Act.

²³³⁵ Section 7 of the Clayton Act of 1914 (prior to the 1950 amendment): “*That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share other capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.*” (own emphasis); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962) 312.

²³³⁶ Celler-Kefauver Act of 29 December 1950, Public Law 899, Chap 1184 of the 81st Congress, 64 Stat. 1125 available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/64/STATUTE-64-Pg1125.pdf> (accessed on 21 December 2023).

²³³⁷ Section 7 of the Clayton Act of 1914 (amended by the Celler-Kefauver Act of 1950): “*That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*” (own emphasis); Notes “Section 7 of the Clayton Act: A Legislative History” (1952) *Columbia Law Review* Vol. 52, No. 6 (June 1952) 766-781, available at https://www.jstor.org/stable/1119306?seq=1&cid=pdf-reference#references_tab_contents (accessed 18 March 2023).

²³³⁸ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962) 316.

prohibition extends to mergers between parties in a vertical relationship²³³⁹ (vertical mergers) that may substantially lessen competition in any line of commerce in any part of the US.²³⁴⁰

Section 11 is amended to expand the authority that enforces compliance with the *Clayton Act*.²³⁴¹

4.1.4 US Antitrust Goals

Some authors state that the original “antitrust goal” in the US included the protection of small businesses or at least the “*preservation of competitors*.”²³⁴² Others believe that the antitrust goal was to ensure not only competitive participation but also “*economic opportunity, wealth distribution and political liberty*.”²³⁴³ Yet another set of authors contends that the original or ultimate “antitrust goal” was to protect consumers.²³⁴⁴

For example, Wright remarks that several antitrust authors initially interpreted the main goal of antitrust law as prohibiting “*bigness*” and preserving “*the small, localised businesses that characterised early America*”.²³⁴⁵ In the 20th century, others have argued, and some courts have found, that the protection of consumer welfare is the

²³³⁹ A vertical relationship refers to a “relationship between a firm and its suppliers, its customers or both.” See section 1(1)(xxxiii) of the South African Competition Act.

²³⁴⁰ *Brown Shoe Co., Inc. v. United States* (1962) 317.

²³⁴¹ Before the amendment of the Clayton Act, through the Celler-Kefauver Act of 1950, section 11 of the Clayton read: “*That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission Federal Reserve where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce (...)*.” Following the amendment, section 11 reads: “*That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce (...)*”. See Celler-Kefauver Act 64 Stat. 1125, sections 7 and 11.

²³⁴² Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2), 337-358, at 352.

²³⁴³ Thorelli *Federal Antitrust Policy: Origination of an American Tradition* (1955); May “Historical Analysis in Antitrust Law” (1990) *New York Law School Law Review*, 35(4), 857-878, at 863.

²³⁴⁴ Bork “Legislative Intent and the Policy of the Sherman Act” (1966) *The Journal of Law & Economics*, Vol. 9, pp. 7-48, available at <https://www.jstor.org/stable/724991> (accessed on 14 January 2022) at 15 n.11; Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2), 337-358, at 352.

²³⁴⁵ Wright *et al.* “Requiem for Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust” (2019) *Arizona State Law Journal*, 51(1), 299.

most effective standard to achieve the antitrust goal.²³⁴⁶ In this regard, the Chicago School took the view that the main goal of the Sherman Act was to promote consumer welfare.²³⁴⁷

May observes that historical interpretations of the intent of the US Congress in passing the Sherman Act have changed over time with the change of antitrust concerns and the change of economic and intellectual views.²³⁴⁸ Thorelli was of the view that in passing the Sherman Act, the US Congress sought to protect competition efficiency, economic opportunity, wealth distribution and political freedom.²³⁴⁹ Thorelli viewed this philosophy as a goal of equal economic opportunity or "*economic egalitarianism*".²³⁵⁰ Nevertheless, while acknowledging that consumers were the "ultimate" beneficiaries of the Sherman Act, Thorelli also recognised that small businesses were "the intended immediate beneficiaries".²³⁵¹

Several authors in the 1990s also took the view that Congress' initial focus was on economic opportunity, distribution and efficiency.²³⁵² Some antitrust practitioners believed that the US Congress' predominant goal was "consumer welfare", but there were also other values to be considered.²³⁵³ For example, Carey argues that the US Congress that passed the Sherman Act trusted at least that the Sherman Act "*would be used to protect rather than to injure small business people, farmers, fishers and workers seeking economic betterment; that competition would be preserved, and the*

²³⁴⁶ Wright *et al.* "Requiem for Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust" (2019) *Arizona State Law Journal*, 51(1), 299.

²³⁴⁷ See below 4.1.4.2.4 Chicago School. Fox "The battle of the soul of antitrust" (1987) *California Law Review* Vol. 75, No. 3, Symposium: Anticipating Antitrust's Centennial, 917-923, available at <https://doi.org/uplib.idm.oclc.org/10.2307/3480656> (accessed on 12 January 2022) 2.

²³⁴⁸ May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 98; May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review*, 35(4), 863.

²³⁴⁹ Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955) 225-230, 570-572; May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review*, 35(4), 863; May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 95

²³⁵⁰ Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955), 564-572; May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review*, 35(4), 863.

²³⁵¹ May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 95 referring to Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955), 227.

²³⁵² May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 95.

²³⁵³ Bork "Legislative Intent and the Policy of the Sherman Act" (1966) *The Journal of Law & Economics*, Vol. 9, pp. 7-48, available at <https://www.jstor.org/stable/724991> (accessed on 14 January 2022) 10; Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 343.

trend toward concentration of power and wealth epitomised by the trusts would at least be moderated."²³⁵⁴

4.1.4.1 The Antitrust Goal of the *Clayton*, *FTC*, and *Robinson-Patman Acts*

Oppenheim argues that, from the history of these laws, one can distil an antitrust goal of protecting small businesses from monopoly and abuse of market power or dominance by large firms.²³⁵⁵ Oppenheim is also of the view that these three pieces of legislation share the common goal of "*maintaining effective competition in markets in which there is opportunity for access and freedom of contesting shares of business.*"²³⁵⁶ He further believes that section 7 of the *Clayton Act* confirms Congress' intent to stop the concentration of economic power created by mergers.²³⁵⁷

Orbach,²³⁵⁸ however, takes a different view and believes that the "*protection of small business is no longer part of US antitrust laws.*" He contends that the legislative history of antitrust laws, namely the *Sherman*, *Clayton* and *FTC Acts*, indicates that protecting small businesses' interests was initially one of the antitrust goals.²³⁵⁹ He points out that, for example, in 1936, following socio-economic challenges, the Robinson-Patman Act, as discussed above, was enacted to ensure that large firms did not discriminate against small enterprises on the basis of price.²³⁶⁰ Orbach remarked that this resulted in heavy criticism by authors, such as Bork, one of the most influential antitrust visionaries as discussed below,²³⁶¹ and the Chicago School.²³⁶² They criticised the application of antitrust law as elevating the interests of small businesses above market efficiency.²³⁶³ According to Orbach, this is how the *Rule of Reason* principle²³⁶⁴ was introduced in assessing antitrust cases, such as the *Standard Oil*

²³⁵⁴ Own emphasis. Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 337-358, at 358.

²³⁵⁵ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal* 156.

²³⁵⁶ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal* 156.

²³⁵⁷ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal* 162.

²³⁵⁸ Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate* 55.

²³⁵⁹ Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate* 55.

²³⁶⁰ Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate* 55.

²³⁶¹ See below: 4.1.4.2.3 Bork (1966/1978).

²³⁶² Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate* 55.

²³⁶³ Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate* 55.

²³⁶⁴ See above Chap 3, para 3.5.3.1.4. Section 4(1)(a); See *National Society of Professional Engineers v United States* 435 US 679 (1978) 692 for the distinction between *per se* and the rule of reason in the US.

case in 1911.²³⁶⁵ Accordingly, in 2016, Orbach remarked that protecting small businesses is a past consideration and no longer a goal in enforcing antitrust laws.²³⁶⁶

4.1.4.2 Various interpretations of the goal of the *Sherman Act*

It is to be noted that there are several historical interpretations of the objective of the US Congress when it enacted the Sherman Act. This section will consider some of these interpretations.

4.1.4.2.1 Louis Brandeis (1856-1941)

Louis Dembitz Brandeis was the son of a small grain merchant in Kentucky.²³⁶⁷ Brandeis was born and bred in Louisville, which Wu describes as a town with a multitude of small businesses.²³⁶⁸ Brandeis graduated from Harvard Law School and practiced as an attorney in Boston.²³⁶⁹ Wu indicates that Brandeis' clients were mainly small businesses, which he vigorously defended during the rise of the Trust movement in the late 1900s.²³⁷⁰ Brandeis' main principle was economic decentralization,²³⁷¹ and he would later be described as the "*monopolization campaign's leading public opponent*."²³⁷² In 1916, Brandeis was appointed as a judge (Justice) to the Supreme Court of the US.²³⁷³

²³⁶⁵ *Standard Oil Company of New Jersey et al. v The United States* 221 US 1, 106 (1910) 60, where the court stated: "Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." (own emphasis); Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate* 55.

²³⁶⁶ Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate* 55.

²³⁶⁷ Wu *The Curse of Bigness – Antitrust in the New Gilded Age* (2018) Columbia Global Reports 34.

²³⁶⁸ Wu *The Curse of Bigness – Antitrust in the New Gilded Age* (2018) Columbia Global Reports 34.

²³⁶⁹ Wu *The Curse of Bigness – Antitrust in the New Gilded Age* (2018) Columbia Global Reports 35; Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 10.

²³⁷⁰ See 4.1.2 History of the US Antitrust Law for a description of the concept of a "Trust".

²³⁷¹ Brandeis *Other People's Money and How the Bankers Use It* (1914) Chap VIII "A Curse of Bigness" 188; Wu *The Curse of Bigness – Antitrust in the New Gilded Age* (2018) Columbia Global Reports 35; Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 10.

²³⁷² Wu *The Curse of Bigness – Antitrust in the New Gilded Age* (2018) Columbia Global Reports 36.

²³⁷³ Brandeis University "Our Namesake: Louis D. Brandeis", available at <https://www.brandeis.edu/about/louis-brandeis.html>? (accessed on 26 December 2023).

Foer describes Brandeis as “*an energetic proponent of fair trade*”,²³⁷⁴ and Sawyer identifies him as “*the historical figure most closely identified with the progressive politics of antitrust activism*”,²³⁷⁵ who denounced the unfair business practices of big corporations through what he called “*the curse of bigness*.”²³⁷⁶

In examining how large corporations caused economic concentration to the detriment of the public in the US in the early 1900s (around 1910), Brandeis made some recommendations with respect to the railroad sector to tackle economic concentration.²³⁷⁷ This included prohibiting railroads from owning stock in firms whose products they transported.²³⁷⁸ Brandeis was of the view that this kind of legislation would decentralise the market.²³⁷⁹ Practising as an attorney at that time, Brandeis testified before the Committee on the Judiciary of the House of Representatives that “*to get monopoly by getting a competitor out of the way (...) That is not competition, that is destruction. It is not the purpose of competition at all; it is destruction (...)*”²³⁸⁰ He added, “*Now the same principle applies, of course, in business. If a man is strong, who has the endurance which comes with size and with wealth, is allowed to use that against an individual, that is not competition. Competition consists in being able to do the thing better - either cheaper or in quality better, in service better - than the other person; that is competition. The Standard Oil Co. did not compete with those individuals when it went in and destroyed them. They committed industrial murder just as much as the man who physically used his strength to put an end to the person about him.*”²³⁸¹

²³⁷⁴ Foer “Small business and antitrust” (2001) *Small Business Economics*, Feb. 2001, Vol.16, No.1, Special Issue: The invisible part of the iceberg: Research issues in industrial organization and small business, 3-20, at 3.

²³⁷⁵ Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 10.

²³⁷⁶ Brandeis *Other People’s Money and How the Bankers Use It* (1914) Chap VIII “A Curse of Bigness” 162–188; Sawyer “US Antitrust Law and Policy in Historical Perspective” (2019) Harvard Business School Working Paper 19-110, at 10.

²³⁷⁷ Brandeis *Other People’s Money and How the Bankers Use It* (1914) Chap VIII “A Curse of Bigness” 162–188, 162-164.

²³⁷⁸ Brandeis *Other People’s Money and How the Bankers Use It* (1914) Chap VIII “A Curse of Bigness”, 187–188.

²³⁷⁹ Brandeis *Other People’s Money and How the Bankers Use It* (1914) Chap VIII “A Curse of Bigness”, 187–188.

²³⁸⁰ Hearings on H.R. 11380 Before the House Committee on the Judiciary, 62d Cong., 1st Sess. 23 (1912). MacIntyre “Small business and the antitrust laws” (1961) *University of Detroit Law Journal*, 39(2), 169-180, at 174-175.

²³⁸¹ Hearings on H.R. 11380 Before the House Committee on the Judiciary, 62d Cong., 1st Sess. 23 (1912). MacIntyre “Small business and the antitrust laws” (1961) *University of Detroit Law Journal*, 39(2), 169-180, at 175.

Oppenheim also notes that Justice Brandeis' criticism of big businesses' practices was adopted by Justice Douglas in *Columbia Steel*,²³⁸² where he stated that the lesson of the problem of bigness "*should by now have been burned into our memory by Brandeis. The Curse of Bigness shows how size can become a menace - both industrial and social (...) Industrial power should be decentralised as a part of the philosophy and command of The Sherman Act*".²³⁸³ In this regard, Brandeis recognised that size (referring to bigness) is not a crime, but size may become harmful through the way in which it is attained or used.²³⁸⁴ He also believed that size attained through merger or acquisition, other than natural growth, has significantly caused economic concentration.²³⁸⁵

4.1.4.2.2 Hans Thorelli (1921-2009)

Many antitrust authors often refer to Hans Thorelli's book "*The Federal Antitrust Policy*",²³⁸⁶ as an authoritative source on the history of US antitrust law and interpretation of US antitrust goal.²³⁸⁷ Thorelli was a Swedish citizen born in New Jersey who held, among others, a doctorate degree in Political Science from the University of Stockholm.²³⁸⁸ He conducted extensive research in antitrust in Sweden and worked as a Consultant Economist to the Ad Hoc Committee on Restrictive

²³⁸² *United States v. Columbia Steel Co.*, 334 U.S. 495, 535 (1948).

²³⁸³ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal*, 39(2), 155-168, at 157 referring to Justice Douglas' statement in *United States v. Columbia Steel Co.*, 334 U.S. 495, 535 (1948) 535-536.

²³⁸⁴ Brandeis *Other People's Money and How the Bankers Use It* (1914) Chap VIII "A Curse of Bigness", 163-164.

²³⁸⁵ Brandeis *Other People's Money and How the Bankers Use It* (1914) Chap VIII "A Curse of Bigness", 163-164.

²³⁸⁶ Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955).

²³⁸⁷ Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin* 339-340, 342, 352-353; Hovenkamp "Whatever did happen to the Antitrust Movement?" (2018) *Faculty Scholarship at Penn Law*, available at https://scholarship.law.upenn.edu/faculty_scholarship/1964 (accessed on 24 January 2022) 583; Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives*, Vol. 33, No. 3 (Summer 2019) 94-117, 98; May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review*, 35(4), 863; May "The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History" (1990) *Antitrust Law Journal*, 59(1), 95; Stigler "The Origin of the Sherman Act" (1985) *The Journal of Legal Studies*, Jan. 1985, Vol. 14, No. 1 (Jan. 1985) 1; Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 15:4, 275-295.

²³⁸⁸ Cosway "The Federal Antitrust Policy: Origination of an American Tradition, by Hans B. Thorelli" (1956) *Indiana Law Journal* (Vol. 31, Issue 3, Article 9), available at <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2709&context=ilj> (accessed on 26 December 2023) 429. Thorelli passed away in 2009. See Hans B. Thorelli: September 18, 1921 - August 18, 2009, available at <https://www.allencares.com/obituaries/Hans-BThorelli-26598/#!/Obituary> (accessed on 2 December 2024).

Business Practices of the Economic and Social Council of the United Nations in New York.²³⁸⁹

Thorelli, in explaining how important competition was to the crafters of the Sherman Act, describes the goal of antitrust as creating equal opportunities for all and fostering “full and free competition” not only for consumers, but also for competitors.²³⁹⁰ He stated that “Active competition was the mainstream of what we have labelled economic egalitarianism. It was the dispenser of justice to consumer and producer alike. It was the guardian of equal opportunity, of the common right of the individual to pursue his calling unmolested by those more successfully ambitious or powerful than he. Not least, competition was the key to technical and economic progress, and, hence ultimately to social welfare as well.”²³⁹¹

4.1.4.2.3 Harvard School of thought (1930 to 1970s)

According to Piraino, the Harvard School prevailed from the middle of the 20th century to the 1970s,²³⁹² more specifically during the 1960s and 1970s.²³⁹³ Hovenkamp remarks that the Harvard School thrived from the 1930s through the 1950s.²³⁹⁴

Piraino points out that the Harvard School argued that the industry’s structure determines competition or the performance of firms in a market.²³⁹⁵ Hovenkamp also explains that the Harvard School was based on the notion that certain market structures were conducive to certain types of anti-competitive conduct.²³⁹⁶ This

²³⁸⁹ Cosway “The Federal Antitrust Policy: Origination of an American Tradition, by Hans B. Thorelli” (1956) *Indiana Law Journal* (Vol. 31, Issue 3, Article 9), available at <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2709&context=ilj> (accessed on 26 December 2023) 429.

²³⁹⁰ Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955) 225-230, 564-572.

²³⁹¹ Own emphasis. Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955) 570; Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin* 353.

²³⁹² Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 348.

²³⁹³ Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 346. Piraino reports that Harvard scholars included Donald F. Turner and Philip Areeda, who were influenced by previous Harvard economists such as Edward Chamberlain, Edward Mason, and Joe Bain. Hovenkamp “The Rationalization of Antitrust” (2003) 116(3) *Harvard Law Review* 917, at 920.

²³⁹⁴ Hovenkamp “The Harvard and Chicago Schools and the Dominant Firm” (2010) *U Iowa Legal Studies Research Paper*, 2.

²³⁹⁵ Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 348.

²³⁹⁶ Hovenkamp “The Harvard and Chicago Schools and the Dominant Firm” (2010) *U Iowa Legal Studies Research Paper*, 2.

concept is known as the theory of “structuralism”.²³⁹⁷ Hovenkamp explains “structuralism” as a concept in terms of which the deviation of an industry from perfect competition directly relates to that industry's structure, which is defined by the number of firms in the market and their relative sizes.²³⁹⁸

According to Piraino, the Harvard theory submits that firms with market power are likely to behave anti-competitively.²³⁹⁹ Piraino further explains that according to the Harvard approach, any mergers, joint ventures, or agreements that enable a firm to acquire, increase or exercise market power were presumed to be illegal.²⁴⁰⁰ This was irrespective of their potential to benefit consumers through lower prices or increased output.²⁴⁰¹ Piraino remarks that this meant that, under the Harvard approach, plaintiffs did not have to lead complex economic evidence to succeed in their claim against dominant firms’ abuse of market power.²⁴⁰² He further explained that Harvard scholars also believed that the Sherman and Clayton Acts were enacted because of the increased economic and political power of the trusts, such as Standard Oil, and that Congress’s objective in enacting these Acts was to protect individual competitors from large firms’ market power.²⁴⁰³

Hovenkamp states that Areeda and Turner, who were two prominent Harvard scholars, originally acknowledged that antitrust goals should include “noneconomic goals.”²⁴⁰⁴ However, they found that such goals are difficult to administer coherently, but if they can be administered, they align exclusively with economic goals.²⁴⁰⁵ Accordingly, Harvard School does not only focus on economic efficiency. It also

²³⁹⁷ Cournot *Researches into the Mathematical Principles of the Theory of Wealth* (Nathaniel T. Bacon trans., Macmillan Publishers 1897) (1838). Hovenkamp “The Rationalization of Antitrust” (2003) 116(3) *Harvard Law Review* 917, at 919.

²³⁹⁸ Hovenkamp “The Rationalization of Antitrust” (2003) 116(3) *Harvard Law Review* 917, at 919.

²³⁹⁹ Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 346.

²⁴⁰⁰ Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 346.

²⁴⁰¹ Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 346.

²⁴⁰² Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 346.

²⁴⁰³ Piraino “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century” (2007) 82(2) *Indiana Law Journal* 345, at 349. Bouwer *A Critical Appraisal of South Africa’s Political Approach to Competition Regulation* (2022). PhD thesis University of Pretoria) 27.

²⁴⁰⁴ Hovenkamp “The Areeda-Turner Treatise in Antitrust Analysis” (1996) 41(4) *Antitrust Bulletin* 815, at 824.

²⁴⁰⁵ Hovenkamp “The Areeda-Turner Treatise in Antitrust Analysis” (1996) 41(4) *Antitrust Bulletin* 815, at 824.

recognises that in a democratic environment, goals other than economic efficiency could be goals of competition law.²⁴⁰⁶ Hovenkamp explains that if there are non-economic goals, the judges must follow the statute, and not exclusively follow an economic approach.²⁴⁰⁷ Regarding mergers, Harvard school merger policy, similar to the Chicago school, condemns mergers based on economic analysis of competitive threats.²⁴⁰⁸ The Harvard School considers efficiencies as a reason for justifying a merger rather than condemning it.²⁴⁰⁹ Hovenkamp further explains that Areeda and Turner had a much more qualified view of structuralism, which regards structure and market power as prerequisites to anticompetitive conduct.²⁴¹⁰

4.1.4.2.4 Bork (1966/1978)

Robert Bork is an American legal scholar from the University of Chicago and a lawyer, who was appointed judge of the US Court of Appeals for the District of Columbia Circuit from 1982 to 1988.²⁴¹¹ Many authors, writing on the US antitrust legislative history, have identified Bork as one of the main proponents of the philosophy that antitrust law mainly seeks to protect consumer welfare and efficiency.²⁴¹² In this regard, Hovenkamp and Sawyer also indicate that Bork's view was that the Sherman Act's primary goal was "*to increase economic efficiency*."²⁴¹³ Likewise, May also mentions that Bork argued that Congress' goal was "*the promotion of economic efficiency and*

²⁴⁰⁶ Hovenkamp "The Areeda-Turner Treatise in Antitrust Analysis" (1996) 41(4) Antitrust Bulletin 815, at 824.

²⁴⁰⁷ Hovenkamp "The Areeda-Turner Treatise in Antitrust Analysis" (1996) 41(4) Antitrust Bulletin 815, at 824.

²⁴⁰⁸ Hovenkamp "The Areeda-Turner Treatise in Antitrust Analysis" (1996) 41(4) Antitrust Bulletin 815, at 825.

²⁴⁰⁹ Hovenkamp "The Areeda-Turner Treatise in Antitrust Analysis" (1996) 41(4) Antitrust Bulletin 815, at 825.

²⁴¹⁰ Hovenkamp "The Areeda-Turner Treatise in Antitrust Analysis" (1996) 41(4) Antitrust Bulletin 815, at 825

²⁴¹¹ Office of the Solicitor General US Department of Justice "Historical Biography, Solicitor General: Robert H. Bork", available at <https://www.justice.gov/osg/bio/robert-h-bork> (accessed on 27 December 2023).

²⁴¹² Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*; Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110; Hovenkamp "Antitrust's protected classes" (1989) *Michigan Law Review*, vol. 88, no.1, 1-48; Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate*, vol. 2, no. 4, 52; Kovacic "The Chicago obsession in the interpretation of US antitrust history" (2020) *The University of Chicago Law Review*, vol. 87, no.2, 459-494; May "Historical Analysis in Antitrust Law" (1990); Wu *The Curse of Bigness – Antitrust in the New Gilded Age* (2018) Columbia Global Reports 17.

²⁴¹³ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School 6; Hovenkamp "Antitrust's protected classes" (1989) *Michigan Law Review* 22.

consumer welfare maximisation".²⁴¹⁴ Carey also points out that Bork considered the legislative intent to be "the maximization of wealth or consumer want satisfaction."²⁴¹⁵

According to Bork, antitrust policy was primarily about protecting consumer welfare or "the maximization of consumer welfare".²⁴¹⁶

On US antitrust and small business, Bork argued that Congress' concern was not about small business opportunities.²⁴¹⁷ He criticised the argument that the antitrust goal was about preserving the interests of small businesses.²⁴¹⁸ In this regard, Bork stated, "*It is simply not accurate that Congress ever squarely decided to prefer the preservation of small business to the preservation of a free market in which the forces of competition were dominant. There was much oratory in Congress about the virtues of small business but no clear indication that antitrust should create shelters for the inefficient. Moreover, the statutory language of all the major antitrust laws after the Sherman Act explicitly requires the preservation of competition. That places an enormous burden of persuasion upon those who purport to find in the legislative history a direction to value small business above competition.*"²⁴¹⁹

Bork criticised the use of antitrust law for the protection of small businesses to the detriment of efficiency.²⁴²⁰ In this regard, Kovacic notes Bork's criticism of the US antitrust regime at the time, namely criticism of: (i) the preservation of small business interests using antitrust law; (ii) the strict enforcement against mergers and dominant firms' conduct; (iii) Congress' "destructive legislation"; (iv) Federal judges for issuing

²⁴¹⁴ May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review* 864.

²⁴¹⁵ Bork "Legislative Intent and the Policy of the Sherman Act" (1966) *The Journal of Law & Economics* 7; Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin* 338.

²⁴¹⁶ Bork "Legislative Intent and the Policy of the Sherman Act" (1966) *The Journal of Law & Economics* 10; Bork *The Antitrust Paradox* 57; Carey "The Sherman Act: What Did Congress Intend" (1989) *The Antitrust Bulletin* 344.

²⁴¹⁷ Bork *The Antitrust Paradox* 60-66; May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review* 864.

²⁴¹⁸ Bork and Bowman "The Crisis in Antitrust (1965) *Columbia Law Review*, 65(3), 363-376, at 369-370; Bork "Legislative Intent and the Policy of the Sherman Act" (1966) *The Journal of Law & Economics* 42-43.

²⁴¹⁹ Own emphasis. Bork and Bowman "The Crisis in Antitrust (1965) *Columbia Law Review*, 65(3), 363-376, at 370.

²⁴²⁰ Bork *The Antitrust Paradox* 64; Orbach "Antitrust in the Age of Anxieties" (2016) *Competition Law & Policy Debate*, vol. 2, no. 4, 55; Orbach "Was the crisis in antitrust a Trojan Horse?" (2014) *Antitrust Law Journal*, Vol.79, No.3, 881-992, 884.

decisions serving to protect small businesses to the detriment of business efficiency.²⁴²¹

Bork argued that *“it is the essential mechanism of competition and its prime virtue that more efficient firms take business away from the less efficient.”*²⁴²² For Bork, it was mainly about consumer welfare.²⁴²³ According to Bork, the *Sherman Act* was concerned solely with the preservation of consumer welfare, which meant prohibiting output restriction but still maintaining efficiency.²⁴²⁴ Bork was of the view that monopoly achieved by efficiency could be allowed and that Congress’ main goal was preserving consumer welfare over other competing goals, such as the promotion of small businesses in the same market.²⁴²⁵

Bork argued that there were two principal goals that Senator Sherman sought to pursue in advocating for antitrust legislation, namely, (a) promoting free competition and (b) preventing price increase to consumers, and that these two goals were both consumer-welfare oriented.²⁴²⁶

In comparing Bork’s and Thorelli’s interpretations of the US Congress’ view of competition, Carey observed that *“Bork’s Congress saw competition as instrumental to the aim of consumer welfare; Thorelli’s Congress saw competition desirable in and of itself, and conducive to several political, social, and economic goods, only one of which was the economic progress that advances consumer welfare.”*²⁴²⁷

²⁴²¹ Bork *The Antitrust Paradox* 3-7, 55-66, 406-407, 163-164, 175-178; Kovacic “The Chicago obsession in the interpretation of US antitrust history” (2020) *The University of Chicago Law Review* 472.

²⁴²² Bork and Bowman “The Crisis in Antitrust (1965) *Columbia Law Review*, 65(3), 363-376, at 375.

²⁴²³ Bork “Legislative Intent and the Policy of the Sherman Act” (1966) *The Journal of Law & Economics* 44, 47, Bork remarked that: *“If values other than consumer welfare are to be made legitimate criteria for Sherman Act litigation, the legitimation will have to proceed from some base other than the purpose of the Fifty-first Congress”*; Hovenkamp “Antitrust’s protected classes” (1989) *Michigan Law Review* 22.

²⁴²⁴ Bork “Legislative Intent and the Policy of the Sherman Act” (1966) *The Journal of Law & Economics* 15 fn 11, 27-28, 47; Hovenkamp “Antitrust’s protected classes” (1989) *Michigan Law Review* 22.

²⁴²⁵ Bork “Legislative Intent and the Policy of the Sherman Act” (1966) *The Journal of Law & Economics* 27-28, 30-31; Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin* 351.

²⁴²⁶ Bork “Legislative Intent and the Policy of the Sherman Act” (1966) *The Journal of Law & Economics* 15-16 fn 11.

²⁴²⁷ Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin* 353.

4.1.4.2.5 Chicago School (From about 1970)

The Chicago School is a school of thought that is said to have strongly influenced US antitrust law since the early 1970s.²⁴²⁸ Bork was one of the most prominent Chicago School scholars.²⁴²⁹

According to Fox, an equally famous antitrust scholar, the Chicago School prefers an economy without government interference.²⁴³⁰ The Chicago School believes that every entrepreneur strives to be efficient and that market competition remains effective when undisturbed by the law.²⁴³¹ According to the Chicago School, and as also expressed by Bork, Congress' ultimate goal in passing the Sherman Act was to protect or enhance consumer welfare.²⁴³² The Chicago School's conception of competition law is described as one that condemns output limitation or efficiency.²⁴³³

Foer indicates that the Chicago School believed that the exit of small businesses was the price to pay for vigorous competition.²⁴³⁴ The School also believed that many vertical relationships promote efficiency, which is good for the economy and is likely to benefit consumers (improve consumer welfare).²⁴³⁵

Sawyer also points out that the Chicago School of Law and Economics argued that maximising consumer welfare should be antitrust law's sole goal.²⁴³⁶ The School describes the "contemporary US competition policy" as one that "*maximises consumer welfare*" or "*seeks to give consumer greater product choice at the lowest cost.*"²⁴³⁷ Sawyer observes that the Chicago School's antitrust policy took the view that markets were robust and self-correcting and that government intervention worsened

²⁴²⁸ Kovacic "The Chicago obsession in the interpretation of US antitrust history" (2020) *The University of Chicago Law Review*, vol. 87, no.2, 459.

²⁴²⁹ Kovacic "The Chicago obsession in the interpretation of US antitrust history" (2020) *The University of Chicago Law Review*, vol. 87, no.2, 459 & 463. See also Bouwer and Van Heerden "Considering the goals of competition law through a critical review of selected competition theories" 2023 *THRHR* 430.

²⁴³⁰ Fox "The battle of the soul of antitrust" (1987) *California Law Review* 917.

²⁴³¹ Fox "The battle of the soul of antitrust" (1987) *California Law Review* 917.

²⁴³² Fox "The battle of the soul of antitrust" (1987) *California Law Review* 917-919.

²⁴³³ Fox "The battle of the soul of antitrust" (1987) *California Law Review* 919.

²⁴³⁴ Foer "Small business and antitrust" (2001) *Small Business Economics* 11.

²⁴³⁵ Foer "Small business and antitrust" (2001) *Small Business Economics* 12.

²⁴³⁶ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 3.

²⁴³⁷ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 18.

inefficiencies, rather than making the market more competitive.²⁴³⁸ The School's proponents were also of the view that efficiency justified industrial concentration.²⁴³⁹

Lamoreaux further points out that the Chicago School contended that the focus of a competition enquiry needed to shift from whether large firms *had* market power to whether they were *abusing* their market power to the detriment of consumers.²⁴⁴⁰ Notably, the test that the Chicago School applied to assess whether there had been a competition infringement was not to look at the dominant firm's market share, but at whether consumers were actually worse off.²⁴⁴¹

4.1.4.2.6 Lande's Interpretation (1982)

Professor Robert Lande is also renowned for his extensive work on US antitrust law and his interpretation of the US antitrust goal.²⁴⁴² He is the co-founder of the American Antitrust Institute that was founded in 1998.²⁴⁴³

Lande is of the view that, although Congress was concerned about preserving small businesses' interests in enacting the *Sherman Act*, there were only a few references of support for small producers in the legislative history of the *Sherman Act*.²⁴⁴⁴ Lande viewed that Congress intended to establish an economic system providing equal opportunities to enter the market, where there are enough producers to stimulate competition and where no companies become too large to dominate.²⁴⁴⁵

Additionally, Lande argued that Congress' primary concern was wealth transfers from consumers to dominant firms.²⁴⁴⁶ Thus, according to Professor Lande, Congress was

²⁴³⁸ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 18.

²⁴³⁹ Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School* 19.

²⁴⁴⁰ Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 95.

²⁴⁴¹ Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 109.

²⁴⁴² Robert H. Lande Biography, available at <https://www.justice.gov/sites/default/files/atr/legacy/2007/03/12/221861.pdf> (accessed on 27 December 2023).

²⁴⁴³ The American Antitrust Institute is an independent non-profit organisation founded in 1998 by Albert Foer, Professor Robert Lande and Jonathan Cuneo. The AAI seeks to promote competition that protects consumers, businesses and society. Available at <https://www.antitrustinstitute.org/about-us/> (accessed on 27 December 2023).

²⁴⁴⁴ Lande 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) *The Hastings Law Journal* 67, 101; Foer "Small business and antitrust" (2001) *Small Business Economics* 2.

²⁴⁴⁵ Lande 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) *The Hastings Law Journal* 67, 104; Foer "Small business and antitrust" (2001) *Small Business Economics* 2.

²⁴⁴⁶ Lande 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) *The Hastings Law Journal* 67, 68 & 150; Hovenkamp "Antitrust's protected classes" (1989) *Michigan Law Review* 22.

more concerned about wealth transfer or the deprivation of consumer wealth than about efficiency.²⁴⁴⁷

4.1.4.2.7 New Brandeisians (From about 2000 to date)

The New Brandeisians²⁴⁴⁸ (or “New Brandeis School”)²⁴⁴⁹ is a school of thought that believes that antitrust should focus on structures and processes of competition, not outcomes. In this regard, Khan remarks that “[Re]focusing *antitrust on structures and a broader set of measures to assess market power can return the law to focusing on the competitive process.*”²⁴⁵⁰ According to Sawyer, the New Brandeisians “*aims to reinsert the older political logic of antitrust into contemporary regulation.*”²⁴⁵¹

The New Brandeisians are named after Louis Brandeis who, as discussed above,²⁴⁵² believed in fair trade.²⁴⁵³ According to Lamoreaux, the New Brandeisians believe that the big tech firms engage in anti-competitive practices that foreclose potential competition and that they use clever political tactics to get away with such practices.²⁴⁵⁴ They are also of the view that the orthodox/Chicago School approach²⁴⁵⁵ to antitrust law, namely the focus on the protection of consumer welfare, has made the US vulnerable to other illegal conduct by big firms.²⁴⁵⁶

Lamoreaux is of the view that the concerns raised by the New Brandeisians are similar to the concerns raised by those who challenged the rise of the trusts and other big businesses, like Standard Oil, and which pushed for the passing of antitrust laws in late 1800s and early 1900s.²⁴⁵⁷ Lamoreaux argues that the New Brandeisians’ concerns, similar to the concerns raised in the late 1800s against the formation of the trusts, are not about the effect of big businesses’ conduct on consumer welfare, but

²⁴⁴⁷ Lande ‘Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged’ (1982) *The Hastings Law Journal* 67, 67, 142 & 150; Hovenkamp ‘Antitrust’s protected classes’ (1989) *Michigan Law Review* 23.

²⁴⁴⁸ At the time of writing this part of the study 2020-2022, the New Brandeisians movement still exists.

²⁴⁴⁹ Khan ‘The New Brandeis Movement: America’s antimonopoly debate’ (2018) *Journal of European Competition Law & Practice*, 2018, Vol.9, No.3, 131-132.

²⁴⁵⁰ Khan ‘The New Brandeis Movement: America’s antimonopoly debate’ (2018) *Journal of European Competition Law & Practice*, 2018, Vol.9, No.3, 131-132, at 132.

²⁴⁵¹ Sawyer ‘US Antitrust Law and Policy in Historical Perspective’ (2019) *Harvard Business School* 24.

²⁴⁵² See above, paragraph 4.1.4.2.1 – Louis Brandeis (1856 – 1941).

²⁴⁵³ Foer ‘Small business and antitrust’ (2001) *Small Business Economics* 3.

²⁴⁵⁴ Lamoreaux ‘The Problem of Bigness’ (2019) *The Journal of Economic Perspectives* 94

²⁴⁵⁵ See 4.1.4.2.4 Chicago School.

²⁴⁵⁶ Lamoreaux ‘The Problem of Bigness’ (2019) *The Journal of Economic Perspectives* 94.

²⁴⁵⁷ Lamoreaux ‘The Problem of Bigness’ (2019) *The Journal of Economic Perspectives* 110 and 113.

rather concerns about the foreclosure of competitors from the market and concerns about “political manipulation”.²⁴⁵⁸

4.1.4.3 The specific US Antitrust goal of protecting small businesses

Oppenheim stated that legislation, such as the Small Business Act 1958,²⁴⁵⁹ was passed to assist small businesses.²⁴⁶⁰ In *United States v. Aluminium Co. of America* (“the Alcoa case”),²⁴⁶¹ Judge Learned Hand stated that “*throughout the history of these statutes (one of them being the Sherman Act), it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.*”²⁴⁶² However, in the same judgement, he also confirmed that one of Congress’ objectives in passing the *Sherman Act* was promoting small business.²⁴⁶³ In this regard, Judge Hand stated that Congress “*was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.*”²⁴⁶⁴

²⁴⁵⁸ Lamoreaux “The Problem of Bigness” (2019) *The Journal of Economic Perspectives* 113

²⁴⁵⁹ Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023).

²⁴⁶⁰ Small Business Act of 1958, 72 Stat. 384, 15 U.S.C. §§ 631-47 (1958); Small Business Investment Act of 1958, 72 Stat. 689, 15 U.S.C. §§ 661-96 (1958), amending §§ 4 and 7 of the Small Business Act of 1958, 72 Stat. 384, 387, 15 U.S.C. §§ 633, 636 (1958). Cf. Automobile Dealer Franchise Act of 1956, 70 Stat. 1125, 15 U.S.C. §§ 1221- 25 (1956); Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 156-157, fn 6.

²⁴⁶¹ *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945). Available at <https://law.justia.com/cases/federal/appellate-courts/F2/148/416/1503668/> (accessed on 27 December 2023). In this case, Aluminium Company of America (Alcoa) was accused of monopolizing interstate and foreign commerce in the market for the manufacture and sale of “virgin” aluminium ingot. It was also accused of engaging in restraint of trade in this market. The Court of Appeal (the Circuit Court) found that Alcoa had the power and intent to monopolise the market and had accordingly infringed section 2 of the Sherman Act, which stipulates that: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine...”.

²⁴⁶² *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 429; Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 157.

²⁴⁶³ *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945) 427; Elzinga “Goals of antitrust: Other than competition and efficiency, what else counts” (1977) *University of Pennsylvania Law Review*, 125(6), 1191-1213, at 1203.

²⁴⁶⁴ Own Emphasis. *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945) 427; Elzinga KG “Goals of antitrust: Other than competition and efficiency, what else counts” (1977) *University of Pennsylvania Law Review* 1203.

Later in this chapter, the study considers *Brown Shoe Co. v US*,²⁴⁶⁵ where the Court recognised Congress' intent to protect small businesses. Although Chief Justice Warren stated that "*it is competition and not competitors that the (Sherman) Act protects*", he confirmed that "*we cannot fail to recognise Congress' desire to promote competition through the protection of viable, small, locally owned businesses.*"²⁴⁶⁶

4.1.5 Enforcement of US Antitrust law and small businesses

The section below discusses the application of the US antitrust law on SMEs, either as perpetrators or as victims of anti-competitive conduct. It also considers a few US cases, which have discussed or referred to the protection of SMEs as one of the goals of antitrust law.

4.1.5.1 Antitrust applies to Big and Small

It is widely recognised that competition law (antitrust law in the US) applies to all sizes of enterprises, big and small.²⁴⁶⁷ Chaffetz remarks that antitrust law is enforced equally against big or small firms, no matter the size of the perpetrator, to eradicate anti-competitive conduct.²⁴⁶⁸ For example, collusive conduct in the form of price fixing, market division or allocation, or the fixing of trading conditions is regarded as illegal regardless of whether the perpetrators are big or small enterprises.²⁴⁶⁹ Accordingly, small businesses are not exempt from antitrust enforcement if they, for example, have engaged in cartel activities.²⁴⁷⁰

As Oppenheim observes, "*There is no absolutism under [the] antitrust policy for any group when cartelism rears its head.*"²⁴⁷¹ He points out that the US DoJ and FTC have

²⁴⁶⁵ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 374 (1962).

²⁴⁶⁶ Own Emphasis. Bork R and Bowman W "The Crisis in Antitrust (1965). *Columbia Law Review*, 65(3), 363-376, at 373; Elzinga KG "Goals of antitrust: Other than competition and efficiency, what else counts" (1977) *University of Pennsylvania Law Review* 1203. Elzinga also mentions several court cases, following the *Brown Shoe* case, which indicate an appreciation for the goal of protecting small businesses, namely *United States v. Von's Grocer' Co* 384 U.S. 270 (1966); *United States v. G. Heileman Brewing Co.* 345 F. Supp. 117 (E.D. Mich. 1972). See Elzinga KG "Goals of antitrust: Other than competition and efficiency, what else counts" (1977) *University of Pennsylvania Law Review* 1204.

²⁴⁶⁷ Chaffetz "The Antitrust Laws and Small Business" (1953) 2 *ABA Antitrust Section* 78. Own emphasis.

²⁴⁶⁸ Chaffetz "The Antitrust Laws and Small Business" (1953) 2 *ABA Antitrust Section* 82.

²⁴⁶⁹ Chaffetz "The Antitrust Laws and Small Business" (1953) 2 *ABA Antitrust Section* 82.

²⁴⁷⁰ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal* 162-163.

²⁴⁷¹ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal* 163.

consistently punished the perpetrators of cartel activities, whether committed by large or small firms.²⁴⁷²

In the context of trade associations, Oppenheim observes that the law against cartel activities or illegal cooperative conduct by an association of small businesses will be judged as severely as judging collusive conduct by an association of large firms.²⁴⁷³ Anti-competitive conduct by a trade association will also be prosecuted regardless of the size of the firms which form part of the association.²⁴⁷⁴

According to Oppenheim, enforcement of exclusive dealing and tying provisions under the Clayton Act does not seem to favour small firms over large ones.²⁴⁷⁵ The provisions on tying also apply to SMEs.²⁴⁷⁶ This is because the test of “harm to competition” is whether a substantial part of the commerce is foreclosed in the relevant market.²⁴⁷⁷

In this regard, and to support the contention that the US antitrust law applies to all business sizes, Oppenheim observes that Competition should not privilege only one group, as it may harm the intended beneficiaries.²⁴⁷⁸ His view is that fair and effective antitrust enforcement cannot be achieved by favouring either small or large businesses, as privileging a specific category of business may undermine fair competition from other businesses.²⁴⁷⁹ It is, therefore, important to maintain a level playing field for all business sizes.²⁴⁸⁰

²⁴⁷² Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁷³ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁷⁴ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁷⁵ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 165.

²⁴⁷⁶ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 165.

²⁴⁷⁷ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 165.

²⁴⁷⁸ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 166.

²⁴⁷⁹ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 166.

²⁴⁸⁰ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 167.

4.1.5.2 Antitrust rules that affect SMEs

SMEs are thus affected by antitrust rules – either when they are the victims of anti-competitive conduct or when they are the parties who engage in anti-competitive conduct. These include antitrust law provisions that prohibit cartels.²⁴⁸¹ As pointed out, in the US, small businesses are not immune from antitrust enforcement against cartels that they form part of.²⁴⁸² Further, according to Elzinga, the effect of prohibited conduct, such as price fixing, tying or exclusive dealing, on SMEs, may be difficult to assess.²⁴⁸³ However, price discrimination conduct may clearly prevent the entry or affect the expansion of a small firm in a market.²⁴⁸⁴

4.1.5.3 SMEs and Cartels

As pointed out by Oppenheim, antitrust rules prohibiting cartels apply to both small and big firms.²⁴⁸⁵ There is no justification for cartel conduct, which is regarded in the US as a *per se* violation of antitrust law. Accordingly, both small and big firms are not given the leeway to justify their cartel conduct.²⁴⁸⁶ As Oppenheim notes, “*There is no absolutism under antitrust policy for any group when cartelism rears its head.*”²⁴⁸⁷

Enforcement of the antitrust laws must be effective in all respects, regardless of the size of the parties involved in the anti-competitive conduct.²⁴⁸⁸ In this regard, Glover comments that “*there's no support at all for price fixing among small business that I've ever been able to detect; they feel that, if somebody engages in price fixing, he ought to get what's coming to him.*”²⁴⁸⁹

²⁴⁸¹ Foer “Small business and antitrust” (2001) *Small Business Economics* 4.

²⁴⁸² Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 162-163.

²⁴⁸³ Elzinga KG “Goals of antitrust: Other than competition and efficiency, what else counts” (1977) *University of Pennsylvania Law Review* 99.

²⁴⁸⁴ Elzinga KG “Goals of antitrust: Other than competition and efficiency, what else counts” (1977) *University of Pennsylvania Law Review* 199.

²⁴⁸⁵ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁸⁶ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁸⁷ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁸⁸ Glover “Antitrust and Small Business: Killing the Bigness-is-Better Myth (II)” (1985) *Antitrust Law & Economics Review* 48.

²⁴⁸⁹ Glover “Antitrust and Small Business: Killing the Bigness-is-Better Myth (II)” (1985) *Antitrust Law & Economics Review* 48.

4.1.5.4 Cartel per se Illegal

The “*per se illegal*” nature of the cartel conduct means, as pointed out by Oppenheim, that “*these restraints, by their inherent nature or character, are deemed conclusively unreasonable once the fact of the conspiracy is established.*”²⁴⁹⁰ As small businesses are not exempt from antitrust enforcement that punish or prohibit cartel conduct, they can also not advance any justification for engaging in this conduct –not even based on their small size.²⁴⁹¹

In line with this position, the US DoJ also does not discriminate or differentiate between large or small firms in the enforcement of antitrust rules against *per se* violation.²⁴⁹²

4.1.5.5 Small Businesses and Trade Associations

As pointed out by Oppenheim, US courts do not condone cooperative conduct of associations of small businesses. Anti-competitive conduct by a trade association is assessed severely, regardless of the size of the firms constituting the trade association.²⁴⁹³ In other words, whether the members are small or large firms, a trade association engaged in anti-competitive conduct will face the might of the law.²⁴⁹⁴

4.1.5.6 SMEs and Dominance

Kellezi *et al.* observe that in the US, SMEs are unlikely to be found guilty of unilateral or abuse of dominance contraventions.²⁴⁹⁵ This is because of their small market share.²⁴⁹⁶ Companies liable for this conduct are generally firms with monopoly power.²⁴⁹⁷ SMEs are, therefore, more likely to be victims of unilateral or abuse of dominance conduct²⁴⁹⁸ than infringers.

²⁴⁹⁰ Oppenheim, S. (1961). Small and big business: Orientation of antitrust points and counterpoints. *University of Detroit Law Journal* 163.

²⁴⁹¹ Oppenheim, S. “Small and big business: Orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁹² Oppenheim, S. “Small and big business: Orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁹³ Oppenheim, S. “Small and big business: Orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁹⁴ Oppenheim, S. “Small and big business: Orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 163.

²⁴⁹⁵ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 258. See above Chapter 3, para 3.5.3.3 Abuse of dominance.

²⁴⁹⁶ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 258.

²⁴⁹⁷ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 260.

²⁴⁹⁸ See above Chapter 3, para 3.5.3.3 Abuse of dominance.

As observed by Foer, the dominance of large firms may affect small competitors when they are prevented from entering a certain market.²⁴⁹⁹ Small businesses are also affected by a firm's dominance in a market when they are consumers of the dominant firm's products, which puts the small firm at the mercy of non-competitive or high prices that the dominant firm may impose or charge.²⁵⁰⁰

A firm may also abuse its dominance and affect small players by engaging in predatory pricing or tying conduct.²⁵⁰¹

4.1.5.7 SMEs and Predation

During the early days of antitrust law in the US, predatory conduct was of great concern as it particularly resulted in the exit of small competitors from the market.²⁵⁰² The case against Standard Oil in 1911, as discussed above,²⁵⁰³ is an early example of the effect of predation on small competitors.²⁵⁰⁴

Predatory pricing²⁵⁰⁵ is often viewed as a difficult type of conduct to prove by small businesses, which may affect their ability to compete on a level playing field.²⁵⁰⁶ Foer, however, remarks that predatory pricing conduct often affects small players, as they must price or compete against giants who price below costs. The costs of small businesses are thus likely to be higher than the cost of a larger company, which will

²⁴⁹⁹ Foer "Small business and antitrust" (2001) *Small Business Economics* 10.

²⁵⁰⁰ Foer "Small business and antitrust" (2001) *Small Business Economics* 10.

²⁵⁰¹ Tying is a practice that requires a person to buy goods or services on condition that the buyer purchases separate goods or services unrelated to the main goods or services. In *Eastman Kodak Co. v Image Technical Services, Inc., et al.* 461-462 (discussed above), the Supreme Court described a tying arrangement as "an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier-violates § 1 only if the seller has appreciable economic power in the tying product market." A tying arrangement may contravene section 1 of the Sherman Act, which prohibits a contract restraining trade or commerce among the US states or with foreign nations. It may also contravene section 2 of the Sherman Act, which prohibits conduct that monopolises or attempts to monopolise trade or commerce among the US states or with foreign nations. Predatory pricing occurs when a firm (generally a dominant firm) prices below a certain cost in order to exclude its competitors from the market. This conduct may infringe section 2 of the Sherman Act, as it may amount to an attempt to monopolise; Foer "Small business and antitrust" (2001) *Small Business Economics* 10.

²⁵⁰² Foer "Small business and antitrust" (2001) *Small Business Economics* 8.

²⁵⁰³ See above, para 4.1.2 History of the US Antitrust Law; para 4.1.3.1.2 Origin of the Sherman Act; 4.1.4.1 The Antitrust Goal of the Clayton, FTC, and Robinson-Patman Acts.

²⁵⁰⁴ Foer "Small business and antitrust" (2001) *Small Business Economics* 7.

²⁵⁰⁵ Predatory pricing occurs when a firm (generally a dominant firm) prices below a certain measure of cost in order to exclude its competitors from the market. This conduct may infringe section 2 of the Sherman Act, as it may amount to an attempt to monopolise. Foer "Small business and antitrust" (2001) *Small Business Economics* 9.

²⁵⁰⁶ Foer "Small business and antitrust" (2001) *Small Business Economics* 8.

use its economies of scale to price at a very low price.²⁵⁰⁷ The view expressed by Foer is that small businesses should support antitrust enforcement efforts to fight the predatory pricing strategies of dominant firms.²⁵⁰⁸

4.1.5.8 SMEs and Buyer Power

The US antitrust law recognises that buyer power is damaging to small businesses.²⁵⁰⁹ Antitrust law can thus counter the abuse of buyer power.²⁵¹⁰

In the US, “buyer power” refers to a dominant firm’s independent ability to dictate and control the price at which it buys goods or services from its suppliers. Small businesses may be affected by the conduct of a dominant firm with buyer power. This may happen when a small business supplies a dominant firm with buyer power. A dominant firm’s buyer power may, therefore, negatively affect small businesses, especially when an exclusive agreement regulates the supply of the relevant goods or services. In this case, the negative impact on small business may be felt, when the small business would have supplied the products at a higher price to firms without buyer power and would have obtained a better profit.²⁵¹¹

4.1.5.9 SMEs and Price Discrimination

The FTC has recognised that price discrimination is a tool used by sellers with market power which helps them to maintain or enhance their monopoly power.²⁵¹² In this regard, in 1956, the Committee on the Judiciary, House of Representatives of the US, remarked that price discrimination that favours specific buyers adversely affects the competitive landscape.²⁵¹³ It further noted that firms can abuse their market power and push small players out of the market through discriminatory conduct.²⁵¹⁴

²⁵⁰⁷ Foer “Small business and antitrust” (2001) *Small Business Economics* 10.

²⁵⁰⁸ Foer “Small business and antitrust” (2001) *Small Business Economics* 10.

²⁵⁰⁹ Foer “Small business and antitrust” (2001) *Small Business Economics* 7.

²⁵¹⁰ Foer “Small business and antitrust” (2001) *Small Business Economics* 7.

²⁵¹¹ Foer “Small business and antitrust” (2001) *Small Business Economics* 10. Buyer power may be prohibited under section 2 of the Sherman Act when a dominant firm monopolises or attempts to monopolise any part of the trade or commerce. Price discrimination refers to a dominant firm discriminating between its customers in terms of price, discount, allowance, rebate, etc. Price discrimination is prohibited under section 2 of the Robinson-Patman Act.

²⁵¹² MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 180.

²⁵¹³ ,” MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 180.

²⁵¹⁴ The House of Representatives also stated that: “*In practical effect, the law as presently construed allows the private interest of a discriminator to outweigh the public interest in preserving competitive opportunity at all levels of business activity.*” MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 180.

Macintyre remarks that some authors believe that it is important to strengthen enforcement activities against conduct that amounts to price discrimination to protect small businesses and preserve a competitive landscape.²⁵¹⁵ In this regard, the FTC has argued that by paying fees and rebates to exclude competitors offering lower-cost drug alternatives, competition and consumer protection laws may be violated.²⁵¹⁶ The FTC issued an enforcement statement in 2022 to increase intervention against any rebate and illegal bribe schemes which blocked patient access to competing low-cost drugs.²⁵¹⁷ It argued that such conduct is anti-competitive and negatively impacts consumers.²⁵¹⁸

4.1.5.10 SMEs and Mergers

Oppenheim argues that the *rule of reason* standard should be used to assess mergers between small businesses.²⁵¹⁹ This is because section 7²⁵²⁰ of the *Clayton Act* might

²⁵¹⁵ MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 180.

²⁵¹⁶ FTC “FTC to Ramp up Enforcement against any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman that Block Cheaper Drugs” (2022) available at <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes> (accessed on: 2 December 2023).

²⁵¹⁷ FTC “FTC to Ramp up Enforcement against any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman that Block Cheaper Drugs” (2022) available at <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes> (accessed on: 2 December 2023); The FTC’s Enforcement Statement states that: Exclusionary rebates that foreclose competition from lower-cost medicines may constitute unreasonable agreements in restraint of trade under Section 1 of the Sherman Act; unlawful monopolisation under Section 2 of the Sherman Act; or exclusive dealing under Section 3 of the Clayton Act; Inducing prescription drug middlemen to place higher-priced drugs on formularies instead of lower-cost alternatives in a manner that shifts costs to payers and patients may violate the prohibition against unfair methods of competition or unfair acts or practices under Section 5 of the FTC Act and; Paying or accepting rebates or fees in exchange for excluding drugs may constitute commercial bribery under Section 2(c) of the Robinson-Patman Act, which prohibits compensating an intermediary to act against the interests of the party it represents in the transaction.

²⁵¹⁸ Federal Trade Commission “Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products” (16 January 2022), available at [Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products \(ftc.gov\)](https://www.ftc.gov/policy/statement-of-the-federal-trade-commission-on-rebates-and-fees-in-exchange-for-excluding-lower-cost-drug-products) (accessed on 22 December 2023); Federal Trade Commission “FTC to Ramp up Enforcement against any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman that Block Cheaper Drugs” (2022) available at <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes> (accessed on: 2 December 2023).

²⁵¹⁹ Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal* 162.

²⁵²⁰ Section 7: “That no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. 18.

prohibit mergers between small businesses or might affect small businesses' opportunities to dispose of their business, except where a "failing firm" defence may be raised.²⁵²¹

Elzinga also warns against a too strict merger policy, as this could also prevent mergers between small businesses, that may be in financial hardship or whose founder is too old to carry on with the business.²⁵²² In this regard, Elzinga states that *"A merger policy that is too strict hurts small businesses, a point not always understood even by the friends of small businesses. Should the small enterprise suffer financial reverses, or should ageing owners wish to sell out, the number of potential buyers will be minimised by a merger policy that is too severe. This means the possibility of running afoul of such an antimerger policy becomes an added risk of entering the market. The result could be fewer small businesses, just the opposite of what is desired."*²⁵²³

Further, Golodner notes that the FTC's Antitrust Division's priority is to investigate and prosecute cartel-type operations in the interest of small businesses.²⁵²⁴ Golodner also argues that this type of conduct excludes or suppresses competition and negatively affects small businesses, which are usually customers of businesses that engage in collusive conduct and would, therefore, be victims of such conduct.²⁵²⁵

4.1.6 Review of US Antitrust case law on the treatment of SMEs

A review of a few US cases on alleged contraventions of US antitrust legislation indicates that US courts initially acknowledged the protection or promotion of small business interests as one of the goals of antitrust legislation. This seems to have been

²⁵²¹ The "failing firm" defence refers to the defence a merging party may raise to show that the relevant firm is unable to compete in the market or unable to meet its financial obligations or "is no longer a vital competitive factor in the market". See *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962) 319. See also Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal* 162.

²⁵²² Elzinga KG "Goals of antitrust: Other than competition and efficiency, what else counts" (1977) *University of Pennsylvania Law Review* 1197.

²⁵²³ Elzinga KG "Goals of antitrust: Other than competition and efficiency, what else counts" (1977) *University of Pennsylvania Law Review*, 1197.

²⁵²⁴ Golodner "Antitrust, Innovation, Entrepreneurship and Small Business" (2000) *SBA Conference on Industrial Organisation*, 13 available at <https://www.justice.gov/atr/speech/antitrust-innovation-entrepreneurship-and-small-business> (accessed on: 2 December 2023).

