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## Vindicating the right to food in South Africa: Leveraging market inquiries as a form of accountability

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**Summary:** *This article examines the potential of market inquiries as a competition law mechanism to realise the right to nutritious and adequate food. By probing the intersection of competition law and food security, it demonstrates how market inquiries can interrogate and dismantle structural barriers within food markets, ensuring accountability and fostering an enabling environment for equitable access. Through a nuanced analysis of South Africa's Fresh Produce Market Inquiry (FPMI), Health Market Inquiry (HMI) and comparative insights from foreign market inquiries in the food sector, key lessons and actionable recommendations are distilled. The discussion highlights that market inquiries extend beyond isolated enforcement actions, offering a systemic lens through which concentrated market power, buyer dominance and information asymmetries can be addressed. In doing so, they operationalise the state's constitutional and international obligations to respect, protect and fulfil the right to food, while simultaneously advancing public health objectives. The FPMI illustrates how structural features such as buyer power and barriers to entry undermine affordability, diversity and sustainability of food supply, while its remedies provide a framework for accountability over time. The HMI, by contrast, underscores the challenges of implementation and the need for political will, monitoring and civic participation to translate findings into meaningful reform. Comparative experiences, including supplier codes and adjudicators in jurisdictions such as New Zealand and the United Kingdom, demonstrate that targeted regulatory interventions can rebalance market relationships, stabilise supply chains and improve consumer access to nutritious food. The findings empower civic organisations and competition authorities to harness market inquiries as a vital tool to vindicate the right to food, promoting a more equitable and just food system. Ultimately, the article argues that market inquiries represent a practical accountability mechanism that links competition policy to human rights outcomes, moving the right to food from principle to implementation through structural reform and sustained oversight.*

**Key words:** *adequate food; competition law; food security; fresh produce market inquiry; market inquiry; nutritious; right to food*

## 1 Introduction

Food security has been a central and continuous issue plaguing governments for many decades. The World Bank Group, in line with the outcomes of the World Food Summit of 1996, defines 'food security' as the state 'when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food that meets

their dietary needs and food preferences for an active and healthy life'.<sup>1</sup>

South Africa is no exception to this issue of food security, as in 2021, approximately 2,1 million households in South Africa (11,6 per cent) indicated that they experienced hunger.<sup>2</sup> Food security encompasses not only the availability of food but also its quality. Nutritious food is crucial to food security.<sup>3</sup> In South Africa, the intersection of food security and competition law presents a critical area of focus in vindicating the right to food, a fundamental human right enshrined in both national and international legal frameworks. The right to food, particularly access to sufficient and nutritious food, is a cornerstone of human dignity and well-being and crucial to the attainment of public health goals.

While the direct link between competition law and food security may not be immediately apparent, the regulation of competition in the food sector plays a pivotal role in safeguarding food security. Monopolistic practices, market concentration and anti-competitive behaviour can have a significant impact on food prices, availability and quality, exacerbating food insecurity, especially among vulnerable populations. Thus, competition law serves as an essential tool in preventing market distortions that could undermine access to adequate food. In this context, the commercial determinants of health offer a useful lens for understanding how corporate strategies, such as pricing, product placement, lobbying and consolidation, shape population health outcomes.<sup>4</sup> By recognising that powerful food industry actors can influence food environments in ways that restrict healthy choices and entrench inequitable access, the commercial determinants of health underscore the need to regulate concentrated market power.<sup>5</sup> It therefore complements and strengthens the argument that competition law is a critical mechanism for addressing the structural commercial drivers that compromise food security and the realisation of the right to food.

1 Food and Agriculture Organisation of the United Nations (FAO) 'Report of the World Food Summit' 17 November 1996, <https://www.fao.org/4/w3548e/w3548e00.htm> (accessed 18 June 2024); World Bank Group 'What is food security?', <https://www.worldbank.org/en/topic/agriculture/brief/food-security-update/what-is-food-security> (accessed 18 June 2024).

2 Statistics South Africa 'Focus on food inadequacy and hunger in South Africa in 2021' 11 April 2023, <https://www.statssa.gov.za/?p=16235> (accessed 16 August 2024).

3 FAO (n 1).

4 K Lee & N Freudenberg 'Public health roles in addressing commercial determinants of health' (2022) 43 *Annual Review of Public Health* 375.

5 AB Gilmore and others 'Defining and conceptualising the commercial determinants of health' (2023) 401 *The Lancet* 1194.

This article explores the role that competition law can play in vindicating the right to food in South Africa. Of particular interest is how market inquiries, a competition law mechanism, can be leveraged to ensure that all South Africans have access to sufficient, safe and nutritious food. The discussion begins with an exploration of the intersection between food security and competition law, after which it delves into the role of South African food-related market inquiries in vindicating the right to food. The article then turns to some comparative lessons before providing recommendations and concluding. Ultimately, the article advocates the recognition of competition law and, more specifically, market inquiries, as a potential avenue to assist in the realisation of food security and the vindication of the right to food.

## 2 Intersection of food security and competition law

### 2.1 Link between food security and the right to food

It is inarguable that food, particularly nutritious food, is one of the most basic needs of human beings.<sup>6</sup> It is intrinsically linked to constitutionally guaranteed rights that relate to, among other things, human dignity and life. Yet, in 2018, over 2 billion people globally did not have consistent access to nutritious, sufficient and safe food.<sup>7</sup> A report by Statistics South Africa noted that in 2021, 2,6 million of the 17,9 million South African households, which translates to 15 per cent thereof, reported having inadequate access to food.<sup>8</sup> An additional 1,12 million, which is 6 per cent, of households reported a severe inadequacy in terms of food access.<sup>9</sup> These figures underscore not only the scale of food insecurity but also the extent to which the fundamental elements of the right to food remain unrealised for many individuals.

The term ‘sufficient’, which is used in the definition of ‘food security’,<sup>10</sup> highlighting quantity, speaks to the fact that a person has

6 M Guillen-Royo, J Velazco & L Camfield ‘Basic needs and wealth as independent determinants of happiness: An illustration from Thailand’ (2011) 110 *Social Indicators Research* 519.

7 J Jesson and others ‘Food insecurity and depression: A cross-sectional study of a multi-site urban youth cohort in Durban and Soweto, South Africa’ (2021) 26 *Tropical Medicine and International Health* 687.

8 Statistics South Africa ‘Assessing food inadequacy and hunger in South Africa in 2021 using the General Household Survey (GHS)’ 28 March 2023, [https://www.statssa.gov.za/?page\\_id=1854&PPN=03-00-20&SCH=73568](https://www.statssa.gov.za/?page_id=1854&PPN=03-00-20&SCH=73568) (accessed 18 June 2024) 16.

9 As above.

10 See introduction for the definition used by the World Bank Group.

to have enough food. However, the quality or substance of the food is equally as important and, thus, attention is also drawn to the term 'nutritious' which is incorporated in the meaning of food security. This aligns with the internationally recognised components of the right to food which, as elaborated by the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) in General Comment 12, include availability, accessibility, both physical and economic, adequacy (which encompasses safety, nutritional value and cultural acceptability) and sustainability for present and future generations.<sup>11</sup> These elements map directly onto the key dimensions of food security, thereby illustrating that food security operates as a practical expression of what the right to food requires in concrete terms.

