

COMPETITION POLICY AND INEQUALITY: DEVELOPING COUNTRIES' PERSPECTIVES



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I. INTRODUCTION

One can argue that we live in an age of discontent. Under the pressure of economic crises, security threats and regional conflicts, populism at both ends of the political spectrum coupled with distrust in laws, institutions and the elites that represent them became more pronounced. Antitrust or competition law & policy is an area where these developments have had a direct impact. A law that was born out of public discontent with the power of trusts and endeavoured to change the *status quo* is again called into action.

II. COMPETITION LAW AS A WEALTH REDISTRIBUTION TOOL - THE YEAS AND NAYS

Economic concentration is considered a suspect for higher prices, slow investments and wage stagnation.² Stiglitz points to market power as the main culprit for income inequality,³ additionally Atkinson further asserts that we should introduce an explicitly distributional dimension into competition policy in order to have a proper balance of power among stakeholders.⁴ On the other hand, Hovenkamp finds that even though antitrust enforcement may affect wealth distribution it is not systematically from the rich to the less rich or vice-versa.⁵ Crane has also warned against using antitrust law as a tool to fight wealth inequality.⁶ Nonetheless, he makes a distinction between developed and developing countries noting that the assumption that antitrust violations are regressive and hence that antitrust enforcement is progressive may hold more ground in the former rather than the latter, given that usually “the means of production are concentrated in a very small number of private hands

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² Council Of Economic Advisers Issue Brief, Benefits Of Competition And Indicators Of Market Power, Updated May 2016.

³ Stiglitz, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 28–33 (2012). See also earlier work on the issue of including other goals such as poverty and wealth inequality under competition law: Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, Southwestern Journal of Law and Trade in the Americas, Vol. 13, p. 211, 2007; NYU Law School, Public Law Research Paper No. 07-12; NYU Law and Economics Research Paper No. 07-26.

⁴ Atkinson, INEQUALITY: WHAT CAN BE DONE?, Harvard University Press, 2015, p. 303.

⁵ Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI Antitrust Chronicle, 2017, U. of Penn, Inst. for Law & Econ Research Paper No. 17-26.

⁶ Crane, *Antitrust And Wealth Inequality*, Cornell Law Review, Vol. 101 pp. 1171—1128.

and the vast bulk of society interacts with capital as employees and consumers.”⁷

Using the existing legal framework, Gal proposes that competition law, as part of the social contract, may have a role to play yet not solely and recommends some measures to reduce inequality, without significantly altering competition law.⁸ These include broadening the goals of competition law in certain circumstances to incorporate distributional effects. Similarly, Baker & Salop emphasize the role competition law and enforcement may play in combating inequality by, among other things, rethinking the goals and objectives of competition law by adopting consumer welfare as the goal of antitrust law rather than economic efficiency and expressly including inequality as an explicit competition policy focus.⁹

III. DEVELOPMENTAL OBJECTIVES AND COMPETITION LAW & POLICY

It is important to note here that these discussions mainly address competition law & policy as they stand in developed countries. Although there may be a common basic understanding about economic efficiency as the main objective of competition enforcement, the objectives of competition law & policy may differ considerably from one country to another.

An important objective for the adoption of competition laws in the developing world is the positive relation these laws have with development, as underlined in the work of various international organizations (“IOs”). From an adopter’s perspective, competition law needs to be acclimated with a number of social and developmental goals and policies addressing, among others, inequality. Accordingly, based on these objectives, there is a spectrum of competition law models, where, on the one end, we find a single objective that is economics-based (sometimes referred to as efficiency-based,¹⁰ core,¹¹ or neoclassical-price theory objectives¹²), and competition laws with a plurality of objectives (sometimes referred to as non-efficiency based¹³ or multiple objectives¹⁴).

The discussion then extended to what kind of competition law & policy would be suitable for developing countries.¹⁵ These policies/laws must account for their “special attributes” rejecting mere transplantation of competition laws from developed countries.¹⁶ Hence, to meet its development promise, competition law in developing countries may have other objectives. This “customization” of competition law may make it a better fit to the context in which it operates but may represent a different model of classical competition law & policy as understood in the origin countries.