²⁵²⁵ Golodner "Antitrust, Innovation, Entrepreneurship and Small Business" (2000) *SBA Conference on Industrial Organisation*, 14 available at <https://www.justice.gov/atr/speech/antitrust-innovation-entrepreneurship-and-small-business> (accessed on: 2 December 2023).

the position from at least 1890 to about the 1970s.²⁵²⁶ However, Fox and Basenov points out that from 1970, which marks the advent of the Chicago School and its views, the US courts' position changed to view the goal of competition law as more about protecting efficiency and consumer welfare than protecting competitors or the competitive landscape.²⁵²⁷ The position appears to be slightly changing with the rise of the "New Brandeis" movement in the 2000s and the debate around the US Congress's original intent to pass antitrust laws.²⁵²⁸

The section below considers some of the US cases that illustrate the US courts' early interpretation of the goals of antitrust law, including the protection or promotion of small businesses and the shift post-1970.

4.1.6.1 *Standard Oil Company of New Jersey, et al., v United States (1910)*

As alluded to above,²⁵²⁹ the *Standard Oil* case²⁵³⁰ is one of the first prominent US antitrust cases. In this case, Standard Oil Company of New Jersey, its affiliated companies and its main shareholders²⁵³¹ were accused of engaging in collusive conduct by restraining the trade and commerce in, as well as monopolising the petroleum market.²⁵³² The alleged conduct was said to have started in or about 1870 and continued until at least 1906.²⁵³³ Standard Oil was accused of, amongst other, concluding agreements with various firms and individuals to fix the price of crude and refined oil, and related petroleum products to limit the production and transportation of

²⁵²⁶ Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021, provided by Prof E. Fox to Prof C. Van Heerden in September/November 2021, at 11.

²⁵²⁷ Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021, at 14-15.

²⁵²⁸ Khan "The New Brandeis Movement: America's antimonopoly debate" (2018) *Journal of European Competition Law & Practice*, 2018, Vol.9, No.3, 131-132. See above, para 4.1.4.2.6 New Brandeisians (From about 2000 to date).

²⁵²⁹ See above, para 4.1.2 History of the US Antitrust Law; para 4.1.3.1.2 Origin of the Sherman Act; 4.1.4.1 The Antitrust Goal of the Clayton, FTC, and Robinson-Patman Acts; para 4.1.5.7 SMEs and Predation.

²⁵³⁰ *Standard Oil Company of New Jersey et al. v The United States* 221 US 1, 106 (1910).

²⁵³¹ Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio and sixty-two other corporations and partnerships, as also seven individuals (which included John D. Rockefeller and William Rockefeller).

²⁵³² *Standard Oil Company v The United States* (1910) 31.

²⁵³³ *Standard Oil Company v The United States* (1910) 31.

these products.²⁵³⁴ Standard Oil was also accused of restraining trade and commerce among the several States and monopolising the market.²⁵³⁵

It was alleged that Standard Oil, a dominant player in the petroleum market, received special rebates and discounts from various railroad companies for transporting its petroleum products through railways. This enabled Standard Oil to increase its dominant position in the petroleum market. The US Government (“the State”) brought this case under the Sherman Act, arguing that in 1899, Standard Oil acquired shares in various companies, and this acquisition constituted a “*combination in restraint of trade*” in contravention of section 1 of the Sherman Act.²⁵³⁶ The State further argued that through the preferential rebates and discriminatory rates on the transportation of its petroleum products, Standard Oil engaged in anti-competitive conduct, which destroyed small manufacturers and dealers throughout the country.²⁵³⁷

The Circuit Court had found in favour of the State that Standard Oil’s acquisition of shares in various companies constituted a restraint of trade and an attempt to monopolise the market in contravention of section 2 of the Sherman Act.²⁵³⁸ The US Supreme Court confirmed this finding.²⁵³⁹

In relation to small businesses, the State had argued that the evidence relating to Standard Oil receiving rebates and discriminatory rates in the transportation of its products, as well as Standard Oil’s “*unfair and oppressive methods of competition*”, which destroyed small manufacturers and dealers in the US, was material in this case.²⁵⁴⁰ The US Supreme Court found that the purpose of acquiring shares in various companies was to form a combination to monopolise the petroleum market, maintain dominance and exclude other players (which would include small players) from that market.²⁵⁴¹

²⁵³⁴ *Standard Oil Company v The United States* (1910) 31.

²⁵³⁵ *Standard Oil Company v The United States* (1910) 31.

²⁵³⁶ *Standard Oil Company v The United States* (1910) 22.

²⁵³⁷ *Standard Oil Company v The United States* (1910) 29.

²⁵³⁸ *Standard Oil Company v The United States* (1910) 45. The US Supreme Court also referred to the Sherman Act as the “Anti-trust Act”. See *Standard Oil Company v The United States* (1910) 31.

²⁵³⁹ *Standard Oil Company v The United States* (1910) 74.

²⁵⁴⁰ *Standard Oil Company v The United States* (1910) 29.

²⁵⁴¹ *Standard Oil Company v The United States* (1910) 75.

4.1.6.1.1 Relevance of this case for this thesis

The Standard Oil case is one of the first US antitrust cases which indicates the treatment of SMEs under competition law. Standard Oil was alleged to have engaged in anti-competitive conduct, which destroyed small manufacturers and dealers throughout the country. Standard Oil's impugned conduct of destroying small manufacturers and dealers in the US was considered a material factor in this case. This shows that the goal of protecting SMEs was more prominent in the early years of the Sherman Act, which was enacted in 1890.

Lamoreaux analysed this case and explained that large companies, like Standard Oil, could not be found to have infringed the Sherman Act just because of their size.²⁵⁴² This is because one had to show that the main objective of the group of companies was to restrain trade.²⁵⁴³ Lamoreaux cites the *Standard Oil* case to explain that one had to prove the companies' dominance not from "*normal methods of industrial development*", but from "*new means of combination (...) with the purpose of excluding others from trade and thus centralising in the combination a perpetual control.*"²⁵⁴⁴ Lamoreaux also believes that commentators who have interpreted the *rule of reason* as a test of harm to consumers have misread the *Standard Oil* decision.²⁵⁴⁵ She argues that Chief Justice Edward Douglas White, in his opinion in the *Standard Oil* case, did not seek to assess the harm or damage to consumers, but rather, he focused on the abuse of dominant conduct on other individuals and firms.²⁵⁴⁶ In this regard, Lamoreaux quotes Chief Justice Edward Douglas White, who found that Standard Oil's objective was to drive competitors out of the market: "*No disinterested mind (...) could survey the evidence about Standard Oil without being irresistibly driven to the conclusion that the very genius for commercial development and organisation which was manifested from the beginning soon begot an intent and purpose (...) to drive*

²⁵⁴² Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 98.

²⁵⁴³ Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 98.

²⁵⁴⁴ Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 99.

²⁵⁴⁵ Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 99, referring to Bork - Bork RH "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division." (1965) *Yale Law Journal* 74(5), 775–847, and Bork RH *The Antitrust Paradox: A Policy at War with Itself* (1978).

²⁵⁴⁶ Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 99.

others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view."²⁵⁴⁷

The Standard Oil case, therefore, shows that the focus of US antitrust enforcement in the early years of US antitrust law was on conduct excluding competitors rather than consumer welfare.²⁵⁴⁸

4.1.6.2 Federal Trade Commission v Morton Salt (1948)

In *FTC v Morton Salt*,²⁵⁴⁹ the FTC issued a cease-and-desist order against Morton Salt, a producer and seller of table salt, for discriminating in prices between its different buyers of similar grades and qualities of table salt.²⁵⁵⁰ The issue was that Morton Salt was charging its small buyers (less-than-carload purchasers) prices higher than the prices it was charging its larger buyers (carload purchasers) for the same products.²⁵⁵¹ The FTC found that such conduct discriminated against small buyers and contravened section 2 of the Clayton Act, as amended by the Robinson-Patman Act.²⁵⁵² The FTC found that Morton Salt's discriminatory discounts extended to its larger buyers injured competition in the markets for the wholesale and retail of salt. The Circuit Court dismissed the FTC's decision.²⁵⁵³ The Circuit Court found that the Commission's findings were unfounded or contrary to the evidence and that the Commission's cease-and-desist order against Morton Salt was too broad.²⁵⁵⁴ The FTC appealed the Circuit Court's decision, and the Supreme Court confirmed the FTC's findings.²⁵⁵⁵

The Supreme Court found that the Robinson-Patman Act does not require a showing of actual harm to competition.²⁵⁵⁶ In other words, it does not require that the discriminatory conduct has actually harmed competition, but "*only that there is a reasonable possibility that [the conduct] 'may' have such an effect.*"²⁵⁵⁷

²⁵⁴⁷ Own emphasis. Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 99, referring to Standard Oil Company v The United States (1910) 75-77.

²⁵⁴⁸ Lamoreaux "The Problem of Bigness" (2019) *The Journal of Economic Perspectives* 99.

²⁵⁴⁹ *Federal Trade Commission v Morton Salt Co.* 334 US 37 (1948).

²⁵⁵⁰ *Federal Trade Commission v Morton Salt Co.* (1948) 37 & 39.

²⁵⁵¹ *Federal Trade Commission v Morton Salt Co.* (1948) 47-48.

²⁵⁵² See above 4.1.3.3 The Robinson-Patman Act.

²⁵⁵³ *Federal Trade Commission v Morton Salt Co.* (1948) 40.

²⁵⁵⁴ *Federal Trade Commission v Morton Salt Co.* (1948) 40.

²⁵⁵⁵ *Federal Trade Commission v Morton Salt Co.* (1948) 42-44.

²⁵⁵⁶ *Federal Trade Commission v Morton Salt Co.* (1948) 46.

²⁵⁵⁷ *Federal Trade Commission v Morton Salt Co.* (1948) 46.

This case dealt specifically with discrimination against small buyers. In confirming the FTC's findings, the Supreme Court stated that "*the legislative history of the Robinson-Patman Act shows that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the former's quantity purchasing power.*"²⁵⁵⁸ The Supreme Court further remarked that "*in enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end, it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasised a belief that § 2 of the Clayton Act had "been too restrictive, in requiring a showing of general injury to competitive conditions (. . .) " The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimised by the discrimination'.*"²⁵⁵⁹ The Supreme Court then found that there was sufficient evidence to show that the small purchasers (less-than-carload purchasers) might have been injured in competing with the large purchasers (carload purchasers) and that the FTC was correct in finding that this discriminatory conduct might have resulted in a substantial lessening of competition.²⁵⁶⁰

4.1.6.2.1 Relevance of this case for this thesis

This case is relevant because of its interpretation of harm to competition in price discrimination case. It found that to find price discrimination, actual harm to competition was not required. But, what needs to be established is whether there is a reasonable possibility that the impugned conduct may have such an effect.

The Supreme Court also condemned the dominant firm's conduct of discriminating against a small buyer merely because of the quantities of goods it purchased. The case reiterated the purpose of the Robinson-Patman Act to protect small businesses. It explained that injury to competition entailed a showing of injury to the victimised competitor. This test can be used to assess cases where SMEs are the victims.

²⁵⁵⁸ Own emphasis. *Federal Trade Commission v Morton Salt Co.* (1948) 43.

²⁵⁵⁹ Own emphasis. *Federal Trade Commission v Morton Salt Co.* (1948) 49.

²⁵⁶⁰ *Federal Trade Commission v Morton Salt Co.* (1948) 50.

This Morton Salt case provides a test of harm to competition that this study recommends could be used to assess harm to competition in cases involving SMEs as victim to anti-competition conduct.

4.1.6.3 *Brown Shoe Co., Inc. v United States (1962)*

This matter²⁵⁶¹ concerned a merger between Brown Shoe Co, Inc. (“Brown Shoe”) and Kinney Co, Inc. (“Kinney”), both large manufacturers and retailers of men’s, women’s, and children’s shoes. The FTC had found that the merger could substantially lessen competition or could create a monopoly in the market for the production, distribution, and sale of shoes. It found that the merger would infringe section 7 of the Clayton Act. The District Court agreed with the FTC’s findings and ordered Brown Shoe to divest its interests, including assets and shares, from Kinney.²⁵⁶² Brown Shoe appealed the District court’s decision.

On appeal, the Supreme Court found that the 1950 amendments were prompted by Congress’ concerns over a surge of economic concentration in the US economy.²⁵⁶³ It found that “*the desirability of retaining ‘local control’ over industry and the protection of small businesses*” were factors in support of the amendments.²⁵⁶⁴ The Supreme Court noted that Congress knew that a merger between two large companies or between a large and a small company may contravene the Clayton Act, but that a merger between two small companies may be approved to enable the merged entity to compete against large dominant firms.²⁵⁶⁵ The Supreme Court noted that Congress’ objective in passing the amendments included protecting small businesses.²⁵⁶⁶ In this regard, the Supreme Court stated that “*Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.*”²⁵⁶⁷

Although the Supreme Court remarked that the amendments were meant to protect competition and not competitors, and that mergers would only be prohibited if they

²⁵⁶¹ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

²⁵⁶² *Brown Shoe Co., Inc. v. United States* (1962) 304 & 346.

²⁵⁶³ *Brown Shoe Co., Inc. v. United States* (1962) 315.

²⁵⁶⁴ *Brown Shoe Co., Inc. v. United States* (1962) 315-316.

²⁵⁶⁵ *Brown Shoe Co., Inc. v. United States* (1962) 319 & 331.

²⁵⁶⁶ *Brown Shoe Co., Inc. v. United States* (1962) 333.

²⁵⁶⁷ Own emphasis. *Brown Shoe Co., Inc. v. United States* (1962) 333.

tend to distort competition,²⁵⁶⁸ the Supreme Court nevertheless reiterated Congress' desire to promote small businesses' interests. In particular, it stated, "*Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognise Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralisation. We must give effect to that decision.*"²⁵⁶⁹

The Supreme Court found that the appellant (Brown Shoe) had not provided any adequate justification for the approval of the merger, which could have been in the form of showing that one of the parties was failing (i.e the "failing firm"-defence)²⁵⁷⁰ or did not have the resources to compete effectively in the market.²⁵⁷¹ Brown Shoe had also not demonstrated that the merger would enable small companies to compete effectively with large dominant players in the markets.²⁵⁷²

²⁵⁶⁸ The Court stated: "*Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.*" *Brown Shoe Co., Inc. v. United States* (1962) 320.

²⁵⁶⁹ Own emphasis. *Brown Shoe Co., Inc. v. United States* (1962) 344.

²⁵⁷⁰ The doctrine of "failing firm" originates from *International Shoe Co. v FTC*, 280 U.S. 291 (1930) 302-303, where the Supreme Court found that: "*In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure, with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser) not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public, and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.*" Available at <https://supreme.justia.com/cases/federal/us/280/291/> (accessed on 21 December 2023). The failing firm doctrine has been embodied in the Horizontal Merger Guidelines issued by the US Department of Justice and Federal Trade Commission, which states that a merger is unlikely to be anti-competitive if one of the merging parties is failing in that the merger would cause the assets of that failing firm to exit the relevant market. To raise this defence, the relevant failing firm must show that: (1) it would not meet its financial obligations in the near future; (2) it would not be able to reorganise itself under the Bankruptcy law; and (3) it has made the necessary efforts to obtain alternative offers to keep the assets in the relevant market, which will have a lesser effect on competition than the proposed merger. See U.S. Department of Justice and the Federal Trade Commission "Horizontal Merger Guidelines" (19 August 2010), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmq.pdf> (accessed on 21 December 2023) 32, para 11.

²⁵⁷¹ *Brown Shoe Co., Inc. v. United States* (1962) 346.

²⁵⁷² *Brown Shoe Co., Inc. v. United States* (1962) 346.

The Supreme Court thus found in favour of the State (the FTC) and confirmed the District Court's finding that the merger was likely to substantially lessen competition in the retail of men's, women's, and children's shoes in cities where both Brown Shoe and Kinney sold through owned or controlled outlets.²⁵⁷³

4.1.6.3.1 Relevance of this case for this thesis

The case is relevant as it is the case in which the mantra “protect competition, not competitors” emerged. As discussed in Chapter Three, this phrase has often been used to submit that the goal of competition law is about economic efficiency and enhancement of consumer welfare, instead of protecting competitors, in particular inefficient competitors. However, it is noted that although the Supreme Court in the Brown Shoe case made that pronouncements, the court also recognised that one of the concerns of the US Congress in passing the Sherman Act was the protection of small business. So this mantra cannot be seen in isolation, but must take into account the full comment made by the Supreme Court.

4.1.6.4 *United States v. Arnold, Schwinn & Co. et al.*

In this case,²⁵⁷⁴ Arnold, Schwinn & Co (“Schwinn”) and an association of distributors of Schwinn's products were accused of fixing prices, allocating exclusive territories to wholesalers and jobbers, and confining merchandise to franchised dealers.²⁵⁷⁵ Schwinn was a major manufacturer of bicycles.²⁵⁷⁶ Schwinn's distributors and retailers were mainly “*small independent bicycle sales and repair dealers*”.²⁵⁷⁷ Schwinn allocated specific territories to its wholesalers and requested that these wholesalers only distribute to Schwinn's franchisees within their respective territories.²⁵⁷⁸

The District Court dismissed the price-fixing charges and found that “*the Schwinn franchising system was fair and reasonable*”.²⁵⁷⁹ The District Court, however, found that the allocation of territories was a *per se* violation of Section 1 of the Sherman Act, in relation to the products Schwinn sold to its distributors or wholesalers.²⁵⁸⁰ The

²⁵⁷³ *Brown Shoe Co., Inc. v. United States* (1962) 346.

²⁵⁷⁴ *United States v. Arnold, Schwinn & (and) Co. et al.*, 388 U.S. 365, 394 (1967)

²⁵⁷⁵ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 365.

²⁵⁷⁶ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 365.

²⁵⁷⁷ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 384.

²⁵⁷⁸ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 365.

²⁵⁷⁹ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 365.

²⁵⁸⁰ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 365 & 376.

District Court instructed Schwinn not to limit the territory within which its wholesalers or jobbers could sell Schwinn products. The State did not appeal the District Court's findings but requested that the limitations on Schwinn's distributors (where the distributor acts as agent or consignee of Schwinn or on the Schwinn Plan) be considered under the *rule of reason*, and that such limitations be regarded as "*an unreasonable restraint of trade*."²⁵⁸¹

The US Supreme Court remarked that the promotion of Schwinn's self-interest could not be considered under the *rule of reason* to immunise an otherwise unlawful conduct.²⁵⁸² In this regard, the Supreme Court noted that price fixing is unlawful and restricts distribution.²⁵⁸³ However, it noted that a manufacturer is entitled to select his customers and "*may 'franchise' certain dealers to whom, alone, he will sell his goods*."²⁵⁸⁴ This would, therefore, not contravene the Sherman Act.²⁵⁸⁵

The Supreme Court held that distributors and retailers of Schwinn's products should be allowed to sell wherever and to whomever they wished to sell.²⁵⁸⁶ It also found that the limitation imposed by a manufacturer on its distributors will only contravene section 1 of the Sherman Act if it unreasonably restricts competition.²⁵⁸⁷

The Supreme Court confirmed the District Court's finding that a manufacturer's restriction on the territories where its distributors could resell the manufacturer's products constitutes a *per se* contravention of the Sherman Act.²⁵⁸⁸ This would be a *per se* violation in circumstances where the manufacturer has departed from his dominion or ownership of the product.²⁵⁸⁹ In other words, where the manufacturer no longer owns the products, he cannot impose restrictions on the territories within which the products may be sold.²⁵⁹⁰

However, the Supreme Court found that the restrictions on the distributors or wholesalers, although not justifiable, could not be regarded as a *per se* violation of the

²⁵⁸¹ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 365.

²⁵⁸² *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 375.

²⁵⁸³ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 376.

²⁵⁸⁴ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 376.

²⁵⁸⁵ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 376.

²⁵⁸⁶ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 378.

²⁵⁸⁷ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 366.

²⁵⁸⁸ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 379.

²⁵⁸⁹ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 379.

²⁵⁹⁰ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 379.

Sherman Act, in circumstances where there was no price fixing, but where there were mass merchandisers and the need for a franchise system to meet competition.²⁵⁹¹ The Supreme Court also found that Schwinn's franchise system did not constitute "*an unreasonable restraint of trade*", especially in circumstances where Schwinn retained ownership of the products and the dealers were similar to the manufacturer's agents or salesmen.²⁵⁹²

In respect of small business, Schwinn submitted that its distribution model was to enable small and independent businesses to compete more effectively in the market.²⁵⁹³ In this regard, the Supreme Court found that a rule that would *per se* prohibit all vertical restrictions and franchising models, that designate specific distributors or retailers of a manufacturer that retains the ownership of his products, "*might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising 'through independent dealers, and it might sharply accelerate the trend towards vertical integration of the distribution process*".²⁵⁹⁴

In this case, Justice Stewart delivered a separate judgment, from Justice Fortas' main judgment, where he discussed the justifications for Schwinn's franchising policy. He confirmed that in *Brown Shoe Co. v. US*, the Supreme Court "recognised Congress' concern with the disappearance of the small independent merchant in the face of competition from vertically integrated giants."²⁵⁹⁵ In acknowledging the benefits of the franchise system for small businesses, Justice Stewart remarked that "*franchising promises to provide the independent merchant with the means to become an efficient and effective competitor of large integrated firms*".²⁵⁹⁶ He further mentioned the case of *Susser v. Carvel Corp.*,²⁵⁹⁷ in which it was found that the franchise system enables numerous groups of individuals to form small businesses to compete against large corporations instead of being mere employees and stated, "*Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition*

²⁵⁹¹ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 381.

²⁵⁹² *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 381.

²⁵⁹³ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 374.

²⁵⁹⁴ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 380.

²⁵⁹⁵ Own emphasis. *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 386.

²⁵⁹⁶ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 386.

²⁵⁹⁷ *Susser v. Carvel Corp.*, 381 US 125 (1965), see fn 8 of *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 387.

and force ‘suppliers to abandon franchising and integrate forward to the detriment of small business’.”²⁵⁹⁸

Justice Stewart also remarked that vertical integration might hamper the growth of small businesses.²⁵⁹⁹

4.1.6.4.1 Relevance of this case to the thesis

The relevance of this case is that franchisor may impose restrictions on their franchisees, but as long as such restrictions are reasonable. Further distributors and retailers of a franchisor should be allowed to sell wherever and to whomever they wish to sell. Restriction on territories would be regarded as per se contravention of the Sherman Act, especially where the manufacturer no longer owns the goods. The restrictions would, however, not be regarded as a per se violation if there is no price fixing and if the restrictions are necessary for the franchise system to meet competition. Accordingly, the franchise system may be good to enable small businesses to compete against large companies.

4.1.6.5 *Continental T. V., Inc., et al., v GTE Sylvania Inc.*

In this case,²⁶⁰⁰ Continental TV Inc (“Continental”) complained that GTE Sylvania Inc (“Sylvania”), a manufacturer of television sets, contravened section 1 of the Sherman Act. Continental alleged that Sylvania limited the number of retail franchisees in a specific area and required its franchisees to sell Sylvania’s products only from the territories that had been allocated to them.²⁶⁰¹ Continental, therefore, contended that the limitation on location or territories was unlawful.

The District Court, relying on the judgment in *US v Arnold Schwinn & Co* (1967) as discussed above,²⁶⁰² found that Sylvania’s conduct was a *per se* contravention of section 1 of the Sherman Act. This was in circumstances where Sylvania had concluded an agreement with its franchised retailers restricting the location from which the franchised retailers were allowed to resell Sylvania’s products.²⁶⁰³

²⁵⁹⁸ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 387.

²⁵⁹⁹ *United States v. Arnold, Schwinn & (and) Co. et al.* (1967) 394.

²⁶⁰⁰ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.*, 433 U.S. 36, 71 (1977).

²⁶⁰¹ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 36.

²⁶⁰² See above 4.1.6.4 *United States v. Arnold, Schwinn & (and) Co. et al.*

²⁶⁰³ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 36.

The Court of Appeals for the Ninth Circuit (the Circuit Court), however, dismissed the District Court's decision and found that Sylvania's conduct had "*less potential for competitive harm*" than the unlawful restrictive conduct in *Schwinn*.²⁶⁰⁴ The Circuit Court found that the conduct had to be assessed under the *rule of reason*,²⁶⁰⁵ and not as a *per se* violation.²⁶⁰⁶ The Circuit Court overruled "the *per se* rule stated in *Schwinn*."²⁶⁰⁷

In particular, the Circuit Court seemed to recognise the special treatment of small businesses, especially in the context of franchised business. It stated, "*We also note that per se rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen*."²⁶⁰⁸ The Circuit Court therefore seemed to favour a franchise system, where small independent businesses may be formed and participate in the market, as opposed to a vertical integration of the franchisor's own business.²⁶⁰⁹

4.1.6.5.1 Relevance of this case for the thesis

The relevance of the *Sylvania* case for small businesses is the Circuit Court's interpretation of the *per se* rule as stated in the *Schwinn* case. In *Schwinn*, the Supreme Court considered the fact that the distributors and retailers on which the territorial restriction was imposed, were small independent dealers. The Supreme Court in *Schwinn*, therefore, found that the territorial restriction in respect of products to which Schwinn retained ownership and risk was found not to constitute "*an unreasonable restraint of trade*." This was because the franchisees were small firms, and the franchise system enabled Schwinn's outlets to compete with other giant retailers in the market. However, the Supreme Court in *Schwinn* found that the territorial restriction in respect of products on which Schwinn no longer retained ownership or risk, was found to be a *per se* violation. This stance appeared to have

²⁶⁰⁴ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 36.

²⁶⁰⁵ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 36.

²⁶⁰⁶ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 37.

²⁶⁰⁷ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 58.

²⁶⁰⁸ Own emphasis. *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 57, fn 26.

²⁶⁰⁹ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 57-58.

been taken because the restriction was imposed on small businesses. Accordingly, in *Schwinn*, there seems to have been some special consideration of the fact that the victims were small businesses.

In *Sylvania*, the Circuit Court did, however, not consider that the affected parties were small businesses. The Circuit Court decided to use the rule of reason standard in the assessment of vertical restrictions. In passing, though, it acknowledged the special treatment of small businesses in the application and interpretation of antitrust law, especially where the franchise system may be regarded as an avenue through which small independent businesses may be formed as opposed to a perpetuation of vertical integration of large firms.²⁶¹⁰

The relevance of this case is, therefore, the treatment of SMEs in the context of franchise. The court found that the franchise system worked to the benefit of SMEs, and finding restriction imposed by the franchisor as a per se restriction could work to the detriment of SMEs. This decision indicates that the franchise system may actually be used by SMEs to compete against large businesses, as opposed to vertical integration by large firm which can eliminate small independent businesses.

4.1.6.6 *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* (2004)²⁶¹¹

In a private antitrust case,²⁶¹² *Trinko, LLP* (“Trinko”) accused *Verizon Communications Inc.* (“Verizon”) of, amongst others, disrupting the telecommunication services of its

²⁶¹⁰ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 57, fn 26.

²⁶¹¹ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 US 398, 418 (2004).

²⁶¹² Private antitrust action is brought by a private party against a firm for alleged contravention of antitrust legislation. Private parties generally institute private antitrust action, as victims of antitrust violation in order to claim damages and recover their losses from the infringer. However, private action may also be instituted to confirm that a firm has contravened antitrust law, without the FTC or DOJ's finding of an antitrust infringement. Public antitrust action is one brought by the FTC or the DOJ (the Antitrust Division), as part of their enforcement of antitrust legislation to ensure compliance with antitrust laws, punish and deter anti-competitive conduct and protect the public from anti-competitive harm. See OECD “Relationship between public and private antitrust enforcement – United States” (15 June 2015) OECD Directorate for Financial and Enterprise Affairs Competition Committee available at <https://www.justice.gov/media/818666/dl?inline> (accessed on 21 December 2023). Section 7 of the Sherman Act authorises any person affected by an infringement of the Act to institute proceedings and claim treble damages: “Any person who shall be injured, in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and

competitors in order to discourage customers from dealing with Verizon's competitors.²⁶¹³ Verizon owned elements of the local loop, which were essential input for its competitors in rendering telecommunication services. Trinko alleged that this conduct contravened section 2 of the Sherman Act. In terms of the Telecommunications Act of 1996,²⁶¹⁴ Verizon was required to provide access to operations support systems (OSS) to its competitors to enable them to fulfil customers' orders.²⁶¹⁵ Trinko alleged that Verizon did not comply with that obligation.²⁶¹⁶ The Supreme Court, however, found that Verizon's alleged breach of its duty to share its network with competitors did not contravene section 2 of the Sherman Act.²⁶¹⁷ Fox and Bazenov²⁶¹⁸ report that the State of New York and other states, appearing as "friends of the Court" (*amici curiae*), noted that Verizon's ownership of the local loop gave it "*power of life or death over its rivals*."²⁶¹⁹ Bell Atlantic, Verizon's predecessor, had apparently threatened its competitors with "*death by a thousand cuts*".²⁶²⁰ The Supreme Court found that monopoly power could not necessarily be regarded as unlawful, in that monopoly pricing may actually produce innovation and economic growth.²⁶²¹ In this regard, the Court stated, "[T]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."²⁶²² The Court held that to promote

the costs of suit, including a reasonable attorney's fee ." See also sections 4 and 16 of the Clayton Act of 1914, 38 Stat. 731, as amended 15 U. S. C. §§ 15, 26.

²⁶¹³ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 398.

²⁶¹⁴ 47 U.S.C. s251(c); *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 398.

²⁶¹⁵ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 398.

²⁶¹⁶ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 398.

²⁶¹⁷ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 398.

²⁶¹⁸ Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021 (unpublished article at the time of writing this section – 18 May 2022) 15.

²⁶¹⁹ Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021 (unpublished article at the time of writing this section – 18 May 2022) 15. See also *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 414.

²⁶²⁰ Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021 (unpublished article at the time of writing this section – 18 May 2022) 15. See also *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 414.

²⁶²¹ Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021 (unpublished article at the time of writing this section – 18 May 2022) 16, fn 49 referring to p407 of the Verizon judgement.

²⁶²² *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (2004) 407.

innovation, monopoly power would only be regarded as unlawful if it was anti-competitive.²⁶²³

In its decision, the Court considered the *Aspen Skiing* case,²⁶²⁴ where the Supreme Court had upheld a Jury's finding for the plaintiff. In *Aspen Skiing*, the Court stated that "*the Jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition ... over the long run by harming its smaller competitor.*"²⁶²⁵ In *Aspen Skiing*, the Court found that that Aspen had accepted to forfeit its short-term benefits to achieve long-term competitive harm, especially harming its smaller competitors.²⁶²⁶

However, the Court in *Verizon* found that "*the refusal to deal alleged in the present case does not fit within the limited exception recognised in Aspen Skiing.*"²⁶²⁷ In alluding to the paradigm that competition law protects competition and not competitors, the Court stated that it did not believe that the *Verizon* case was an exception to the view that competition law is not about helping competitors.²⁶²⁸

4.1.6.6.1 Relevance of this case to this thesis

The *Verizon* judgement is a confirmation of the US courts' position that the enforcement of antitrust law is about promoting competition and not protecting competitors. As pointed out, the case law that suggested that harm to small players may have been a consideration in determining whether the conduct was anti-competitive was found not to be applicable in this specific case.²⁶²⁹

4.1.6.7 Woodman's Food Market v Clorox Co. & Clorox Sales

In this private case,²⁶³⁰ Woodman's Food Market ("Woodman") accused the Clorox Sales Company and the Clorox Company ("Clorox") of discriminating between wholesale discount outlets (discount warehouses) and ordinary grocery stores in

²⁶²³ *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* (2004) 407.

²⁶²⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585, 601 (1985).

²⁶²⁵ Own emphasis. *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* (2004) 409.

²⁶²⁶ *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* (2004) 409.

²⁶²⁷ *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* (2004) 409.

²⁶²⁸ *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* (2004) 411.

²⁶²⁹ *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP* (2004) 409-410.

²⁶³⁰ *Woodman's Food Market, Inc. v. Clorox Co.* 833 F.3d 743 (7th Cir. 2016); See also United States Court of Appeals, Seventh Circuit. *Woodman's Food Market, Inc., Plaintiff–Appellee, v. Clorox Company and Clorox Sales Company, Defendants–Appellants.* No. 15–3001. Decided: August 12, 2016, available at <https://caselaw.findlaw.com/us-7th-circuit/1746042.html> (accessed on 19 May 2022).

alleged contravention of sub-section 2(e) of the *Robinson-Patman Act* (which is found in section 13(e) of 15 U.S. Code § 13 - *Discrimination in price, services, or facilities*).²⁶³¹

Clorox was allegedly selling its largest containers or packs of consumer goods only to discount warehouses, whilst selling small packages to ordinary local grocery stores, which included Woodman. The large packages were cheaper than the small units of the same goods.²⁶³²

Woodman alleged that Clorox's supply of large packs only to discount wholesalers constituted promotional services, and its refusal to make the same offer to ordinary local grocery stores, like Woodman, constituted price discrimination in contravention of sub-sections 2(d) and (e) of the *Robinson-Patman Act*²⁶³³ (sections 13(d)²⁶³⁴ and (e) of 15 U.S. Code § 13). The US Court of Appeals, 7th Circuit (the Circuit Court) in assessing the case (decided on 12 August 2016), remarked that the Robinson-Patman Act's "*fit with antitrust policy is awkward, as it was principally designed to protect small businesses, but the Supreme Court has told us that the Act should not be understood as an exception from the consumer-welfare norm that animates the antitrust laws.*"²⁶³⁵

The Circuit Court further noted the US Supreme Court's renowned reminder that "*the antitrust laws protect competition, not competitors.*"²⁶³⁶ The Circuit Court, therefore,

²⁶³¹ Sub-section 2(e) of the *Robinson-Patman Act* of 1936, 49 Stat. 1526 et seq. (also found in 15 U.S.C. §13(e)). This is in the US Code Title 15: Commerce and Trade, Chapter 1, Monopolies and Combinations in Restraint of Trade, § 13 - Discrimination in price, services, or facilities). It stipulates: "*it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.*" Available at <https://www.law.cornell.edu/uscode/text/15/13> (accessed on 21 December 2023).

²⁶³² *Woodman's Food Market, Inc. v Clorox Company and Clorox Sales Company* (2016).

²⁶³³ In a nutshell, in terms of section 2(d) and (e) of the Robinson-Patman Act, price discrimination through the offer of different promotional "services or facilities" to the same purchasers is prohibited.

²⁶³⁴ Section 2(d) of the *Robinson-Patman Act* of 1936 49 Stat. 1526 et seq., 15 U. S. C. §§ 13(d) stipulates: "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." Available at <https://www.law.cornell.edu/uscode/text/15/13> (accessed on 21 December 2023).

²⁶³⁵ Own emphasis. *Woodman's Food Market, Inc. v Clorox Company and Clorox Sales Company* (2016).

²⁶³⁶ *Brown Shoe Co., Inc. v. United States* (1962) 344; *Atlantic Richfield v USA Petroleum*, 495 U.S. 328 (1990), 338.

interpreted sections 2(d) and (e) of the *Robinson-Patman Act* (sections 13(d) and (e) of 15 U.S. Code § 13) in the light of the view that antitrust laws are not aimed at protecting competitors.²⁶³⁷ The Circuit Court found that Clorox's refusal to sell large packages of its goods to Woodman did not contravene section 2(e) of the Robinson-Patman Act (sections 13(e) of 15 U.S. Code § 13), in that Clorox's "large packs" did not amount to "*promotional services or facilities*" and its failure to offer these large packs to all its purchasers did not contravene section 2(e) of the Robinson-Patman Act (sections 13(e) of 15 U.S. Code § 13). The Circuit Court stated that "*size alone is not enough to constitute a promotional service or facility for purposes of subsection 13(e); any discount that goes along with size must be analysed under subsection 13(a); and the convenience of the larger size is not a promotional service or facility.*"

The Supreme Court subsequently declined to hear an appeal against the Circuit Court.²⁶³⁸ The Circuit Court's decision, therefore, stands.²⁶³⁹

4.1.6.7.1 Relevance of this case for this thesis

Notably, the relevance of this case for the treatment of small businesses under US antitrust law is that the fact that small businesses may have been affected by Clorox's conduct, did *not* constitute a special factor to be considered in assessing the alleged conduct. The Act was interpreted with the same technical rigidity and consideration of the "*protect competition, and not competitors*" paradigm, as applied in antitrust cases, post the 1970s.

4.1.7 Executive Order on Promoting Competition in the American Economy (2021)

As of 2021, the US Administration has indicated its intention to pay more attention to the "public interest" side of antitrust law by considering, amongst others, the protection of small business interests as one of the areas that antitrust agencies should consider. In this regard, on 9 July 2021, US President Mr Joseph Biden Jr issued an *Executive*

²⁶³⁷ *Woodman's Food Market, Inc. v Clorox Company and Clorox Sales Company* (2016).

²⁶³⁸ "Supreme Court Declines to hear Seventh Circuit case holding that bulk packaging does not constitute a promotional service under the Robinson-Patman Act" (8 March 2017). Available at <https://www.klgates.com/Supreme-Court-Declines-to-Hear-Seventh-Circuit-Case-Holding-That-Bulk-Packaging-Does-Not-Constitute-a-Promotional-Service-Under-the-Robinson-Patman-Act-03-08-2017> (accessed on 20 May 2022).

²⁶³⁹ *Ibid.*

Order on Promoting Competition in the American Economy (“The Executive Order”).²⁶⁴⁰

The *Executive Order* confirms the antitrust policy that the Biden administration intends to enforce, namely, to combat excessive market concentration; abuse of market power; cartels; and anti-competitive mergers. It, therefore, sets out the course of action that the Biden Administration intends to follow to enhance competition in the US economy. It starts by acknowledging that the US economy is founded on the principle of a “*fair, open and competitive marketplace*.” On this point, it identifies small businesses as one of the important players in the economy that requires a competitive marketplace to be able to effectively participate in the economy. In this regard, the *Executive Order* acknowledges that excessive market concentration has threatened the development of, amongst others, small businesses.²⁶⁴¹

As stated in the *Executive Order*, the Biden Administration recognises the importance of small businesses in the economy and that small businesses’ welfare depends on an open and competitive market. It also recognises that there has been a weakening of competition and a widening of racial, income and wealth inequality over the last few decades, which made several groups, including small businesses, suffer.²⁶⁴² The *Executive Order*, therefore, specifically recognises the place of small businesses in antitrust.

To emphasize this important development in the approach to US antitrust enforcement and its approach to dealing with small businesses in the context of antitrust law, some of the relevant extracts of the *Executive Order* acknowledging the importance of an open and competitive economy for the safeguarding of small businesses’ interests, are highlighted below:

- “*A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic*

²⁶⁴⁰ Executive Order on Promoting Competition in the American Economy (July 9, 2021) Presidential Actions. Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed on 20 May 2022); Administration of Joseph R. Biden, Jr. *Executive Order 14036 - Promoting Competition in the American Economy* (9 July 2021), The White House. Available at <https://www.govinfo.gov/content/pkg/DCPD-202100578/pdf/DCPD-202100578.pdf> (accessed on 22 December 2023).

²⁶⁴¹ Section 1 of the Executive Order 1.

²⁶⁴² Section 1 of the Executive Order 1.

*economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.*²⁶⁴³

- *“The American promise of a broad and sustained prosperity depends on an open and competitive economy. (...) “For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home income, which they can reinvest in their enterprises.”²⁶⁴⁴*
- *“Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy, and widening racial, income, and wealth inequality. Federal government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price.”²⁶⁴⁵*

The *Executive Order* further points out that the Biden Administration recognises the importance of “safeguarding” small businesses’ interests in the economy. This is especially true in the information technology sector, where the *Executive Order* notes that certain dominant internet platforms use their market power to exclude small entrants that rely on these platforms to conduct their business and survive in the market.²⁶⁴⁶ The *Executive order* reaffirms the US policy that the increasing power of foreign monopolies and cartels is addressed not by tolerating domestic monopolies,

²⁶⁴³ Own emphasis. Executive Order on Promoting Competition in the American Economy (July 9, 2021) Presidential Actions. At section 1: Policy. Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed on 20 May 2022).

²⁶⁴⁴ Executive Order on Promoting Competition in the American Economy (July 9, 2021) Presidential Actions. At section 1: Policy. Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed on 20 May 2022).

²⁶⁴⁵ Own emphasis. Executive Order on Promoting Competition in the American Economy (July 9, 2021) Presidential Actions. At section 1: Policy. Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed on 20 May 2022).

²⁶⁴⁶ Section 1 of the Executive Order: Policy, 1. The Executive Order also stated that: “We must act now to reverse these dangerous trends, which constrain the growth and dynamism of our economy, impair the creation of high-quality jobs, and threaten America’s economic standing in the world (...) It is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.” Section 1 of the Executive Order 2.

but by encouraging competition and innovation by small and large companies, locally and globally.²⁶⁴⁷

The *Executive Order* sets out, amongst others, activities that can be done to enhance small business competitiveness in the economy under the US antitrust law, as envisaged by the Biden administration. In this regard, the *Executive Order* enjoins the heads of all agencies to use their powers to advance the policies outlined in section 1 of the *Executive Order*.²⁶⁴⁸ This includes enhancing small business competitiveness through the agencies' procurement and other spending.²⁶⁴⁹ In the agricultural sector, for example, the Secretary of Agriculture is required to improve farmers' and smaller food processors' access to retail markets by reporting²⁶⁵⁰ on the effect of concentration and practices in the food retail sector that may infringe antitrust laws,²⁶⁵¹ and on other support that may improve local and regional food enterprises' access to retail markets.²⁶⁵² In order to protect the beer, wine and spirit market and improve small, independent and new businesses' access to this market, the *Executive Order* requires the relevant agencies²⁶⁵³ to assess the market structure, competition conditions and any threats to competition and barriers to entry. This includes assessing any anti-competitive conduct in this market that may prevent small businesses from distributing their products.²⁶⁵⁴ It also includes reducing any barriers that prevent smaller and independent brewers, winemakers, and distilleries from accessing the market.²⁶⁵⁵

4.1.7.1 Hovenkamp's analysis of the *Executive Order*

In an analysis of the *Executive Order*, Hovenkamp observes that as per general antitrust policy, the *Executive Order* raises concerns about market power or the ability to profit from charging high prices.²⁶⁵⁶ However, it does not frown upon the size of large firms or low prices that may injure small businesses.²⁶⁵⁷ He remarks that as much

²⁶⁴⁷ Section 1 of the Executive Order: Policy, 2.

²⁶⁴⁸ Section 5 of the Executive Order: Further Agency Responsibilities, 5.

²⁶⁴⁹ Section 5(a)(ii) of the Executive Order: Further Agency Responsibilities, 5.

²⁶⁵⁰ This is done in consultation with the Chair of the FTC and reporting to the Chair of the White House Competition Council.

²⁶⁵¹ The FTC Act of 1914, the Robinson-Patman Act of 1936.

²⁶⁵² Section 5(i)(iv) of the Executive Order: Further Agency Responsibilities 8.

²⁶⁵³ The Secretary of the Treasury, in consultation with the Attorney General and the Chair of the FTC.

²⁶⁵⁴ Section 5(j)(i) of the Executive Order: Further Agency Responsibilities 8.

²⁶⁵⁵ Section 5(k)(iii) of the Executive Order: Further Agency Responsibilities 8.

²⁶⁵⁶ **Hovenkamp H** "President Biden's Executive Order on Competition: An Antitrust Analysis" (2022) *Arizona Law Review* 386.

²⁶⁵⁷ **Hovenkamp H** "President Biden's Executive Order on Competition: An Antitrust Analysis" (2022) *Arizona Law Review* 386.

as large online platforms may harm small businesses competing with them, these giant platforms have also provided distribution channels for small businesses through which they can reach broader markets.²⁶⁵⁸ According to Hovenkamp, the war between big retail stores and small businesses a century ago was more harmful to small businesses than the present relationship between online retail platforms and small businesses.²⁶⁵⁹ Online platforms offer intermediary services through which small businesses can expand and reach markets or customers they could not reach before.²⁶⁶⁰ Nevertheless, Hovenkamp suggests that the FTC could assess large online sellers' behaviour to sort out the competitive from the anti-competitive conduct.²⁶⁶¹

Hovenkamp further remarks that the *Executive Order* does not name any of the dominant online platforms or question whether they possess substantial market power.²⁶⁶² It neither calls for breakups nor accuses any particular platform of anti-competitive practices.²⁶⁶³ The *Executive Order*, however, list several practices that should be investigated and pursued, namely “*serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.*”²⁶⁶⁴ In this regard, Hovenkamp observes that the acquisitions of smaller firms by large online platforms often seek to prevent the entry of small competitors into the market.²⁶⁶⁵

Nevertheless, Hovenkamp submits that Antitrust should not be used to punish firms or make them less productive to achieve some non-economic goal.²⁶⁶⁶ He further argues that antitrust should not protect one economic group, such as small business, over

²⁶⁵⁸ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 391.

²⁶⁵⁹ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 391.

²⁶⁶⁰ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 391.

²⁶⁶¹ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 392.

²⁶⁶² **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 392.

²⁶⁶³ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 392.

²⁶⁶⁴ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 392.

²⁶⁶⁵ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 397.

²⁶⁶⁶ **Hovenkamp H** “President Biden's Executive Order on Competition: An Antitrust Analysis” (2022) *Arizona Law Review* 416.

others, including consumers and labor.²⁶⁶⁷ Hovenkamp proposes an output-driven approach that would be tolerant to large firms, as long as they do not engage in anti-competitive practices.²⁶⁶⁸

4.1.7.2 Development following the *Executive Order*

It is submitted that recommendations of the *Executive Order* are already being implemented by the FTC. Notably, in 2023, the FTC investigated Southern Glazer's Wine & Spirits LLC (a distributor of wine and spirits products) for alleged price discrimination against retailers, in contravention of the Robinson-Patman Act.²⁶⁶⁹ As part of this investigation, the FTC issued a civil investigative demand (CID) against Total Wine in terms of section 20 of the FTC Act.²⁶⁷⁰ A CID is a form of subpoena that requires a company to produce documents in an investigation.²⁶⁷¹ It is compulsory in

²⁶⁶⁷ Hovenkamp H "President Biden's Executive Order on Competition: An Antitrust Analysis" (2022) *Arizona Law Review* 416.

²⁶⁶⁸ Hovenkamp H "President Biden's Executive Order on Competition: An Antitrust Analysis" (2022) *Arizona Law Review* 416.

²⁶⁶⁹ *Federal Trade Commission v Retail Services & Systems, Inc. d/b/a Total Wine & More*, Petition of the Federal Trade Commission for a show cause hearing and an order enforcing civil investigating demand, Case 1:23-mc-00028, Document filed 20 October 2023. Available at [Petition Of The Federal Trade Commission For A Show Cause Hearing and An Order Enforcing Civil Investigative Demand \(ftc.gov\)](https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-takes-total-wine-federal-court-enforce-compliance-antitrust-civil-investigative-demand) (accessed on 22 December 2023). The Federal Trade Commission "FTC Takes Total Wine to Federal Court to Enforce Compliance with Antitrust Civil Investigative Demand" (2023) available at: <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-takes-total-wine-federal-court-enforce-compliance-antitrust-civil-investigative-demand> (accessed on: 4 December 2023); for prohibited price discrimination in the US, see above 4.1.3.3 The Robinson-Patman Act.

²⁶⁷⁰ Section 20(c)(1) [15U.S.C.57b-1] of the FTC Act, states: "(c)(1) *Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)), or to antitrust violations, the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to submit such tangible things, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.*"

See Federal Trade Commission "Petition of the Federal Trade Commission for a Show Cause Hearing and an Order Enforcing Civil Investigative Demand" (2023) available at: https://www.ftc.gov/system/files/ftc_gov/pdf/total_wine_petition.pdf (accessed on: 1 December 2023).

²⁶⁷¹ Federal Trade Commission "Petition of the Federal Trade Commission for a Show Cause Hearing and an Order Enforcing Civil Investigative Demand" (2023) available at: https://www.ftc.gov/system/files/ftc_gov/pdf/total_wine_petition.pdf (accessed on: 1 December 2023). In terms of section 57b-1(a)(1) of 15US Code Subchapter I – Federal Trade Commission, a civil investigative demand (CID) is "any demand issued by the commission under subsection (c)(1)". Subsection (c)(1) states: "*Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), or to antitrust violations, the Commission may, before the institution of any proceedings under this subchapter, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to submit such tangible things, to file written reports or answers*

that a company must comply with such a request failing which the FTC may file for a court order to enforce the CID.²⁶⁷² The FTC stated that the *Southern Glazer's* case shows that the FTC takes allegations of price discrimination seriously.²⁶⁷³

In addition, in 2022, the FTC and DoJ's Antitrust Division launched a joint public inquiry to strengthen enforcement against anti-competitive mergers.²⁶⁷⁴ According to the FTC, evidence suggests that various industries in the US are becoming less competitive and more concentrated, which threatens small businesses, workers, entrepreneurs, and consumers.²⁶⁷⁵ Accordingly, the two agencies requested public comments on merger guidelines to investigate and prohibit anti-competitive mergers.²⁶⁷⁶ Further, in 2022, small business owners and employees have called on the FTC to deal with big tech company mergers that dominate their markets.²⁶⁷⁷ The small business owners urged the FTC and DoJ to implement antitrust frameworks against market monopoly, which undermines small businesses.²⁶⁷⁸ In this regard,

to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony." (own emphasis)

²⁶⁷² Federal Trade Commission "Petition of the Federal Trade Commission for a Show Cause Hearing and an Order Enforcing Civil Investigative Demand" (2023) available at: https://www.ftc.gov/system/files/ftc_gov/pdf/total_wine_petition.pdf (accessed on: 1 December 2023). Section 57b-1(e) of 15US Code states: "*Petition for enforcement - Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section. All process of any court to which application may be made as provided in this subsection may be served in any judicial district.*" (own emphasis)

²⁶⁷³ Federal Trade Commission "Petition of the Federal Trade Commission for a Show Cause Hearing and an Order Enforcing Civil Investigative Demand" (2023) available at: https://www.ftc.gov/system/files/ftc_gov/pdf/total_wine_petition.pdf (accessed on: 1 December 2023).

²⁶⁷⁴ The Federal Trade Commission "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers" (2022) available at: <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers> (accessed on: 4 December 2023).

²⁶⁷⁵ The Federal Trade Commission "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers" (2022) available at <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers> (accessed on: 4 December 2023).

²⁶⁷⁶ The Federal Trade Commission "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers" (2022) available at <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers> (accessed on: 4 December 2023).

²⁶⁷⁷ Haight "Small Business Owners Call on FTC, DoJ to Institute Antitrust Measures against Big Tech" available at <https://broadbandbreakfast.com/2022/05/small-business-owners-call-for-ftc-doj-to-institute-antitrust-measures-against-big-tech/> (accessed on: 4 December 2023).

²⁶⁷⁸ Haight "Small Business Owners Call on FTC, DoJ to Institute Antitrust Measures against Big Tech" available at <https://broadbandbreakfast.com/2022/05/small-business-owners-call-for-ftc-doj-to-institute-antitrust-measures-against-big-tech/> (accessed on: 4 December 2023).

antitrust agencies were encouraged to continue promoting competition and monitor big tech companies.²⁶⁷⁹

Lastly, in April 2023, Lina Khan,²⁶⁸⁰ noted that small businesses are negatively affected by non-compete clauses in contracts.²⁶⁸¹ Non-compete clauses are similar to restraint of trade clauses²⁶⁸² in an employment contract. They are considered to inhibit competition, especially the entry of small businesses in a market, as such clauses usually prevent an employee (who wishes to conduct his/her own business) from operating a business similar to his/her employer's business (i.e. a competing business) during a certain period, in the same sector or area in which his employer operates.²⁶⁸³ Khan reiterated the antitrust goal of maintaining fair competition in the US, including the effective participation of small businesses in the economy.²⁶⁸⁴ Khan undertook to engage with small businesses to "eradicate" non-compete clauses that impede the ability of small businesses to effectively participate in the market.²⁶⁸⁵ In April 2024, the FTC published the final non-compete clause rule.²⁶⁸⁶ The non-compete

²⁶⁷⁹ Haight "Small Business Owners Call on FTC, DoJ to Institute Antitrust Measures against Big Tech" available at <https://broadbandbreakfast.com/2022/05/small-business-owners-call-for-ftc-doj-to-institute-antitrust-measures-against-big-tech/> (accessed on: 4 December 2023).

²⁶⁸⁰ The FTC Chairperson at the time of drafting this part of the thesis (i.e. December 2023).

²⁶⁸¹ Khan "Remarks of Chair M. Khan as Prepared for Delivery Small Business Majority Event on Non-compete Agreements" (2023) available at https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-small-business-majority-event-noncompete.pdf (accessed on 5 December 2023).

²⁶⁸² Federal Trade Commission "Non-Compete Clause Rule" (2024) 16 CFR Part 910, available at https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf (accessed on 2 December 2024) 6. See also section 1 of the Sherman Act 26 Stat. 209, 15 U.S.C 1, which prohibits, among others, contracts in restraint of trade.

²⁶⁸³ This relates to the FTC's proposed rule to ban non-compete clauses in employment contracts. See Federal Trade Commission *Non-compete Clause Rule* (19 January 2023) 88 FR 3482, available at <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule> (accessed on 22 December 2023). See also Fact Sheet: FTC proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, available at https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf (accessed on 22 December 2023). In October 2023, it was reported that the FTC is likely to vote in April 2024 on its proposed rule to ban non-compete clauses in employment contracts. Available at [https://verdict.justia.com/2023/10/24/the-ftcs-initial-policy-case-for-banning-all-non-compete-clauses-in-employment-agreements#:~:text=The%20Federal%20Trade%20Commission%20\(FTC,American%20firms%20use%20such%20clauses](https://verdict.justia.com/2023/10/24/the-ftcs-initial-policy-case-for-banning-all-non-compete-clauses-in-employment-agreements#:~:text=The%20Federal%20Trade%20Commission%20(FTC,American%20firms%20use%20such%20clauses). (accessed on 22 December 2023).

²⁶⁸⁴ Khan "Remarks of Chair M. Khan as Prepared for Delivery Small Business Majority Event on Non-compete Agreements" (2023) available at https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-small-business-majority-event-noncompete.pdf (accessed on 5 December 2023).

²⁶⁸⁵ Khan "Remarks of Chair M. Khan as Prepared for Delivery Small Business Majority Event on Non-compete Agreements" (2023) available at https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-chair-khan-small-business-majority-event-noncompete.pdf (accessed on 5 December 2023).

²⁶⁸⁶ Federal Trade Commission "FTC Announces Rule Banning Noncompetes" (23 April 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> (accessed on 2 December 2024).

clause rule has been issued in terms of sections 5 and 6(g) of the FTC Act.²⁶⁸⁷ The rule provides that the conclusion of non-compete clauses by any person with workers is an unfair method of competition and, thus, a contravention of section 5 of the FTC Act.²⁶⁸⁸ The final non-compete rule provides that existing non-complete clauses concerning senior executives can remain in force.²⁶⁸⁹

4.1.8 Conclusion

From the discussion above, it is evident that there is now a realisation in the US to rethink the way antitrust law is being enforced, especially against big businesses. At least since the 1970s, the Chicago School of thought has prevailed to favour an interpretation of the antitrust goal to protect consumer welfare and efficiencies, where the US government will only intervene when prices go up and there is direct evidence of harm to consumer welfare.²⁶⁹⁰ However, the Chicago School of thought is now under severe criticism.²⁶⁹¹ As pointed out by Kovacic, there are views that believe that the Chicago School's interpretation of the antitrust goal should be repudiated.²⁶⁹²

As can be seen from the above, the current US Administration is more inclined to reconsider the antitrust goal of protecting small business interests,²⁶⁹³ or at least the consideration of public interest factors that would include protection of small businesses. However, whether small businesses will receive more protection in relation to antitrust law in the US will depend on whether the US courts will apply this

²⁶⁸⁷ Section 5 of the FTC Act 38 STAT. 717 (1914) states: "(a)(1) *Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*" Section 6(g) of the FTC Act states: "*That the commission shall also have power- (...) (g) From time to time to classify corporations and (except as provided in section 18(a)(2) of this Act) to make rules and regulations for the purpose of carrying out the provisions of this Act.*"

²⁶⁸⁸ Federal Trade Commission "Non-Compete Clause Rule" (2024) 16 CFR Part 910, available at https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf (accessed on 2 December 2024) 1.

²⁶⁸⁹ Federal Trade Commission "Non-Compete Clause Rule" (2024) 16 CFR Part 910, available at https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf (accessed on 2 December 2024).

²⁶⁹⁰ Kovacic "The Chicago obsession in the interpretation of US antitrust history" (2020) *The University of Chicago Law Review*, vol. 87, no.2, 459-494, available at <https://www.jstor.org/stable/10.2307/26892418> (accessed on 4 July 2022).

²⁶⁹¹ Kovacic "The Chicago obsession in the interpretation of US antitrust history" (2020) *The University of Chicago Law Review*, vol. 87, no.2, 459-494, at 462, available at <https://www.jstor.org/stable/10.2307/26892418> (accessed on 4 July 2022).

²⁶⁹² Kovacic "The Chicago obsession in the interpretation of US antitrust history" (2020) *The University of Chicago Law Review*, vol. 87, no.2, 459-494, at 463, available at <https://www.jstor.org/stable/10.2307/26892418> (accessed on 4 July 2022).

²⁶⁹³ See above, para 4.1.4 US Antitrust Goals; see above para 4.1.4.1 The Antitrust Goal of the Clayton, FTC, and Robinson-Patman Acts; see also Fox and Bazemov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021, at 16.

ideology in their court decisions. Nevertheless, given that the Biden Administration confirmed this intention in an *Executive Order*, it is unlikely to be ignored.