As will be seen, food security is an integral part of the right to food, a right which is reflected in various national and international legal instruments. Prominently, section 27 of the Constitution of the Republic of South Africa, 1996 (Constitution), forming part of the Bill of Rights, stipulates that every person has the right to have access to sufficient food and water and that the government is tasked with ensuring that they take reasonable legislative and other steps to accomplish the 'progressive realisation' of this right, within the parameters of the resources available to it.<sup>12</sup> In interpreting socio-economic rights such as those in section 27, South African courts have emphasised the importance of reasonableness and context, requiring the state to adopt coherent, inclusive and effective measures to progressively realise access to adequate food.<sup>13</sup> This jurisprudence reinforces the substantive link between food security and the constitutional right to food, as both demand sustained, equitable and accessible food systems capable of meeting people's dietary and nutritional needs.

The realisation of the right to access food is further addressed in the Constitution, with reference being made to the South African Human Rights Commission (SAHRC). The SAHRC is a democratic body tasked with advancing accountability, transparency and good governance in the public sector through actions such as investigation,

11 United Nations 'E/C.12/1999/5: General Comment 12 on the right to adequate food' 12 May 1999, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/ec1219995-general-comment-no-12-right-adequate-food> (accessed 30 November 2025).

12 Sec 27 of the Constitution of the Republic of South Africa, 1996 (Constitution).

13 See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health and v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).

reporting and offering recommendations.<sup>14</sup> The Constitution requires the SAHRC to annually command the organs of state to furnish them with information on the steps that such organs have taken in relation to the realisation of the right to food, among other rights contained in the Bill of Rights.<sup>15</sup> Through this reporting mechanism, the SAHRC effectively monitors whether the state is taking adequate steps to ensure that food is available, accessible, adequate and sustainable, again mirroring the core elements of both the right to food and food security.

Further to this, international law also carries considerable weight in the South African legal system. For example, a court, tribunal or forum has to consider international law when interpreting the Bill of Rights in the Constitution.<sup>16</sup> In fact, not only when interpreting the Bill of Rights, but also when interpreting legislation as a whole, a court is required to give preference to an interpretation that aligns with international law, as opposed to accepting an interpretation that fails in such alignment.<sup>17</sup> Thus, the right to have access to sufficient food in section 27 must be considered in light of international law. Taking a look at some of these international legal instruments, there is article 25(1) of the Universal Declaration of Human Rights (Universal Declaration) which states that every person has the right to a standard of living that is sufficient for their own and their family's health and well-being, which includes food.<sup>18</sup> Mirroring this provision is article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides that state parties, being cognisant of the gravity of international synergy based on unprejudiced consent, must take the necessary steps in ensuring that the right is realised.<sup>19</sup> ICESCR also contains a provision to the effect that state parties must ensure that world food supplies are equitably distributed on the basis of need, due to the issues faced by food-importing and food-exporting countries.<sup>20</sup> This latter provision is relevant both to 1966, when ICESCR was adopted, and to the present day, when there is an imbalance in the equitable access of food throughout the world. General Comment 12 further clarifies that states must not only respect and protect individuals' existing

14 M Mojapelo 'The role of the South African Human Rights Commission to records management in the public sector in South Africa' (2018) 50 *Journal of the South African Society of Archivists* 28.

15 Sec 184(3) Constitution.

16 Sec 39(1)(b) Constitution.

17 Sec 184(3) Constitution.

18 Art 25(1) United Nations General Assembly, Resolution 217A (III); Universal Declaration of Human Rights (10 December 1948) A/RES/217(III).

19 Art 11(1) United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (16 December 1966), A/RES/21/2200A (ICESCR).

20 Art 11(2)(b) ICESCR.

access to adequate food, but must take proactive steps to facilitate and promote such access, obligations that align with national duties under section 27 and with the conditions required to achieve food security.<sup>21</sup>

The legal articulation of nutritious food adequacy and the right to food have been further developed in respect of vulnerable groups, including children, for whom specific protections and obligations have been recognised. Section 28(1)(c) of the Constitution provides that every child has the right to 'basic nutrition'.<sup>22</sup> As Chirwa explains, in the health sciences space, nutrition encompasses various aspects, including the biochemical composition of food, human dietary needs, and the bodily absorption of essential nutrients.<sup>23</sup> Consequently, when considered a fundamental right, nutrition entails specific state obligations to guarantee access to diverse and nutrient-rich food options.<sup>24</sup> Furthermore, the right to basic nutrition for children implies that they are entitled to a minimum standard of nutritional intake, sufficient to support their growth, health and overall well-being, thereby meeting their developmental dietary requirements.<sup>25</sup> Ensuring that children have adequate food is an obligation of their parents or guardians. According to section 305(4) of the Children's Act,<sup>26</sup> an individual who is legally responsible in the maintenance of a minor is guilty of an offence if, while having the ability to do so, such an individual does not provide the minor with, amongst other things, adequate food.<sup>27</sup> The constitutional protection afforded to children thus reinforces one of the core dimensions of both the right to food and food security or adequacy, while highlighting the heightened vulnerability of certain groups.

Therefore, it is impossible to separate the right to food from access to sufficient and nutritious food. The government plays a key role in ensuring that these terms find harmony, as Hendriks and Olivier observe, that the right to food imposes governmental responsibilities to ensure that food is culturally acceptable, sustainably supplied (both environmentally and economically), and accessible without infringing upon other human rights.<sup>28</sup> The constitutional right to

21 United Nations (n 11).

22 Sec 28(1)(c) Constitution.

23 DM Chirwa 'Child poverty and children's rights of access to food and to basic nutrition in South Africa' (2009) 10 *ESR Review: Economic and Social Rights in South Africa* 4.

24 As above.

25 As above.

26 Children's Act 38 of 2005 (Children's Act).

27 Sec 305(4) Children's Act.

28 C Hendriks & NJJ Olivier 'Review of the South African agricultural legislative framework: Food security implications' (2015) 32 *Development Southern Africa* 557.

food imposes both duties and standards of justification and scrutiny on the state.<sup>29</sup> The state is required to uphold this right by protecting access to adequate food and ensuring that it is not hindered or diminished through deliberately retrogressive measures.<sup>30</sup> This responsibility, known as a negative duty, includes taking steps to prevent interference with access to food. Additionally, the state has a positive duty to promote and fulfil the right to food by implementing appropriate measures, which may be legislative, administrative or budgetary.<sup>31</sup> These duties are aligned with the state's broader human rights obligations to respect, protect and fulfil socio-economic rights. The obligation to respect requires the state to refrain from actions that directly or indirectly impede access to adequate food; the obligation to protect requires the state to regulate private actors whose conduct may undermine such access; and the obligation to fulfil requires active measures to facilitate and provide food where necessary. Within this framework, competition law becomes a critical regulatory mechanism through which the state discharges its protective duty, particularly by addressing market practices that may obstruct equitable access to nutritious and affordable food.

These duties mirror the structural requirements of achieving food security; indeed, the availability, accessibility, adequacy and sustainability of food cannot be realised without the state fulfilling its constitutional and international human rights obligations. It is argued that regulation of competition in the food industry is one avenue that is pivotal in ensuring that government's positive and negative duties are met and that everyone has access to nutritious food, as will be explained below.