7 Id. at 1185.

8 Gal notes that in essence the competition process produces, at least on the short run, winners and losers i.e. inequality, but would reduce inequality on the long-run. Gal, *The Social Contract at the Basis of Competition Law*, Forthcoming, *Competition Policy: between Equity and Efficiency* (Lianos & Gerard eds., Cambridge University Press, 2017).

9 Baker & Salop, “Antitrust, Competition Policy, and Inequality” (2015), Working Papers, Paper 41

10 Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 *WILLIAM AND MARY LAW REVIEW* (1989).

11 OECD, *The Objectives of Competition Law and Policy* (Note by the Secretariat ed., 2003).

12 Lianos, *Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy*, CLES RESEARCH PAPER SERIES No. 5/2016 (2016). Barnes described it earlier as “narrow or neoclassical view of objectives.” Barnes, *WILLIAM AND MARY LAW REVIEW*, (1989), p.797.

13 Barnes, *WILLIAM AND MARY LAW REVIEW*, (1989).

14 OECD, *The Objectives of Competition Law and Policy* (Note by the Secretariat ed., 2003).

15 Gal & Fox, *Drafting competition law for developing jurisdictions: learning from experience*, in *ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW* (Gal, et al. eds., 2014) and Mateus, *Competition and Development: What Competition Law Regime?*, in *COMPETITION LAW AND DEVELOPMENT* (Daniel Sokol, et al. eds., 2013).

16 OECD, *PROMOTING PRO-POOR GROWTH, PRIVATE SECTOR DEVELOPMENT* (2006), at p. 43.

IV. ALTERNATIVE VIEW: AFRICAN COMPETITION LAWS

The diffusion of competition law in South Africa (“SA”) represents a case in point. The adoption of the current competition law regime in SA occurred in the 1990s. Post-Apartheid, the political landscape was dominated by the governing party, the ANC, a party based on social democracy. In addition to boosting economic efficiency and competitiveness, the new competition law & policy is also concerned about equality and fighting racial exclusion. Further, subsequent policy documents set priorities for targeted sectors, anti-competitive conduct, and case selection.¹⁷ Fighting inequality was the undercurrent which guided many of the new government’s policy choices. The new government had a holistic understanding of its objectives, which affected how it interpreted democracy and human rights. In this context, competition law was framed as part of the “democratization” process rather than “market liberalization,” which insured its support by the public and the pro-socialist ANC members.¹⁸ This greatly influenced the reception of the economics-based competition laws. As part of the “democratization” process, competition law had to include broader objectives to serve other stakeholders and reflect a “holistic” policy approach.

This holistic approach is not unique to SA; the competition laws of a number of African countries vary in many ways, but they all display a plurality of objectives that go beyond economic welfare objectives. The spectrum of objectives ranges from protecting SMEs, equitable consideration for disadvantaged segments of the society, protecting employment, meeting development goals and protecting the environment. To understand how these different objectives are applied, we look closely at the merger regimes of jurisdictions in Sub-Saharan Africa, with emphasis on SA as the leading jurisdictions spearheading this model.¹⁹

A. Most Common Types of Considerations

Unlike SA, the majority of jurisdictions subject to our review adopt a non-exhaustive list of public interest considerations (“PICs”). Very few jurisdictions opted, similarly to SA, for a closed list of PICs which includes assessing the effects of a merger on a particular industrial sector or region, employment, the ability of small, medium and micro businesses (“SMMEs”) or firms controlled or owned by historically disadvantaged persons (“BEE”) to become competitive, and/or the ability of national industries to compete in the international markets.²⁰ The remaining jurisdictions either adopt a non-exhaustive list of PICs and/or very broad considerations under the public interest criteria.²¹ Botswana,²² Kenya,²³ Namibia,²⁴ and Zambia²⁵ adopted what we call the four-plus (“4+”) categories which includes the four categories of PICs similar to SA but as part of a non-exhaustive list of objectives. National development programs, or more broadly economic and social development, are

¹⁷ See the Prioritisation Framework of 2008, OECD Poverty Reduction, p. 245.