4.2 European Competition Law – Treatment of SMEs

4.2.1 Introduction

This section considers the treatment of SMEs under the European Union (EU) competition law. For this purpose, this section provides a definition of SMEs in terms of the EU Commission. It then briefly sets out the history of the EU competition law, in particular, the evolution of the Treaties that deal with EU competition law - from the *Treaty of Rome* in 1957, establishing the European Economic Community, to the current *Treaty on the Functioning of the European Union* (TFEU) in 2009. This comparative section also considers the objectives of the EU competition law. This is to establish whether (like in South Africa) the promotion of SMEs is regarded as an objective of competition law. An objective that is to allow SMEs to compete effectively without being constrained by anti-competitive conduct. This is also expressed by the recognition that consideration of competition law objectives assists in determining the priority areas of competition law enforcement.²⁶⁹⁴ In this part, the thesis notes the scholarly views on the objectives of EU competition law and whether the protection of SMEs to ensure their participation in the economy can be regarded as one of them. The thesis also notes that the ultimate goal of EU competition law is to ensure that competition in the EU market is maintained. It analyses Articles 101 and 102 of the TFEU (previously articles 81 and 82 of the *Treaty of Rome*) which specifically deal with EU competition law. It then considers EU competition rules affecting SMEs. There are block exemption regulations that could benefit SMEs by exempting them from competition law enforcement because of the minimal impact their conduct might have on the EU market. In this regard, this chapter discusses the EU *de minimis* rule (contained in the EU *De Minimis Notice*),²⁶⁹⁵ which applies to agreements (between firms) that do not have an appreciable effect on competition or trade between EU

²⁶⁹⁴ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 370.

²⁶⁹⁵ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022).

member states. The study uses the terms “*De Minimis Notice*” and “*de minimis rule*” interchangeably to refer to the notion in the *EU De Minimis Notice* that agreements that do not appreciably restrict competition or trade between EU members are exempt from competition scrutiny, except hardcore cartels. Although it is acknowledged that the *de minimis rule* does not exempt SMEs from competition law scrutiny, as indicated in this chapter, the European Commission (EC) has previously recognised that agreements between SMEs (whether in a horizontal or vertical relationship)²⁶⁹⁶ would likely fall under the *de minimis rule* issued by the EC.²⁶⁹⁷ The chapter further considers the 2004 EC’s *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (“*EC Guidelines on the effect on trade*”),²⁶⁹⁸ as SMEs’ agreements or practices are generally unlikely to have a significant effect on the trade between EU member states. In addition, this chapter considers the treatment of SMEs under the competition law of various European Member States. There are generally no provisions in the various EU countries’ competition legislation dealing specifically with SMEs. EU countries prohibit companies (or undertakings) from engaging in anti-competitive practices, irrespective of the size. However, some EU countries’ competition legislation provides for safe harbours, similar to the EU *de minimis rule*. In line with the focus of this thesis, the study also discusses several cases involving SMEs. This critical analysis indicates that the EU Commission and EU courts frown upon conduct that excludes the participation of SMEs in the EU market.

4.2.2 EU definition of SMEs

The EU has adopted a standard definition of SMEs in its *Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises* (“*EU Commission Recommendation on SME definition*”).²⁶⁹⁹ The

²⁶⁹⁶ See above Chapter 3: The treatment of SMEs under the South African Competition Act, para 3.5.3.1 Restrictive horizontal practices, para 3.5.3.2 Restrictive vertical practices.

²⁶⁹⁷ European Commission Notice *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] 2004/C OJ C 101/81, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁶⁹⁸ European Commission Notice *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] 2004/C OJ C 101/81, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) paras 44- 57.

²⁶⁹⁹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023).

standard definition aims to enhance the consistency and efficiency of policies that impact SMEs and minimize the potential for distortion of competition.²⁷⁰⁰

The *EU Commission Recommendation on SME definition* defines an SME²⁷⁰¹ as any entity conducting an economic activity, irrespective of its legal form, including self-employed persons, family businesses and partnerships or associations regularly conducting an economic activity.²⁷⁰² Such entity employs less than 250 persons and has an annual turnover of less than EUR 50 million and/or an annual balance sheet total of less than EUR 43 million.²⁷⁰³ In particular, a small enterprise is defined as an enterprise that employs less than 50 persons and whose annual turnover and/or balance sheet total is not more than EUR 10 million.²⁷⁰⁴ A micro-enterprise is defined as an enterprise that employs less than 10 persons and whose annual turnover and/or balance sheet total is not more than EUR 2 million.²⁷⁰⁵

SMEs are, thus, defined by considering two main criteria, namely: (a) the staff number and (b) the financial criteria. The staff number criterion is also referred to as the “staff headcount criterion” and is considered to be the main consideration in determining whether an enterprise is an SME. The financial criterion indicates the scale, performance and competitive position of an enterprise.²⁷⁰⁶ It also includes the

²⁷⁰⁰ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 36, para 1.

²⁷⁰¹ The definition refers to micro, small and medium-sized enterprises.

²⁷⁰² Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Article 1.

²⁷⁰³ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Articles 1 and 2(1).

²⁷⁰⁴ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Article 2(2).

²⁷⁰⁵ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Article 2(3).

²⁷⁰⁶ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 36, para 4.

enterprise's turnover and the balance sheet total, reflecting the overall wealth of a business.²⁷⁰⁷

In determining whether an enterprise is an SME, and to remove from the category of SMEs groups of enterprises with economic power exceeding that of an SME, the EC further distinguishes between autonomous enterprises, partner enterprises and linked enterprises.²⁷⁰⁸ The determining factor is whether there is a holding of 25% or more of the capital or voting right, or exercise of dominant influence or control by an enterprise over another.²⁷⁰⁹ In addition, an enterprise in which 25% or more of the capital or voting rights are in the hands of public bodies will not be regarded as an SME.²⁷¹⁰

4.2.3 A brief history of EU Competition law

European Union (EU) Competition law was first introduced in the *Treaty of Rome* in 1957.²⁷¹¹ The *Treaty of Rome* (also known as the *EC Treaty*) comprised the *Treaty establishing the European Economic Community (EEC Treaty)*²⁷¹² and the *Treaty*

²⁷⁰⁷ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 36, para 4.

²⁷⁰⁸ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 37, para 9. An autonomous enterprise is neither a partner nor a linked enterprise. A partner enterprise is where there is an upstream enterprise which holds solely or jointly with a linked enterprise 25% or more of the capital or voting right of the downstream enterprise. A linked enterprise is where an enterprise has majority rights in another enterprise or exercises a dominant influence or control over the other enterprise. See Article 3. In terms of Article 3(4) of the Commission Recommendation of 6 May 2003: “an enterprise cannot be considered an SME if 25 % or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.” However, in terms of Article 2(2) of the Commission Recommendation of 6 May 2003, enterprises can be categorised as autonomous even if there is a holding of 25 % or more by certain categories of investors, such as universities or non-profit research centres, etc.

²⁷⁰⁹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 37, para 9.

²⁷¹⁰ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 40, Article 3(4).

²⁷¹¹ *Treaty of Rome* of 25 March 1957, available at https://aei.pitt.edu/37139/1/EEC_Treaty_1957.pdf (accessed on 16 January 2024); Caree *et al.* “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) 97, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

²⁷¹² *Treaty establishing the European Economic Community*, available at [EEC_Treaty_1957.pdf \(pitt.edu\)](https://aei.pitt.edu/37139/1/EEC_Treaty_1957.pdf) (accessed on 16 January 2024).

establishing the European Atomic Energy.²⁷¹³ In 1993, the *EEC Treaty* was renamed to the *Treaty establishing the European Community* (the EC)²⁷¹⁴ by the *Treaty on European Union* (also known as the *Treaty of Maastricht on the European Union*).²⁷¹⁵ In 2009, the *Treaty of Lisbon*²⁷¹⁶ came into effect and replaced the EC Treaty with the *Treaty on the Functioning of the European Union* (TFEU).²⁷¹⁷

European competition law is regulated and implemented by the European Commission (EC) in cooperation with the national competition authorities of the Member States of the European Union.²⁷¹⁸ In particular, within the EC, the Directorate-General for Competition (DG Comp) directly enforces competition law in the EU.²⁷¹⁹ The DG Comp takes decisions on mergers, antitrust and State aid matters.²⁷²⁰

²⁷¹³ *Consolidated version of Treaty establishing the European Atomic Energy* [2016] 2016/C OJ C 203/1, available at [CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:0203:FULL) (europa.eu) (accessed on 17 January 2024); Eurostat Statistics Explained “Glossary: Treaties of Rome”, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome or [Glossary: Treaties of Rome - Statistics Explained](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome_-_Statistics_Explained) (europa.eu) (accessed on 7 August 2022).

²⁷¹⁴ *Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community* [2002] 2002/C OJ 325/01, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2002:325:FULL> (accessed on 17 January 2024); Eurostat Statistics Explained “Glossary: Treaties of Rome”, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome or [Glossary: Treaties of Rome - Statistics Explained](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome_-_Statistics_Explained) (europa.eu) (accessed on 7 August 2022).

²⁷¹⁵ *Consolidated version of the Treaty on European Union* [2010] OJ C83/13. Available at [Consolidated version of the Treaty on European Union](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:0083:FULL) (europa.eu) (accessed on 16 January 2024).

²⁷¹⁶ *Treaty of Lisbon*, *Official Journal of the European Union* 2007/C 306/1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL> (accessed on 17 January 2024).

²⁷¹⁷ *Treaty on the Functioning of the European Union*, *Official Journal of the European Union* C202/1, available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016E/TXT (accessed on 17 January 2024); Eurostat Statistics Explained “Glossary: Treaties of Rome”, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome or [Glossary: Treaties of Rome - Statistics Explained](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome_-_Statistics_Explained) (europa.eu) (accessed on 7 August 2022).

²⁷¹⁸ DIRECTORATE-GENERAL / COMP Competition “This Commission department is responsible for EU policy on competition and for enforcing EU competition rules, in cooperation with national competition authorities”, available at https://ec.europa.eu/info/departments/competition_en#leadership (accessed on 12 November 2022); Caree *et al.* “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) 100, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

²⁷¹⁹ DIRECTORATE-GENERAL / COMP Competition “This Commission department is responsible for EU policy on competition and for enforcing EU competition rules, in cooperation with national competition authorities”, available at https://ec.europa.eu/info/departments/competition_en#leadership (accessed on 12 November 2022); Caree *et al.* “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) 100, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

²⁷²⁰ Caree *et al.* “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) 100, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

As pointed out by Caree *et al*, the European competition rules are found in Treaty Articles, the European Council's²⁷²¹ and the European Commission's Regulations, and European Commission's notices and guidelines (these notices and guidelines are not binding but are mere guidance).²⁷²² Articles 101 and 102 of the TFEU (discussed further below) currently deal with the EU competition policy.²⁷²³ They have replaced Articles 81 and 82 of the *Treaty of Rome*²⁷²⁴ which specifically dealt with anti-

²⁷²¹ The Council of the European Union is informally also known as "the Council" which amend and adopt laws, and coordinate policies. The Council is described as the EU institution that "negotiates and adopts EU laws, together with the European Parliament, based on proposals from the European Commission". See https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/council-european-union_en#:~:text=Together%20with%20the%20European%20Parliament,an%20EU%20body%20at%20all (accessed on 2 April 2024). The European Commission is described as the EU institution that, *inter alia*, proposes and implement laws in line with the objectives the EU Treaties. See European Commission "What the European Commission does in law", available at https://commission.europa.eu/about-european-commission/what-european-commission-does/law_en (accessed on 2 April 2024).

²⁷²² Caree *et al*. "European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions" (2010), available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022) 100.

²⁷²³ European Commission "Competition Policy – Antitrust", available at https://ec.europa.eu/competition-policy/antitrust_en (accessed on 18 June 2022).

²⁷²⁴ In Commission Regulation (EU) 330/2010 of 20 April 2010 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices* [2010] OJ L102/1, the EC stipulated that "With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate." Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330> (accessed on 20 January 2024). Article 81 of the EC Treaty (previously Article 85) prohibited agreements between firms, decisions by associations of firms or concerted practices which may affect trade between member states and prevent, restrict or distort competition within the common market. The prohibited conduct included fixing prices or trading conditions, market allocation, etc., which was outright prohibited. However, Article 81 would not apply to agreements that improved the production or distribution of goods, promoted technical or economic progress, and benefited consumers but did not restrict competition. Article 81 states: "1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings; - any decision or category of decisions by associations of undertakings; - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." EUROPA > European Commission > DG

competitive practices and sought to protect the competitive process in the market in order to promote consumer welfare.²⁷²⁵

Concerning small and medium-sized enterprises (SMEs), Carree *et al* indicate that “the Commission uses block exemption regulations concerning certain forms of economic conduct, as well as to small and medium-size enterprises.”²⁷²⁶ As will be discussed further below, the Commission uses the *de minimis* rule for cases involving agreements that do not have an appreciable (substantial) effect on competition or trade between Member States.²⁷²⁷ SMEs are more likely to fall under the *de minimis* rule, as SMEs often have low turnover and market share, which are unlikely to substantially affect competition or trade between member states.²⁷²⁸

4.2.4 Objectives of EU Competition Law

EU competition law has several objectives.²⁷²⁹ Some authors have debated whether EU competition law aims to protect consumer welfare or to achieve “an effective

Commission “Article 81 of EC Treaty (ex Article 85)”, available at [EU/Competition/Article 81 of the EC Treaty \(ex Article 85\) \(europa.eu\)](https://ec.europa.eu/competition/legislation/treaties/ec/art81_en.html) or https://ec.europa.eu/competition/legislation/treaties/ec/art81_en.html (accessed on 20 November 2022). Article 82 of the EC Treaty (previously article 86) prohibited the abuse by a firm of a dominant position within the common market. It stipulated: “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

EUROPA > European Commission > DG Competition “Article 82 of the EC Treaty (ex Article 86), available at [EU/Competition/Article 82 of the EC Treaty \(ex Article 86\) \(europa.eu\)](https://ec.europa.eu/competition/legislation/treaties/ec/art82_en.html) or [EU/Competition/Article 82 of the EC Treaty \(ex Article 86\) \(europa.eu\)](https://ec.europa.eu/competition/legislation/treaties/ec/art82_en.html) (accessed on 20 November 2022).

²⁷²⁵ Carree *et al*. “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) 101, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022). Article 81 applied to horizontal, vertical, licensing and joint venture agreements, whilst Article 82 applied to abuse of dominance.

²⁷²⁶ Carree *et al*. “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010), available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022) 102.

²⁷²⁷ Carree *et al*. “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) 102, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

²⁷²⁸ Fox and Bazenov “Antitrust and inequality: The history of (in)equality in competition law and its guide to the future” (2021) 38 – Draft article revised as of 9 September 2021.

²⁷²⁹ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 339.

competitive process".²⁷³⁰ Parret argues that protecting consumer welfare is the ultimate goal of competition, while "*the achievement of an effective competition process*" is an intermediary role.²⁷³¹ Fox, in comparing the US and EU competition law regimes, finds that the main goal of EU competition policy is the economic integration of EU member states.²⁷³²

Notably, the ultimate goal of the *EC Treaty*, in which EU Competition policy finds its origin, was "*economic welfare within a single market*".²⁷³³ In this regard, Article 2 of the *EC Treaty* set specific objectives, such as socio-economic, environmental, labour and developmental goals.²⁷³⁴ Article 3 of the *EC Treaty* confirmed, among other things, the establishment of a competition policy to implement the goals set out in Article 2.²⁷³⁵ In particular, Article 3(1)(g) of the Treaty stated that the European Community seeks to achieve, amongst others, "*a system ensuring that competition in the internal market is not distorted*".²⁷³⁶ As observed by Carree *et al*, the initial aim of EU competition law could, therefore, be interpreted as ensuring that there was no distortion of competition in the market, namely the maintenance of (effective) competition in the market.²⁷³⁷

²⁷³⁰ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 340.

²⁷³¹ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 340.

²⁷³² Fox "US and EU Competition Law: A Comparison" (1997) *Global Competition Policy*, available at https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf (accessed on 20 November 2022) 340.

²⁷³³ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 342.

²⁷³⁴ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 342.

²⁷³⁵ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 342.

²⁷³⁶ *Consolidated Version of the Treaty establishing the European Community*, OJ C325/33 (2002), Article 3(1)(g), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2002:325:FULL> (accessed on 13 May 2024); Carree *et al*. "European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions" (2010) 100, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

²⁷³⁷ Carree *et al*. "European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions" (2010) 100 available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

However, neither the *EC Treaty*, which initially introduced competition regulation in the EU market nor the *Treaty on the Functioning of the European Union (TFEU)*, which currently regulates EU competition law, expressly set out the objectives of EU competition law.²⁷³⁸ According to Parret, EU competition law has been interpreted by considering the goals set out in Articles 2 and 3 of the *EC Treaty*.²⁷³⁹

Parret reports that there is thus no standard view on the goals of EU competition policy.²⁷⁴⁰ In this regard, several scholars have different opinions on the goals of the EU competition policy.²⁷⁴¹ For example, Bishop and Walker have considered “*integration and economic*” goals as the EU competition policy’s goals.²⁷⁴² Motta has considered “*economic efficiency and European market integration*” as the main goals of EU competition policy, but he has also considered social and political objectives.²⁷⁴³ However, more recently (2024), Fumagalli and Motta have indicated that the ultimate objective of EU competition policy is consumer welfare.²⁷⁴⁴ In this regard, they believe that in tying and bundling cases, the Commission should be guided by the ultimate objective of protecting consumer welfare, and the concept of “restricting competition” should be interpreted as “harming consumers” instead of “harming rivals”.²⁷⁴⁵ They believe that to establish an exclusionary abuse, it should be shown that the conduct,

²⁷³⁸ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 343

²⁷³⁹ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 343-345.

²⁷⁴⁰ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 345.

²⁷⁴¹ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 345.

²⁷⁴² Bishop and Walker *Economics of EU competition law: Concepts, Application and Measurement* (London, Sweet & Maxwell, 1999), 5; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 345.

²⁷⁴³ Motta *Competition Policy, Theory and Practice* (2004) (Cambridge University Press) 15; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 346.

²⁷⁴⁴ Fumagalli and Motta “Economic principles for the enforcement of abuse of dominance provisions” (February 2024) BSE Working Paper 1431, Policy Report, 2.

²⁷⁴⁵ Fumagalli and Motta “Economic principles for the enforcement of abuse of dominance provisions” (February 2024) BSE Working Paper 1431, Policy Report, 5.

which excludes existing or potential competitors, ultimately harms consumer welfare.²⁷⁴⁶

Monti has argued that the protection of economic freedom, market integration and efficiency are the ultimate goals of EU competition policy, with economic freedom being the main objective.²⁷⁴⁷ Ahlborn and Padilla have identified fairness, welfare and efficiency, and market integration goals as the European Competition policy goals.²⁷⁴⁸ As mentioned above, Fox has also identified economic integration of EU member states as the primary objective of EU competition policy.²⁷⁴⁹ Jones and Sufrin supported this, by stating that “*the integration of the single market is an important aspect of EU competition law.*”²⁷⁵⁰ According to Parret, the promotion of market integration has always been the focus of EU competition law and is also assumed to be in the interests of consumers.²⁷⁵¹ An OECD study conducted in 2003, has also considered market integration as a public interest objective.²⁷⁵²

European competition law has further been described as protecting rivals’ opportunities, differentiating it from the US antitrust law that focuses on protecting consumer welfare.²⁷⁵³ However, economic efficiency and consumer welfare protection

²⁷⁴⁶ Fumagalli and Motta “Economic principles for the enforcement of abuse of dominance provisions” (February 2024) BSE Working Paper 1431, Policy Report, 9.

²⁷⁴⁷ Monti “Article 81 and Public Policy” (2002) *Common Market Law Review* Vol. 39, 1057.

Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 346.

²⁷⁴⁸ Ahlborn and Padilla “From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC competition law” in Ehlermann and Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (2008), 55; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 346.

²⁷⁴⁹ Fox “US and EU Competition Law: A Comparison” (1997) *Global Competition Policy*, available at https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf (accessed on 20 November 2022) 340.

²⁷⁵⁰ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1.

²⁷⁵¹ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 346 – 347.

²⁷⁵² OECD “The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency” (2003) *OECD Journal of Competition Law and Policy* Vol.5, 7, available at https://www.oecd-ilibrary.org/governance/the-objectives-of-competition-law-and-policy-and-the-optimal-design-of-a-competition-agency_clp-v5-art2-en (accessed on 23 September 2023); Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 347.

²⁷⁵³ De Smet “The Diametrically Opposed Principles of US and EU Antitrust Policy” (2008) *European Competition Law Review* 356; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal*, 348.

are recognised goals of EU competition policy.²⁷⁵⁴ Fox has also recognised that the EU competition law regime, like the US, seeks to promote consumers' interests and the free flow of goods in a competitive market.²⁷⁵⁵

Importantly, the protection of SMEs is also recognised as one of the goals of EU competition policy.²⁷⁵⁶ One of the competition regulations specifically protecting SMEs is the EU *De Minimis Notice*.²⁷⁵⁷ This is further discussed below.²⁷⁵⁸ However, SMEs are not exempt from competition rules against cartels.²⁷⁵⁹ Hard-core restraints are prohibited regardless of the size of the perpetrator.²⁷⁶⁰ Regarding conduct that requires a certain threshold to be met, for example, market share, the EU recognises that an SME may in some instances be dominant in a market, depending on how the market is defined.²⁷⁶¹

Some scholars have criticised the protection of SMEs as potentially conflicting with protecting economic welfare.²⁷⁶² However, Parret observes that SME protection may

²⁷⁵⁴ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 350.

²⁷⁵⁵ Fox "US and EU Competition Law: A Comparison" (1997) *Global Competition Policy*, 339 available at https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf (accessed on 20 November 2022).

²⁷⁵⁶ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

²⁷⁵⁷ See above 4.2.1 Introduction; European Commission "Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)" (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022); Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

²⁷⁵⁸ See 4.2.5.1 below.

²⁷⁵⁹ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

²⁷⁶⁰ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

²⁷⁶¹ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

²⁷⁶² Motta *Competition Policy, Theory and Practice* (Cambridge University Press, 2004), 15; Van den Bergh and Camesasca *European Competition Law and Economics: A Comparative Perspective* (2006) (London, Thomson Sweet & Maxwell, 2nd ed); Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

become the focus of public policy during a financial crisis.²⁷⁶³ Fox has also noted that EU competition law “*is concerned about competitive opportunities for small and medium-size firms, raising the economic level of worse-off nations, and general notions of ‘fairness’*.”²⁷⁶⁴

Other objectives of EU competition law include justice, fairness and non-discrimination.²⁷⁶⁵ Parret argues that “*fairness has been and still is one of the cornerstones of the European competition regime*.”²⁷⁶⁶ In this regard, fairness is linked to the principle of non-discrimination, which is supported by most legal systems.²⁷⁶⁷

It is further important to note that some authors recognise that there might be a risk in reconciling the different objectives of EU competition law, especially the possible lack of cohesion between promoting efficiency and protecting SMEs.²⁷⁶⁸ However, a proper determination of the goals of competition law is essential as it assists in determining the priority areas for enforcement.²⁷⁶⁹

Parret further observes that the EU seem to favour a “*compromise approach*” which “*harmonises the immediate consumer interests with the overall welfare of society by subordinating the consumer interest to the national interest, but only temporarily*.”²⁷⁷⁰ However, she concludes that approaching competition policy more as protecting consumer welfare than protecting free competition or competitors, has proven safer in

²⁷⁶³ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 354.

²⁷⁶⁴ Fox “US and EU Competition Law: A Comparison” (1997) *Global Competition Policy*, 340, available at https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf (accessed on 20 November 2022).

²⁷⁶⁵ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 354.

²⁷⁶⁶ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 355.

²⁷⁶⁷ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 355.

²⁷⁶⁸ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 370.

²⁷⁶⁹ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 370.

²⁷⁷⁰ Ahdar “Consumers, Redistribution of Income and the Purpose of Competition Law” (2002) *European Competition Law Review* Vol 23, Issue 7, 314-353, 341; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 375.

instances where the concept of free market underpinning the EU treaties is not well realised.²⁷⁷¹

4.2.5 EU Competition Legislation

4.2.5.1 *The Treaty on the Functioning of the European Union (TFEU)*

As indicated above,²⁷⁷² the *Treaty on the Functioning of the European Union (TFEU)* currently regulates European competition law.²⁷⁷³ In particular, Articles 101 and 102 of the *TFEU* deal with EU competition policy.²⁷⁷⁴

Article 101, which essentially replaces Article 81 of the *EC Treaty*,²⁷⁷⁵ prohibits agreements and concerted practices between two or more firms, and decisions by associations of firms, which may affect trade between EU Member States, and which may prevent, restrict or distort competition in the internal market.²⁷⁷⁶ Article 101 deals with both horizontal and vertical agreements.²⁷⁷⁷ Cartel activities are prohibited under Article 101.²⁷⁷⁸ In particular, Article 101 stipulates the following:

“1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

²⁷⁷¹ Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 376.

²⁷⁷² See para 4.2.2 A brief history of the EU Competition law.

²⁷⁷³ European Commission “Competition Policy – Antitrust”, available at https://ec.europa.eu/competition-policy/antitrust_en (accessed on 18 June 2022).

²⁷⁷⁴ European Commission “Competition Policy – Antitrust”, available at https://ec.europa.eu/competition-policy/antitrust_en (accessed on 18 June 2022).

²⁷⁷⁵ See above 4.2.3 A brief history of EU Competition law.

²⁷⁷⁶ European Commission “Competition Policy – Antitrust”, available at https://ec.europa.eu/competition-policy/antitrust_en (accessed on 18 June 2022).

²⁷⁷⁷ European Commission “Competition Policy – Antitrust Overview”, available at https://ec.europa.eu/competition-policy/antitrust/antitrust-overview_en (accessed on 18 June 2022). Horizontal agreements are those concluded between parties in a horizontal relationship, i.e. competitors. Vertical agreements are those concluded between parties in a vertical relationship, i.e. supplier – customer relationship or manufacturer – distributor relationship.

²⁷⁷⁸ European Commission “Competition Policy – Cartels”, available at https://ec.europa.eu/competition-policy/cartels_en (accessed on 18 June 2022).

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited under this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,*
- any decision or category of decisions by associations of undertakings,*
- any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”²⁷⁷⁹

²⁷⁷⁹ Consolidated version of the Treaty on the Functioning of the European Union – Part three: Union policies and internal actions – Title VII: Common rules on competition, taxation and approximation of laws – Chapter 1: Rules on competition – Section 1: Rules applying to undertakings – Article 101 (ex Article 81 TEC), *Official Journal* 115 , 09/05/2008 P. 0088 – 0089, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML> (accessed on 18 June 2022).

Article 102, which essentially has replaced Article 82 of the *EC Treaty*,²⁷⁸⁰ prohibits any abuse by a dominant firm of its dominant position in the internal market or any substantial part of it.²⁷⁸¹ In particular, Article 102 stipulates the following:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”*²⁷⁸²

National Competition Authorities (NCAs) can use the provisions of Articles 101 and 102 to enforce competition in their respective jurisdictions.²⁷⁸³

4.2.5.2 EC Merger Regulation

The *Council Regulation (EC) on the Control of Concentrations between Undertakings* (the EC Merger Regulation) regulates mergers in Europe.²⁷⁸⁴ In this regard, Article

²⁷⁸⁰ See above 4.2.3 A brief history of EU Competition law.

²⁷⁸¹ European Commission “Competition Policy – Antitrust”, available at https://ec.europa.eu/competition-policy/antitrust_en (accessed on 18 June 2022).

²⁷⁸² Consolidated version of the Treaty on the Functioning of the European Union – Part three: Union policies and internal actions – Title VII: Common rules on competition, taxation and approximation of laws – Chapter 1: Rules on competition – Section 1: Rules applying to undertakings – Article 102 (ex Article 82 TEC), *Official Journal* 115 , 09/05/2008 P. 0089 – 0089, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102> (accessed on 18 June 2022)

²⁷⁸³ European Commission “Competition Policy – Antitrust Overview”, available at https://ec.europa.eu/competition-policy/antitrust/antitrust-overview_en (accessed on 18 June 2022)

²⁷⁸⁴ *Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings* (the EC Merger Regulation) *Official Journal of the European Union* L24/1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> (accessed on 18 June 2022).

8(3) of the *EC Merger Regulation* states that the Commission may declare a merger incompatible with the common market, i.e. prohibit a merger that significantly impedes effective competition because of the creation or strengthening of a dominant position. If the merger results in the coordination of competitive behaviour of independent undertakings, such coordination will be assessed against any efficiency it may achieve, including improving the production or distribution of goods that may benefit consumers. In particular, Article 8(3) states:

*“Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.”*²⁷⁸⁵

4.2.6 EU Competition rules affecting SMEs

4.2.6.1 The EU De Minimis Notice

The European Court of Justice (ECJ) has often held that Article 101 of the *TFEU* does not apply when an agreement lacks an “appreciable effect” on competition.²⁷⁸⁶ As a result, the EU Commission issued the *Notice on agreements of minor importance*

²⁷⁸⁵ Article 2(3) of the EC Merger Regulation states that: “A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”

Article 2(4) of the EC Merger Regulation states that: “To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.”

Article 81(3) of the EEC Treaty (which has now been replaced by Article 101 of the TFEU) stated that: “The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings; - any decision or category of decisions by associations of undertakings; - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.” (own emphasis)

²⁷⁸⁶ European Commission “Antitrust – Commission adopts revised safe harbours for minor agreements (“De Minimis Notice”) and provides guidance on “by object” restrictions of competition – Frequently asked questions” (25 June 2014) available at https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022)

which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*) in 2014.²⁷⁸⁷

The *De Minimis Notice* exempts agreements that do not appreciably restrict competition from the application of Article 101 of the *TFEU*.²⁷⁸⁸ The *De Minimis Notice* also exempts agreements that do not appreciably affect trade between EU member states from the application of Article 101(1) of the *TFEU*.²⁷⁸⁹ In other words, the EC will not prosecute parties to an agreement that does not have an appreciable effect on trade between member states²⁷⁹⁰ or to agreements with “a negligible effect on competition.”²⁷⁹¹

The *De Minimis Notice* sets out the market share thresholds and circumstances in which an agreement likely to prevent, restrict or distort competition within the internal market does not substantially limit competition under Article 101 of the Treaty.²⁷⁹²

Notably, the *De Minimis Notice* does not specify what constitutes “an appreciable effect on trade between the Member States.”²⁷⁹³ However, the EC has issued

²⁷⁸⁷ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022).

²⁷⁸⁸ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 3.

²⁷⁸⁹ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 4.

²⁷⁹⁰ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 4.

²⁷⁹¹ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 3.

²⁷⁹² European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 3.

²⁷⁹³ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available

Guidelines in 2004 on the concept of “*appreciable effect on trade*”,²⁷⁹⁴ namely the *Guidelines on the effect on trade concept contained in Articles 81 and 82 [now Article 101 and 102] of the Treaty* (“*EC Guidelines on the effect on trade*”).²⁷⁹⁵ The Commission uses a benchmark of a 5% market share threshold and a EUR 40 million turnover threshold to determine agreements that do not have “*an appreciable effect on trade between member states*”.²⁷⁹⁶ Such agreements would typically not be prohibited under Article 101(1) of the Treaty even if their object is to prevent, restrict or distort competition.²⁷⁹⁷

The *De Minimis Notice* is particularly relevant to SMEs. On this point, the EC has recognised that agreements between SMEs generally do not have an appreciable effect on trade between member states.²⁷⁹⁸ In this regard, the *De Minimis Notice* states, “*It should be noted that agreements between small and medium-sized undertakings (SMEs)*²⁷⁹⁹ ... *are also not normally capable of affecting trade between*

at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022).

²⁷⁹⁴ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022).

²⁷⁹⁵ Commission Notice “*Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*” (27 April 2004) *Official Journal of the European Union* (2004/C 101/07) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022).

²⁷⁹⁶ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 4.

²⁷⁹⁷ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 4.

²⁷⁹⁸ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) fn 5.

²⁷⁹⁹ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) fn 5: “*It should be noted that agreements between small and medium-sized undertakings (SMEs), as defined in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises or any future recommendation replacing it (OJ L 124, 20.5.2003, p. 36), are also not normally capable of affecting trade between Member States.*”

*Member States.*²⁸⁰⁰ The *EC Guidelines on the effect on trade* are discussed further below.

The EC has confirmed that the effect of the *De Minimis* Notice is that the Commission will not initiate an investigation in respect of an agreement that is within the market thresholds of the Notice.²⁸⁰¹ The Commission will also not impose fines on parties it has prosecuted but who can show that they have genuinely assumed that the market shares set out in the Notice had not been exceeded.²⁸⁰²

The *De Minimis* Notice further applies to decisions by associations of companies²⁸⁰³ and concerted practices.²⁸⁰⁴ The *De Minimis* Notice is not binding on national courts

²⁸⁰⁰ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022); Commission Notice “*Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*” (27 April 2004) *Official Journal of the European Union* (2004/C 101/07) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸⁰¹ European Commission “Antitrust – Commission adopts revised safe harbours for minor agreements (“*De Minimis* Notice”) and provides guidance on “by object” restrictions of competition – Frequently asked questions” (25 June 2024) available at https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022).

²⁸⁰² Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 5.

²⁸⁰³ In *J. C. J. Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* Case C-309/99, [2002] ECR I-1577, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0309> (accessed on 20 January 2024), in an Opinion of Advocate General Léger delivered on 10 July 2001 (available at <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=46497&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4005489> (accessed on 20 January 2024)) (hereafter Léger AG opinion) para 61, Advocate General Léger described an association of firms or undertakings as consisting of “*undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general.*” In relation to competition law, Advocate Léger explained that the concept of an association of undertakings “*seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article 85(1) covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body.*” Léger AG Opinion para 62. See also Jones and Sufrin (6th Ed.) 138.

²⁸⁰⁴ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 6. In *Imperial Chemical Industries Ltd. v Commission of the European Communities*, Case 48/69 [1972] ECR 619 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61969CJ0048>

and national competition authorities of individual member states but merely provides guidance.²⁸⁰⁵ Accordingly, they are not obliged to apply the *De Minimis Notice* to assess an alleged contravention of Article 101 of *TFEU*.²⁸⁰⁶

The *De Minimis Notice* provides “safe harbours” for minor agreements between firms with market shares below certain thresholds.²⁸⁰⁷ According to the EC, agreements exempted from the application of Article 101(1) are those where:

- (i) in case of an agreement between competitors, the aggregate market share of the parties to the agreement is less than 10% of the market affected by the agreement;²⁸⁰⁸ and

(accessed on 20 January 2024) (hereafter *ICI v Commission (Dyestuffs)*) at paras 64-65, the European Court Justice stated that “Article 85 draws a distinction between the concept of ‘concerted practices’ and that of ‘agreements between undertakings’ or of ‘decisions by associations of undertakings’; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. By its very nature, then, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants.” In *Re the European Sugar Cartel; Cooperative Vereniging ‘Suiker Unie’ UA v Commission* [1975] ECR 1663, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61973CJ0040> (accessed on 20 January 2024) (hereafter *Suiker Unie v Commission*) para 174, the European Court of Justice stated the prohibition of coordinated practice “strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.” In this regard, Jones and Sufrin (6th Ed.) 153 explain that “[A]lthough the concept (of coordinated practice) does not require an actual *pal* or a ‘meeting of the minds’, it does seem to require reciprocal cooperation or a joint intention to conduct themselves in a specific way, disclosed through direct or indirect contact, designed to influence the conduct of an actual or potential competitor to reveal to them the course of conduct that will or may be adopted on the market. Where therefore firms engage in conduct designed to remove stateic uncertainty about each other’s future conduct on the market, they are not acting independently and so their conduct is subject to Article 101.”

²⁸⁰⁵ European Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*) [2014] 2014/C OJ C291/1, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 5; European Commission “Antitrust – Commission adopts revised safe harbours for minor agreements (“De Minimis Notice”) and provides guidance on ‘by object’ restrictions of competition – Frequently asked questions” (25 June 2014) available at https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022).

²⁸⁰⁶ European Commission “Antitrust – Commission adopts revised safe harbours for minor agreements (“De Minimis Notice”) and provides guidance on ‘by object’ restrictions of competition – Frequently asked questions” (25 June 2014) available at https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022).

²⁸⁰⁷ European Commission “Antitrust – Commission adopts revised safe harbours for minor agreements (“De Minimis Notice”) and provides guidance on “by object” restrictions of competition – Frequently asked questions” (25 June 2014) available at https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022).

²⁸⁰⁸ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis Notice*)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at

- (ii) in case of an agreement between non-competitors, the individual market share of each of the parties to the agreement is less than 15% of the market affected by the agreement.²⁸⁰⁹

The *De Minimis Notice* further states that where it is difficult to classify the type of relationship between the parties to the agreement, i.e. whether it is horizontal or vertical relationship,²⁸¹⁰ the applicable threshold will be 10% of the market affected by the agreement.²⁸¹¹ Where the cumulative effect of agreements concluded by different suppliers or distributors restricts competition in a market, the market share threshold will be 5%.²⁸¹² The EC recognises that individual suppliers or distributors with a market share of less than 5 % generally do not contribute significantly to a cumulative foreclosure effect.²⁸¹³ The EC is also of the view that an agreement will not be regarded as “*appreciably restricting competition*” in the market if the parties to the agreement have a market share of less than 10%, 15% or 5%, as the case may be,

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en)
(accessed on 18 June 2022) para 8(a).

²⁸⁰⁹ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 8(b).

²⁸¹⁰ See Chapter 3, at 3.5.3.1. Restrictive horizontal practices. In terms of section 1(1)(xv) of the Competition Act 89 of 1998, as amended, a horizontal relationship between firms refers to a “relationship between competitors.” See also Chapter 3, at 3.5.3.2. Restrictive vertical practices. In terms of section 1(1)(xxxxiii) of the Competition Act 89 of 1998, as amended, a vertical relationship between firms refers to a “relationship between a firm and its suppliers, its customers or both”.

²⁸¹¹ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 9.

²⁸¹² European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 10.

²⁸¹³ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 10.

during the last two consecutive years, “*by more than 2 percentage points*.”²⁸¹⁴ The market share is based on the determination of a relevant market.²⁸¹⁵

The *De Minimis* Notice is not unlimited in its application and importantly, does not apply to a cartel or collusive agreements, such as price fixing, output or sales limitation, market allocation, etc.²⁸¹⁶ Moreover, the safe harbours above do not apply to what the EC considers “*hardcore restrictions*”.²⁸¹⁷

4.2.6.2 The EC Guidelines on the effect on trade

As stated above, the *EC Guidelines on the effect on trade* limit the application of Article 101 of the *TFEU* to agreements and practices that “*are capable of having effects of a certain magnitude*.”²⁸¹⁸ “*Appreciability*” is assessed by considering, amongst other factors, the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned.²⁸¹⁹ The stronger the firm’s

²⁸¹⁴ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 11.

²⁸¹⁵ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 12. For an explanation of the concept or determination of a “relevant market”, see Chapter 3, at 3.5.3.1.3 SMEs – victims of prohibited horizontal practices.

²⁸¹⁶ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 13.

²⁸¹⁷ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 13.

²⁸¹⁸ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 44.

²⁸¹⁹ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 45.

market position, the more likely the appreciable effect of the impugned agreement or practice on trade between Member States.²⁸²⁰

The threshold used in determining the appreciable effect of the anti-competitive agreement or practice on trade between Member States is based on the market share and turnover of the concerned entities.²⁸²¹ In this regard, the EU Notice states that *“Appreciability can thus be measured both in absolute terms (turnover) and in relative terms, comparing the position of the undertaking(s) concerned to that of other players on the market (market share).”*²⁸²²

In terms of the *EC Guidelines on the effect on trade*, in principle, the EC will find that an agreement or practice did not have an appreciable effect on trade between member states if the following conditions are met:²⁸²³

- (a) the aggregate market share of the concerned firms in the relevant market affected by the conduct is less than 5%;
- (b) For horizontal agreements, the aggregate annual turnover of the concerned firms in the European Community (Community) for the affected products is less than 40 million Euro;
- (c) For vertical agreements, the aggregate annual turnover of the concerned supplier in the Community for the affected products is less than 40 Million Euro;

²⁸²⁰ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 45.

²⁸²¹ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 46.

²⁸²² European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 47.

²⁸²³ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 52.

- (d) For agreements between a buyer and several suppliers, the relevant turnover will be the “*buyer’s combined purchases of the products covered by the agreements.*”²⁸²⁴

4.2.6.3 Agreements between SMEs exempt under EC regulations and guidelines

Although the European Commission (EC) acknowledges that it is impossible to identify every single category of agreement that may have an appreciable effect on trade between Member States, it has identified instances when trade is unlikely to be appreciably affected.²⁸²⁵ These instances include agreements exempt under the EU *De Minimis Notice*, which, as discussed above, stipulates that agreements between SMEs are unlikely to have an appreciable effect on trade between Member States.²⁸²⁶ This is based on the presumption that SMEs operate more locally or regionally²⁸²⁷ and are unlikely to hold a strong market position in the Common Market.²⁸²⁸

The EC has also set out general principles indicating when an agreement is unlikely to have an appreciable effect on trade.²⁸²⁹ This is through a “non-appreciable affectation of trade” rule (*NAAT-rule*), which sets “*a standard defining the absence of an appreciable effect on trade between Member States.*”²⁸³⁰ This standard is regarded

²⁸²⁴ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 52.

²⁸²⁵ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸²⁶ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸²⁷ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸²⁸ Fox and Bazenov “Antitrust and inequality: The history of (in)equality in competition law and its guide to the future” (2021) – Draft article revised as of 9 September 2021 (accessed on 5 February 2022) 38.

²⁸²⁹ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸³⁰ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras

as a “negative rebuttable presumption” that the EC applies to all agreements that were subject to scrutiny under Article 81 of the *Treaty of Rome* and now, scrutiny under 101 *TFEU*.²⁸³¹ When this presumption applies, the Commission will not institute proceedings.²⁸³² The presumption applies when the conditions set out above under *the EC Guidelines on the effect on trade* are met.²⁸³³

The EU Commission also issued block exemption regulations and guidelines that provided safe harbours in applying Article 101 of the *TFEU*, especially for SMEs, which usually have low turnovers and market shares.²⁸³⁴ These block exemption regulations and guidelines, which were applicable for only a specific period of time, included: (i) *Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements*;²⁸³⁵ (ii) *Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European*

44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸³¹ European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸³² European Commission “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)” (27 April 2004) *Official Journal of the European Union* (C 101/81) paras 44- 57, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)) (accessed on 6 June 2022) para 50.

²⁸³³ See above 4.2.6.2 The EC Guidelines on the effect on trade.

²⁸³⁴ Fox and Bazenov “Antitrust and inequality: The history of (in)equality in competition law and its guide to the future” (2021) – Draft article revised as of 9 September 2021 (accessed on 5 February 2022) 38.

²⁸³⁵ EU Commission *Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements* [2010] OJ L335/36, available at <http://data.europa.eu/eli/reg/2010/1217/oj> (accessed on 6 June 2022) or <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1217&qid=1695588859836> (accessed on 24 September 2023). According to EUR-Lex, this regulation is no longer in force. The validity end date was 30 June 2023. EU Regulation No 1217/2010 was amended by EU Commission Regulation 2022/2455 of 8 December 2022, amending *EU Regulation No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements* [2022] OJ L321/1, available at [Publications Office \(europa.eu\)](https://publications.europa.eu) (accessed on 21 January 2024). Article 1 of EU Regulation 2022/2455 stipulates that EU Regulation No 1217/2010 shall expire on 30 June 2023.

Union to certain categories of specialisation agreements;²⁸³⁶ and (iii) *Guidelines on Vertical Restraints*.²⁸³⁷

Article 2(1) of the *Commission Regulation (EU) No. 1217/2010* exempted from the application of Article 101(1) research and development (R&D) agreements, which contain restrictions on competition. The exemption was for the duration of the R&D, where the agreement was between non-competing firms.²⁸³⁸ But, where the R&D agreement was between competing firms, the exemption would only last for the duration of the R&D if at the time of concluding the R&D agreement: (a) the combined market shares of the parties to the R&D agreement did not exceed 25% of the relevant product and technology markets; or (b) the combined market share of the financing party and all the parties, with which the financing party concluded R&D agreements, did not exceed 25% of the applicable product and technology markets.²⁸³⁹ In terms of Article 4(3), the exemption continued even after the end of the R&D agreement if the parties' combined market shares continue to not exceed 25% of the product and technology markets.

²⁸³⁶ EU Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L335/43, available at <http://data.europa.eu/eli/reg/2010/1218/oj> (accessed on 6 June 2022) or <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1218&qid=1695601254170> (accessed on 24 September 2023). According to EUR-Lex, this regulation is no longer in force. The validity end date was 30 June 2023. EU Regulation No 1218/2010 was amended by EU Commission Regulation 2022/2456 of 8 December 2022 amending EU Regulation No 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2022] OJ L321/3, available at [Publications Office \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2456&qid=1695588859836) (accessed on 21 January 2024). Article 1 of EU Regulation 2022/2456 stipulates that EU Regulation No 1218/2010 shall expire on 30 June 2023.

²⁸³⁷ EU Commission *Guidelines on Vertical Restraints* [2010] 2010/C OJ 130/1, paras 8-11, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519(04)&from=EN) (accessed on 6 June 2022) replaced by EU Commission *Guidelines on Vertical Restraints* [2022] 2022/C OJ 248/1, 10, para 3.1, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630(01)) (accessed on 25 September 2023).

²⁸³⁸ European Commission "Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union of certain categories of research and development agreements" (18 December 2010) *Official Journal of the European Union* L 335/36, available at <http://data.europa.eu/eli/reg/2010/1217/oj> (accessed on 6 June 2022) or <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1217&qid=1695588859836> (accessed on 24 September 2023) Article 4(1). According to EUR-Lex, this regulation is no longer in force. The validity end date was 30 June 2023.

²⁸³⁹ European Commission "Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union of certain categories of research and development agreements" (18 December 2010) *Official Journal of the European Union* L 335/36, available at <http://data.europa.eu/eli/reg/2010/1217/oj> (accessed on 6 June 2022) or <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1217&qid=1695588859836> (accessed on 24 September 2023) Article 4(2). According to EUR-Lex, this regulation is no longer in force. The validity end date was 30 June 2023.

Commission Regulation (EU) No. 1218/2010 exempted from the application of Article 101(1) of the *TFEU* specialisation agreements, which contained restrictions on competition.²⁸⁴⁰ In terms of Article 3 of the Regulation, the exemption only applies if the combined market share of the parties to the specialisation agreement does not exceed 20% of any relevant market.²⁸⁴¹

The Commission's *Guidelines on Vertical Restraints* confirm that agreements of minor importance, which usually involve SMEs, fall outside the scope of Article 101(1). These guidelines apply to vertical agreements concluded between non-competing firms where the individual market share in the relevant market is less than 15%.²⁸⁴² In relation to SMEs, the *Guidelines on Vertical Restraints* confirm the Commission's position that "*subject to cumulative effect and hardcore restrictions, vertical agreements between small and medium-sized undertakings as defined in the Annex to Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises are rarely capable of appreciably affecting trade between Member States or of appreciably restricting competition within the meaning of Article 101(1), and therefore generally fall outside the scope of Article 101(1). In cases where such agreements nonetheless meet the conditions for the application of Article 101(1), the Commission will normally refrain from opening proceedings for lack*

²⁸⁴⁰ European Commission "Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements" (18 December 2010) Official Journal of the European Union L 335/43, available at <http://data.europa.eu/eli/reg/2010/1218/oj> (accessed on 6 June 2022) or <https://www.legislation.gov.uk/eur/2010/1218/article/2> (accessed on 6 November 2022) article 2, or <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1218&qid=1695601254170> (accessed on 24 September 2023). According to EUR-Lex, this regulation is no longer in force. The validity end date was 30 June 2023.

²⁸⁴¹ European Commission "Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements" (18 December 2010) Official Journal of the European Union L 335/43, available at <http://data.europa.eu/eli/reg/2010/1218/oj> (accessed on 6 June 2022) or <https://www.legislation.gov.uk/eur/2010/1218/article/3> (accessed on 6 November 2022), article 3, or <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1218&qid=1695601254170> (accessed on 24 September 2023). According to EUR-Lex, this regulation is no longer in force. The validity end date was 30 June 2023.

²⁸⁴² European Commission "Guidelines on Vertical Restraints" (2010/C 130/1) (19 May 2010) *Official Journal of the European Union* C130/1, paras 8-11, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519(04)&from=EN) (accessed on 6 June 2022) replaced by European Commission "Guidelines on Vertical Restraints" (2022/C 248/1) (30 June 2022) *Official Journal of the European Union* C248/1, 10, para 3.1, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630(01)) (accessed on 25 September 2023).

*of sufficient interest for the European Union unless those undertakings collectively or individually hold a dominant position in a substantial part of the internal market.*²⁸⁴³

The above EU regulations and guidelines show that SMEs are most likely to benefit from the above exemptions, as they usually have low turnover and market shares.²⁸⁴⁴ As indicated above, the Commission uses a benchmark of a *5% market share threshold and a EUR 40 million turnover threshold* to determine agreements that do not have “*an appreciable effect on trade between member states*”.²⁸⁴⁵ Such benchmark is also used to exempt agreements between SMEs as normally incapable of affecting trade between member states.²⁸⁴⁶

4.2.7 Treatment of SMEs under the EU Competition law – A look at various European Countries

Below is a synopsis of the treatment of SMEs under the competition law of various European countries, based on information from the International League of Competition Law (LIDC).²⁸⁴⁷ While this mainly relates to the national legislation of

²⁸⁴³ European Commission “Guidelines on Vertical Restraints” (2010/C 130/1) (19 May 2010) *Official Journal of the European Union* C130/1, para 11, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519(04)&from=EN) (accessed on 6 June 2022) replaced by European Commission “Guidelines on Vertical Restraints” (2022/C 248/1) (30 June 2022) *Official Journal of the European Union* C248/1, 10, para 3.1, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630(01)) (accessed on 25 September 2023).

²⁸⁴⁴ Fox and Bazenov “Antitrust and inequality: The history of (in)equality in competition law and its guide to the future” (2021) – Draft article revised as of 9 September 2021 (accessed on 5 February 2022) 38.

²⁸⁴⁵ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 4.

²⁸⁴⁶ Communication from the Commission “*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) fn 5: “*It should be noted that agreements between small and medium-sized undertakings (SMEs), as defined in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises or any future recommendation replacing it (OJ L 124, 20.5.2003, p. 36), are also not normally capable of affecting trade between Member States.*”

²⁸⁴⁷ The International League for Competition Law (LIDC) is an international association which was created in 1930. The LIDC is composed of 18 national groups from France, Luxemburg, Belgium, Italy, Austria, Brazil, Czech Republic, Germany, the Iberian Region, Hong Kong, Japan, Hungary, Ukraine, Nordic Group, Poland, Romania, Switzerland and United-Kingdom. The LIDC studies competition law, intellectual property law and unfair competition law. The LIDC describes its objectives as: “*to promote the principles of fairness and justice in competitive trade; to collect together information and documentation relating to (unfair) competition law and intellectual property law in various countries; to provide documentation and information on these subjects; to study and compare the legislation of the different member countries and to propose solutions for the problems faced in (unfair) competition and*

selected European countries, it provides an overview of how SMEs are generally treated in Europe. Each EU country has its own national competition legislation. This analysis helps to better understand how SMEs are treated under the competition laws of various EU countries. The study considers specific aspects relating to, among other things, the relevant country's treatment of SMEs and public antitrust enforcement relating to SMEs.

4.2.7.1 Treatment of SMEs in some EU countries

Some EU countries have competition legislation providing for the promotion of SMEs. For example, the French Commercial Code exempts from the prohibition of anti-competitive practices, agreements that seek to improve the management of SMEs.²⁸⁴⁸ The Belgium Code of Economic Law of 28 February 2013, as amended, also promotes SMEs by exempting anti-competitive agreements, decisions by associations, and concerted practices, which enable SMEs to strengthen their competitiveness in Belgian and international markets.²⁸⁴⁹ The *Hungarian Competition Act* provides for warnings instead of fines against SMEs if it is a first offence not infringing Articles 101 or 102 of the *TFEU*.²⁸⁵⁰ This applies only if the infringement does not involve price-

*intellectual property law at both the national and the international level; to publish the principles formulated by the LIDC in the fields of competition law, intellectual property law and unfair competition; to research and defend the means of assuring freedom in commerce and business.” Available at <https://www.ligue.org/lidc/who-we-are/> (accessed on 28 January 2024). Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014).*

²⁸⁴⁸ Article L420-4-II of the French Commercial Code (Act No 2001-420 of 15 May 2001, Article 48, Official Gazette of 16 May 2001) “II.- Certain categories of agreement or certain agreements, in particular when they are intended to improve the management of small or medium-sized undertakings, may be recognised as meeting these conditions by a decree adopted following a favourable opinion from the Council on Competition.”, available at <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> (accessed on 24 February 2024); Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2017) 109.

²⁸⁴⁹ Art IV. 1§ 3, 3° of the Belgium Code of Economic law provides: “However, the provisions of paragraph 1 shall not apply: (...)to any concerted practice or category of concerted practices, which contribute to improving the production or distribution of goods, to promoting technical or economic progress, or which enable small and medium sized enterprises to strengthen their competitive position in the relevant market or in the international market, while allowing users a fair share of the resulting benefit, but without however: a) imposing restrictions on the undertakings concerned that are not indispensable to the attainment of these objectives; b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.” Available at <https://www.belgiancompetition.be/sites/default/files/content/download/files/CEL%20Consolidated%20BCA.pdf> (accessed on 24 February 2024).

²⁸⁵⁰ *Hungarian Competition Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices*, as amended. Available at https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpv_tataly_20190101_a&inline=true (accessed on 5 December 2024) Article 78(8).

fixing or market allocation during a public procurement process, or where the infringement is against a vulnerable group of persons, such as mentally or physically disabled individuals.²⁸⁵¹

Other EU countries generally do not have provisions in their competition legislation dealing specifically with SMEs or special treatment for SMEs.²⁸⁵² EU competition legislation generally prohibits anti-competitive practices engaged in by companies, irrespective of size.²⁸⁵³ However, some EU countries have laws that support SMEs. For example, in the Czech Republic, Act 47/2002²⁸⁵⁴ provides for the assistance of SMEs through State aid.²⁸⁵⁵ Some EU countries' competition legislation includes safe harbours similar to the EU *de minimis* rule (contained in the *EU De Minimis Notice*),²⁸⁵⁶ which exempts SMEs from certain prohibitions of anti-competitive practices.²⁸⁵⁷ For example, section 7 of the Danish Competition Act (Consolidation Act No. 869 of 8 July 2015) provides for a *de minimis* rule which exempts “*agreements of minor importance*” from the application of the Danish Competition Act.²⁸⁵⁸ This is because SMEs are

²⁸⁵¹ Hungarian Competition Act LVII of 1996, Article 78(9).

²⁸⁵² Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 67, 81, 142, 168: Austria, Croatia, Czech Republic, Hungary and Italy.

²⁸⁵³ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2017) 131.

²⁸⁵⁴ 47/2002 Coll. Act of 11 January 2002 on the support of small and medium-sized enterprises and on an amendment to Act No 2/1969 Coll., on the establishment of ministries and other central institutions of state administration of the Czech Republic, as amended. Available at <https://www.mpo.cz/assets/dokumenty/26693/31130/331757/priloha001.pdf> (accessed on 28 January 2024).

²⁸⁵⁵ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors. LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition* (2017) 81.

²⁸⁵⁶ Chapter Four, 4.2.6.1 The EU De Minimis Notice. At para 4.2.1 Introduction, above, the study explains that it uses the terms “de minimis Notice” and “de minimis rule” interchangeably to refer to the notion in the *EU De Minimis Notice* that agreements that do not appreciably restrict competition or trade between EU members are exempt from competition scrutiny, except hardcore cartels.

²⁸⁵⁷ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors. LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition* (2017) 88.

²⁸⁵⁸ Section 7 of the Danish Competition Act state: “-(1) The prohibition set out in Section 6(1) above shall not apply to agreements between undertakings, decisions made by an association of undertakings or concerted practices between undertakings, in case the undertakings involved have i) an aggregate annual turnover of less than DKK 1 billion and an aggregate share of less than 10 per cent of the product or service market concerned, cf., however, subsections (2)-(4); or ii) an aggregate annual turnover of less than DKK 150 million, cf., however, subsections (2)-(4).”, available at <https://www.en.kfst.dk/media/1351/competition-act-8692015.pdf> (accessed on 24 February 2024). Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2017) 88.

unlikely to have the necessary dominance or market power in relevant markets.²⁸⁵⁹ In addition, SMEs generally have low turnover compared to large firms. SMEs' conduct is, therefore, unlikely to significantly affect the relevant market. However, the exemption is not applicable in the case of hardcore cartels.²⁸⁶⁰ SMEs may be found guilty of engaging in a hard-core cartel, especially through trade associations and may be sanctioned for such conduct.²⁸⁶¹

As mentioned above, certain countries, like France, provide for the special treatment of SMEs, where SMEs are exempt from the prohibition of anti-competitive practices or agreements that seek to improve the management of SMEs.²⁸⁶² Germany also provides for the special treatment of SMEs, in some respects. For example, section 3 of the German Competition Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*)²⁸⁶³ exempts agreements between competing SMEs if (a) the effect on competition in the market is insignificant and (b) if the agreement seeks to enhance SMEs' competitiveness.²⁸⁶⁴ These agreements

²⁸⁵⁹ For a definition of "relevant market", see Chapter Three, 3.5.3.1.2 SMEs – victims of prohibited horizontal practices

²⁸⁶⁰ Section 7(2) of the Danish Competition Act: "*The exceptions in subsection (1) shall not apply to cases in which undertakings or an association of undertakings agree, coordinate or decide on i) prices, profits etc. for the sale or resale of goods or services, ii) restrictions on production or sales, iii) sharing of markets or customers, or iv) fixing bids prior to their tendering, fixing conditions for the opening of bids, deferring bids, prior notification of bids, or any other form of bid rigging.*", available at <https://www.en.kfst.dk/media/1351/competition-act-8692015.pdf> (accessed on 24 February 2024). Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 88.

²⁸⁶¹ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 33 (Austria), 52 (Belgium), 88, 90, 93, 94 (Denmark), 145 (Hungary).