## **2.2 Regulation of competition is needed to uphold the right to food**

The role that competition law plays in the food environment may not be strikingly apparent, particularly since the current South African competition legislation makes no mention of food. Nevertheless, its importance lies in its impact on the power that a business has in a particular market, something which is vital in the food environment. In particular, anti-competitive practices have direct implications for the core components of the right to food, availability, accessibility (including economic accessibility), adequacy and sustainability, by

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<sup>29</sup> Hendriks & Olivier (n 28) 559.

<sup>30</sup> As above.

<sup>31</sup> As above.



influencing the prices, diversity and distribution of food.<sup>32</sup> Practices such as price fixing, exclusionary conduct or excessive pricing can limit consumers' ability to access affordable and nutritious food, thereby undermining food security.<sup>33</sup> In the words Fox, '[e]fficiency is seldom the value or goal closest to the hearts and minds of the legislators who enact competition laws. More commonly, at the legislative stage, a competition law is about private power and how to contain its use and abuse.'<sup>34</sup>

One of the main objectives of competition law is to protect the competition that exists between businesses.<sup>35</sup> This is of value owing to the fact that markets that are void of competition soon become the breeding grounds of monopolists. Monopoly, the exclusive control or provision of goods or services, results in a misuse and, often, the abuse of market power.

The avoidance of this undesired occurrence, as Fox indicated, is one of the primary concerns of competition law. In line with Davis and others' view on the negative consequences of monopolies, the downside of monopolies includes the monopolist's ability to autocratically increase prices, reduce the availability of the goods or services, and compromise the provision of high-quality outputs due to a lack of innovation.<sup>36</sup> The possibility of ever-increasing prices by monopolies, particularly in reference to the food sector, would be dangerously unfavourable. Bearing in mind the previously mentioned statistics of food inadequacy in South Africa, and the fact that in 2018 a quarter of the South African population indicated that they had run out of money for food in that year,<sup>37</sup> monopolistic increases in food prices would pose as a catalyst to the issue of a lack of food security in South Africa. Notably, vulnerable groups, such as those belonging to impoverished households, women and child-headed households, or those who are single breadwinners, would face severe difficulties should food prices increase at the whim of monopolies.<sup>38</sup>

32 M Anisimova, N Yurchenko & N Kopytets 'Improving antitrust instruments for food security' (2021) 282 *Web of Conferences* 1.

33 As above.

34 EM Fox 'Equality, discrimination, and competition law: Lessons from and for South Africa and Indonesia' (2000) 41 *Harvard International Law Journal* 593.

35 K Stylianou & M Iacovides 'The goals of EU competition law: A comprehensive empirical investigation' (2022) 42 *Legal Studies* 628.

36 L Davis & Ö Orhangazi 'Competition and monopoly in the US economy: What do the industrial concentration data show?' (2021) 25 *Competition and Change* 6.

37 S van der Berg, L Patel & G Bridgman 'Food insecurity in South Africa: Evidence from NIDS-CRAM wave 5' (2022) 39 *Development Southern Africa* 723.

38 See I Lianos 'Competition law as a form of social regulation' (2020) 65 *The Antitrust Bulletin* 54, wherein it is explained that liberalisation of competition regulation that increases monopoly power results in welfare losses, particularly for the poorest parts of a population. Achieving the lowest possible prices for

In addition to the economic burden created through artificially inflated prices, anti-competitive conduct may also impede other dimensions of the right to food. For instance, monopolistic control over key supply chains can reduce the physical accessibility of food by limiting the diversity of suppliers within local markets and may adversely affect adequacy where dominant firms prioritise low-cost, low-nutrient foods over more nutritious alternatives.<sup>39</sup> Accordingly, anti-competitive conduct not only harms market functioning, but constitutes a structural barrier to the realisation of the right to food by limiting the affordability and accessibility of essential food items.<sup>40</sup> A clear illustration of this is the well-known bread cartel case, in which major South African bakeries colluded to fix the price of bread. This conduct not only increased the cost of a staple food relied upon by low-income households, but also restricted consumer choice and entrenched unequal access to an essential, nutritionally important product.<sup>41</sup> The case demonstrates how anti-competitive practices can undermine food security and hinder the effective enjoyment of the right to adequate food.

The Competition Act<sup>42</sup> is one mechanism that assists in addressing these various issues that stem from a lack of competition, including food environments, although not explicitly stated. Among other stipulations in the Preamble to this Act, it is stated that all South Africans will benefit from an efficient and competitive economic environment that harmonises the interests of workers, owners and consumers.<sup>43</sup> Therefore, in order to draw that link between competition law and the right to food, attention must specifically be paid to the consumer's interests. A competitive market structure supports the state's obligation to protect the right to food by ensuring

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consumers is a key objective of competition law. See H Hovenkamp 'Antitrust and platform monopoly' (2021) 130 *Yale Law Journal* 1956, wherein it is explained that in assessing the efficacy of an antitrust remedy, the same benchmarks used to gauge the success of antitrust laws broadly should be employed, namely, enhanced output, reduced prices, improved product quality and stimulated innovation. The primary objective of antitrust legislation is not to compromise firms' efficiency, profitability or size, nor to adversely impact consumers through increased prices, diminished quality or reduced quantity. While concerns surrounding privacy, political influence and social and economic disparities are indeed pertinent to legal policy, they only constitute antitrust issues if they also pose a threat to output, price competition or innovative progress.

39 J Clapp & K Bester 'The monopoly problem at the heart of Canada's food system' (2025) 3 *Perspectives: A Canadian Journal of Political Economy and Social Democracy* 10.

40 J Clapp 'The problem with growing corporate concentration and power in the global food system' (2021) 2 *Nature Food* 404.

41 Norton Rose Fulbright 'Breach of competition law sparks collective redress claims in South Africa' October 2015, <https://www.nortonrosefulbright.com/en/knowledge/publications/da30b6f6/breach-of-competition-law-sparks-collective-redress-claims-in-south-africa> (accessed 30 November 2025).

42 Competition Act 89 of 1999 (Competition Act).

43 Preamble to the Competition Act.

that private actors do not engage in practices that undermine equitable access to adequate and nutritious food. Importantly in this regard, the Act contains several prohibitions with the objective of sustaining and improving competition. For instance, one of the prohibitions relates to the restriction of specific horizontal and vertical practices.<sup>44</sup> According to sections 4(1) and 5(1) of the Competition Act, an agreement between or practice of parties in a horizontal or vertical relationship is prohibited if it results in a major prevention or decrease of competition in a market, except in instances where a party demonstrates that the 'technological, efficiency or other pro-competitive gain' arising from it prevails over its overall result.<sup>45</sup> The Act defines a horizontal relationship as the relationship that exists between competitors; a vertical relationship refers to the relationship that exists between a firm and its suppliers and customers.<sup>46</sup>

Part A of chapter 4 of the Competition Act covers the establishment and regulation of the Competition Commission (Commission). Section 19(1) of the Competition Act establishes the Commission as a juristic person, bearing jurisdiction throughout the Republic of South Africa and whose functions must be carried out in terms of the Act.<sup>47</sup> While an administrative body, the Commission is regarded as a specialist institution and its fundamental duties include investigating complaints of prohibited conduct carried out by firms and prosecuting such conduct.<sup>48</sup> The Commission is tasked with investigating cases wherein it suspects that a respondent firm has violated the Competition Act.<sup>49</sup> The Commission starts with an investigation, and may refer the conduct and firm to the Competition Tribunal for a determination, depending on the evidence discovered during the investigation process.<sup>50</sup> Other responsibilities of the Commission include the implementation of measures that improve market transparency, improving public awareness of the Act and conducting impact studies.<sup>51</sup> These enforcement and investigative functions directly contribute to safeguarding the right to food by curbing private conduct that may undermine the affordability and availability of essential food products.

