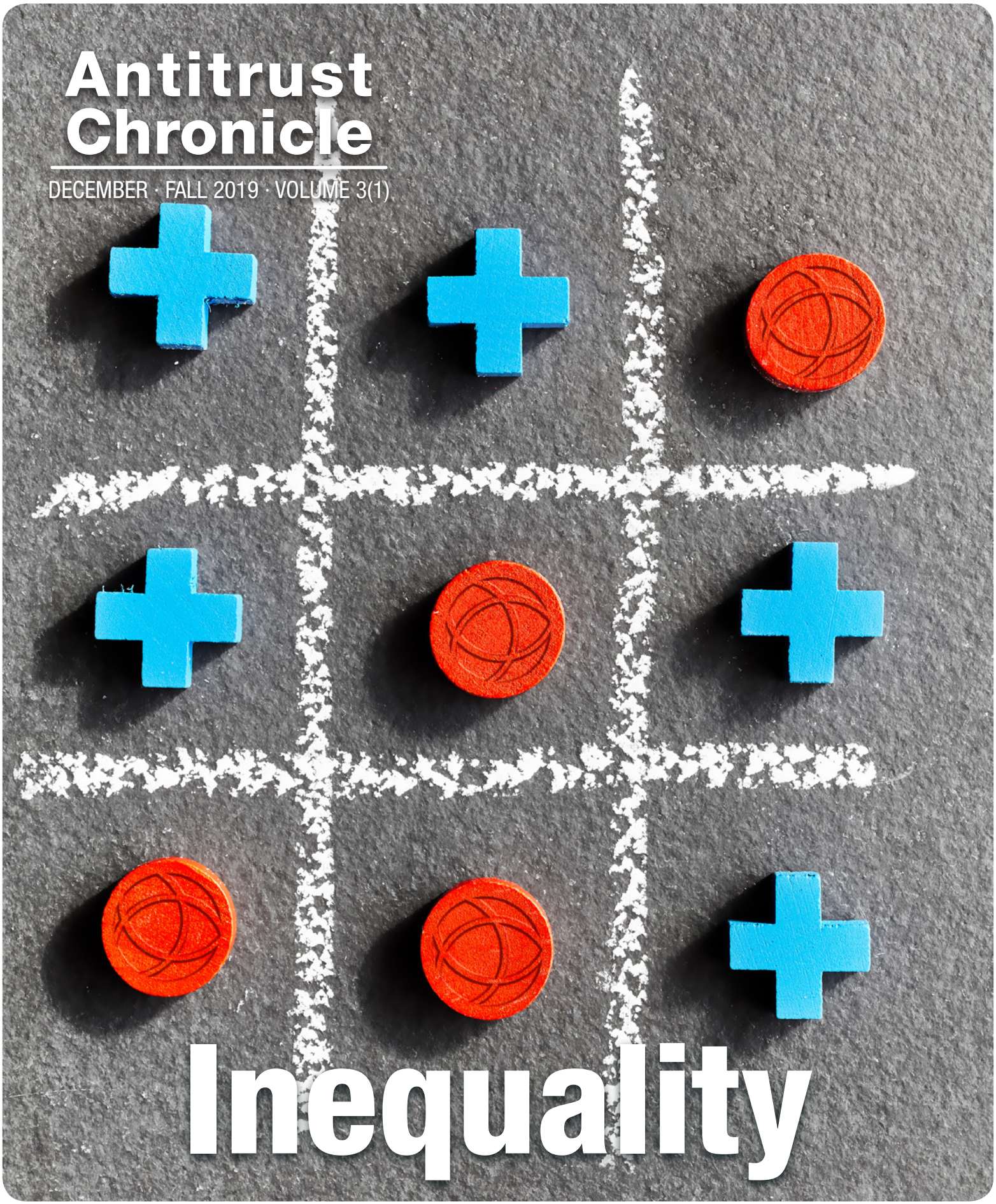

Antitrust Chronicle

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Inequality

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In this edition of the Antitrust Chronicle, we present a set of pieces that deal with the interaction between antitrust enforcement and the pursuit of economic equality, which is to the forefront of modern political discourse.

In economic jargon, no terms are as fraught as the notions of "winners" and "losers." From Rawlsian theory to the concept of Pareto optimality, these ideas are interwoven into every area of economic discourse, and the specific domain of antitrust law is no exception.

From the earliest days of antitrust enforcement, commentators have been aware of the redistributive effects of the rules and their application. Even commentators perceived to be on opposite sides of the ideological spectrum (adherents of the "Chicago School" of economists on the one hand, and "neo-Brandeisians" on the other) elaborate their theories in terms of "consumer welfare" (or its various synonyms) in order to justify them.

But what is the scope of "consumer welfare"? And how does antitrust enforcement interact with other political objectives, such as the provision of social care, healthcare, or the pursuit of equality? For example, does historical oppression of certain groups in a given country justify modulated enforcement of the antitrust rules that most countries agree are necessary for the functioning of a market economy? Should the state provision of certain services (like healthcare) be subject to the full rigors of the market? Or should antitrust law be considered to be "set off" from other domains of economic regulation? If so, how should antitrust rules be coordinated with these other domains?

These are some of the questions that the contributors to this edition of the Chronicle seek to address.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

CPI Talks…

…with Alejandra Palacios Prieto

In this month's edition of CPI Talks we have the pleasure of speaking with Alejandra Palacios Prieto, Chairwoman of Mexico's Comisión Federal de Competencia Económica (Federal Commission of Economic Competition ("COFECE")).

South Africa, Competition Law and Equality: Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed

By Eleanor M. Fox

In South Africa, the question is not whether to incorporate "equality" into the competition law, but how. In view of the history of heinous exclusion of all black South Africans, South Africa has long recognized inclusiveness as a competition law value. Recent amendments seek to further the equality goal. This essay argues that, within a significant space, the goals of an equitable and efficient competition law overlap. Maximizing this space requires a greater appreciation of exclusionary conduct and its harmful effects. The author next singles out the amendments that contemplate "transformation" obligations on parties to some big mergers and contracts who are seeking clearance or exemption. She highlights the special challenges to transparency, predictability, equal opportunity, and rule of law. She argues that with hard work (which is being done) the system can be administrable, with due process, and likely to engage the creative talents of the left-out majority.

The Social Contract at the Basis of Antitrust: Should we Recalibrate Competition Law to Limit Inequality?

By Michal S. Gal

Competition law constitutes an important part of the social contract that stands at the basis of market economies, which conceptualizes the relationship between the state and its citizens, as well as among citizens, and legitimizes state action. This article seeks to unveil the social contract that stands at the basis of competition laws by shedding light on the assumptions at its basis. It then explores whether these assumptions indeed further the goals of the social contract, namely total and individual welfare. In particular, in light of recent challenges to the welfare effects of market economies, this short article seeks to determine whether equality and inclusive growth goals should play a more pronounced role in the competition laws of developed jurisdictions, and if so, by what means.

Market Power: The Inequality Connection

By Sean F. Ennis

Market power is increasingly considered a potential source of inequality. Interestingly, during the same period in which mark-ups are likely to have risen substantially, and inequality to have increased, extreme poverty has fallen dramatically. These results suggest the ultimate mechanisms driving these changes may be complex. To the extent that market power is one of the origins of inequality, results of a long-run analysis based on a steady state model incorporating market power suggest that, out of 8 major OECD countries, Germany and the U.S. have the largest per capita wealth impact from reducing market power.

SUMMARIES

The Curious Case of Competition Law and Health Equity

By Theodosia Stavroulaki

Healthcare markets are forming in Europe. Some countries, such as the UK, have introduced competitive forces in their health systems as a means to improve their efficiency and quality. The role of competition in healthcare is a hotly debated topic with some considering it "anathema" and others seeing it as "a magic bullet." Aiming to spark this heated, albeit unsettled, debate, this article raises an additional concern: it contends that when competitive forces are introduced into a health system, the main actors involved in the provision of healthcare, mainly physicians acting either as gatekeepers or purchasers of healthcare services may enter into agreements that restrict competition among healthcare providers with a view to protecting equity and access to care. This article asks the wider question: should competition authorities in Europe consider in their competition analysis the core objectives their health systems strive to attain, such as equity? How and to what extent can antitrust enforcers integrate distributive concerns into their competition assessment on the basis of Article 101 TFEU?

How Competition Authorities can Enable Economic Transformation to Reduce Inequality: Some Examples from Africa

By Sara Nyman & Tania Begazo

Actions by competition authorities in Africa are contributing to transforming economic structures, giving more opportunities to the poor as buyers, entrepreneurs, and employees. In addition to the more direct link between competition law enforcement and consumer welfare that can create benefits for the poor, competition authorities are using their advocacy, policy advice, and enforcement powers to create economic opportunities for the less well-off and allow them to contribute to the much-needed productivity growth in the region. As at the end of 2019, 36 countries in Africa now have competition laws and 26 of those have functional competition authorities. With these countries covering over 85 percent of Africa's GDP, increasing enforcement and advocacy actions by these authorities have the potential to play an important role in pro-poor economic transformation.

WHAT'S NEXT?

For January 2020, we will feature Chronicles focused on issues related to (1) **Labor Markets**; and (2) **Agriculture**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE FEBRUARY 2020

For February 2020, we will feature Chronicles focused on issues related to (1) **Data**; and (2) **Disruptive Innovation**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…with Alejandra Palacios Prieto

In this month's edition of CPI Talks we have the pleasure of speaking with Alejandra Palacios Prieto, Chairwoman of Mexico's Comisión Federal de Competencia Económica (Federal Commission of Economic Competition ("COFECE")).

Thank you, Chairwoman Prieto, for sharing your time for this interview with CPI.

In the introduction of the document Market Power and Social Welfare by COFECE, you indicate the following:

> **(…) Competition is about ensuring that all citizens have access to the goods and services of their choice, according to their income levels, without restrictions produced by the exercise of market power of certain economic agents.[1]**

1. **Do you think that competition policy can do something to increase people's income levels or can it just be limited to preventing companies from abusing their market power?**

Household consumption is related to both consumer income and the price of goods and services. Public authorities typically lend more attention to individuals' income and intervene to increase them as a means of enhanced social welfare. Commonly implemented income-supplement policies include direct cash transfers, microcredit and food programs. All are relevant and potentially effective public policies that seek to increase consumer welfare.

That said, products prices — as opposed to what they *should* or *could* be — also have a significant impact on household welfare. The lower the prices, the more you can get for your available income. Therefore, the role of competition policy in increasing purchasing power and expanding the range of goods and services households can afford does help combat inequality.

In competitive markets, social welfare is maximized to the extent that companies compete to offer better products at lower prices. In contrast, companies that operate in less competitive environments exert an effect on consumers who run out of alternatives to meet their needs and must pay more for the same commodity, buy less of it, or stop buying it altogether.

Economic inequality has become a central issue in both public discussions and political discourse worldwide. Alongside the emergence of social movements and organizations dedicated to combating inequality, influential economists have published several studies that analyze this matter. Academics, politicians, activists and policymakers have begun to recognize inequality as a high priority issue on the public agenda and to propose solutions such as competition policy and efficient market regulation.

In Mexico, discussions on how competition policy can contribute to reducing inequality gaps are relatively recent. Since for most consumers the direct relationship between competition and social welfare can be unclear, we must encourage development of studies that show the costs families face when they purchase goods in concentrated markets. This is exactly what Andrés Aradillas does in the study *Market Power and Social Welfare* (which COFECE commissioned from him as an independent academic expert).

1 COFECE, "Estudio sobre el impacto que tiene el poder de mercado en el bienestar de los Hogares", October 12, 2018, available at https://www.cofece.mx/cofece-da-a-conocer-estudio-sobre-el-impacto-que-tiene-el-poder-de-mercado-en-el-bienestar-de-los-hogares-mexicanos/.

The results of the study find that market power negatively impacts household income, welfare and inequality. On average:

- Mexican households pay a 98 percent overcharge when there is market power.
- Mexican families allocate 16 percent of their income to pay overcharges when acquiring goods in the presence of market power.
- The impact is greater in lower income households, whose loss is 4.4 times greater than what the wealthiest families lose as a proportion of their income.

2. In this context, which sectors should be a priority for COFECE? Those that are accessed by a large part of the population or those identified as charging excessive prices, even if they are only consumed by people in the highest income deciles?

Lack of resources is a restriction that affects the scope of action of all public institutions. COFECE's overarching priority is taking on anticompetitive practices in markets that have the greatest impact on Mexican society at large. To that end, we have built a strategy that allows making the best possible use of institutional resources by identifying priority sectors in the Mexican economy. The Commission's 2018-2021 Strategic Plan establishes the criteria for carrying out this objective:

1. **Contribution to economic growth.** Sectors whose market size and growth rate most contribute to Mexico's GDP.
2. **Generalized consumption.** Sectors that produce goods and services subject to greater demand among the entire population.
3. **Crosscutting.** Sectors and subsectors that produce intermediate goods and services that are production inputs for relevant end-consumer goods and services.
4. **Impact on lower-income populations.** Sectors that produce goods and services that have the greatest impact on lower-income household expenditures.
5. **Prevalence of anticompetitive behavior.** Sectors and subsectors in which characteristics and regulations facilitate collusive agreements or market concentration.

Based on these criteria, COFECE identified six priority sectors:

a. The financial sector and all its related markets;

b. The agri-food sector and its links along the production chain;

c. The energy sector;

d. The transportation sector;

e. Pharmaceuticals and health services; and

f. Public procurement (which though not considered an economic sector in itself, is an economic activity of great importance to social welfare).

3. The same document quantifies the price premium that different products have (table 9 of the study) with respect to combating inequality. Do you think that the work of the Commission will end when this price premium is zero or when it has reached some reasonable margin? In each case, what else can the Commission do?

Monopolistic behavior generally results in higher prices. However, it is not necessarily anticompetitive conduct that leads to lack of competition in the market in the first place. In some cases, the origins of market power have to do with barriers to entry that arise from control over essential facilities, high returns on scale, technological superiority and, frequently, government-imposed regulatory barriers.

With regard to regulation, when deemed necessary, governments issue rules to regulate economic activity, to all manner of public-policy ends, including for environmental protection, public health issues, market failure corrections or to establish the parameters certain activities or services with externalities must be subject to. However, there are cases where these regulations, far from achieving their objectives, restrict market efficiency. In such a context, competition authorities must draw up analyses and studies that serve to persuade regulators that are responsible for competition inhibiting regulations of the costs society in general pay for these, and if possible, propose alternative ways to meet public policy objectives while not damaging market competition processes.

In contrast, when higher prices are a direct consequence of the exercise of market power through anticompetitive practices, it is, of course, our responsibility as competition agencies to enforce the law and make sure we sanction them.

Market Power and Social Welfare estimates the excessive prices paid by consumers, but does not determine the underlying causes, i.e. whether this is abuse of market power, cartelization or something else. Put another way, it does not distinguish between situations where market power derives from anticompetitive behavior, regulatory barriers or business efficiencies. What the study seeks to underline is the importance of competition policy in supporting consumer welfare as well as why it should be in all governments' interest to establish robust competitive markets.

4. Would you recommend including "Excessive Prices" in the LFCE as a monopolistic practice to combat inequality?

That's a very good question — to which I do not have the answer — and that I've asked myself many times.

On the one hand, as mentioned above, excessive pricing does not necessarily imply an exercise of market power and, therefore, Mexican law does not equate it with any type of anti-competitive behavior. Multiple factors, besides a firm's exercise of market power — such as increased production costs, changes to production processes and regulations — can lead to higher prices.

That said, one question that elicits great interest among competition experts is how far a price should be from its cost and, therefore, what producers/supplier' appropriate profit margin should be. A company's margin on a given product can reflect an exercise of market power, but could also have to do with innovation/development investments, efficiency distances between competitors or the existence of patents. However, in Mexico, we see certain "overconcentrated" markets in which prices charged seem "too high."

In such cases, Mexican competition law contemplates a protocol known as a "declaration of effective competition conditions" through which the antitrust agency can investigate if a supplier operates free from competition. COFECE's rulings in these declarations are directed to the sector regulator, which at its discretion can impose price regulations or modify legal frameworks in line with COFECE recommendations that permit competitive conditions to be restored.

5. Recently it has been argued that market concentration can also have an effect on factor markets, in particular on the labor market. Has COFECE considered or will it consider these effects in its determinations?

Several recent academic studies present evidence that increased market concentration reduces labor income share as a proportion of total income. They suggest that in industries in which there has been a growth in market concentration in recent years, labor costs have dropped sharply relative to profits. In other words, the return on labor has been transferred to investors as increased profit margin. As markets concentrate, workers have fewer employment options and therefore accept lower salaries. Despite all this, we do not consider factor market effects in merger analyses and other investigative procedures.

Also related to market concentration and labor markets, there is the fact that the existence of fewer employers increases the likelihood of agreements being struck between those employers so as not to compete by offering better conditions to competitors' workers (i.e. non-poaching agreements). This reduces employees' job mobility options. With regard to this type of practice, in 2018 COFECE initiated a (still-ongoing) investigation into possible monopolistic practices (cartel-like conduct) related to the recruiting and signing of Mexico's professional soccer players.

6. Do you think that the objectives of the LFCE should be expanded to include increasing employment levels and/or salaries?

Competition authorities must ensure the presence of conditions that allow efficient market development because, as those companies expand, consumer welfare also grows by offering higher quality goods and services at lower prices. Normally, competition authorities' goals do not include guaranteeing minimum employment or salary rates. Labor policies (apart from non-poaching agreements) are regulated by other government entities.

That said, I believe we must not lose sight that sometimes, especially in the short term, increased market competition can lead to job losses and can put downward pressure on certain (mainly non-specialized) salaries. This occurs because in competitive markets, companies may lay off employees and reduce salaries to create efficiencies related to cost reduction, limit profit margins and coax out even more competitive final prices. Likewise, less efficient companies often fail, taking jobs with them. In the short-term it could be a public policy dilemma, for which governments must generate policies to offset short-term job loss, instead of hampering competition. Studies indicate that the most competitive economies have greater prospects for long-term job creation and higher salaries.