²⁸⁶² Article L420-4-II of the French Commercial Code (Act No 2001-420 of 15 May 2001, Article 48, Official Gazette of 16 May 2001) "*II.- Certain categories of agreement or certain agreements, in particular when they are intended to improve the management of small or medium-sized undertakings, may be recognised as meeting these conditions by a decree adopted following a favourable opinion from the Council on Competition.*", available at <https://wipo.lex-res.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf> (accessed on 24 February 2024); Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2017) 109.

²⁸⁶³ Gesetz gegen Wettbewerbsbeschränkungen – GWB: Competition Act in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 1 of the Act of 25 October 2023 (Federal Law Gazette I, p. 294). Available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0021 (accessed on 3 February 2024), Part One: Restraints of Competition.

²⁸⁶⁴ Gesetz gegen Wettbewerbsbeschränkungen – GWB: Competition Act in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 1 of the Act of 25 October 2023 (Federal Law Gazette I, p. 294). Available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0021 (accessed on 3 February 2024), Part One: Restraints of Competition, Chapter 1 Agreements, Decisions and Concerted Practices Restricting Competition, Section 3 Cartels of Small or Medium-Sized Enterprises.

generally concern joint research and development, joint purchasing, etc. Italy also provides special treatment for SMEs under its sub-contracting law.²⁸⁶⁵ This prohibits a firm from abusing the economic dependence of a supplier or customer.²⁸⁶⁶

Recommendations that have been made in respect of the treatment of SMEs in some EU countries include: (a) the adoption of special competition rules for SMEs in small economies, like Croatia; (b) lenient treatment for SMEs as they often face substantial competitive pressure from large entities;²⁸⁶⁷ (c) the formation of joint ventures to enable SMEs to compete in the market; (d) issuing of guidelines setting out procedural and substantive competition law for SMEs and an "SME Office";²⁸⁶⁸ (e) developing competition awareness programs for SMEs, which would include "the do's and don'ts of antitrust law."²⁸⁶⁹

However, it is noted that challenges such as limited resources, lack of capital or experience, and technological challenges cannot all be addressed by competition rules alone or by amendments to competition law.

Regarding the public enforcement of competition law on SMEs, on substantive and procedural rules: (a) there are generally no specific competition rules dealing with SMEs; (b) certain countries have specific provisions in their competition legislation that could benefit or specifically apply to SMEs; (c) EU countries generally also apply the *de minimis* rule in their national territory, but may apply different safe harbours than the one provided for under the EU *de minimis* rule;²⁸⁷⁰ (d) competition law applies to all firms, irrespective of the size; (e) SMEs may also benefit from smaller fines because of their size;²⁸⁷¹ (f) Some EU countries also exempt SMEs from the application of the competition legislation where the impugned conduct enhances SMEs'

²⁸⁶⁵ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 170.

²⁸⁶⁶ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 170.

²⁸⁶⁷ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 73-74.

²⁸⁶⁸ See France summary in the table above.

²⁸⁶⁹ See Italy, Kellezi, Kilpatrick and Kbel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 174.

²⁸⁷⁰ See Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 144; Italy, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 174.

²⁸⁷¹ See Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 144.

competitiveness;²⁸⁷² (g) SMEs are generally exempt from the application of the abuse of dominance provisions or provisions prohibiting conduct or agreements that restrict competition in the market. This is because of SMEs' low turnover and small market share.²⁸⁷³ Accordingly, competition law infringement by an SME is unlikely to affect the market significantly.²⁸⁷⁴ However, SMEs are not exempted from the application of competition rules that prohibit hardcore cartels;²⁸⁷⁵ (h) Several EU countries regard provisions prohibiting abuse of dominance conduct as protecting SMEs as victims of such conduct;²⁸⁷⁶ (i) mergers between SMEs are also generally not the subject of merger control.²⁸⁷⁷

On the fundamental rights of SMEs as infringers or victims of prohibited anti-competitive conduct in the EU, there are generally no specific rules pertaining to SMEs. SMEs have the same rights as any other firms.²⁸⁷⁸ But, in Germany, for example, SMEs can file anonymous complaints with the Federal Cartel Office (FCO) to avoid any possible retaliation from their large partners.²⁸⁷⁹

On leniency or settlement, there is also generally no special treatment or rules specifically dealing with SMEs.²⁸⁸⁰ This is probably because none of the EU

²⁸⁷² See Belgian, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 50.

²⁸⁷³ See Denmark, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 96; Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 143.

²⁸⁷⁴ See Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 144.

²⁸⁷⁵ See Denmark, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 96; Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 144.

²⁸⁷⁶ See France, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 125 ; Germany, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 134.

²⁸⁷⁷ See Denmark, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 96.

²⁸⁷⁸ See Austria, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 34 ; Belgium, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 54 ; Croatia, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 72 ; Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 150.

²⁸⁷⁹ See Germany, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 138.

²⁸⁸⁰ See Austria, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 35; Croatia, Kellezi, Kilpatrick and Kobel (eds)

jurisdictions analysed above, exempt SMEs from the application of competition law provisions prohibiting hard-core cartels. However, Hungary recognises that the “marker application”²⁸⁸¹ process may enable firms with limited resources, like SMEs, to apply for leniency.²⁸⁸²

On sanctions or penalties, SMEs generally face the same sanction regime in the EU as large companies.²⁸⁸³ There are no specific dispensations for sanctions relating to SMEs.²⁸⁸⁴ However, the size of the firm may play a role in the quantification of a fine.²⁸⁸⁵ This is because the turnover of a firm in the relevant market, or in the line of business in which the contravention has taken place, is generally used to determine a fine.²⁸⁸⁶ In other words, the fine is determined by considering the firm’s turnover of the goods or services related to or affected by the impugned conduct.²⁸⁸⁷ And the SME’s turnover in the relevant market within a specific country is often likely to be lower than large firms’ turnover.²⁸⁸⁸ Some countries, like France and Germany, also consider the

Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors (2014) 72 ; Czech, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85 ; Denmark, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 98 ; Germany, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 133 ; Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 151.

²⁸⁸¹ See Chapter Three, 3.5.3.1.2 SMEs – victims of prohibited horizontal practices.

²⁸⁸² Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 151.

²⁸⁸³ Austria, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 36.

²⁸⁸⁴ Czech, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85.

²⁸⁸⁵ Chapter Three, 3.5.6.1 Guidelines for the Determination of Administrative Penalties for Prohibited Practices; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 36.

²⁸⁸⁶ Chapter Three, 3.5.6.1 Guidelines for the Determination of Administrative Penalties for Prohibited Practices; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 36.

²⁸⁸⁷ European Commission “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003” OJ 2006/C 210/02, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)) (accessed on 21 May 2024) 3, para 13; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 55-56.

²⁸⁸⁸ Austria, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 36 ; Belgium, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 56; Denmark, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 99-100 ; Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

ability of a firm to pay the administrative fine.²⁸⁸⁹ They consider that SMEs might be unable to pay hefty fines because of their low turnover. In Hungary, the market position of the infringing firm is one of the factors considered when determining a fine.²⁸⁹⁰ This factor is viewed as one that permits a different treatment when imposing a fine on SMEs.²⁸⁹¹ This is because of SMEs' small size, their limited resources, their lack of market power and the assumption that the impact of their conduct on the market is unlikely to be significant.²⁸⁹²

The EU countries analysed had several recommendations on the treatment of SMEs under the public enforcement of competition law. For example, Fussenegger, reporting on Austria, took the view that competition law should apply to all economic entities irrespective of size and that there should therefore not be special competition legislation for SMEs.²⁸⁹³ Boudou *et al*, reporting on France, believe that there are already adequate provisions in the competition legislation that protect SMEs' interests.²⁸⁹⁴ These provisions include the prohibition of abuse of dominance conduct, such as loyalty discounts, predatory pricing, etc.²⁸⁹⁵ This view also argues that there

²⁸⁸⁹ France, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 119; Germany, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 134.

²⁸⁹⁰ Section 78(3) of the Hungarian Competition Act LVII of 1996 states: "(3) *The amount of the fine shall be established with all the circumstances of the case taken into account, in particular the gravity of the infringement, the duration of the infringing situation, the benefit gained by the infringement, the market position of the party infringing the law, the culpability of the conduct, the cooperation of the undertaking during the proceeding and the repetition and frequency of the infringement. The gravity of the infringement shall be established, in particular, on the basis of the extent of the threat to economic competition and the range and extent of the harm to the interests of ultimate trading parties.*" (own emphasis)

²⁸⁹¹ Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152; Italy, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 180.

²⁸⁹² Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

²⁸⁹³ Gerhard Fussenegger reporting on Austria in Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 37; France, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 126; Germany, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 140.

²⁸⁹⁴ Mathilde Boudou, Laurence Charvoz, Jean-Patrice de La Laurencie, Olivier Sautel and Veronique Selinsky reporting on France in Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 126.

²⁸⁹⁵ Boudou *et al*. reporting on France, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 126; Meinrad Dreher and Julia Körner reporting on Germany, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 140.

should not be any differentiation between the size of companies regarding access to justice and procedural rights.²⁸⁹⁶

Other countries, such as Croatia and the Czech Republic, however, believe that there should be specific rules protecting SMEs: for example, rules relating to buyer power in the retail sector,²⁸⁹⁷ lenient rules against SME infringers,²⁸⁹⁸ or special dispensations for SMEs in the leniency programs and settlement or sanction provisions, especially when SMEs are infringers.²⁸⁹⁹ Some countries, such as the Czech Republic and Hungary, have also proposed specific protection mechanisms for SMEs to report anti-competitive conduct.²⁹⁰⁰ They also recommend adopting the EU *de minimis* rule in their national legislation.²⁹⁰¹ They have further recommended that competition authorities not investigate agreements between SMEs that do not raise public interest concerns.²⁹⁰² It is argued that this will enable competition authorities to focus their resources and priorities on anti-competitive conduct that substantially affects the market.²⁹⁰³ Hojnik explains that the upside for SMEs is avoiding infringement of competition law, reducing the risk of having unenforceable agreements and improving SMEs' ability to compete against big conglomerates.²⁹⁰⁴

Other recommendations include developing awareness programs that may train SMEs on the importance of complying with competition rules.²⁹⁰⁵

²⁸⁹⁶ Clare Zammit report on Italy, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 180.

²⁸⁹⁷ Boris Andrejaš reporting on Croatia, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 73.

²⁸⁹⁸ Croatia, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 73-74.

²⁸⁹⁹ Lenka Čížková reporting on Czech Republic, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85.

²⁹⁰⁰ Czech, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85.

²⁹⁰¹ Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

²⁹⁰² Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

²⁹⁰³ Hungary, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

²⁹⁰⁴ Hojnik "De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?" (2013) *European Journal of Legal Studies*, Vol. 6, Issue 1, available at https://cadmus.eui.eu/bitstream/handle/1814/28728/Hojnik_Vol6_1_145UK.pdf?sequence=1 (accessed on 3 December 2024) 29.

²⁹⁰⁵ Italy, Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 179.

4.2.7.2 Other considerations

While this thesis focuses on the public enforcement of competition law concerning SMEs, it is worth noting that some of the challenges SMEs face in relation to the enforcement of competition law in the EU include challenges relating to private actions for damages when SMEs have been victims of anti-competitive conduct.²⁹⁰⁶ As pointed out by Kellezi *et al*, challenges pertaining to actions for damages include proving the contravention; quantifying damages; instituting legal proceedings in various jurisdictions; SMEs' limited resources; risks of losing and having to pay the defendant's costs; risks of losing a business partner; and problems with access to information, especially with leniency applications.²⁹⁰⁷ There are no specific best practices for private litigation by SMEs in the civil courts.²⁹⁰⁸

Nevertheless, SMEs in the EU may benefit from the "collective redress" mechanism provided for in the European Commission's *Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* ("*Collective Redress Recommendation*").²⁹⁰⁹ Collective redress is a way to stop or prevent unlawful business practices that harm many claimants, such as consumers and/or SMEs.²⁹¹⁰ It can also be used to compensate those affected by these practices.²⁹¹¹ In this regard, SMEs are amongst those who could institute actions for collective redress under the *Collective Redress Recommendation*.²⁹¹² However,

²⁹⁰⁶ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 23.

²⁹⁰⁷ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 24.

²⁹⁰⁸ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 24.

²⁹⁰⁹ The European Commission "Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law" (2013/396/EU) OJ L 201/60-65, para 41, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=en> (accessed on 16 December 2023); Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 25.

²⁹¹⁰ Buccirrossi, Carpagnano, Ciari, Tognoni and, C. Vitale "Collective Redress in Antitrust, Study requested by the European Parliament's Committee on Economic and Monetary Affairs" 15; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 25.

²⁹¹¹ Buccirrossi, Carpagnano, Ciari, Tognoni and, C. Vitale "Collective Redress in Antitrust, Study requested by the European Parliament's Committee on Economic and Monetary Affairs" 15; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 25.

²⁹¹² Buccirrossi, Carpagnano, Ciari, Tognoni and, C. Vitale "Collective Redress in Antitrust, Study requested by the European Parliament's Committee on Economic and Monetary Affairs" 69.

collective redress only applies if the claims are in respect of harm or damages resulting from the same illegal conduct.²⁹¹³

It is also worth mentioning the EU Digital Market Act of 2022 which seeks to ensure that markets with large online platforms, regarded as gatekeepers, are fair and open to competition.²⁹¹⁴

4.2.7.3 EU Digital Market Act (2022)

The *EU Digital Market Act* recognises that digital services and online platforms play a vital role in the economy.²⁹¹⁵ They enable businesses to access a broad customer base in the EU, facilitate cross-border trade and create new business opportunities for companies that benefit consumers in the EU.²⁹¹⁶ However, core/large platforms often have features that can be used by these core platform providers (“the large platform providers”) to exploit users and customers by making users (especially third-party sellers) heavily depend on online platforms.²⁹¹⁷ These features include scale economies, strong network effects, business users’ high dependence, vertical integration, and data-driven advantages.²⁹¹⁸ The *EU Digital Markets Act* outlines how some of these characteristics and unfair business practices of large platform providers can substantially lessen competition on the core platforms.²⁹¹⁹ This may affect the fairness of the relationship between the large platform provider, the firms operating on the platform and end-users.²⁹²⁰

²⁹¹³ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 26. The Commission Recommendation on Collective Redress refers to ‘mass harm situation’ which is “a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons”. See Commission Recommendation on Collective Redress (2013) L 201/62.

²⁹¹⁴ European Union “Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)” (2022) (hereinafter “the EU Digital Markets Act”), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925> (accessed on 10 December 2024), para 11.

²⁹¹⁵ European Union “Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)” (2022) (hereinafter “the EU Digital Markets Act”), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925> (accessed on 10 December 2024), para 1.

²⁹¹⁶ EU Digital Markets Act, para 1.

²⁹¹⁷ EU Digital Markets Act, para 2.

²⁹¹⁸ EU Digital Markets Act, para 2.

²⁹¹⁹ EU Digital Markets Act, para 2.

²⁹²⁰ EU Digital Markets Act, para 2.

The *EU Digital Markets Act* further remarks that there are several large firms providing core online platforms (“the large platforms”) that have emerged with market power, which could be described as “gatekeepers” in terms of the *EU Digital Markets Act*.²⁹²¹ These large platforms are able to connect many users/sellers with a broad range of customers. This enables large platforms to leverage their advantages, which include access to a large amount of data.²⁹²² Some of these large platforms are able to control the whole platform ecosystem in the digital market.²⁹²³ The large platforms are structured in such a way that it is extremely difficult for emerging or new market operators to challenge them.²⁹²⁴ Large platforms or gatekeepers’ conduct are likely to result in serious imbalances in bargaining power and, thus, unfair business practices that adversely affect users/sellers and end users/customers on core platforms.²⁹²⁵ This may negatively affect prices, quality, fair competition, choice and innovation in the digital market.²⁹²⁶ The *EU Digital Markets Act* remarks that ensuring fair economic outcomes with respect to core platform services is challenging. The *EU Digital Markets Act* notes that Articles 101 and 102 of the *TFEU* apply to gatekeepers’ conduct. However, they do not adequately address the challenge raised by the conduct of gatekeepers, which may not necessarily be dominant under competition law.²⁹²⁷

Regarding SMEs, the *EU Digital Markets Act* provides that when the core platform is an SME, the assessment of any alleged unfair practices should consider whether the SME would be able to substantially lessen competition on the core platform.²⁹²⁸ This is because the *EU Digital Markets Act* primarily targets large core platforms with significant market power rather than SMEs.²⁹²⁹ Further, large core platforms or gatekeepers are required to disclose a non-confidential summary of their compliance with the *EU Digital Markets Act* to stakeholders, especially to SMEs.²⁹³⁰ This is probably because SMEs are the main users or third-party sellers on core online

²⁹²¹ EU Digital Markets Act, para 3.

²⁹²² EU Digital Markets Act, para 3.

²⁹²³ EU Digital Markets Act, para 3.

²⁹²⁴ EU Digital Markets Act, para 3.

²⁹²⁵ EU Digital Markets Act, para 4.

²⁹²⁶ EU Digital Markets Act, para 4.

²⁹²⁷ EU Digital Markets Act, para 5.

²⁹²⁸ EU Digital Markets Act, para 24.

²⁹²⁹ EU Digital Markets Act, para 24.

²⁹³⁰ EU Digital Markets Act, para 68.

platforms.²⁹³¹ They heavily rely on established online platforms to reach a large customer audience.²⁹³² SMEs often lack countervailing buyer power against core platforms, making them vulnerable to unfair business practices by these large platforms.²⁹³³ Such practices may deny SMEs access to features that could enhance their visibility, ultimately hindering their growth.²⁹³⁴ Hence, there is a requirement for large core platforms to disclose to SMEs their compliance with the *EU Digital Markets Act*.

4.2.8 Review of EU competition case law on the treatment of SMEs

4.2.8.1 *Eurofix-Bauco v Hilti*

In *Eurofix-Bauco v Hilti*,²⁹³⁵ Eurofix and Bauco complained about Hilti's abuse of dominance in the markets for nails and cartridge strips. Eurofix was a small business that manufactured and distributed various nails, including nails used in Hilti's nail guns and other manufacturers' nail guns.²⁹³⁶ Bauco was also a small firm which imported and distributed nails used in Hilti's nail guns.²⁹³⁷ Independent nail producers (like the complainants), who were generally small firms and had small market shares,²⁹³⁸ sold nails for Hilti's nail guns and other producers' nail guns through plant-hire companies or similar distributors/dealers.²⁹³⁹

Hilti was dominant in the European Community (EC)²⁹⁴⁰ market for nail guns and accessories used in the construction industry and the markets for Hilti-compatible nails and cartridge strips.²⁹⁴¹ Hilti's products, namely nail guns and cartridge strips, were

²⁹³¹ European Commission "Commission Decision of 20.12.2022 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement"

Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box. Hereinafter "EC Amazon decision (2022)".

²⁹³² EU Digital Markets Act, para 1.

²⁹³³ EC Amazon decision (2022), paras 93 and 222.

²⁹³⁴ EC Amazon decision (2022), paras 93 and 222.

²⁹³⁵ *Eurofix-Bauco v Hilti* [1988] OJ L65/19. Commission Decision (Case IV/30.787 and 31.488) 88/138/EEC [1988] OJ L65/19.

²⁹³⁶ *Eurofix-Bauco v Hilti* [1988] OJ L65/19, para 4.

²⁹³⁷ *Eurofix-Bauco v Hilti* [1988] OJ L65/19, para 5.

²⁹³⁸ *Eurofix-Bauco v Hilti* [1988] OJ L65/19, para 67.

²⁹³⁹ *Eurofix-Bauco v Hilti* [1988] OJ L65/19, para 24.

²⁹⁴⁰ This was then known as the European Economic Community (EEC).

²⁹⁴¹ *Eurofix-Bauco v Hilti* [1988] OJ L65/19, para 70; Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 477.

under patent protection.²⁹⁴² The Hilti-compatible nails produced and sold by small independent firms were not under patent protection.²⁹⁴³

Hilti was accused of engaging in various practices²⁹⁴⁴ to ensure that its customers of cartridge strips would only use its nails and not purchase and use the nails of small independent nail producers.²⁹⁴⁵ In particular, the complainants alleged that Hilti's practices of tying the sales of nails with cartridge strips restricted their entry into the market.²⁹⁴⁶ The various practices complained of included tying cartridge strips with nails;²⁹⁴⁷ discrimination against customers who were buying nails from competitors by reducing discounts to these customers;²⁹⁴⁸ preventing Hilti's independent distributors, especially those in the Netherlands, from exporting to the UK;²⁹⁴⁹ refusal to supply cartridges to independent producers of nails and other nail gun producers;²⁹⁵⁰ refusal to grant a patent licence for the manufacturing of cartridges similar to Hilti's cartridges;²⁹⁵¹ Hilti also used to refuse to give guarantees on tools using non-Hilti nails.²⁹⁵² Hilti further applied discriminatory tactics against its competitors and their customers, with the aim of converting these customers to Hilti.²⁹⁵³

The Commission found that: (a) Hilti was supplying cartridge strips only if the purchasers, being end-users or distributors, were also buying Hilti's nails;²⁹⁵⁴ (b) Hilti's practices prevented the entry of independent nail and cartridge strip producers who wanted to supply consumables for Hilti's nail guns;²⁹⁵⁵ (c) Hilti was dominant in the three separate markets for nail guns, cartridge strips and nails; (d) Hilti's conduct of tying the supply of Hilti's nails to Hilti's cartridges prevented the entry and expansion of small independent producers and suppliers of Hilti-compatible nails and cartridge

²⁹⁴² Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 477.

²⁹⁴³ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 477.

²⁹⁴⁴ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 76-85.

²⁹⁴⁵ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 477.

²⁹⁴⁶ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 17.

²⁹⁴⁷ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 30.

²⁹⁴⁸ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 33.

²⁹⁴⁹ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 35. The effect of hindering export to the UK was that competitors like the complainants, Eurofix and Bauco, could not purchase cartridges from Hilti's independent distributors in the Netherlands, who were selling cartridges at a lower price.

²⁹⁵⁰ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 38.

²⁹⁵¹ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 39. Hilti did that by setting the royalty at a very high price.

²⁹⁵² Eurofix-Bauco v Hilti [1988] OJ L65/19, para 44.

²⁹⁵³ Eurofix-Bauco v Hilti [1988] OJ L65/19, 45.

²⁹⁵⁴ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 30.

²⁹⁵⁵ Eurofix-Bauco v Hilti [1988] OJ L65/19. Commission Decision at para 50.

strips to customers;²⁹⁵⁶ (e) Hilti's conduct was exploitative and exclusionary and its tying conduct left the consumer with no choice regarding the source of its nails;²⁹⁵⁷ (f) Hilti's behaviour was exclusionary, in that it prevented small independent producers of cartridge strips and Hilti-compatible nails from entering or expanding in the market to disturb Hilti's dominant position.²⁹⁵⁸ Consequently, Hilti's conduct was found to have contravened Article 102 of the *TFEU*.

Hilti argued that the requirement only to use Hilti's accessories or consumables on Hilti's nail guns was to ensure safety, as the non-Hilti accessories were sub-standard. However, the Commission rejected Hilti's argument. The General Court confirmed the Commission's findings.²⁹⁵⁹ On appeal, the European Court of Justice also affirmed the General court's judgment.²⁹⁶⁰

4.2.8.1.1 Relevance of this case for the thesis

The relevance of the *Hilti*-decision for this thesis is that the case concerned the exclusion of small producers/suppliers of cartridge strips and nails through Hilti's abuse of dominance conduct, in particular, its "tying and bundling" conduct. The case illustrates how a dominant player, Hilti, used its dominant position in the markets concerned to prevent the entry of small independent producers and suppliers of nails and cartridge strips. This case also shows that the competition authority took into consideration that firms that were excluded from the market were small players.

In this context the next case to be considered is the *Tetra Pak II* case.

4.2.8.2 *Elopak Italia v Tetra Pak*

In this case,²⁹⁶¹ Elopak Italia (Elopak)²⁹⁶² complained that Tetra Pak Italiana (Tetra Pak) and its partner companies in Italy engaged in an abuse of dominance, adversely

²⁹⁵⁶ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 478.

²⁹⁵⁷ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 75.

²⁹⁵⁸ Eurofix-Bauco v Hilti [1988] OJ L65/19, para 75.

²⁹⁵⁹ Case T-30/89, Hilti [1991] ECR II-1439; Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 478, fn 607.

²⁹⁶⁰ Case C-53/92 P, Hilti [1994] ECR I-667; Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 478, fn 608.

²⁹⁶¹ Elopak Italia v Tetraak [1991] OJ L72/1. The Commission's decision was upheld by the General Court and by the Court of Justice, case C-333/94 P, Tetra Pak II [1996] ECR I-5951. Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 316.

²⁹⁶² Although Elopak was not described as an SME, it had a 27% market share of the non-aseptic market compared to Tetra Pak, which had 55% market share. Based on these market shares, Elopak was, therefore, regarded as small compared to Tetra Pak, which dominated more than half of the market. See Elopak Italia v Tetra Pak [1991] OJ L72/1, paras 13 and 101.

affecting Elopak's competitiveness in the market.²⁹⁶³ Elopak alleged that Tetra Pak was engaged in predatory pricing of cartons for packaging milk.²⁹⁶⁴ Elopak also alleged that Tetra Pak imposed unfair conditions on the supply of the machines used to fill in the cartons and the sale of the machines at predatory prices.²⁹⁶⁵

Tetra Pak was a dominant player in the market for packaging liquid and semi-liquid foods in cartons.²⁹⁶⁶ It operated in aseptic packaging of long-life products and non-aseptic packaging of fresh products.²⁹⁶⁷ Elopak was Tetra Pak's main competitor for packaging liquid foods in cartons. Notably Elopak was not operating in the aseptic packaging.²⁹⁶⁸

The Commission found that there were four separate product markets in the packaging of liquid and semi-liquid foods in cartons:²⁹⁶⁹ (a) the market for the machines using technology for the sterilisation of cartons and packaging UHT-treated liquid and semi-liquid foods in those cartons, under aseptic conditions, namely the aseptic packaging machines; (b) the corresponding market for packaging cartons; (c) the market for machines used to package fresh liquid foods; and (d) the corresponding market for packaging cartons.²⁹⁷⁰ In summary, these were the market for machines to package UHT-treated liquid and semi-liquid food (the aseptic packaging machines), the market for aseptic cartons, the market for machines to package fresh liquid food in non-aseptic cartons (non-aseptic machines), and the market for non-aseptic cartons.²⁹⁷¹ The geographical market was the European Community.²⁹⁷² The General Court confirmed the Commission's findings of four separate markets.²⁹⁷³

Tetra Pak was dominant in the aseptic sector (namely, the markets for aseptic packaging machines and aseptic cartons), with a market share of approximately 90 to 95% of the industry.²⁹⁷⁴ Elopak and other smaller producers attempted to enter the

²⁹⁶³ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 5.

²⁹⁶⁴ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 6.

²⁹⁶⁵ For an explanation of "predatory price" see Chapter One, 1.11.1. United States of America (US); Elopak Italia v Tetra Pak [1991] OJ L72/1, para 5.

²⁹⁶⁶ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 1.

²⁹⁶⁷ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 1.

²⁹⁶⁸ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 3.

²⁹⁶⁹ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 11.

²⁹⁷⁰ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 11.

²⁹⁷¹ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 92. Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 305.

²⁹⁷² Elopak Italia v Tetra Pak [1991] OJ L72/1, para 98.

²⁹⁷³ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 305.

²⁹⁷⁴ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 12.

aseptic markets.²⁹⁷⁵ Tetra Pak was also dominant in the non-aseptic sector (namely, the market for non-aseptic machines and non-aseptic cartons), with approximately 50 to 55% of the industry.²⁹⁷⁶ Elopak was one of its main competitors, with 27% of the market.²⁹⁷⁷

The Commission found that Tetra Pak abused its dominance in the aseptic and non-aseptic markets in contravention of Article 86 of the EEC Treaty (now Article 102 of the *TFEU*).²⁹⁷⁸ Tetra Pak did so by imposing certain contractual obligations on the users of Tetra Pak's products (namely aseptic cartons and machines, as well as non-aseptic cartons and machines) which bound these users to only use Tetra Pak's products.²⁹⁷⁹ This prevented users from buying from Tetra Pak's competitors and thus excluded potential competition.²⁹⁸⁰ Tetra Pak also engaged in discriminatory pricing conduct for the cartons and the machines between users in different EU member states.²⁹⁸¹ Tetra Pak's prices and various anti-competitive practices also aim to eliminate competitors and their technology in Italy.²⁹⁸² Tetra Pak further followed a policy of profit maximisation to the detriment of consumers, enabling Tetra Pak to charge predatory prices in areas where it was facing competition, mainly in the non-aseptic market.²⁹⁸³

4.2.8.2.1 Relevance of this case for the thesis

The relevance of the *Tetra Pak*-case for this thesis is that Tetra Pak's conduct was also found to prevent the entry and expansion of smaller producers in the aseptic markets.²⁹⁸⁴ The fact that the class of firms excluded from the market was smaller firms was thus considered by the EU Commission.

Akman points out that the above two cases have, however, been criticised as protecting competitors instead of protecting competition for the benefit of consumers.²⁹⁸⁵ In this regard, Akman states the following:

²⁹⁷⁵ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 104(3) fn.8.

²⁹⁷⁶ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 13.

²⁹⁷⁷ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 13.

²⁹⁷⁸ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 104.

²⁹⁷⁹ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 105.

²⁹⁸⁰ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 105 and 170.

²⁹⁸¹ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 105 and 170.

²⁹⁸² Elopak Italia v Tetra Pak [1991] OJ L72/1, para 170.

²⁹⁸³ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 105.

²⁹⁸⁴ Elopak Italia v Tetra Pak [1991] OJ L72/1, 104(3) fn.8

²⁹⁸⁵ Akman *The concept of abuse in EU competition law: Law and economic approaches* (2015) 304.

“Some commentators interpret both *Hilti* and *Tetra Pak II* as being driven by concerns about the structure of the market, rather than the extraction of monopoly profits or the protection of consumers. They argue that in these cases the concern was with the ability of smaller firms to compete, which represents a policy not so much about efficiency and free competition as the protection of small firms and competitors. This criticism implies that when there is no ‘exploitation’ in the form of harmful effects on customers, the prohibition of exclusionary conduct results in protecting competitors rather than competition.”²⁹⁸⁶

4.2.8.3 *Merci Convenzionali v Siderurgica*

The case of *Merci Convenzionali*²⁹⁸⁷ shows how the European General Court applied Article 102 *TFEU* to a small firm found to be dominant in a narrow market.²⁹⁸⁸ Article 102 *TFEU* applies to any firm dominant in a defined market, irrespective of the size of the firm. Article 102 *TFEU* may, thus, also apply to a small firm that may be dominant in a specific market.²⁹⁸⁹ However, for Article 102 *TFEU* to apply to a small firm, such a firm must have significant market power in the relevant market, and its conduct must affect inter-state trade.²⁹⁹⁰

In terms of Italian national law, *Merci Convenzionali* enjoyed the exclusive rights to render unloading and handling services in the port of Genoa.²⁹⁹¹ These exclusive rights prevented other firms and ships’ crews from rendering these services.²⁹⁹² *Merci* rendered these services through a dock-work company. A strike broke at the dock-work company, delaying the unloading of *Siderurgica*’s ship.²⁹⁹³ The ship’s internal crew was prevented from unloading the ship because of *Merci*’s exclusive rights.²⁹⁹⁴ *Siderurgica* demanded that *Merci* compensate it for the damages it had suffered due to the delay in unloading the ship, as well as reimbursement for the charges

²⁹⁸⁶ Akman *The concept of abuse in EU competition law: Law and economic approaches* (2015) 304, referring to Jones and Surfin *EU Competition Law: Text, Cases and Materials* (2011) (4th Ed.) 462. Own emphasis.

²⁹⁸⁷ *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

²⁹⁸⁸ Lorenz M *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 *TFEU* to small undertakings, 207.

²⁹⁸⁹ Lorenz M *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 *TFEU* to small undertakings, 207.

²⁹⁹⁰ Lorenz M *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 *TFEU* to small undertakings, 207.

²⁹⁹¹ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 604.

²⁹⁹² Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 604.

²⁹⁹³ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 604

²⁹⁹⁴ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 604

Siderurgica had paid to *Merci* for the services which had not been rendered.²⁹⁹⁵ The European Court of Justice (ECJ) found that *Merci* had a statutory monopoly over a significant part of the common market and, thus, dominance in terms of Article 102 TFEU. The ECJ confirmed that a firm may be found to have contravened Article 102 TFEU if, by the mere exercise of its exclusive right, “*it cannot avoid abusing its dominant position or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses.*”²⁹⁹⁶

4.2.8.3.1 Relevance of this case for this thesis

Citing the *Merci* decision, Lorenz remarked that the ECJ found that *Merci* had abused its dominance despite *Merci*’s peculiarities.²⁹⁹⁷ These included *Merci*’s position as the only company active in the market, the fact that unloading services were the only services that *Merci* rendered and *Merci*’s size or its “*limited economic strength*” as a small firm.²⁹⁹⁸ This decision accords with the views of several EU countries discussed above, that competition law should apply to all firms irrespective of size.

The study now turns to a discussion of an early EU decision on the effect of a merger on small businesses, namely the EC’s decision in the GE/Honeywell merger, to illustrate that the EU has frowned upon mergers that could raise barriers for competitors, in particular small players.

4.2.8.4 GE/Honeywell

In *GE/Honeywell*,²⁹⁹⁹ General Electric Co (GE), a large US firm in the market for jet engines for large commercial and regional aircraft, sought to acquire Honeywell, a dominant player in avionics and non-avionic systems and corporate jet engines.³⁰⁰⁰ The European Commission was concerned that GE would leverage its dominance in the market for avionics, non-avionics systems and corporate jet engines, in which

²⁹⁹⁵ C 604; Lorenz *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 TFEU to small undertakings, 207.

²⁹⁹⁶ *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli SpA* [1991] ECR I-5889, para 17; Lorenz *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 TFEU to small undertakings, 207; Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 604.

²⁹⁹⁷ Lorenz *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 TFEU to small undertakings, 207.

²⁹⁹⁸ Lorenz *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 TFEU to small undertakings, 207.

²⁹⁹⁹ Case no. Comp/M.2220 of 3 July 2001, aff’d Cases T-209 and 201/01, [2005] ECR II-5527 and 5575.

³⁰⁰⁰ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1181.

Honeywell was a dominant player.³⁰⁰¹ The merged entity's potential abuse would have resulted in engaging in bundling practices and price cuts.³⁰⁰² The concern was that the merged entity would offer low bundled prices for purchasing its aircraft engines and avionics and non-avionics systems, which would have resulted in the exclusion of the merged entity's competitors, who would then have been forced out of the market.³⁰⁰³ The EC found that consumers would have also been harmed, as the theory of harm was that as soon as competitors exit the market, the merged entity would increase its prices and reduce the quality of its products.³⁰⁰⁴ Affected smaller companies were identified as the regional and corporate jet manufacturers.³⁰⁰⁵ Smaller competitors, who were also supplying avionics systems, complained that they were facing pressure from Honeywell's capability to bundle its products and that such a bundling strategy would be enhanced with the *GE/Honeywell* merger.³⁰⁰⁶ In this regard, the EC found that Honeywell was the leading supplier of avionics and non-avionics products and that no other competitors could replicate these products.³⁰⁰⁷ The EC, therefore, found that the merger would have substantially lessened competition in the aerospace or aircraft market.³⁰⁰⁸

The GE/Honeywell was prohibited by the EU but approved by the US. Commentators remark that the difference between the US and the EU approaches to this transaction was that the US focused on short-term efficiencies and benefits for consumers, whilst the EU considered the long-term effects of the transaction, in that post-merger price reduction, through bundled products, would have pushed competitors of the market.³⁰⁰⁹ This would then enable the merged entity to raise its prices above merger levels, thus affecting consumers.³⁰¹⁰

On appeal, the General Court criticised the EU Commission for making "*a manifest error of assessment in holding that the financial strength and vertical integration of the merged entity would bring about the creation or strengthening of dominant positions*

³⁰⁰¹ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1181.

³⁰⁰² Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1181.

³⁰⁰³ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1181-1182.

³⁰⁰⁴ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1182.

³⁰⁰⁵ GE/Honeywell, Comp/M.2220, 60, para 228.

³⁰⁰⁶ GE/Honeywell, Comp/M.2220, 83, para 329.

³⁰⁰⁷ GE/Honeywell, Comp/M.2220, 83, para 329.

³⁰⁰⁸ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 405.

³⁰⁰⁹ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 406.

³⁰¹⁰ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 406.

on the markets for avionics or non-avionics products.”³⁰¹¹ Nevertheless, the General Court found that the proposed merger would adversely affect the internal market.³⁰¹²

4.2.8.4.1 Relevance of this case to this thesis

The relevance of the *Honeywell*- case to this thesis is the criticism levelled against the EU decision. The EU Commission was criticised for “*protecting competitors and not competition*”. As noted by the South African Competition Tribunal in *Nationwide Poles*,³⁰¹³ the mantra that competition law “*protects competition, not competitors*” is often raised by those who do not attribute a special place for SMEs in competition.³⁰¹⁴ In particular, the US authorities, who had approved the merger, believed that the EC’s decision fundamentally departed from the general antitrust position that “*antitrust laws protect competition, not competitors*”.³⁰¹⁵ The EU rejected this criticism. The EU clarified that it was not against mergers that create efficiencies for the benefit of consumers but rather against mergers that could raise barriers for competitors and eventually reduce consumer welfare.³⁰¹⁶ This highlights the differences between the EU and US views on the role played by competitors, particularly small players, in a market.³⁰¹⁷

4.2.8.5 ECS vs AKZO

In this case,³⁰¹⁸ Engineering & Chemical Supplies (Epsom and Gloucester) Ltd (ECS),³⁰¹⁹ a small UK producer of organic peroxide, benzoyl peroxide, in the UK, accused AKZO Chemie B.V. (AKZO) of abusing its dominance in the European

³⁰¹¹ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 405 referring to para 364 of the General Court’s decision in *GE/Honeywell*.

³⁰¹² Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 406.

³⁰¹³ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* 2005 1 CPLR 156 (CT).

³⁰¹⁴ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* 2005 1 CPLR 156 (CT), para 85

³⁰¹⁵ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 406

³⁰¹⁶ European Commission Speech - 10 July 2001 “Extracts from a speech by Mario Monti European Commissioner for Competition matters The Future for Competition Policy in the European Union Merchant Taylor’s Hall London, 9 July 2001”, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_01_340 (accessed on 20 April 2024); See also “Commissioner Monti dismisses criticism of *GE/Honeywell* merger review and rejects politicisation of the case” (2001), available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_01_855/IP_01_855_EN.pdf (accessed on 20 April 2024).

³⁰¹⁷ Fox “We Protect Competition, You Protect Competitors” (2003) *World Competition Law and Economics Review*, Vol 26 Issue 2, 149 – 165.

³⁰¹⁸ *ECS v AKZO* [1985] OJ L374/1.

³⁰¹⁹ On appeal, the court confirmed that when the dispute broke, ECS had an extremely small market share in the plastic sector. Para 40.

Economic Community (EEC) organic peroxides market.³⁰²⁰ ECS focused on the production of benzoyl peroxide for use as a bleaching agent in flour milling.³⁰²¹ AKZO was a multinational company which also produced benzoyl peroxide, but mainly for use in the plastics sector.³⁰²²

ECS sought to enter the plastics market by supplying benzoyl peroxide to one of AKZO's largest customers.³⁰²³ When AKZO learned about ECS entry, AKZO started reducing its prices below cost for benzoyl peroxides in the UK flour market.³⁰²⁴ This practice excluded ECS as a competitor in the flour additives market in the UK and Ireland. This eventually prevented ECS's expansion in the EEC market for organic peroxide in the plastics sector.³⁰²⁵ The Commission found that AKZO had engaged in predatory pricing conduct to eliminate a small competitor from the plastics sector.³⁰²⁶

In assessing AKZO's market power, the Commission considered, amongst others, that (i) AKZO had *"always successfully repulsed any attacks on its position by smaller producers"*³⁰²⁷ and (ii) *"once such small but potentially dangerous competitors are neutralized, AKZO has been able to raise the price for the particular product in respect of which their competition was felt."*³⁰²⁸

The Commission also found that smaller firms' entry and expansion in the market were unsuccessful because of AKZO's conduct.³⁰²⁹ In assessing whether AKZO's conduct amounted to an abuse of dominance, the Commission considered whether the conduct complained of, namely *"pricing and commercial conduct intended to damage a smaller competitor or eliminate it from the market"*, constituted an abuse of dominance conduct prohibited under Article 86 (now Art. 102 of the *TFEU*).³⁰³⁰ The Commission also had to consider whether AKZO's conduct in selling flour additives constituted an abuse of dominance in the larger organic peroxides market.³⁰³¹

³⁰²⁰ ECS v AKZO [1985] OJ L374/1, para 1.

³⁰²¹ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 387.

³⁰²² Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 387.

³⁰²³ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 387.

³⁰²⁴ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 387.

³⁰²⁵ ECS v AKZO [1985] OJ L374/1, para 1.

³⁰²⁶ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 387.

³⁰²⁷ ECS v AKZO [1985] OJ L374/1, 18 (iii), para 69.

³⁰²⁸ ECS v AKZO [1985] OJ L374/1, 18 (iii), para 69.

³⁰²⁹ ECS v AKZO [1985] OJ L374/1, 18, para 70.

³⁰³⁰ ECS v AKZO [1985] OJ L374/1, 19, para 72.

³⁰³¹ ECS v AKZO [1985] OJ L374/1, 19, para 72.

The Commission found that the dominant firm's unfair business practices aimed to eliminate, discipline or deter smaller competitors, and that such conduct would contravene the competition provisions.³⁰³²

The Commission also found that *"if prices are taken to a level where a business does not cover its total costs, smaller but possibly more efficient firms will eventually be eliminated and the larger firm with the greater economic resources - including the possibility of cross-subsidization - will survive."*³⁰³³

Whilst the Commission acknowledged that large firms should not be prevented from vigorously competing against smaller competitors or new entrants, the Commission confirmed that:

*"the maintenance of a system of effective competition does however require that a small competitor be protected against behaviour by dominant undertakings designed to exclude it from the market not by virtue of greater efficiency or superior performance but by an abuse of market power."*³⁰³⁴

The Commission also found that a dominant player's tactics of obtaining pricing information of other suppliers (its competitors) from its customers and using such information to price below the lowest alternative available to the customer, are exclusionary.³⁰³⁵ AKZO's condition that a price will only apply if a customer buys all its products from AKZO was also regarded as exclusionary.³⁰³⁶ The Commission found that smaller suppliers were excluded from getting any business which was automatically going to the large supplier because of anti-competitive tactics.³⁰³⁷ The Commission thus found that AKZO's conduct denied the smaller firm *"the benefits of the free play of competition."*³⁰³⁸

In this case, although ECS was a small player, it was considered an important threat to AKZO's position in the market. Removing ECS from the market would have discouraged other smaller firms from challenging AKZO's market position. The

³⁰³² ECS v AKZO [1985] OJ L374/1, 19, para 74.

³⁰³³ ECS v AKZO [1985] OJ L374/1, 20, para 77.

³⁰³⁴ ECS v AKZO [1985] OJ L374/1, 21, para 81. Own emphasis.

³⁰³⁵ ECS v AKZO [1985] OJ L374/1, 22, para 83.

³⁰³⁶ ECS v AKZO [1985] OJ L374/1, 22, para 83.

³⁰³⁷ ECS v AKZO [1985] OJ L374/1, 22, para 83.

³⁰³⁸ ECS v AKZO [1985] OJ L374/1, 22, para 83.

Commission also noted its decision in the *Toltecs/Dorcet* trademarks case,³⁰³⁹ where it found that in a national market dominated by a few large firms, the exclusion of a small supplier from another Member State is a serious infringement, especially where the firm exercising exclusion has market power.³⁰⁴⁰

The Commission thus found that this principle would also apply under Article 86 (now Article 102 *TFEU*), where a dominant firm prevents a smaller producer from entering a new market or punishes it for having entered the market.³⁰⁴¹

Accordingly, the Commission found that AKZO's conduct directly threatened a small competitor by preventing it from expanding into a new market and exercising a competitive constraint on AKZO.³⁰⁴² AKZO's conduct also damaged ECS's business. The EC held that:

*"by taking this action to prevent or punish the expansion of a small competitor to another Member State, AKZO was flouting one of the fundamental objectives of the Treaty, namely the creation of a single market between Member States."*³⁰⁴³

AKZO appealed the EC's decision to the European Court of Justice.³⁰⁴⁴ The ECJ rejected AKZO's appeal and confirmed the EC's decision.³⁰⁴⁵ The ECJ confirmed that pricing below costs (i.e., predatory pricing) is abusive if it seeks to eliminate and drive out of the market a competitor that is as efficient as the dominant firm but which, due to its smaller financial resources, cannot counter the competition targeted against it.³⁰⁴⁶

4.2.8.5.1 Relevance of this case for this thesis

This case shows how the EU competition authorities dealt with the predatory pricing conduct of a large player to prevent the entry and expansion of a small player into a

³⁰³⁹ *Toltecs/Dorcet* (1982) OJ L379/19 (82/897/EEC), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31982D0897> (accessed on 26 September 2023) 26.

³⁰⁴⁰ *Toltecs/Dorcet* (1982) OJ L379/19 (82/897/EEC), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31982D0897> (accessed on 26 September 2023) 26; *ECS v AKZO* [1985] OJ L374/1, 23, para 89.

³⁰⁴¹ *ECS v AKZO* [1985] OJ L374/1, 23, para 83.

³⁰⁴² *ECS v AKZO* [1985] OJ L374/1, 25, para 97.

³⁰⁴³ *ECS v AKZO* [1985] OJ L374/1, 25, para 97. Own emphasis.

³⁰⁴⁴ *AKZO v Commission*, Case C-62/86 of 3 July 1991.

³⁰⁴⁵ *AKZO v Commission*, Case C-62/86 of 3 July 1991, I-3477.

³⁰⁴⁶ *AKZO v Commission*, Case C-62/86 of 3 July 1991, I-3455-3456, para 72.

market. The small size of the excluded competitor was considered when assessing AKZO's market power.³⁰⁴⁷ The fact that the competitor excluded was a small business, was also considered in determining whether the conduct complained of amounted to abuse of dominance in contravention of Article 86 (now Article 102 of the *TFEU*).³⁰⁴⁸

The fact that a dominant firm's unfair business practice aimed at eliminating, disciplining and deterring smaller competitors was found to infringe competition provisions.³⁰⁴⁹ More importantly, the Commission recognised that a competitive environment needs the participation and protection of smaller competitors against dominant firm's anti-competitive behaviour.³⁰⁵⁰

The Commission's findings that a dominant firm's abuse of market power denies a smaller player "*the benefits of the free play of competition*" indicates that the EU Commission acknowledged the goal of protecting SMEs to freely and fairly participate in the market to maintain a competitive environment.³⁰⁵¹ Furthermore, the EC's findings indicated that AKZO was breaching a fundamental objective of the *TFEU* by preventing a small competitor's expansion in another Member State. This confirmed that promoting or protecting SMEs is an important objective of EU competition law.³⁰⁵²

4.2.8.6 Amazon Marketplace and Amazon Buy Box

On 20 December 2022, the EC issued a decision relating to proceedings under Article 102 of the *TFEU* regarding Amazon's alleged anti-competitive practices on its online platform or marketplace.³⁰⁵³ The impugned business practices that the EC investigated related to Amazon's use of non-public data of third-party sellers' listings and transactions on Amazon's online marketplace.³⁰⁵⁴ Amazon was alleged to use these data for its own retail operations on its online marketplace. This was identified as "the Data-use-Conduct". The EC also investigated Amazon's conditions and

³⁰⁴⁷ ECS v AKZO [1985] OJ L374/1, 18 (iii), para 69.

³⁰⁴⁸ ECS v AKZO [1985] OJ L374/1, 19, para 72.

³⁰⁴⁹ ECS v AKZO [1985] OJ L374/1, 19, para 74.

³⁰⁵⁰ ECS v AKZO [1985] OJ L374/1, 21, para 81.

³⁰⁵¹ ECS v AKZO [1985] OJ L374/1, 21, para 81.

³⁰⁵² ECS v AKZO [1985] OJ L374/1, 25, para 97.

³⁰⁵³ European Commission "Commission Decision of 20.12.2022 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement" Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box. Hereinafter "EC Amazon decision (2022)".

³⁰⁵⁴ EC Amazon decision (2022), para 1.

criteria for selecting the offer that features in the “Buy Box” and the eligibility of third-party sellers to Prime and their offers to Prime label.³⁰⁵⁵ This conduct was identified as “the Buy Box-related conduct” and the “Prime-related conduct”.³⁰⁵⁶

Amazon operates as an online marketplace or platform connecting online customers and third-party sellers.³⁰⁵⁷ Amazon also acts as an online retailer, selling products on its own website/online platform directly to customers.³⁰⁵⁸ Amazon is, therefore, an online marketplace where third-party sellers sell and list their products, and an online retailer where it sells its own products.³⁰⁵⁹

The EC found that Amazon uses non-publicly available data of third-party sellers listing on its online platform for its own retail online operations, to compete with those sellers.³⁰⁶⁰ Amazon's Buy Box-related conduct imposes conditions and criteria that favour Amazon's own retail operations.³⁰⁶¹ The EC preliminary investigation found that Amazon is dominant on the online marketplace market in Germany and France, and its Data-use conduct (i.e. the use of third party sellers' listings and sales to Amazon's advantage) contravenes Article 102 of the *TFEU*.³⁰⁶² The EC also found that in relation to the Buy-Box conduct, Amazon is dominant in the market for online marketplace services, and such conduct is likely to contravene Article 102 of *TFEU*.³⁰⁶³

In investigating the matter, the EC found that Amazon retail and third-party sellers are competitors, as they compete at the retail level to sell the same goods on Amazon's online marketplace.³⁰⁶⁴ Amazon obtains its revenue from the fees and commissions paid by third-party sellers for the use of its platform and from its own retail sales to the end customers.³⁰⁶⁵ The Buy-Box feature is a privilege ranking position on a particular Amazon's unique product identifiers (ASIN) page.³⁰⁶⁶ It is important for a third-party seller to have its products on the "featured offer" to be visible to customers, as it

³⁰⁵⁵ EC Amazon decision (2022), para 1.

³⁰⁵⁶ *Ibid.*

³⁰⁵⁷ EC Amazon decision (2022), para 3.

³⁰⁵⁸ EC Amazon decision (2022), para 3.

³⁰⁵⁹ EC Amazon decision (2022), para 3.

³⁰⁶⁰ EC Amazon decision (2022), para 4.

³⁰⁶¹ EC Amazon decision (2022), para 5.

³⁰⁶² EC Amazon decision (2022), para 6.

³⁰⁶³ EC Amazon decision (2022), para 7.

³⁰⁶⁴ EC Amazon decision (2022), para 24.

³⁰⁶⁵ EC Amazon decision (2022), para 26.

³⁰⁶⁶ EC Amazon decision (2022), para 37.

eventually converts such visibility into actual sales.³⁰⁶⁷ Third-party sellers on online marketplaces are small-revenue sellers that are unlikely to be able to build their own online platform to sell their products, and thus rely on online marketplaces, such as Amazon.³⁰⁶⁸ The advantage of selling on an established online marketplace is to get access to a large consumer audience because of the high volume of traffic of customers on these platforms.³⁰⁶⁹

In assessing Amazon's conduct, the EC also noted that:

*“An undertaking which holds a very large market share for some time, without smaller competitors being able to meet rapidly the demand from those who would like to break away from that undertaking, is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.”*³⁰⁷⁰

The EC found that none of Amazon's competitors could match its size, profile, and services.³⁰⁷¹ Based on this and considering the large number of small third-party sellers on Amazon's online platform, the EC preliminary concluded that Amazon was able to act independently of its competitors, i.e. the third-party sellers and thus had market power.³⁰⁷² The EC also found that these third-party sellers could not exert countervailing buyer power against Amazon.³⁰⁷³ The EC, therefore, found that Amazon was dominant in the market for the provision of marketplace services for retailers in relation to consumers in Germany and France.³⁰⁷⁴

The EC further found that Amazon's use of non-public data of third-party sellers for its own retail operations could distort competition in Amazon's online marketplace by giving Amazon a competitive advantage.³⁰⁷⁵ The EC, thus, found that this

³⁰⁶⁷ EC Amazon decision (2022), para 47.

³⁰⁶⁸ EC Amazon decision (2022), para 67.

³⁰⁶⁹ EC Amazon decision (2022), para 68.

³⁰⁷⁰ Own emphasis. EC Amazon decision (2022), para 84.

³⁰⁷¹ EC Amazon decision (2022), para 87.

³⁰⁷² EC Amazon decision (2022), para 93.

³⁰⁷³ EC Amazon decision (2022), para 93.

³⁰⁷⁴ EC Amazon decision (2022), para 95.

³⁰⁷⁵ EC Amazon decision (2022), para 96.

contravened Article 102 of the *TFEU*.³⁰⁷⁶ The EC pointed out that “A system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators.”³⁰⁷⁷

After assessing Amazon’s conduct, the EC found that the Data-use conduct, the Buy Box-related conduct and the Prime-related conduct prevent competition and were likely to have the effect prohibited under Article 102 of the *TFEU*.³⁰⁷⁸ The EC found that these three practices had the potential of marginalising third-party sellers, who, as indicated above, were mainly small players, by restricting their ability to grow and/or partially foreclosing them from highly demanded products.³⁰⁷⁹ This would then negatively affect their scale and thus lessen competitive pressure on Amazon.³⁰⁸⁰

Amazon disagreed with the EC preliminary findings, but nevertheless offered to remedy the EC concerns.³⁰⁸¹ As a remedy regarding the data-use concern, Amazon undertook to not use the non-public data.³⁰⁸² Regarding the Buy Box conduct, Amazon undertook to apply non-discriminatory conditions and criteria to identify the Featured Offer displayed in the Buy Box.³⁰⁸³

4.2.8.6.1 Relevance of this matter to this thesis

This case shows that the marginalisation of small players through restricting their entry or expansion in a market is an important consideration in assessing whether a dominant player has engaged in an abuse of dominance conduct and thus infringed Article 102 of the *TFEU*. The exclusion of small players is not merely regarded as the inevitable exclusion of inefficient competitors due to rigorous competition from dominant players, but it is considered as a deprivation of equal opportunities between economic operators. The case also shows that preventing small businesses to expand negatively affects their scale and thus renders them less efficient, eventually inhibiting their competitive pressure against dominant players.³⁰⁸⁴ This indicates that harm to competition in cases involving SMEs as victims may be assessed by considering

³⁰⁷⁶ EC Amazon decision (2022), para 96.

³⁰⁷⁷ Own emphasis. EC Amazon decision (2022), para 162.

³⁰⁷⁸ EC Amazon decision (2022), para 221.

³⁰⁷⁹ EC Amazon decision (2022), para 222.

³⁰⁸⁰ EC Amazon decision (2022), para 222.

³⁰⁸¹ EC Amazon decision (2022), para 8.

³⁰⁸² EC Amazon decision (2022), para 232.

³⁰⁸³ EC Amazon decision (2022), para 234.

³⁰⁸⁴ EC Amazon decision (2022), para 222.

whether the impugned conduct may render them less effective and thereby lessen their competitive pressure against a dominant player. This case, therefore, indicates that the status of those excluded, namely small online third-party sellers, was considered to find that Amazon had infringed Article 102 of the *TFEU*.

4.2.9 Conclusion

As pointed out, EU competition law is regulated under the *TFEU*.³⁰⁸⁵ EU competition rules are also found in the regulations of the Council of the EU, and the EU Commission's notices and guidelines.³⁰⁸⁶ Article 101 of the *TFEU* prohibits horizontal and vertical agreements, and Article 102 prohibits abuse of dominance in the internal market or any substantial part of it.³⁰⁸⁷ Merger control is regulated under the *European Merger Control Regulation (EUMR)*.³⁰⁸⁸

The EU also has exemptions and leniency policies that include safe harbours that enable SMEs to conduct their business safely and avoid the risk of being accused of infringing competition law.³⁰⁸⁹ These include the EU *De Minimis Notice* on SMEs with

³⁰⁸⁵ See Chapter 4.2: European Competition Law – Treatment of SMEs. [Glossary:Treaties of Rome - Statistics Explained \(europa.eu\)](#) (accessed on 7 August 2022). European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <https://www.refworld.org/docid/4b17a07e2.html> (accessed on 17 December 2023); also available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2008/115/01> (accessed on 17 December 2023); Articles 101 and 102, available at https://eur-lex.europa.eu/resource.html?uri=cellar:88f94461-564b-4b75-aef7-c957de8e339d.0006.01/DOC_3&format=PDF (accessed on 17 December 2023).

³⁰⁸⁶ For a description of the Council of the EU and the EU Commission see Chapter 4.2, 4.2.2 A brief history of the EU Competition law. In a nutshell, the Council of the EU, together with the EU Parliament negotiates and adopts the laws and the EU Commission proposes and implements the laws; Carree, Gunster and Schinkel “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010), available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022) 100. As discussed in Chapter 4.2: European Competition Law – Treatment of SMEs, these notices and guidelines are not binding but are mere guidance.

³⁰⁸⁷ Chapter 4.2, 4.2.4.1 The Treaty on the Functioning of the European Union (TFEU); European Commission “Competition Policy – Antitrust”, available at https://ec.europa.eu/competition-policy/antitrust_en (Accessed on 18 June 2022). Articles 101 and 102, available at https://eur-lex.europa.eu/resource.html?uri=cellar:88f94461-564b-4b75-aef7-c957de8e339d.0006.01/DOC_3&format=PDF (accessed on 17 December 2023).

³⁰⁸⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal OF the European Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> (accessed on 18 June 2022); Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1084.

³⁰⁸⁹ Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 15. The exemption does not apply if SMEs are involved in “hard-core” prohibitions like cartel activities.

small turnover thresholds, which exempts SMEs from the application of Article 101 of the *TFEU* if the conduct does not substantially affect trade in the EU.³⁰⁹⁰

The objective of EU competition law may be gleaned from Articles 2 and 3 of the *EC Treaty*, which have been used to interpret EU competition law³⁰⁹¹, and which seeks to establish, amongst others, “a system ensuring that competition in the internal market is not distorted.”³⁰⁹² Notably though, there is no specific mention of SMEs in this objective.