44 See sec 1 of the Competition Act, which defines a horizontal relationship as the relationship that exists between competitors and a vertical relationship that refers to the relationship that exists between a firm and its suppliers and/or its customers.

45 Sec 4(1)(a) Competition Act.

46 Sec 1 Competition Act.

47 Sec 19(1) Competition Act.

48 L Kelly & D Unterhalter (eds) *Principles of competition law in South Africa* (2017) para 3.1.

49 Kelly & Unterhalter (n 48) para 3.1.1.

50 As above.

51 Secs 21(1)(a), (b) & (g)(B) Competition Act.

While investigating individual firms for violations is a crucial aspect of the Commission's enforcement toolkit, it is not the only mechanism at its disposal. In addition to addressing specific instances of non-compliance, the Commission also possesses the authority to launch comprehensive market inquiries, allowing for a broader examination of industry-wide practices and structural issues. While these other mechanisms, in certain contexts, can contribute to enhancing market conditions in ways that indirectly support food security, for example, by improving access to information or strengthening public oversight, they do not offer the same depth of structural interrogation as market inquiries. Market inquiries are uniquely positioned to uncover systemic features of a market that impede competitive outcomes and, by extension, may hinder the realisation of the right to food. For this reason, and given that their application to the right to food remains comparatively underexplored, this article focuses specifically on market inquiries while recognising the complementary value of other tools within the Commission's mandate. This proactive approach of market inquiries enables the Commission to identify and address systemic problems, promoting a more competitive and equitable market environment. Such inquiries are particularly significant in food markets, where structural features, such as high levels of concentration, limited entry and information asymmetries, can inhibit food availability and raise prices, with direct implications for food security and the realisation of the right to food. The following part delves into the Commission's power to initiate market inquiries, the scope for such power and potential outcomes that can be derived from it.

### 2.3 The mechanism of market inquiries

Section 43A(1) of the Competition Act stipulates that a market inquiry refers to a formal inquiry, not into the conduct or activities of any particular named firm, but rather into the general state of competition, and the levels of concentration in and structure of a market for specific products or services.<sup>52</sup> In fact, the whole of chapter 43A of the Competition Act specifically provides for market inquiries

<sup>52</sup> Sec 43A(1) Competition Act. The mechanism of market inquiries takes on varying terms depending on the country under scope. Eg, in the United Kingdom (UK) it is referred to as 'market investigations' and in the European Union (EU) as 'sector inquiries'; see D Chetty and others 'The role of market inquiries in assessing the state of competition and facilitating *ex ante* regulation of markets' 5 September 2014 5, <https://www.compcom.co.za/wp-content/uploads/2014/09/Conference-Paper-Knowledge-is-power-The-role-of-market-inquiries-in-assessing-the-state-of-competition-and-facilitating-ex-ante-regulation-of-markets.pdf> (accessed 20 June 2024). Lessons from market inquiries in other countries are discussed later in this article.

in South African competition law and, notably, this chapter, along with other provisions in the Act that pertain to market inquiries, was only legislated for in 2013, when section 6 of the Competition Amendment<sup>53</sup> commenced. Now, under section 21(1)(gA) of the Competition Act it is explicitly stated that the Commission has the responsibility to 'initiate and conduct market inquiries in terms of chapter 4A'. This amendment was precipitated by a series of significant events, including the previously mentioned 'bread cartel' scandal of 2007, which exposed widespread price fixing among major bread producers and sparked a public outcry for more robust competition regulations.<sup>54</sup> Furthermore, the 2008 financial crisis underscored the need for enhanced oversight and regulation of large corporations.<sup>55</sup> Additionally, the Commission's 2008 inquiry into the banking sector revealed alarming levels of concentration and anti-competitive practices,<sup>56</sup> underscoring the necessity for stronger legislative measures to promote competition and protect consumers.

It is important to note that an investigation by the Commission has always formed part of its ordinary functions, as section 21(1)(c) of the Competition Act provides that the Commission is responsible for investigating and evaluating alleged contraventions of the chapter 2 restrictions on certain practices and on abusing a dominant position.<sup>57</sup> However, these investigations by the Commission specifically focus on the conduct of individual firms, which is where market inquiries differ from ordinary investigations.

Sections 43C and D of the Competition Act outline the procedures for market inquiries conducted by the Commission. The Commission's findings must be reported to the Minister of Trade and Industry and published in the *Government Gazette*, whether or not recommendations are included.<sup>58</sup> Subsequently, the minister is obligated to present the report to the National Assembly.<sup>59</sup> Although the Commission itself cannot enact structural changes to the market, it plays a crucial role in identifying elements that may

53 Act 1 of 2009.

54 Competition Commission 'Tribunal imposes penalty of R195 million on Pioneer summary' 3 February 2010, <https://www.compcom.co.za/wp-content/uploads/2020/05/TRIBUNAL-IMPOSES-PENALTY-OF-R195-MILLION-ON-PIONEER.pdf> (accessed 16 August 2024).

55 DH Erkens, M Hung & P Matos 'Corporate governance in the 2007-2008 financial crisis: Evidence from financial institutions worldwide' (2012) 18 *Journal of Corporate Finance* 389.

56 K Letlaka 'Competition and profit persistence in the South African banking sector' Master's dissertation, University of the Witwatersrand, 2019 10.

57 Sec 21(1)(c) Competition Act.

58 Kelly & Unterhalter (n 48) para 8.7.2.

59 As above.

restrict or distort competition.<sup>60</sup> It can make recommendations to the minister, who then can propose legislative steps to enhance market competitiveness.<sup>61</sup>

Despite not having direct authority to implement market changes, the Commission does possess certain powers under section 43C(3) of the Competition Act. It can take actions against firms based on the information gathered during the inquiry, such as initiating complaints for suspected violations of chapter 2 of the Competition Act, settling these complaints, conducting further investigations, or referring complaints directly to the Competition Tribunal without additional investigation.<sup>62</sup>

Although market inquiries offer the Commission a wider scope of tackling competition-related issues, especially when compared to the individual firm-based investigations, it is not free from criticism. Cachalia and Beyleveld bring several shortcomings of market inquiries to the forefront, such as it being vulnerable to challenges in the Competition Tribunal and Competition Appeal Court.<sup>63</sup> In addition to this shortcoming, the issue has also been raised that the Commission in market inquiries can only take action for purposes of remedying, mitigating or preventing the adverse effect on competition.<sup>64</sup>

Noting these as valid future developmental points for market inquiries, it nevertheless has far-reaching impacts on competition through its broad public interest remedies. For instance, as Wagener and Upfold point out, the Commission's extensive powers that allow it to conduct market inquiries using methods such as information requests, surveys, data reviews, consultations and public hearings, enable it to make findings and impose remedial actions on firms for conduct that would not have normally been considered as a transgression against the Competition Act.<sup>65</sup> Unlike prosecuting a dominant firm for exclusionary acts, which requires proving that the anti-competitive effects outweigh any technological efficiency or pro-competitive gain, market inquiries have a lower threshold.<sup>66</sup> The Commission only needs to show that any feature of the market

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60 As above.