7. What should be the relationship between industrial policy and competition policy? For example, should an industrial policy that guarantees an increase in employment and income levels but that results in an increase in market concentration be combated by competition policy?

Competition policy seeks to create conditions in markets that allow consumers to reap the benefits of competition: innovation, quality and alternative goods and services at better prices. After applying and enforcing competition policy over several decades, we have come to recognize that this dynamic generates short-term winners and losers (i.e. companies go out of business or entire industries disappear because of innovative production processes or novel products).

Years ago, industrial policy was notorious for picking winners and losers. Particularly in closed economies, it focused on driving a few large companies (so-called "national champions") that were protected from competition. The idea was that protection would allow them to become stronger and then more effective in competing abroad. Today, we realize that a more successful tactic is strengthening domestic businesses via intense internal competition to create efficient companies that can better compete against global companies. Thus, today's industrial policy should promote the creation of business ecosystems for industrial development, particularly in markets that play strategic roles in national economies. This means focusing on the success of specific industries, as opposed to individual corporations. At the same time, economic policy should focus on helping losers rejoin the market.

That said, we should also note that there can be complementarities between industrial and competition policy. Competition policy should not be understood as being opposed to large companies or their growth. If growth emerges from innovation and does not represent risks to proper market functioning, it must be welcome. On the other hand, industrial policy should not focus on artificially favoring chosen companies; instead it should generate conditions that support efficiency improvements for the entire industry.

8. Recently, the issue of platform power has been considered in jurisdictions such as the U.S. and the European Union. In particular, mention is made of the acquisition of platforms by other platforms for the purpose of exporting their power to other markets or for the purpose of eliminating competition into the future. What is COFECE's position in this regard and does it believe that it has the same repercussions for emerging economies such as Mexico

In emerging markets such as Mexico, different economic activities move simultaneously but at two different speeds. On one hand, a great part of our economic activity takes place in traditional, non-digitalized markets in which lower-income households purchase basic products and services (such as food and transport) that account for a large percentage of their total expenditures. In many of these economic activities, a high market concentration prevails among traditional suppliers. In some relevant cases, such as transport and retail, alternatives that digital platforms offer may be an interesting source of competitive pressure on the incumbents; their disruption in Mexican markets is welcome.

On the other hand, many sectors are already immersed in a modern global economy and are therefore part of the worldwide digitalization trend. In these markets, the competition authority faces similar challenges to those presented to their peers in developed countries and must allocate resources to addressing them. We are on it.

We have already issued a document which compiles the generally accepted challenges faced by competition authorities regarding both enforcing competition law in digital markets (including investigating anticompetitive practices and merger control) and advocating for pro-competitive regulation.

Moving forward, we plan to carry out diverse actions in order to meet new challenges. We are currently: (i) working on the design and creation of a multidisciplinary division to handle investigations related to digital markets (learning from the example of the first authorities to do so); (ii) gathering a group of outside experts to advise on how to take on challenges arising from the current context; (iii) planning a capacity building strategy regarding data management and economic analysis in digital markets; and (iv) working on bringing first-hand knowledge on the topic to our staff directly from those world-wide experts developing it.

9. Do you think that similar treatment should be given to historical operators in certain markets (say the financial sector) towards the acquisition of digital platforms (say in the Fintech space)?

Digital markets are characterized by being highly dynamic, which often results in dynamic efficiencies, a positive characteristic of competitive markets. Digitalization is transforming traditional markets by allowing customers to compare prices, as well as the quality of goods and services. Digital platforms are (1) creating new markets; (2) providing new ways for acquiring goods and services; (3) in many cases, reducing transaction costs and lowering prices; and (4) creating a collaborative economy. In many ways because of the existence of digital platforms we are better off as consumers.

Recently, COFECE issued its first ever merger decision involving a player in a digital market. It was a transaction between Walmart, the biggest brick-and-mortar retailer in Mexico, and Cornershop, a start-up that offers logistical services for the purchase and immediate delivery of products offered by different retailers (some of which are Walmart's direct competitors) to final consumers. In this case, COFECE blocked the merger because of the potential risks detected, which included the risk that the platform (Cornershop) could refuse to offer its services to Walmart's retail competitors and/or that the new economic agent resulting from the transaction could pass information produced by platform retailers to Walmart for retailing strategies. Cornershop is the largest player in the market for such services, as is Walmart in its own market, so the size of both merging parties did matter.

Thanks to this first experience, COFECE learned a great deal about how to approach a merger between a traditional supplier and a digital one. Without a doubt, we have a lot more to learn. Much of the knowledge we still need to gain will be related to a better understanding of digital enterprise business models, including their finance and exit strategies, the incentives these strategies bring about, the possibilities that the technology allows, the potential use and value of the data involved, among other aspects.

SOUTH AFRICA, COMPETITION LAW AND EQUALITY: RESTORING EQUITY BY ANTITRUST IN A LAND WHERE MARKETS WERE BRUTALLY SKEWED

BY ELEANOR M. FOX[1]

1 Eleanor M. Fox is a Professor of Law and is the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She thanks Ammara Cachalia, Dennis Davis, James Hodge, and Liberty Mncube for helpful conversations and comments.

I. INTRODUCTION: THE CONSTITUTION, THE COMPETITION ACT, AND THE AMENDMENTS

Equality is an imperative value of all law in South Africa. This essay about equality and the South African Competition Law begins by locating the value in the Constitution of the New South Africa. It proceeds to examine the law as developed under the 1998 Competition Act, to examine the recent amendments geared towards greater inclusiveness of a still racially skewed economy, to consider the fit of the amendments with the goals of efficiency and equity, and to identify challenges to the institutions to make the amendments work.

The Constitution of South Africa was adopted upon the overthrow of apartheid, which had heinously excluded the country's majority population, black Africans. The Constitution contains a Bill of Rights. First among all enumerated rights – higher than freedoms of expression and of property – is equality. Second is dignity. The Constitution authorizes affirmative action in favor of historically disadvantaged people.

Then Deputy Chief Justice Dikgang Moseneke captured the depth of the Constitutional guarantee in his judgment in *Minister of Finance v. Van Heerden*:

> The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance. . . . In explicit terms, the Constitution commits our society to 'improve the quality of life of all citizens and free the potential of each person.'[2]

The New South Africa hoped for a transformation of the society. All law was expected to contribute. The Competition Act of 1998 is part of this fabric. Black Africans had been totally excluded by positive law from participating in the formal economy, and opening markets was expected to open the doors wide to black participation. Thus, the Competition Act included in its Purposes:

> "(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."

The Purposes clause, however, was not textually woven into the prohibitory provisions of the Act, leaving ambiguity in the law. Over the next 20 years, the competition jurisprudence missed opportunities to lean towards inclusiveness in ways that might have better satisfied the goal of equal economic opportunity[3] – despite much excellent enforcement helping society by lowering prices of necessities.[4]

In 2017, then-President Jacob Zuma noted with urgency that the radical transformation had not occurred. South Africans still did not participate equally or close to equally in the South African economy. Zuma announced that the Competition Act would need to be amended to facilitate the transformation. He promised that the government would bring forward amendments to the Act to

> address the need to have a more inclusive economy and to de-concentrate the high levels of ownership and control we see in many sectors. … In this way we seek to open up the economy to new players, give black South Africans opportunities in the economy and indeed help to make the economy more dynamic, competitive and inclusive. This is our vision of radical economic transformation.[5]

Minister of Economic Development Ebrahim Patel took up the cause and promised that the plan would include the following:

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2 *Minister of Finance v. Van Heerden* (CCT 63/03) [2004] ZACC 3, 2004 (6) SA 121 (CC), paras 22-23.

3 See Eleanor M. Fox and Mor Bakhoum, MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT AND COMPETITION LAW IN SUB-SAHARAN AFRICA (Oxford 2019), Chapter 5: Leaning in Towards Inclusive Development.

4 See David Lewis, THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT (Jacana 2012). See in general the annual reports of the Competition Commission, www.compcom.co.za.

5 President Jacob Zuma, 2017 State of the Nation Address.

> 9. . . . [Market inquiries] [T]he competition authorities must be empowered to consider these questions proactively or at the request of key stakeholders . . . . *Markets plagued by* over-concentration and *untransformed ownership* will be identified, investigated and appropriate measures applied to remedy these market features. These inquiries, and any remedies that result, will target the primary structural impediments to market entry and ownership by black South Africans.
>
> 10. The proposed amendments also will seek to incentivise firms to develop relationships and adopt strategies that would alter market structure, reduce concentrations by encouraging entry of historically disadvantaged South Africans (particularly those who own small and medium-sized enterprises), reduce barriers to entry, and expand ownership to ensure that more enjoy substantive economic citizenship.[6]

The Amendments were proposed and adopted.[7] They fall largely into five categories: 1) *Dominant firms' abuses*; 2) *Exemptions for anti-competitive agreements and practices*; 3) *Mergers*: Transformation was added to the list of public interests, and a process was introduced for vetting mergers that may threaten national security; 4) *Market inquiries*: power to investigate markets for distortions of competition was enhanced and strong remedies authorized, and distortion was defined to include adverse impact on SMEs and HDPs; and 5) *Institutional*: the Minister was given more powers of intervention, and in general the Executive is given more power. I elaborate selectively on these reforms.

A. Dominant Firms

Excessive pricing. The 1998 Act prohibited excessive pricing by dominant firms, and cases were brought, but the cases were lost in view of demanding burdens of proof. The Amendments shift the onus. If the plaintiff shows that the price was excessive (in accordance with factors stated in the law and guidelines to be provided by the Commission), the defendant must prove that the price was reasonable.

This shift of the onus effectively overrules, among others, the *Mittal Steel* case.[8] The super-dominant parastatal had charged low export prices, where it faced world competition, but it charged exorbitant domestic prices (cost plus phantom transportation costs, also called import price parity), handicapping domestic steel buyers in their businesses going forward. Moreover, an effective remedy was available – opening arbitrage opportunities for purchasers for export.

Margin squeeze. The Amendments add margin squeeze to the list of practices prohibited unless justified.

Buying power. The Amendments prohibit exercise of monopsony power in sectors to be designated by the Minister. (The Minister has now designated agro-processing, grocery retail, and on-line intermediation services.) In the designated sectors a dominant firm may not impose unfair prices or other unfair trading conditions on a supplier that is a small or medium business ("SME") or historically disadvantaged person ("HDP").[9] Where the plaintiff makes a prima facie case, the dominant firm must prove that the prices or trading conditions are not unfair.

Draft regulations issued by the Minister and draft guidelines issued by the Commission were posted for public comment and are being finalized. They will clarify factors that, among other things, will be used to determine unfairness.[10]

Price discrimination. The 1998 Act prohibits dominant firms from engaging in price discrimination likely to substantially prevent or lessen competition. The Amendments prohibit, also, dominant firms' price discrimination that would impede SMEs and HDPs from participating effectively in the market. Moreover, where plaintiff makes a prima facie case of prohibited discrimination, plaintiff wins its case unless the dominant firm can show that the price discrimination did not impede the ability of the SME or HDP to participate effectively.

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6 Background Note issued by the Minister of Economic Development, May 25, 2017. Italics added.

7 On February 13, 2019, President Cyril Ramaphosa signed the Competition Amendment Bill in Law and on July 12, 2019, President Ramaphosa published a notice immediately bringing into force certain of the provisions of the Competition Amendment Act. The provisions brought into force do not include the national security provision in mergers or the buyer power and price discrimination sections of the abuse of dominance law.

8 *Harmony Gold Mining Co. v. Mittal Steel Corp.*, 70/CAC/Apr07 [2009] ZACAC 1. See discussion in Making Markets Work at pp. 106-07.

9 The category of historically disadvantaged persons refers to people who, before the current Constitution, were discriminated against on the basis of race, and entities owned or controlled by them. According to the Minister's regulations, to qualify as an HDP, a firm may supply not more than 20 percent of the purchases of the dominant buyer for the good or service.

10 See Commission website, www.compcom.co.za.

This amendment effectively overrules *Nationwide Poles v. Sasol*.[11] There, dominant supplier Sasol, having no cost justification, charged small businessman Mr. Foot much more than it charged his big business rivals for a critical input. Foot was squeezed from the market, but (appearing pro se) he did not prove that the price discrimination harmed competition in the output market. Today, the burden would shift to Sasol to prove that it was not the price discrimination that impaired Mr. Foot's ability to compete effectively. Otherwise, Mr. Foot would win.

The Minister's regulations and the Commission's guidelines, which are being finalized after a period of public comment, will identify when a price discrimination is likely to impede effective participation.

Exclusionary acts in general. The definition of exclusionary acts (which are subject to pro-competition, pro-efficiency justifications) always included acts that impede or prevent a firm from entering and expanding in a market. It now also includes acts that keep a firm from *participating* in the market. "Participation" is defined as the ability of or opportunity for firms to sustain themselves in the market.

B. Exemptions: Anticompetitive Agreements and Practices

Anticompetitive agreements and practices may be eligible for an exemption. Under the 1998 Act, an exemption could be granted if the agreement[12] promoted exports, promoted the ability of SMEs or HDPs to become competitive, stopped a decline in an industry, or fostered economic stability. The amendments add as grounds for exemption: promotion of the ability of SMEs and HDPs to participate (as well as enter and expand) in the market; and "competiveness and efficiency gains that promote employment or industrial expansion." They also add as grounds for exemption "development, growth, [and] transformation" (along with stability) of an industry. "Transformation" is the key concept that we will refer to below.

C. Mergers

Public interest. Since the adoption of the 1998 Act, the authorities must vet mergers not only for their anticompetitive effects but also for effects on enumerated public interests including employment and the ability of SMEs and HDPs to become competitive. The Amendments embellish the SME/HDP clause. The substituted clause requires consideration of the effect of the merger on the ability of SMEs and HDPs "to effectively enter into, participate in or expand in the market." They also add as a factor that must be considered: "*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by [HDPs] and workers in firms in the market.*" (Emphasis added.) As under the 1998 Act, the Minister may appear as a party on any public interest issue.

Mergers that may affect national security. After this amendment comes into force, the President must appoint a committee to consider whether acquisitions by a foreign acquiring firm may have an adverse effect on the national security interests of the country.

D. Market Inquiries

Before the Amendments the Commission could decide to conduct market inquiries where it had reason to believe that features of the market impeded, distorted or restricted competition. At the conclusion of any such inquiry, the Commission could make recommendations. The Amendments give market inquiries teeth by giving the Commission on approval of the Tribunal the power to order remedies; even significant structural remedies. The Amendments give the Minister power to require market inquiries. In making its decision, the Commission must have regard to whether the structure of the market has an adverse effect on SMEs of HDPs. Effect on SMEs/HDPs is an identified feature that may constitute a distortion of competition. As Minister Patel said, "markets plagued by. . . untransformed ownership will be identified."[13]

11 *Nationwide Poles v. Sasol Ltd.*, 71CR/Dec03 [2005] ZACT 17. See discussion in Making Markets Work at pp. 110-12.

12 "Agreement" is used hereafter to include "practices" because agreement is the principal category contemplated.

13 See Minister Patel quoted above, text at note 6.

II. EQUALITY

A. The 1998 Act

I shall comment on the salience of equality in the South African competition law; first, before the Amendments; then, in view of them.

In view of South Africa's history and aspirations, pushing towards greater equality is imperative. A racially skewed economy not only offends all of the ideals and aspirations of the New South Africa; it is not sustainable. The question is not whether to give regard to equality, but how.

But what kind of equality? What kind of equality is possibly achievable by a competition law? How can competition law help in a meaningful way to "free the potential"[14] of the most unequal citizens, who bear the scars of historic exclusion?

There is one thing that markets policed by competition law do well. They provide opportunity to people to enter markets and grow on their merits. If markets are clogged by power and if the firms shore up their power by excluding outsiders, that is bad for consumers and it is also bad for budding entrepreneurs.[15]

South Africa's Competition Act of 1998 was an admirable start. Its Purposes clause made clear that it always valued inclusiveness; and inclusiveness, translated into antitrust, means vigilant concern for lowering barriers, opening markets, and trusting in the not-yet-imagined contributions of outsiders to increase competition and innovation. In this space, efficiency and equity meet.[16] The Tribunal tried to cultivate this space and to lean on the side of the poorer and un-advantaged population. Several of its decisions would have done so, but technicalities of the law produced reversals.[17]

The Amendments to the Competition Act try to reset this balance. They also go much further, accounting for the fact that the great mass of historically disadvantaged individuals systemically get less favored treatment.

B. The Amendments

Some of the Amendments fit the project outlined above: marrying equity with efficiency; making the markets work better for consumers by giving outsiders[18] a fairer shot to participate. As to other Amendments – e.g. law to control abuses of buyer power – the prohibition can be efficient. It is common cause that some uses of monopsony power are anticompetitive. And some of the Amendments are purely redistributive of wealth and opportunity.[19] Much of the pricing behavior identified by the Amendments is unfair exploitation made possible by grossly unequal bargaining power. The authorities face significant challenges to identify "unfairness" in a manner that has standards and is justiciable. (This is an important and complex category but I do not engage with it further here. The Commission has grappled with it, and the results of its thinking will be reflected in the forthcoming guidelines.) Finally, some mergers and some agreements may become the subject of a bargain with the Minister for an undertaking to facilitate transformation, which could be in the form of a promise by the parties to give shareholding to or enter a joint venture with workers or HDPs in order to get clearance or exemption.

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14 See Deputy Chief Justice Moseneke in *Minister of Finance v. Van Heerden*, quoted at note 2, *supra*.

15 Of course the entrepreneurs need education and training to be positioned to take advantage of economic opportunity in the first place, and before that, they need nourishing food, clean water, and medicines, all of which necessities other policies must provide. This is only to say that the burdens disadvantaged people face are huge even before they confront exclusionary monopolists and unforgiving markets.