Like in the US, there is a proliferation of views on the EU competition goals.³⁰⁹³ However, it is evident that the recurring themes of EU competition goals include economic welfare and efficiency, EU market integration, and fairness. Nevertheless, protecting SMEs is also recognised as one of the goals of EU competition policy. The *EC De Minimis Notice* is an instrument that specifically seeks to achieve this goal.³⁰⁹⁴ This is from the recognition that that agreements between SMEs generally do not have an appreciable effect on trade between member states.³⁰⁹⁵ Accordingly, SMEs are most likely to be protected under this notice.

Similarly, several EU countries regard provisions prohibiting abuse of dominance conduct as protecting SMEs as victims of such conduct.³⁰⁹⁶ However, the EU

³⁰⁹⁰ Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies; Chapter Four: Comparative Study, 4.2 European Competition Law – Treatment of SMEs, 4.2.5 EU Competition Legislation - The Treaty on the Functioning of the European Union (TFEU); Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014)15.

³⁰⁹¹ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 343 and 345.

³⁰⁹² See Chapter Four, 4.2.4 Objectives of EU Competition Law; *Consolidated Version of the Treaty establishing the European Community*, OJ C325/33 (2002), Article 3(1)(g), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2002:325:FULL> (accessed on 13 May 2024); Caree *et al.* “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022) 100.

³⁰⁹³ See Chapter Four, 4.2.4 Objectives of EU Competition law.

³⁰⁹⁴ See Chapter Four, 4.2.6.1 The EU De Minimis Notice; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 353.

³⁰⁹⁵ As indicated above (Chapter Three, para 3.5.3.1.2 SMEs – victims of prohibited horizontal practices, collusive conduct or agreement is colloquially known as a cartel). See also European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) fn 5.

³⁰⁹⁶ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 125 ; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 134.

recognises that an SME may be dominant in a market, depending on how the market is defined.³⁰⁹⁷ As discussed above,³⁰⁹⁸ the EU case law includes several cases where the EC considered the exclusion of small businesses as a factor in analysing alleged anti-competitive conduct. This shows an appreciation of the goal of protecting SMEs in a market, and indicate that a dominant firm's anti-competitive conduct would not go unnoticed if it seeks to prevent or hinder the entry or expansion of a small business. This much was confirmed in *ECS/AKZO* where the EC stated that whilst large firm can vigorously compete against small competitors, maintaining competition requires that small competitors be protected against dominant firms' anti-competitive conduct at excluding small competitors, not because of the dominant firm's efficiency, but due to their abuse of market power.³⁰⁹⁹

³⁰⁹⁷ See Chapter Four, 4.2.4 Objectives of EU Competition Law; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

³⁰⁹⁸ See above, para 4.2.8 Review of EU competition case law on the treatment of SMEs

³⁰⁹⁹ *ECS/AKZO* [1985] OJ L374/1, 21, para 81.

Chapter Five: Conclusion

5.1 Introduction

This chapter presents the conclusions and recommendations regarding the South African *Competition Act 89 of 1998*'s ("*the Competition Act*") objective of ensuring fair participation for small and medium-sized enterprises (SMEs).

For this purpose, first, this chapter highlights the focus of the thesis as golden thread running through the study, which was on assessing whether the provisions of the *Competition Act* relating to SMEs, adequately ensure that they have an equitable opportunity to participate in the economy. Second, it gives an overview of what SMEs are, their importance to the economy, and the challenges they face in their ability to participate effectively in the economy. Third, it summarizes the findings of the study. It does that by, first, setting out the best practices that can be followed to address the identified challenges faced by SMEs; and, second, summarizing the comparative study, which entails comparing South Africa's treatment of SMEs in the context of competition law against the approaches of the United States (US) and European Union (EU), which both have well-established competition law frameworks that significantly predate the current South African competition law framework. The comparative analysis considers the relevant competition laws in these respective jurisdictions; how they define SMEs for purposes of competition law; the history and purpose of competition law with special consideration of SMEs; the general treatment of SMEs under the competition law of these respective jurisdictions; and the treatment of SMEs under specific prohibited anti-competitive conduct. The comparative analysis also provides an overview of the case law on the treatment of SMEs in the context of competition law, making relevant observations on this benchmarking exercise. Fourth, this chapter considers the conclusions to the various research questions posed in Chapter One.³¹⁰⁰ In summation, it subsequently recommends a few approaches that may be followed to ensure that the *Competition Act 89 of 1998* achieves its objective of enabling SMEs to be competitive in the market.

³¹⁰⁰ Chapter One, para 1.9 Research Objectives.

5.2 Focus of the thesis

This thesis sought to assess the provisions of the South African *Competition Act* 89 of 1998 (“the Competition Act”) relating to SMEs in order to consider whether the *Competition Act* adequately deals with SMEs to ensure their fair and effective entry and participation in the market.³¹⁰¹ To use the wording of section 2(e) of the Competition Act, the thesis considered whether the provisions of the *Competition Act* relating to SMEs ensure that they have an equitable opportunity to participate in the economy.³¹⁰² To answer this question, the thesis addressed the research objectives as stated in Chapter One as follows:³¹⁰³ first, it established what SMEs are,³¹⁰⁴ their importance in the economy³¹⁰⁵ and the various challenges affecting their growth;³¹⁰⁶ second, it considered the best practices in dealing with the challenges faced by SMEs, in particular in the context of competition law;³¹⁰⁷ third, it discussed the treatment of SMEs under the current South African competition law;³¹⁰⁸ and fourth, the thesis explored the treatment of SMEs in the context of competition/antitrust law in the US and EU.³¹⁰⁹

5.3 Summary of the Findings

5.3.1 An overview of SMEs – Definition, importance and challenges

As discussed in Chapters One and Two, there is no standard global definition of an SME.³¹¹⁰ An SME is generally defined in terms of certain criteria that can generally be said to be indicative of its “size” as a species of business or firm. These criteria include the number of employees, the annual turnover and the sector in which the entity operates.³¹¹¹ In this regard, the OECD defines an SME as a non-subsidary

³¹⁰¹ Chapter One, para 1.1 Introduction.

³¹⁰² Section 2(1)(e) of the *Competition Act* sets out one of the purposes of the Act as: “to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy”.

³¹⁰³ Chapter One, Background, para 1.9 Research objectives.

³¹⁰⁴ Chapter One, para 1.1 Definition of SMEs.

³¹⁰⁵ Chapter Two, An overview of SMEs and best practices in dealing with SMEs, para 2.2 Importance of SMEs in the economy

³¹⁰⁶ Chapter Two, para 2.3 Factors affecting SMEs growth.

³¹⁰⁷ Chapter Two, para 2.4 Best practices in dealing with the challenges faced by SMEs

³¹⁰⁸ Chapter Three: The treatment of SMEs under the South African Competition Act.

³¹⁰⁹ Chapter Four: Comparative Study.

³¹¹⁰ Chapter One, para 1.2 Definition of SMEs; Chapter Two, para 2.2 Definition of SMEs; OECD “Enhancing the contributions of SMEs in a global and digitalized economy” (2017) 4.

³¹¹¹ Chapter Two, para 2.2 Definition of SMEs.

independent entity that employs fewer than a given number of employees.³¹¹² The number of employees is generally between 5 to 10 employees for micro-enterprises, less than 50 employees for small enterprises and between 200 and 250 employees for medium-sized enterprises.³¹¹³

The study pointed out that, in South Africa, in the context of competition law, an SME is defined as a separate and distinct enterprise managed by one or more owners, operating in any sector of the economy and satisfying specific criteria, namely the number of paid employees and the total annual turnover.³¹¹⁴ These factors differ per sector of the economy.³¹¹⁵

In the US, the US *Small Business Act of 1953*³¹¹⁶ defines a small business as an independently owned and operated non-dominant firm in its area of business.³¹¹⁷ The criteria used to determine whether an entity is a small business include its number of employees, dollar volume, net worth, and net income.³¹¹⁸

³¹¹² OECD “Small and Medium-sized Enterprises: Local Strength, Global Reach” (2000) *OECD Policy Brief*, available at <https://www.oecd.org/cfe/leed/1918307.pdf> (accessed on 9 March 2019) 2.

³¹¹³ Chapter One, para 1.2. Definition of SMEs; OECD “Small and Medium-sized Enterprises: Local Strength, Global Reach” (2000) *OECD Policy Brief*, available at <https://www.oecd.org/cfe/leed/1918307.pdf> (accessed on 9 March 2019) 2.

³¹¹⁴ Chapter Two, para 2.2 Definition of SMEs; Notice in terms of section 1 of the Competition Act, 1998 (Act no. 89 of 1998), GN987 in GG42578 of 12 July 2019. Available at <https://www.ellipsis.co.za/wp-content/uploads/2019/02/Notice-in-terms-of-section-1-of-the-Competition-Act-12-July-2019.pdf> (accessed on 8 July 2023). Sakata “Small and medium-sized enterprises – their place in antitrust: Does the Competition Amendment Act, 2018 effectively bring more protection to SMEs?” (August 2019) Paper presented at the 13th Annual Competition Law, Economics and Policy Conference, available at <https://www.compcom.co.za/wp-content/uploads/2020/12/CompCom-Special-Edition-Newsletter-s.pdf> (accessed on 19 September 2021) (hereafter Sakata (2019)) 50. Notice in terms of section 1 of the Competition Act, 1998 (2019), Columns 3 and 4 of the Schedule to the Notice.

³¹¹⁵ *Ibid.*

³¹¹⁶ The Small Business Act of 1953, 67 Stat. 233 (1953), available at <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg230.pdf> (accessed on 18 December 2023) was amended by the Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023); MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170.

³¹¹⁷ Small Business Act of 1958, [15 U.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023) section 3(a)(1) which states: “For the purposes of this Act, a small business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.”

³¹¹⁸ The Small Business Act of 1953, 67 Stat. 233 (1953), available at <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg230.pdf> (accessed on 18 December 2023) was amended by the Small Business Act of 1958, [15 V.S.C 631 et seq.; 72 Stat. 384 et seq.] available at <https://www.govinfo.gov/content/pkg/COMPS-1834/pdf/COMPS-1834.pdf> (accessed on: 7 December 2023) section 3(a)(2)(B).

In the EU, an SME³¹¹⁹ is defined as any entity engaged in an economic activity, irrespective of its legal form, including self-employed persons, family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity,³¹²⁰ which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million and/or an annual balance sheet total not exceeding EUR 43 million.³¹²¹

The approach to defining SMEs, which this study views as best to ensure inclusivity, is a combination of the above three definitions. This would define an SME as an enterprise engaged in an economic activity, which is non-dominant in its area of business and would have a certain number of employees and a turnover not exceeding a specific number set for a particular industry. SMEs are, thus, generally defined by considering two main criteria, namely the staff number and the financial criteria.³¹²²

As also pointed out,³¹²³ SMEs are pivotal in a country's economy³¹²⁴ As they contribute to the economy's growth, job creation and poverty alleviation.³¹²⁵ The crux of the matter is, however, that several factors hamper SMEs' development and affect their ability to realise these economic and developmental goals and these factors need to be interrogated to ensure that competition law recognises the very pivotal role of SMEs in an economy and acts as a catalyst for their ability to effectively compete and grow

MacIntyre "Small business and the antitrust laws (1961) *University of Detroit Law Journal* 170.

³¹¹⁹ The definition refers to micro, small and medium-sized enterprises.

³¹²⁰ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Article 1.

³¹²¹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 39, Articles 1 and 2(1).

³¹²² Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 36, para 4.

³¹²³ See above, Chapter Two - An overview of international standards or best practices in dealing with SMEs, 2.2 Importance of SMEs in the economy.

³¹²⁴ Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) Centre on Regulation and Competition – Working paper series, University of Manchester (UK), available at <https://scholar.google.com/scholar?q=Regulation%2C+competition+and+small+and+medium+enterprises+in+developing+countries&inst=3850658151283745516> (accessed on 28 June 2020) 7.

³¹²⁵ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 5.

noted relevant best practices from Canada³¹³⁴ in the form of effective policy coordination, which could be improved through clear leadership in SME and entrepreneurship policies within the government.³¹³⁵ In this regard, the best practices include establishing a government department to assist other government departments with SMEs' affairs.³¹³⁶ The lead department will be responsible for, amongst others, developing a comprehensive and integrated policy and strategy document for SMEs, which, if submitted, should be updated regularly to ensure that the treatment of SMEs remain clear and current.³¹³⁷ It will also, in particular, develop an entrepreneurship policy in collaboration with other governments, NGOs and business sector stakeholders.³¹³⁸

In the context of access to finance, best practices include financial support to SMEs through loans, credit, grants and non-financial support in the form of information, mentorship, training and so forth.³¹³⁹ Best practices also include government support to specific entrepreneurs (for example, historically disadvantaged individuals in South Africa, women or youth) or specific types of SMEs,³¹⁴⁰ and the formation of cooperatives amongst entrepreneurs to access credit.³¹⁴¹ It was noted that greater access to finance, especially from the formal financial sector, encourages the informal

Competitiveness Outlook 35, available at <https://intracen.org/media/file/413> (accessed on 19 September 2020) 45.

³¹³⁴ Chapter One, 1.11.3 Canada and Australia for best practices.

³¹³⁵ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs, OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

³¹³⁶ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs, OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

³¹³⁷ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs; OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

³¹³⁸ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs, OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

³¹³⁹ Chapter Two, 2.5.2.2.2 Best practices for SMEs in the context of access to finance; OECD "SME and Entrepreneurship Outlook 2019" (2019) OECD Publishing, Paris, available at <https://doi.org/10.1787/34907e9c-en> (accessed on 11 July 2020) 131.

³¹⁴⁰ Chapter Two, 2.5.2.7.3 Government policies that enhance SMEs' competitiveness; OECD "SME and Entrepreneurship Outlook 2019" (2019) OECD Publishing, Paris, available at <https://doi.org/10.1787/34907e9c-en> (accessed on 11 July 2020) 130, Table 3.1. Helping SMEs go global: Selected examples of mainstreamed approaches.

³¹⁴¹ Chapter Two, 2.5.2.2.2 Best practices for SMEs in the context of access to finance; Abor and Quartey "Issues in SME Development in Ghana and South Africa" 2010 International Research Journal of Finance and Economics, available at [Issues-in-SME-Development-in-Ghana-and-South-Africa.pdf](https://www.researchgate.net/publication/271111111_Issues_in_SME_Development_in_Ghana_and_South_Africa) (researchgate.net) (accessed on 17 August 2020) 225.

sector to formalise.³¹⁴² Other forms of support are special taxes applied to start-ups and import duties to limit foreign competition.³¹⁴³ Favourable tax regimes for SMEs also enable them to thrive. For example, although not one of the main selected comparative jurisdictions of this thesis from a competition law perspective, it added value to point out that the Canadian tax system offers SMEs preferential tax rates without having to change their business models or make new investments.³¹⁴⁴ Canada also promotes support programs for SMEs that wish to participate in growth projects. In the context of SMEs' access to finance on digital platforms, best practices in promoting SMEs include using ICT-enabled tools that use digital platforms.³¹⁴⁵ This includes mobile phone payments, which assist SMEs in their business transactions.³¹⁴⁶ In the context of SMEs and finance technology, public-private partnerships are recommended where businesses may benefit from the private sector's capital/funds and know-how and save on high regulatory costs.³¹⁴⁷

Notably, in the business environment context, it was pointed out in Chapter Two that Canada recommends developing specifically targeted programs that address market failures affecting SMEs and start-ups;³¹⁴⁸ expanding loan guarantee programs, enhancing direct government lending; improving SMEs' training systems; and that

³¹⁴² Chapter Two, 2.5.2.2.2 Best practices for SMEs in the context of access to finance; UNCTAD "Entrepreneurship in the least developed countries: Major constraints and current policy frameworks" (2018) The Least Developed Countries Report 2018 Chapter 4, 90.

³¹⁴³ Chapter Two, 2.5.2.2.2 Best practices for SMEs in the context of access to finance; Quartey "Regulation, competition and small and medium enterprises in developing countries" (2001) Centre on Regulation and Competition – Working paper series, University of Manchester (UK), available at <https://scholar.google.com/scholar?q=Regulation%2C+competition+and+small+and+medium+enterprises+in+developing+countries&inst=3850658151283745516> (accessed on 28 June 2020) 15.

³¹⁴⁴ Chapter Two, 2.5.2.2.2 Best practices for SMEs in the context of access to finance; OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris 30, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 25.

³¹⁴⁵ Chapter Two, 2.5.2.2.3 SMEs access to finance on digital platforms; International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) ITC, Geneva, available at <https://intracen.org/file/smeco2018pdf> (accessed on 21 August 2020) 15.

³¹⁴⁶ Chapter Two, 2.5.2.2.3 SMEs access to finance on digital platforms; International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) ITC, Geneva, available at <https://intracen.org/file/smeco2018pdf> (accessed on 21 August 2020) 16.

³¹⁴⁷ Chapter Two, 2.5.2.2.6 SMEs and Finance Technology; International Trade Centre (ITC) "SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age" (2018) ITC, Geneva, available at <https://intracen.org/file/smeco2018pdf> (accessed on 21 August 2020) 85.

³¹⁴⁸ Chapter Two, 2.5.2.4.2 Best practices for an SME conducive business environment; OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 29.

ensuring an enabling business environment where firms compete fairly will help bank lending to SMEs.³¹⁴⁹

In the context of access to technology, best practices include increased use of digital or online platforms that enable better interaction between customers and sellers (such as SMEs).³¹⁵⁰ In this regard, it was highlighted that online platforms enable SMEs to do business in international markets without being physically present in those markets.³¹⁵¹

Regarding management capabilities, it was indicated that best practices include government support or subsidies for training SME owners or managers.³¹⁵² As discussed in Chapter Two,³¹⁵³ the South African example of creating “*sectoral training authorities*” is a good example of best practice in addressing SMEs’ challenges in skills development.³¹⁵⁴ Best practices also include establishing skills development centres for SME employees.³¹⁵⁵ Similarly, Canada’s best practices include introducing a national workplace training fund,³¹⁵⁶ which admittedly, might be more easily

³¹⁴⁹ Chapter Two, 2.5.2.4.2 Best practices for an SME conducive business environment; International Trade Centre “COVID-19: The Great Lockdown and its impact on Small Businesses” (2020) SME Competitiveness Outlook, available at <https://intracen.org/media/file/413> (accessed on 19 September 2020) 49.

³¹⁵⁰ Chapter Two, 2.5.2.5.1 SMEs and online/digital platforms; International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018) ITC, Geneva, available at <https://intracen.org/file/smeco2018pdf> (accessed on 21 August 2020) 14.

³¹⁵¹ Chapter Two, 2.5.2.6 Management capabilities for SMEs / Skills Development / Organisational learning / Lack of Managerial skills; International Trade Centre (ITC) “SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age” (2018) ITC, Geneva, available at <https://intracen.org/file/smeco2018pdf> (accessed on 21 August 2020) 14.

³¹⁵² Chapter Two; 2.5.2.6 Management capabilities for SMEs / Skills Development / Organisational learning / Lack of Managerial skills; Abor and Quartey “Issues in SME Development in Ghana and South Africa” 2010 International Research Journal of Finance and Economics, available at [Issues-in-SME-Development-in-Ghana-and-South-Africa.pdf \(researchgate.net\)](https://www.researchgate.net/publication/311111111_Issues-in-SME-Development-in-Ghana-and-South-Africa.pdf) (accessed on 17 August 2020) 224.

³¹⁵³ Chapter Two, 2.5.2.6 Management capabilities for SMEs / Skills Development / Organisational learning / Lack of Managerial skills.

³¹⁵⁴ Chapter Two, 2.5.2.6 Management capabilities for SMEs / Skills Development / Organisational learning / Lack of Managerial skills; UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) Report by the UNCTAD Secretariat, available at [diaeed20095_en.pdf \(unctad.org\)](https://unctad.org/publication/2010/1/20100001_en.pdf) (accessed on 17 September 2020) 19, Box 4 - *The creation of sectoral training authorities in South Africa*.

³¹⁵⁵ Chapter Two, 2.5.2.6 Management capabilities for SMEs / Skills Development / Organisational learning / Lack of Managerial skills; UNCTAD “Integrating Developing Countries’ SMEs into Global Value Chains” (2010) Report by the UNCTAD Secretariat, available at [diaeed20095_en.pdf \(unctad.org\)](https://unctad.org/publication/2010/1/20100001_en.pdf) (accessed on 17 September 2020) 19.

³¹⁵⁶ Chapter Two, 2.5.2.6 Management capabilities for SMEs / Skills Development / Organisational learning / Lack of Managerial skills; OECD “SME and Entrepreneurship Policy in Canada” (2017) OECD Publishing, Paris 30, available at [http://dx.doi.org/10.1787/9789264273467-en](https://dx.doi.org/10.1787/9789264273467-en) (accessed on 24 August 2020) 37.

attainable in a developed jurisdiction as opposed to a developing jurisdiction but which it is submitted, is also not to be dismissed as being out of reach of a developing jurisdiction.

In the context of access to markets and SMEs' competitiveness, the study pointed out that best practices include increasing SMEs' participation in global markets, particularly in global value chains (GvCs).³¹⁵⁷ International standards in this context also include offering financial and insurance support to SMEs to export their products,³¹⁵⁸ creating a competitive environment and appropriate laws and regulations,³¹⁵⁹ and improving public procurement programs. Regarding public procurement programs, it was indicated that best practices include establishing an office of SMEs to review large procurement contracts and determine whether they could be divided into smaller ones.³¹⁶⁰ Best practices also include public procurement regulations that promote SMEs' fair participation in tender processes and equal treatment of all bidders and suppliers.³¹⁶¹ In the context of enhancing SMEs' competitiveness, it was explained that Canada also recommends promoting measures to increase SMEs' productivity and access to international markets and encouraging SMEs' market entry and expansion.³¹⁶²

In the context of competition law, it was observed that best practices include the Australian competition law which, although not one of the main selected comparative

³¹⁵⁷ Chapter Two, 2.5.2.7 Access to markets and SMEs competitiveness; OECD "Enhancing the role of SMEs global value chains" (2007) OECD Global Conference in Tokyo (31 May – 1 June 2007), available at <https://www.oecd.org/industry/smes/38774814.pdf> (accessed on 24 June 2023); UNCTAD "Integrating Developing Countries' SMEs into Global Value Chains" (2010) Report by the UNCTAD Secretariat, available at [diaeed20095_en.pdf \(unctad.org\)](https://unctad.org/publication/diaeed20095_en.pdf) (accessed on 17 September 2020) 23-24.

³¹⁵⁸ Chapter Two, 2.5.2.7 Access to markets and SMEs competitiveness; OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris 30, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 37.

³¹⁵⁹ Chapter Two, 2.5.2.7 Access to markets and SMEs competitiveness; OECD "SME and Entrepreneurship Outlook 2019" (2019) OECD Publishing, Paris, available at <https://doi.org/10.1787/34907e9c-en> (accessed on 11 July 2020) 134.

³¹⁶⁰ Chapter Two, 2.5.2.7.2 Public procurement programs OECD; "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris 30, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 38.

³¹⁶¹ Chapter Two, 2.5.2.7.2 Public procurement programs; OECD "SME and Entrepreneurship Outlook 2019" (2019) OECD Publishing, Paris, available at <https://doi.org/10.1787/34907e9c-en> (accessed on 11 July 2020) 134.

³¹⁶² Chapter Two, 2.5.2.7.3 Government policies that enhance SMEs' competitiveness; International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) SME Competitiveness Outlook, available at <https://intracen.org/media/file/413> (accessed on 19 September 2020) 17.

jurisdictions of this thesis, has specific provisions that deal with SMEs.³¹⁶³ One of these provisions includes the designation of a specific Commissioner responsible for SMEs.³¹⁶⁴ In this regard, the Australian Competition and Consumer Commission (ACCC) has a specific unit dealing with SMEs.³¹⁶⁵ The ACCC has also established a *Small Business and Franchising Consultative Committee*, which provides a forum where industry and government can discuss and address competition and consumer law concerns in the small business and franchising sectors.³¹⁶⁶ This committee is made up of representatives from the SME sector, who meet to discuss issues of common concern and receive the ACCC's feedback on its latest activities in the SME sector.³¹⁶⁷

In Chapter Two, the thesis also discussed best practices on procedural aspects exempting SMEs from the application of competition rules prohibiting certain types of anti-competitive practices.³¹⁶⁸ Chapter Two also considered that leniency policies apply to SMEs.³¹⁶⁹ The exemptions and leniency include the EU competition law's safe harbours that enable SMEs to conduct their business safely and avoid the risk of being accused of infringing competition law;³¹⁷⁰ the EU *De Minimis Notice* on SMEs with small turnover thresholds, which exempts SMEs from the application of Article 101 of the *Treaty on the Functioning of the European Union (TFEU)* if the conduct does not

³¹⁶³ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Schaper "Competition regulation, open markets and small business" (2012) European Competition Law Review E.C.L.R. 33(8), 333-338, 336.

³¹⁶⁴ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Schaper "Competition regulation, open markets and small business" (2012) European Competition Law Review E.C.L.R. 33(8), 333-338, 336.

³¹⁶⁵ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Schaper "Competition regulation, open markets and small business" (2012) European Competition Law Review E.C.L.R. 33(8), 333-338, 336-337.

³¹⁶⁶ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Australian Competition & Consumer Commission "Small Business and Franchising Consultative Committee", available at <https://www.accc.gov.au/inquiries-and-consultations/consultative-committees/small-business-franchising-consultative-committee#:~:text=The%20Small%20Business%20and%20Franchising,discussed%20by%20industry%20and%20government>. (accessed on 7 April 2023); Schaper "Competition regulation, open markets and small business" (2012) European Competition Law Review E.C.L.R. 33(8), 337.

³¹⁶⁷ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Schaper "Competition regulation, open markets and small business" (2012) European Competition Law Review E.C.L.R. 33(8), 337.

³¹⁶⁸ Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies.

³¹⁶⁹ Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies.

³¹⁷⁰ Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 15. The exemption does not apply if SMEs are involved in "hard-core" prohibitions like cartel activities.

substantially affect trade in the EU;³¹⁷¹ the UK competition rules which, although not one of the main selected comparative jurisdictions of this thesis, provide immunity to firms that are parties to “*small agreements*”;³¹⁷² programs that raise awareness of, and compliance with, competition laws;³¹⁷³ enforcement actions targeting competition law infringements by SMEs;³¹⁷⁴ clear and predictable competition rules which are essential for SMEs’ decision-making processes to avoid infringing the law and facing the ensuing consequences.³¹⁷⁵

As indicated, Kellezi *et al*³¹⁷⁶ recommended several best practices for the treatment of SMEs in the context of competition law namely: establishing a “sector-specific legal definition” of SMEs in the context of competition law; promoting and creating awareness of competition law and compliance programs for SMEs;³¹⁷⁷ developing guidelines to assist SMEs in understanding competition law;³¹⁷⁸ guaranteeing the anonymity of SMEs that have requested anonymity of their identities when filing complaints against anti-competitive practices;³¹⁷⁹ encouraging SMEs to make use of

³¹⁷¹ Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies; Chapter Four: Comparative Study, 4.2 European Competition Law – Treatment of SMEs, 4.2.5 EU Competition Legislation - The *Treaty on the Functioning of the European Union (TFEU)*; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 15.

³¹⁷² Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 15.

³¹⁷³ Chapter Two, 2.7.5.3 Exempting SMEs and Leniency policies; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 15.

³¹⁷⁴ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 10; OECD “Promoting Compliance with competition law” (2012) OECD Policy Roundtables, available at <https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf> (accessed on 15 December 2023) 211.

³¹⁷⁵ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 11.

³¹⁷⁶ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 22 & 28, para 1.5 : Resolution adopted by the LIDC

³¹⁷⁷ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 28, para 1.5 : Resolution adopted by the LIDC.

³¹⁷⁸ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Alemani, Klein, Koske, Vitale and Wanner “New Indicators of Competition Law and Policy in 2013 for OECD and non-OECD Countries” (2013) OECD Economics Department Working Papers, No. 1104, OECD Publishing, Paris, available at <https://dx.doi.org/10.1787/5k3ttg4r657h-en> (accessed on 25 June 2023) 16; OECD (2019) (fn 142) 98-99.

³¹⁷⁹ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 22.

the leniency or immunity programmes;³¹⁸⁰ considering the firm's size, financial and market position and ability to pay a fine, when determining a fine on SMEs;³¹⁸¹ adopting collective redress mechanisms and measures to reduce the financial and organisational obstacles that SMEs face when instituting civil damages actions;³¹⁸² providing legal aid tools to reduce litigation costs and inequality in competition matters;³¹⁸³ introducing specialised competition law panels in bar associations and arbitration courts to reduce the costs of litigation and time to finalise a matter;³¹⁸⁴ inserting provisions protecting SMEs against dominant firms in abuse of dominance provisions;³¹⁸⁵ and imposing divestiture as a condition to anti-competitive mergers that harm SMEs.³¹⁸⁶

5.3.3 Summary of the Comparative Study

This thesis sought to contribute to the existing literature in the treatment of SMEs in competition law with a focus on their ability to grow and compete effectively in their relevant markets by considering the extent to which South African competition law adequately ensures a competition framework that suitably accommodates SMEs in South Africa to achieve the Competition Act's objective of ensuring SMEs' fair and effective participation in the economy.³¹⁸⁷ To determine this, the thesis examined the treatment of SMEs in South Africa in order to benchmark it against best practices in

³¹⁸⁰ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 22.

³¹⁸¹ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 22.

³¹⁸² Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 27.

³¹⁸³ Chapter Two, 2.7.6 Best practices in dealing with SMEs from a competition law perspective; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 27-28.

³¹⁸⁴ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 27-28.

³¹⁸⁵ See section 8(4) of the South African Competition Act, 89 of 1998, as amended, prohibiting a dominant firm from abusing its buying.

³¹⁸⁶ Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Golodner "Antitrust, Innovation, Entrepreneurship and Small Business" (2001), *Small Business Economics*, Feb., 2001, Vol. 16, No. 1, Special Issue: The Invisible Part of the Iceberg: Research Issues in Industrial Organization and Small Business 32, available at [Antitrust, Innovation Entrepreneurship and Small Business on JSTOR](#) (accessed on 22 August 2020) 34.

³¹⁸⁷ Section 2(1)(e) of the Competition Act sets out one of the purposes of the Act as: "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy".

this particular context in the US and the EU. As explained in Chapter One,³¹⁸⁸ the US and EU were selected as comparative jurisdictions because of their well-established competition law frameworks and their experience and knowledge of competition law and interaction with SMEs.³¹⁸⁹ As pointed out in this thesis, the terms “competition law” and “antitrust law” were used interchangeably.³¹⁹⁰

In conducting the comparative study, the thesis considered the relevant competition legislation in these two selected jurisdictions; the definition of SMEs in the context of competition law; the history of competition law and the place of SMEs in the competition law history of the respective jurisdictions; the goals of the competition laws and the treatment of SMEs under these laws. The thesis finally discussed relevant competition cases relating to the treatment of SMEs under the competition law of the selected comparative jurisdictions.

5.3.3.1 The Competition or Antitrust Legislation

As mentioned in Chapter Three,³¹⁹¹ competition law in South Africa is regulated under the *Competition Act 89 of 1998*, as amended (“*the Competition Act*”). The South African *Competition Act* prohibits horizontal and vertical restrictive practices, abuse of a dominant position, and price discrimination.³¹⁹² It also regulates the granting or refusal of exemptions and mergers, as well as the conduct of market inquiries.³¹⁹³

In the US, the framework for regulation by competition law is principally found in the *Sherman Act*,³¹⁹⁴ which prohibits “*contracts, combination in the form of trust or conspiracy*” that restrain trade or commerce between US states (interstate trade) or US states and foreign countries.³¹⁹⁵ It also prohibits any monopoly conduct or attempts to monopolise any part of the trade or commerce between US states or between the US and non-US countries.³¹⁹⁶ The US antitrust legislation also includes

³¹⁸⁸ Chapter One, 1.11 Selection of comparative jurisdictions.

³¹⁸⁹ Chapter One, 1.11 Selection of comparative jurisdictions.

³¹⁹⁰ Chapter One, 1.1 Introduction.

³¹⁹¹ See Chapter Three: The treatment of SMEs under the South African Competition Act, para 3.3 History of the South African Competition Legislation.

³¹⁹² See Chapter Three: The treatment of SMEs under the South African Competition Act.

³¹⁹³ See Chapter Three: The treatment of SMEs under the South African Competition Act.

³¹⁹⁴ See Chapter Four: Comparative Study, 4.1: US Antitrust Law and SMEs; *Sherman Act*, enacted July 2, 1890, Chapter 647 of the 51st Congress, Sess. I, 26 Stat. 209.

³¹⁹⁵ Section 1 of the *Sherman Act*.

³¹⁹⁶ Section 2 of the *Sherman Act*.

the *Clayton Act*, the *Federal Trade Commission Act (FTC Act)* and the *Robinson-Patman Act*.³¹⁹⁷ The *Clayton Act* prohibits, amongst others, exclusive dealings and anticompetitive mergers.³¹⁹⁸ The *FTC Act* established an administrative body, the Federal Trade Commission (FTC) responsible for the enforcement of antitrust legislation.³¹⁹⁹ The *Robinson-Patman Act*³²⁰⁰ prohibits price discrimination by sellers where the discrimination is likely to substantially harm competition or create a monopoly in any line of commerce.³²⁰¹

As pointed out, EU competition law is regulated under the *Treaty on the Functioning of the European Union (TFEU)*.³²⁰² EU competition rules are also found in the regulations of the Council of the EU, and the EU Commission's notices and guidelines.³²⁰³ Article 101 of the *TFEU* prohibits horizontal and vertical agreements, and Article 102 prohibits abuse of dominance in the internal market or any substantial

³¹⁹⁷ See Chapter Four, 4.1: US Antitrust Law and SMEs; *Clayton Act* of 15 October 1914, Chapter 323 of the 63rd Congress; 38 Stat. 730. Available at <https://www.govinfo.gov/content/pkg/COMPS-3049/pdf/COMPS-3049.pdf> (accessed on 17 December 2023);

Federal Trade Commission Act of 26 September 1914, Chapter 311 of the 63rd Congress; 38 Stat. 717. Available at <https://www.govinfo.gov/content/pkg/COMPS-388/pdf/COMPS-388.pdf> (accessed on 17 December 2023);

Robinson-Patman Act of 19 June 1936, Chapter 592 of the 74th Congress; 49 Stat. 1526 et seq., available at <https://www.govinfo.gov/content/pkg/COMPS-12152/pdf/COMPS-12152.pdf> (accessed on 17 December 2023). In Chapter Four, para 4.1.3.4 The Miller-Tydings Resale Price Maintenance Act and McGuire Act, the study also mentioned the *Miller-Tydings Resale Price Maintenance Act* 50 STAT. 693 (1937) and the *McGuire Act* 66 STAT. 631 (1952) dealing with resale price maintenance. However, these two pieces of legislation were repealed in 1976. In para 4.1.3.6 The Celler-Kefauver Act, the study also mentioned the *Celler-Kefauver Act* 64 Stat. 1125 (1950) which amended sections 7 and 11 of the *Clayton Act*.

³¹⁹⁸ MacIntyre "Small business and the antitrust laws" (1961) *University of Detroit Law Journal* 176; Kintner "Counselling Small Business under the Antitrust Laws and the *Robinson-Patman Act*" (1963) 4.

³¹⁹⁹ See Chapter 4.1: US Antitrust Law and SMEs. Both the *Clayton* and *FTC Acts* were enacted in 1914.

³²⁰⁰ See Chapter 4.1: US Antitrust Law and SMEs. The *Robinson-Patman Act* was enacted in 1936.

³²⁰¹ Kintner "Counselling Small Business under the Antitrust Laws and the *Robinson-Patman Act*" (1963) 8.

³²⁰² See Chapter 4.2: European Competition Law – Treatment of SMEs. [Glossary: Treaties of Rome - Statistics Explained \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2008/115/01) (accessed on 7 August 2022). European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <https://www.refworld.org/docid/4b17a07e2.html> (accessed on 17 December 2023); also available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2008/115/01> (accessed on 17 December 2023); Articles 101 and 102, available at https://eur-lex.europa.eu/resource.html?uri=cellar:88f94461-564b-4b75-aef7-c957de8e339d.0006.01/DOC_3&format=PDF (accessed on 17 December 2023).

³²⁰³ For a description of the Council of the EU and the EU Commission see Chapter 4.2, 4.2.2 A brief history of the EU Competition law. In a nutshell, the Council of the EU, together with the EU Parliament negotiates and adopts the laws and the EU Commission proposes and implements the laws; Caree, Gunster and Schinkel "European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions" (2010), available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022) 100. As discussed in Chapter 4.2: European Competition Law – Treatment of SMEs, these notices and guidelines are not binding but are mere guidance.

part of it.³²⁰⁴ Merger control is regulated under the *European Merger Control Regulation (EUMR)*.³²⁰⁵

5.3.3.2 Definition of SMEs under competition law

Given that SMEs are the focus of this research, it was essential for the thesis to provide appropriate contextualization by examining the definition of SMEs in respect of the abovementioned three jurisdictions. As pointed out, the South African *Competition Act* defines SMEs in terms of certain criteria, such as the number of employees and the firm's total turnover, depending on the sector in which the SME operates.³²⁰⁶ This definition accords with best practice in defining SMEs,³²⁰⁷ the *EU Commission Recommendation on SME definition*³²⁰⁸ and the criteria the US follows to classify a company as a "small business".³²⁰⁹ The US criteria also include "the number of employees" and "dollar volume of business" or "annual sales" or "net worth" of the company.³²¹⁰ These criteria vary according to economic sectors. Nevertheless, both the EU and the US use the number of employees and turnover figure as criteria for defining an SME.

³²⁰⁴ Chapter 4.2, 4.2.4.1 The *Treaty on the Functioning of the European Union (TFEU)*; European Commission "Competition Policy – Antitrust", available at https://ec.europa.eu/competition-policy/antitrust_en (Accessed on 18 June 2022). Articles 101 and 102, available at https://eur-lex.europa.eu/resource.html?uri=cellar:88f94461-564b-4b75-aef7-c957de8e339d.0006.01/DOC_3&format=PDF (accessed on 17 December 2023).

³²⁰⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal OF the European Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> (accessed on 18 June 2022); Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1084.

³²⁰⁶ See Chapter Three, 3.4 Definition of small and medium-sized enterprises.

³²⁰⁷ OECD "Small and Medium-sized Enterprises: Local Strength, Global Reach" (2000) *OECD Policy Brief*, available at <https://www.oecd.org/cfe/leed/1918307.pdf> (accessed on 9 March 2019) 2. See Chapter One, 1.2. Definition of SMEs.

³²⁰⁸ See Chapter Two, 2.2 Definition of SMEs; Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L124. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2003:124:FULL> (accessed on 17 December 2023) 36. Also available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003H0361> (accessed on 17 December 2023); Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 5-6.

³²⁰⁹ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 5-7; OECD "Small and Medium-sized Enterprises: Local Strength, Global Reach" (2000) *OECD Policy Brief*, available at <https://www.oecd.org/cfe/leed/1918307.pdf> (accessed on 9 March 2019) 2. See Chapter One above, 1.2.1 Definition of SMEs.

³²¹⁰ See Chapter Two, 2.2 Definition of SMEs; Chapter Four, 4.1 US Antitrust Law and SMEs 4.1.1 US Definition and Importance of Small Business; MacIntyre "Small business and the antitrust laws" (1961) *University of Detroit Law Journal* 170.

In the EU, In determining whether an enterprise is an SME, and to remove from the category of SMEs groups of enterprises with economic power exceeding that of an SME, the EC further distinguishes between autonomous enterprises, partner enterprises and linked enterprises.³²¹¹ The determining factor is whether there is a holding of 25% or more of the capital or voting right, or exercise of dominant influence or control by an enterprise over another.³²¹² Furthermore, an enterprise in which 25% or more of the capital or voting rights are in the hands of public bodies will not be regarded as an SME.³²¹³

5.3.3.3 History of competition or antitrust law

The history of the competition law of the jurisdictions considered in this study informs the treatment of SMEs and shows why such treatment differs from one jurisdiction to the other. Such history assists in understanding why SMEs occupy a special place or deserve attention under the competition law of these respective jurisdictions. In this regard, the US was a leader in this context with its antitrust laws that date back to the 1800s.³²¹⁴ As observed, there are various views on who lobbied for these antitrust laws. However, it is generally accepted that small businesses, particularly small oil companies, were among those who most passionately lobbied for antitrust laws.³²¹⁵ As previously discussed, the US first antitrust legislation, the *Sherman Act*,³²¹⁶ was enacted because of concerns over the perceived domination by large trusts,³²¹⁷ particularly the coordination between companies and the abuse of dominance in the market.³²¹⁸

³²¹¹ See above Chapter Four, para 4.2.2 EU definition of SMEs.

³²¹² See above Chapter Four, para 4.2.2 EU definition of SMEs.

³²¹³ See above Chapter Four, para 4.2.2 EU definition of SMEs.

³²¹⁴ See Chapter Four, 4.1.2 History of the US Antitrust Law.

³²¹⁵ Chapter Four, 4.1.2 History of the US Antitrust Law; Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 15:4, 275–295, at 275.

³²¹⁶ See Chapter 4.1: US Antitrust Law and SMEs. Sherman Act of 2 July 1890, Chapter 647 of the 51st Congress; 26 Stat. 209. Available at <https://www.govinfo.gov/content/pkg/COMPS-3055/pdf/COMPS-3055.pdf> (accessed on 17 December 2023).

³²¹⁷ See Chapter Four, 4.1.2 History of the US Antitrust Law, 4.1.3.1.2 Origin of the Sherman Act; Wright, Dorsey, Klick and Rybnicek "Requiem for Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust" (2019) *Arizona State Law Journal*, 51(1), 293-370, at 299.

³²¹⁸ See Chapter Four, 4.1.2 History of the US Antitrust Law, 4.1.3.1.2 Origin of the Sherman Act; Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) Harvard Business School Working Paper 19-110, at 2.

In the EU, competition law was first introduced in the *Treaty of Rome* in 1957, when the European Economic Community (EEC) was established.³²¹⁹ This was born from the need to ensure “*economic welfare within a single market*”³²²⁰ or “*the economic integration of EU member states*”.³²²¹

In contrast to the aforementioned jurisdictions, South Africa has quite a different competition law history. It did not start out with a comprehensive competition law framework albeit that there were fragments of competition rules as early as 1907 and 1923 that dealt with monopolistic behaviour and restraint of trade.³²²² However, South Africa’s first comprehensive competition legislation was the *Regulation of Monopolistic Conditions Act 24 of 1955*.³²²³ Notably, this legislation did not deal with mergers.³²²⁴ Fast forward to 1979, a more expansive competition law was enacted, namely the *Maintenance and Promotion of Competition Act 96 of 1979*.³²²⁵ During that time, public interest was considered important to assess monopolistic behaviour and mergers.³²²⁶ Actions against restrictive practices could only be taken after consideration of the public interest.³²²⁷ This implies that harm to competition was determined by considering the public interest. Brooks points out that between 1986 to 1994, the

³²¹⁹ See Chapter Four, 4.2.3 A brief history of the EU Competition law; Eurostat Statistics Explained “Glossary: Treaties of Rome”, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome or [Glossary:Treaties of Rome - Statistics Explained \(europa.eu\)](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Treaties_of_Rome_-_Statistics_Explained_(europa.eu)) (accessed on 7 August 2022).

³²²⁰ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 342.

³²²¹ See Chapter Four, 4.2.4 Objectives of EU Competition law; Fox “US and EU Competition Law: A Comparison” (1997) *Global Competition Policy*, 340 available at https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf (accessed on 20 November 2022) 340.

³²²² See Chapter Three, 3.3 History of the South African Competition Legislation; Republic of South Africa “Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955” (March 1977) 1, para 2; see also Section 1(1) of The Board of Trade and Industries Act 28 of 1923, GN1074 in GG1330 of 30 June 1923 Vol LII, at iv; see also Sutherland and Kemp *Competition Law of South Africa* (2020) 3-26, para 3.2.1: 1907 to the Mouton Commission.

³²²³ See Chapter Three, 3.3 History of the South African Competition Legislation; Sutherland and Kemp *Competition Law of South Africa* (2020) 3-27.

³²²⁴ See Chapter Three, 3.3 History of the South African Competition Legislation; Sutherland and Kemp *Competition Law of South Africa* (2020) 3-28.

³²²⁵ See Chapter Three, 3.3 History of the South African Competition Legislation; The Maintenance and Promotion of Competition Act 96 of 1979, GN1437 in GG6545 of 4 July 1979.

³²²⁶ See Chapter Three, 3.3 History of the South African Competition Legislation; Republic of South Africa “Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955” (March 1977) (xii)-(xiii), para (a) & (c); The Antitrust Bulletin 182. See also Republic of South Africa: Report of the Commission of inquiry into the regulation of monopolistic conditions Act, 1955 (also known as the Mouton report, 1977) para 139, p.64; p.31 (The Antitrust Bulletin – p.177)

³²²⁷ Sutherland and Kemp *Competition Law of South Africa* (2020) 3-37-38.

general approach to economic policy was to consider, amongst others, the effect of policy measures on small businesses.³²²⁸ In 1994, after transitioning to a democracy, the first South African democratically elected political party, the *African National Congress* (ANC), drafted the *Reconstruction Development Programme* (RDP), where concerns about the lack of development of smaller firms, especially black-owned businesses, due to repressive regulations were also highlighted.³²²⁹ The South African government's *White Paper on Reconstruction and Development*, issued in 1994, also confirmed the RDP's position that competition law had to promote small businesses and their participation in the economy.³²³⁰ This led to the enactment of competition legislation in 1998 that included the promotion of SMEs as one of its primary objectives. Thus, real concerns about protecting or promoting SMEs in South Africa through competition legislation were raised in the early 1990s.

On 20 October 1998, the President assented to the *Competition Act 89 of 1998*,³²³¹ which came into effect on 30 November 1998.³²³² The *Competition Act* specifically identified the promotion of SMEs as one of its purposes.³²³³ As discussed in Chapter Three,³²³⁴ several amendments to the *Competition Act 89 of 1998* have been made over the years.³²³⁵ These amendments include the *Competition Amendment Act 35 of 1999*,³²³⁶ the *Competition Amendment Act 15 of 2000*,³²³⁷ the *Competition Second*

³²²⁸ See above Chapter Three, para 3.3 History of South African Competition Legislation; See Brooks "Redefining the objectives of South African Competition Law" (2001) *The Comparative and International Law Journal of Southern Africa*, 299. See also Sutherland and Kemp (2020) 3-39.

³²²⁹ See Chapter Three, 3.3 History of the South African Competition Legislation; African National Congress "The Reconstruction and Development Programme (RDP)" (1994), available at https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf (accessed on 4 July 2023) para 4.1.6; Sutherland and Kemp *Competition Law of South Africa* (2020) 3-39.

³²³⁰ White Paper on Reconstruction and Development in GN1954 in GG16085 of 23 November 1994, para 3.8; Sutherland and Kemp *Competition Law of South Africa* (2020) 3-40.

³²³¹ *Competition Act 89 of 1998*, GN1392 in GG19412 of 30 October 1998.

³²³² Proclamation by the President of the Republic of South Africa, Competition Act, 1998 (Act No. 89 of 1998), RG6368 in GG19557 of 30 November 1998. Available at <https://archive.gazettes.africa/archive/za/1998/za-government-gazette-regulation-gazette-dated-1998-11-30-no-19557.pdf> (accessed on 17 December 2023).

³²³³ Section 2(e) states: "The purpose of this Act is to promote and maintain competition in the Republic in order – (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy." The wording of section 2(e) remained the same with the 2018 amendments. See Chapter One: Background and Chapter Two: An overview of international standards or best practices in dealing with SMEs.

³²³⁴ See Chapter Three, 3.3 History of the South African Competition Legislation.

³²³⁵ South African Government "*Competition Act 89 of 1998*" available at <https://www.gov.za/documents/competition-act> (accessed on 17 December 2023).

³²³⁶ GN513 in GG1981 of 30 April 1999.

³²³⁷ GN528 in GG21234 of 26 May 2000.

Amendment Act 39 of 2000,³²³⁸ the *Competition Amendment Act 1 of 2009*,³²³⁹ and the *Competition Amendment Act 18 of 2018*.³²⁴⁰ With regard to these amendments, the 2018 amendments (introduced by the *Competition Amendment Act 18 of 2018*) in particular, have enhanced the promotion and protection of SMEs.³²⁴¹

5.3.3.4 The purpose of competition/antitrust law and SMEs

Unlike the US and EU, the South African *Competition Act* specifically sets out under its purposes, the promotion of SMEs' effective and fair participation in the economy as a specific objective of the Act.³²⁴² This objective is foreshadowed in the *Preamble of the Act*³²⁴³ and reaffirmed in the *Memorandum on the objects of the Competition Amendment Bill, 2018*.³²⁴⁴

The thesis highlights that the position is slightly different in the US and EU as competition legislation in these jurisdictions does not expressly set out the promotion of SMEs to enable them to participate effectively in the economy, as a goal of competition legislation.

In the US, there is a proliferation of views on what the antitrust goal is, which can be gleaned from the interpretation of various scholars and judgments.³²⁴⁵ Some writers have reported that the original antitrust goal included protecting SMEs or at least preserving competitors.³²⁴⁶ Others have criticised this view and argued that maximising consumer welfare was the antitrust law's sole or ultimate goal.³²⁴⁷ Certain

³²³⁸ GN1354 in GG21880 of 13 December 2020.

³²³⁹ GN875 in GG32533 of 28 August 2009.

³²⁴⁰ GN175 in GG42231 of 14 February 2019.

³²⁴¹ Chapter Three, 3.4 The 2018 Amendments to the Competition Act.

³²⁴² Sections 2(e) sets out one of the purposes of the Act as ensuring that SMEs have an equitable opportunity to participate in the economy. *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC) para 169.

³²⁴³ Preamble of the Competition Act, 89 of 1998, as amended.

³²⁴⁴ Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.1.

³²⁴⁵ See Chapter Four, 4.1.4 US Antitrust Goals.

³²⁴⁶ See Chapter Four, 4.1.4 US Antitrust Goals; Carey "The Sherman Act: What Did Congress Intend" (1989) *Antitrust Bulletin*, 34(2), 352; Troesken "The Letters of John Sherman and the Origins of Antitrust" (2002) *The Review of Austrian Economics*, 15:4, 275; Wright *et al.* "Requiem for Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust" (2019) *Arizona State Law Journal*, 51(1), 293-370 also mentions several antitrust practitioners, scholars and economists who initially believed that the protection of small business interests was the ultimate goal of antitrust law; Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal*, 39(2) 156-157.

³²⁴⁷ See Chapter Four, 4.1.4 US Antitrust Goals; Sawyer "US Antitrust Law and Policy in Historical Perspective" (2019) *Harvard Business School Working Paper* 19-110, 3; Bork "Legislative Intent and the Policy of the Sherman Act" (1966) *The Journal of Law & Economics*, Vol. 9, pp. 7-48, available at

authors believe the antitrust goal was to ensure competitive participation and “*economic opportunity, wealth distribution and political liberty*”.³²⁴⁸ Some others believe that the goal of US antitrust law changed over time with the change of antitrust concerns and economic and intellectual views to be more about economic efficiency or “consumer welfare maximization”.³²⁴⁹

In respect of EU competition law, neither the *EC Treaty* nor the *TFEU* expressly sets out the objective of EU competition law.³²⁵⁰ However, the EU’s goals set out in Articles 2 and 3 of the *EC Treaty* have been used to interpret EU competition law.³²⁵¹ In particular, Article 3(1)(g) of the *EC Treaty* stated that the European Community seeks to achieve, amongst others, “*a system ensuring that competition in the internal market is not distorted*.”³²⁵² Notably though, there is no specific mention of SMEs in this objective.

Like in the US, there is a proliferation of views on the EU competition goals.³²⁵³ Some scholars have argued that the main goal of EU competition policy is the “*economic integration of EU member states*”.³²⁵⁴ The goal of EU competition policy has also been described as “*economic welfare within a single market*”;³²⁵⁵ “*economic efficiency and*

<https://www.jstor.org/stable/724991> (accessed on 14 January 2022) 15, fn11; Carey “The Sherman Act: What Did Congress Intend” (1989) *Antitrust Bulletin*, 34(2) 352.

³²⁴⁸ See Chapter Four, 4.1.4 US Antitrust Goals; Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1955) 225-230, 570-572; May “Historical Analysis in Antitrust Law” (1990) *New York Law School Law Review*, 35(4) 863.

³²⁴⁹ See Chapter Four, 4.1.4 US Antitrust Goals; May “Historical Analysis in Antitrust Law” (1990) *New York Law School Law Review*, 35(4) 863-864.

³²⁵⁰ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 343.

³²⁵¹ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 343 and 345.

³²⁵² See Chapter Four, 4.2.4 Objectives of EU Competition Law; *Consolidated Version of the Treaty establishing the European Community*, OJ C325/33 (2002), Article 3(1)(g), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2002:325:FULL> (accessed on 13 May 2024); Caree *et al.* “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions” (2010) available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022) 100.

³²⁵³ See Chapter Four, 4.2.4 Objectives of EU Competition law.

³²⁵⁴ See Chapter Four, 4.2.4 Objectives of EU Competition law; Fox “US and EU Competition Law: A Comparison” (1997) *Global Competition Policy*, available at https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf (accessed on 20 November 2022) 340.

³²⁵⁵ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 342.

European market integration";³²⁵⁶ the protection of economic freedom, market integration and efficiency;³²⁵⁷ fairness, welfare and efficiency, and market integration;³²⁵⁸ economic integration of EU member states;³²⁵⁹ "*the integration of the single market*";³²⁶⁰ the promotion of market integration in the interests of consumers;³²⁶¹ market integration as a public interest objective;³²⁶² justice, fairness and non-discrimination.³²⁶³ In this regard, Parret argues that "*fairness has been, and still is, one of the cornerstones of the European competition regime.*"³²⁶⁴

From the above, it is evident that the recurring themes of EU competition goals include economic welfare and efficiency, EU market integration, and fairness. Nevertheless, protecting SMEs is also recognised as one of the goals of EU competition policy. As

³²⁵⁶ See Chapter Four, 4.2.4 Objectives of EU Competition law; Motta *Competition Policy, Theory and Practice* (2004) 15; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 346.

³²⁵⁷ See Chapter Four, 4.2.4 Objectives of EU Competition law; Monti "Article 81 and Public Policy" (2002) *Common Market Law Review* Vol. 39, 1057; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 346.

³²⁵⁸ See Chapter Four, 4.2.4 Objectives of EU Competition law; Ahlborn and Padilla "From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC competition law" in Ehlermann and Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (2008), 55; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 346.

³²⁵⁹ See Chapter Four, 4.2.4 Objectives of EU Competition law; Fox "US and EU Competition Law: A Comparison" (1997) *Global Competition Policy*, available at https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf (accessed on 20 November 2022) 340.

³²⁶⁰ See Chapter Four, 4.2.4 Objectives of EU Competition law; Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1.

³²⁶¹ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 346 – 347.

³²⁶² See Chapter Four, 4.2.4 Objectives of EU Competition law; OECD "The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency" (2003) *OECD Journal of Competition Law and Policy* Vol.5, 7, available at https://www.oecd-ilibrary.org/governance/the-objectives-of-competition-law-and-policy-and-the-optimal-design-of-a-competition-agency_clp-v5-art2-en (accessed on 23 September 2023); Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 347.

³²⁶³ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 354.

³²⁶⁴ See Chapter Four, 4.2.4 Objectives of EU Competition law; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 355.

was pointed out in Chapter Four, one of the competition regulations specifically protecting SMEs, is the significant *EC De Minimis Notice*.³²⁶⁵

From a review of the competition goals of the above three jurisdictions, it can be concluded that, although the US and EU have to some extent acknowledged the promotion of SMEs as one of the goals of their competition legislation, whether in the past or present, the South African competition legislation is on a different footing as it expressly affords a special place for SMEs in the legislative framework aimed at promoting their participation in the economy. The consideration of the goals of a specific competition law is of critical importance because it determines how SMEs are treated under competition law. Such goals are critical in the interpretation and application of the law. It serves as a constant reminder to competition authorities of what the legislator intended to achieve in promulgating the law. The difference in goals in the various competition laws interrogated in this thesis, informs the difference in the treatment of SMEs under the competition laws of South Africa as a developing country, the US and the EU as developed countries. It is submitted that an interpretation of competition law that is more focused on efficiency or consumer welfare is likely to deny SMEs a special place in competition³²⁶⁶ that they so direly need to thrive and, thus, favour the mantra “*protect competition and not competitors*”.³²⁶⁷ However, it is submitted that a specific mention of promoting SMEs as a competition goal in the applicable competition legislation has the effect of forcing the competition authorities to consider this objective in matters involving SMEs and accord SMEs a special place in competition considerations.³²⁶⁸ In this regard, the South African Constitutional Court has enjoined the competition authorities to consider the purpose of the Competition Act, which includes equal opportunities for SMEs to participate in the economy, in their decision-making process.³²⁶⁹

³²⁶⁵ See Chapter Four, 4.2.6.1 The EU *De Minimis Notice*; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 353.

³²⁶⁶ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT), para 85.

³²⁶⁷ See Chapter Three: The treatment of SMEs under the South African Competition Act, discussion of *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT) para 85; See Chapter 4.1: US Antitrust Law and SMEs, discussion of *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 374 (1962) 320.

³²⁶⁸ *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT), para 85.

³²⁶⁹ Chapter Three, 3.6.5.3 Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another; *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* (2021) ZACC 35, para 7.