¹⁸ Lewis, *Thieves at the dinner table: enforcing the competition Act, a personal account*, (2012), p. 10.

¹⁹ We identified nineteen countries in Sub-Saharan Africa that, in addition to having merger control, also adopt provisions in relation to public interest considerations as part of their merger review process. At least fifteen of these have functioning competition authorities. These are Botswana, Cameroon, Gambia, Kenya, Malawi, Mauritius, Namibia, Nigeria, Seychelles, SA, Swaziland, Tanzania, Zambia and Zimbabwe. It should be noted that we included Madagascar, Mozambique, and Rwanda where competition authorities are being set-up and Burundi where there is no information available on the functions of competition bodies. We also add Nigeria since it has a functioning merger control regime as well as its economic importance. We make no judgment as to how strictly the laws are enforced.

²⁰ Section 12A(3) of the Act. However, Article 2, Purpose of the Act, includes broader objectives such as economic development.

²¹ These are Botswana, Burundi, Cameroon, Gambia, Kenya, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Zambia and Zimbabwe.

²² Section 59(2) Competition Act of 2009.

²³ Section 46(2) of the Competition Act no. 12 of 2010.

²⁴ Section 47(2) of Competition Act no. 2 of 2003. The Merger Guidelines however states that in general the Commission will limit itself to listed PICs, except in “extraordinary cases.” Namibian Competition Commission, Merger Guidelines (2016), p. 39

²⁵ Article 31 of Competition and Consumer Protection Act of 2010.

among the declared PICs under the competition laws of Burundi,²⁶ Cameroon,²⁷ the Gambia,²⁸ Madagascar,²⁹ and Zambia.³⁰ Mozambique additionally considers national entrepreneurship as a PIC.³¹ The competition laws of Mauritius, Seychelles and Tanzania include unique PICs to their counterparts, such as the safety of goods and services and environment protection.³²

We found that the most featured PIC is international competitiveness/export promotion. This reflects the importance of integrating in the world economy as a priority. It is then followed by the competitiveness of SMMEs and empowerment of historically disadvantaged citizens. This reflects a desire to develop SMMEs as the backbone of their economy and to bring equality to disfranchised segments of the society.