16 See Eleanor Fox, Outsider Antitrust: "Making Markets Work for People," as a Post-Millennium Development Goal, Chapter 2 in COMPETITION POLICY FOR THE NEW ERA: INSIGHTS FROM BRICS AND DEVELOPING COUNTRIES (Tembinkosi Bonakele, Eleanor M. Fox and Liberty Mncube, eds., Oxford 2018); Competition Policy at the Intersection of Equity and Efficiency: the Developed and Developing World, Chapter 23 in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY (Gerard and Lianos, eds., Cambridge 2019).

17 See Making Markets Work at pp. 99-112.

18 I do not refer to inefficient, laggard outsiders but those who could and would provide what consumers want and deliver on their merits.

19 "Redistribution" is often regarded as a pejorative word by economists; a tool to avoid lest it drag down the efficient state of being. But the "efficient state of being" of South Africa was built upon outrageous and now fortunately unconstitutional redistribution – apartheid. It may be more accurate to call the Amendments a very modest rebalancing.

In this section I discuss two prominent aspects of the Amendments: more weight given to market participation by SMEs and HDPs, and conditioning clearances on the promise of benefits to SMEs or HDPs in the interests of a greater spread of ownership and thus of transformation.

1. Special Attention to Opportunity for Entry, Participation and Expansion of SMEs and HDPs

Most small businesses are HDPs, so that the SME/HDP categories are largely overlapping. Moreover, the category of firms without market power is disproportionately comprised of small businesses. Valuing entry, participation and expansion of firms without power in the application of substantive principles of antitrust is largely congruent with the aim of making markets more robust.[20]

Antitrust is process-oriented. It does not engineer outcomes. It means to set in place an environment likely to facilitate the forces and incentives that produce robust competition. The ecosystem gives opportunity to firms to compete on their merits, which in its turn makes people as consumers better off. The process is likely to produce firms that are competitive at home and in world markets. Ideally, the system operates as a *deus ex machina*. Antitrust clears away the clogs and lets the impersonal machinery work. The Amendments' attention to SMEs' entry and success would normally fit well with the goal of healthy competition and competitive markets.

If the goal is healthy, efficient competition that produces best results for consumers, can the mandate to ease participation of SMEs be over-used, drive up prices, and retard the growth of a competitive economy? This is possible but is not the intention[21] and need not be the result. The enforcers and the judiciary should concentrate on the considerable space for simultaneously encouraging SMEs and protecting the forces of competition. The South African law demands that they find this space.

2. Exemption of Agreements and Practices

The amendments add grounds for exemption of agreements and practices (hereafter generalized as "agreements.") The added grounds include: effective market participation of SMEs/HDPs; development, growth and transformation; and competitiveness and efficiency gains that promote employment or industrial expansion.

Some of these grounds are properly part of the competition analysis and should not require exemption. For purposes of strengthening rule of law, including predictability and transparency, it is important for the authorities to complete the competition analysis on its own terms and not to reflexively push cases into the space of exemption. Most agreements (and practices) are not anticompetitive and should not need an exemption. Agreements that are efficient and agreements that improve competitiveness are usually also procompetitive. Agreements that are anticompetitive are almost always harmful and should not be allowed absent a clear showing of a higher public benefit.[22] It would be bad antitrust and consumer policy to greenlight anticompetitive agreements on grounds that the contracting parties agree to give business opportunities to HDPs. This need not happen and I believe that the current competition authorities and Minister will guard against it, but a caveat is important especially for the future.

Good antitrust policy would maximize the space for determining what is not anticompetitive and not in need of exemption. To facilitate this objective, the authorities might give advisory opinions in ambiguous cases, helping to minimize the parties' risk of falling foul of an antitrust prohibition and incurring a penalty despite good faith attempts to comply.

By another point of view and possibly the intended one, parties to all agreements of ambiguous effect would be advised to seek an exemption. They may be likely to get an exemption in a wide grey area if they structure their deal to contribute sufficiently to transformation. The challenges of this course of action are the same as those connected with merger clearance, which we discuss below.

20 The category of SMEs is not fully congruent with the condition of and aspirations for HDPs. The expansion (or more realistic appreciation) of the concept of exclusionary practices in antitrust is one step, but not sufficient, to address and redress the concerns.

21 See language of then President Zuma, quoted at note 5, *supra*.

22 The most obvious category in which an exemption might be granted is combinations of very small market actors to obtain countervailing bargaining power against big players. These are not agreements likely to be subjected to a social obligation.

3. Mergers

Transformation is now a public interest objective that the authorities must consider in clearing mergers. This means that mergers — even if pro-competitive — may be conditioned on the parties' agreement to give shares in the deal or to offer partnerships in a joint venture, or (carrying over from pre-Amendment requirements but with more emphasis) to offer significant worker retraining and entrepreneurial capacity-building to HDPs.

South African competition jurisprudence already offers examples of merging parties' agreements to provide retraining for redundant workers and capacity-building for small suppliers. For many years, the authorities have imposed on merging parties a requirement to retrain redundant workers. The merger is causing redundancies, and unemployment is in crisis. It is fair for merging parties to invest in solving a problem they create? But the past programs have not been well-monitored. They may not be well designed or sufficient for workers' transitions. Much more work can be done in this area for creative solutions that maximize workers' potentials, even with the same amount of money that the firms currently spend on redundant employees and retraining.[23] Creative methodologies to reposition redundant workers could make a positive difference.

For building capacity of small suppliers, lessons can be drawn from the *Walmart/Massmart* case.[24] This large supermarket merger threatened the existence of the small suppliers, who feared their displacement by giant Walmart's global value chain. Walmart undertook, by court order, to invest 200 million Rands (U.S. $13 million) on top of 40 million Rands already spent by Massmart, for capacity training of small suppliers with a view to their qualification to enter the global value chain. In an *ex post* review, the program was found to have made a positive contribution to job creation and local procurement.[25]

But this is not the principal category envisioned by the merger Amendments. A principal category is the envisioned transformation, using mergers as the occasion for providing business opportunities to historically disadvantaged people.[26]

What will be the parameters of required contributions to transformation? On the side of the parties, will they be advised of the scope of required contributions so that they can assess the costs of their deal in advance of their commitment to it? On the side of the beneficiaries, since the Amendments envision new players, not just the "usual suspects," will prospective beneficiaries get notice of and access to the opportunities to participate? Will the standards be sufficiently clear so that the mandate and its execution are justiciable and the courts will have a template for assessment?[27]

The category presents challenges of transparency, clarity, predictability and equal treatment for those who will contribute to transformation; equality of opportunity of prospective beneficiaries to participate; and a selection profile that will maximize the chances of the beneficiaries' successful business engagements.

Skewed ownership is a critical problem for South Africa. Competition policy has been identified as a tool to help solve the problem. The degree of clarity and transparency, and of efficiency with due process in clearing or exempting transactions, will be hallmarks of successful implementation.

23 See Making Markets Work at p. 87.

24 *Wal-Mart Stores Inc. and Massmart Holdings Ltd.* 73 LM/Dec10 [2011]ZACT 41.

25 Ex-Post Review of the Wal-mart/Massmart Merger by Thulani Mandiriza,Thembalethu Sithebe and Michelle Viljoen, WORKING PAPER CC2016/03.

26 The category bears a resemblance to the Black Economic Empowerment ("BEE") program. The BEE program is voluntary. It does important work but its success rate is not entirely encouraging. See Athandiwe Saba, Has BEE been a dismal failure?, Mail & Guardian (Africa), 31 Aug. 2018.

27 Similar questions on a larger scale are relevant in the event of market inquiries based on untransformed markets.

III. CONCLUSION

In summary, I make six points.

1. More equity in the constituency of the South African economy is a necessary objective for South Africa.

2. There is a natural fit between more equity and more efficiency in applying competition law in South Africa. Until the long left-out majority are meaningfully integrated into the economic mainstream, the South African economy cannot begin to realize its potential for efficiency. Moreover, higher barriers and deeper entrenchment of cronyism and vested interests mean more fragility of outsider competition. This means that leaning towards inclusiveness, rather than leaning towards freedom for incumbents, is a sounder route towards competitive markets as well as fairly constituted ones.

3. The 1998 Act meant to embed the inclusiveness value in the law, but could have done more. The 2018 Amendments should be interpreted in this spirit: giving regard to SMEs and HDPs to make markets more dynamic; not to shelter inefficiencies. So interpreted, the Amendments should enhance both competition and equity in South Africa.

4. To the extent that equity and efficiency share common space, the law is both distributive to historically disadvantaged people and also good for consumers and competitiveness.

The law could be interpreted to prioritize inclusiveness outside of the space of overlap. For clarity, rigor and transparency, the authorities should complete the competition analysis first, and, at a second stage, do the public interest analysis, as they have been doing all of these years.[28]

5. Especially in the case of exemptions of agreements and clearance of mergers, the transformation objective may be paramount. Standards and transparency are critical elements.

6. The institutions face the challenge to make the Amendment project work so as to deliver, along with competitive markets, the twin Constitutional values of (more) equality and dignity. The competition institutions of South Africa are strong. The administrators of the system are thoughtful and they care about both equality and markets – which can deliver aspects of equality. The project of implementing the Amendments requires enormous thought, planning and hard work beforehand (which is being done) to lay the foundations of a system that is both administrable, with rule of law, and likely to engage the creative talents of the left-out majority.

28 See, e.g. *Shell South Africa and Tepco Petroleum Ltd.*, Case 66/LM/Oct01, Feb.22, 2002.

THE SOCIAL CONTRACT AT THE BASIS OF ANTITRUST: SHOULD WE RECALIBRATE COMPETITION LAW TO LIMIT INEQUALITY?

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I. INTRODUCTION

The social contract is a voluntary agreement among individuals by which organized society comes into being and is vested with its rights. While the social contract is a metaphor, the idea at its basis has great value, as it serves to conceptualize the relationship between the state and its citizens, as well as among citizens, and it creates the basis for the legitimacy of state action.

The idea of a social contract appears in the writings of Socrates, and was later developed by modern philosophers. While each suggested a somewhat different basis for the social contract, their theories share several common traits: men voluntarily choose to submit to the authority of a state; they do so in order to be able to live in a civil society, which is conducive to their own interests; the state is directed towards the common good, understood and agreed to collectively. Most philosophers also agree that mutual security and the protection of social and individual welfare stand at the basis of the social contract.

Competition law, like any other form of governmental regulation, is part of the social contract. In market-based economies it constitutes an important element of the socio-economic portion of this contract, which is focused on increasing total and individual welfare. It does so by ensuring that privately-erected artificial barriers to competition are prohibited.

Accordingly, for the social contract to work well, total welfare should increase. Indeed, antitrust is based on the assumption that competition can reduce prices and increase all types of efficiency. The protection of competition also serves non-economic goals such as dispersing power and opportunity, reducing harmful political effects, and supporting democracy.

The social contract should also ensure that individual welfare is increased, at least in the long-run. Antitrust attempts to further this goal in several cumulative ways. Most basically, consumers enjoy better and cheaper products and services, thereby increasing their ability to better fulfill their individual preferences. Competition can also positively affect social mobility and equality of opportunity of members of society.

Of course, competition is not a panacea; it does not work well where significant market failures exist, such as information asymmetries, negative externalities, free riding, or collective action problems. Furthermore, competition does not attempt to solve all welfare issues. Rather, it is part of a broader set of governmental instruments designed -at least in theory- to collectively meet the goals of the social contract. To give one example, education and retraining programs, that increase market entry and mobility, are essential parts of a social contract.

Unfortunately, it seems that at least in some economies the social contract is not working well. Recent years have envisaged an increased rate of dissatisfaction with market economies. A growing number of citizens feel that the promises of the competition-based market system, which form an important part of the implicit social contract, are not fulfilled and that markets are no longer working in their favor. Indeed, statistics indicate that social mobility is low; that wealth inequality keeps rising; or that education and social security do not create viable solutions for workers to ensure that wide geographic areas or occupational groups are not significantly and irreparably harmed. In the U.S. and the EU, for example, the economic prospects of young people are, for the first time in several decades, grimmer than those of their parents.

This, in turn, creates social unrest and a degree of distrust in the market system which, in turn, reduces the ability of markets and societies to function well. Public debates bring to the forefront questions of whether capitalism and liberalism, the way they are currently practiced, indeed further the interests all members of society.

These developments require us to examine the social contract from which state regulation acquires its legitimacy and determine whether its instruments should be changed, to meet these new challenges. This short article focuses on whether equality and inclusive growth goals should play a more pronounced role in antitrust.

To do so, the connection between social contract and inequality is explored. Next, the interrelation between antitrust and inequality is analyzed. The article then analyzes the assumptions that antitrust is based upon, and the way they are met in the real world. The last part suggests some ways in which antitrust can incorporate some measures designed to reduce inequality, without significantly changing its focus.

II. THE SOCIAL CONTRACT AND INEQUALITY

Is equality part of the social contract, and if so – what weight should be given to it when it clashes with other values? Equality plays different roles in the writings of social contract theorists. All modern philosophers assume that a normative (hypothetical) social contract is created when free and equal persons come together and agree to create a new collective body (the state), directed at the good of all. As such, it should not serve the interests of one group over another. Otherwise, those suffering from such inequality would not have agreed to join the collective.

This idea is embodied, in its most famous form, in Rawls' *A Theory of Justice*,[2] in which he argues that the moral and political content of the social contract is discovered via impartiality. He suggests the use of a symbolic veil of ignorance, behind which each person is denied any particular knowledge of one's circumstances, such as one's gender, race, talents or disabilities, social status, or preferences. Persons are also assumed to be rational and disinterested in one another's well-being. These are the conditions under which, Rawls argues, one can choose principles for a just society, on which the social contract can be based. Because no one has any particular knowledge that could be used to develop principles that favor his own particular circumstances, the principles chosen from such a perspective are necessarily just.

Rawls argues for two principles of justice that would emerge in such a situation, which determine the distribution of both civil liberties and social and economic goods. The first states that each person is to have as much basic liberty as possible, as long as everyone is granted the same liberties. The second principle states that while social and economic inequalities can be just, such inequalities must be to the advantage of everyone. This means, in Rawls' view, that economic inequalities are only justified when the least advantaged member of society is better off than she would be under alternative arrangements. Accordingly, short-term inequality might be justified in order to serve long-term justice.

Of course, the Rawlsian ideal of a social contract is not the only one possible. Other leading theories include, *inter alia*, utilitarianism and the capabilities approach. Utilitarianism emphasizes the maximization of utility, regardless of its distribution among individuals.[3] Inequality should be remedied only if it harms overall utility. The capabilities approach is based on two core normative claims: the freedom to achieve well-being is of primary moral importance, and freedom to achieve well-being is to be understood in terms of people's capabilities, that is, their real opportunities to do and be what they have reason to value. To enable every person to enjoy his right to well-being, at least at a minimum level, distribution should relate not only to the resource which is redistributed, but also to each individual's basic capabilities to use this resource to further his goals. Nobel laureate Amartya Sen emphasizes that this focus is the only way to ensure real equality between individuals to achieve their goals.[4]

Despite the plethora of theories regarding the social contract at the basis of the state, it can be argued that, at least in most Western societies, equality should serve as a basic guiding principle of the social contract. At a minimum, inequality should only be accepted if its benefits to the common good significantly outweigh the harm it causes to (some) individuals, and even those individuals enjoy benefits from the overall regulatory scheme, to make their position Pareto-optimal in the long run, relative to a different set of rules governing and regulating society. The following analysis takes this minimum as a basis for the analysis.

Inequality in the marketplace has two main facets: inequality of opportunity to enter and expand in the market (suppliers), to take advantage of what it can offer (consumers); and inequality of wealth, which affects the ability to act both as suppliers and as consumers. Inequality of opportunity may clash with the social contract in at least three ways. First, it does not justly disperse the opportunities for participating in and enjoying the benefits of the marketplace, as it allows some to enjoy a comparative advantage over others. Second, it may clash with the economic goal of increasing the total welfare pie, which could then be distributed among members of society. As economic studies have shown, inequality reduces overall economic growth by preventing or limiting the ability of some parts of society to contribute to the marketplace. Third, and relatedly, inequality of opportunity has psychological consequences: one's satisfaction and motivation to take part in an action is affected by the opportunities others have relative to himself. Accordingly, inequality of opportunity harms individual and societal welfare by creating social unrest which might shake the foundations of society.

Observe, however, that while equality of opportunity in the long-run can be viewed as a foundational legitimizing principle of Western societies, this does not imply complete equality of opportunity at any point in time. Rather, much depends on the conditions which have led to such inequality. To illustrate, a comparative advantage which is a result of hard work and effort, as such, should not be viewed as a manifestation of unequal opportunity.

2 John Rawls, *A Theory of Justice* (Harvard University Press 1971, revised ed., 2000).

3 See, e.g. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1907).

4 Amartya Sen, *Choice, Development as Freedom* (Knopf 1999); *The Idea of Justice* (Harvard University Press 2009).

Inequality of wealth raises more difficult questions. When it results from inequality of opportunity, it is deemed to be unjust. Yet inequality of wealth can also result from other factors, such as talent and motivation. Their acceptance as a basis for inequality of wealth depends on the normative concepts and assumptions at the basis of the social contract. In communist economies inequality of wealth is generally unacceptable, while in market economies it is treated, at least to some extent, as an inherent and even important part of the social contract, as elaborated below.

Of course, reality is much more complicated than this idealized conceptualization of a contract struck between members of society. The idea that citizens are free to choose a society which adheres to their normative values can easily be questioned. So can the idea that the state is a benevolent actor, which strives to fulfill its goals for the welfare of all. Therefore, the social contract is an abstract notion, not to be found in the real world in its pure form. Yet the legitimacy of state action is dependent, in many citizens' eyes, on such action serving at least some basic normative principles that further the common and individual good. In such an environment, extreme and long-term inequality can have a significant destabilizing force. Accordingly, this article examines the current application of antitrust in light of this social contract.

III. ANTITRUST AND INEQUALITY: THE BASIC DILEMMA

Let us now examine the role inequality plays in antitrust. As elaborated, antitrust has an intricate and dual relationship with inequality, which creates a basic tension.