5.3.3.5 The Treatment of SMEs under competition or antitrust law

A consideration of the specific provisions of the respective competition laws of the countries that were interrogated in this thesis also indicates that South Africa is more specific regarding the treatment of SMEs than the US and EU. As pointed out, several provisions of the South African *Competition Act* specifically deal with SMEs.³²⁷⁰ Of particular significance is the 2018 amendments to the South African *Competition Act* which have introduced the “buyer power” provisions that protect SMEs from the buying power of dominant firms in specific sectors.³²⁷¹ SMEs are also protected in the amended provisions of section 9, dealing with price discrimination,³²⁷² section 10, dealing with exemptions³²⁷³ and section 12, dealing with public interest grounds in the context of mergers.³²⁷⁴

³²⁷⁰ See Chapter Three, para 3.5 Provisions of the Competition Act dealing with SMEs. Section 2(e) which sets out one of the purposes of the Competition Act as ensuring that SMEs fairly participate in the economy; section 10(3)(b)(ii) which states that a prohibited agreement or practice may be exempted only if the restriction is required to promote SMEs’ or HDPs’ effective entry, participation in or expansion within a market (2018 amendments); section 12A(3)(c) which requires the competition authorities to consider the effect of a merger on the ability of SMEs or HDIs to effectively enter into, participate in or expand within the market, when determining whether a merger can or cannot be justified on public interest grounds; section 8(4) which prohibits a dominant firm from requiring or imposing unfair prices or other trading conditions on a supplier that is an SME or HDP in a sector designated by the Minister; section 9(1)(a)(ii), which prohibits a dominant firm from price discriminating if it is likely that the effect of such discrimination will impede the ability of SMEs or HDPs to participate effectively. Several other provisions also refer to SMEs: See Chapter Three, 3.5 Provisions of the Competition Act dealing with SMEs. Sections 15 (revocation of merger approval and enforcement of merger conditions), 16 (Competition Tribunal merger proceedings), and 43 (Market inquiries), in particular section 43C(2), which enjoins the Commission to consider the impact of the adverse effect on competition on SMEs and HDIs in assessing whether any feature of the relevant market restricts competition when conducting a market inquiry. Further, section 43G(1)(a) provides that SMEs are allowed to participate in the market inquiry if they compete in the market that was the subject of the inquiry. Section 59(3) outlines the factors the Tribunal must consider when determining an appropriate administrative penalty. In particular, section 59(3)(d) requires the Competition Tribunal to consider the impact of the contravention on SMEs or HDIs in determining a penalty.

³²⁷¹ In terms of the Ministerial Regulations, the designated sectors to which the buyer power provisions apply are grocery wholesale and retail, agro-processing, and eCommerce and online services. This means that a small business can only invoke section 8(4) if there has been abuse of buyer power in the above designated sectors. See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance; Competition Amendment Bill, 2018 [B23B-2018] – General objectives.

³²⁷² See Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination;

³²⁷³ See Chapter Three, 3.5.3.4 Exemptions of prohibited practices; Memorandum on the objects of the Competition Amendment Bill, 2018, para 3.5.1. “*Clause 7 of the Bill seeks to amend section 10 of the Act. The amendment to section 10(3)(b)(ii) makes the entry, participation in and expansion of small or medium businesses or firms owned or controlled by historically disadvantaged persons an important consideration in the process of determining exemptions. This will also address the concern that these firms frequently exit the market.*”

³²⁷⁴ See Chapter Three, 3.5.4 Merger regulations; Memorandum on the objects of the Competition Amendment Bill, 2018, para 3.7.3. “*The proposed amendments to subsection [12A](3) seek to explicitly create public interest grounds in merger control that deal with ownership, control and the support of small and medium businesses and firms owned or controlled by historically disadvantaged persons as well as the ownership in firms by workers in those firms.*”

The study found that there are no specific provisions in the US antitrust legislation that expressly deal with SMEs, apart from the *Robinson-Patman Act*³²⁷⁵ which has been described as legislation that seeks to promote or protect SMEs.³²⁷⁶ The *Robinson-Patman Act* was born from concerns about large firms' exploitative behaviour vis-à-vis small suppliers or customers.³²⁷⁷

The EU, however, has specific competition regulations dealing with SMEs. These include safe harbours, such as the EU *De Minimis Notice* (which contains what this study has identified as the *de minimis* rule).³²⁷⁸ As pointed out, the EU *De Minimis Notice* exempts SMEs from the application of certain prohibitions of anti-competitive practices when they do not meet a certain threshold that is considered significant enough to negatively affect competition.³²⁷⁹ The EU in particular recognises that agreements between SMEs generally do not have an appreciable effect on trade between member states.³²⁸⁰

The *De Minimis Notice* provides safe harbours for minor agreements between firms with market shares below certain thresholds.³²⁸¹ However, as highlighted, the *De*

³²⁷⁵ See Chapter Four, 4.1.3.3 The *Robinson-Patman Act*; Robinson-Patman Antidiscrimination Act of 19 June 1936, Chapter 592 of the 74th Congress; 49 Stat. 1526 et seq., available at <https://www.govinfo.gov/content/pkg/COMPS-12152/pdf/COMPS-12152.pdf> (accessed on 17 December 2023).

³²⁷⁶ Kintner "Counselling Small Business under the Antitrust Laws and the *Robinson-Patman Act*" (1963) 8-9.

³²⁷⁷ See Chapter Four, 4.1: US Antitrust Law and SMEs.

³²⁷⁸ See Chapter Four, 4.2.6.1 The EU *De Minimis Notice*. In Chapter Four, 4.2.1 Introduction, the study explains that it uses the terms "*De Minimis Notice*" and "*de minimis* rule" interchangeably to refer to the notion in the EU *De Minimis Notice* that agreements that do not appreciably restrict competition or trade between EU members are exempt from competition scrutiny, except hardcore cartels.

³²⁷⁹ European Commission "Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)" (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) paras 3 and 4. See Chapter 4.2: European Competition Law – Treatment of SMEs.

³²⁸⁰ As indicated above (Chapter Three, para 3.5.3.1.2 SMEs – victims of prohibited horizontal practices, collusive conduct or agreement is colloquially known as a cartel). See also European Commission "Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)" (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) fn 5.

³²⁸¹ See Chapter Four, 4.2 European Competition Law – Treatment of SMEs, 4.2.6.1 The EU *De Minimis Notice*; See also https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022). The Commission uses a benchmark of a "5 % market share threshold and a EUR 40 million turnover threshold" to determine agreements that do not have "an appreciable effect on trade between member states" and would typically not be prohibited under Article 101(1) even if their object is to prevent, restrict or distort competition. European Commission "Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the

Minimis Notice does not apply to a cartel or collusive agreement.³²⁸² This study has highlighted that several EC regulations and guidelines also exempt certain types of agreements between SMEs.³²⁸³ Block exemption regulations and guidelines further provide safe harbours when applying Article 101 of the *TFEU*, especially for SMEs, which usually have low turnovers and market shares.³²⁸⁴

In 2022, the EU also issued the *EU Digital Market Act* of 2022 which seeks to ensure that markets with large online platforms, regarded as gatekeepers, are fair and open to competition.³²⁸⁵ Regarding SMEs, the *EU Digital Markets Act* provides that when the core platform is an SME, the assessment of any alleged unfair practices should consider whether the SME would be able to substantially lessen competition on the core platform.³²⁸⁶ This is because the *EU Digital Markets Act* primarily targets large core platforms with significant market power rather than SMEs.³²⁸⁷

Nevertheless, all three jurisdictions, South Africa, the US, and the EU, recognise the protection of SMEs as a vital competition law goal. However, the South African position is more explicit than that of the US and EU in how it captures this goal in the South African *Competition Act 89 of 1998*.

Functioning of the European Union (De Minimis Notice)" (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 4.

³²⁸² European Commission "Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)" (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 13.

³²⁸³ See Chapter Four, 4.2.6.3 Agreements between SMEs exempt under EC regulations and guidelines.

³²⁸⁴ See Chapter Four, 4.2.6.3 Agreements between SMEs exempt under EC regulations and guidelines; Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021 (accessed on 5 February 2022) 38.

³²⁸⁵ See Chapter Four, para 4.2.7.3 EU Digital Market Act (2022); European Union "Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)" (2022) (hereinafter "the EU Digital Markets Act"), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925> (accessed on 10 December 2024), para 11.

³²⁸⁶ See Chapter Four, para 4.2.7.3 EU Digital Market Act (2022); EU Digital Markets Act, para 24.

³²⁸⁷ See Chapter Four, para 4.2.7.3 EU Digital Market Act (2022); EU Digital Markets Act, para 24.

This thesis pointed out that, in this regard, section 2(e) of the South African *Competition Act* specifically sets out the objective of promoting SMEs.³²⁸⁸ It further pointed out that, in the US, certain judges have acknowledged that protecting SMEs is one of the competition goals.³²⁸⁹ This is despite the fact that such a goal is not expressly stated in the *Sherman, Clayton* or *Robinson-Patman* Acts. However, the study has also noted Bork's criticism of the antitrust goal of protecting SMEs.³²⁹⁰ Such criticism has influenced the view that the US legislator was concerned with promoting economic efficiency or consumer welfare maximization, rather than focusing on protecting SMEs as an antitrust goal.³²⁹¹ There thus seems to be a divergence of views on the US antitrust goal between economic efficiency or consumer welfare maximization and the protection of SMEs. As further pointed out, the EU also recognises SMEs' protection through competition notices, regulations, and guidelines, such as the *De Minimis Notice* mentioned above.³²⁹²

5.3.3.6 The treatment of SMEs under specific prohibited conduct

On the treatment of SMEs under specific prohibited conduct, the thesis noted the following:

5.3.3.6.1 Unilateral conduct or abuse of dominance

In respect of unilateral conduct or abuse of dominance, it was noted that South Africa follows the same approach as the approaches followed by the US and EU.

³²⁸⁸ See Chapter Three, 3.5.2 Purpose of the Competition Act; Section 2(e) states: "*The purpose of this Act is to promote and maintain competition in the Republic in order – (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.*"

³²⁸⁹ Chapter Four, 4.1.4.3 The Specific US Antitrust Goal of the Protection of Small Businesses; Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945) 427; Chief Justice Warren in *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294-374 (1962) 344.

³²⁹⁰ Bork was appointed judge of the US Court of Appeals for the District of Columbia Circuit from 1982 to 1988. See Chapter Four, 4.1.4.2.3 Bork (1966/1978); Office of the Solicitor General US Department of Justice "Historical Biography, Solicitor General: Robert H. Bork", available at <https://www.justice.gov/osg/bio/robert-h-bork> (accessed on 27 December 2023).

³²⁹¹ See Chapter Four, 4.1.4.2.3 Bork (1966/1978); May "Historical Analysis in Antitrust Law" (1990) *New York Law School Law Review*, 35(4), 864.

³²⁹² Elzinga KG "Goals of antitrust: Other than competition and efficiency, what else counts" (1977) *University of Pennsylvania Law Review*, 125(6), 1204.

In the US, SMEs are unlikely to be found guilty of unilateral or abuse of dominance contraventions.³²⁹³ This is because of their small market share.³²⁹⁴ Companies liable for this conduct are generally firms with monopoly power.³²⁹⁵ SMEs are, therefore, more likely to be victims of unilateral or abuse of dominance conduct than infringers.

Similarly, several EU countries regard provisions prohibiting abuse of dominance conduct as protecting SMEs as victims of such conduct.³²⁹⁶ However, the EU recognises that an SME may be dominant in a market, depending on how the market is defined.³²⁹⁷ Nevertheless, as mentioned above, the EU provides safe harbours for SMEs in the form of the *de minimis* rule. As discussed,³²⁹⁸ the EU *De Minimis* Notice (which contains what the study has identified as the *de minimis* rule) exempts from the application of Article 101 of the *TFEU*,³²⁹⁹ agreements that do not appreciably restrict competition³³⁰⁰ and agreements that do not appreciably affect trade between Member States.³³⁰¹ The *De Minimis* Notice provides “safe harbours” for minor agreements between firms whose market shares are below certain thresholds.³³⁰² On this point, the EC has recognised that agreements between SMEs generally do not have an

³²⁹³ See Chapter Four, 4.1.5.6 SMEs and Dominance; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 258.

³²⁹⁴ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 258.

³²⁹⁵ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 260.

³²⁹⁶ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 125 ; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 134.

³²⁹⁷ See Chapter Four, 4.2.4 Objectives of EU Competition Law; Parret “Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy” (2010) *European Competition Journal* 353.

³²⁹⁸ Chapter Four, 4.2.6.1 The EU *De Minimis* Notice.

³²⁹⁹ Article 101 prohibits agreements and concerted practices between two or more firms, and decisions by associations of firms, which may affect trade between EU Member States, and which may prevent, restrict or distort competition in the internal market. Article 101 deals with both horizontal and vertical agreements.

³³⁰⁰ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 3.

³³⁰¹ European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 4.

³³⁰² European Commission “Antitrust – Commission adopts revised safe harbours for minor agreements (“De Minimis Notice”) and provides guidance on “by object” restrictions of competition – Frequently asked questions” (25 June 2024) available at https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022).

appreciable effect on trade between member states,³³⁰³ as their market shares are likely to be lower than the market share benchmark used by the EC to determine agreements that do not have an appreciable effect on trade between member states. Accordingly, SMEs are most likely to be protected under this notice.

South Africa has specific provisions protecting SMEs under its abuse of dominance or unilateral conduct prohibitions. These include section 8(4),³³⁰⁴ proscribing abuse of buyer power, and section 9,³³⁰⁵ prohibiting price discrimination by a dominant seller that impedes the ability of, amongst others, SMEs, to participate effectively. As alluded to in this study, there have indeed been cases in South Africa where an SME was found to have abused its dominance by charging an excessive price during the COVID-19 crisis.³³⁰⁶ However, more particularly in *Babelegi*,³³⁰⁷ the CAC found that the impugned conduct was a *de minimis* breach of section 8(1) as it was committed by a small firm which had sold very few masks at an exorbitant price.³³⁰⁸ The CAC, however, held that it needed to “*show fidelity to the Act*” by applying the law as set out in section 8(1) to the facts of the case.³³⁰⁹ The CAC considered the size of the firm (being a small or medium firm) and the “*de minimis character of the offence*”, namely the fact that the affected sales were minimal, in the determination of the penalty.³³¹⁰ The CAC thus found that this case did not justify the imposition of a penalty.³³¹¹ Whilst the CAC showed “*fidelity to the Act*” by applying section 8(1) to an SME, the non-imposition of a fine, in this case, could be viewed as a way of showing fidelity to the public interest goal regarding SMEs. This is due to the minor nature of the offence,

³³⁰³ See above Chapter Four, 4.2.6.1 The EU *De Minimis Notice*; European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) fn 5.

³³⁰⁴ See above, Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance.

³³⁰⁵ See above, Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination.

³³⁰⁶ See above, Chapter Three, 3.6.4.4 *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] 2 CPLR 470 (CAC) para 41; *Competition Commission of South Africa v Bluecollar Occupational Health (Pty) Ltd* (COVCR114Sep20) [2023] ZACT 16 (3 April 2023), available at <https://www.saflii.org/za/cases/ZACT/2023/16.html> (accessed on 11 April 2024); *Competition Commission v Tsutsumi Business Enterprises CC* (CT Case no. COVCR113Sep20), available at <https://www.comptrib.co.za/open-file?FileId=53053> (accessed on 11 April 2024).

³³⁰⁷ *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] 2 CPLR 470 (CAC).

³³⁰⁸ *Babelegi* (CAC) para 79.

³³⁰⁹ *Babelegi* (CAC) para 79.

³³¹⁰ *Babelegi* (CAC) para 80.

³³¹¹ *Babelegi* (CAC) para 80.

as found by the CAC, and the goal of enabling SMEs to participate effectively in the economy through, amongst others, not imposing crippling fines that could drive them out of the market.

Importantly, this thesis argues that a best practice for assessing harm to competition in abuse of dominance cases where SMEs are the victims, is yet to be established. It is submitted that in the South African context, the assessment of harm to competition in cases where SMEs are the victims of abuse of dominance, should be whether the conduct “*impedes the ability of SMEs to participate effectively*”. This is one of the tests expressly set out in the price discrimination provision in section 9 of the South African Competition Act.³³¹² It is submitted that this threshold should also apply with respect to the other prohibited abuse of dominance conduct, namely the exclusionary conduct prohibited under sections 8(1)(c) and 8(1)(d).³³¹³

5.3.3.6.2 Restrictive practices or exclusive dealings

In respect of restrictive vertical practices or exclusive dealings, the study found that South Africa follows the same approach as the US and EU.

In the US, the test of “harm to competition” is whether a substantial part of commerce is foreclosed in the relevant market.³³¹⁴ The provisions on tying also apply to SMEs.³³¹⁵

In the EU, article 101 of the *Treaty on the Functioning of the European Union (TFEU)* prohibits vertical agreements which may affect trade between EU Member States and may restrict competition in the internal market.³³¹⁶ As previously mentioned, the European Court of Justice (ECJ) has often held that Article 101 of the *TFEU* does not

³³¹² See Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination. Section 9(1)(a)(ii) of the *Competition Act 89 of 1998*, as amended, which prohibits a dominant firm, as the seller of goods or services, from price discriminating if it is likely that the effect of impeding the ability of SMEs or HDPs to participate effectively.

³³¹³ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance.

³³¹⁴ See Chapter Four, para 4.1.5.1 Antitrust Applies to Big and Small; Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal*, 39(2) 165.

³³¹⁵ See Chapter Four, para 4.1.5.1 Antitrust Applies to Big and Small; Oppenheim “Small and big business: orientation of antitrust points and counterpoints” (1961) *University of Detroit Law Journal*, 39(2) 165.

³³¹⁶ See above Chapter Four, para 4.2.5.1 The Treaty on the Functioning of the European Union (*TFEU*); European Commission “Competition Policy – Antitrust”, available at https://ec.europa.eu/competition-policy/antitrust_en (accessed on 18 June 2022).

apply when an agreement lacks an “appreciable effect” on competition.³³¹⁷ In this regard, the European Commission (EC) issued the *De Minimis Notice*, which exempts agreements that do not appreciably restrict competition and that do not appreciably affect trade between EU member states from the application of Article 101 of the *TFEU*.³³¹⁸ Therefore, the test of “harm to competition” is whether the impugned agreement appreciably restricts competition in a market or appreciably affects trade between member states.

The South African *Competition Act* similarly refers to the effect of substantially preventing or lessening competition in a market.³³¹⁹

5.3.3.6.3 Predation

During the early days of antitrust law in the US, predatory conduct was of great concern as it particularly resulted in the exit of small competitors from the market.³³²⁰ The case against Standard Oil in 1911, as discussed in Chapter Four,³³²¹ is an example of the effect of predation on small competitors.³³²² The view in the US has been that small businesses should support antitrust enforcement efforts to fight the predatory pricing strategies of dominant firms.³³²³

³³¹⁷ See above Chapter Four, para 4.2.6.1 The EU *De Minimis Notice*; European Commission “Antitrust – Commission adopts revised safe harbours for minor agreements (“De Minimis Notice”) and provides guidance on “by object” restrictions of competition – Frequently asked questions” (25 June 2014) available at https://ec.europa.eu/commission/presscorner/detail/en/memo_14_440 (accessed on 18 June 2022)

³³¹⁸ See above Chapter Four, para 4.2.6.1 The EU *De Minimis Notice*; European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) paras 3 and 4.

³³¹⁹ Restrictive vertical practices are prohibited under section 5(1) of the Competition Act. Resale maintenance is prohibited under section 5(2)

³³²⁰ Foer “Small business and antitrust” (2001) *Small Business Economics* 7.

³³²¹ See above, Chapter Four, para 4.1.6.1 *Standard Oil Company of New Jersey, et al., v United States* (1910).

³³²² See above, Chapter Four, para 4.1.5.7 SMEs and Predation; *Standard Oil Company of New Jersey et al. v The United States* 221 US 1, 106 (1910). Foer “Small business and antitrust” (2001) *Small Business Economics* 7. See Chapter 4.1: US Antitrust Law and SMEs.

³³²³ See Chapter Four, para 4.1.5.7 SMEs and Predation; Foer “Small business and antitrust” (2001) *Small Business Economics* 10.

In the EU, predation is assessed under article 102 of the *TFEU*, which prohibits any abuse by a dominant firm of its dominant position in the internal market or any substantial part of it.³³²⁴

In South Africa, it was indicated that predation was tested in *Media 24*,³³²⁵ which involved a complaint by Gold Net News (“GNN”), a small competitor of Media 24 (Pty) Ltd (“Media 24”), alleging that Media 24 engaged in predatory pricing in respect of one of its newspapers to push GNN out of the market. The Tribunal found in favour of GNN, but the Competition Appeal Court (CAC) dismissed the Tribunal’s decision. The CAC disagreed with the Tribunal’s choice of cost standard in this particular case. The matter was appealed to the Constitutional Court, which also found that Media 24 did not engage in predatory pricing. This case confirmed the view of US authors that predatory pricing is difficult for small businesses to prove, which may affect their ability to compete on a level playing field.³³²⁶

5.3.3.6.4 Buyer power

US authors have recognised that buyer power is damaging to small businesses and that antitrust law can counter the abuse of buyer power.³³²⁷

In the EU, buyer power will be considered under article 102 of the *TFEU*. In particular, article 102(a) which prohibits abuse by dominant undertaking consisting of “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*.”³³²⁸

Notably, South Africa is more explicit in its condemnation of buyer power affecting SMEs. Buyer power is explicitly prohibited in section 8(4) of the *Competition Act*.³³²⁹ This provision was introduced to give effect to the objective of promoting the equitable

³³²⁴ See above, Chapter Four, para 4.2.5.1 The *Treaty on the Functioning of the European Union (TFEU)*. See also Chapter Four, para 4.2.8.2 *Elopak Italia v Tetra Pak*; Chapter Four, para 4.2.8.5 *ECS vs AKZO*.

³³²⁵ See above, Chapter Three, para 3.6.4.3 *Competition Commission of South Africa v Media 24 (Pty) Ltd*; *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC).

³³²⁶ See above, Chapter Four, 4.1.5.8 SMEs and Predation; Foer “Small business and antitrust” (2001) *Small Business Economics* 8.

³³²⁷ See above, Chapter Four, para 4.1.5.9 SMEs and Buyer Power; Foer “Small business and antitrust” (2001) *Small Business Economics* 7.

³³²⁸ Own emphasis. See above, Chapter Four, para 4.2.5.1 The *Treaty on the Functioning of the European Union (TFEU)*.

³³²⁹ See above, Chapter Three, para 3.5.3.3.1 Section 8 – Abuse of dominance.

participation of SMEs in the economy. In this regard, the Competition Commission has confirmed that:

*“the objective of the buyer power provisions is to enhance the participation of small and medium businesses (SMEs) and historically disadvantaged persons (HDP) firms in the economy by protecting these firms from unfair exploitation by dominant buyers of their products.”*³³³⁰

The introduction of the “buyer power” provision in the *Competition Act* has, however, raised uncertainty as to how the competition authorities will apply it, especially on the question of what would constitute an unfair price or trading condition.³³³¹ In this regard, the *Minister of Trade, Industry and Competition* (DTIC) issued *Buyer Power Regulations* on 13 February 2020 to designate the specific sectors to which the buyer power provisions apply and to describe the meaning of “unfair price or trading condition”.³³³² South Africa is, therefore, progressing well on the path of concretising the promotion of SMEs. What is left to see, is how these provisions will be applied by the competition authorities and courts and the impact thereof on the participation of SMEs in a relevant market.

5.3.3.6.5 Price discrimination

With respect to price discrimination, the *US Federal Trade Commission* (FTC) has recognised that price discrimination is a tool used by sellers with market power which helps them to maintain or enhance their monopoly power.³³³³ In this regard, in 1956, the Committee on the Judiciary, House of Representatives of the US stated that:

“price discriminations favoring preferred buyers present a danger to the competitive enterprise system which is inconsistent with the policy of the price discrimination statute. Firms can abuse their superior market position and engage in discriminatory practices that eliminate small suppliers and small retailers from the competitive scene. In practical effect, the law as presently construed allows the private interest of a

³³³⁰ Competition Commission “Commission releases buyer power guidelines that give boost to small business” (2020) Press Release 18 May 2020. <https://www.compcom.co.za/wp-content/uploads/2020/05/Commission-releases-buyer-power-guidelines-that-give-boost-to-small-business-1.pdf> (accessed on 16 September 2021).

³³³¹ See above, Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance.

³³³² See above, Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance.

³³³³ See above, Chapter Four, 4.1.5.10 SMEs and Price Discrimination; MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 39(2), 180.

*discriminator to outweigh the public interest in preserving competitive opportunity at all levels of business activity.*³³³⁴

In the EU, price discrimination is proscribed under Article 102 of the *TFEU*. In particular, Article 102(a) (mentioned above)³³³⁵ prohibiting the imposition of unfair purchase or selling prices or other unfair trading conditions by a dominant undertaking.³³³⁶ Further, Article 102(c) prohibits the application of different conditions to equivalent transactions with other trading parties, placing them at a competitive disadvantage.³³³⁷

In South Africa, section 9 of the *Competition Act* was amended under the *2018 Competition Amendment Act* to introduce provisions specifically protecting SMEs against price discrimination by a dominant firm.³³³⁸ Price discrimination can be found if the conduct concerned is likely to have the effect of impeding the ability of SMEs to participate effectively in a relevant market.³³³⁹ The Minister of DTIC also issued *Price Discrimination Regulations* on 13 February 2020.³³⁴⁰ The *Price Discrimination Regulations* set out the relevant factors and benchmarks for determining whether a dominant firm's conduct amounts to price discrimination that impedes SMEs' effective participation in a market.³³⁴¹

5.3.3.6.6 Private antitrust enforcement or civil claim

Regarding private antitrust enforcement or civil claims, the US recognises that private antitrust enforcement is also a valuable way of protecting small businesses' and the public interest.³³⁴² This is because private antitrust reinforces public enforcement to maintain competition in a market and discourages firms from engaging in anti-

³³³⁴ Own emphasis. MacIntyre "Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 39(2), 180.

³³³⁵ See above, para 5.3.3.6.4 Buyer power.

³³³⁶ Chapter Four, para 4.2.5.1 The *Treaty on the Functioning of the European Union (TFEU)*.

³³³⁷ Chapter Four, para 4.2.5.1 The *Treaty on the Functioning of the European Union (TFEU)*.

³³³⁸ See Chapter Three, para 3.5.3.3.2 Section 9 – Price discrimination.

³³³⁹ Section 9(1)(a)(ii) states: "An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if – (a) it is likely to have the effect of—(...) (ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively."

³³⁴⁰ See Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination; Regulations on Price Discrimination Made by the Minister Under Competition Act, 1998. GN 169 in GG 43018 Government Gazette of 13 February 2020.

³³⁴¹ Regulations on Price Discrimination Made by the Minister Under Competition Act, 1998. GN 169 in GG 43018 Government Gazette of 13 February 2020, 15-16.

³³⁴² MacIntyre "Small business and the antitrust laws (1961) *University of Detroit Law Journal* 178.

competitive practices, as the government alone cannot provide all the necessary antitrust enforcement for the public and the protection of small businesses.³³⁴³

In the EU, SMEs face challenges in claiming damages when they have been victims of anti-competitive conduct.³³⁴⁴ Challenges to private actions or damages claims include proving the contravention; quantifying damages; instituting legal proceedings in various jurisdictions; SMEs' limited resource; risks of losing and having to pay the defendant's costs; risks of losing a business partner; access to information; especially with leniency applicants, etc.³³⁴⁵ There are no specific best practices for private litigation by SMEs in the civil courts.³³⁴⁶ Nevertheless, SMEs in the EU may benefit from the "collective redress" mechanism, which seeks to prevent and stop unlawful business practices affecting multiple consumers and/or SMEs, and to compensate for the harm caused by such unlawful conduct.³³⁴⁷ In this regard, in June 2013, SMEs were amongst those who could institute collective redress actions in terms of the June 2013 European Commission's *Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU Law* ("Commission Recommendation on

³³⁴³ MacIntyre "The role of the private litigant in antitrust enforcement" (1962), available at https://www.ftc.gov/system/files/documents/public_statements/683441/19620118_macintyre_the_role_of_the_private_litigant_in_antitrust_enforcement.pdf (accessed on 21 April 2024) 4.

³³⁴⁴ See Chapter Four, 4.2.7.2 Other considerations; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 23.

³³⁴⁵ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 24.

³³⁴⁶ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 24.

³³⁴⁷ Buccirosi, Carpagnano, Ciari, Tognoni and, C. Vitale "Collective Redress in Antitrust, Study requested by the European Parliament's Committee on Economic and Monetary Affairs" 15; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 25. collective redress' means: (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress) See The European Commission "Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law" (2013) Official Journal of the European Union L 201/60-65, para 41, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=en> (accessed on 16 December 2023) L 201/62;

Collective Redress”).³³⁴⁸ However, collective redress only applies if the claims are in respect of harm or damages resulting from the same illegal conduct.³³⁴⁹

In South Africa, section 65 of the *Competition Act* entitles a person who has suffered loss or damages arising from a prohibited practice to claim damages from the offending firm.³³⁵⁰ An SME may, therefore, be the victim - in other words, a person who has suffered loss or damage because of a prohibited practice. Likewise, an SME may also be the infringer, in other words, the company against whom the damages claim is brought. For example, the SME may be part of a cartel that has caused loss or damage to consumers in the market. Consumers may therefore invoke section 65 to claim damages against the perpetrator of the cartel, including the offending SME.

5.3.3.6.7 SMEs and mergers

In the US, mergers are dealt with under the *Clayton Act*,³³⁵¹ which prohibits anticompetitive mergers that may negatively affect competition.³³⁵² Some US authors have warned against a stringent merger policy, as this could also prevent mergers between small businesses that may be in financial hardship or whose founder is too old to continue the business.³³⁵³

³³⁴⁸ The European Commission “Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law” (2013) Official Journal of the European Union L 201/60-65, para 41, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=en> (accessed on 16 December 2023); Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 25.

³³⁴⁹ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 26. The Commission Recommendation on Collective Redress refers to ‘mass harm situation’ which is “a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons”. See Commission Recommendation on Collective Redress (2013) L 201/62.

³³⁵⁰ Chapter Three, 3.5.7 Civil claim for damages; Section 65(6) of the Competition Act allows a person who has suffered loss or damage as a result of a prohibited practice to claim civil damages.

³³⁵¹ *Clayton Act* of 15 October 1914, Chapter 323 of the 63rd Congress; 38 Stat. 730. Available at <https://www.govinfo.gov/content/pkg/COMPS-3049/pdf/COMPS-3049.pdf> (accessed on 17 December 2023). See Chapter 4.1: US Antitrust Law and SMEs.

³³⁵² Chapter Four, para 4.1.5.11 SMEs and Mergers; MacIntyre “Small business and the antitrust laws (1961) *University of Detroit Law Journal*, 39(2), 176; Kintner EW “Counselling Small Business under the Antitrust Laws and the *Robinson-Patman Act*” (1963) 4.

³³⁵³ Chapter Four, 4.1.5.11 SMEs and Mergers; Elzinga KG “Goals of antitrust: Other than competition and efficiency, what else counts” (1977) *University of Pennsylvania Law Review*, 125(6), 1197.

In the EU, as previously mentioned,³³⁵⁴ the *EC Merger Regulation* regulates mergers in Europe.³³⁵⁵ In terms of Article 8(3) of the *EC Merger Regulation*, the EU Commission may prohibit a merger that significantly impedes effective competition in the EU market because of creating or strengthening a dominant position.³³⁵⁶ The EU Commission may also prohibit a merger that has the effect of coordinating the competitive behaviour of independent firms without achieving any efficiencies.³³⁵⁷

In some EU countries, mergers between SMEs are generally not the subject of merger control.³³⁵⁸ In the *GE/Honeywell* merger, the EC clarified that it was not against mergers that create efficiencies for the benefit of consumers but rather against mergers that could raise barriers for competitors and eventually reduce consumer welfare.³³⁵⁹

In South Africa, when considering a merger, competition authorities are required to assess not only the merger's effect on competition but also its effect on public interest grounds.³³⁶⁰ When assessing the merger on public interest grounds, the Competition Authorities are required to consider the effect of the merger on, *inter alia*, SMEs' ability to effectively enter, participate or expand within the market.³³⁶¹ In this regard the *Memorandum on the Objects of the Competition Amendment Bill of 2018*, states that:

³³⁵⁴ See Chapter Four, para 4.2.5.2 EC Merger Regulation.

³³⁵⁵ *Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings* (the EC Merger Regulation) *Official Journal of the European Union* L24/1, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> (accessed on 18 June 2022).

³³⁵⁶ See Chapter Four, para 4.2.5.2 EC Merger Regulation.

³³⁵⁷ See Chapter Four, para 4.2.5.2 EC Merger Regulation.

³³⁵⁸ Chapter Four, 4.2.7 Treatment of SMEs under the EU Competition law – A look at various European Countries; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 96.

³³⁵⁹ European Commission Speech - 10 July 2001 “Extracts from a speech by Mario Monti European Commissioner for Competition matters The Future for Competition Policy in the European Union Merchant Taylor's Hall London, 9 July 2001”, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_01_340 (accessed on 20 April 2024); See also “Commissioner Monti dismisses criticism of GE/Honeywell merger review and rejects politicisation of the case” (2001), available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_01_855/IP_01_855_EN.pdf (accessed on 20 April 2024).

³³⁶⁰ Chapter Three, para 3.5.4 Merger regulations.

³³⁶¹ Section 12A(3)(c) of the Competition Act requires the competition authorities to consider the effect of a merger on the ability of SMEs or HDIs to effectively enter into, participate in or expand within the market when determining whether a merger can or cannot be justified on public interest grounds.

“The proposed amendments to subsection (3) (referring to section 12A(3))³³⁶² seek to explicitly create public interest grounds in merger control that deal with ownership, control and the support of small and medium businesses and firms owned or controlled by historically disadvantaged persons as well as the ownership in firms by workers in those firms.”³³⁶³

This study has further found that South Africa is well-advanced in its assessment of public interest issues. In this regard, on 2 June 2016, the Competition Commission issued *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998*.³³⁶⁴ These guidelines were revised on 20 March 2024, as the *Revised Public Interest Guidelines*.³³⁶⁵ The guidelines confirmed that following the 2018 amendments to the *Competition Act*, the competition and public interest assessments are on equal footing.³³⁶⁶ Competition authorities must consider all mergers on both competition and public interest factors.³³⁶⁷ Similar to the 2016 *Public Interest guidelines*, the *Revised guidelines* recommend the consideration of any possible remedies in a merger transaction.³³⁶⁸ The remedies include establishing a development fund to provide technical and financial support to suppliers, and to assist SMEs and HDIs.³³⁶⁹ The remedies also include skills development and training programs.³³⁷⁰

³³⁶² Section 12A(3), which requires the competition authorities to consider the effect of a merger on various public interest grounds, when determining whether a merger can or cannot be justified on public interest grounds.

³³⁶³ Memorandum on the Objects of the Competition Amendment Bill (B23B-2018), 28, clause 3.7.3.

³³⁶⁴ Chapter Three, para 3.5.4 Merger regulations; *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998*, GN309 in GG40039 of 2 June 2016, available at <https://www.compcom.co.za/wp-content/uploads/2017/11/Gov-Gazette-Public-Interest-Guidelines.pdf> (accessed on 24 September 2021).

³³⁶⁵ Chapter Three, para 3.5.4.2 Revised Public Interest Guidelines, 2024.

³³⁶⁶ Revised Public Interest Guidelines Relating to Merger Control, GN4544 in GG50323 of 20 March 2024, available at https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (accessed on 10 October 2024) 28, para 4.1.

³³⁶⁷ Revised Public Interest Guidelines Relating to Merger Control, GN4544 in GG50323 of 20 March 2024, available at https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf (accessed on 10 October 2024) 28, para 4.1.

³³⁶⁸ Chapter Three, para 3.5.4.2 Revised Public Interest Guidelines, 2024.

³³⁶⁹ Chapter Three, para 3.5.4.1 2016 Public Interest Guidelines; para 3.5.4.2 Revised Public Interest Guidelines, 2024.

³³⁷⁰ Chapter Three, para 3.5.4.1 2016 Public Interest Guidelines; para 3.5.4.2 Revised Public Interest Guidelines, 2024.

5.3.3.6.8 Cartel conduct

In the US, SMEs are liable for engaging in cartel conduct, irrespective of their size.³³⁷¹ These include the hard-core offences of price fixing, output limitation, profit sharing, market allocation and bid rigging.³³⁷² Collusive conduct in the form of price fixing, market division or allocation, or the fixing of trading conditions is regarded as illegal whether the perpetrators are big or small enterprises.³³⁷³ Accordingly, small businesses are not exempt from antitrust enforcement if they have engaged in cartel activities.³³⁷⁴ The US DoJ and FTC have consistently punished the perpetrators of cartel activities, whether committed by large or small firms.³³⁷⁵ Small businesses seem to be the group of businesses that tend to be prosecuted for cartel activities more than large businesses, and such a tendency may be regarded as "anti-small business law".³³⁷⁶ SMEs generally form cartels to survive and counter their disadvantageous position vis-a-vis large firms' position, in terms of their limited access to capital, limited cost-savings, receiving less favourable trading terms because of their small volume purchase, the fact that they are less likely to attract qualified staff, etc.³³⁷⁷ Other factors that may push SMEs to collude include the advantage of remaining legally and economically independent instead of merging with other firms, or to counter large firms' economies of scale or to compete with large firms.³³⁷⁸ In addition, as discussed in Chapter Three,³³⁷⁹ small businesses may also be bullied by a large player to join the cartel.³³⁸⁰ SMEs that are new to a market may be pressured by other players in

³³⁷¹ Chapter Four, para 4.1.5.3 SMEs and Cartels; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 258.

³³⁷² Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 266.

³³⁷³ Chaffetz "The Antitrust Laws and Small Business" (1953) 2 *ABA Antitrust Section* 82.

³³⁷⁴ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" ((1961) *University of Detroit Law Journal*, 39(2) 162-163.

³³⁷⁵ Oppenheim "Small and big business: orientation of antitrust points and counterpoints" ((1961) *University of Detroit Law Journal*, 39(2) 163.

³³⁷⁶ Glover "Antitrust and Small Business: Killing the Bigness-is-Better Myth (II)" (1985) *Antitrust Law & Economics Review*, vol. 17, no. 3, 47.

³³⁷⁷ OECD Policy Roundtables "General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises" (1996), available at <https://www.oecd.org/daf/competition/cartels/1920345.pdf> (accessed on 21 April 2024) 8.

³³⁷⁸ OECD Policy Roundtables "General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises" (1996), available at <https://www.oecd.org/daf/competition/cartels/1920345.pdf> (accessed on 21 April 2024) 9.

³³⁷⁹ Chapter Three, 3.6.3.1.1 Relevance of this case for the thesis (referring to MacNeil Agencies (Pty) Ltd v Competition Commission [2013] 2 CPLR 416 (CAC)).

³³⁸⁰ Chapter Three, 3.6.3.1.1 Relevance of this case for the thesis (referring to MacNeil Agencies (Pty) Ltd v Competition Commission [2013] 2 CPLR 416 (CAC)) referring to *Competition Commission v Southern Pipeline Contractors and another* [2015] JOL 33964 (CT), para 43.

the market to engage in illegal conduct in order to keep status quo in the market.³³⁸¹ Further, small businesses entering a market are often seen as disruptors. Consequently incumbent firms may demand that they abide by the "rules of the game" if they want to remain in the market.³³⁸²

Furthermore, US Courts do not condone cooperative conduct of associations of small businesses. Anti-competitive conduct by a trade association is assessed severely, regardless of the size of the firms constituting the trade association.³³⁸³

In the EU, cartel is prohibited under Article 101 of the *TFEU*.³³⁸⁴ Hardcore restraints or cartels, which include price fixing, output or sales limitation, and market or customer allocation, are prohibited regardless of the size of the perpetrator.³³⁸⁵ Accordingly, whilst SMEs are protected under the *De Minimis Notice*, the notice does not insulate SMEs from the application of competition rules that prohibit hardcore cartels.³³⁸⁶ SMEs may be found guilty of engaging in a hardcore cartel, especially through trade associations and may be sanctioned for such conduct.³³⁸⁷

As pointed out in this thesis, South Africa follows the same approach as in the US and EU, in that SMEs may be victims or infringers of cartel conduct.³³⁸⁸ SMEs are likely to engage in cartel activities when they are part of an association that takes a decision to fix prices, allocate or divide markets, or rig tenders.³³⁸⁹ An example of widespread

³³⁸¹ Chapter Three, 3.6.3.1.1 Relevance of this case for the thesis (referring to MacNeil Agencies (Pty) Ltd v Competition Commission [2013] 2 CPLR 416 (CAC)).

³³⁸² Chapter Three, 3.6.3.1.1 Relevance of this case for the thesis (referring to MacNeil Agencies (Pty) Ltd v Competition Commission [2013] 2 CPLR 416 (CAC)).

³³⁸³ See Chapter Four, 4.1.5.5 Small Businesses and Trade Associations; Oppenheim "Small and big business: orientation of antitrust points and counterpoints" (1961) *University of Detroit Law Journal*, 39(2) 163.

³³⁸⁴ See Chapter Four, 4.2.5.1 The *Treaty on the Functioning of the European Union (TFEU)*; European Commission "Competition Policy – Cartels", available at https://ec.europa.eu/competition-policy/cartels_en (accessed on 18 June 2022).

³³⁸⁵ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal* 353.

³³⁸⁶ Chapter Four, 4.2.7.1 Summary of the treatment of SMEs in some EU countries; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 96; Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 144.

³³⁸⁷ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 33 (Austria), 52 (Belgium), 88, 90, 93, 94 (Denmark), 145 (Hungary).

³³⁸⁸ See Chapter Three, 3.5.3.1.2 SMEs – victims of prohibited horizontal practices; Chapter Three, 3.5.3.1.3 SMEs – offenders of restrictive horizontal practices

³³⁸⁹ Schaper "Competition Law, Enforcement and the Australian Small Business Sector" (2010) *Small Enterprise Research*, available at <https://doi.org/10.5172/ser.17.1.7> (accessed on 25 August 2021) 15.

cartel conduct that affected SMEs in South Africa is the construction cartel as discussed in Chapter three, where both large and small firms were implicated.³³⁹⁰

5.3.3.6.9 Exemption

As indicated in this thesis, the US provides for the exemption of SMEs from liability of “joint conduct”.³³⁹¹ “Joint conduct” occurs when a firm, whose market share is large enough to infer market power, colludes with other companies, and such conduct is likely to have anti-competitive effects.³³⁹² However, because the US generally believes that SMEs are unlikely to have a large market share, SMEs can be exempt from such liability.³³⁹³

Some EU countries also exempt SMEs from the application of competition legislation where the impugned conduct serves to enhance SMEs’ competitiveness.³³⁹⁴ SMEs are generally exempt from the application of the abuse of dominance provisions or provisions prohibiting conduct or agreements that restrict competition in the market. This is because of their low turnover and small market share.³³⁹⁵ However, SMEs are not exempted from the application of competition rules that prohibit hardcore cartels.³³⁹⁶

It was further pointed out that in South Africa, a firm (thus also including an SME) may apply to exempt, from the application of Chapter 2 of the *Competition Act*,³³⁹⁷ a prohibited agreement or practice³³⁹⁸ that contributes to: (a) maintaining or promoting

³³⁹⁰ See Chapter Three, 3.5.3.1.2.1 SMEs affected by the construction cartel in South Africa; Competition Commission South Africa “Corporate Leniency Policy” (2008), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021) 15, para 16.6.

³³⁹¹ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 261.

³³⁹² Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 261.

³³⁹³ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 261.

³³⁹⁴ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 50.

³³⁹⁵ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 96; v143.

³³⁹⁶ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 96; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 144.

³³⁹⁷ See Chapter Three, para 3.5.3.4 Exemptions of prohibited practices. Chapter 2 of the Competition Act deals with prohibited practices.

³³⁹⁸ A prohibited agreement or practice, which can be exempted if it meets the requirements of section 10(3), includes restrictive horizontal practices, prohibited under section 4 of the Competition Act (see

exports; (b) promoting the effective entry, participation or expansion of SMEs or HDIs in a market; (c) change in productive capacity to prevent a decline in an industry; (d) the economic development, growth, transformation or stability of any industry designated by the Minister; or (e) the competitiveness and efficiency benefits that enhance employment or industrial expansion.³³⁹⁹

During the COVID-19 pandemic, the Minister of Trade, Industry and Competition (DTIC) in South Africa issued a number of regulations exempting certain agreements or practices in the healthcare, retail property and banking sectors from the application of sections 4 and 5 of the *Competition Act*.³⁴⁰⁰ As mentioned, the purpose of these exempting regulations was to, *inter alia*, prevent the pandemic's negative impact from escalating and assist small businesses in managing their business during the national disaster so that they could continue with their operation.³⁴⁰¹ These exemptions also affected SMEs, as they are involved in the supply chain of essential goods.³⁴⁰² This

Chapter Three, para 3.5.3.1 Restrictive horizontal practices), restrictive vertical practices, prohibited under section 5 of the Competition Act (see Chapter Three, para 3.5.3.2 Restrictive vertical practices), abuse of dominance conduct, prohibited under section 8 of the Competition Act (see Chapter Three, para 3.5.3.3 Abuse of dominance) and price discrimination, prohibited under section 9 of the Competition Act (see Chapter Three, para 3.5.3.3.2 Section 9 – Price discrimination).

³³⁹⁹ See Chapter Three, para 3.5.3.4 Exemptions of prohibited practices. Section 10(3) states: “*The Competition Commission may grant an exemption in terms of subsection (2)(a) only if— (a) any restriction imposed on the firms concerned by the agreement or practice concerned, or category of agreements or practices concerned, is required to attain an objective mentioned in paragraph (b); and (b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives: (i) maintenance or promotion of exports; (ii) promotion of the effective entry into, participation in or expansion within a market by small and medium businesses, or firms by historically disadvantaged persons; (iii) change in productive capacity necessary to stop decline in an industry; (iv) the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry; or (v) competitiveness and efficiency gains that promote employment or industrial expansion.*”

³⁴⁰⁰ COVID- 19 Block Exemption for the Healthcare Sector, 2020, GN R.349 in GG43114 of 19 March 2020, available at https://www.gov.za/sites/default/files/gcis_document/202003/4311419-3dti.pdf (accessed on 20 September 2021); Naidu and Nxumalo (Baker McKenzie) “South Africa: Competition Law Exemptions and Regulations applicable during COVID-19” (25 March 2020) *SA Financial Regulation Journal*, available at <http://financialregulationjournal.co.za/2020/03/25/south-africa-competition-law-exemptions-and-regulations-applicable-during-covid-19/> (accessed on 25 August 2021).

³⁴⁰¹ Chapter Three, 3.5.2.4 Exemptions of prohibited practices.

³⁴⁰² ENS Africa “Government issues urgent exemption for suppliers of essential goods to prevent shortages” (2021) *ENSight*, available at https://www.ensafrica.com/news/detail/4515/government-issues-urgent-exemption-for-suppli?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed on 25 August 2021); COVID- 19 Block Exemption for the Retail Property Sector, 2020, GNR.358 in Government Gazette 43134 of 24 March 2020, available at https://www.gov.za/sites/default/files/gcis_document/202003/43134rg11059gon358.pdf (accessed on 21 September 2021) 4, para 3.2.

thesis noted that these block exemption regulations were considered regulations that sought to promote SMEs' participation in the economy during a time of crisis.³⁴⁰³

It was also pointed out in Chapter Three that on 3 June 2024, the *Minister of Trade, Industry and Competition* (DTIC) published the *SMEs Block exemption regulations*.³⁴⁰⁴ The *SMEs Block exemption regulations* seek to exempt certain agreements or practices among SMEs from the application of sections 4(1) and 5(1) of the *Competition Act*.³⁴⁰⁵ This enables collaboration among SMEs that would have otherwise infringed the *Competition Act*.³⁴⁰⁶ The aim is to stimulate SMEs' growth and participation in the economy, which is one of the objectives of the *Competition Act*.³⁴⁰⁷ The *SMEs Block exemption regulations* apply to specific categories of agreements or practices among SMEs, including research and development, toll manufacturing, joint purchasing, joint selling, commercialisation and standardisation agreements, and collective negotiations with large buyers or suppliers.³⁴⁰⁸

5.3.3.6.10 Fines

This study observed that, in the US, SMEs' financial position is considered against the degree of liability for their conduct.³⁴⁰⁹ When determining an appropriate administrative penalty or fine, the court can consider the SME's ability to pay a fine and the degree of the SME's responsibility for engaging in the prohibited conduct.³⁴¹⁰

It was further pointed out that SMEs may also benefit from smaller fines in certain EU countries because of their size.³⁴¹¹ In principle, SMEs in the EU generally face the

³⁴⁰³ Chapter Three, 3.5.3.4 Exemptions of prohibited practices.

³⁴⁰⁴ Chapter Three, para 3.5.3.4.1 Block Exemption Regulations for Small, Micro and Medium-sized Businesses, 2024; Block exemption regulations for small, micro and medium-sized businesses, 2024, GN2538 in GG50748 of 3 June 2024.

³⁴⁰⁵ SMEs Block exemption regulations 2024, para 5. See Chapter Three, para 3.5.3.1 Restrictive horizontal practices, para 3.5.3.2 Restrictive vertical practices.

³⁴⁰⁶ SMEs Block exemption regulations 2024, para 5.

³⁴⁰⁷ SMEs Block exemption regulations 2024, para 6. See Chapter Three, para 3.5.2 Purpose of the Competition Act; Section 2(e) of the Competition Act.

³⁴⁰⁸ Chapter Three, para 3.5.3.4.1 Block Exemption Regulations for Small, Micro and Medium-sized Businesses, 2024.

³⁴⁰⁹ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 272.

³⁴¹⁰ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 273.

³⁴¹¹ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 144.

same sanction regime as large companies.³⁴¹² There are no specific dispensations for sanctions relating to SMEs.³⁴¹³ However, the size of the firm does play a role in the quantification of a fine. This is because a firm's turnover in the relevant market is generally used to determine a fine, and the SME's turnover in the relevant market within a specific country is often likely to be lower than large firms' turnover.³⁴¹⁴ Accordingly, the size of the firm, its "*economic dimension*" or market position,³⁴¹⁵ and its ability to pay the fine are all factors that can benefit SMEs in determining a fine. As pointed out by Kellezi *et al.*, this is because of SMEs' small size, limited resources, lack of market power and the assumption that the impact of their conduct on the market is unlikely to be significant.³⁴¹⁶

In South Africa, administrative penalties are dealt with under section 59 of the Competition Act. SMEs may also be the subject of section 59, as they may find themselves on the wrong side of the law when engaging in prohibited practices. The 2018 Competition Amendment Act has introduced the requirement to consider the impact of the contravention on SMEs and HDIs when determining an appropriate penalty.³⁴¹⁷ The new section 59(3A) in the *2018 Competition Amendment Act*, which stipulates that the Tribunal may also consider the turnover of the firm(s) that *controls* the respondent when determining the penalty amount, may affect parent companies of SMEs who have engaged in prohibited conduct. The parent company may be held jointly and severally liable together with the offender SME for the payment of the fine if the parent company "knew or should have known" about the contravention.

³⁴¹² Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 36.

³⁴¹³ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85.

³⁴¹⁴ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 36; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 56; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 99-100; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

³⁴¹⁵ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152; Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 180.

³⁴¹⁶ Kellezi *et al.* (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

³⁴¹⁷ See Chapter Three, 3.5.6 Administrative penalties Section 33(d) of the Competition Amendment Act 18 of 2018; Section 33 of the 2018 Amendment Act amended section 59(3)(d) of the Competition Act to require the Competition Tribunal to consider the impact of the contravention on SMEs or HDIs in determining an administrative penalty under the Competition Act.

5.3.3.6.11 Immunity

Both the US and EU provide leniency or immunity³⁴¹⁸ in exchange for cooperation when a firm discloses the existence of an illegal cartel.³⁴¹⁹ None of these jurisdictions, however, provides for special treatment or rules specifically granting immunity to SMEs.³⁴²⁰ Nevertheless, in Hungary being an EU member state,³⁴²¹ for example, the marker application process³⁴²² is recognised as a process that may enable firms with limited resources, like SMEs, to apply for leniency.³⁴²³

South Africa also has a comprehensive leniency policy issued by the Competition Commission in 2004 and updated in 2008, titled the *Corporate Leniency Policy*.³⁴²⁴ Similar to the US and EU, the South African leniency policy does not provide for the special treatment of SMEs. Both large and small firms may apply for immunity.³⁴²⁵ But like in the EU, the marker process in terms of the South African leniency policy could be used to encourage SMEs to apply for leniency.³⁴²⁶

³⁴¹⁸ Chapter Three, 3.5.3.1.2 SMEs – victims of prohibited horizontal practices.

³⁴¹⁹ 7-3.300 - Antitrust Division Leniency Policy and Procedures, available at <https://www.justice.gov/atr/page/file/1490246/dl?inline> (accessed on 13 April 2024); European Commission “Leniency”, available at https://competition-policy.ec.europa.eu/antitrust-and-cartels/leniency_en#:~:text=The%20Commission%20has%20operated%20a,heavy%20fine%20for%20competition%20infringements (accessed on 13 April 2024).

³⁴²⁰ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 35; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 72; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 98 ; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 133; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 151.

³⁴²¹ European Union “Easy to read – The European Union”, available at https://european-union.europa.eu/easy-read_en (accessed on 9 December 2024).

³⁴²² Chapter Three, 3.5.3.1.2 SMEs – victims of prohibited horizontal practices.

³⁴²³ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 151.

³⁴²⁴ Competition Commission South Africa “Corporate Leniency Policy” (2004) GN195 in GG25963, available at https://www.gov.za/sites/default/files/gcis_document/201409/25963u.pdf (accessed on 13 April 2024); Competition Commission South Africa “Corporate Leniency Policy” (2008) GN638 in GG31064, available at https://www.gov.za/sites/default/files/gcis_document/201409/31064628.pdf (accessed on 13 April 2024).

³⁴²⁵ Competition Commission South Africa “Corporate Leniency Policy” (2008), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021) 15, para 16.6.

³⁴²⁶ Chapter Three, 3.5.3.1.2 SMEs – victims of prohibited horizontal practices; Competition Commission of South Africa “Corporate Leniency Policy – Competition Commission South Africa” (2008), available at <https://www.compcom.co.za/wp-content/uploads/2017/11/CLP-public-version-120520081.pdf> (accessed on 10 September 2021) 12, para 12.

5.3.4 Case law

The study presented the following summary of the case law analysis on the antitrust/competition law treatment of SMEs in the US and EU as opposed to South Africa:

5.3.4.1 United States

In the US, one of the seminal cases that considered the impact of anti-competitive conduct on SMEs was *Standard Oil Company of New Jersey et al. v. The United States*.³⁴²⁷ In this case, the State found that Standard Oil engaged in anti-competitive conduct through preferential rebates and discriminatory rates on the transportation of its petroleum products, which financially destroyed small manufacturers and dealers throughout the country.³⁴²⁸ The US considered Standard Oil's "*unfair and oppressive methods of competition*" as material in this case.³⁴²⁹

The thesis also considered *FTC v Morton Salt*.³⁴³⁰ This case specifically dealt with price discrimination against small buyers. In confirming the FTC's findings, the Appellate Court considered Congress' concern, in enacting the *Robinson-Patman Act*, regarding protecting small businesses who were unable to purchase large quantities.³⁴³¹ The Appellate Court confirmed Congress' view that it was malevolent that a large buyer could obtain a competitive advantage over a small buyer just because of the large buyer's quantity buying power.³⁴³² It confirmed that the Senate Judiciary Committee Report found section 2 of the *Clayton Act* to be too restrictive, as it required proof of general injury to competitive conditions.³⁴³³ The Appellate Court consequently found that the new provision in section 1 of the *Robinson-Patman Act* sought to find injury to competition by establishing injury to the competitor victimized by the discrimination.³⁴³⁴

³⁴²⁷ See *Standard Oil Company of New Jersey et al. v The United States* 221 US 1, 106 (1910), Chapter Four, 4.1.6 Review of US Antitrust Case Law on the Treatment of SMEs.

³⁴²⁸ *Standard Oil Company v The United States* (1910) 29.

³⁴²⁹ *Standard Oil Company v The United States* (1910) 29.

³⁴³⁰ See Chapter Four, 4.1.6.2 Federal Trade Commission v Morton Salt (1948); *Federal Trade Commission v Morton Salt Co.* 334 US 37, 61 (1948).

³⁴³¹ *FTC v Morton Salt Co.* (1948) 49.

³⁴³² *FTC v Morton Salt Co.* (1948) 43.

³⁴³³ *FTC v Morton Salt Co.* (1948) 49.

³⁴³⁴ 15 U.S.C. 13; *FTC v Morton Salt Co.* (1948) 49.

*Brown Shoe Co., Inc. v. United States*³⁴³⁵ was also considered, where the famous dictum “*protect competition and not competitors*” was pronounced.³⁴³⁶ The case concerned a merger between Brown Shoe Co, Inc (Brown Shoe) and Kinney Co, Inc. (Kinney), both large manufacturers and retailers of men’s, women’s and children’s shoes. In assessing the case, the court reviewed the legislative history of the amendment to section 7 of the *Clayton Act*, effected by the *Celler-Kefauver Act* of 1950,³⁴³⁷ which deals with mergers.³⁴³⁸ This was to determine whether the lower court’s decision to prohibit the merger in this matter was consistent with the legislature’s intent.³⁴³⁹ The court considered some of the factors relevant to assessing the validity of a merger and specifically discussed by Congress in redrafting section 7.³⁴⁴⁰ It found that:

*“taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.”*³⁴⁴¹

Nevertheless, in applying this principle to the case, the court recognised that:

*“Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.”*³⁴⁴²

The court was concerned that the merger would create a large national chain which was integrated with a manufacturing operation.³⁴⁴³ It accepted that the results of large integrated or chain operations could benefit consumers and that their expansion does not become unlawful just because of its possible adverse effect on small

³⁴³⁵ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 374 (1962).

³⁴³⁶ Swaine “Competition, Not Competitors, nor Canards: Ways of Criticizing the Commission” (2002) 23(3) *University of Pennsylvania Journal of International Economic Law* 597, 609-610.