61 As above.

62 As above.

63 F Cachalia & A Beyleveld 'Exploring legal and policy options to address the competition-inequality nexus: The case of South Africa' in J Broulik & K Cseres (eds) *Competition law and economic inequality* (2022) 212.

64 As above.

65 M Wagener & C Upfold 'Broad public interest remedies in market inquiries' 30 August 2023, <https://www.financialinstitutionslegalsnapshot.com/2023/08/30/broad-public-interest-remedies-in-market-inquiries/> (accessed 2 July 2024).

66 As above.

impedes, restricts or distorts competition. This lower bar allows the Commission to take action, for instance, when market conditions hinder small and medium enterprises (SMEs) from effectively competing.<sup>67</sup> In the food environment, this can play a major role in ensuring consumers have access to adequate and nutritious food. This is particularly relevant given documented examples, such as price fixing in staple foods, exclusionary conduct in fresh produce supply chains, and collusive arrangements affecting input costs, which demonstrate how anti-competitive behaviour in the food sector directly undermines competitive market functioning and ultimately affects food security. Although market inquiries have been widely recognised across sectors for their ability to uncover structural distortions, their application to food systems is especially compelling because these distortions translate into concrete barriers to accessing adequate food.

By investigating structural barriers and anti-competitive practices, market inquiries can help identify and address issues that limit access to healthy food options, such as restrictive supply chain arrangements or unfair trade practices. For example, where a market inquiry uncovers exclusive contracts, excessive mark-ups or discriminatory procurement practices affecting fresh produce, its recommendations may include opening access to distribution infrastructure, reducing input bottlenecks or reforming pricing mechanisms. This can have significant implications for vindicating the right to food, as it can lead to increased availability, affordability and diversity of nutritious food, because lowering barriers to entry encourages more suppliers enhances competition on quality and price, and facilitates a wider range of nutritious products reaching consumers, thus ultimately contributing to improved food security and public health. By leveraging market inquiries, competition authorities can play a critical role in promoting a more equitable and inclusive food system, which will be further explored through the example of the Fresh Produce Market Inquiry.

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67 As above.

### 3 Unpacking the role of South African food-related market inquiries in vindicating the right to food

#### 3.1 The positive contribution of the Fresh Produce Market Inquiry to the right to food

The Commission launched the Fresh Produce Market Inquiry (FPMI) on 23 March 2023, subsequent to gazetting the final terms of reference for the inquiry on 14 February 2023.<sup>68</sup> However, seeing that section 43B(2) of the Competition Act stipulates that the Commission has to gazette a notice announcing the market inquiry's establishment at least 20 days before it commences,<sup>69</sup> the official commencement date of the FPMI as determined by the Commission was 31 March 2023.<sup>70</sup> In essence, the overall objective of the FPMI was to determine if competition in the market is impeded, restricted or distorted by any features in the fresh produce value chain.<sup>71</sup>

The FPMI focuses on the value chain, and not just the supply chain. A 'supply chain' encompasses the system and resources necessary to transfer a product or service from the supplier to the customer, whereas a 'value chain' extends this concept by considering how value is added at each stage, benefiting both the product or service and the involved participants.<sup>72</sup> The term 'value chain' is more attractive along sustainability lines because it explicitly includes both internal and external stakeholders in the process of creating value.<sup>73</sup> That is why Carstensen and others explain that even though the food supply chain is commonly described as having three major stages, that is, agricultural production, industrial processing and wholesale or retail distribution, a more detailed examination reveals that it is far more intricate.<sup>74</sup> Numerous additional stages and links contribute to the chain, enhancing its value through various goods and services inputs.<sup>75</sup> An example of this would be the incorrect presumption that a food value chain begins with a farmer where, in actual fact,

68 Competition Commission 'Media statement Commission launches Fresh Produce Market Inquiry' 23 March 2023 1, <https://www.compcom.co.za/wp-content/uploads/2023/03/Media-Statement-Commission-launches-Fresh-Produce-Market-Inquiry-23-March-2023.pdf> (accessed 24 June 2024).

69 Sec 43B(2) Competition Act.

70 Competition Commission (n 68).

71 As above.

72 University of Cambridge 'What is a value chain? Definitions and characteristics', <https://www.cisl.cam.ac.uk/education/graduate-study/pgcerts/value-chain-defs> (accessed 24 June 2024).

73 As above.

74 PC Carstensen and others 'Competition law and policy and the food value chain' (2016) 1 *Concurrences* 1.

75 As above.



consideration has to also be given to seed providers and other various factors of production.<sup>76</sup>

Even though competition concerns, rather than food security, are the main focus of the FPMI, the FPMI nevertheless directly relates to food security, as its scope is fixed on food and, more particularly, on fresh produce. This direct relation is evident throughout the FPMI's process. For instance, at the launch of the FPMI, the commissioner of the Commission touched on three ways in which the agricultural sector takes on a crucial role in South Africa's economic development:<sup>77</sup> first, through its contribution to the country's gross domestic product (GDP), which was recorded in the third quarter of 2022 as 19,2 per cent;<sup>78</sup> second, through its provision of employment opportunities, particularly in peri-urban and rural areas, which is justified by noting that 5 per cent of South Africa's workforce is employed in the agricultural sector;<sup>79</sup> third, and most relevant to this article, is the fact that the agricultural sector is a key player in ensuring food security in South Africa.<sup>80</sup>

The commissioner noted that since 2008, the food and agro-processing sector has been prioritised by the Commission because of its substantial economic impact and its potential to drive inclusive growth within the South African economy.<sup>81</sup> The sector's importance extends broadly across the economy, highlighting its role as a key contributor and a catalyst for economic inclusivity.<sup>82</sup> The FPMI was launched with the objective of investigating the fresh produce value chain in order to gain insights into its operation and identify any factors or combinations of factors that might be hindering, limiting or distorting competition and participation.<sup>83</sup> If these factors can be rectified, the adequacy of food that is available to the public, from a competition perspective, can be better maintained. However, the FPMI also directly relates to nutritious food, as its scope of inquiry specifically focuses on certain fruits and vegetables, namely, apples, citrus, bananas, pears and table grapes, for the fruit category, and potatoes, onions, carrots, cabbage, tomatoes and spinach, for the

76 Carstensen and others (n 74) 2.

77 Competition Commission 'Remarks by the Commissioner of the Competition Commission, Ms Doris Tshepe, on the occasion of the media briefing on the official launch of the Fresh Produce Market Inquiry' 23 March 2023, <https://www.compcom.co.za/wp-content/uploads/2023/03/REMARKS-BY-THE-COMMISSIONER-OF-THE-COMPETITION-COMMISSION70.pdf> (accessed 24 June 2024) 1.