In most jurisdictions, antitrust is applied in a manner in which inequality considerations are dealt with only indirectly. Nonetheless, antitrust's inherent characteristics reduce inequality in several ways. First, by lowering artificial entry barriers, antitrust allows more people to enter the market and compete or expand in it based on merit. Second, by lowering prices and increasing quality, it enables more consumers to enjoy market benefits and it reduces inequality of wealth. Third, by reducing the ability of market players to enjoy non-merit based market power, both types of inequalities are reduced. This is because market power might have been translated into political power and influence, thereby enabling strong groups to enjoy a disproportional part of the welfare pie.

At the same time, antitrust naturally furthers inequality of wealth, at least in the short run. The very concept of competition encapsulates the idea of winners and losers; of Darwinian forces that shape the marketplace based on consumers' preferences and technological abilities. Accordingly, competition naturally results is an inherent inequality of wealth between suppliers. Should the winning suppliers enjoy significant market power, this can also lead to wealth inequalities between suppliers and consumers.

Yet this resulting wealth inequality, it is believed, is what drives competition in the first place. It is part of the engine and driver behind competition. Accordingly, inequality of wealth is often treated as an inherent and even important aspect of competition. Such inequality, however, is assumed to be short-term with regard to each and every supplier. Competition is seen as a dynamic process, in which those that currently possess market power can be replaced by newcomers. Therefore, most antitrust laws do not place significant weight on issues of the short-term distribution of the benefits from trade. Moreover, it is generally believed that most markets will be competitive once artificial entry barriers are eliminated, and thus inequality will be minimized by the market's invisible hand. Furthermore, inequality is better addressed by other regulatory tools. The question is thus whether and at what point does inequality stop furthering the social contract.

IV. THE DILEMMA: INCLUSIVE GROWTH GOALS IN DEVELOPED JURISDICTIONS

The goal of inclusive growth – reducing inequality in the distribution of benefits created in the marketplace through antitrust – has been advocated for developing jurisdictions. Professor Fox, a leading voice in this regard, argues that such a focus is necessary in order to enable mobility, incentivize entrepreneurship, and stimulate innovation.[5] It satisfies a need for legitimacy, since a distribution-blind law may not take root. Furthermore, opportunity only to the already powerful means that the country is not making efficient use of the talents and potential contributions of large segments of its population.

Should suggestions for inclusive growth as part of antitrust also apply to developed jurisdictions? The time is ripe for such an exploration, given global dissatisfaction with at least some aspects of capitalism and market liberalism.

5 Eleanor M. Fox, "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia," (2000) 41 HARV. INT'L L. J. 579.

To answer this question, we need to reevaluate the assumptions that lead developed countries not to include reduction of inequality and inclusive growth as direct goals of antitrust. Below I analyze four basic assumptions that, I believe, stand as the basis of the existing status-quo.

A. Equality of Opportunity

It is generally assumed that market players from all parts of society have relatively equal opportunity to enter and to expand in the market. While it is acknowledged that people possess different skills and resources, it is generally assumed that the state's efforts in creating and maintaining a reasonable educatory system, and an environment with well-functioning market institutions and due process, create an enabling environment for most people to take advantage of market opportunities, based on their skills and motivations.

But is there real equality of opportunity? At least in some jurisdictions the answer is negative. Successful entrepreneurship in many markets – even more pronounced in today's technologically advanced world – requires inputs that the market or the state do not or cannot easily provide to all potential entrants (e.g. high levels of education). Inequality in such inputs can lead to large discrepancies in access opportunities. Political economy influences might create additional entry barriers.

Indeed, statistics show that social mobility is low. If the market system truly created equality of opportunity, then social mobility should have been at a much higher level. So even according to the free market paradigm, something has gone wrong and the current system cannot be assumed to provide equal opportunity to all market participants.

B. The Market Will Reduce Most Instances of Inequality in the Long Run

The second assumption is that once we deal effectively with artificial entry barriers, the market's invisible hand will reduce most instances of inequality, at least in the long run.

Undoubtedly, limiting artificial entry barriers into markets can increase equality. However, as elaborated above, inequality of wealth is an integral part of the market system, at least in the short and medium run. Furthermore, market failures or political economy influences might create conditions of significant inequality that may not be easily eroded. In such instances, antitrust is a limited tool.

Exogenous factors further increase inequality of wealth on both national and international levels. The main factor is globalization, which strengthen competition over the locus of businesses. Another exogenous factor involves technological changes which reduce the need for many types of human interventions in production or supply processes. This factor also increases the difficulty involved in supplying a safety net in the form of retraining.

C. Inequality is Inherent to Competition

Indeed, inequality of wealth is an inherent and important part of the competitive process that serves to increase the total welfare pie. Yet it is a matter of degree and of causes. If inequality results from unequal opportunities to participate in the market or take advantage of its offers, then it might be viewed as unjust. Furthermore, much depends on the degree of inequality created by market interactions.

D. Antitrust is not the Correct Tool

The fourth assumption is that even if equality should take precedence in some cases, antitrust is not the correct tool to further it. More efficient tools might include, *inter alia*, tax, social security, support of small and medium businesses, education, requirements for foreign direct investment and creating a better infrastructure for commerce. These tools can, at least theoretically, rebalance the social contract by augmenting and complementing antitrust.

While these tools are important, most suffer from inherent limitations. Education, for example, is very long-term; Social security suffers from psychological limitations, because its recipients might feel that they are left out of the market and are dependent on the government rather than on their own efforts; and political effects shape at least some of these tools so that they are not applied efficiently.

These assumptions challenge the way that free market ideals are currently applied. One of the main arguments is that the social contract is not working well. It promised equal opportunity for all to participate in markets; that if people invest in doing their best (e.g. spend time and resources on higher education), then most will have a good chance to recover their investment and lead a comfortable life; and that the combined efforts of individuals who act in such a way will further public welfare. These promises have not been fulfilled, at least for some citizens. The increased disbelief in the market system is troubling, because for markets to operate, people must believe in their mechanism. Mistrust creates unrest and might disintegrate the social fabric. It also reduces the number of people who are willing to contribute to the market game.

Accordingly, the next section suggests examining the current application of antitrust in light of this failure of the social contract.

V. THE ROLE OF ANTITRUST IN LIMITING INEQUALITY

While education and infrastructure might be more important for increasing equality in the long run, some changes in antitrust might nonetheless be justified as part of an overall societal effort to reinstate a stable social contract which is based on a belief in the market as a source of welfare. While these changes need not be extreme, they can play a significant part in furthering the social contract.

A. When Fine-tuning Might be Required

Before we delve into some suggestions, it is important to observe that antitrust already includes some focus on distributive effects. Most importantly, most laws further the goal of consumer welfare, rather than total welfare. Yet consumers are aggregated into one group, not looking further into the effects on different classes of consumers affected by the conduct. As Farrell & Katz observe, "rich and poor consumers may be differentially affected by an antitrust decision; distributional concerns would suggest weighing the impact on the poor more heavily, but a consumer surplus standard insists that they count equally."[6]

To strengthen the belief in the social contract at the basis of antitrust, a fine-tuning of the system might be required: giving more thought and weight to where profits accrue: which sub-groups are affected, and the importance of the transaction to their welfare as well as to total welfare. Recognizing differences can create an opportunity for correcting some of the ills of the current system. Yet it must be done carefully, to ensure that the social contract is indeed fulfilled.

Let me give three examples of cases where the above suggestion may be relevant. I do not argue that these examples should necessarily affect the application of antitrust. To determine whether such a change is justified, a deeper analysis is required, which is beyond the scope of this article. Such an analysis must take into account, *inter alia*, the effects of more complicated and nuanced rules on enforcement costs and on the conduct of market players and enforcers, and whether the competition authority is the right body to engage in more nuanced social analysis. Nonetheless, the examples illustrate instances in which it is worth considering performing such an analysis.

The first example involves a case in which the relevant transaction makes all consumers and suppliers better off or at least does not harm their welfare with regard to the specific transaction. On its face, this transaction should be allowed. Yet this analysis disregards existing discrepancies in society. Let us assume that indeed all consumers are better off, but some – the more wealthy ones – are much better off than the poor ones. Such a transaction will increase existing wealth discrepancies in society, thereby potentially making the overall position of the weaker members of society worse off.

The second example involves a case which is Pareto-optimal to all consumers when focusing only on the effects of the specific transaction. Yet this time only a distinct sub-group of consumers benefit from the transaction. This can be illustrated by two extreme examples: lowering the costs of luxury cars would only affect the wealthier members of society; and lowering the costs of cheap furniture would mainly affect the weaker members of society. Once we look more carefully at which sub-group of consumers is affected, it is clear that in a world of scarce enforcement resources, the second case may serve societal needs and the social contract better. The second case may be Pareto-optimal to all members of society in the long-run.

The third example involves a case in which not all consumers are better off. Rather, some sub-group(s) are better off, and some are worse-off. Under the laws of most jurisdictions, such a transaction would not be allowed. Yet despite the fact that Pareto optimality is not met in the specific transaction, it might be met in the long run, if the transaction significantly benefits the weaker members of society while only marginally

6 Joseph Farrell & Michael L. Katz, "The Economics of Welfare Standards in Antitrust," (2006) COMPETITION POL'Y INT'L. 1.

harming the wealthy ones. It might also serve Kaldor-Hicks efficiency, whereby overall welfare is increased. Kaldor-Hicks requires that the overall benefits to those that are made better off could in theory compensate those that are made worse off.

B. Some Suggestions

Even if one believes that the social contract is better served by giving weight to equality and inclusive growth considerations, the question remains whether antitrust is necessarily the best tool to achieve these goals. Antitrust suffers from significant inherent limitations. It has a limited number of instruments at its disposal, that mainly include fines and prohibitions; it does not have the information or the ability to see the larger picture, of all the tools available to the state to remedy a problem; it does not have the democratic mandate to engage in balancing exercises which involve public interest considerations that go beyond pure competition concerns.

In light of these limitations, this section suggests several ways in which antitrust can better serve the social contract, without significantly changing its focus and the tools at its disposal, yet introducing a more nuanced distributional dimension into it.

The above considerations should *affect the choice of cases*, especially where enforcement resources are scarce. The authority should consider focusing on market access issues which affect the ability of the weaker parts of society to take part and participate in the market on a larger scale than their current conditions allow. It should also consider giving priority to cases which increase consumer welfare of the weaker groups in society. To use the above example, lowering entry barriers in the market for lucrative cars should be given a lower priority than in the market for cheap furniture.

Moreover, antitrust enforcers should attempt to *unpack the aggregatory group of consumers*, where it is likely to significantly increase social welfare. In relevant cases, Kaldor-Hicks optimality should be preferred to Pareto optimality. To reduce uncertainty, however, the authority should develop tools that clearly spell out the balance to be sought, and only divert from the aggregatory analysis where a more nuanced analysis is likely to bring about significant benefits. Transparency is an essential element of this analysis, to limit political pressures and to increase awareness of the considerations taken into account.

Furthermore, even if antitrust is not the best instrument for furthering the social interest in securing jobs for workers for the long-term benefit of society, we still need to ensure that the application of antitrust *does not inhibit the application of other policies* which are aimed at furthering reinforcing goals. Most importantly, antitrust should not create a *de jure* or *de facto* veto power to antitrust considerations, where it is in the public interest that they be balanced with other considerations.

In addition, the Authority's *advocacy role* should be used to advocate the adoption of governmental policies that further the social contract by complementing antitrust. It should also explain to the wide public the logic behinds the choice of its actions, to strengthen their understanding of the market system and the trust that the actions taken are indeed in line with the social contract. This is especially important where the positive effects of its actions could only be observed in the long run; or where the legal tools are inherently limited and citizens might get the impression that the system is not working for them. Finally, the tool of *market inquiries* enables competition authorities to point out harmful public restraints.

VI. CONCLUSION

Significant and persistent inequality in favor of specific social groups creates a major challenge to the existing social contract, or at least to the way we apply it in practice. This has led to social tensions and unrest around the world. It is thus time to question whether our tools must be changed to enable a better furtherance of the goals of this contract.

As this article argues, the challenges to the social contract, as it is currently applied, go to the heart of the goals at the basis of antitrust. They require that antitrust be sensitive, in appropriate cases, to distributional effects. Yet loading the delicate task of changing the current socio-economic fabric on antitrust alone is highly problematic and might negatively affect the ability of antitrust to achieve its other goals. Antitrust should be one of several tools harnessed for advancing equality and inclusiveness.

MARKET POWER: THE INEQUALITY CONNECTION

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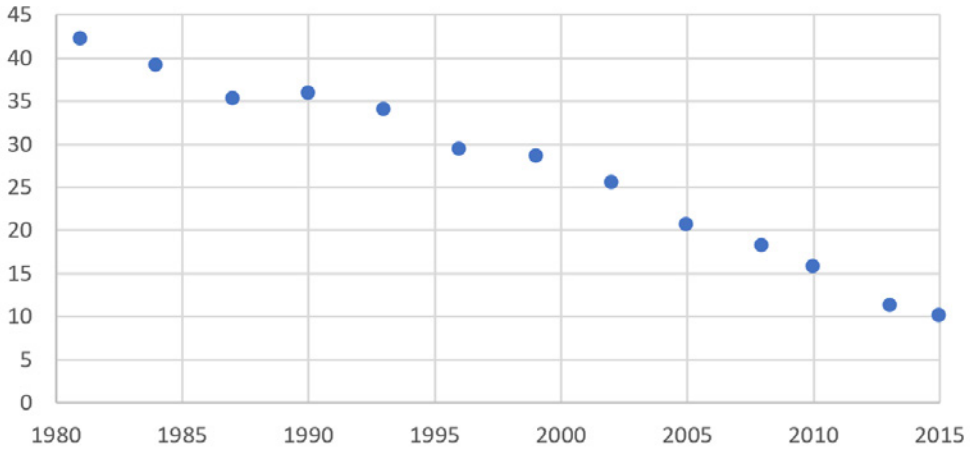
I. INTRODUCTION

Recent research has emphasized the extent to which inequality within individual countries has been growing.[2] At the same time, some observers have questioned whether inequality between countries has also grown over time or even whether it may have decreased due to the movement of jobs from developed countries to developing countries. Careful analyses have suggested that the worldwide Gini coefficient, a common indicator of dispersion of income or wealth, has only changed slightly or shown a lessening of relative inequality.[3] "Absolute" Gini measures, that compare the real value of differences between income or wealth, will automatically suggest that inequality has increased substantially, if income or wealth have increased proportionately across population groups.[4]

With the policy emphasis on inequality, a seemingly reduced emphasis has been placed on poverty. World Bank figures suggest that poverty has declined dramatically over the last four decades, which may seem intuitively at odds with some authors' suggestion that global inequality is rising. Figure 1 shows World Bank estimates for the percentage of the worldwide population living in poverty based on one daily income figure.

Figure 1. Poverty headcount ratio at $1.90 per day (2011 PPP)(% of population)



Source: World Bank
https://data.worldbank.org/indicator/SI.POV.DDAY?end=2017&start=1981&view=chart

The observations that inequality is rising and poverty falling can be completely consistent; if the real income of the poor double and that of the wealthier triple, inequality increases while poverty would fall. One might reasonably argue that an increase in global inequality may be less of a concern when poverty levels are falling than when poverty levels are rising. The focus on inequality in the popular discourse has the perverse effect of reducing the policy focus on reducing poverty. Policies for addressing the two policy foci can differ, though addressing market power may be common to both.

This paper focuses on the inequality impacts of market power, while explicitly recognizing that poverty reduction is another fundamental and related topic. Reducing market power is another route to reducing poverty. One example of this is a case study of competition in mobile telephony services in Mexico in Ennis et al. (2017),[5] which shows that improving competition and market operation in this industry was followed by price decreases that translate, just in one sector, into a 4 percent increase in disposable income for the poorest.

2 See, notably, work by Piketty & Saez.

3 Lakner, C. & B. Milanovic. 2013. "Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession." Policy Research Working Paper No. 6719. World Bank, Washington, DC.

4 See Wade, R. Undated blog. "Our misleading measure of income and wealth inequality: the standard Gini coefficient. http://triplecrisis.com/our-misleading-measure-of-income-and-wealth-inequality-the-standard-gini-coefficient/ or Anand, S. & P. Segal, 2015 "The Global Distribution of Income," in Atkinson, A.B. & F. Bourguignon, *Handbook of Income Distribution, Volume 2A,* Elsevier, Amsterdam.

5 See Ennis, S., P. Gonzaga & C. Pike (2017), "The effects of market power on inequality," *Competition Policy International*, October.

The suggestion that inequality is rising is sometimes taken as an indictment of the market mechanism or of trade. Such a view is overly simplistic. Substantial empirical and political choice evidence suggests that many aspects of production and productivity work better in market mechanisms than in fully-planned allocation mechanisms. Using tax mechanisms as redistributive schemes has income-reducing consequences that can be very substantial, and for which some interesting experiments are known that show rising marginal tax rates can reduce incentives to earn by substantial amounts, creating large deadweight losses.[6]

The point of this paper is that one of the best ways to improve equality without incentive-distorting tax remedies is through government policy to reduce exercise of illegitimate market power. This can have the further benefit of effectively raising the real income of the poor, when sectors experiencing increased competition provide goods and services to the poor, as can be the case for mobile phones and many other basic products.

II. MODEL

In recent research, Ennis et al (2019)[7] provide indications of the change in wealth that would have occurred from moving to competitive margins in an economy that starts with excess or unexplained margins. The redistributive effects of market power on wealth and income depend on a few key variables: a market-power indicator (mark-up); the income share of labor; the ratio between the average saving rate and the marginal propensity to save; and the observed difference between income and wealth shares in the presence of market power. A reduction of market power will increase (decrease) the income and wealth of population groups whose income share exceeds (is less then) the corresponding wealth share. Moreover, to the extent the marginal propensity to save is greater than the average propensity, the wealth effects of market power for the wealthy are increased, as they will tend to save a higher percentage of their increased income than their average saving.