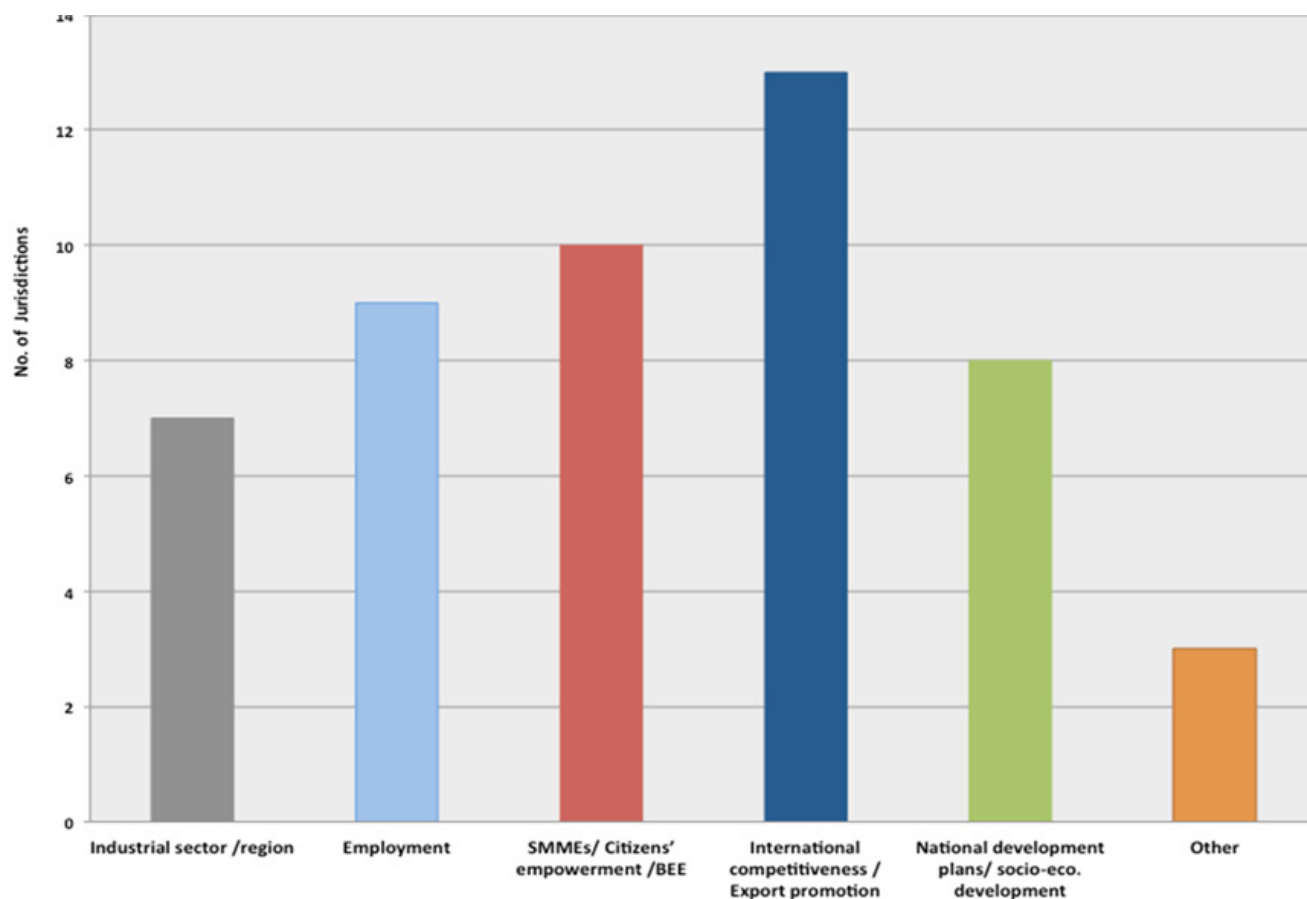


Figure 1 Categories of PICs in in Sub-Saharan Africa (select jurisdictions)
 Source: Compilation by author based on the review of national competition laws

Employment takes third place despite being the subject that feature the most in merger conditions. National development and/or socio-economic development follow employment, then competitiveness of industrial sectors or regions. Some jurisdictions adopted, or are in the course of adopting, guidelines addressing how public interest considerations will be dealt with (for example SA, Kenya and Botswana). In others, it is left to the consideration of a competition enforcement body or a political decision by a minister with no further guidance. In any case, a competition analysis of a given transaction must be performed first.

26 Article 46 of Law No. 1/06 of 2010.

27 Section 17 of The Competition Law no. 98/013 of July 14, 1998.

28 Article 37 (4) Act 4 of 2007.

29 Article 26 Competition Law no. 20 of 2005.

30 Article 31 of the Competition and Consumer Protection Act no. 24 of 2010.

31 Article 21 of Law no. 10 of 2013.

32 Article 22 of Seychelles Fair Competition Act of 2009 and Section 13 of Tanzania Fair Competition Act no. 8 of 2003.

B. Assessing PICs

The competition authorities in these jurisdictions are thus required to assess various public policy concerns, whether in the narrow sense (competition) or the broader sense (such as inequality). This echoes a problem that was much debated among a number of theorists: how to reconcile conflicting principles.³³ The first possible answer is that only one principle should prevail. From a utilitarian perspective, the principle that maximizes utility should prevail, i.e. preference is given to the principle, which would lead to the highest sum of utility regardless of how this utility is distributed.³⁴ If the outcome is similar then it is a matter of moral indifference which principle we choose. However, we may care not just about the aggregate utility but also about how this is distributed across the population. Consequently, if we need to weigh more than one value, how can we weigh these plural values against each other? Some proposed balancing as a solution to the problem.³⁵ It is not clear, however, what weight should be given to each principle. This is why this approach has been criticized as not providing a real solution to the problem of balancing competing principles.³⁶