³⁴³⁷ See above Chapter Four, para 4.1.3.6 The *Celler-Kefauver Act*; *Celler-Kefauver Act* of 29 December 1950, Public Law 899, Chap 1184 of the 81st Congress, 64 Stat. 1125 available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/64/STATUTE-64-Pg1125.pdf> (accessed on 21 December 2023); 15 U.S.C. 18 (Supp. 1951), available at <https://www.law.cornell.edu/uscode/text/15/18> (accessed on 21 December 2023).

³⁴³⁸ *Brown Shoe Co., Inc. v. United States* (1962) 312.

³⁴³⁹ *Brown Shoe Co., Inc. v. United States* (1962) 312.

³⁴⁴⁰ *Brown Shoe Co., Inc. v. United States* (1962) 316.

³⁴⁴¹ *Brown Shoe Co., Inc. v. United States* (1962) 320.

³⁴⁴² *Brown Shoe Co., Inc. v. United States* (1962) 333.

³⁴⁴³ *Brown Shoe Co., Inc. v. United States* (1962) 344.

businesses.³⁴⁴⁴ In this regard, the court stated that “*it is competition, not competitors, which the Act protects.*”³⁴⁴⁵ However, the court recognised “*Congress’ desire to promote competition through the protection of viable, small, locally owned businesses.*”³⁴⁴⁶ The Court eventually found in favour of the State (the FTC) and confirmed the District Court’s decision that the merger was likely to substantially lessen competition in the retail of men’s, women’s, and children’s shoes in cities where the merging parties were represented.³⁴⁴⁷

In *United States v. Arnold, Schwinn*,³⁴⁴⁸ Schwin’s distribution model of imposing territory and price restrictions on its distributors and franchisees was alleged to be prohibited *per se*. The Supreme Court cautioned against *per se* prohibition of all vertical or franchising restrictions where the manufacturer retains the ownership of goods or services, which it distributes through small firms.³⁴⁴⁹ The Supreme Court found that such a strict position would severely hamper the growth of SMEs who strive to compete with international giants.³⁴⁵⁰ This would also increase vertical integration, presumably because SMEs would rather be absorbed through vertical integration than be punished for being in a restrictive vertical or franchising relationship.³⁴⁵¹

In a separate opinion by Justice Stewart, in discussing the justifications for the Schwinn’s franchising policy, he also confirmed that in *Brown Shoe Co. v. US*,³⁴⁵² the Appellate Court “*recognised Congress’ concern with the disappearance of the small independent merchant in the face of competition from vertically integrated giants.*”³⁴⁵³ In recognizing the advantages of franchising for small businesses, Justice Stewart noted that franchising offers the independent merchant the ability to become a competent and effective competitor of large integrated firms.³⁴⁵⁴ Justice Stewart also remarked that vertical integration might hamper the growth of small businesses.³⁴⁵⁵

³⁴⁴⁴ *Brown Shoe Co., Inc. v. United States* (1962) 344. Own emphasis.

³⁴⁴⁵ *Brown Shoe Co., Inc. v. United States* (1962) 344.

³⁴⁴⁶ *Brown Shoe Co., Inc. v. United States* (1962) 344. Own emphasis.

³⁴⁴⁷ *Brown Shoe Co., Inc. v. United States* (1962) 346.

³⁴⁴⁸ *United States v. Arnold, Schwinn & (and) Co. et al*, 388 U.S. 365, 394 (1967).

³⁴⁴⁹ *United States v. Arnold, Schwinn & (and) Co. et al* (1967) 380.

³⁴⁵⁰ *United States v. Arnold, Schwinn & (and) Co. et al* (1967) 380.

³⁴⁵¹ *United States v. Arnold, Schwinn & (and) Co. et al* (1967) 380.

³⁴⁵² See above. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 374 (1962).

³⁴⁵³ *United States v. Arnold, Schwinn & (and) Co. et al* (1967) 386.

³⁴⁵⁴ *United States v. Arnold, Schwinn & (and) Co. et al* (1967) 386.

³⁴⁵⁵ *United States v. Arnold, Schwinn & (and) Co. et al* (1967) 394.

*Continental v. GTE*³⁴⁵⁶ echoed Schwinn's findings on the treatment of small businesses in the context of franchised businesses. The Appellate Court favoured a franchise system that could be an avenue through which small independent businesses may be formed as opposed to perpetuating vertical integration of large firms.³⁴⁵⁷ In this regard, the court stated:

*"We also note that per se rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a per se rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen."*³⁴⁵⁸

The *Verizon Communications Inc. vs. Trinko, LLP*³⁴⁵⁹ judgment confirmed the US courts' position that the enforcement of antitrust law is about promoting competition and not protecting competitors. In this case, the Appeal Court found that monopoly power could not necessarily be regarded as unlawful because monopoly pricing may produce innovation and economic growth.³⁴⁶⁰ In this regard, the court found that having monopoly power and being able to charge monopoly prices was not unlawful, but was a characteristic of the free-market system.³⁴⁶¹ In alluding to the paradigm that "*competition law is about competition and not protecting competitors*", the Appeal Court found that the *Verizon* case could not be regarded as an exception to the principle that there is no obligation to assist competitors.³⁴⁶² The case law that suggested that harm to small players may have been a factor in determining whether the conduct was anti-competitive, was found inapplicable in this specific case.³⁴⁶³

³⁴⁵⁶ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.*, 433 U.S. 36, 71 (1977).

³⁴⁵⁷ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 57, fn.26.

³⁴⁵⁸ *Continental T.V., Inc., et al. v. GTE Sylvania Inc.* (1977) 57, fn.26. Own emphasis.

³⁴⁵⁹ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 US 398, 418 (2004).

³⁴⁶⁰ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 407; Fox and Bazenov "Antitrust and inequality: The history of (in)equality in competition law and its guide to the future" (2021) – Draft article revised as of 9 September 2021 (accessed on 5 February 2022) (unpublished article at the time of writing this section – 18 May 2022) 16, fn 49.

³⁴⁶¹ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 407.

³⁴⁶² *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 411.

³⁴⁶³ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (2004) 409-410.

In *Woodman's Food Market v Clorox Co. & Clorox Sales*,³⁴⁶⁴ the Appeal Court remarked that the *Robinson-Patman Act*'s main purpose to protect small businesses was at odds with the antitrust law's objective of protecting consumer welfare.³⁴⁶⁵ The court further noted the US Supreme Court's reminder that "*the antitrust laws protect competition, not competitors*."³⁴⁶⁶ The Court of Appeal found that Clorox's refusal to sell large packages of its goods to Woodman, as an ordinary grocery store,³⁴⁶⁷ did not contravene section 13(e) of the *Robinson-Patman Act*.³⁴⁶⁸ The fact that ordinary grocery stores (likely to be SMEs) may have been affected by Clorox's conduct did not constitute a factor that the court considered in determining whether the alleged conduct contravened the *Robinson-Patman Act*. The Act was interpreted on the basis of the paradigm "*competition law protects competition, and not competitors*", as applied in US antitrust cases post the 1970s.

The above cases indicate that the goal of promoting SMEs was considered in the early years of US antitrust law. However, the court's approach to antitrust law change is seemingly influenced by the competition goal of maximizing efficiency and protecting consumer welfare. There appears to still be a debate on the appropriate goal of antitrust law, i.e. between "pure competition" goals of efficiency and consumer welfare, and non-economic goals which include promoting SMEs.³⁴⁶⁹

³⁴⁶⁴ *Woodman's Food Market v Clorox Co. & Clorox Sales* (US Court of Appeals, 7th Circuit) – 2016

³⁴⁶⁵ United States Court of Appeals, Seventh Circuit. *Woodman's Food Market, Inc., Plaintiff–Appellee, v. Clorox Company and Clorox Sales Company, Defendants–Appellants*. No. 15–3001. Decided: August 12, 2016, available at <https://caselaw.findlaw.com/us-7th-circuit/1746042.html> (accessed on 19 May 2022).

³⁴⁶⁶ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 374 (1962) 320; *Atlantic Richfield v USA Petroleum*, 495 U.S. 328 (1990), 338.

³⁴⁶⁷ The study notes that Woodman was not specifically described as a small business but as an ordinary grocery store allegedly receiving different treatment than discount warehouses. Nevertheless, the study cites the Woodman case because Chief Judge Wood made reference to the *Robinson-Patman Act*, whose principal objective is said to be the protection of small businesses.

³⁴⁶⁸ Section 13(e) of the *Robinson-Patman Act* states: "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." Available at <https://www.law.cornell.edu/uscode/text/15/13> (accessed on 18 December 2023).

³⁴⁶⁹ Bouwer A *Critical Appraisal of South Africa's Political Approach to Competition Regulation* (2022). PhD thesis University of Pretoria, 18, para 2.1 "Pure Competition" Goals.

5.3.4.2 European Union (EU)

As discussed in Chapter Four, the EU case law includes several cases where the EC considered the exclusion of small businesses as a factor in analysing alleged anti-competitive conduct.

In *Eurofix-Bauco v Hilti*,³⁴⁷⁰ Hilti, a dominant player in the cartridge strips and nails market, was alleged to abuse its dominance through tying and bundling,³⁴⁷¹ thereby excluding small producers or suppliers of these products. Hilti's conduct prevented the entry of small independent producers and suppliers of nails and cartridge strips in the market for nails and cartridge strips.³⁴⁷² The European Commission found that Hilti's behaviour was exclusionary, in that it prevented small independent producers of cartridge strips and Hilti-compatible nails from entering or expanding in the market to disturb Hilti's dominant position.³⁴⁷³ Consequently Hilti's conduct was found to have contravened Article 102 of the *TFEU*.³⁴⁷⁴

In *Elopak Italia v Tetra Pak*,³⁴⁷⁵ Tetra Pak, a dominant player in the aseptic and non-aseptic markets, abused its dominance and adversely affected its small competitors' competitiveness in the aforesaid market.³⁴⁷⁶ Albeit smaller than Tetra Pak, Elopak was one of its main competitors.³⁴⁷⁷ Elopak alleged that Tetra Pak was engaged in predatory pricing³⁴⁷⁸ of cartons for packaging milk³⁴⁷⁹ and that it imposed unfair

³⁴⁷⁰ *Eurofix-Bauco v Hilti* [1988] OJ L65/19. Commission Decision (Case IV/30.787 and 31.488) 88/138/EEC [1988] OJ L65/19.

³⁴⁷¹ Tying is a practice that requires a person to buy goods or services on the condition that the buyer purchases separate goods or services unrelated to the main goods or services. Tying is often referred to in combination with Bundling. Bundling is a practice in which the seller sells the products or services in a bundle, i.e., selling two goods or services together. See Chapter Four, 4.1.3.2 The *Clayton Act* and *FTC Act*.

³⁴⁷² Chapter Four, 4.2.8 Treatment of SMEs under EU Competition law — considering some cases; *Eurofix-Bauco v Hilti* [1988] OJ L65/19, paras 17 and 25.

³⁴⁷³ Chapter Four, 4.2.8 Treatment of SMEs under EU Competition law — considering some cases; *Eurofix-Bauco v Hilti* [1988] OJ L65/19, para 75.

³⁴⁷⁴ See Chapter Four, 4.2.5.1 The *Treaty on the Functioning of the European Union (TFEU)*, Article 102 of *TFEU* prohibits any abuse by a dominant firm of its dominant position in the internal market or any substantial part of it; see also European Commission "Competition Policy – Antitrust", available at https://ec.europa.eu/competition-policy/antitrust_en (accessed on 18 June 2022).

³⁴⁷⁵ *Elopak Italia v Tetra Pak* [1991] OJ L72/1. The Commission's decision was upheld by the General Court and by the Court of Justice, case C-333/94 P, *Tetra Pak II* [1996] ECR I-5951. Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 316.

³⁴⁷⁶ *Elopak Italia v Tetra Pak* [1991] OJ L72/1, para 5

³⁴⁷⁷ *Elopak Italia v Tetra Pak* [1991] OJ L72/1, para 13

³⁴⁷⁸ See Chapter One, 1.11.1 United States of America (US); Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance. Predatory pricing occurs when a firm (generally a dominant firm) prices below a certain measure of cost in order to exclude its competitors from the market.

³⁴⁷⁹ *Elopak Italia v Tetra Pak* [1991] OJ L72/1, para 6.

conditions on the supply of the machines used to fill in the cartons and the sale of the machines at predatory prices.³⁴⁸⁰ Tetra Pak's conduct was found to prevent the entry and expansion of Elopak and other smaller producers in the aseptic markets.³⁴⁸¹ The fact that the class of firms excluded from the market was smaller firms was thus considered by the EU Commission.³⁴⁸²

Akman points out that the above two cases have, however, been criticised as protecting competitors instead of protecting competition for the benefit of consumers.³⁴⁸³ It has been argued that, if the relevant conduct does not result in the exploitation of consumers, but only exclusionary abuse, the prohibition of such conduct would be regarded as protecting competitors rather than competition.³⁴⁸⁴

In *Merci Convenzionali v Siderurgica*,³⁴⁸⁵ the EU General Court found that a small firm was dominant in a narrow market and abused its dominance in the said market.³⁴⁸⁶ The court did not consider Merci's small size or "*limited economic strength*" as a mitigating factor to a finding of abuse of dominance.³⁴⁸⁷ This decision confirms the EU's approach that competition law, in principle, applies to all firms, irrespective of their size (albeit that there may be measures to accommodate SMES such as under the EU *De Minimis Notice*).³⁴⁸⁸

In the *GE/Honeywell merger*,³⁴⁸⁹ the EU Commission was concerned that the merged entity would offer low bundled prices for purchasing its aircraft engines and avionics and non-avionics systems, which would have resulted in the exclusion of the merged entity's competitors.³⁴⁹⁰ Both GE and Honeywell were dominant in their respective

³⁴⁸⁰ Elopak Italia v Tetra Pak [1991] OJ L72/1, paras 5 and 6.

³⁴⁸¹ Elopak Italia v Tetra Pak [1991] OJ L72/1, para 104(3), fn.8

³⁴⁸² See Chapter Four, 4.2.8.2 Elopak Italia v Tetra Pak.

³⁴⁸³ See Chapter Four, 4.2.8.2 Elopak Italia v Tetra Pak; Akman *The concept of abuse in EU competition law: Law and economic approaches* (2015) 304.

³⁴⁸⁴ Akman *The concept of abuse in EU competition law: Law and economic approaches* (2015) 304. referring to Jones and Surfin *EU Competition Law: Text, Cases and Materials* (2011) (4th Ed.) 462.

³⁴⁸⁵ *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli SpA* [1991] ECR I-5889. See Chapter 4.2: European Competition Law – Treatment of SMEs.

³⁴⁸⁶ Lorenz M *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 TFEU to small undertakings, 207.

³⁴⁸⁷ Lorenz M *An introduction to EU Competition Law* (2013), Chap. 5.7 – Application of Article 102 TFEU to small undertakings, 207.

³⁴⁸⁸ See above, Chapter Four, para 4.2.6.1 The EU *De Minimis Notice*.

³⁴⁸⁹ Case no. Comp/M.2220 of 3 July 2001, aff'd Cases T-209 and 201/01, [2005] ECR II-5527 and 5575. See Chapter 4.2: European Competition Law – Treatment of SMEs.

³⁴⁹⁰ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1181-1182

markets.³⁴⁹¹ Smaller suppliers of avionics systems competing with Honeywell complained that they were facing pressure from Honeywell's capability to bundle its products and that such a bundling strategy would be enhanced with the *GE/Honeywell* merger.³⁴⁹² The *GE/Honeywell* merger was prohibited by the EU but approved by the US. Comments on these two different approaches were that the US focused on short-term efficiencies and consumer benefits, whilst the EU focused on the long-term effects of the merger which would have forced competitors to exit³⁴⁹³ whereafter the merged entity would have increased its prices to the detriment of consumers.³⁴⁹⁴ The US authorities viewed the EC's approach as fundamentally departing from the general antitrust position that "*antitrust laws protect competition, not competitors*".³⁴⁹⁵ The European Commission rejected this criticism.³⁴⁹⁶ It clarified that it was not against mergers that create efficiencies for the benefit of consumers, but against mergers that could raise barriers for competitors and eventually reduce consumer welfare.³⁴⁹⁷ This case highlights the differences between the views of the EU and US on the role played by small competitors in a market.³⁴⁹⁸

³⁴⁹¹ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 1181.

³⁴⁹² *GE/Honeywell*, Comp/M.2220, 83, para 329.

³⁴⁹³ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 406.

³⁴⁹⁴ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 406.

³⁴⁹⁵ Ezrachi *EU Competition law: an analytical guide to the leading cases* (2012) (3rd Ed.) 406.

³⁴⁹⁶ European Commission Speech - 10 July 2001 "Extracts from a speech by Mario Monti European Commissioner for Competition matters The Future for Competition Policy in the European Union Merchant Taylor's Hall London, 9 July 2001", available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_01_340 (accessed on 20 April 2024); See also "Commissioner Monti dismisses criticism of GE/Honeywell merger review and rejects politicisation of the case" (2001), available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_01_855/IP_01_855_EN.pdf (accessed on 20 April 2024).

³⁴⁹⁷ European Commission Speech - 10 July 2001 "Extracts from a speech by Mario Monti European Commissioner for Competition matters The Future for Competition Policy in the European Union Merchant Taylor's Hall London, 9 July 2001", available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_01_340 (accessed on 20 April 2024); See also "Commissioner Monti dismisses criticism of GE/Honeywell merger review and rejects politicisation of the case" (2001), available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_01_855/IP_01_855_EN.pdf (accessed on 20 April 2024).

³⁴⁹⁸ Fox "We Protect Competition, You Protect Competitors" (2003) *World Competition Law and Economics Review*, Vol 26 Issue 2, 149 – 165.

In *ECS vs AKZO*,³⁴⁹⁹ the EC found that AKZO had engaged in predatory pricing³⁵⁰⁰ to eliminate a small competitor from the plastics sector.³⁵⁰¹ The Commission also found that AKZO's conduct had prevented smaller firms' entry and expansion in the market.³⁵⁰² The EC held that a dominant firm's unfair commercial practices aimed at eliminating, disciplining or deterring smaller competitors would come under the scope of Article 86 infringements if the other conditions for its application were met.³⁵⁰³ Whilst the Commission acknowledged that large firms should not be prevented from vigorously competing against smaller competitors or new entrants, the Commission confirmed that:

*"the maintenance of a system of effective competition does, however, require that a small competitor be protected against behaviour by dominant undertakings designed to exclude it from the market not by virtue of greater efficiency or superior performance but by an abuse of market power."*³⁵⁰⁴

The EC thus found that AKZO's conduct denied the smaller firm *"the benefits of the free play of competition."*³⁵⁰⁵ The EC also referred to its decision in the *Toltecs/Dorcet* trademarks case.³⁵⁰⁶ In that case, it was found that where a few dominant firms dominate a national market, restricting the competition of a small supplier from another Member State is a serious infringement, especially if it is an important player in the market that restricts the small player.³⁵⁰⁷

In the EC's investigation against Amazon for alleged contravention of Article 102 of *TFEU*,³⁵⁰⁸ the EC found that Amazon used non-publicly available data of third-party sellers listing on its online platform for its own retail online operations, to compete with

³⁴⁹⁹ *ECS/AKZO* [1985] OJ L374/1.

³⁵⁰⁰ See Chapter One, 1.11.1 United States of America (US); Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance. Predatory pricing occurs when a firm (generally a dominant firm) prices below a certain measure of cost in order to exclude its competitors from the market.

³⁵⁰¹ Jones and Surfin *EU Competition Law – Text, Cases and Materials* (2016) (6th Ed.) 387.

³⁵⁰² *ECS/AKZO* [1985] OJ L374/1, 18, para 70.

³⁵⁰³ *ECS/AKZO* [1985] OJ L374/1, 19, para 74.

³⁵⁰⁴ *ECS/AKZO* [1985] OJ L374/1, 21, para 81.

³⁵⁰⁵ *ECS/AKZO* [1985] OJ L374/1, 22, para 83.

³⁵⁰⁶ *Toltecs/Dorcet* (1982) OJ L379/19 (82/897/EEC), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31982D0897> (accessed on 26 September 2023).

³⁵⁰⁷ *Toltecs/Dorcet* (1982) OJ L379/19, 26; *ECS/AKZO* [1985] OJ L374/1, 23, para 89. Own emphasis.

³⁵⁰⁸ See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; European Commission "Commission Decision of 20.12.2022 relating to a proceeding under Article 102 of the *Treaty on the Functioning of the European Union (TFEU)* and Article 54 of the EEA Agreement" Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box. Hereinafter "EC Amazon decision (2022)".

those sellers.³⁵⁰⁹ The EC also found that Amazon imposed conditions and criteria that favour Amazon's own retail operations.³⁵¹⁰ The EC preliminary investigation found that Amazon is dominant in the online marketplace market in Germany and France, and its conduct was likely to contravene Article 102 of *TFEU*.³⁵¹¹ Third-party sellers on online marketplaces were small-revenue sellers that were unlikely to be able to build their own online platform to sell their products, and thus rely on online marketplaces, such as Amazon.³⁵¹² The EC found that none of Amazon's competitors could match its size, profile, and services.³⁵¹³ Based on this and considering the large number of small third-party sellers on Amazon's online platform, the EC preliminary concluded that Amazon was able to act independently of its competitors, i.e. the third-party sellers and thus had market power.³⁵¹⁴ The EC also found that these third-party sellers could not exert countervailing buyer power against Amazon.³⁵¹⁵

A review of the above cases indicates that the EC does consider the fact that the class of firms excluded by exclusionary or abuse of dominance conduct are small firms. There appears to be an appreciation that effective competition in a market requires the entry and participation of small players. In this regard, the EC is not against maximising efficiency for the benefit of consumers. However, it frowns upon the exclusion of small competitors as a result of abuse of market power.

5.3.4.3 South Africa

Chapter Three discussed several cases in South Africa that have dealt with SMEs. One of the seminal cases is *Nationwide Poles v Sasol* that was heard several years prior to the introduction of the 2018 Competition Amendment Act.³⁵¹⁶ The crux of this case is the Tribunal's discussion on the "special place" that SMEs have in competition

³⁵⁰⁹ See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; EC Amazon decision (2022), para 4.

³⁵¹⁰ See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; EC Amazon decision (2022), para 5.

³⁵¹¹ See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; EC Amazon decision (2022), para 7.

³⁵¹² See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; EC Amazon decision (2022), para 67.

³⁵¹³ See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; EC Amazon decision (2022), para 87.

³⁵¹⁴ See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; EC Amazon decision (2022), para 93.

³⁵¹⁵ See Chapter Four, para 4.2.8.6 Amazon marketplace and Amazon Buy Box; EC Amazon decision (2022), para 93.

³⁵¹⁶ Chapter Three, 3.6.1 *Nationwide Poles v Sasol* – The Tribunal's decision; *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT).

law.³⁵¹⁷ As discussed, the case related to allegations that Sasol had engaged in price discrimination of its creosote products against small purchasers, including Nationwide Poles, who was the complainant. The Tribunal remarked that price discrimination provisions were introduced to enable SMEs to enter new markets and to compete effectively on merits.³⁵¹⁸ The Tribunal confirmed that the South African *Competition Act* is concerned with the development of SMEs, as provided for in section 2(e) of the *Competition Act*.³⁵¹⁹ It further remarked that fairness should be considered in assessing prohibited conduct against SMEs.³⁵²⁰ It found that the concept of “fairness” is not foreign to the *Competition Act* or jurisprudence.³⁵²¹ In this regard, the Tribunal considered the sections of the *Competition Act* referring to SMEs, such as the public interest provisions under the merger section³⁵²² and the exemption provisions,³⁵²³ and found that they were all envisaging fairness and equity.³⁵²⁴ The Tribunal further remarked that, while considerations of “fairness” or “equity” could be regarded as contrary to the objective of “pure” consumer welfare protection, the purpose of ensuring SMEs’ equitable participation in the economy confirmed the legislator’s intent that “equity” and “fairness” should be part of the competition analysis.³⁵²⁵ The Tribunal found that the mantra “competition law protects competition and not competitors” as pronounced in the US *Brown Shoe Co* case,³⁵²⁶ seeks to deny SMEs a special place in competition law.³⁵²⁷ It was thus the Tribunal’s view that competition law enforcement should be concerned with anti-competitive behaviour that negatively affects the market structure.³⁵²⁸ The Tribunal remarked that it was not the legislator’s intention that the complainant would establish the anti-competitive effect of price discrimination, especially where the complainant or victim was a small business.³⁵²⁹ According to the Tribunal, regarding price discrimination, the legislator intended to create a *competitive*

³⁵¹⁷ *Nationwide Poles* (CT) para 84.

³⁵¹⁸ *Nationwide Poles* (CT) para 81.

³⁵¹⁹ *Nationwide Poles* (CT) para 81. Section 2(e) states: “*The purpose of this Act is to promote and maintain competition in the Republic in order – (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy.*”

³⁵²⁰ *Nationwide Poles* (CT) para 83.

³⁵²¹ *Nationwide Poles* (CT) para 83.

³⁵²² Section 12A(3)(c).

³⁵²³ Section 10(3)(b)(ii).

³⁵²⁴ *Nationwide Poles* (CT) para 83.

³⁵²⁵ *Nationwide Poles* (CT) para 83.

³⁵²⁶ *Brown Shoe Co., Inc. v. United States* (1962) 344; See Chapter Four, 4.1.6.3 *Brown Shoe Co., Inc. v. United States*.

³⁵²⁷ *Nationwide Poles* (CT) para 85.

³⁵²⁸ *Nationwide Poles* (CT) para 87.

³⁵²⁹ *Nationwide Poles* (CT) para 99.

relevance threshold, not a *competitive harm* threshold (in the form of harm to consumer welfare).³⁵³⁰ A *competitive relevance* threshold is when the complainant establishes that the conduct is relevant to the complainant in that it relates to, or affects, its business or competitiveness.³⁵³¹ In *Nationwide Poles*,³⁵³² the Tribunal found that the complainant, Mr Foot, was able to establish the relevance of the discriminatory act to competition.³⁵³³ The Tribunal explained that the relevance of the discriminatory conduct to competition was established by showing that Mr Foot and other small customers, as competing producers of treated poles using creosote that was a crucial input in their production process and the subject of Sasol's price discrimination, were at a competitive disadvantage compared to other competing producers of treated poles.³⁵³⁴ Accordingly, price discrimination was found to be relevant to competition.³⁵³⁵ The competitive harm threshold, in the form of consumer welfare harm, refers to a standard that considers harm to competition in the form of output reduction and increase in prices, and thus adversely affects consumers.³⁵³⁶ The Tribunal concluded that, if small firms' competitiveness is suppressed, it will affect the market's competitive structure and will likely substantially harm competition in the market.³⁵³⁷ It was eventually found by the Tribunal that Sasol engaged in price discrimination in contravention of section 9 and that there was no justification for its conduct.³⁵³⁸ In explaining the Tribunal's approach to this case, Lewis explains that the Tribunal found that section 9 was "*an unusual hybrid of public interest and competition considerations*."³⁵³⁹ He further explains that the public interest consideration in that section was "*the ability of small business to enter and thrive*", which represents a clear competition element.³⁵⁴⁰ He submits that "*While employment and the promotion of black economic empowerment constitute, when placed alongside competition considerations, 'pure' public interest considerations, support for SMEs, in addition to*

³⁵³⁰ *Nationwide Poles* (CT) para 102-104.

³⁵³¹ *Nationwide Poles* (CT) para 102-104.

³⁵³² *Nationwide Poles v Sasol (Oil) (Pty) Ltd* [2005] 1 CPLR 156 (CT).

³⁵³³ *Nationwide Poles* (CT) para 104.

³⁵³⁴ *Nationwide Poles* (CT) para 104.

³⁵³⁵ *Nationwide Poles* (CT) para 104.

³⁵³⁶ *Nationwide Poles* (CT) para 83.

³⁵³⁷ *Nationwide Poles* (CT) para 126.

³⁵³⁸ *Nationwide Poles* (CT) para 140.

³⁵³⁹ Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 181.

³⁵⁴⁰ Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 181.

*representing a public interest, also embodies cognisable competition considerations.*³⁵⁴¹

Sasol appealed the Tribunal's decision to the CAC.³⁵⁴² The CAC noted that the Tribunal had considered comparative law and had adopted an approach to price discrimination similar to the US approach.³⁵⁴³ Accordingly, the CAC considered the US approach to price discrimination. The CAC confirmed that price discrimination in the US is prohibited under the *Robinson-Patman Act* of 1936.³⁵⁴⁴ The CAC then proceeded to consider several US cases on price discrimination.³⁵⁴⁵ It referred to *Morton Salt*,³⁵⁴⁶ where the US Supreme Court held that: "*the [Robinson-Patman] Act was especially concerned with protecting small businesses*".³⁵⁴⁷ It also held that the *Robinson-Patman Act* could be triggered by "*a reasonable possibility of harm to competition*".³⁵⁴⁸ It further referred to *Brooke*,³⁵⁴⁹ in which the US Supreme Court held that there were two lines of enforcement against price discrimination: the primary line seeking to promote consumer welfare,³⁵⁵⁰ and the secondary line usually seeking to promote small sellers against price discrimination.³⁵⁵¹ In July 2005, commenting on the legislative reform of the secondary line enforcement, the American Antitrust Institute (AAI) Working Group³⁵⁵² recommended a refocus of the secondary line price

³⁵⁴¹ Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 181.

³⁵⁴² *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC).

³⁵⁴³ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 16.

³⁵⁴⁴ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 17.

³⁵⁴⁵ The CAC considered *FTC v Morton Salt Company* 334 US 37, 61 (1948); *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation* 509 US 209 (1993).

³⁵⁴⁶ 3.6.2 Sasol v Nationwide Poles – The CAC's decision; *FTC v Morton Salt Company* 334 US 37 at 42 (1948).

³⁵⁴⁷ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 20; *FTC v Morton Salt Company* 334 US 37 at 42 (1948) para 49.

³⁵⁴⁸ See Chapter Three, 3.6.2 Sasol v Nationwide Poles – The CAC's decision; *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 20; *FTC v Morton Salt Company* 334 US 37 at 42 (1948) para 50.

³⁵⁴⁹ See Chapter Three, 3.6.2 Sasol v Nationwide Poles – The CAC's decision; *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation* 509 US 209 (1993) 224; *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 22;

³⁵⁵⁰ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 22; *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation* 509 US 209 (1993) 221.

³⁵⁵¹ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 23; *Brooke Group Ltd. v Brown and Williamson Tobacco Corporation* 509 US 209 (1993).

³⁵⁵² See Chapter Four, 4.1.4.2.5 Lande's Interpretation (1982); The American Antitrust Institute is an independent non-profit organisation founded in 1998 by Albert Foer, Professor Robert Lande and Jonathan Cuneo. The AAI seeks to promote competition that protects consumers, businesses and society. Available at <https://www.antitrustinstitute.org/about-us/> (accessed on 27 December 2023).

discrimination to protect small firms from price discrimination that gives buying power to dominant firms.³⁵⁵³

The CAC also considered EU case law, namely *Hoffman-La Roche and Co AG v Commission of the European Communities*,³⁵⁵⁴ where the EU court ruled that abusive conduct is conduct that has: “*the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*”³⁵⁵⁵ The CAC also took note of the remarks by Fox that the EU’s legislation “*protects openness of and access to markets, and the right of market actors not to be fenced out by dominant firm strategies that are not based on competitive merits.*”³⁵⁵⁶ As part of the comparative law that it considered, the CAC further took note of the views of the Korean Competition Advisory Board’s chair, Kyu-Uck Lee, on the dual role of competition policy. This includes (a) enabling underprivileged economic agents (including small businesses) to participate in the competition process effectively and (b) establishing the rules of fair and free competition.³⁵⁵⁷

Nevertheless, the CAC agreed with the *amicus* in this case, who contended that the wording of the price discrimination provisions³⁵⁵⁸ did not show that they were enacted to protect small businesses as opposed to protecting the competitive process.³⁵⁵⁹ Accordingly, it found that the appropriate test for the likelihood of substantial

³⁵⁵³ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC) 24.

³⁵⁵⁴ See Chapter Three, 3.6.2 *Sasol v Nationwide Poles* – The CAC’s decision; *Hoffman-La Roche and Co AG v Commission of the European Communities* [1979] ECR 461; *Sasol Oil v Nationwide Poles* (CAC) 25.

³⁵⁵⁵ *Sasol Oil v Nationwide Poles* (CAC) 25; *Hoffman-La Roche and Co AG v Commission of the European Communities* [1979] ECR 461, para 89.

³⁵⁵⁶ *Sasol Oil v Nationwide Poles* (CAC) 26; Fox “What is harm to competition? Exclusionary Practices and Anti Competitive Effect” (2002) *Antitrust Law Journal* Vol. 70, No. 2, at 392.

³⁵⁵⁷ *Sasol v Nationwide Poles* (CAC) 27; Lee “A ‘Fairness’ Interpretation of Competition Policy with Special Reference to Korea’s Laws” (1997) KFTC, essay presented at The Symposium in Commemoration of the 50th Anniversary of the Founding of the Fair Trade Commission in Japan, Competition Policy for the 21st Century at 61 (on file with author).

³⁵⁵⁸ The CAC invited Mr Maenetje as “*amicus*”. The CAC stated that the “*amicus*” had contended that “*there is nothing in the text of section 9 which shows that the purpose of the section was to protect small enterprises as opposed to protecting the competitive process or, in the words of the Tribunal, “the underlying competitive structure of the market”* and submitted that “it was doubtful that section 2 of the Act which sets out the purposes of the Act justifies departure from the ordinary meaning of the words used in section 9(1)(a).” *Sasol Oil v Nationwide Poles* 51. Prior to the 2018 amendments (see Chapter Three above, section 9(1)(a) prohibited a seller that is a dominant firm from price discrimination, if it was likely to substantially prevent or lessen competition.

³⁵⁵⁹ *Sasol Oil v Nationwide Poles* 28.

prevention or lessening of competition in price discrimination is “*whether there is a reasonable possibility*” that price discrimination may negatively affect competition.³⁵⁶⁰

The CAC then concluded that, based on the evidence, there was no reasonable possibility that in this particular matter, competition had been substantially affected.³⁵⁶¹ It confirmed the mantra that “*competition law does not protect the competitor, it protects competition*.”³⁵⁶² It further held that evidence only indicating that one competitor may be prejudiced is insufficient to find a contravention of section 9(1)(a) of the Competition Act.³⁵⁶³ However, the CAC notably also confirmed that its decision should not undermine SMEs' ability to use the *Competition Act* to protect their free and fair competition.³⁵⁶⁴

Accordingly, as much as the mantra “protect competition and not competitors” was confirmed, the CAC also recognised the Competition Act's objective of protecting SMEs' ability to compete freely and fairly.³⁵⁶⁵

For purposes of assessing the treatment of SMEs under the South African competition jurisprudence, the thesis considered cases involving SMEs decided by the CAC and Constitutional Court during the period 2010 to 2021, specifically cartel, abuse of dominance and merger cases. This is because this period reflected the courts' approach before the 2018 Competition Amendment Act came into force.³⁵⁶⁶ In this regard, since the enactment of the 2018 Competition Amendment Act³⁵⁶⁷ and the Constitutional Court's decision in *Mediclinic*³⁵⁶⁸, the South African competition authorities have sought to interpret the Act more purposively. The study has, therefore, also considered some of the groundbreaking cases or developments relating to SMEs during 2022 and 2024.

³⁵⁶⁰ *Sasol Oil v Nationwide Poles* 28.

³⁵⁶¹ *Sasol Oil v Nationwide Poles* 40.

³⁵⁶² *Sasol Oil v Nationwide Poles* 40.

³⁵⁶³ *Sasol Oil v Nationwide Poles* 40.

³⁵⁶⁴ *Sasol Oil v Nationwide Poles* 57.

³⁵⁶⁵ *Sasol Oil v Nationwide Poles* 41.

³⁵⁶⁶ Most of the provisions came into effect on 12 July 2019 (Proclamation No. 46 of 2019 in GG42578 of 12 July 2019) and 13 February 2020 (Proclamation No. 10 of 2020 in GG43018 of 13 February 2020). See Chapter Three, para 3.3 “The 2018 Amendments to the Competition Act” above.

³⁵⁶⁷ Most of the provisions came into effect on 12 July 2019 (Proclamation No. 46 of 2019 in GG42578 of 12 July 2019) and 13 February 2020 (Proclamation No. 10 of 2020 in GG43018 of 13 February 2020). See 3.3 “The 2018 Amendments to the Competition Act” above.

³⁵⁶⁸ on 15 October 2021.

In respect of cartel cases, as far as the merits were concerned, the study observed that the competition law has been applied to SMEs by the letter, in that SMEs are not immune from the application of the law relating to cartel conduct. There is no special test or consideration applied to SMEs to determine the merits of a cartel case. Collusive or cartel conduct is *per se* prohibited, and there is no technological, efficiency or pro-competitive justification that can be advanced to defend such conduct. Reasons like “passive participation”, lack of knowledge of the law, or being “*bullied by a large player*”³⁵⁶⁹ into participating in the cartel conduct were not condoned by the courts. In a few cases, the size and limited participation of the firm were, to some extent, considered when determining the administrative penalty.

The position in the relevant cases is summarised below.

In *MacNeil*,³⁵⁷⁰ the CAC found that MacNeil, a small business in the PVC pipe market, had participated in a cartel relating to piped products. MacNeil had argued that it was a small business that had been bullied into participating in the cartel by the large incumbent companies. MacNeil also contended that its participation in the cartel meetings was “passive”.³⁵⁷¹ On the merits, the CAC found that MacNeil participated in the cartel as it did not give any “external manifestation” of its disagreement with the collusive arrangement.³⁵⁷² However, after evaluating MacNeil’s mitigating circumstances, *inter alia*, being a new entrant with a small market share, the CAC decided to reduce the administrative penalty from R2 million (that the Tribunal had imposed) to R1,25 million.³⁵⁷³

In *Omnico (Pty) Ltd and another v Competition Commission and others*,³⁵⁷⁴ the CAC found that Omnico (Pty) Ltd (“Omnico”) and Coolheat Cycle Agencies (Pty) Ltd (“Coolheat”) had participated in cartel activities in the bicycle market. Omnico and Coolheat contended that they did not actively participate in the collusive

³⁵⁶⁹ *The Competition Commission v Southern Pipeline Contractors and Another* (Case No: 23/CR/Feb09) para 43. DPI- who was also one of the leaders of the cartel - *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] 2 CPLR 416 (CAC) paras 6, 15 and 31.

³⁵⁷⁰ See Chapter Three, 3.6.3.1 *MacNeil Agencies (Pty) Ltd v Competition Commission*; *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] 2 CPLR 416 (CAC).

³⁵⁷¹ *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] 2 CPLR 416 (CAC) para 34.

³⁵⁷² *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] 2 CPLR 416 (CAC) para 36.

³⁵⁷³ *MacNeil Agencies (Pty) Ltd v Competition Commission* [2013] 2 CPLR 416 (CAC) para 88.

³⁵⁷⁴ See Chapter Three, 3.6.3.2 *Omnico (Pty) Ltd and another v Competition Commission and others*; *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC).

discussions³⁵⁷⁵ and that the meetings did not amount to a cartel agreement.³⁵⁷⁶ The CAC confirmed the principle that silence could not equate to non-participation and that in the context of collusive meetings,³⁵⁷⁷ there was a duty to speak and to publicly distance oneself from the collusive conduct.³⁵⁷⁸ Omnico and Coolheat were both SMEs. Their lack of knowledge of competition law infringements however did not exonerate them from being found guilty of cartel conduct. This is thus also a case where SMEs in a trade association followed the masses and found themselves on the wrong side of the law. The fact that Omnico and Coolheat were both SMEs did not impact on the administrative penalty imposed. The CAC found that the cartel conduct was no less egregious.³⁵⁷⁹

In *Stanley's Removal CC*,³⁵⁸⁰ the Tribunal found that Stanley's Removals had engaged in cartel conduct with its competitors in the furniture removal services market. The Tribunal imposed a low administrative penalty on Stanley's Removals as it had been involved in the lowest number of collusive instances.³⁵⁸¹ The size of the firms as small businesses was not considered under the merits of the case. However, the CAC found that low penalties were appropriate in this case when considering the principle of proportionality and fairness in determining an administrative penalty. In previous cases, the CAC had confirmed that the administrative penalty imposed must be proportional to the degree of blameworthiness of the respondents.³⁵⁸²

In *A'Africa Pest*,³⁵⁸³ the Tribunal had found A'Africa Pest Prevention CC and Mosebetsi, which were small close corporations, guilty of price fixing and collusive

³⁵⁷⁵ *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC) para 3.

³⁵⁷⁶ *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC) para 11.

³⁵⁷⁷ *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC) para 59.

³⁵⁷⁸ *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC) para 61.

³⁵⁷⁹ *Omnico (Pty) Ltd and another v Competition Commission and others* [2016] 2 CPLR 398 (CAC) paras 76 and 77.

³⁵⁸⁰ See Chapter Three, 3.6.3.3 *Competition Commission v Stanley's Removals CC* *Competition Commission v Stanley's Removals CC* [2017] 2 CPLR 505 (CAC).

³⁵⁸¹ *Competition Commission v Stanley's Removals CC* [2017] 2 CPLR 505 (CAC) paras 15 and 24.

³⁵⁸² *Southern Pipelines and another v The Competition Commission of South Africa* [2011] ZACAC 6 (105/CAC/Dec10, 106/CAC/Dec10).

³⁵⁸³ Chapter Three, 3.6.3.4 *A'Africa Pest Prevention CC and another v Competition Commission of South Africa; A'Africa Pest Prevention CC and another v Competition Commission of South Africa* [2019] 1 CPLR 122 (CAC).

tendering in the pest control services market. The fact that these firms were small businesses was not considered a factor in assessing the merits of the case. However, the CAC found that properly characterised, the conduct could not be described as collusive conduct. The CAC also found that the respondents were not part of a single economic entity. Since the CAC did not find A’Africa Pest and Mosebetsi guilty of collusion, the issue of an administrative penalty became irrelevant.

In *Stuttafords Van Lines*,³⁵⁸⁴ the Tribunal had found that the respondents, who were small furniture removal companies, had fixed the cost of e-tolls, but that the impugned conduct had ceased in terms of section 67 of the Competition Act. The CAC found that there was no agreement between the implicated firms as there was no consensus amongst the industry players.³⁵⁸⁵ The fact that the firms involved included small businesses was not a consideration in determining the merits of the case. However, the case illustrates SMEs’ lack of knowledge of competition law infringements and their participation, through an association, in conduct that could potentially be cartel conduct.

In respect of abuse of dominance cases, the thesis observed that where SMEs were the victims of an abuse of dominance, their status as victims did not attract a special test of harm to competition. In cases where SMEs engaged in abuse of dominance, which were under special circumstances like the COVID-19 crisis, the status as an SME did not insulate the small firm from the application of the law. However, the size of the firm, as an SME, and the “*de minimis* character of the offence” were considered in the determination of an administrative penalty. The few cases that were considered in this context and their relevance to the thesis are briefly summarised below.

In *Senwes*,³⁵⁸⁶ Senwes was accused of having abused its dominance in the grain storage market.³⁵⁸⁷ Several small traders alleged that they were adversely affected by Senwes’ differential tariff.³⁵⁸⁸ The Tribunal found that Senwes engaged in “margin

³⁵⁸⁴ Chapter Three, 3.6.3.5 Competition Commission of South Africa v *Stuttafords Van Lines Gauteng Hub (Pty) (Ltd)*; *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub (Pty) (Ltd)* [2020] 2 CPLR 548 (CAC).

³⁵⁸⁵ *Competition Commission of South Africa v Stuttafords Van Lines Gauteng Hub (Pty) (Ltd)* [2020] 2 CPLR 548 (CAC) para 44.

³⁵⁸⁶ Chapter Three, 3.6.4.1 Competition Commission of South Africa v *Senwes Ltd*; *Competition Commission of South Africa v Senwes Ltd* [2009] 1 CPLR 18 (CT).

³⁵⁸⁷ *Competition Commission of South Africa v Senwes Ltd* [2009] 1 CPLR 18 (CT) para 1.

³⁵⁸⁸ *Competition Commission of South Africa v Senwes Ltd* [2009] 1 CPLR 18 (CT) para 213.

squeeze” that affected mainly small traders.³⁵⁸⁹ Although the size of the victims of Senwes’ conduct did not determine the assessment of the anti-competitive conduct, the Tribunal acknowledged that the firms most affected by Senwes’ abusive conduct were smaller traders.³⁵⁹⁰

In *Computicket*,³⁵⁹¹ the CAC confirmed the Tribunal’s decision that Computicket had abused its dominance in the market for the provision of outsourced ticket distribution services (OTDs) in contravention of section 8(1) of the Competition Act.³⁵⁹² Small players in the OTDs market had complained about Computicket’s abuse of dominance.³⁵⁹³ In this case, the CAC acknowledged that rivalry might be reduced in the market because of the negative effect of the dominant player’s conduct on a small firm.³⁵⁹⁴ This is especially the situation when the small firm plays an important role in constraining the dominant player in a part of the market.³⁵⁹⁵ The CAC held that the harm that must be demonstrated should be one that strengthens the dominant player’s position, which substantially impedes its competitors’ expansion or entry into the market.³⁵⁹⁶ In respect of Computicket’s argument that the affected competitors were small and inefficient, the CAC confirmed that the size and efficiency of a competitor are not determinative in establishing the likely harm to competition.³⁵⁹⁷ As discussed in detail in the part of Chapter Three discussing the South African case law on SMEs,³⁵⁹⁸ the *Computicket* case assists in debating one of the thesis’ questions as to

³⁵⁸⁹ Chapter Three, 3.5.2.3.1 Section 8 – Abuse of dominance; *Competition Commission of South Africa v Senwes Ltd* [2009] 1 CPLR 18 (CT) paras 117 and 264. In terms of section 1(e) of the Competition Amendment Act of 2018, margin squeeze “occurs when the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to competitors, is too small to allow downstream competitors to participate effectively”.

³⁵⁹⁰ *Competition Commission of South Africa v Senwes Ltd* [2009] 1 CPLR 18 (CT) para 264.

³⁵⁹¹ Chapter Three, 3.6.4.2 *Computicket (Pty) Ltd v Competition Commission of South Africa; Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC).

³⁵⁹² *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) para 1.

³⁵⁹³ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) para 2.

³⁵⁹⁴ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) para 31.

³⁵⁹⁵ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) para 31.

³⁵⁹⁶ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) para 36.

³⁵⁹⁷ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) para 80.

³⁵⁹⁸ Chapter Three, 3.6 Competition law Jurisprudence – Seminal cases on small and medium-sized enterprises (SMEs); 3.6.4.2 *Computicket (Pty) Ltd v Competition Commission of South Africa*.

the appropriate test of harm to competition that must be used in cases involving SMEs. The CAC confirmed that the “harm to competition”-test that must be applied in abuse of dominance cases, absent proof of actual harm to consumer welfare, is whether the exclusionary conduct renders the dominant firm’s rivals “*less effective competitors*”.³⁵⁹⁹ The thesis has argued that the paradigm of “*protect competition and not competitors*” did not strictly find application in this case, as the harm to competition was established through the effect of the conduct on competitors. Accordingly, a small business affected by a dominant firm’s exclusionary conduct may show that it poses an important competitive constraint on the dominant firm and that the exclusionary conduct renders the small firm a “less effective competitor” or diminishes rivalry.³⁶⁰⁰

In *Media 24*,³⁶⁰¹ Gold Net News (“GNN”), a small competitor of Media 24 (Pty) Ltd (“Media 24”), complained about Media 24’s alleged predatory pricing conduct. The Tribunal found that Media 24 had engaged in predatory pricing in contravention of section 8(c) of the Act, but the CAC dismissed the Tribunal’s decision. On appeal to the Constitutional Court, the first minority judgment held that the *Competition Act* was “*transformative legislation*.”³⁶⁰² The Constitutional Court (first minority judgment) referred to the purpose of the Competition Act, which is to ensure the equitable participation of SMEs in the economy and the promotion of a greater spread of ownership by historically disadvantaged persons.³⁶⁰³ The first minority judgment held that these provisions confirm the constitutional imperative of promoting the right to equality enshrined in section 9 of the Constitution.³⁶⁰⁴ It held that the above provisions were legislative measures seeking to ensure and promote the equality of previously disadvantaged people and that section 8 of the *Competition Act* gives effect to these objectives.³⁶⁰⁵ The thesis has noted that the 2018 amendments to the *Competition*

³⁵⁹⁹ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) para 30.

³⁶⁰⁰ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) paras 30 and 31.

³⁶⁰¹ Chapter Three, 3.6.4.3 Competition Commission of South Africa v Media 24 (Pty) Ltd; *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC).

³⁶⁰² *Competition Commission of South Africa v Media 24 (Pty) Ltd* para 30

³⁶⁰³ Section 2(e) and (f) of the Competition Act, which set out the purposes of the Competition Act as ensuring that SMEs fairly participate in the economy and promoting a greater spread of ownership through increasing the ownership stakes of HDPs.

³⁶⁰⁴ *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC) para 30.

³⁶⁰⁵ *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC) para 30.

Act have paved the way for a “transformative” interpretation,³⁶⁰⁶ suggested by the minority judgment, in cases or sections of the *Competition Act* dealing with SMEs, in particular sections 8(4) (dealing with buyer power) and 9(1)(a)(ii) (dealing with price discrimination) of the Competition Act.

The *Babelegi* case³⁶⁰⁷ is one of the few cases where the Tribunal and the CAC found an SME guilty of abusing its dominance by charging excessive prices on facial protective masks.³⁶⁰⁸ This was in the context of the COVID-19 outbreak,³⁶⁰⁹ where the CAC accepted that “firms that may be accused of price gouging might not necessarily be dominant in ordinary times.” The CAC further accepted that “(I)n cases of excess demand, even a small firm may have considerable market power”³⁶¹⁰ and that a small firm may be dominant under the concept of “*lucky monopolist*”.³⁶¹¹ The CAC, however, found that the contravention was a *de minimis* breach of section 8(1) as it had been committed by a small firm which had sold very few masks for a short period of time and caused minimal harm.³⁶¹² The CAC then decided not to impose an administrative penalty on Babelegi.³⁶¹³ This case confirms that on the merits, the size of the firm would not insulate it from the application of the law if all the elements of the contravention are met. However, the size of the firm, as a small firm, may be considered in the determination of the penalty to be imposed.

Regarding merger cases, competition authorities have grappled with the weight to be given to public interest factors³⁶¹⁴ in order to determine whether they could trump a

³⁶⁰⁶ Chapter Three, 3.6.4.3.1 Relevance of this case (Competition Commission of South Africa v Media 24 (Pty) Ltd) for the thesis.

³⁶⁰⁷ Chapter Three, 3.6.4.4 Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa; Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa [2020] 2 CPLR 470 (CAC).

³⁶⁰⁸ Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa [2020] 2 CPLR 470 (CAC) para 7.

³⁶⁰⁹ Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa [2020] 2 CPLR 470 (CAC) paras 3 and 41.

³⁶¹⁰ Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa [2020] 2 CPLR 470 (CAC) para 47.

³⁶¹¹ Jorge Ramos “*Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power*” (2020) Chapter 7; Babelegi Workwear and Industrial Supplies CC v Competition Commission para 48.

³⁶¹² Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa [2020] 2 CPLR 470 (CAC) paras 79 and 80.

³⁶¹³ Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa [2020] 2 CPLR 470 (CAC) para 80.

³⁶¹⁴ As set out in section 12 A(3), which requires the competition authorities to consider the effect of a merger on various grounds, when determining whether a merger can or cannot be justified on public interest grounds.

finding based on consumer welfare considerations.³⁶¹⁵ One of the public interest grounds in the merger provisions includes the ability of SMEs to effectively enter into, participate in, or expand within the market.³⁶¹⁶ A few merger cases that considered the effect of the merger on small businesses³⁶¹⁷ are discussed below.

The *Walmart/Massmart* merger³⁶¹⁸ dealt with the public interest grounds listed in section 12A(3).³⁶¹⁹ There were concerns about the procurement from local producers in that the merger would have resulted in a significant shift in buying from the local small manufacturers to foreign low-cost Asian producers.³⁶²⁰ This would have significantly affected SMEs in South Africa and caused job losses.³⁶²¹ The CAC found that an appropriate remedy would be one that enhanced the participation of South African SME producers in global value chains where Wal-Mart was dominant.³⁶²² The CAC further found that such a remedy would prevent job losses and increase both employment and economic activity of, amongst others, SMEs.³⁶²³ It required that a study be conducted to investigate the implications of the merger on SMEs and guide the formulation of a framework for a fund that would benefit SMEs and enable them to participate in Wal-Mart's global value chain training programmes.³⁶²⁴ This case shows how the courts opted for a remedy that would ensure the participation of small local

³⁶¹⁵As set out in section 12A(2), which set out the factors that the competition authorities must consider in determining whether the merger is likely to substantially prevent or lessen competition in a market; *Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another* [2012] 1 CPLR 6 (CAC) para 99.

³⁶¹⁶This is the new section 12A(3)(c) under the 2018 Amendments to the Competition Act. The former section 12A(3)(c) stipulated: “the ability of small businesses (...) to become competitive”.

³⁶¹⁷*Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another* [2012] 1 CPLR 6 (CAC) para 100.

³⁶¹⁸Chapter Three, 3.6.5.1 *Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another; Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another* [2012] 1 CPLR 6 (CAC).

³⁶¹⁹*Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another* [2012] 1 CPLR 6 (CAC) 6.

³⁶²⁰*Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another* [2012] 1 CPLR 6 (CAC) 22.

³⁶²¹*Minister of Economic Development and others / Competition Tribunal and others; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc and another* [2012] 1 CPLR 6 (CAC) para 22.

³⁶²²*Walmart* (CAC) para 162.

³⁶²³*Walmart* (CAC) para 162.

³⁶²⁴*Walmart* (CAC) para 167.

producers in the economy. In this context, Mandiriza *et al.* observed that the Massmart Supplier Development Fund, which was established as part of the conditions to the merger,³⁶²⁵ addressed both competition and industrial policy concerns.³⁶²⁶ Particularly, it focused on supporting vulnerable sectors, promoting the entry and expansion of SMEs within Massmart's supply chain, and complying with local procurement commitments.³⁶²⁷

In the *Pioneer/Pannar* merger,³⁶²⁸ the Tribunal had found that the merger would significantly increase the prices of maize hybrid seeds, which would have negatively affected small-scale commercial and subsistence farmers.³⁶²⁹ The CAC was, however, satisfied with a remedy to cap any price increase on maize seeds sold to small-scale commercial, developing and subsistence farmers for a specified period.³⁶³⁰

In *Mediclinic*,³⁶³¹ the Commission appealed a CAC decision approving a merger between Mediclinic Southern Africa (Pty) Ltd (Mediclinic) and Matlosana Medical Health Services (Pty) Ltd ("Matlosana") in the private healthcare services sector.³⁶³² In dismissing the CAC's decision, the Constitutional Court considered the Preamble of the *Competition Act* and emphasised the purpose of ensuring the equitable participation of SMEs in the economy.³⁶³³ The Constitutional Court held that the Preamble and purpose of the *Competition Act* enjoin the competition authorities to promote, protect, respect and fulfil the rights in the Bill of Rights.³⁶³⁴ The Tribunal had found that the merger would restrict HDPs and SMES entry into the sector.³⁶³⁵ The

³⁶²⁵ Mandiriza, Sithebe and Viljoen "An ex-post review of the Wal-Mart/Massmart merger" (2016) Competition Commission Working Paper CC2016/03, 1.

³⁶²⁶ Mandiriza, Sithebe and Viljoen "An ex-post review of the Wal-Mart/Massmart merger" (2016) Competition Commission Working Paper CC2016/03, 15.

³⁶²⁷ *Ibid.*

³⁶²⁸ Chapter Three, 3.6.5.2 Pioneer Hi-Bred International Inc. and another v the Competition Commission and another; *Pioneer Hi-Bred International Inc. and another v the Competition Commission and another* (113/CAC /Nov11) (28 May 2012).

³⁶²⁹ *Pioneer Hi-Bred v the Competition Commission* (CAC) (2012) paras 72 and 73.

³⁶³⁰ *Pioneer Hi-Bred v the Competition Commission* (CAC) (2012) paras 77 and 79.

³⁶³¹ Chapter Three, 3.6.5.3 Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another; *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2023] 1 CPLR 2 (CC); Competition Commission of South Africa v Mediclinic Southern Africa (Pty) and Another [2021] ZACC 35.

³⁶³² *Competition Commission v Mediclinic* (ZACC) para 1.

³⁶³³ *Competition Commission v Mediclinic* (ZACC) para 6.

³⁶³⁴ *Competition Commission v Mediclinic* (ZACC) para 10.

³⁶³⁵ *Competition Commission v Mediclinic* (ZACC) para 41.

Constitutional Court agreed with the Tribunal's findings that the merger would likely substantially harm competition and that the merging parties' proposed conditions would not adequately address the aforesaid harm.³⁶³⁶

Between 2022 and 2024, which can be characterized as the period after the 2018 amendments came into force, there has been an increased recognition of the purpose of promoting or protecting SMEs. Some of the notable developments include the CAC's decision in *Eldan* where the CAC stressed that the competition goal of inclusiveness should distinguish between promoting SMEs (which seeks to protect SMEs from exclusionary anti-competitive conduct) and ensuring that SMEs face the consequences of their anti-competitive conduct.³⁶³⁷ The CAC minority judgment in *Waco*,³⁶³⁸ also considered the purpose of the alleged collusive agreement, namely to empower small black-owned enterprises, as aligning with the purpose of promoting SMEs.³⁶³⁹ This gives regard to the Constitutional Court's request that courts consider the purpose of the Act when interpreting or enforcing it.³⁶⁴⁰

The study, thus, observes that following the 2018 amendments and the Constitutional Court's decision in *Mediclinic*,³⁶⁴¹ the purpose of promoting SMEs has gained prominence. This can be gleaned from, among others, the 2024 *Revised Public Interest Guidelines*,³⁶⁴² the several market inquiries initiated by the Commission,³⁶⁴³ which highlight the importance of promoting SMEs, and the 2024 *SMEs Block exemption regulations*.³⁶⁴⁴

³⁶³⁶ *Competition Commission v Mediclinic* (ZACC) para 80.