If the marginal propensity to save equals the average propensity, a relatively simple formula emerges that links differences in wealth shares between an economic steady state with market power and one with competition, for each wealth group as a function of mark-ups and labor share of income. Ennis et al. (2019) find that in a steady state, where f_i and y_i represent shares of wealth and income respectively for group i under competition (c) or market power (m), the wealth and income share under competition is given by equations (1) and (2) in which s' represents marginal savings rates, s represents average saving rates, μ represents the country's unexplained mark-up, and α_L represents the labor share of income.

$$f_i^c = f_i^m + \frac{\frac{s'}{\bar{s}}(\mu - 1)}{1 - \frac{s'}{\bar{s}}(1 - \mu\alpha_L)}(y_i^m - f_i^m) \qquad (1)$$

$$y_i^c = y_i^m + \frac{\mu - 1}{1 - \frac{s'}{\bar{s}}(1 - \mu\alpha_L)}(y_i^m - f_i^m). \qquad (2)$$

They then find that the difference, for any income group i, between shares of wealth (f_i) in the competitive (c) and uncompetitive state (m) is the same as the difference in shares of income (y_i) in the competitive and uncompetitive state, and is a function of the Lerner index (l)[8] and labor share of income (α_L), and the difference between income shares and wealth shares of that group i, as in equation 3:

$$f_i^c - f_i^m = y_i^c - y_i^m = \frac{l}{\alpha_L}(y_i^m - f_i^m). \qquad (3)$$

6 Feldstein, M. (1995) "The effect of marginal tax rates on taxable income: a panel study of the 1986 Tax Reform Act," *Journal of Political Economy* 103: 551-572 suggests that the impacts of marginal tax rates on income are at least one and as high as 3.5, and suggests that deadweight losses from increasing marginal tax rates can be very large.

7 See Ennis, S., P. Gonzaga & C. Pike. (2019) "Inequality: a hidden cost of market power," *Oxford Review of Economic Policy* 35(3):518-549. https://doi.org/10.1093/oxrep/grz017.

8 The Lerner index is defined as (P-C)/P where P is the price with market power, and C is the marginal cost, which in the model used, equals average cost.

Moreover, if the marginal productivity of labor is constant, this simplifies to a relationship (4) involving mark-ups (μ) and the relative income and wealth shares with market power.

$$f_i^c - f_i^m = y_i^c - y_i^m = (\mu - 1)(y_i^m - f_i^m). \qquad (4)$$

The key point to observe in this model is that mark-ups, marginal propensity to save, average propensity to save, labor share of income and income and wealth shares for each group in the state with market power (i.e. the current state) are observable. This means that results for the differences between income and wealth shares for market power and competitive states can be calibrated from these observable variables, even though the wealth or income in the competitive state is not observable.

These models do not directly consider effects of profit increases being shared with workers in firms with market power profits. It is worth noting that some research (e.g. in the financial sector) suggests that profit distributions to workers goes particularly towards the best paid workers, such as management and high performers, rather than being shared equally across all workers.

III. ESTIMATES

Ennis et al. (2019), Gan et al. (2019), Ennis & Kim (2015), Creedy & Dixon (1998), and Comanor & Smiley (1975)[9] provide estimates of impacts. According to the calculations in Ennis et al. (2019), the labor share of income has relatively low impact on cross-country differences in wealth distribution, but mark-ups and the ratio of marginal to average savings rates can both have very substantial effects on wealth and income distributions. If anything, the marginal savings rate impact is likely underestimated, as one may hypothesize that marginal savings rates are higher for high income groups than low income groups.

Market power is estimated as unexplained mark-ups from a comparison of mark-ups across countries and industries. The unexplained mark-up is that extent to which mark-ups for an industry in one country exceed the lowest mark-up observed for that industry among the countries studied. This approach implicitly includes adjustments for capital needs that differ between industries and necessary rates of return. This technique involves estimating mark-ups for individual companies of each industry over the long-run and aggregating up to the industry level using the method of Hall (1988) and Roeger (1995).[10]

The money value of the change in wealth for the top 10 percent that could come from moving to a competitive mark-up in a country's industries is represented in Table 1 for three relationships between marginal savings rates and average savings rates, the first holding them equal, while the second and third assuming that marginal savings rates are, respectively, 50 percent and 100 percent higher than average saving rates.[11] The findings suggest that, of the eight countries studied, the largest impact of inequality in total USD value occurs in the United States. This is due to a combination of its much larger population, economic size and wealth levels than other countries. The impact of population size suggests that a per capita wealth impact might be more appropriate to perform a comparative cross-country analysis that is not driven by national economic size.

9 See Ennis, S., P. Gonzaga, and C. Pike (2019) "Inequality: a hidden cost of market power," *Oxford Review of Economic Policy* 35(3):518-549 https://doi.org/10.1093/oxrep/grz017; Gans, J., A. Leigh, M. Schmalz & A. Triggs (2019) "Inequality and market concentration, when shareholding is more skewed than consumption," *Oxford Review of Economic Policy* 35(3): 550-563. Ennis, S. & Y. Kim "Market power and wealth distribution," in OECD/World Bank *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth*. World Bank Publishing: Washington, D.C.; Creedy, J. & R. Dixon "The relative burden of monopoly on households with different incomes," *Economica*, 65:258-93; Comanor, W. & R. Smiley (1975) "Monopoly and the distribution of wealth," *Quarterly Journal of Economics*, 89: 177-94.

10 See Hall, R. (1988) "The relation between price and marginal costs in U.S. industry," *Journal of Political Economy* 96: 921-947 and Roeger, W. (1995) "Can imperfect competition explain the difference between primal and dual productivity measures? Estimates for U.S. manufacturing," *Journal of Political Economy* 103:316-331.

11 The ratio of 2:1 of marginal to average savings rates may be closest to estimates in the literature, according to Ennis et al. (2019).

Table 1. Money Value of the Change in Wealth of the Top 10 Percent (billions USD PPP)

Country	$s' = \bar{s}$	$s' = 1.5\bar{s}$	$s' = 2\bar{s}$
Canada	119.8	234.0	447.4
France	274.3	512.8	907.3
Germany	603.0	1,152.5	2,117.3
Japan	439.2	861.4	1,658.6
Korea	195.2	364.6	644.0
Spain	211.5	411.4	780.0
UK	112.9	209.1	363.9
USA	2,526.2	4,883.9	9,156.8
TOTAL	**4,482.1**	**8,629.6**	**16,075.2**

Table 2 calculates the money value in change in per capita wealth of the top 10 percent that would come about from a change to the competitive mark-up. The wealth attributed to market power is thus averaged over the entire population; no suggestion is here made that the average individual wealth levels would actually move up by these amounts, as many other factors may be at play in determining the distribution of wealth levels. Nonetheless, the results are suggestive.

Table 2. Money Value Per Capita of the entire population from Change in Wealth of top 10 Percent (USD PPP)

Country	$s' = \bar{s}$	$s' = 1.5\bar{s}$	$s' = 2\bar{s}$
Canada	3,371	6,584	12,589
France	4,282	8,005	14,163
Germany	7,454	14,247	26,173
Japan	3,450	6,767	13,029
Korea	3,871	7,231	12,772
Spain	4,552	8,854	16,787
UK	1,774	3,285	5,717
USA	7,923	15,317	28,718
TOTAL	**4,585**	**8,786**	**16,243**

In particular, Table 2 suggests that the two countries with the largest per capita effects on wealth are Germany and the U.S. The country with the lowest impact from market power on a per capita basis is the UK, with an effect that is only 23 percent of the size of that in Germany and the U.S. It is worth noting that the overall levels of inequality in the countries are not the focus here; an economy may have low market power (associated with relatively low mark-ups) while still having substantial economic inequality for other reasons.

IV. CONCLUSION

Overall, this analysis tends to confirm the possibility of substantial wealth and income effects from market power. Using the model of Ennis et al. (2019), it can be shown that, out of eight major OECD countries reviewed, the per capita effects of market power are highest in Germany and the U.S., while lowest in the UK. The size of effects in Germany and the U.S. is about 4.5 times larger than in the UK. There is thus significant variation between countries in the size of these effects according to the model used.

A number of caveats are needed for these results. In particular, the data used for calculating mark-ups is long-run, starting from more than 40 years ago, and not including the most recent data that may show an increase in mark-ups in many countries. This approach is one that is very much based on long-run equilibriums, which is appropriate for the type of model that is calibrated, in which the focus is on steady states that would theoretically only be achieved in the long run. But to the extent that there have been recent changes,[12] or improvements in competitive conditions in some of the studied countries compared to others, these changes are not reflected in these analyses. Thus these results should not be taken as a comment on current or recent competition law enforcement and policy.

The approach described has not explored the relative degree of legitimate and illegitimate market power in the 8 countries. Market power can arise from generally positively viewed developments such as innovation (leading to patents) or investment in brand differentiation (which also creates an incentive to maintain quality). On the other hand, some market power arises from what may be considered illegal, illegitimate or less appropriate sources, such as cartels, abuses of market position, mergers that create market power or government regulation that creates market power through entry barriers or other constraints on competitive action. In the future, it may be worth joining the analysis of this paper with a measure of the extent of illegitimate market power compared to positively-viewed market power, in order to gain a sense of their relative impact. The more market power that flows from illegitimate sources, the more value arises from successful government competition policy. As an illustration, supposing that illegitimate market power accounts for one half of the total mark-up from market power and that marginal savings rates are twice the average saving rates, then for the lower 90 percent of the wealth distribution, the average per capita wealth benefit from effective competition could amount to USD 8,121.

12 See De Loecker, J., J. Eechout & G. Unger (2019) "The rise of market power and the macroeconomic implications," mimeo of November 15, 2019 which shows that average markups have risen substantially between 1980 and 2016, doubling or more, driven by the upper tail, while medians have remained relatively constant, or Hall, R. (2018) "New evidence on the markup of prices over marginal costs and the role of mega-firms in the US economy," discussion paper, NBER.

THE CURIOUS CASE OF COMPETITION LAW AND HEALTH EQUITY

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I. SETTING THE SCENE: WHY DO EU HEALTH SYSTEMS MOVE TOWARDS MARKET DRIVEN HEALTHCARE DELIVERY?

Healthcare systems are an essential part of Europe's high levels of social protection and contribute significantly to Europe's ideals of social justice and social cohesion.[2] As highlighted by the Council's statement on the common values and principles of the EU healthcare systems ("The Statement"),[3] there are some core values and principles that are shared across the EU about how health systems should respond to the needs of the populations and the patients they serve.[4] Essentially, these are universality, access to good quality care, equity, and solidarity.[5] *Universality* means that "no-one is barred access to health care";[6] The notion of *solidarity* closely relates to "the financial arrangement of the national health systems and the need to ensure accessibility to all";[7] *equity* relates to "equal access according to need, regardless of ethnicity, gender, age, social status or ability to pay."[8] EU Health systems also strive to reduce the existing health inequalities, a major concern for most States in Europe.[9]

Along with the common values and principles they share, European health systems share also some common concerns, in particular increasing health expenditures that are due mainly to three factors: rising life spans, (and therefore, ageing populations) increasing expectations, and the emergence of healthcare technologies.[10] Undoubtedly, whereas these factors contribute to the well-being and quality of life of EU citizens – especially in terms of life longevity – they also drain resources from national health budgets.[11] This, in turn, has led some European countries, such as the UK and the Netherlands to introduce to some degree competition in the delivery of healthcare services as a device to curb continuous increases in healthcare spending.[12]

The role of competition in healthcare is a hotly debated topic with some considering it "anathema" and others seeing it as "a magic bullet."[13] For instance, proponents of the introduction of competitive forces in healthcare vigorously support the claim that hospitals and other medical facilities owned and operated by the State often fail to operate efficiently and respond to the needs and wants of their patients.[14] Because these institutions, they contend, are directly funded from government, with budgets that are determined historically and bear little relationship with their performance, they lack the incentives to restrain their costs and invest in quality.[15] If, however, the argument goes, patients were given the opportunity to choose where they could go for treatment, and if the money followed this choice, so that medical facilities would only obtain funding from the public purse if they successfully attracted patients, then the resultant competition among these facilities would strongly incentivize them to improve the efficiency and quality of their services.[16]

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2 Council Conclusions on Common values and principles in European Union Health Systems, Official Journal of the European Union (2006/C 146/01), 1. This specific document builds upon discussions that have taken place in the Council and with the Commission as part of the Open Method of Coordination, and the High-Level Process of Reflection on Patient Mobility and development in the field of health.

3 *Ibid.*

4 *Ibid.* at 2.

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 W. Sauter, "The Impact of EU Competition Law on National Healthcare Systems," (2013) 38(4) *European Law Review*, 457, 459.

11 *Ibid.*

12 *Ibid.*

13 For a robust discussion on the debate: European Commission, Expert Panel on Effective Ways on Investing in Health ("EXPH"), "Competition among health care providers, investigating policy options in the European Union," The EXPH adopted this opinion at the 10th plenary meeting of May 7, 2015 after public consultation, 8.

14 J. Le Grand, "Choice and Competition in publicly funded healthcare," (2009) 4(4) *Health Economics, Policy and the Law*, 479-80.

15 *Ibid.*

16 *Ibid.*

Nonetheless, opponents of the introduction of market forces in healthcare often tell a different story. Essentially, they allege than any healthcare system based on market-driven healthcare delivery carries within it the danger of reducing quality, restricting access to healthcare services and exacerbate the existing health inequities.[17] More than that, they warn that while the empirical literature on the impact of competition among healthcare providers on their performance has primarily assessed the effect of hospital competition on outcome measures, such as mortality rates, it has not adequately examined the impact of competition on the social objectives that health systems at the macro level pursue, such as equity and access.[18]

In further enriching this topical, albeit complex, debate, this article puts forward two additional concerns: *First*, it argues that the risk that the introduction of market values in healthcare may harm core objectives of EU health systems, such as equity, cannot always be excluded. This is because the goal of competition in healthcare and the pursuit of core values of EU health systems, such as equity or access to healthcare, may in certain cases clash; *Second*, it indicates that when conflicts between these objectives actually emerge, the main actors involved in the provision of healthcare, notably physicians acting as gatekeepers or purchasers of healthcare services (e.g. in the case of the English national health service "NHS") may be encouraged to enter into agreements that restrict quality competition among providers with a view to ensuring access and continuity of care. Such agreements, this article claims, may under certain conditions catch the attention of competition law which generally assumes that consumers are better off if competition between market players is preserved.[19]

Shedding some light on these competition concerns, this article asks: can competition authorities in Europe consider in their competition analysis the core objectives that their health systems strive to attain, such as equity? In delving into this question, this article first briefly discusses the main aspects of the procompetitive regime that promoted competition among providers in the English NHS since the early 1990s. It also identifies some of the potential conflicts between the goals of competition and equity this regime may create and the antitrust concerns that may emerge as a result of these conflicts. By bringing to the fore these competition concerns and by examining the extent to which distributive concerns can be injected in an antitrust analysis on the basis of article 101 TFEU, this article takes the stance that the answer to the core question it poses should not necessarily be a negative one.

II. TOWARDS THE MARKETIZATION OF EU HEALTH SYSTEMS: A SHORT TRAVEL TO THE UK EXPERIENCE

The extent to which European countries have introduced competition among the market players in the field of healthcare varies across Europe. The English NHS, for example, embraced the introduction of market mechanisms within it as early as the early 1990s when the then Conservative Government implemented the National Health Service and Community Care Act (the "Act"), establishing the "Internal Market."[20] By separating the purchasing ("commissioning") and the provision of healthcare services across the UK, the Act essentially sought to reinforce competition among providers of healthcare.[21] Providers and purchasers were linked by a contract. Purchasers' main goal was to buy more elective care in order to reduce the long waiting lists existed for many elective procedures.[22] Therefore, they had powerful incentives to negotiate lower prices.[23] As the scope of competition among providers under the internal market was limited, it did not have a dramatic impact on NHS.

The late 1990s brought an end to this "internal market" experience with a move to a system that focused more on quality and less on prices.[24] The new Labour Leadership did not abolish the purchaser-provider split. However, it introduced an activity-based payment system for hospitals known as "Payment by Results" ("PbR").[25] In order that money could follow the patients and provide an incentive for efficient providers

17 European Commission, *supra* note 13 at 8.

18 *Ibid.* at 40-41, 49-50.

19 Theodosia Stavroulaki "Connecting the Dots: Antitrust, Quality and Medicine," (2019) 31(2) *Loyola Consumer Law Review* 175, 19.

20 National Health Service and Community Care Act 1990, available at http://www.legislation.gov.uk/ukpga/1990/19/contents.

21 For a comprehensive review of the market reforms of the healthcare system in the UK, J. Cylus, E Richardson, L. Findley, M. Longley, C. O'Neill, D. Steel, (2015) 17(5) *United Kingdom: Health system review. Health Systems in Transition*, 16.

22 C. Propper, S. Burgess & D. Gossage, "Competition and Quality: Evidence from the NHS Internal Market 1991-9," (2008) 118(525) *The Economic Journal*, 138, 142.

23 *Ibid.*

24 European Commission, *supra* note 13 at 47.

25 N. Mays, A. Dixon, L. Jones, "Return to the Market: Objectives and Evolution of New Labour's Market Reforms," in N. Mays, A. Dixon & L. Jones (eds) in *Understanding New Labour's Reforms of the English NHS*, (London: The King's Fund: 2011) 12.

to increase their activity through output, the Government implemented a system of fixed national prices (tariffs) that were set by the Department of Health.[26] Given that this new scheme limited the possibility of any negotiation in terms of prices, competition among providers was theoretically based on innovation and quality.