Another approach is to order these competing principles so that one knows when and how much weight to give to each of them. Rawls's "priority problem" addresses how to assess weights of competing principles of justice.³⁷ Either a single overall principle can be identified and takes precedence over any other principles (prioritization), or a lexical order, where a certain sequence must be followed when considering the various principles at play.³⁸ Prioritization may be suitable if it is possible to identify an "initial choice situation" of a certain priority to be followed based on a given hierarchy between competing principles. In case it is possible to identify some considerations as more important than others, balancing could take the form of lexical order of principles. Lexical order is defined as "an order requires us to satisfy the first principle in the ordering before we can move on to the second. . . [A] principle does not come into play until those previous to it are either fully met or do not apply."³⁹ One important qualification of the lexical order is that unless the earlier principles have but a limited application and establish definite requirements which can be fulfilled, later principles will never come into play.⁴⁰

Accordingly, applying the above to the merger analysis, the interaction between competition and PICs may take the form of (a) prioritization, where for example competition analysis trumps public interest; (b) balancing, where both considerations have equal weight and can either cure or prohibit a merger; or (c) a lexical order where a balancing act occurs with the acknowledgment that certain considerations are more important than others. Prioritization is easier to administer with the order usually set under statute. However, there is not always an explicit hierarchy between those two independent sets of considerations set under the merger regime. In such cases, this leaves two policy options: balancing equal considerations or a lexical order of unequal considerations.

33 This holistic approach also raises other issues of third party intervention, evidence and the type of remedies/conditions adopted and how they are applied (monitored). For more on this see Raslan, *Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?*, 39 *World Competition*, Issue 4, Kluwer Law International (2016) (hereinafter Raslan 2016).

34 MILL & SHER, *UTILITARIANISM* (Hackett Publishing Company 2nd ed. 2001).

35 ROSS & STRATTON-LAKE, *THE RIGHT AND THE GOOD* (Oxford University Press. 2002). Ross identifies seven *prima facie* duties to balance one's actions giving special weight to duties of non-maleficence. Ayal argues that in case a balancing test is to be applied antitrust should follow the rules set under constitutional law in that regard. See AYAL, *FAIRNESS IN ANTITRUST: PROTECTING THE STRONG FROM THE WEAK* (Hart Publishing. 2014), p.158.

36 See for example Harsanyi, *Can the maximin principle serve as a basis for morality? A critique of John Rawls's theory*, 69 *THE AMERICAN POLITICAL SCIENCE REVIEW* (1975) and AMARTYA, *THE IDEA OF JUSTICE* (Penguin Books. 2009).

37 RAWLS, *A THEORY OF JUSTICE* (Oxford University Press. 1999), pp. 36-46. Rawls criticized the utilitarian approach to the priority problem.

38 *Id.*

39 RAWLS, *A Theory of Justice*. 1999, p. 244. See also Clark & Gintis, *Rawlsian justice and economic systems*, *PHILOSOPHY & PUBLIC AFFAIRS* (1978), p. 310.

40 See RAWLS, *A Theory of Justice*. 1999 p 45 and Barry, *John Rawls and the Priority of liberty*, *PHILOSOPHY & PUBLIC AFFAIRS* (1973), pp. 274-290.