³⁶³⁷ See above Chapter Three, para 3.1.2 Developments (2022-2024) *Life Wise v Commission (2022)* para 34.

³⁶³⁸ Chapter Three, para 3.6.6.4 *The Competition Commission v Waco Africa (Pty) Ltd and others; The Competition Commission v Waco Africa (Pty) Ltd and others* (Case No. 246/CAC/Jun23).

³⁶³⁹ Chapter Three, para 3.6.6.4 *The Competition Commission v Waco Africa (Pty) Ltd and others; Waco (2024)*, para 92.

³⁶⁴⁰ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2023] 1 CPLR 2 (CC).

³⁶⁴¹ See above, para 3.6.5.3 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another*.

³⁶⁴² See above, para 3.5.4.2 *Revised Public Interest Guidelines*, 2024.

³⁶⁴³ See above, para 3.5.5.1 *The Grocery Retail Market Inquiry*; para 3.6.6.3 *The Commission's Online Intermediary Platforms Market Inquiry*.

³⁶⁴⁴ See above, para 3.5.3.4.1 *Block Exemption Regulations for Small, Micro and Medium-sized Businesses*, 2024.

5.3.5 Observations regarding the Comparative Study

The case law analysed under the above three jurisdictions does not show a special treatment afforded to SMEs in their respective competition adjudication. However, some provisions in the South African and EU competition laws pertinently deal with SMEs.³⁶⁴⁵ Nevertheless, a common feature in the treatment of SMEs in these three jurisdictions, is that the firm's size is considered when determining an administrative penalty (a fine). SMEs can, therefore, benefit from these provisions as they would generally receive lower administrative penalties due to their size.

5.4 Discussion

This thesis considered the treatment of SMEs under the South African Competition Act. This was done to establish whether the *Competition Act* achieves its purpose of promoting or protecting SMEs to enable them to grow and effectively participate in the economy. However, considering that SMEs may also engage in prohibited anti-competitive practices, such as cartel conduct, the thesis sought to determine how to best formulate what the *Competition Act* should provide for or how it should be interpreted.

The thesis found that various provisions in the Act expressly give effect to the objective of ensuring that SMEs compete effectively and fairly in the market.³⁶⁴⁶ The position before and after the *2018 Competition Amendment Act* is, however, noticeably different. Prior to the amendments introduced by the *2018 Competition Amendment*

³⁶⁴⁵ See Chapter Three, 3.5.2 Purpose of the Competition Act, 3.5.3.3 Abuse of dominance, 3.5.3.4 Exemptions of prohibited practices, 3.5.4 Merger regulations, 3.5.5 Market inquiries – section 43, 3.5.6 Administrative penalties, Chapter Four, 4.2.6.1 The EU *De Minimis Notice*, 4.2.6.2 The EC Guidelines on the effect on trade, 4.2.6.3 Agreements between SMEs exempt under EC regulations and guidelines

³⁶⁴⁶ Section 2(e) setting out one of the purposes of the Competition Act as ensuring that SMEs fairly participate in the economy; section 8(4) prohibiting a dominant firm from requiring or imposing unfair prices or other trading conditions on a supplier that is an SME or HDP in a sector designated by the Minister; section 9(1)(a)(ii), prohibiting a dominant firm from price discriminating if it is likely that the effect of such discrimination will impede the ability of SMEs or HDPs to participate effectively; section 10(3)(b)(ii) stating that a prohibited agreement or practice may be exempted only if the restriction is required to promote SMEs' or HDPs' effective entry, participation in or expansion within a market (2018 amendments); section 12A(3)(c) requiring the competition authorities to consider the effect of a merger on the ability of SMEs or HDIs to effectively enter into, participate in or expand within the market, when determining whether a merger can or cannot be justified on public interest grounds; 43C(2) requiring the Commission, when assessing whether any feature of the relevant market restricts competition, to consider the impact of the adverse effect on SMEs and HDIs; and 59(3)(d) requiring the Competition Tribunal to consider the impact of the contravention on SMEs or HDIs in determining a penalty) of the Competition Act.

Act, SMEs' interests were only specifically mentioned in the purpose section of the Act (section 2(e)), exemption provisions (section 10(3)(b)(ii)) and public interest grounds of mergers consideration (section 12A(3)(c)).³⁶⁴⁷ There was no express mention of SMEs in the prohibited practice provisions (sections 4, 5, 8 and 9).³⁶⁴⁸ The *2018 Competition Amendment Act* changed this position by reinforcing references to equal opportunity for SMEs.³⁶⁴⁹ The *2018 Competition Amendment Act* reiterates the objective of, amongst others, protecting and promoting SMEs' growth in the economy.³⁶⁵⁰ In this regard, the *Memorandum on the objects of the Competition Amendment Bill, 2018* states that addressing high economic concentration in the South African economy and skewed ownership profile requires that special attention be given to the impact of anti-competitive conduct on SMEs.³⁶⁵¹ The *2018 Competition Amendment Act* also introduced more provisions specifically providing for the promotion of SMEs, namely sections 8(4), 9(1)(a)(ii), 43C(2) and 59(3)(d) as discussed in Chapter Three above.³⁶⁵²

Now, as a result of the aforementioned amendments, there is specific mention of SMEs under certain prohibited practice provisions.³⁶⁵³ It is submitted that the

³⁶⁴⁷ See Chapter One, 1.6. The interaction between competition law and SMEs in South Africa, Chapter Three, 3.5.2 Purpose of the Competition Act, 3.5.3.4 Exemptions of prohibited practices, 3.5.4 Merger regulations; See Ncube and Paramoer "Competition policy in SA and small business: A review of enforcement cases" (2009). See also *Nationwide Poles v Sasol Oil* (CT) para 88 referring to sections 2(e) (setting out one of the purposes of the Act as ensuring that SMEs have an equitable opportunity to participate in the economy), 10(3)(b)(ii) (stating that a prohibited agreement or practice may be exempted if the restriction is required to promote SMEs' or HDPs' effective entry, participation in or expansion within a market (2018 amendments)), and 12A(3)(c) of the Competition Act (requiring the competition authorities to consider the effect of a merger on the ability of SMEs or HDIs to effectively enter into, participate in or expand within the market, when determining whether a merger can or cannot be justified on public interest grounds). See Chapter Three: The treatment of SMEs under the South African Competition Act.

³⁶⁴⁸ Ncube and Paramoer "Competition policy in SA and small business: A review of enforcement cases" (2009) referring to sections 4 (prohibiting restrictive horizontal practices), 5 (prohibiting restrictive vertical practices), 8 (prohibiting abuse of dominance) and 9 (prohibiting price discrimination by dominant firm as seller) of the Competition Act.

³⁶⁴⁹ Chapter Three, 3.4 The 2018 Amendments to the Competition Act.

³⁶⁵⁰ Chapter Three, 3.4 The 2018 Amendments to the Competition Act; Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.1.

³⁶⁵¹ Chapter Three, 3.4 The 2018 Amendments to the Competition Act; Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.2(b).

³⁶⁵² Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance, 3.5.3.3.2 Section 9 – Price discrimination, 3.5.3.4 Exemptions of prohibited practices, 3.5.5 Market inquiries – section 43, 3.5.6 Administrative penalties.

³⁶⁵³ Section 8(4) prohibits a dominant firm from requiring or imposing unfair prices or other trading conditions on a supplier that is an SME or HDP in a sector designated by the Minister, and 9(1)(a)(ii) of the Act prohibits a dominant firm from price discriminating if it is likely that the effect of such discrimination will impede the ability of SMEs or HDPs to participate effectively. See Chapter Three: The treatment of SMEs under the South African Competition Act.

presence of these provisions would, however, be meaningless unless properly interpreted. In this regard, the thesis found that the objective of developing SMEs has always been part of the South African competition law.³⁶⁵⁴ But this objective was not effectively realised, seemingly because of, amongst others, the influence of foreign law pursuing different competition law goals, the lack of clear prohibited practice provisions protecting SMEs, or the absence of a standard of harm that could fulfil that specific objective of the Act.³⁶⁵⁵

As noted in Chapter One, the application of the Act in the context of SMEs has often encountered challenges. For instance, the well-established mantra “*competition law protects competition and not competitors*” has often been raised to deny SMEs a special place in competition law.³⁶⁵⁶ In this regard, the thesis sought to answer: (a) whether there is a conflict between the mantra “*protect competition and not competitors*” and the Competition Act’s objective of ensuring SMEs an equitable opportunity to participate in the market; and (b) how the interaction between this mantra and the objective of ensuring SMEs’ fair participation supports SME’s greater market access?³⁶⁵⁷

It was pointed out that the principle “*protect competition and not competitors*” was borrowed from the US.³⁶⁵⁸ As discussed in Chapter One, the *Competition Act* provides for the consideration of foreign and international law when interpreting the *Competition Act*.³⁶⁵⁹ Section 1(3) of the Act authorises any person interpreting or applying the Competition Act to consider appropriate foreign and international law.³⁶⁶⁰ The above mantra promotes efficiency objectives, which can sometimes conflict with the public interest objectives outlined in the Act.³⁶⁶¹ As was indicated, this principle is supported

³⁶⁵⁴ Chapter Three, 3.3 History of the South African Competition Legislation, 3.5.2 Purpose of the Competition Act.

³⁶⁵⁵ Chapter Three, 3.6 Competition law Jurisprudence – Seminal cases on small and medium-sized enterprises (SMEs), 3.6.1 Nationwide Poles v Sasol – The Tribunal’s decision, 3.6.2 Sasol v Nationwide Poles – The CAC’s decision.

³⁶⁵⁶ Chapter Three, *Nationwide Poles v Sasol Oil* (CT) para 85.

³⁶⁵⁷ Chapter One: Background, 1.4: Research objectives. Questions (b) and (c).

³⁶⁵⁸ Chapter Four, 4.1.6.3 *Brown Shoe Co., Inc. v United States* (1962); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 374 (1962) 344.

³⁶⁵⁹ Chapter One, 1.10. Research Methodology.

³⁶⁶⁰ See Section 1(3) of the Competition Act as discussed in Chapter One, 1.10. Research Methodology: “Any person interpreting or applying this Act may consider appropriate foreign and international law.”

³⁶⁶¹ See Chapter One, 1.7. Rationale for the study; Ncube and Paramoer “Competition policy in SA and small business: A review of enforcement cases” (2009) 5. They cite sections 2(a) (promoting the efficiency, adaptability and development of the economy) and 2(b) of the Competition Act (providing consumers with competitive prices and product choices) as containing the efficiency objectives, and

by the Chicago School, which focuses on efficiency and views the main goal of competition law as the promotion of consumer welfare.³⁶⁶² Bouwer and Van Heerden confirm that the Chicago School's view on the objective of the Sherman Act was "*not to protect individual competitors in the market at the expense of large monopolies but rather the promotion of the concept "consumer welfare"*."³⁶⁶³ They submit that the Chicago theory has shifted competition regulation's focus from protecting individual competitors to safeguarding the competitive process as a whole.³⁶⁶⁴

It is, however, noted that the Chicago School was advocating for a "consumer welfare" standard that focuses exclusively on efficiency considerations.³⁶⁶⁵

It was pointed out in Chapter Three that South African jurisprudence has been influenced by this principle and the Chicago School of Thought.³⁶⁶⁶ Although certain provisions of the South African *Competition Act* referred to the promotion or protection of SMEs, which is arguably a public interest objective,³⁶⁶⁷ there was, however, no special consideration of the plight of SMEs facing anti-competitive conduct before 2018.³⁶⁶⁸ There seems to have been an issue with the application of the Act, in that the South African courts appear to have applied the law by using approaches from developed jurisdictions like the US and EU, which had passed the stage of considering public interest goals as part of their competition law or antitrust goals. As previously discussed,³⁶⁶⁹ the US antitrust law was more sympathetic to SMEs when it was in its

sections 2(e) and 2(f) (ensuring that SMEs fairly participate in the economy and promoting a greater spread of ownership through increasing the ownership stakes of HDPs) as containing redistributive objectives.

³⁶⁶² See Chapter Four, 4.1.4.2.4 Chicago School; Fox "The battle of the soul of antitrust" (1987) *California Law Review* Vol. 75, No. 3, Symposium: Anticipating Antitrust's Centennial, 917-923, available at <https://doi-org.uplib.idm.oclc.org/10.2307/3480656> (accessed on 12 January 2022) 918.

³⁶⁶³ Bouwer and Van Heerden "Considering the goals of competition law through a critical review of selected competition theories" 2023 *THRHR* 430.

³⁶⁶⁴ Bouwer and Van Heerden "Considering the goals of competition law through a critical review of selected competition theories" 2023 *THRHR* 433.

³⁶⁶⁵ Kovacic "The Chicago obsession in the interpretation of US antitrust history" (2020) *The University of Chicago Law Review*, vol. 87, no.2, 459-494, available at <https://www.jstor.org/stable/10.2307/26892418> (accessed on 4 July 2022) 460.

³⁶⁶⁶ See Chapter Three, 3.6.2.1 Relevance of the Nationwide Poles cases – Tribunal and CAC's decisions.

³⁶⁶⁷ See Chapter Three, 3.6.5.3.1 Relevance of this case (referring to the Constitutional Court's decision in *Mediclinic*); The objective of promoting SMEs is arguably a public interest issue as the promotion of SMEs is a public interest ground under section 12A(3)(c) of the Competition Act dealing with merger regulations.

³⁶⁶⁸ Kampel "Competition law and SMEs: exploring the competitor/competition debate in a developing democracy" (2004) 4; Ncube and Paramoer "Competition policy in SA and small business: A review of enforcement cases" (2009).

³⁶⁶⁹ See Chapter 4 Comparative Study, 4.1 US Antitrust law and SMEs.

infancy, as SMEs were among those who lobbied for antitrust law.³⁶⁷⁰ The US antitrust goal, however, changed in the 1970s with the Chicago School advancing efficiency objectives over small business protection.³⁶⁷¹ The EU has mainly focused on market integration.³⁶⁷² Given the EU's objective of integrating EU member states' markets into one single market.³⁶⁷³ It ensures the free movement of goods between EU member states and seeks to counter trade barriers.³⁶⁷⁴ For example, in the context of competition law, this will include prohibiting territorial restrictions or vertical restraints³⁶⁷⁵ which restrain cross-border trade.³⁶⁷⁶

Juxtaposed with the US and EU as comparative jurisdictions, it is evident that South Africa, as a developing economy, faces its own socio-economic realities. The Preamble to the *Competition Act* and objectives of the 2018 Competition amendments confirm that South Africa's economy is characterised by high levels of economic concentration, which the Act seeks to remedy.³⁶⁷⁷ This is explicitly recognised under the Preamble of the Act. Accordingly, as much as the Act allows for the consideration of foreign law when interpreting the Act,³⁶⁷⁸ competition authorities should not lose sight of the country's socio-economic realities, history and highly concentrated economy that inform the interpretation of some of the objectives of the Act. For this reason, the Constitutional Court has enjoined the competition authorities to consider the goals of the Act, the public interest and the imperatives of the national economy in their decision-making.³⁶⁷⁹ An adequate competition law framework for SMEs should, therefore, be one that considers the objective of promoting SMEs' competitiveness

³⁶⁷⁰ See Chapter 4, 4.1.2 History of the US Antitrust Law, 4.1.3.2.2 Origin of the Sherman Act.

³⁶⁷¹ See Chapter Four, 4.1.2 History of the US Antitrust Law, 4.1.4.2.4 Chicago School.

³⁶⁷² See Chapter Four, 4.2.4 Objectives of EU Competition Law; Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 346 – 347.

³⁶⁷³ European Union "Single Market – A single internal market without borders", available at https://european-union.europa.eu/priorities-and-actions/actions-topic/single-market_en (accessed on 28 April 2024).

³⁶⁷⁴ See Chapter Four, 4.2.4 Objectives of EU Competition Law.

³⁶⁷⁵ See Chapter Three, 3.5.3.2 Restrictive vertical practices.

³⁶⁷⁶ Parret "Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU Competition law and policy" (2010) *European Competition Journal*, 347

³⁶⁷⁷ Chapter Three, 3.5.1 Preamble of the Competition Act, 3.4 The 2018 Amendments to the Competition Act; Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.1.

³⁶⁷⁸ Section 1(3) of the *Competition Act 89 of 1998*, as amended, states: "Any person interpreting or applying this Act may consider appropriate foreign and international law."

³⁶⁷⁹ See Chapter Three, 3.6.5.3 Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another; *Competition Commission v Mediclinic* (ZACC) paras 7 and 8.

and participation in the economy. In addition, it is submitted that an adequate competition law framework for SMEs would also have to consider the scenarios where SMEs are the victims or infringers of anti-competitive conduct.

Where SMEs are the victims, particularly of abuse of dominance, it is submitted that the standard of harm to be applied should achieve the objective of promoting SMEs' competitiveness and participation in the economy. This should be the standard of harm proffered in *Computicket*, as discussed in Chapter Three,³⁶⁸⁰ namely that the dominant firm's exclusionary conduct renders the small firm a "less effective competitor" or diminishes rivalry.³⁶⁸¹ It is submitted that the standard of harm should be similar to the *Morton Salt* standard,³⁶⁸² where injury to competition could be established by showing "*injury to the competitor victimised by the discrimination.*"³⁶⁸³

It was further pointed out that there are specific prohibited practice provisions in the amended *Competition Act* that are protecting SMEs, and which outline the standard of harm to competition to establish a breach of these provisions. These are the "buyer power" provisions in section 8(4)³⁶⁸⁴ of the Act and the price discrimination provisions in section 9 of the Act.³⁶⁸⁵ It was observed that key concepts in these sections are, however, somewhat wide and may lead to different interpretations. These include concepts such as "unfair" prices or trading conditions in section 8(4)³⁶⁸⁶ and the likely effect of "impeding the ability of SMEs to participate effectively" in section 9(1)(a)(ii).³⁶⁸⁷ The question is how these concepts will be determined.

In this regard, on 13 February 2020, the Minister of DTIC issued the *Buyer Power Regulations* and *Price Discrimination Regulations*, as discussed in Chapter Three.³⁶⁸⁸

³⁶⁸⁰ See Chapter Three, 3.6.4.2 *Computicket (Pty) Ltd v Competition Commission of South Africa*.

³⁶⁸¹ *Computicket (Pty) Ltd v Competition Commission of South Africa* [2019] 2 CPLR 539 (CAC) paras 30 and 31.

³⁶⁸² See Chapter 4.1: US Antitrust Law and SMEs for the discussion of *Federal Trade Commission v Morton Salt Co.* 334 US 37, 61 (1948).

³⁶⁸³ *FTC v Morton Salt Co.* (1948) 49.

³⁶⁸⁴ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance.

³⁶⁸⁵ See Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination.

³⁶⁸⁶ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance.

³⁶⁸⁷ See Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination.

³⁶⁸⁸ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance and 3.5.3.3.2 Section 9 – Price discrimination; Regulations on buyer power made by the Minister under Competition Act, 1998, GN168 in GG43018 of 13 February 2020, available at https://www.gov.za/sites/default/files/gcis_document/202002/43018gon168.pdf (accessed on 17 September 2021); Regulations on Price Discrimination Made by the Minister Under Competition Act, 1998. GN 169 in GG 43018 Government Gazette of 13 February 2020.

The *Buyer Power Regulations* outline the factors and benchmarks to consider when determining whether the prices or trading conditions imposed by a dominant firm in a particular sector are unfair.³⁶⁸⁹ The *Price Discrimination Regulations* set out the relevant factors and benchmarks for determining whether a dominant firm's conduct amounts to price discrimination that impedes SMEs' effective participation in a market.³⁶⁹⁰

It is submitted that these Regulations are a good start in interpreting the relevant concepts.³⁶⁹¹ It is, however, trite that regulations are subordinate to the primary legislation in terms of which they are issued.³⁶⁹² Accordingly, the interpretation of the "unfair" concept will still have to reflect the legislator's intention to protect small suppliers in respect of dominant firms against being required to sell their goods or services at prices that impede their ability to participate effectively in the market, in other words, against the abuse of buyer power.³⁶⁹³ On this point, it was highlighted that the *Memorandum to the 2018 Competition Amendment Bill* describes "unfair prices" as prices that impede the supplier's ability to participate effectively.³⁶⁹⁴ It can, therefore, be concluded that the fairness standard in section 8(4) of the *Competition*

³⁶⁸⁹ See Chapter Three, See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance; Regulations on buyer power made by the Minister under Competition Act, 1998, GN168 in GG43018 of 13 February 2020, available at https://www.gov.za/sites/default/files/gcis_document/202002/43018gon168.pdf (accessed on 17 September 2021) 12, para 4. See Chapter Two: An overview of international standards or best practices in dealing with SMEs.

³⁶⁹⁰ Regulations on Price Discrimination Made by the Minister Under Competition Act, 1998. GN 169 in GG 43018 Government Gazette of 13 February 2020, 15-16. See Chapter Two: An overview of international standards or best practices in dealing with SMEs

³⁶⁹¹ Buthelezi, Hodge and Tshabalala "Appropriate Legal Standards in Competition Law: a South African Perspective" (2023) at 22, in Katsoulacos Y (ed) *Antitrust and the Digital Economy: Lega Standards, Presumptions and Key Challenges*. Paris, Concurrences.

³⁶⁹² *Continental Tyres South Africa (Pty) Ltd v Competition Commission and another and a related matter* [2018] 2 CPLR 504 (CAC) para 22.

³⁶⁹³ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance; Competition Amendment Bill and Memorandum on the Objects of the Competition Amendment Bill (2018) 26, clause 3.3.8 states that: "Section 8(4)(a) is introduced to protect suppliers to dominant firms, especially small and medium businesses or a firm owned or controlled by historically disadvantaged persons, from being required, through the abuse of dominance, to sell their goods or services at prices that impede their ability to participate effectively. This seeks to address the problem of monopolies by making such conduct a prohibited practice." (own emphasis)

³⁶⁹⁴ Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance and 3.5.3.3.2 Section 9 – Price discrimination; Competition Amendment Bill and Memorandum on the Objects of the Competition Amendment Bill (2018) 26, clause 3.3.8.

Act³⁶⁹⁵ is the same as the standard applied in section 9(1)(a)(ii),³⁶⁹⁶ namely the likelihood of impeding the ability of SMEs to participate effectively in the market.³⁶⁹⁷

The above standard, however, also faces hurdles. Notably section 9(1)(a)(ii) of the *Competition Act* still refers to small businesses in the plural. One could argue that proving harm in this instance would require proving that the impugned conduct impedes several businesses and not only the competitor victimised by the conduct. However, such an argument does not seem to be what the legislator intended. The legislator's intention seemed to have been to introduce a standard similar to the *Morton Salt* standard, as discussed in Chapter Four, where injury to competition could also be established by showing "*injury to the competitor victimised by the discrimination*."³⁶⁹⁸

Given that the provisions in the South African *Competition Act* expressly recognise the importance of SMEs in the economy, it is submitted that the courts should accord a purposive interpretation³⁶⁹⁹ to "fairness" and "likelihood of impeding SMEs participation" standards. As discussed in Chapter Three,³⁷⁰⁰ this interpretation should consider the purpose of promoting SMEs' equitable participation in the economy.³⁷⁰¹ This is an interpretation that considers "fairness" in competition analysis. Fairness is determined by considering whether the impugned conduct "*impedes the ability of SMEs to participate effectively*" in the market.³⁷⁰² In this regard, the Tribunal noted in *Nationwide Poles* that the provisions referring to SMEs envisage consideration of "equity" or "fairness".³⁷⁰³ Taking into account the Act's abovementioned purpose, it is, therefore, submitted that in interpreting "fairness" or "impediment to participation,"

³⁶⁹⁵ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance. Namely the test of "*unfair prices or other trading conditions*", which is described above as prices that impede the ability of SMEs to participate effectively.

³⁶⁹⁶ Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination.

³⁶⁹⁷ Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination.

³⁶⁹⁸ Chapter Four, para 4.1.6.2 *Federal Trade Commission v Morton Salt* (1948); *FTC v Morton Salt Co.* (1948) 49.

³⁶⁹⁹ See Chapter Three, para 3.6.5.3 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another*; *Mediclinic* paras 3, 5, 9, 10, 33, 53, 55 and 73.

³⁷⁰⁰ Chapter Three, para 3.6.1 *Nationwide Poles v Sasol* – The Tribunal's decision.

³⁷⁰¹ Section 2(e) of the Competition Act. See Chapter Three, para 3.5.2 Purpose of the Competition Act.

³⁷⁰² See Chapter Three, para 3.5.3.3.2 Section 9 – Price discrimination.

³⁷⁰³ Chapter Three, 3.6.1 *Nationwide Poles v Sasol* – The Tribunal's decision; *Nationwide Poles*, para 83.

competition authorities could consider applying the *Morton Salt* standard, namely “injury to the competitor victimised by the discrimination.”³⁷⁰⁴

The thesis has therefore found that the US position that could stand as best practice for the treatment of SMEs as victims of anti-competitive practices, particularly in the context of abuse of dominance conduct, would be the US position *prior* to the advent of the Chicago School of thought.³⁷⁰⁵ This is when the goal of protecting SMEs was regarded as an integral part of the antitrust goal. As discussed below, it is submitted that the EU *De Minimis Notice* can be best practice in cases where SMEs are infringers.

Where SMEs are infringers of prohibited anti-competitive practices, it was observed in Chapter Three that South Africa has adopted a strict approach of applying the law to all firms, irrespective of their size.³⁷⁰⁶ SMEs have been found guilty of cartel conduct and abuse of dominance. In respect of abuse of dominance, the circumstances surrounding breaches by SMEs were peculiar.³⁷⁰⁷ Notably, the contraventions discussed in this thesis took place during the COVID-19 period, which occurred after

³⁷⁰⁴ Chapter Four, 4.1.6.2 Federal Trade Commission v Morton Salt (1948); *FTC v Morton Salt Co.* (1948) 49.

³⁷⁰⁵ Chapter Four, 4.1.4.2.4 Chicago School.

³⁷⁰⁶ Chapter Three, 3.6 Competition law Jurisprudence – Seminal cases on small and medium-sized enterprises (SMEs)

³⁷⁰⁷ Chapter Three, 3.6.4.4 *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa; Babelegi (CAC)* (2020). In the *Competition Commission v Tsutsunami Business Enterprises CC* (CT Case no: COVCR113Sep20). the Tribunal found that Tsutsunami Business Enterprises CC (“Tsutsunami”), a general trader that supplied various products to the government, had contravened the Consumer and Customer Protection and National Disaster Management Regulations and Directions (GN 350 in GG43116 of 19 March 2020) and section 8(1)(a) of the *Competition Act* (which prohibits a dominant firm from charging an excessive price to the detriment of consumers or customers. *Commission v Tsutsunami* para 37). The Tribunal found that Tsutsunami had charged excessive prices on surgical face masks it supplied to the South African Police Service (SAPS) during the period of the Covid-19 pandemic (in particular, 5 to 29 April 2020). Like in *Babelegi* (see Chapter Three), the Tribunal considered the crisis context during the Covid-19 pandemic and the firm’s exploitative pricing behaviour and found that Tsutsunami had market power during the relevant period (*Commission v Tsutsunami* para 76).

In *Competition Commission v Bluecollar Occupational Health (Pty) Ltd* (Case no: COVCR114Sep20) (available at <https://www.saflii.org/za/cases/ZACT/2023/16.pdf> accessed on 17 December 2023) the Tribunal found that Bluecollar Occupational Health (Pty) Ltd (“Bluecollar”), which provide occupational health services, had contravened section 8(1)(a) of the *Competition Act* read with Consumer and Customer Protection and National Disaster Management Regulations and Directions (para 14). The Tribunal found that Bluecollar had charged excessive prices in respect of hand sanitiser it supplied to the South African Police Service (SAPS) during the period of the Covid-19 pandemic (in particular, during 21 March to 15 April 2020). Similarly to *Babelegi* and Tsutsunami (para 57), the Tribunal considered the context of the Covid-19 pandemic, which was a period of crisis and where market conditions were distorted which could lead to a small firm having market power. It found that BlueCollar had temporary market power during this crisis period (para 80) and became a “lucky monopolist” (para 83) (See *Babelegi* in Chapter Three above).

the promulgation of the 2018 Competition Amendment Act, when markets were narrowly defined, and consumers were highly vulnerable because of the scarcity of essential products and mobility restrictions.

The courts would, however, not accept that SMEs use section 2(e) as a defence for breaching the Competition Act.³⁷⁰⁸ This section seeks to promote and protect SMEs from being excluded by anti-competitive behaviour. In *Eldan*, the Tribunal held that the status of a firm as an SME does not exonerate a small business from the application of the law, and any alleged hardship or loss of business would not outweigh the greater public interest that needs protection from breach of the law.³⁷⁰⁹ This position was confirmed by the CAC.³⁷¹⁰

It is further submitted that the EU *De Minimis* rule as discussed in Chapter Four³⁷¹¹ can, however, be best practice in respect of abuse of dominance or vertical restraints involving SMEs as infringers, but not in relation to cartels. This is because the *De Minimis* rule applies to conduct that is unlikely to substantially affect the market.³⁷¹² As previously discussed, SMEs' conduct is unlikely to substantially affect the market because of their small market share.³⁷¹³ However, this depends on how the market is defined.

Other best practices that should be followed have been discussed above. It is noted that competition law is not capable of addressing all of the challenges identified in Chapter 2 (dealing with best practices). It is also acknowledged that the *Competition Act* is not the only instrument that should be used to ensure an equitable opportunity for SMEs to participate in the economy. Although beyond the scope of this thesis, it is submitted that other industrial and economic development policies, such as the *National Integrated Small Enterprises Development (NISED) Strategic Framework* and the *National Development Plan 2030* (NDP), may also be used to promote the participation of SMEs in the economy. NISED seeks to coordinate government efforts

³⁷⁰⁸ Chapter Three, para 3.6.4.4.1 Relevance of this case (Babelegi) for the thesis and para 3.6.6.1 Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa.

³⁷⁰⁹ Chapter Three, 3.6.6.1 *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* [2021] 2 CPLR 228 (CT).

³⁷¹⁰ Chapter Three, 3.6.6.1 *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* [2022] 1 CPLR 3 (CAC).

³⁷¹¹ Chapter Four, 4.2.6.1 The EU *De Minimis* Notice.

³⁷¹² Chapter Four, 4.2.6.1 The EU *De Minimis* Notice.

³⁷¹³ Chapter Four, 4.2.6.3 Agreements between SMEs exempt under EC regulations and guidelines.

in partnership with the private sector to increase the participation of informal SMEs in the formal economy and enable formal SMEs to grow in a conducive environment.³⁷¹⁴ The *National Development Plan 2030* (NDP) proposes to support the development of SMEs in the following areas, public and private procurement, regulatory environment, access to debt and equity finance, support services and skill gaps.³⁷¹⁵ In the context of public and private procurement, the NDP aims to make government procurement opportunities more accessible to SMEs.³⁷¹⁶ This includes ensuring that SMEs are paid within 30 days of service rendered.³⁷¹⁷ Regarding the regulatory environment, the NDP proposed appointing a panel of experts to review regulations affecting SMEs.³⁷¹⁸ Regarding access to finance, the NDP seeks to ease SMEs' access to finance.³⁷¹⁹ The NDP also seeks to create a one-stop agency for SMEs.³⁷²⁰ The NDP proposes training for school leavers and unemployed youth regarding skill gaps.³⁷²¹ In this regard, Mandiriza *et al.* have also confirmed that industrial policies that promote SMEs growth can be used in conjunction with competition policy to facilitate competition in markets.³⁷²²

³⁷¹⁴ National Integrated Small Enterprises Development (NISED) Strategic Framework as the National Small Business Support Strategy, GN3054 in GG48063 of 17 February 2023, available at https://www.gov.za/sites/default/files/gcis_document/202302/48063gon3054.pdf (accessed on 28 April 2024) 9, 12.

³⁷¹⁵ National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 142-143.

³⁷¹⁶ National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 143.

³⁷¹⁷ National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 143.

³⁷¹⁸ National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 143.

³⁷¹⁹ National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 143.

³⁷²⁰ National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 143.

³⁷²¹ National Planning Commission South Africa "National Development Plan 2030 – Our future – make it work" (2012), available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed on 28 April 2024) 143.

³⁷²² Mandiriza, Sithebe and Viljoen "An ex-post review of the Wal-Mart/Massmart merger" (2016) Competition Commission Working Paper CC2016/03, 4.

5.5 Recommendations

Based upon the research conducted, the guidance considered and the conclusions drawn, this part of the thesis sets out the recommendations for reforms to the South African *Competition Act* that are necessary to enable SMEs to participate fairly in the relevant markets in which they operate and to also appropriately address situations where SMEs have engaged in conduct prohibited by the Competition Act. As discussed in Chapter Four,³⁷²³ in July 2021, the US Administration issued an *Executive Order on Promoting Competition in the American Economy*.³⁷²⁴ It was pointed out that the US Administration intended to pay more attention to the public interest side of antitrust law by considering, among others, safeguarding small business interests. In this regard, the US Administration acknowledged that: (a) small businesses are important players in the economy that should enjoy a competitive marketplace to effectively participate in the economy; (b) excessive market concentration has threatened SMEs' growth; (c) small businesses have suffered from a weakening of competition and widening of racial, income and wealth inequality over the past decades; (d) small businesses have been excluded especially in the information technology sector where a few large internet platforms use their market power to exclude small entrants that depend on the large platforms to conduct their business.³⁷²⁵ The Biden Administration has made several recommendations to enhance SMEs' competitiveness, namely: (a) procurement programmes, policies or processes of heads of all agencies must enhance SMEs' competitiveness; (b) in the agriculture and food sector, farmers and smaller food processors must be given better access to retail markets; (c) in the beer, wine and spirit markets, smaller, independent and new operations must be given better access; and (d) any barriers to entry of smaller and independent brewers, winemakers and distilleries must be reduced.³⁷²⁶

It was further pointed out in Chapter Four that recommendations that have been made in respect of the treatment of SMEs in some EU countries include:³⁷²⁷ (a) the adoption

³⁷²³ Chapter Four, 4.1.7 Executive Order on Promoting Competition in the American Economy (2021).

³⁷²⁴ Executive Order on Promoting Competition in the American Economy (July 9, 2021) Presidential Actions, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed on 20 May 2022).

³⁷²⁵ Chapter Four, 4.1.7 Executive Order on Promoting Competition in the American Economy (2021).

³⁷²⁶ Chapter Four, 4.1.7 Executive Order on Promoting Competition in the American Economy (2021).

³⁷²⁷ Chapter Four, 4.2.7.1 Summary of the treatment of SMEs in some EU countries.

of special competition rules for SMEs in small economies, like Croatia;³⁷²⁸ (b) lenient treatment for SMEs as they often face substantial competitive pressure from large entities;³⁷²⁹ (c) the formation of joint ventures to enable SMEs to compete in the market; (d) issuing of guidelines setting out procedural and substantive competition law for SMEs and an “SME Office”, which could be an information office that will assist in understanding the application of competition law on SMEs;³⁷³⁰ as well as (e) developing competition awareness programs for SMEs, which would include “the do’s and don’ts of antitrust law.”³⁷³¹

It was further observed that EU countries that have advocated for competition legislation applicable to all economic entities, irrespective of size, recommend that: (a) there should not be separate special competition legislation for SMEs;³⁷³² (b) there must be adequate provisions in the competition legislation that protect SMEs’ interests, such as the provisions prohibiting abuse of dominance;³⁷³³ (c) all entities should have equal access to justice and procedural rights.³⁷³⁴

Various EU countries also recommend specific rules protecting SMEs, including:³⁷³⁵ (a) rules relating to buyer power in the retail sector,³⁷³⁶ (b) lenient rules against SME infringers,³⁷³⁷ (c) special dispensations for SMEs in the leniency programs, settlement or sanction provisions, especially when SMEs are the infringers,³⁷³⁸ (d) specific

³⁷²⁸ Chapter Four, 4.2.7.1 Summary of the treatment of SMEs in some EU countries.

³⁷²⁹ Kellezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 73-74.

³⁷³⁰ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 117.

³⁷³¹ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 174.

³⁷³² Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 37; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 126; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 140.

³⁷³³ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 126; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 140.

³⁷³⁴ Chapter Four, 4.2.7.1 Summary of the treatment of SMEs in some EU countries; Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 180.

³⁷³⁵ Chapter Four, 4.2.7.1 Summary of the treatment of SMEs in some EU countries.

³⁷³⁶ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 73.

³⁷³⁷ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 73-74.

³⁷³⁸ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85.

protection mechanisms for SMEs to report anti-competitive conduct;³⁷³⁹ (e) the adoption of the EU *de minimis* rule in their national legislation;³⁷⁴⁰ (f) the development of awareness programs that may train SMEs on the importance of complying with competition rules;³⁷⁴¹ and (g) recommendations that competition authorities do not investigate agreements between SMEs that do not raise public interest concerns.³⁷⁴² This is to enable competition authorities to focus their resources and priorities on anti-competitive conduct that substantially affects the market.³⁷⁴³

Bearing all of the aforementioned in mind, the thesis makes the following recommendations in the context of the treatment of SMEs by South African competition law:

5.5.1 Recommendation One

The use of the *de minimis* rule (contained in the *EU De Minimis Notice*)³⁷⁴⁴ in cases involving SMEs as infringers, except in hardcore cartel cases³⁷⁴⁵ or *per se* violations of the Competition Act.³⁷⁴⁶ As previously discussed, the *EU De Minimis Notice* exempts from the application of Article 101 of the *TFEU*, agreements between firms that do not “appreciably restrict” competition or agreements that do not “appreciably affect” trade between EU Member States.³⁷⁴⁷ As further discussed in Chapter

³⁷³⁹ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 85.

³⁷⁴⁰ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

³⁷⁴¹ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 179.

³⁷⁴² Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

³⁷⁴³ Kellezi et al. (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 152.

³⁷⁴⁴ As indicated in Chapter Four, 4.2.1 Introduction, the study uses the terms “*De Minimis Notice*” and “*de minimis* rule” interchangeably to refer to the notion in the *EU De Minimis Notice* that agreements that do not appreciably restrict competition or trade between EU members are exempt from competition scrutiny, except hardcore cartels.

³⁷⁴⁵ See Chapter Four, Objectives of EU Competition Law.

³⁷⁴⁶ See Chapter Four, 4.2.1 Introduction; European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the *Treaty on the Functioning of the European Union* (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022).

³⁷⁴⁷ See Chapter Four, 4.2.6.1 The *EU De Minimis Notice*; European Commission “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the *Treaty on the Functioning of the European Union* (De Minimis Notice)” (30 August 2014) *Official Journal of the European Union* (2014/C 291/01), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en) (accessed on 18 June 2022) para 3 and 4; Caree et al. “European Antitrust Policy 1957 – 2004: An Analysis of Commission Decisions”

Four,³⁷⁴⁸ SMEs are more likely to fall under the *de minimis* rule, as they often have low turnover and market share, which are unlikely to substantially affect competition.³⁷⁴⁹ Applying the *EU De Minimis Notice* on SMEs acknowledges that practices by SMEs are likely to cause minimal harm.³⁷⁵⁰ This also enables SMEs to participate in the market without risking being prosecuted for conduct that has a trivial effect on competition in the market.³⁷⁵¹

5.5.2 Recommendation Two

The goal of promoting SMEs in cases affecting SMEs should be appropriately considered. As discussed above, the competition authorities and the courts are enjoined to give a purposive interpretation of the Act when dealing with provisions of the Act that do not expressly refer to SMEs.³⁷⁵² In this regard, and as discussed above, the elements required to show a contravention of the provisions expressly referring to SMEs, indicate that injury to SMEs is sufficient to trigger the relevant provision. But, for provisions not expressly mentioning SMEs, such as the vertical prohibited practices and abuse of dominance provisions in section 5 and section 8 of the *Competition Act*, respectively, it is not clear whether the objective of promoting SMEs will be considered if they are affected by the impugned conduct. A purposive interpretation of the provisions not expressly mentioning SMEs will require the person applying the *Competition Act* to consider the purpose of promoting SMEs when interpreting those provisions.³⁷⁵³

(2010) 102, available at <https://link.springer.com/content/pdf/10.1007/s11151-010-9237-9.pdf> (accessed on 12 November 2022).

³⁷⁴⁸ See Chapter Four, 4.2.6.1 The *EU De Minimis Notice*.

³⁷⁴⁹ Fox and Bazenov “Antitrust and inequality: The history of (in)equality in competition law and its guide to the future” (2021) 38 – Draft article revised as of 9 September 2021.

³⁷⁵⁰ See Chapter Three, 3.6.4.4 *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa; Babelegi Workwear and Industrial Supplies CC v Competition Commission (2020)* para 80.

³⁷⁵¹ Chapter Two, 2.7.5.3 Best practices on procedural aspects exempting SMEs and Leniency policies; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for small and middle size undertakings and image protection from non-competitors* (2014) 15. The exemption does not apply if SMEs are involved in “hard-core” prohibitions like cartel activities.

³⁷⁵² See Chapter Three, 3.6.5.3 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another; Competition Commission v Mediclinic (ZACC)* paras 7 and 8.

³⁷⁵³ See Chapter Three, 3.6.5.3 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another; Competition Commission v Mediclinic (ZACC)* paras 7 - 10. See also Lewis *Enforcing Competition Rules in South Africa – Thieves at the Dinner Table* (2013) 187.

5.5.3 Recommendation Three

The study suggests establishing a law reform committee to evaluate whether inserting provisions safeguarding or promoting SMEs in vertical prohibited practices and abuse of dominance provisions would effectively serve the purpose of the *Competition Act*.³⁷⁵⁴ The proposed provision may be similar to the new provision inserted in section 9(1)(a)(ii) of the *Competition Act*, which prohibits price discrimination if it impedes the ability of SMEs to participate effectively in the market.³⁷⁵⁵ Similar to section 8(4) of the *Competition Act*, which prohibits a dominant firm from abusing its buying power over SMEs in a designated sector,³⁷⁵⁶ the above proposed SME protection provision in vertical prohibited practices and abuse of dominance provisions could be restricted to promoting or protecting SMEs in designated sectors. This recommendation is linked to Recommendation Two and will avoid uncertainty about what anti-competitive test to apply in cases involving SMEs as victims of anti-competitive conduct. It will also ensure that the objective of giving special attention to the impact of anti-competitive conduct on SMEs is achieved.³⁷⁵⁷ However, there is a different view that this would create a massive new risk for large firms, as it implies a significant expansion of scope for the Competition Act, in respect of SMEs. It may also significantly raise litigation risks, because it is easy to initiate investigations. This different perspective suggests that the benchmarking exercise, which aimed to identify “best practices”, did not reveal that the inclusion of SME provisions in all vertical prohibited practices and abuse of dominance provisions will assist in promoting SMEs, as envisaged by the *Competition Act*.

5.5.4 Recommendation Four

The standard of harm to use in assessing competitive effects in cases involving SMEs as the victims of anti-competitive conduct should be whether SMEs have been “rendered less effective competitors”,³⁷⁵⁸ or consideration of the injury to the SME

³⁷⁵⁴ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance. Section 8(4) of the South African Competition Act, 89 of 1998, as amended, prohibits a dominant firm from abusing its buying power on SMEs and HDIs.

³⁷⁵⁵ See Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination.

³⁷⁵⁶ This prohibits dominant firms from imposing unfair prices or trading conditions on SMEs in a designated sector. See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance

³⁷⁵⁷ See Chapter Three, 3.4 The 2018 Amendments to the Competition Act; Memorandum on the objects of the Competition Amendment Bill, 2018 (B23B-2018) para 2.2(b).

³⁷⁵⁸ See Chapter Three, 3.6.4.2 Computicket (Pty) Ltd v Competition Commission of South Africa.

victimised by the conduct, or SMEs participation in the relevant market, which is to be assessed against the principle of fairness.³⁷⁵⁹ In other words, whether the impugned conduct “*impedes the ability of SMEs to participate effectively*”.³⁷⁶⁰ This is one of the tests expressly set out in the price discrimination provision in section 9 of the South African *Competition Act*.³⁷⁶¹

Under this standard, the anti-competitive effect of exclusionary conduct is established by determining whether the impugned conduct has substantially affected competitors’ (SME’s) ability to compete effectively in the market.³⁷⁶² As submitted in Chapter Three,³⁷⁶³ the focus of this test seems to be on the competitors. Given the objective of promoting or protecting SMEs to enhance their participation in the economy, an SME-focus test, like the abovementioned tests, would be recommended to ensure that practices that reduce the competitiveness of SMEs should be condemned.

5.5.5 Recommendation Five

As mentioned above,³⁷⁶⁴ the *Competition Act* is not the only instrument that should be used to ensure SMEs’ effective participation in the economy. Other industrial and economic policies should also be used. Policy coordination is recommended to ensure that the various policies effectively contribute to promoting SMEs in the economy. In this regard, Canada’s best practices for effective policy coordination, as discussed in Chapter Two should be considered.³⁷⁶⁵ This includes clear leadership in SME and entrepreneurship policies within the government, in particular, establishing a government department to assist other government departments with SMEs’ affairs.³⁷⁶⁶ The lead department will be responsible for, amongst others, developing a

³⁷⁵⁹ See Chapter Three, 3.5.3.3.1 Section 8 – Abuse of dominance, 3.6.1 Nationwide Poles v Sasol – The Tribunal’s decision, 3.6.3.3 Competition Commission v Stanley’s Removals CC.

³⁷⁶⁰ See above para 5.3.3.6.1 Unilateral conduct or abuse of dominance.

³⁷⁶¹ See Chapter Three, 3.5.3.3.2 Section 9 – Price discrimination. Section 9(1)(a)(ii) of the *Competition Act 89 of 1998*, as amended, which prohibits a dominant firm, as the seller of goods or services, from price discriminating if it is likely that the effect of impeding the ability of SMEs or HDPs to participate effectively.

³⁷⁶² See Chapter Three, 3.6.4.2.1 The relevance of this case (*Computicket*) to the thesis

³⁷⁶³ See Chapter Three, 3.6.4.2 *Computicket* (Pty) Ltd v Competition Commission of South Africa, 3.6.4.2.1 The relevance of this case (*Computicket*) to the thesis.

³⁷⁶⁴ Chapter Five, 5.4. Discussion.

³⁷⁶⁵ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs, OECD “SME and Entrepreneurship Policy in Canada” (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

³⁷⁶⁶ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs, OECD “SME and Entrepreneurship Policy in Canada” (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

comprehensive and integrated strategy document for SMEs.³⁷⁶⁷ The lead department will also develop an entrepreneurship policy in collaboration with other governments, NGOs and business sector stakeholders.³⁷⁶⁸ In the coordination of the relevant policies, there should also be measures to increase SMEs' productivity and access to international markets, and to encourage SMEs' market entry, growth and expansion.³⁷⁶⁹

5.5.6 Recommendation Six

In addition to the above recommendation on coordinating leadership in SME affairs within the government, the government should designate a Deputy Commissioner³⁷⁷⁰ (from the Competition Commission) with knowledge of or experience in small business matters who will be responsible for overseeing competition matters involving SMEs or matters that particularly affect SMEs.³⁷⁷¹ This is an approach followed in Australia, where the Australian Consumer and Competition Commission is required to have at least one Deputy Chairperson who has knowledge of, or experience in small business matters.³⁷⁷² Such a mandate ensures that a senior decision-maker with a deep understanding of SME matters is part of the decision-making process that must take SMEs' unique challenges and opportunities into account.³⁷⁷³ Additionally, such a

³⁷⁶⁷ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs; OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

³⁷⁶⁸ Chapter Two, 2.5.2.1.5 Best practices in the context of policy coordination and strategy for SMEs, OECD "SME and Entrepreneurship Policy in Canada" (2017) OECD Publishing, Paris, available at <http://dx.doi.org/10.1787/9789264273467-en> (accessed on 24 August 2020) 30.

³⁷⁶⁹ Chapter Two, 2.5.2.7.3 Government policies that enhance SMEs' competitiveness; International Trade Centre "COVID-19: The Great Lockdown and its impact on Small Businesses" (2020) SME Competitiveness Outlook, available at <https://intracen.org/media/file/413> (accessed on 19 September 2020) 17.

³⁷⁷⁰ In terms of section 19(2) of the *Competition Act 89 of 1998*, as amended "*the Competition Commission consists of the Commissioner and two or more Deputy Commissioners, appointed by the Minister in terms of this Act.*"

³⁷⁷¹ See Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Competition and Consumer Act, 2010, No. 51 of 1974, Vol. 1, Part II, sec 10 (1B). Available at <https://www.legislation.gov.au/C2004A00109/latest/text> (accessed on 30 March 2024).

³⁷⁷² See Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Competition and Consumer Act, 2010, No. 51 of 1974, Vol. 1, Part II, sec 10 (1B). Available at <https://www.legislation.gov.au/C2004A00109/latest/text> (accessed on 30 March 2024).

³⁷⁷³ See Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Competition and Consumer Act, 2010, No. 51 of 1974, Vol. 1, Part II, sec 10 (1B). Available at <https://www.legislation.gov.au/C2004A00109/latest/text> (accessed on 30 March 2024).

mandate can help make informed and effective decisions that positively impact the SME sector.³⁷⁷⁴

5.5.7 Recommendation Seven

Awareness must be created, as well as engaging in advocacy and developing programs specifically targeted at SMEs so they can become more aware of, and comply with, competition law. These should include programs that raise awareness and knowledge of competition law and enforcement actions targeting competition law infringements by SMEs.³⁷⁷⁵ It would enable SMEs to know what is prohibited and when to approach the Commission for relief against practices threatening their existence or survival. It also includes competition compliance programs for SMEs, as well as training and general advice on competition compliance programmes and how to not engage in collusive conduct.³⁷⁷⁶

5.5.8 Recommendation Eight

Cartel conduct affecting SMEs should attract a harsher penalty. Cartel conduct is regarded as the most egregious anti-competitive conduct, which has a very negative impact on consumers and the market. Cartel conduct directly affecting SMEs (for example as customers) goes against the Competition Act' objective of promoting SMEs. A harsher penalty for cartel conduct affecting SMEs would, therefore, deter or appropriately punish such conduct, and also protect SMEs. This recommendation may, however, be contested due to penalties imposed in past cases falling below statutory thresholds.

This recommendation also takes into consideration the *2018 amendment* of section 59(3) of the *Competition Act*, which outlines the factors that the Tribunal must consider when determining an appropriate administrative penalty.³⁷⁷⁷ The *2018 amendments to*

³⁷⁷⁴ *Ibid.*

³⁷⁷⁵ OECD "Promoting compliance with competition law 2011" (2012), a roundtable report from the OECD Competition Committee, available at <https://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf> (accessed on 25 June 2023) at 211; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 10.

³⁷⁷⁶ See Chapter Two, 2.7.6 Best practices in dealing with SMEs in competition law; Këllezi, Kilpatrick and Kobel (eds) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (2014) 13.

³⁷⁷⁷ See Chapter Three, 3.5.6 Administrative penalties Section 33(d) of the Competition Amendment Act 18 of 2018.

the Competition Act have introduced the requirement to consider the impact of the contravention on SMEs and HDIs when determining an appropriate penalty.³⁷⁷⁸ This addition supports the objective of the amendments to the Competition Act, namely “*to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons.*”³⁷⁷⁹

5.5.9 Recommendation Nine

It is recommended that a committee of representatives from the small business and the franchising sectors be established to discuss and address competition and consumer law concerns in the small business and franchising sectors.³⁷⁸⁰ This is because the franchising model is recognised as one of the best vehicles for SMEs to enter a market and one of the most effective ways to ensure their economic participation.³⁷⁸¹ In this regard, Biggs argues that franchising is suited for the development of SMEs.³⁷⁸² The recommended committee should follow the example of the Australian *Small Business and Franchising Consultative Committee*, established by the Australia Competition and Consumer Commission (ACCC).³⁷⁸³ This Committee provides a forum for industry and government to discuss and address competition and consumer law concerns in the small business and franchising

³⁷⁷⁸ Section 59(3)(d) of the Competition Act amended by section 33(d) of the Competition Amendment Act 18 of 2018 states: “59(3)when determining an appropriate penalty, the Competition Tribunal must consider the following factors: (...) (d) the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact upon small and medium businesses and firms owned or controlled by historically disadvantaged persons.” (own emphasis)

³⁷⁷⁹ Competition Amendment Bill, 2018.

³⁷⁸⁰ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Australian Competition & Consumer Commission “Small Business and Franchising Consultative Committee”, available at <https://www.accc.gov.au/inquiries-and-consultations/consultative-committees/small-business-franchising-consultative-committee#:~:text=The%20Small%20Business%20and%20Franchising.discussed%20by%20industry%20and%20government>. (accessed on 7 April 2023); Schaper “Competition regulation, open markets and small business” (2012) European Competition Law Review E.C.L.R. 33(8), 337.

³⁷⁸¹ Franchising Notice (2017) para 2.3 and 6.1.

³⁷⁸² Biggs *An evaluation of the impact of the Consumer Protection Act 68 of 2008 on the relationship between franchisors and franchisees* (PhD thesis 2016 Nelson Mandela Metropolitan University) 194-195.

³⁷⁸³ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Australian Competition & Consumer Commission “Small Business and Franchising Consultative Committee”; Schaper “Competition regulation, open markets and small business” (2012) 337.

sectors.³⁷⁸⁴ This committee should also comprise representatives from the SME sector who meet to discuss issues of common concern and receive the ACCC's feedback on its latest activities in the SME sector.³⁷⁸⁵

5.6 Concluding remarks

As discussed in this thesis, the South African *Competition Act* contains provisions that expressly deal with SMEs. These provisions are aimed to give effect to the objective of ensuring equitable opportunities for SMEs to participate in the economy.³⁷⁸⁶ On the face of it, through these provisions, the *Competition Act* appears to achieve its purpose of promoting or protecting SMEs to enable them to grow and effectively participate in the economy. This is also being mindful that SMEs may engage in prohibited anti-competitive practices, such as cartel conduct.

Nevertheless, the *Competition Act* would only be an effective tool in promoting equal and fair participation by SMEs in the various relevant South African markets if its interpretation and application give due consideration to the purpose of the Act. This is done by properly balancing the efficiency and public interest objectives that are required to be served by competition law. As indicated, the interpretation or application of South African competition law has been strongly influenced by the US and EU approaches, which are regarded as the two leading systems of competition regulation globally.³⁷⁸⁷ It is submitted that some of the approaches of these jurisdictions, such as the principle "*competition law protects competition and not competitors*",³⁷⁸⁸ read with the US *Morton Salt* standard,³⁷⁸⁹ (to balance the efficiency and public interest goals), or the EU *De Minimis Notice*,³⁷⁹⁰ can be regarded as best

³⁷⁸⁴ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Australian Competition & Consumer Commission "Small Business and Franchising Consultative Committee"; Schaper "Competition regulation, open markets and small business" (2012) 337.

³⁷⁸⁵ Chapter Two, 2.7.6.1 Best practices in dealing with SMEs in competition law – The Australian example; Schaper "Competition regulation, open markets and small business" (2012) 337.

³⁷⁸⁶ Chapter One, 1.6. The interaction between competition law and SMEs in South Africa; Section 2(e) states: "The purpose of this Act is to promote and maintain competition in the Republic in order – (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy."

³⁷⁸⁷ Bradford, Chilton, Linos and Weaver "The global dominance of European competition law over American antitrust law" (2019) *Journal of Empirical Legal Studies*, Vol. 16, Issue 4, 731.

³⁷⁸⁸ Chapter Three, *Nationwide Poles v Sasol Oil* (CT) para 85.

³⁷⁸⁹ Chapter Four, 4.1.6.2 Federal Trade Commission v Morton Salt (1948); *FTC v Morton Salt Co.* (1948) 49. This is the standard where injury to competition could be established by showing "injury to the competitor victimised by the discrimination". See above para 5.4 Discussion.

³⁷⁹⁰ See Chapter Four, 4.2.6.1 The EU *De Minimis Notice*.

practices in ensuring that SMEs “*survive, succeed and compete freely or favourably*”, as stated by the Constitutional Court in *Mediclinic*.³⁷⁹¹

However, the adoption of any approach should not be merely done as a matter of course but with due consideration of the fact that South Africa is a developing country with its own socio-economic realities characterised by, amongst others, a highly concentrated economy. This calls for an interpretation that promotes transformation of the national economy, which, as set out in the Preamble of the Competition Act,³⁷⁹² over the course of many years, was characterised by excessive concentration of ownership and control as well as unjust restrictions on full and free participation of all in the economy.³⁷⁹³ The transformation should include the opening up of the economy through not only restraints against the exclusion of SMEs from a market but also promoting their participation in the economy. This is an approach that does not only focus on the efficiency objective of the *Competition Act* but also considers the “transformative context” of the purpose of the *Competition Act*,³⁷⁹⁴ which includes ensuring that the previously excluded, including SMEs, have equitable opportunities to participate and compete, and are allowed to succeed and operate in a conducive environment that considers the imperatives of the national economy.³⁷⁹⁵ An adequate competition law framework for SMEs in South Africa would, therefore, be one that supports a transformative interpretation of the *Competition Act* and aligns with the best practices recommended above.

³⁷⁹¹ See Chapter Three, 3.6.5.3 Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another; *Competition Commission v Mediclinic* (ZACC) para 7.

³⁷⁹² See Chapter Three, 3.5.1 Preamble of the Competition Act.

³⁷⁹³ See Chapter Three, 3.5.2 Purpose of the Competition Act, 3.5.3.1.2 SMEs – victims of prohibited horizontal practices, 3.6.4.3 Competition Commission of South Africa v Media 24 (Pty) Ltd, 3.6.6.2 eMedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another.

³⁷⁹⁴ eMedia Investments (Pty) Ltd South Africa v Multichoice (Pty) Ltd and another [2022] 2 CPLR 23 (CAC) paras 84-85 and 87.

³⁷⁹⁵ *Competition Commission v Mediclinic* (ZACC) paras 7 and 8; *Competition Commission of South Africa v Media 24* (ZACC) para 30.

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