To enhance quality competition, the Government also implemented policies that allowed patients to exercise choice at the point of referral. On the basis of these policies, patients could choose between any provider, private or NHS, that had agreed to provide care at the national tariff system (PbR).[27] Therefore, from around 2002 onwards the provision of NHS services was gradually opened up to several accredited healthcare providers including both publicly owned and independent providers, mainly NHS Foundation Trusts ("NHS FTs") and Independent Sector Treatment Centers ("ISTCs").[28] These institutions were established to provide high volume and low-risk surgery to patients.[29] The government also sought to enhance quality competition by allowing elective patients to choose any provider who met NHS standards and tariffs through the so-called "choose and book" system.[30] This was an electronic appointment booking system that was installed in hospitals and general practitioner ("GP") surgeries to enable GPs and patients to book their appointments online, in the GP surgery, or from home.[31]

As with the Labour Government, the Coalition Government under the Health and Social Care Act of 2012 ("HSCA") also attempted to promote quality by (a) facilitating patients' choice and competition among healthcare providers; (b) limiting competition in terms of prices; and (c) by enforcing quality regulation and ensuring that multiple bodies and regulators are responsible for supervising the quality of NHS services, notably the Care Quality Commission, NHS Improvement and the purchasers of NHS services (the NHS commissioners) [32] Additionally, the HSCA "made a direct correlation between competitive behavior in the NHS and competition law."[33] Specifically, the HSCA gave NHS Improvement (former Monitor) competition powers in the Competition Act 1998 concurrently with the Competition and Markets Authority (CMA).[34] On the basis of the clause 62(3) of the HSCA, NHS Improvement is obliged to exercise its functions with a view to preventing anticompetitive behavior, which *is against the interests of people who use these services*. Thus, NHS Improvement can investigate anti-competitive agreements or allegations of abuse of market power.[35] It is also responsible for ensuring that NHS commissioners respect patients' right to choose and do not engage in *anti-competitive behavior* when purchasing services unless it is in the interests of NHS patients.[36]

What type of equity and access concerns could such a regime create? To begin with, a regulatory regime that extends choice and competition as a means to achieve quality improvements may incentivize providers to compete on the dimensions of quality that can be easily verified by consumers, commissioners or regulators, such us waiting times or mortality rates. The NHS, for instance, disseminates information on providers' performance with regards to mortality rates.[37] This disclosure, however, may incentivize providers to alter their conduct to improve their performance on these indicators.[38] Hospitals, for instance, may avoid attracting high-risk patients by limiting their contracts with high quality

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26 *Ibid*. at 7.

27 A. Dixon, R. Robertson, "Patient Choice of Hospital," in N. Mays, A. Dixon & L. Jones (eds) *Understanding New Labour's Reforms of the English NHS*, (London: The King's Fund 2011), 53.

28 M. Sanderson, P. Allen, D. Osipovic, "The regulation of competition in the National Health Service (NHS): what difference has the Health and Social Care Act 2012 made?" (2017) 12 *Health Economics, Policy and Law*, 1, 4-6.

29 *Ibid*.

30 L. Stirton, "Back to the future, lessons on the procompetitive regulation on health services," (2014) 22(2) *Medical Law Review*, 180, 191.

31 A. Dixon, R. Robertson, *supra* note 27, at 55. Since 2015 this system is called: NHS e-Referral Service (e-RS).

32 During the Labour period, the Primary Care Trusts (or "PCTs") that involved all GPs were responsible for the commissioning of NHS services. After the introduction of the HSCA 2012 the PCTs were abolished and replaced by Clinical Commissioning Groups ("CCGs") that are consortia of GPs. NHS England is also responsible for commissioning specific services. See L. Stirton, *supra* note 30 at 192. For the purpose of this paper, I will call the CCGs "NHS commissioners."

33 *Ibid*.

34 Article 72 HSCA 2012.

35 *Ibid*.

36 See Regulation 10(1) of "the Procurement, Patient Choice and Competition Regulations" and Monitor's Enforcement Guidance on the Procurement, Patient, Choice and Competition Regulations: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/283508/EnforcementGuidanceDec13.pdf.

37 For instance: https://www.nhs.uk/news/medical-practice/guide-rates-best-and-worst-hospitals-in-2011/. Patients also rate hospitals on the basis of their experiences: https://www.nhs.uk/Review/List/P95971?currentpage=2.

38 European Commission, *supra* note 13 at 47.

surgeons specialized in complex high- risk surgeries.[39] Extending, therefore, patients' choices with a view to fostering quality may, in certain cases, raise equity and access concerns.

More than that, extending patients' choice by allowing private entities to offer more profitable elective services may leave NHS organizations with the complex, high-risk, intensive care, which they had previously been able to cross-subsidize with revenue from their lower risk elective procedures.[40] ISTCs, for instance, that were established in the UK during the Labour Leadership were specifically intended to treat low-risk, elective patients rather than high-risk, high-cost NHS patients.[41] Thus, the risk that these entities may pose a threat to equity or access by cherry-picking the more profitable low-risk cases that previously allowed the NHS bodies to cross-subsidize their high-risk intensive care cannot be excluded.

To reduce these risks and ensure core objectives of their health systems, the NHS commissioners may agree with the GPs in their role as gatekeepers to restrict patients' choice and refer more patients for elective care to NHS bodies engaging also in risky non-elective procedures so that these entities can cross-subsidize these costly procedures and ensure continuity of care.[42] Arguably, such agreements may reduce patients' choice and restrict competition among providers on quality in the elective services market. At the same time, though, they may ensure the financial stability of NHS organizations and therefore secure access to high-risk complex procedures. How should competition authorities evaluate these potentially "equity-enhancing" agreements? Should they consider, for example, that they may promote access and health equity and balance these goals against the harm caused to competition? And if so, under what legal techniques?

These questions become even more important if we consider clinical evidence demonstrating that the conditions you are born, live and work have a significant impact on health inequalities.[43] Indeed, the physical environment is an important determinant of health variations.[44] Poorer neighborhoods, for instance, "are disproportionately located near highways, industrial areas, and toxic waste sites, since land there is cheaper."[45] Childhood asthma incidence "is also rising in urban neighborhoods among poor children, and the severity is greater among these children."[46] The poor individuals that lack stable housing are also more likely to use the emergency department rather than a regular clinic as their primary source of care.[47] This reality may incentivize NHS commissioners to agree with the GPs acting as gatekeepers to refer more patients for elective care to NHS hospitals that offer high-risk non-elective services in disadvantaged areas so that these hospitals can cross-subsidize their high demand for respiratory and emergency care services. How should competition authorities respond to the entities' claim that their agreement does nothing more than ensure the financial stability of the NHS bodies offering high-risk costly services in poor and disadvantaged areas and should be exempted from the application of competition law?

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39 *Ibid*. at 48 (for an analogous example in health insurance). See also R. H. Palmer "Using health outcomes data to compare plans, networks and providers," (1998) 10(6) *International Journal for Quality in Healthcare*, 477, 482.

40 P. Allen & L. Jones, "Diversity of Health Care Providers," in N. Mays, A. Dixon & L. Jones (eds), *Understanding New Labour's Reforms of the English NHS*, (London: The King's Fund, 2011), 22.

41 *Ibid*. at 18.

42 In a report published by the Cooperation and Competition Panel (or else "CCP") to inform commissioners on the extent to which specific restrictions of competition can be justified on the basis that they can benefit patients, it is mentioned that NHS commissioners (PCTs during the labor period) constrained patients' ability to choose their routine elective care provider by influencing GP referral decisions and in some cases, asking GPs to refer patients to (or away from) certain providers. Ensuring providers' stability and the continuity of services were some of the justifications that, among others, were raised, by the NHS commissioners for such restrictions. GPs, the report says, agreed with NHS commissioners' recommendations. See CCP panel, "Review of the operation of 'Any Willing Provider,' for the provision of routine elective care," London: Cooperation and Competition Panel Curtis, LE, 2014. The CCP was established during the Labour Leadership to advise the Secretary of Health and Monitor on how restraints of competition should be resolved, See https://www.ccpanel.org.uk/.

43 M. Marmot, *The Health Gap, The Challenge of An Unequal World* (Bloomsbury, 2015) 27.

44 N. Rice & P. C Smith, "Ethics and geographical equity in health care," (2001) 27 *Journal of Medical Ethics*, 256.

45 N. E. Adler & K. Newman, "Socioeconomic Disparities in Health: Pathways and Policies," (2002) 21(2) *Health Affairs,* 60, 66.

46 *Ibid.*

47 C. A. Jones, A. Perera, M. Chow, I. Ho, J. Nguyen & S. Davach "Cardiovascular Disease Risk Among the Poor and Homeless – What We Know So Far," (2009) 5 *Current Cardiology Reviews*, 69, 70.

To the extent these entities are not considered to act as "undertakings" they may escape antitrust scrutiny.[48] If, however, they are considered to be "undertakings" on the basis that they engage in an economic activity, then they may be subject to competition law. Importantly, the term "undertaking" focuses exclusively on the nature of the activity carried out by the entity concerned.[49] Therefore, it is irrelevant whether the entity is of public or private nature or whether it is engaged in profit or non-profit activity. Consequently, a given entity might be regarded as an undertaking for one part of its activities while the rest may fall outside the competition rules.[50]

The question of whether the GPs in the case at issue are undertakings might entail less complexity. GPs offer their services in the context of the English NHS as independent providers[51] and compete to attract patients on the basis of their performance.[52] Considering *Pavlov*[53] where the Court ruled that physicians perform an economic activity when they receive remuneration for the services they offer, and bear the financial risks associated with them, it may be argued that the GPs in this case are "undertakings."

However, the question of whether the NHS commissioners act as "undertakings" in this case is a more difficult one to address. For instance, in *FENIN*[54] the Court held that hospitals that are part of the Spanish national health system do not perform an economic activity when they purchase their medical equipment in order to provide free healthcare services to patients. Therefore, there is no breach of competition law when they systematically delay payment of their debts. As these hospitals, the Court held, are funded by social security contributions and operate *on the basis of the solidarity principle*, they cannot be held to be undertakings.

The Court's test, however, in *FENIN* may not necessarily apply in the case of purchasers, such as the NHS commissioners that perform their duties in market-based systems that strive to promote a wider set of goals: choice, competition *and* solidarity.[55] It may also not necessarily apply in the case of entities, such as the NHS Commissioners, that purchase but also provide healthcare services in the relevant market.[56] In *BetterCare*,[57] for instance, the UK Competition Appeal Tribunal (the "CAT") held that a local authority ("NHS Trust") was an undertaking when it purchased social care services from independent providers at considerably low prices. In reaching this conclusion, the CAT took into consideration that the activity performed by this entity had both "business" and "social dimensions."[58] Indeed, the local authority ensured access to care for elderly populations by entering into commercial transactions with independent providers.[59] Since, this entity operated in a competition-based system[60] and acted not only as a purchaser but also as a seller in the relevant market,[61] the CAT was not convinced by the OFT's initial findings that the entity in question was not an undertaking. The CAT remitted the case back to the OFT which ultimately found no abuse of dominance on the grounds that the entity in question did not set the prices at which it purchased social services.[62]

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48 For a discussion on whether NHS commissioners and medical professionals are undertakings: Mary Guy, *Competition Policy in Healthcare, Frontiers in Insurance Based and Taxation Funded Systems*, (Intersentia 2019) 64-90. The author also notes that NHS has not been formally categorized as a Service of General Economic Interest but the possibility that the legislation governing the NHS may be considered as "an act of entrustment" cannot be excluded.

49 A. Jones, B. Sufrin, *EC Competition law*, (OUP 2014), 124-125.

50 C-475/99. *Ambulanz Glöckner v Landkreis Südwestpfalz*, [2001] ECR I-8089, Jacobs AG para 72.

51 https://www.healthcareers.nhs.uk/explore-roles/doctors/pay-doctors.

52 *iWantGreatCare.org*, for instance, allows patients to compare the quality of GPs on the basis of reviews. In case they are not happy with the services they are offered they can change their GP. See also: https://www.nhs.uk/Services/GP/ReviewsAndRatings/DefaultView.aspx?id=42367.

53 Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] para 76.

54 Case C-205/03, *Federacion National de Empresas de Instrumentacion Cientifi ca Medica Tecnica y Dental (FENIN) v. Commission of the European Communities* [2006] ECR I-6295.

55 For a thorough discussion on why NHS commissioners ("CCGs") are undertakings especially because they operate in a competition-based system: A. Sánchez Graells, "Why are NHS Commissioners "undertakings" and, consequently, subject to competition law ?" available at https://www.howtocrackanut.com/blog/2014/06/why-are-nhs-commissioners-undertakings.html?rq=%E2%80%98Why%20are%20NHS%20Commissioners%20%E2%80%98undertakings%E2%80%99%20and%2C%20consequently%2C%20subject%20to%20competition%20law%3F%E2%80%99.

56 CCGs in the UK are GP practices that can also provide medical services: https://www.england.nhs.uk/commissioning/who-commissions-nhs-services/ccgs/.

57 Case 1006/2/1/01 *BetterCare Group Limited v. Director General of Fair Trading* [2002] CAT.

58 *Ibid.* at 230.

59 *Ibid* at 234.

60 *Ibid.*

61 *Ibid.* at paras 199-201.

62 OFT, Case No. CA98/09/2003, *BetterCare Group Ltd v. North & West Belfast Health & Social Services Trust* (Remitted case) 18.12.2003, para 58.

Following *BetterCare and FENIN*, the OFT published a policy report[63] clarifying the conditions under which public bodies may be considered undertakings. In this report, the OFT underlines that these entities do not perform an economic activity when they exercise public powers, (e.g. when they act "in a purely administrative capacity").[64] In contrast, it alleges that they engage in an economic activity when they supply goods or services and this supply is of a commercial, and not of a wholly social nature.[65] Upstream purchasing, the report further contends, is an economic activity only to the extent the "purchased goods or services are subsequently used to conduct an economic activity downstream."[66]

As noted, the agreement in question between GPs and NHS commissioners may restrict quality competition among healthcare providers in the elective services market. The provision of elective services can be considered an economic activity. Indeed, in this profitable market[67] multiple healthcare providers (including independent entities) compete to attract patients on the basis of the quality of their services. In this market, NHS commissioners may also participate in their role as medical professionals offering their services. Considering that the NHS commissioners may be active players in the elective services market, the possibility that they may be considered "undertakings" when they enter into agreements with GPs that may restrict competition in this market, cannot be excluded.

The above analysis implies that agreements between NHS commissioners and GPs acting as gatekeepers aiming to promote health objectives, such as equity, may not necessarily be exempted from the application of competition law. Therefore, NHS Improvement, the CMA or other competition authorities in Europe applying competition law in healthcare may not always avoid the difficult exercise of balancing the goal of competition against the pursuit of health objectives, such as equity.[68] In this light, the question that ultimately emerges is whether such a balancing act can be performed by NHS Improvement or competition authorities in Europe when they face analogous conflicts on the basis of Article 101 TFEU (or the respective articles in their national competition rules). Therefore, the last part of this piece shines a light on this topical question.

III. CAN COMPETITION LAW TAKE INTO ACCCOUNT THE NOTION OF EQUITY IN THE CONTEXT OF ARTICLE 101 TFEU?

While the pursuit of public policy goals, such as solidarity, has strongly influenced the Court's assessment when it examines whether a specific entity is "an undertaking,"[69] it has also shaped the core of its *Pluralistic Approach* in the context of Article 101 (1) TFEU. On the basis of this approach, the Court accommodated conflicting policy objectives by establishing the principle that competition rules should be interpreted "*in light of the Treaty as a whole*."[70] Under this approach, any competition law assessment must first examine the overall context in which the agreement was concluded and more particularly its legal and economic context.[71] In line with this principle, the Court has excluded agreements from the application of Article 101(1) TFEU on the basis that they are necessary for the attainment of a legitimate objective. In *Wouters*, this objective was the integrity of the legal profession.[72] In *Meca-Medina*, the legitimate objectives the Court thought deserved special attention were athletes' integrity and ethical values in sport.[73] In line with this case law, competition authorities may, therefore, argue that an agreement that aims to protect equity, pursues a legitimate objective, and therefore should be exempted from the application of article 101TFEU.

63 OFT, "The Competition Act 1998 and Public Bodies, Policy Note1/2004," OFT443.

64 *Ibid.* at 11. See also C-343/95 *Diego Cali & Figli SrL v. Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547 ('*Diego Cali*'), paras 22 to 23.

65 *Ibid.* at 13-18. A commercial activity is, for instance, one that is "undertaken for profit in direct competition with private sector companies." The report also clarifies that exclusively social is usually an activity that cannot by its nature be carried out for profit without State support or is carried out according to the principle of solidarity.

66 *Ibid.* at 12-14.

67 See for instance, Competition Commission, Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust/Poole Hospital NHS Foundation Trust at 6.132:

68 For a similar discussion: A. Sánchez Graells, "New rules for health care procurement in the UK: a critical assessment from the perspective of EU economic law," (2015) 1 *Public Procurement Law Review* 16. It should be noted that NHS Commissioners are not required by public procurement rules to enter into such agreements to promote equity. See Monitor, "Substantive Guidance on the Procurement, Patient Choice and Competition Regulation," (2013).

69 *FENIN*, *supra* note 54. See also Joined Cases C-159/91 and 160/91, *Poucet and Pistre* [1993] ECR I-637.

70 A. Witt, "Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order," (2012) 8(3) *European Competition Journal*, 443, 466.

71 *Ibid.*

72 Case C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

73 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission of the European Communities.*

The question that entails higher complexity is whether the goal of access or equity can be considered by competition authorities on the basis of Article 101(3) TFEU. Considering the European Commission's decision-making practice following the adoption of Regulation 1/2003[74] that arguably induced economic thinking in the application of competition law, most scholars and commentators would argue that the pursuit of social goals and objectives, such as equity, can no longer play a meaningful role in the context of Article 101(3 TFEU). In line with the Commission's White Paper on the modernization of the rules implementing Articles 101 and 102 TFEU, they would claim that the main goal of Article 101(3) TFEU is to provide a legal basis for the *economic* assessment of restrictive practices rather than an analytical framework under which public policy goals can be weighed against restraints to competition. Since, in the context of the Commission's more economic approach the main goal of Article 101 TFEU is the protection of competition in the market "as a means of enhancing consumer welfare" most antitrust scholars would insist that the pursuit of public policy goals can no longer affect a competition assessment on the basis of Article 101(3) TFEU.

The Commission's 2004 Guidelines on the application of Article 81(3) (now 101(3) TFEU), also support this line of thinking. They say: "Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 101(3)." Additionally, they clarify that the purpose of the first condition of Article 101(3) TFEU is to identify *the types of efficiency gains* that can be considered. These can be either cost efficiencies or efficiencies of qualitative nature.