1. Balancing Considerations

Under the SA merger regime, there is no explicit hierarchy between the competition test and the public interest test, but rather a certain analytical progression that is being followed.⁴¹ By the same token, the public interest test may not encroach on the competition analysis. Accordingly, the SA merger regime adopts the second approach in giving equal balance to both competition and PICs and attempts to find means to measure these principles and weigh them against each other. The simple version of this exercise is a merger where both competition and public interest analysis lead to the prohibition or clearance of the merger. But what happens in the case where the outcome of the analysis of one is positive and the other is negative? Can a merger which has failed the competition test but justified on public interest grounds be approved? Or can a merger that has passed the competition test but failed the public interest test be prohibited? The answer is in the affirmative in both cases.⁴²

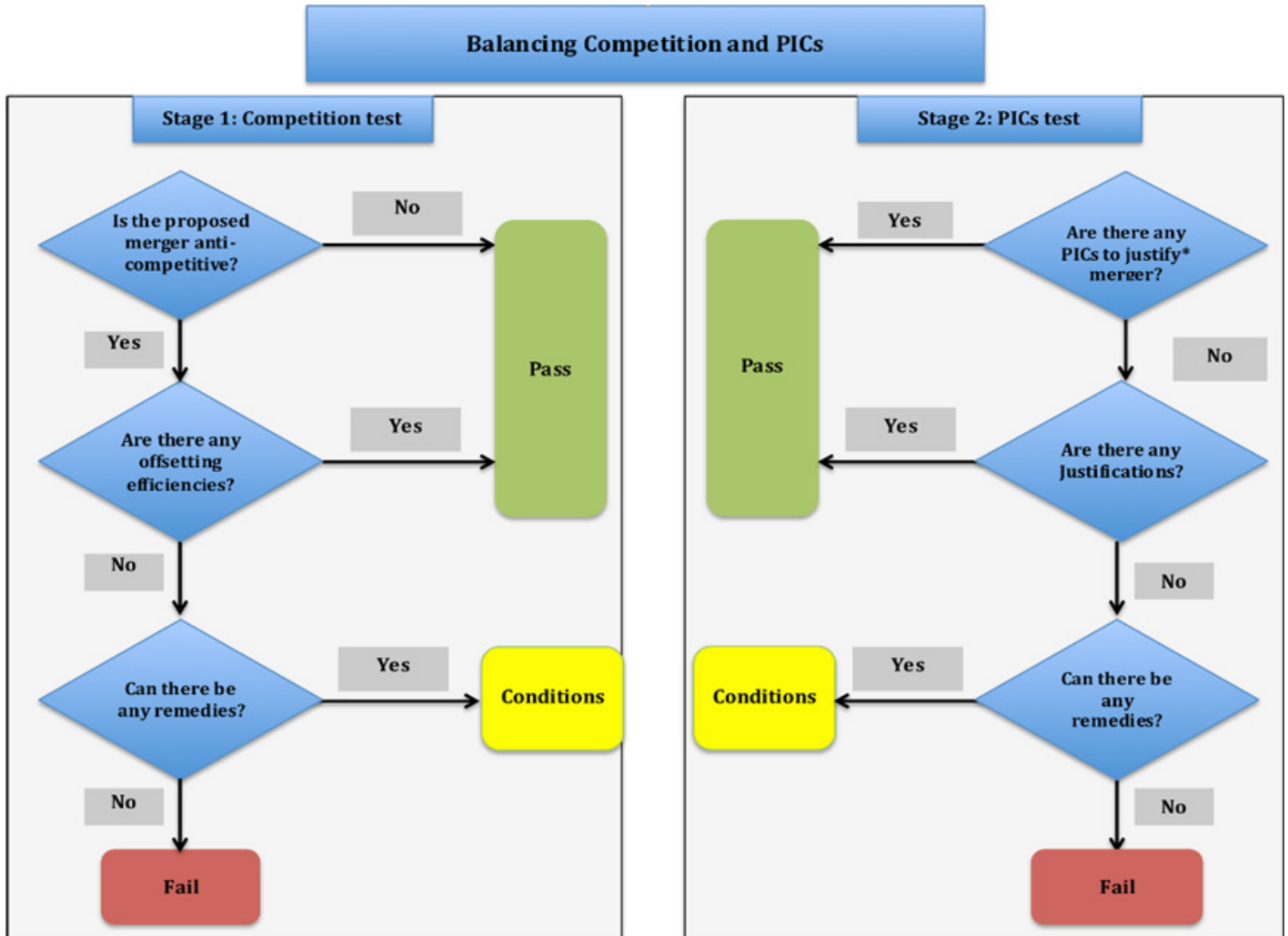


Figure 2 Balancing competition and PICs
Source: Raslan 2016

*Justifications means PIC, whether positive or negative, that justifies allowing or blocking a merger, as the case may be (*Harmony Gold Mining Company and Gold Fields merger*).⁴³

41 See *Anglo American Holdings Ltd and Kumba Resources Ltd./Industrial Development Corporation* (intervening), 46/LM/Jun02, (2003). A number of merger regimes under review follow the SA framework for merger analysis. These are Botswana, Namibia, Kenya, Malawi, Zambia and Nigeria.

42 Id.