78 As above.

79 As above.

80 As above.

81 As above.

82 As above.

83 As above.

vegetable category.<sup>84</sup> These selected fruits and vegetables make up 70 per cent of the production and sale of fruits and vegetables in South Africa.<sup>85</sup>

In early 2025, the Commission released the final report for the FPML. It outlines eight findings with a set of recommendations and remedies attached thereto, ranging from the deteriorating conditions of the national fresh produce markets (NFPMs) to the barriers to entry for SMEs.<sup>86</sup> While this article does not delve into each of these findings, it is noted that the final report brings in the concept of food security at various parts in the document. For instance, in its finding regarding the NFPMs' deterioration, it acknowledged the critical role that the current NFPM system plays in food safety and security and pinpointed inadequate funding of NFPMs as problematic to the food security experienced by small towns.<sup>87</sup>

The FPML's outcomes aim to enhance competition in the fresh-produce value chain which, if successfully implemented, will have a ripple effect that ultimately boosts the supply of nutritious food. By promoting a more competitive market, the recommendations encourage innovation, efficiency and better pricing, making fresh produce more accessible to a wider population. Increased competitiveness can also strengthen distribution and reduce inefficiencies, supporting a more reliable flow of fresh produce into the market. By advocating change that makes nutritious food more accessible, affordable and available, the FPML's recommendations play a crucial role in the vindication of the right to food. Although the inquiry is framed as a competition intervention rather than a food-security mechanism, its proposed market reforms create conditions that support the realisation of the right to adequate and nutritious food.

### 3.2 Lessons learnt from the Health Market Inquiry

While market inquiries vary in terms of scope and objective, as a tool it faces similar challenges in terms of implementation, regardless of the area in which it is applied. Accordingly, drawing on the lessons learnt from the Health Market Inquiry (HMI) is beneficial to current and future market inquiries that relate to food, such as the FPML

<sup>84</sup> Competition Commission (n 77) 2.

<sup>85</sup> As above.

<sup>86</sup> Competition Commission 'Fresh Produce Market Inquiry Final Report' 13 January 2025, [https://www.compcom.co.za/wp-content/uploads/2025/01/CC\\_FPML-Final-Non-Confidential-Report-2025.pdf](https://www.compcom.co.za/wp-content/uploads/2025/01/CC_FPML-Final-Non-Confidential-Report-2025.pdf) (accessed 30 November 2025).

<sup>87</sup> Competition Commission (n 86) 394.

discussed above, to ensure that the resulting findings meaningfully and effectively address competition barriers so as to support food security and the right to food.

On 29 November 2013 the Competition Commission gazetted the Terms of Reference for Market Inquiry into the Private Healthcare Sector, which set the commencement date of the HMI as 6 January 2014.<sup>88</sup> This market inquiry was instituted for purposes of investigating if there were preventative, distortive or restrictive features in competition within the private health sector.<sup>89</sup> Solanki and others describe the HMI as being the ‘most systematic and comprehensive investigation that there has yet been into the SA private healthcare sector’,<sup>90</sup> as its final report was published after many years of investigation – in September 2019 – with its findings and recommendations.

The HMI provides several valuable lessons that can be applied to the FPMI final report and future market inquiries to enhance its effectiveness and impact. The HMI was noted for its systematic and thorough investigation into the private healthcare sector. The FPMI sought to adhere to this approach in its investigation as reflected in its detailed examination of the fresh produce value chain reflected in its final report. However, the FPMI final report focuses on the impact on small to medium enterprises and falls short of considering communities who form part of the supply chain as consumers.

The HMI involved extensive consultations with various stakeholders, including healthcare providers, insurers and patients. Although the FPMI final report was comprehensive and engaged with farmers, distributors and retailers, it did not refer to any engagement with consumers. The FPMI engaged associations, financiers, government, suppliers, national fresh produce market, processors, regulators, researchers and retailers. None of the stakeholders consulted represented the interests or knowledge of consumers, food security or food rights. This is contrary to the inclusion of such stakeholders in the Grocery Retail Market Inquiry (GRMI) conducted in 2019.<sup>91</sup>

88 Government Notice 1166, GG 29 November 2013, 37062 (terms of reference for market inquiry into the private healthcare sector) 74.

89 L Nkonki and others ‘The Health Market Inquiry and its potential contribution to improving health systems functioning in South Africa’ (2019) 1 *South African Health Review* 82.

90 GC Solanki and others ‘The Competition Commission Health Market Inquiry Report: An overview and key imperatives’ (2020) 110 *South African Medical Journal* 88.

91 See Competition Commission ‘The Grocery Retail Market Inquiry Final Report’ 25 November 2019, <https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf> (accessed 25 August 2024). The GRMI assessed competition dynamics across the broader grocery retail sector,

The GRMI and the FPMI were both initiated because the Commission had reason to believe that there existed features, or a combination of features, in the sectors that may prevent, distort or restrict competition in the markets.<sup>92</sup> The GRMI followed the lead of the HMI, which emphasised the importance of consumer welfare in the healthcare sector, by including consumer surveys in the inquiry. The FPMI final report similarly prioritises the impact of market conditions on consumers, recognising the importance of the fresh produce market to the 'nutrition and welfare of citizens'.<sup>93</sup> However, it did not engage consumers as stakeholders, which is a departure from a positive approach followed by HMI and GRMI.

Upon review of the FPMI, it would seem that it does not incorporate consumers as it adopts a different approach. However, the FPMI adopts a consumer impact assessment approach, where the issue is resolved at the producer and supplier levels of the supply chain with the interests of the consumers in mind. Therefore, it can be said that the FPMI addresses the interests of consumers, and provides remedial action to adjust the fresh produce market accordingly, thus strengthening food security and the right to food in South Africa. In this regard, the FPMI serves as a tool for consumers to enforce non-compliance or advocate government action where government is responsible for enacting remedial action. Thus, the FPMI provides an opportunity to succour a human rights-based approach, which would support the fulfilment of the right to food. This includes considering and recognising the impact of market conditions on vulnerable populations and ensuring that all individuals have access to sufficient, safe and nutritious food. Although not expressly recognised, the FPMI's recommendations are made with the impact on consumers in mind, thereby affecting people's right to food and the greater public health landscape. This includes evaluating how competition in the fresh produce market affects the availability and affordability of nutritious food, which is essential for maintaining public health. In step with the HMI's approach, the FPMI has maintained well-documented and publicly accessible findings and recommendations, thus, maintaining transparency by regularly

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covering food, beverages, household goods and other fast-moving consumer goods. Its key concerns included the role of exclusive lease agreements in reinforcing the dominance of major supermarket chains, the exercise of buyer power that enabled these chains to secure favourable trading terms from suppliers, and regulatory barriers, such as municipal by-laws and high rental costs, that constrained smaller retailers. While the GMI offers important insights into retail-level competition, its scope was not limited to food and did not extend meaningfully into earlier stages of the value chain. For this reason, it is referenced only briefly here and not examined in detail.

92 Competition Commission (n 91) 24; Competition Commission (n 86) i.

93 Competition Commission (n 86) 1.

publishing updates and final reports, ensuring that all stakeholders are informed of the inquiry's progress and outcomes.

One of the criticisms of the HMI has been the poor implementation of its findings which the FPMI should seek to mitigate in the implementation of its findings. The FPMI final report makes findings and provides binding recommendations or remedies to address the findings, includes responsible parties, and remedial actions that will have to be in place for five years.<sup>94</sup> The FPMI final report should have included a plan for monitoring and evaluating compliance and enforcing remedial actions where there is non-compliance.

One of the other hinderances to the implementation of the HMI's recommendations has been attributed to a lack of political will and practicality of implementing the recommendations. The FPMI should, therefore, have sought to ensure the practicality of its recommendations, as far as possible, which removes a barrier to implementation. The final report has kept its findings and recommendations brief and specific, thus, hopefully, improving their feasibility. Stakeholders, including consumers, can also advocate the implementation of the FPMI recommendations to impress political actors to follow through on remedial action for which they are responsible.