Considering the analysis above, it may therefore be argued that in cases where the goals of equity and efficiency (in the form of maximizing consumer welfare) clash, unless competition authorities attached an economic value to the notion of equity or widened the notion of consumer welfare, they may not be able to integrate equity concerns into their competition analysis. Is this *mission possible* in the context of the competition problems that the previous section brought to the fore? This point is crucial and, therefore, deserves further analysis.

In the previous section, it was submitted that GPs in the UK in their role as gatekeepers may agree with NHS commissioners to refer more patients for elective care in NHS bodies located in disadvantaged areas so that these bodies can cross-subsidize their high demand for high cost, emergency care services. Arguably, such an agreement restricts the choice of consumers seeking routine, elective services in order to ensure choice and access to less advantaged consumer groups seeking non-elective costly services. In this case, the parties' anticompetitive agreement may analogize to an exercise of distributive justice since it restricts choice for consumers seeking elective services to ensure access to consumers seeking urgent non-elective services in disadvantaged areas. At the same time, it involves an economic taking from entities specializing in elective care to entities specializing in complex non-elective care.

In this light, it may be argued that if competition authorities chose to protect equity they may have to perform *an act of redistribution* between different consumer groups. They may, for example, have to take the view that ensuring choice for the vulnerable groups of society seeking urgent non-elective care in poor areas weighs more than protecting choice for the consumer groups seeking elective routine care. This, however, may be in contrast with one of the main goals of EU competition law, the *maximization of consumer welfare*, which is an efficiency objective and not a distribution one.[75] Indeed, the use of a consumer welfare standard may treat the same people unequally in their roles as workers and producers but entails treating all consumers *as equally* deserving with respect to the activity of consumption.[76] This is because competition law is primarily concerned with the overall welfare of society, without distinguishing between different consumer groups.[77] To promote equity, therefore, on the basis of Article 101(3) TFEU competition authorities may choose to adopt an alternative consumer welfare standard; one that takes into consideration that consumer welfare is "the aggregation of individual interests" that do not always align and "that can be combined only by some process of weighing the circumstances of different groups."[78]

Arguably, weighing the diverse interests of different social groups may not be an easy exercise for competition authorities. It may be defended, however, on the grounds that health systems that strive to promote access and equity are not indifferent as to who consumes healthcare. For this reason, in societies promoting health equity healthcare resources are not unevenly distributed, clustered in urban and more prosperous areas and scarce in less advantaged, rural neighborhoods.[79] For the same reason, Avedis Donabedian argues that the notion of efficiency in

74 Council Regulation (EC) No 1/2003 of 16 December 2002 On the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty.

75 For a criticism of how narrowly the term 'consumer welfare' has been interpreted see, indicatively, K. Bania, *The Role of Media Pluralism in the Enforcement of EU Competition Law* (Concurrences, 2019).

76 B. Von Rompuy, *Economic Efficiency, The Sole concern of Modern Antitrust Policy*? (Kluwer Law International, 2012), 48.

77 K J Cseres, "The Controversies of the Consumer Welfare Standard," (2007) 2(3) *The Competition Law Review*, 121, 124.

78 A. Atkinson, *Inequality, What can be done*? (Cambridge, HUP, 2015) 126. For a thorough discussion on whether distributive concerns should be considered by competition law see also: I. Lianos "The Poverty of Competition law: The Short Story" in D. Gerard & I. Lianos, *Competition Law: between Equity and Efficiency* (CUP 2019), 45-87.

79 M. Whitehead, WHO (2000) Policy Report EUR/ICP/RPD 4147734r "The concepts and principles of equity and health," 9.

healthcare also incorporates the notion of "distributional efficiency" that requires "the distribution of care among different classes of patients (characterized by age, sex, economic status, place of residence, economic status) in a way proportionate to expected improvements in health."[80] In line with this principle, healthcare resources may be allocated to social groups who are sicker or are more likely to benefit from access to healthcare.[81] In light of these concerns, competition authorities may take the stance that unless they adopted an alternative notion of consumer welfare, one that takes distributive concerns into account, they may apply competition law in healthcare in a manner that underestimates how their societies have democratically decided to allocate their healthcare resources. Hence, they may raise the claim that the adoption of an alternative consumer welfare standard may in certain cases be necessary so that they apply competition law in their health systems in line with their core values and principles.

Competition authorities, however, may also protect equity by adopting an alternative approach. They may take the view, for instance, that the pursuit of equity creates benefits not only for the vulnerable parts of health populations but for the society as a whole. Protecting health equity contributes to the reduction of health inequalities. This may benefit *all members of society* on the basis that some types of health disparities "have obvious spillover effects on the rest of society;"[82] these may include the dissemination of infectious diseases, the adverse impact of alcohol and drug misuse or increases in crime rates.[83] Promoting equity therefore may reduce these negative externalities.

The reduction of health inequalities has an economic value for an additional reason: because health improvements for all parts of society lead to economic growth. This is because health is not only the consequence but also a cause of wealth.[84] For example, health relates to labor productivity. Indeed, healthy workers "lose less time from work due to ill health and are more productive when working."[85] Access to health also promotes education. Childhood health, for example, "can have a direct effect on cognitive development and the ability to learn as well as school attendance."[86] Health is also closely linked with investments. This is because a longer lifespan can increase the incentive for business investments and savings for retirement.[87]

By acknowledging the economic benefits access to healthcare may create for all members of society, competition authorities may raise the claim that an agreement that protects equity contributes significantly to *economic progress* in the parlance of Article 101(3) TFEU. This interpretation may be in line with the Commission's position in the 1999 White Paper emphasizing that the purpose of Article 101(3) TFEU is to provide a framework for the *economic assessment* of restrictive practices. Indeed, by considering the impact of access to healthcare on the reduction of health inequalities and, ultimately economic progress, competition authorities may integrate equity concerns into their competition analysis.

Surely, these proposals can be challenged on several grounds, and their applications may entail considerable difficulties for competition authorities. Elaborating on these challenges will definitely shape the core of a future paper. However, this paper shined a light on why competition authorities should not necessarily exclude the possibility of considering the goal of health equity in the context of their competition assessment on the basis of Article 101 TFEU.

80 A. Donabedian, *An introduction to Quality Assurance in Health Care, (*OUP 2003) 10.

81 *Ibid.*

82 Woodward A, Kawachi "Why reduce health inequalities?" (2000) (54) *Journal of Epidemiology & Community Health,* 923-929.

83 *Ibid.*

84 D. E. Bloom, D. Canning "Population Health and Economic Growth," Commission on Growth and Development, The World Bank, Working Paper No.24, 1.

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

IV. CONCLUSION

This paper asked the question of whether competition law can consider the goal of health equity in the context of article 101 TFEU. First, it argued that competition authorities may consider this objective by applying the Court's more *Pluralistic Approach* on the basis of article 101(1) TFEU. Additionally, this piece raised the concern that competition authorities may protect the goal of health equity by adopting an alternative notion of consumer welfare standard; one that takes into consideration distributive concerns. Although adopting this approach may not be an easy exercise for competition authorities, it may, however, safeguard that their competition analysis is in line with the core values and principles of their health systems. It also put forward the claim that the pursuit of health equity has an economic value as such. This is because the reduction of health inequalities contributes to economic progress in several ways. These economic benefits, this paper claimed, can be considered by competition authorities in the context of article 101 (3) TFEU.

HOW COMPETITION AUTHORITIES CAN ENABLE ECONOMIC TRANSFORMATION TO REDUCE INEQUALITY: SOME EXAMPLES FROM AFRICA

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I. COMPETITION: THE MISSING LINK BETWEEN ECONOMIC TRANSFORMATION AND POVERTY REDUCTION IN AFRICA?

Economic transformation – the process through which resources move from lower to higher productivity activities – is key for economic growth and poverty reduction, particularly in Africa. Shifts from lower to higher productivity activities lead to more and better jobs, higher labor incomes and capital returns, ultimately lifting the poor out of poverty and reducing inequality. However, in Africa, the rate at which growth has translated into poverty reduction has been lower than in other regions, and this is partly explained by constraints in the process of economic transformation.[2] Based on the latest comparable household statistics across 27 Sub-Saharan countries, productivity growth in the agriculture sector (the sole source of income for 42 percent of households) has been relatively sluggish, and productivity in the new sectors to which labor has moved (mainly services and trade) is not as high as in other countries.[3]

Weak competition limits the potential for economic transformation to create better jobs and higher incomes through productivity growth. In fact, competition is one of the main factors that affect both productivity growth within a sector and the ability for market players to enter other sectors that have higher productivity. Cartels and monopolies reduce incentives of existing firms to compete, innovate and enhance productivity. Market foreclosure practices together with government rules that strengthen dominant firms or discriminate against more productive firms discourage entry into high-productivity economic activities. Meanwhile, a lack of competition in key input markets lowers productivity growth of downstream firms that rely on those inputs.[4] Empirical evidence from a study into product market competition, productivity and jobs in South Africa found that (i) markups had generally risen between 2010 – 2014, largely driven by larger firms that have higher pricing power; and (ii) firms that faced lower competition (measured by their pricing power), had lower productivity growth, lower employment, and lower wage growth.[5]

Competition in African markets is relatively weak: economic factors are exacerbated by the lack of effective enforcement of competition rules and the existence of government rules and practices that impair competition based on merit. According to the Global Competitiveness Report 2019, 71 percent of African countries rank in the bottom half of countries globally in terms of domestic competition.[6] For example, according to Bertelsmann Stiftung's Transformation Index ("BTI"), which is derived on the basis of expert assessments, African countries rank lowest globally on the extent to which: (i) rules prevent the development of economic monopolies and cartels; and (ii) the extent to which the fundamentals of market-based competition have developed. African markets also often display features that can make them more prone to anticompetitive practices, such as small market size and relatively high concentrations. Indeed, previous studies on the Africa region have found that weak competition in input markets like fertilizer and cement has had adverse effects in these markets, which are key to driving economic transformation and the creation of better jobs (see Box 1).

2 World Bank, Making Transformation Work for the African Poor (2017), mimeo. See also Paci P. & M. Tuccio "Why is growth less poverty reducing in Africa?" (2016).

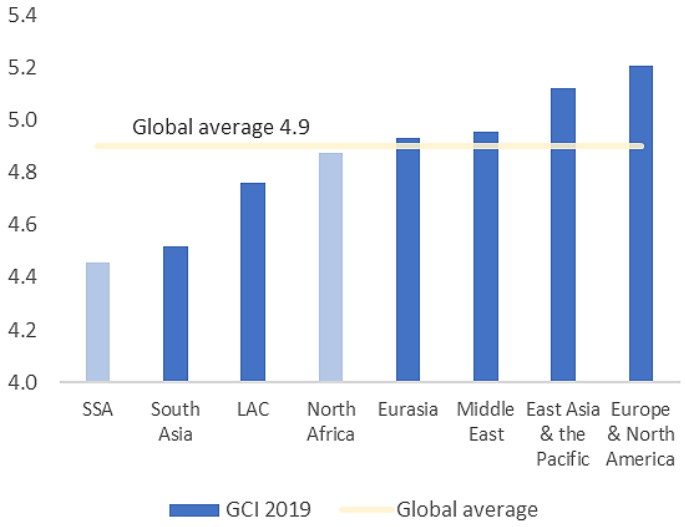
3 *Ibid.*

4 For a summary of studies on this effect see World Bank– OECD, "A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth" (2017).

5 Dauda S., S. Nyman, & A. Cassim "*Product market competition, productivity and jobs: the case of South Africa*," (forthcoming 2019).

6 This draws on perception-based indicators from the World Economic Forum's Global Competitiveness Index (WEF GCI), which ranks countries in terms of the components that constitute their global competitiveness based on a survey of a representative sample of business leaders in their respective countries as well as public data sources.

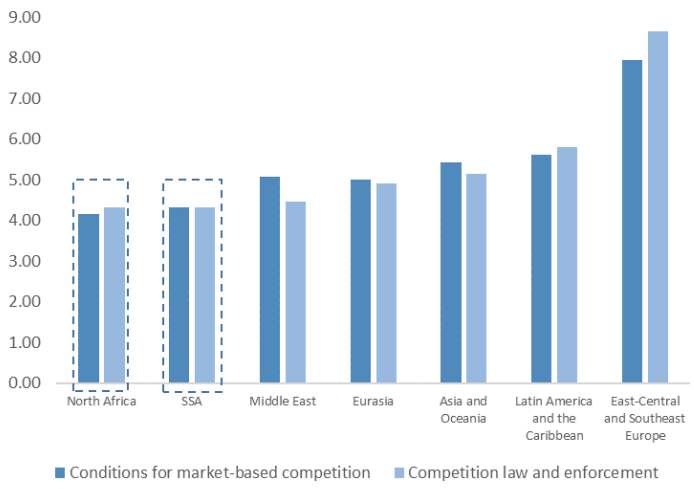
Figure 1: Global Competitiveness Index – Competition in Services



Note: Measured on a scale of 1 to 7, with 7 representing higher intensity of competition in services (includes professional, retail and network services). SSA stands for Sub-Sharan Africa.

Source: WEF GCI (2019)

Figure 2: Market-based Competition and Competition Policy Enforcement by Country Group



Note: Measured on a scale of 1 to 10, where 10 denotes the best conditions for market-based competition and the existence of comprehensive competition laws that are strictly enforced, respectively. SSA stands for Sub-Sharan Africa.

Source: Bertelsmann Stiftung (2018)

Box 1: Examples of Competition Issues in Key Input Markets in Africa

Cement

Average cement prices in Africa were 183 percent higher, on average, than the world price of cement at the end of 2014. Even if prices in African countries were only around 10 percent higher than a competitive level, African cement consumers could be overpaying by more than $2.5 billion a year due to a lack of competition (with $1.4 billion of that in Sub-Saharan Africa).

Fertilizer

Retail prices of fertilizer in Africa are significantly above prices in the Black Sea and Middle East regions. A review of ten African countries - which included Ethiopia, Ghana, Kenya, Burkina Faso, Mozambique, Nigeria, Tanzania, Rwanda, South Africa and Zambia - found that urea prices at retail outlets averaged $712 per metric ton, well above average retail prices in the Middle East ($472 per metric ton) and in the Black Sea Region ($424 per metric ton).

Even when controlling for income levels and transport costs, prices of goods and services consumed by households in urban Africa are 20 to 30 percent higher than in other main cities around the world.[1] This result could stem in part from a lack of competition within value chains.

1. Nakamura et al (2016); World Bank. 2016. Breaking down barriers: unlocking Africa's potential through vigorous competition pdicy. Washington, D.C.: World Bank Group

II. IN THIS CONTEXT, WHERE DO WE START?

In order to boost pro-poor economic transformation, actions to promote competition have to focus on those sectors where the poor are involved as producers, entrepreneurs or employees. Considering their importance for economic transformation and poverty reduction, we will define these core sectors as:

1. Agriculture (encompassing subsistence agriculture and production of cash crops) - where the poor are typically small producers.

2. The "third" sector – where the poor are typically small entrepreneurs but could also be employees (including small retailers, small providers of tourism services, as well as small goods producers).

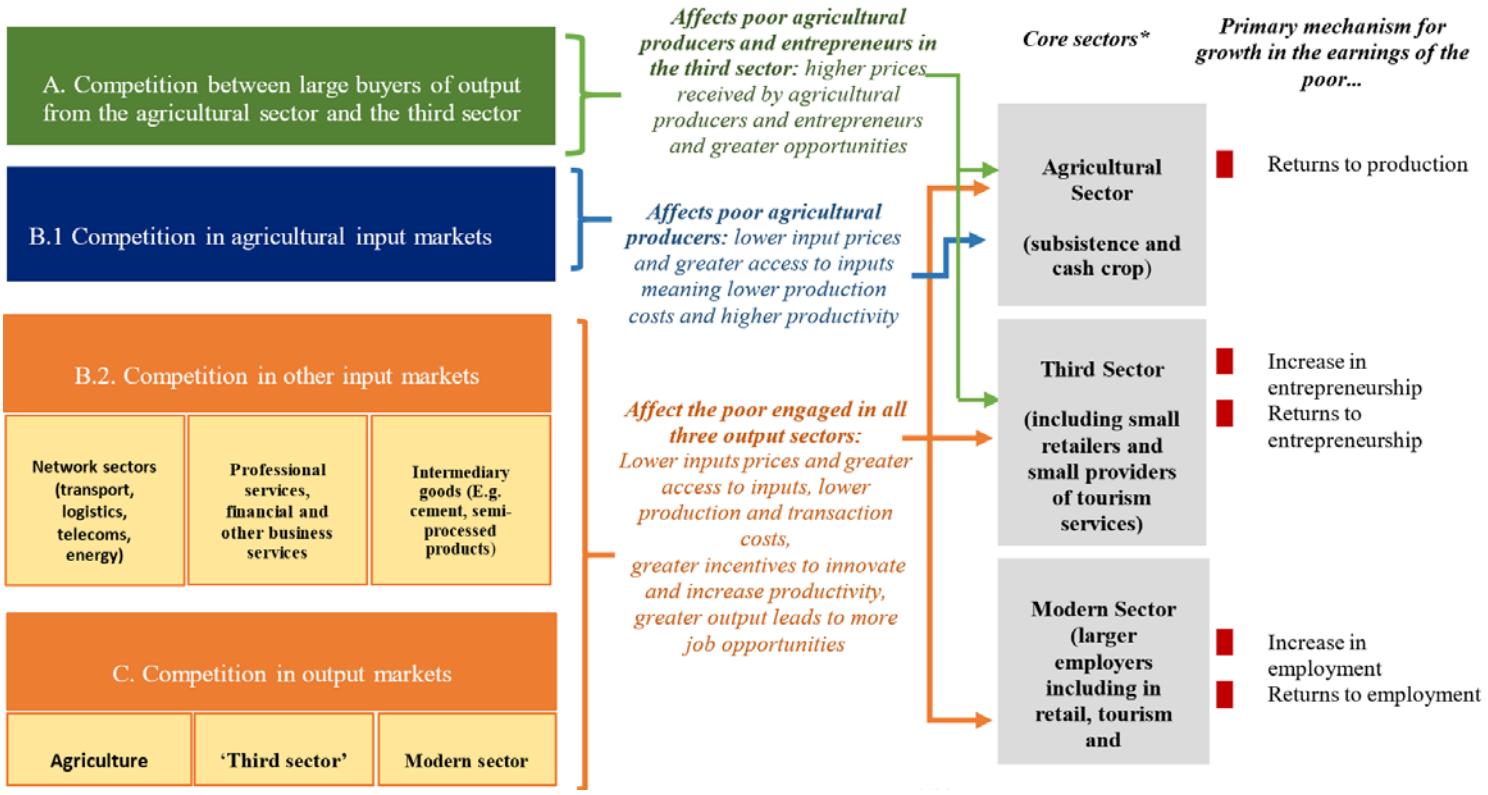
3. The "modern" sector – where the poor are typically salaried employees (including larger retailers, large tourism businesses, and large manufacturers).