43 *Harmony Gold Mining Company Limited and Gold Fields Limited*, 93/LM/Nov04, (2005), p.13. It was argued that a merger must be prohibited if there is no evidence that it can be justified on public interest grounds. The Tribunal did not agree with this interpretation of the Competition Act.

The practice of the SA competition authorities so far is that no merger has been approved for PICs in case it was also found to be anti-competitive. However, pro-competitive mergers may be approved despite their detrimental impact on public interest with conditions mitigating that said impact.⁴⁴ A relevant example to note here is the merger of Anglo American Holdings Ltd and Kumba Resources Ltd, with the Industrial Development Corporation (“IDC”) intervening, the IDC, a state-owned national development finance institution mandated to promote economic growth, industrial development and economic empowerment where the boundaries of the BEE considerations were put to the test. It was argued that the BEE should be interpreted in accordance with section 2(f) of the Act to promote a greater spread of ownership. The Tribunal however found this interpretation over-reaching as it would have transformed the Act “from an antitrust statute, albeit with a public interest aspect, into an unchecked vehicle for redistribution.”⁴⁵ This reflects an awareness of the boundaries of applying a holistic competition policy, which directly addresses distribution of wealth.

2. Lexical Order of Objectives

The majority of merger control regimes in the jurisdictions examined adopts a lexical order where competition assessment takes first place. Only if the outcome is negative, a balancing act is then performed in case there are PICs that may outweigh the harm to competition.⁴⁶