### 3.3 Lessons from foreign market inquiries

#### 3.3.1 *New Zealand's Groceries Market Study*

In order to strengthen the impact of the FPMI, as well as other ongoing and future market inquiries that pertain to food in South Africa, lessons can be gathered from foreign market inquiries that also delved into the food sector. Such a pool of information exists with New Zealand, as in March 2022, New Zealand's Commerce Commission (NZ Commission) published the Final Report of its Market Study into the Retail Grocery Sector (NZ Report).<sup>95</sup>

According to New Zealand's Minister of Commerce and Consumer Affairs, in 2020, the high levels of concentration in the grocery sector, possible competition issues and, notably, the prices

<sup>94</sup> Competition Commission (n 86) 438.

<sup>95</sup> Competition Commission New Zealand 'Market study into the retail grocery sector final report' 8 March 2022, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf) (accessed 15 August 2024).

of groceries that consumers had to pay, warranted the need for the study.<sup>96</sup> Here, consumer food prices and their link to potential competition concerns were the primary impetus for initiating the market study.<sup>97</sup> Interestingly, the NZ Report stipulates just before providing recommendations that '[w]e only make recommendations below where the information before us suggests that they are likely to improve competition for the long-term benefit of New Zealand grocery consumers'.<sup>98</sup>

This underscores the consumer-centric tone, theme and focus by which food-related market inquiries should abide. A consumer-centred approach allows inquiries to identify barriers that prevent consumers, particularly vulnerable groups, from accessing nutritious food and to craft recommendations that address affordability, availability and competitive market functioning.

The NZ Report proposes measures to improve relationships between suppliers and grocery retailers, including a mandatory code of conduct, stronger laws against unfair contracts, and potential collective bargaining for suppliers.<sup>99</sup> Additionally, the report recommends empowering consumers by standardising price displays, ensuring transparent pricing practices, and simplifying loyalty programme terms.<sup>100</sup>

In response to the findings, which revealed that New Zealand's grocery retail sector suffered from a lack of competition, allowing major supermarkets to shift costs, risks and uncertainty onto suppliers, the NZ Commission introduced the Grocery Supply Code under the Grocery Industry Competition Act.<sup>101</sup> This Code, which became effective in September 2023 and was fully implemented in March 2024, aims to address the significant power imbalance between major supermarkets and suppliers.<sup>102</sup> Core features of the

96 Competition Commission New Zealand (n 95) 14.

97 Ministry of Business, Innovation and Employment 'Initiating a Commerce Commission market study into supermarkets' 16 November 2020 2, <https://www.mbie.govt.nz/dmsdocument/12272-initiating-a-commerce-commission-market-study-into-supermarkets-proactiverelase-pdf> (accessed 15 August 2024).

98 Competition Commission New Zealand (n 95) 379.

99 R Colby, E Stone & J Marshall-Mead 'ComCom's final report takes aim at ineffective grocery sector competition' 8 March 2022, <https://www.simpsongrierson.com/insights-news/legal-updates/comcoms-final-report-takes-aim-at-ineffective-grocery-sector-competition> (accessed 16 August 2024).

100 As above.

101 E Somers 'Commerce Commission launches review into new Grocery Supply Code, says it's an "important checkpoint" to make sure the Code is on the right track' 1 August 2024, <https://www.interest.co.nz/business/129005/commerce-commission-launches-review-new-grocery-supply-code-says-it%E2%80%99s-important> (accessed 16 August 2024).

102 As above.

Code include prohibiting certain unfair trading practices; requiring transparent supply terms; and establishing dispute-resolution mechanisms, thereby ensuring that suppliers are not subjected to unilateral changes, unreasonable payment terms or retaliatory conduct.<sup>103</sup> By improving certainty and fairness in supplier-retailer relationships, the Code seeks to facilitate a more diverse and resilient supply base, ultimately supporting consumer access to a wider range of nutritious foods.

South Africa's FPMI could have drawn valuable lessons from the conception and implementation of New Zealand's Grocery Supply Code in its quest to improve the fresh-produce competition environment. While the FPMI final report does not recommend the creation of a grocery supply code, the New Zealand experience illustrates how formal supplier-protection mechanisms can support a more competitive and transparent fresh produce environment. These insights may assist policy makers in considering whether comparable interventions, appropriately tailored to South Africa's context, could strengthen fairness, efficiency, and ultimately consumer access to nutritious food.

### 3.3.2 *Groceries Market Investigation of the United Kingdom*

Another foreign yet applicable example that offers a wealth of lessons for the FPMI is the United Kingdom (UK) and its Groceries Market Investigation (UK GMI) of 2008. In May 2006, the Office of Fair Trading (OFT) referred a matter to the Competition Commission (UK Commission) for in-depth examination, following a comprehensive study on the grocery supply market in the UK.<sup>104</sup> The OFT was a non-ministerial department responsible for protecting consumer-interests and was once one of the UK's principal competition authorities until its closure in April 2014.<sup>105</sup> In their study, the OFT focused on the practices of both large supermarket chains and small convenience stores, amid concerns about potential anti-competitive behaviours in the industry.<sup>106</sup>

<sup>103</sup> As above.

<sup>104</sup> C Wynne 'Q&A: Supermarkets under scrutiny' 15 February 2008, <http://news.bbc.co.uk/2/hi/business/7243522.stm> (accessed 15 August 2024).

<sup>105</sup> P Davis & A Reilly 'The UK Competition Commission's Groceries Market Investigation: Market power, market outcomes and remedies' 22 August 2009 4, <https://ageconsearch.umn.edu/record/53210/files/Peter%20Davis%20Beijing%20Paper%20-final.pdf> (accessed 15 August 2024); Government of the United Kingdom 'Office of Fair Trading', <https://www.gov.uk/government/organisations/office-of-fair-trading> (accessed 15 August 2024).

<sup>106</sup> Wynne (n 104).

The UK Commission ultimately concluded that while the UK groceries industry generally exhibited effective competition, having benefited consumers in many ways, two key concerns remained.<sup>107</sup> One issue was the dominant market position of certain grocery retailers in certain areas that were hindering competition, thus leading to higher prices, reduced quality and poorer service for consumers.<sup>108</sup> This concentration of market power also allowed these retailers to reap additional profits at the expense of weaker competitors.<sup>109</sup> The second issue, as the UK Commission noted, was that the industry's supply chain practices, particularly if they were left unchecked, posed a risk to suppliers, who faced excessive risk transfer and unexpected costs from grocery retailers.<sup>110</sup> This had the possibility of stifling investment and innovation in the supply chain, which ultimately harms consumers.<sup>111</sup>

In the UK GMI Final Report, it was recommended, among other things, that a Groceries Supply Code of Practice (GSCOP) be established, and that a GSCOP ombudsman be created in order to monitor and enforce GSCOP compliance.<sup>112</sup> In August 2009, a little over a year after the UK GMI Final Report was published, the Department for Business and Trade and the Department for Business, Energy and Industrial Strategy in the UK published the Groceries Supply Code of Practice.<sup>113</sup> GSCOP aims to promote fair treatment of suppliers by large grocery retailers, regardless of the suppliers' location, including those based abroad, and its scope encompasses a broad range of products, including food, drink, health and beauty items, and household goods.<sup>114</sup> Notably, GSCOP does not govern the pricing of products or the relationships between suppliers and their

107 Davis & Reilly (n 105) 4.

108 As above.

109 As above.

110 As above.

111 As above.

112 Competition Commission 'The supply of groceries in the UK market investigation' 30 April 2008 15, [https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235418mp\\_/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep\\_pub/reports/2008/fulltext/538.pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235418mp_/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf) (accessed 15 August 2024). New Zealand's Grocery Supply Code and the UK's Groceries Supply Code of Practice are similar in that both aim to stop large supermarket chains from using unfair trading practices against suppliers, requiring clear contracts and fair dealing. The difference is that the UK's Code is older, enforced by a dedicated Groceries Code Adjudicator across multiple big retailers, while New Zealand's Code is newer, overseen by the Commerce Commission, and tailored to its highly concentrated duopoly market.