The earnings of the poor are then affected by (i) the level of competition *in these core sectors themselves*, (ii) the level of competition in markets that are used as *inputs in those sectors*, and (iii) competition among *downstream buyers* of products produced by the poor in these sectors.

Governments in Africa are taking concrete actions to boost competition. This has happened through three categories of actions: (i) enforcement of antitrust laws against abuse of dominance and anti-competitive agreements, and merger control, (ii) measures to open markets and implement sectoral policies that enable contestability, firm entry and rivalry, and (iii) measures to ensure competitive neutrality and prevent non-distortive public aid support. Over time more countries have adopted and increased the effectiveness of competition legal frameworks: 36 countries, covering over 85 percent of Africa's GDP, have competition laws and 26 of those have competition authorities in operation. And pro-competition principles have been integrated into sectoral and economy-wide policies. For example, Ethiopia has recently decided to open up its telecommunications market to competition, and regulatory impact assessment frameworks in Kenya and Zambia now include an evaluation of effects on markets and competition.

The activities of competition authorities cover all these areas of advocacy, policy advice and enforcement, and affect the three core sectors. In these three core sectors, competition authorities have to date been focused relatively more on inputs sectors that are vital to the poor as small producers or entrepreneurs (B.1 and B.2 in Figure 3), for example in agriculture inputs, telecommunications, and transportation. Recently, however, there has been a move towards intervening in markets that buy from the less well-off, such as in retail and agricultural markets (see A in Figure 3 below). Boosting competition between downstream buyers would result in higher prices received by agricultural producers and entrepreneurs in the third sector. In the modern sector, the link to poverty has typically come from the consumer welfare side. However, in certain cases in the modern sector, mostly related to mergers, competition authorities have addressed certain aspects that are directly related to employees in those sectors, often through use of public interest provisions.

Figure 3: Summary of how Competition can Increase Earnings of the Poor Across Sectors



Note: Authors' own elaboration.

III. MOVING BEYOND CONSUMER WELFARE: HOW DO COMPETITION AUTHORITIES CREATE BETTER CONDITIONS FOR PRODUCERS AND ENTREPRENUERS IN THE PROCESS OF ECONOMIC TRANSFORMATION?

A. Actions to Boost Competition Between Large Buyers of Output from the Agricultural Sector and the Third Sector

Competition among downstream buyers increases the incomes of entrepreneurs and producers in upstream output markets. Buyer power – either due to collusion or restrictive government interventions that reinforce dominance – generally depresses prices for small agricultural producers. Competition authorities are tackling this by introducing abuse of buyer power regulations, advocacy, and enforcement mechanisms to increase competition among downstream buyers. Kenya has introduced abuse of buyer power provisions in the Competition Act, with the latest amendment adopted in 2019. The move was a response to a high prevalence of delayed payments for supplies by agricultural producers and small enterprises, with these arrears amounting to an estimated KES 40 billion (approximately U.S.$400 million) as of 2017 and contributing to a high micro, small and medium enterprise ("MSME") mortality rate. South Africa recently introduced new provisions on buyer power into its competition law with the explicit objective of promoting greater participation in the economy by small enterprises by addressing the way that dominant firms interact with these players as their suppliers.[7] Although these provisions are more related to unfair trade practices, they are similar in nature to provisions regarding small and medium enterprises ("SMEs") enforced by competition authorities in Japan and Korea.

Besides adjusting competition laws, competition authorities and other government institutions have taken decisions in benefit of small producers. In Zambia, farm-gate prices for cotton reportedly increased after price-fixing among ginners was detected by the Competition and Consumer Protection Commission (the "CCPC"). In Rwanda, in 2012, the government adopted a competitive bidding process for green-leaf tea by two state-owned tea factories. As a result of this initiative, the country's 60,000 tea farmers saw their incomes increase by an average of 35 percent and is expected to have a strong impact on jobs. This pro-competition reform took in place when the country had a competition law but no competition authority to advocate for competition. In Madagascar, when the vanilla marketing board was replaced as the

7 Preliminary results of the Competition Commission's retail market inquiry in South Africa found that certain characteristics of the formal grocery retail segment were conducive to unequal bargaining power between supermarkets and suppliers.

only buyer of vanilla by more competitive domestic vanilla traders, there was a large positive effect on the purchase price paid to vanilla farmers, lifting about 20,000 individuals out of poverty. Since then, the Competition Commission of Madagascar has started operations and there is more work to be done in agricultural value chains to ensure competition among traders and exporters allows the benefits of international trade to flow to smallholder farmers.[8]

B. Actions to Boost Competition in Input Markets

Competition in agricultural inputs drives returns for smaller agricultural producers and therefore anticompetitive behavior in these markets (such as fertilizer, seeds, and pesticides) inflicts particular harm to low-income producers. Globally, the existence of international cartels in the fertilizer sector raised prices of chemical fertilizers by 17 percent on average during 1990–2010.[9] Global export cartels, such as the Belarus Potash Company export cartel, could increase final consumer prices of potash in Sub-Saharan Africa by at least 29 percent assuming a simple pass-through.[10] The price of potash fertilizer for 2011–2020 under a Canadian cartel arrangement has been projected to be double what it would be under a competitive scenario.[11] While such global export cartels have posed a problem for enforcement action under national competition regimes, competition authorities have been active in domestic fertilizer markets, with Zambia investigating a cartel case in fertilizers, and Kenya's competition authority (the "CAK") conducting a fertilizer market inquiry to identify barriers to competition and starting an enforcement action. In South Africa, structural remedies were imposed by the Competition Commission to restore competition after a case of anticompetitive conduct in the fertilizer market. Analysis indicates that the intervention led to new entry, increased customer choice and price competition, as well as estimated customer savings ranging between R1 billion and R10.5 billion.[12]

In other cases, a lack of appropriate regulatory frameworks creates barriers to competition in agricultural input markets. Starting the process of harmonization of the seed regulatory framework in East Africa led to savings of U.S.$49.1 million for farmers and boosted demand for certified seed in Kenya, Tanzania, and Uganda between 2000 and 2008. Similarly, governments in West Africa through the Economic Community of West African States ("ECOWAS") have also been working to harmonize seed and fertilizer rules and quality control procedures to increase farmer choice and reduce prices.

Competition in transport and distribution sectors shapes earnings for the poor in the agricultural, third and modern sectors. Breaking up anti-competitive practices in international shipping services would reduce transport prices for goods shipped to the United States from developing countries by 25 percent and lead to cost savings of up to U.S.$2 billion.[13] Several countries have sanctioned international shipping lines involved in the shipping cartel, with South Africa being one of the only countries in Sub Saharan Africa to investigate and impose fines on at least two shipping lines with one receiving leniency for cooperation. A lack of domestic competition in intermediate sectors, including transport and distribution services, can hinder the transmission of domestic and international price signals to producers, which would otherwise drive reallocation and diversification. The Competition Commission of South Africa is currently conducting a market inquiry into the public passenger transport sector, including understanding market conditions in the minibus taxi and commuter bus segments which are key for transporting low-income commuters to their place of employment. The Competition and Fair Trade Commission of Malawi has also carried out competition assessments for road, air and water transport.

Competition in other input markets shapes earnings, particularly for entrepreneurs in the 'third' sector and for employees in the modern sector. Competition authorities have used both advocacy and enforcement powers to boost competition and allow for entry in key inputs markets. Independent bakeries in South Africa were harmed by price-fixing among major bread manufacturers who overcharged by 7–42 percent on the price of wheat flour.[14] A cement cartel in the SACU region raised cement prices for South African customers by up to 9.7 percent. Enforcement action by the South African competition authorities to end a regional cartel in cement prevented overcharges on the price of cement of 7.5–9.7 percent, saving downstream firms some (U.S.$79–100 million) a year in input costs. The breakup of the cartel was

8 Porto, Chauvin, & Olarreaga (2011); Part Three: Strengthening Competition To Stimulate Growth And Job Creation in: Stocker, Harivelo, Nantenaina, Cyril, Minosoa (2019). Madagascar Economic Update : A New Start? (English). Washington, D.C. : World Bank Group.

9 Connor (2012).

10 World Bank Group (2016).

11 Jenny (2012).

12 Sunél Grimbeek, Godknows Giya & Qhawe Mahlalela, "The impact on competition in the fertiliser industry after the Sasol divestiture of blending facilities in 2010," 2017.

13 Fink, Mattoo, & Neagu (2002).

14 Mncube (2013).

followed by the first new greenfield entry in the sector for 80 years. As well as offering lower retail prices than the incumbents, the new entrant was projected to create 400 direct permanent jobs and 3000 indirect jobs. Malawi's Competition and Fair Trading Commission in collaboration with the Common Market for Eastern and Southern Africa ("COMESA") prevented the establishment of import barriers to cement that would have otherwise prevented the benefits of entry of regional players in a market that was highly concentrated. The Egyptian Competition Authority also recommended easing the entry of imported steel rebar, including reducing customs tariff to zero, relaxing the regulated specification, shortening the administrative procedures from 30 days to 1 day. Consequently, the import share climbed in one year from 1 percent to 23 percent, and prices decreased by 49 percent from 2008 to 2010.

Telecommunications and mobile financial services are other important inputs that have had a transformative effect in Sub Saharan Africa. In Kenya, antitrust enforcement has curbed the exercise of significant market power by the dominant mobile payment services provider, Safaricom, and increased incomes for small agent enterprises. Following this antitrust case in 2014, there was 9 percent fall in agent exclusivity compared to 2013, along with a 10 percent rise in the profitability of agents overall and a 45 percent increase in rural areas. Collaboration between the CAK, the Central Bank and the Communications Authority to develop and implement system interoperability rules is expected to benefit more than 30 million customers with consumer prices set to decrease. In Zimbabwe, the competition authority investigated the mobile financial services market and engaged in advocacy efforts to boost competition in the sector. The investigations confirmed abuse of dominance in the sector, after which the competition authority engaged other sector regulators to address the issue, resulting in a reduction in the cost of mobile financial services and increased access to mobile payments.

Furthermore, reforming regulations that restrict competition in domestic services (telecoms, energy, professional services, and transport) has been found to increase value add and productivity growth of downstream sectors that use those services. In Italy, the removal of price floors and other restrictions on legal services led to greater productivity.[15] The Polish government succeeded in reducing restrictions in 250 professions and eliminating those in 71 professions, which is expected to reduce excessive costs and other barriers linked to entry into regulated professions and contribute to price decreases and employment growth in the long run. In Africa, many rules (or loopholes in the rules) still allow for professional associations to fix minimum prices or enter into other collusive arrangements. For example, in the case of Kenya, following the CAK's rejection of an exemption request to fix minimum prices for accounting services, a law was passed to allow for it. Meanwhile, in Zambia, allocation of construction public contracts through a professional association cannot be prosecuted given a loophole in the competition law.

C. Actions to Boost Competition in Output Markets

Barriers that protect firms in the three core sectors may reduce entry and incentives to achieve productivity gains, and thus inhibit the creation of more and better jobs. In Zambia, actions by the competition commission prevented the exclusion of potential micro-, small-, and medium-scale entrants from the saw-milling market. The CCPC recommended a competitive process of allocating softwood licenses for both existing and potential sawmill applicants, resulting in entry of 500 small-scale saw millers and creation of an estimated 5,000 direct jobs. Within the same sector, the CAK prevented the loss of close to 7,000 jobs provided by 149 sawmills through advocating for pro-competition licensing, which was implemented by the sector regulator. Similarly, the Egyptian Competition Authority advocated with the Ministry of Trade and Industry to reopen licenses for new integrated steel plants that had been blocked for several years, leading to four additional licenses being awarded that would ultimately lead to job creation.

Another specific feature of competition law enforcement in Africa is the inclusion of public interest concerns in the analysis of mergers. These provisions have allowed competition authorities, for example in South Africa, Kenya and Zambia, to include conditions so that job losses are minimized in the short term after a merger. Nonetheless, this has raised concerns on whether this over-expands the role of competition authorities into labor issues and potentially encourages political interference.

Overall, reforms that increase competition in product markets tend to boost employment in the long term and/or on aggregate largely by expanding output and export opportunities.[16] In Kenya, advocacy action by the CAK helped to remove barriers to entry which almost hindered the development of a new high-value export crop and increase in the returns to farmers. A condition that incumbent tea factories must provide a "no objection" before a license may be issued to a new factory potentially hindered entry of new tea factories, but following CAK's intervention, an investor subsequently established a tea factory which is now exporting to firms in Japan and China. This also allowed smallholder farmers who switched to the specialty tea to realize a 230 percent increase in the price paid per kilo for their product. Reforms have allowed

15 Pellizzari & Pica (2011).

16 A review of this evidence can be found in World Bank - OECD. "A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth," (2017).

private investments (now there are more than 7 licensed processors) and enabled domestic and foreign investors to develop this high potential export crop that could significantly increase productivity, employment, and farmer income as well as diversify Kenya's export crops.

IV. CONCLUSION

In summary, responding to the needs of the economy, competition authorities in Africa are taking actions that support pro-poor economic transformation, leading to lower inequality. In addition to enforcement actions, authorities carry out market enquiries and advocacy actions to boost competition in key input markets and markets where the poor sell. And even in contexts without a competition framework and enforcement authority, governments integrate pro-competition principles in their rules. Looking into the future, competition authorities could be seen as facilitators of pro-poor economic transformation which should raise their profile in the development and growth agenda.

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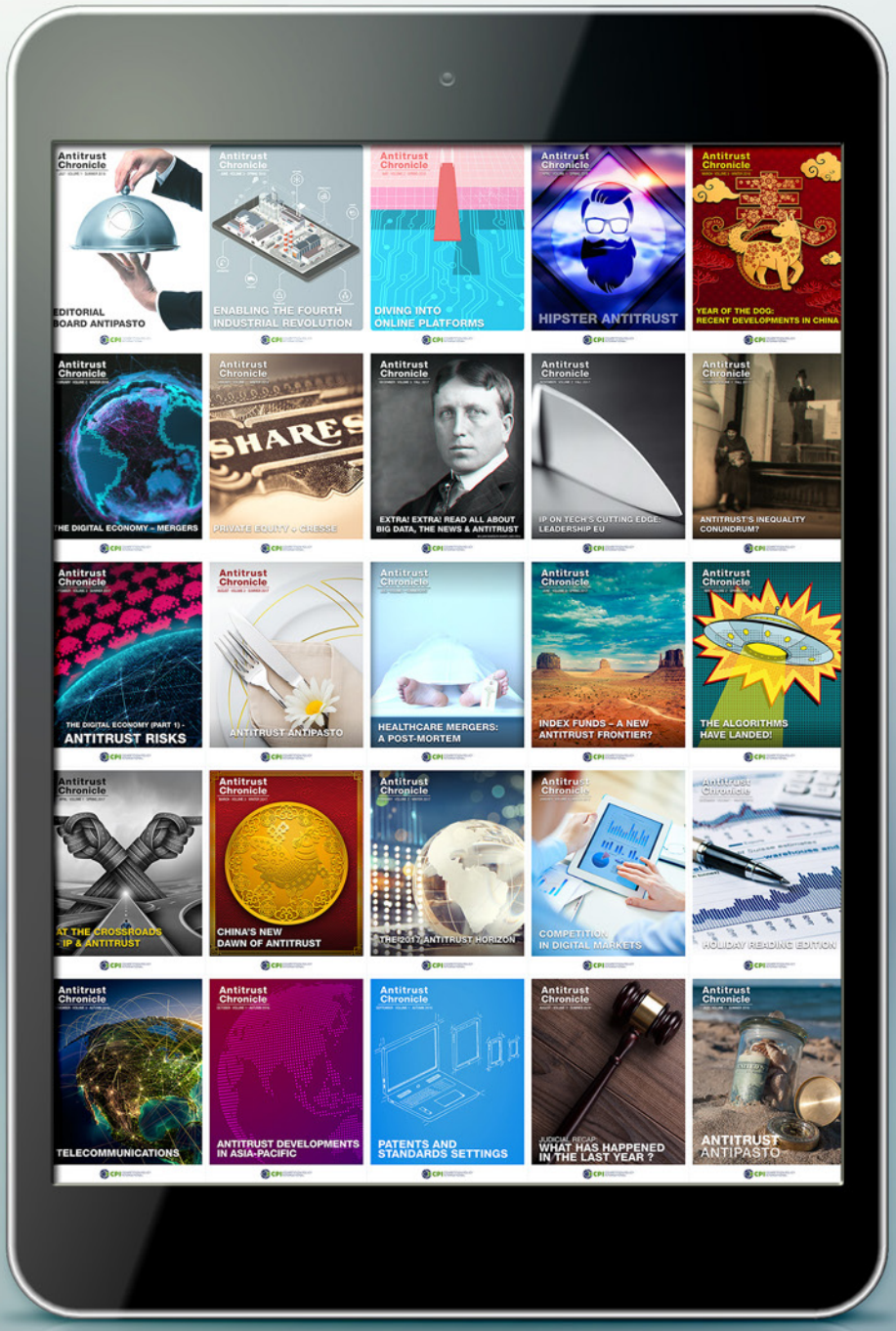


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