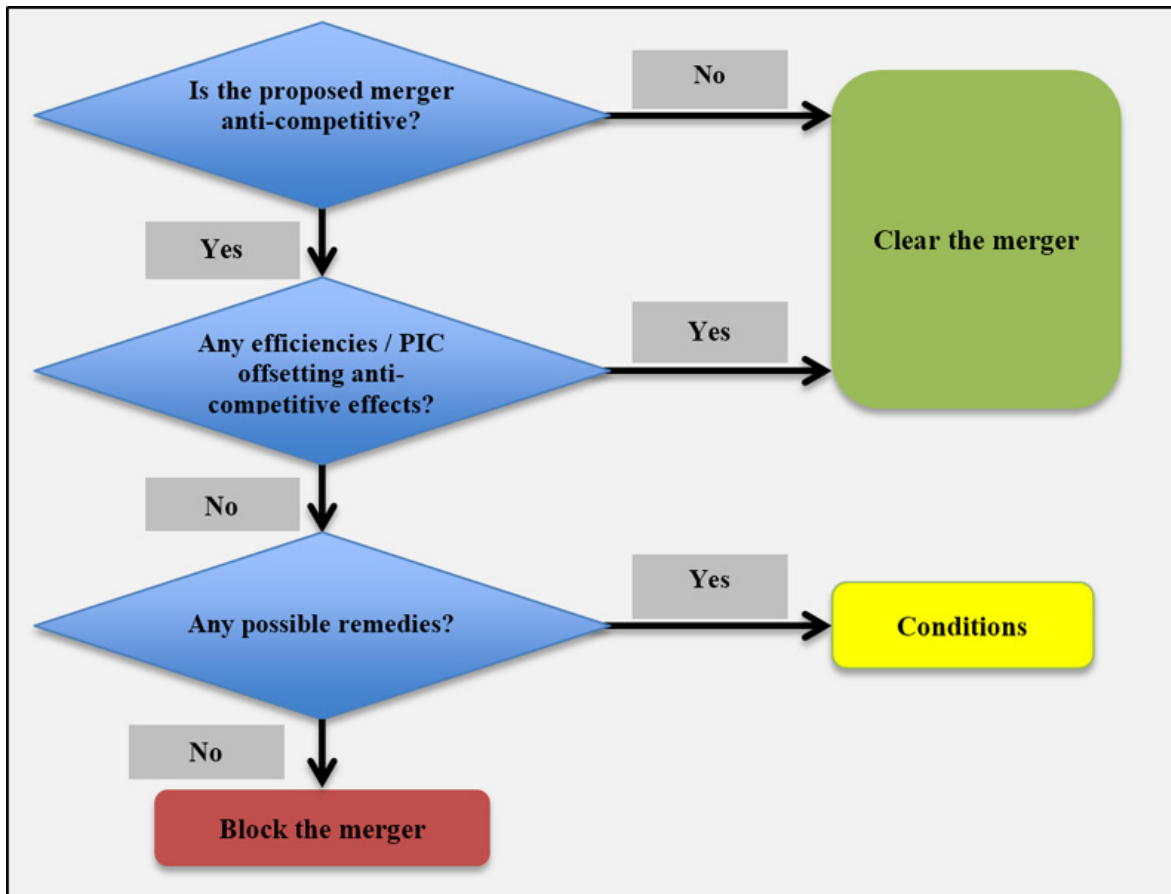


Figure 3 Lexical order of merger analysis
 Source: Based on the review of national competition laws of jurisdictions subject of review.

44 See for example *Minister of Economic Development and Others v. Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v. Wal-Mart Stores Inc.*, 110/CAC/Jun11, 111/CAC/Jul11, (2012).

45 *Anglo American Holdings Ltd and Kumba Resources Ltd./Industrial Development Corporation* (intervening), 46/LM/Jun02, (2003).

46 Competition Law no. 1/06 of 2010 (Burundi), Competition Law no. 98/013 of 1998 (Cameroon), Competition Law no. 4 of 2007 (Gambia), Law no. 14 of 1998 (Gabon), Competition Law no. 20 of 2005 (Madagascar), Competition Act of 2007 (Mauritius), Law no. 10 of 2013 (Mozambique), Law no. 36 of 2012 (Rwanda), Fair Competition Act no. 8 of 2003 (Tanzania), Fair Competition Act of 2009 (Seychelles), Competition Act no. 8 of 2007 (Swaziland) and Competition Act of 1996 (Zimbabwe).

V. CONCLUSION

The diffusion process of competition law & policy across the world entails not only the formal adoption of the said law, but also to look at whether, and to what extent, its norms, rules and institutions were transformed based on a given context. Since in most cases in developing countries competition law & policy is an acquired tool, the new adopters should carefully consider the objectives of adopting such policy and be very clear about what the law can and cannot do. We find here that they have opted for a more holistic competition law that addresses broader considerations including in some instances inequality, which raises many enforcement challenges. If a country opts to include such objectives under its competition law there is a need to set clear parameters for the legal and analytical frameworks through a transparent decision making process to limit the possibility of abuse. This is also of direct relevance to the current debate on the relation between competition and inequality in developed countries. It could possibly be that more research and empirical studies should be directed to these countries to understand how they attempt to reconcile these different (and sometimes contradicting) goals, and to demonstrate what has worked (or not) and how. This may also help developing countries in determining when and how competition law becomes relevant to their developmental path, rather than having unrealistic expectations of what competition law can deliver.