113 Government of the United Kingdom 'Guidance – Groceries Supply Code of Practice' 4 August 2009, <https://www.gov.uk/government/publications/groceries-supply-code-of-practice> (accessed 15 August 2024).

114 TESCO 'Groceries Supply Code of Practice', <https://www.tescopl.com/about/how-we-do-business/groceries-supply-code-of-practice/> (accessed 15 August 2024).



upstream partners, such as farmers or growers, but by establishing clear guidelines, GSCOP seeks to ensure equitable dealings between grocery retailers and their suppliers, by prohibiting retrospective changes to supply agreements, requiring timely payments, preventing retailers from transferring excessive costs or risks onto suppliers, and mandating transparent written terms. These provisions function to curb exploitative conduct by retailers and provide suppliers with predictable trading conditions.<sup>115</sup>

The establishment of GSCOP in the UK has significant implications for consumers and the right to food. By promoting fair treatment of suppliers, GSCOP helps facilitate a more stable and diverse food supply chain, thereby supporting increased access to nutritious food for consumers. This, in turn, can contribute to the realisation of the right to food, which is essential for health and well-being. Moreover, GSCOP demonstrates that regulatory initiatives can drive meaningful change when backed by political will. For South Africa, the UK example illustrates how formalised supplier protections can mitigate the effects of concentrated buyer power, an issue similarly highlighted in the FPML, and thus offers a relevant model for strengthening fairness and transparency in the fresh-produce value chain.

#### **4 Preparing civic organisations to action the outcomes of the fresh produce market inquiry**

Non-governmental organisations (NGOs) can play a crucial role in enhancing the implementation and impact of market inquiries, which serve as evidence for policy development and provide a basis to challenge non-compliance with binding remedial action.<sup>116</sup> In this light, NGOs can serve an important role in bridging a critical gap in the implementation of the FPML to safeguard implementation of the FPML as it benefits consumers.

South Africa has a robust history and precedent of civil society organisations (CSOs) advocating the fulfilment of human rights. The NSNP case provides a relevant example. The case concerned the state's suspension and partial resumption of the National School Nutrition Programme (NSNP), which deprived millions of learners of their primary daily meal, thereby undermining their constitutional

<sup>115</sup> As above.

<sup>116</sup> MS Haque 'A critique of the role of NGOs as partners in governance' (2020) 42 *Asia Pacific Journal of Public Administration* 17; M Pabari and others 'Evidence-informed policy and practice: The role and potential of civil society' (2020) 8 *African Evaluation Journal* 1.

rights to basic nutrition, sufficient food and basic education.<sup>117</sup> Equal Education, Equal Education Law Centre and SECTION27 (all CSOs) drove the litigation seeking the reinstatement of the NSNP.<sup>118</sup> The Court held that the minister and MECs have a constitutional and statutory duty to provide basic nutrition.<sup>119</sup> This case signifies the impact of CSOs in South Africa, which have been significant in driving change, relying on the Constitution such as movements by the Treatment Action Campaign for Access to the right to health.<sup>120</sup>

Similarly, NGOs can raise awareness about the importance of market inquiries and their potential benefits for consumers. By educating the public and policy makers, NGOs can build support for the inquiry's objectives and recommendations, thus bypassing, to a certain extent, the obstinate obstacle of political will.<sup>121</sup> NGOs can monitor the implementation of the inquiry's recommendations and hold relevant stakeholders accountable for non-compliance to the Competition Tribunal. By tracking progress and highlighting any delays or shortcomings, NGOs can ensure that the inquiry's outcomes are effectively realised.

NGOs can also provide training and capacity-building programmes for small and medium enterprises and historically disadvantaged persons' firms. By empowering these businesses, NGOs can help them compete more effectively in the market, thereby strengthening food security and the fulfilment of the right to food. NGOs can advocate policy changes based on the inquiry's findings. By engaging with policy makers and legislators, NGOs can push for the adoption of regulatory reforms that promote competition and protect consumer interests. NGOs should advocate the inclusion of human rights considerations in the implementation of market inquiry recommendations. This includes ensuring that the right to food is upheld and that market conditions do not disproportionately affect vulnerable populations.

## 5 Conclusion and recommendations

The vindication of the right to food through competition law in South Africa represents a critical intersection of public health,

117 *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP).

118 As above.

119 As above.

120 H Ahmad 'The Treatment Action Campaign and the three dimensions of lawyering: Reflections from the rainbow nation' (2013) 10 *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 17-24.

121 S Pasamai & S Salle 'The role of civil society in sustainable agrarian policy advocacy' (2024) 3 *Journal of Social Research* 1.

human rights and economic regulation. By leveraging competition law to address anti-competitive practices in the food sector, South Africa can foster a more equitable and accessible food system. This approach not only promotes market efficiency, but also aligns with the broader constitutional mandate to realise socio-economic rights, including the right to adequate and nutritious food. The integration of competition law into the broader strategy for food security and public health underscores the need for a holistic approach that addresses the structural determinants of hunger and malnutrition. This requires leveraging all possible avenues and solutions. As South Africa continues to confront challenges in ensuring food security for all, the application of competition law is a useful tool in advancing the right to food, thereby contributing to the overall health and well-being of the population. The mechanism of market inquiries is one such example and can be strengthened in South Africa using the lessons learnt from abroad. Further research and policy development in this area, as well the utilisation of NGOs to assist with actioning recommendations from these inquiries, are essential to refine and strengthen this mechanism's ability to protect and promote the fundamental rights to food and health as well as the ancillary-related rights.

From the discussions above, three recommendations can be provided: First, the role of competition law in ensuring food security and fulfilling the right to food needs to be recognised and leveraged. Improved competition can lead to lower prices, improved quality, and greater accessibility of nutritious food. However, there is a need to ensure that a human rights-based approach is utilised. In relation to the FPMI, grounding the final report in a human rights-based approach would have improved competition in the interests of upholding the right to food. Second, the FPMI findings concentrate on small to medium enterprises and previously disadvantaged firms, thereby benefiting consumers. The FPMI final report should have more expressly recognised the public health impact of market conditions on consumers' right to food, food security, and the role of access to fresh produce in improving health. Third, NGOs should use the findings of the FPMI report for advocacy and distributing the report beyond the realm of the current stakeholder group to the broader public to assist with public support and action in implementing the findings of the FPMI. NGO participation will also assist with facilitating collaboration and collective action across all stakeholders and implementors to achieve compliance with the FPMI.