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The impact of competition law remedies on public interest

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Abstract

Public interest considerations have increased in prominence in the recent past largely due to the high unemployment rate in the country and the state of the South African economy. The Competition Act now also includes provisions related to enhancing the economic participation of SMEs and HDPs as well as serves to create employee ownership schemes (ESOPs). There is however surprisingly little research on whether public interest conditions have been able to achieve their desired/intended impact in the market. Nor are there studies which have closely considered the choice of public interest remedy and the underlying reasoning for it being imposed in the market. This is despite many in the field of competition law identifying a shift in the approach taken by the competition authority to public interest conditions. Using a combination of fieldwork interviews and data analysis, we sought to examine more closely the choice of public interest remedy and the factors which informed this choice. We found that while the competition authorities were initially conservative in their approach to the application of public interest remedies, this has shifted to be more interventionist. We have identified several common issues which arose though our fieldwork interviews, and utilising the data provided, make key recommendations that should be of contemporary policy interest to the competition law and policy practicing community.

Keywords: competition law, public interest, merger regulation

JEL codes: L50

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1. Introduction

In several developing nations, especially in Africa, merger control regimes take a wide range of public interest factors into account. These countries include for example Botswana, Namibia, Kenya, Zambia, Malawi, and South Africa (Changole and Boshoff, 2022). Arguably, the nature of socio-economic issues in developing countries with some degree of democratic openness necessitate that competition law considers issues of public interest. Some of the socio-economic issues faced by many developing countries, South Africa included, are a high unemployment rate and lack of employment opportunities, poverty, high degrees of industry concentration, and an inability of local firms to compete on a global scale.

South Africa's post-apartheid competition policy reforms included initiatives to include broader social issues into the competition law. Public interest considerations were embedded in the Competition Act no. 89 of 1998, they are both in the preamble of the Act and are explicitly dealt with under merger assessment. By incorporating public interest considerations into the Act, the potential conflict between socioeconomic programs and market competition was reduced (Hodge et al., 2012).

Public interest considerations have increased in prominence in the recent past largely due to the high unemployment rate in the country and the state of the South African economy (Government Gazette No. 40039, 2016).[1] From 2018, the Act also includes provisions related to enhancing the economic participation of SMEs and HDPs as well as serves to create employee ownership schemes (ESOPs).

There is however surprisingly little research on whether public interest conditions have been able to achieve their desired/intended impact in the market. Whilst the Commission does report on its remedies and 'jobs saved' etc. annually, this is done at a high level and does not necessarily reveal the efficacy of specific remedies once they have been implemented in the market. As we detail further below, neither the Commission nor the Dtic has undertaken a programme of research equivalent to impact studies done by comparable competition authorities. Nor is there a study which has closely considered the choice of public interest remedy, how it was negotiated and the underlying reasoning for it being imposed in the market. This is despite many in the field of competition law identifying a shift in the approach taken by the competition authority to public interest conditions.

The purpose of this research is therefore unique as we conduct an ex-post evaluation of the choice of public interest remedies ordered in competition law proceedings and the factors underlying the choice of these remedies.[2] The range of remedies considered includes the various restrictions on job losses, conditions placed or requirements for SME or HDP ownership, mandatory investment commitments to support HDPs, and institutional commitments for the establishment and operation of Employee Share Ownership Plans (ESOPs). The paper draws on data of the Competition Commission of South Africa (CCSA),

[1] Available: https://archive.gazettes.africa/archive/za/2016/za-government-gazette-dated-2016-06-02-no-40039.pdf

[2] This research question framing – study of choice of remedy and the process of producing public interest conditions -- differs from a comprehensive set of impact studies of the remedies/conditions mandated (through merger approvals) in various sectors, a research project that goes beyond the scope of the time and resources available for this working paper.

which is analysed alongside interviews with key intermediaries for business, labour, and society who are all actively engaged in the crafting of public interest conditions. The research answers the questions around the approach of the authority to public interest conditions, whether the approach has become too interventionist and onerous, and whether public interest conditions are being crafted in a way such that they have the potential to bring about the intended change in the market.

In section 2 we provide a brief literature review of South Africa's regulation of public interest considerations in merger regulation and how this policy has evolved over time. In Section 3, we set out the data and methodology used to arrive at our findings. In Section 4, we discuss the standard narrative which has emerged, identifying three distinct phases of public interest conditions and provide a brief data analysis to support these findings. In Section 5, we draw from our interviews to outline and analyze five specific issues where our results suggest findings that should be of contemporary policy interest to the competition law and policy practicing community. Section 6 concludes and sets out our key recommendations

2. Literature review

This section first begins with a background to South Africa's regulation of public interest considerations in merger regulation (2.1) and concludes by looking at the evolution of how the competition authority's approach to public interest conditions has changed over time (2.2).

2.1. Public interest in merger control proceedings in South Africa

In many developing countries and transitioning economies competition policy is seen as one of the various tools that governments might use to achieve a cogent collection of various development policies (Capobianco and Nagy, 2016). As such, merger-control regimes in developing countries generally include conditions that go beyond the traditional bounds of competition law even if they remain within the policy objective of aiming for working markets (Fox and Bakhoum, 2019). To implement this strategy, competition authorities must pursue traditional, efficiency-based competition policy aims and account for the unique – economic and social needs of the nation.

In the South African competition scheme, the Competition Tribunal has the power to approve, approve with conditions, or prohibit a merger (section 16(2)).[3] Thus, the remedies that panels of the Competition Tribunal mandate in merger control proceedings come in the form of conditions. These remedies (conditions) may consist of structural, behavioural, or other types of remedies. Parties must notify their mergers while they are occurring to the Competition Commission. Third parties under certain conditions are both invited to and allowed to participate.

[3] For an overview of specific aspects of the Competition Tribunal's decisions on the public interest in merger control (including the concept of merger specificity), see Yasmin Carrim, Camilla Mathonsi, and Karissa Moothoo-Padayachie, *Handbook of Case Law: The Competition Tribunal's Guide to Select Cases Decided from 1999 to 2021 (Version 2)*, ed. Yasmin Carrim, 2020/2021 ed. (Competition Tribunal, 2021), 35–60, Available: https://www.comptrib.co.za/Content/Documents/Info%20Library/Tribunal%20Case%20Law/Tribunal%20Case%20Law%20Handbook%202021.pdf.

The Commission has the function to monitor those conditions. Its capacity to monitor the conditions set at the approval stage is however limited (Hodge and Mkwanazi, 2019). There are further sections and tools in the Act to remedy non-compliance with these conditions through adjudicative proceedings should either the Commission or third parties complain of such non-compliance. In at least one instance, the Commission has approached the Tribunal in order to enforce a recommendation/finding of non-compliance with merger conditions but was not successful (Carrim et al, 2021). Should the Tribunal find non-compliance with merger conditions, the Act allows for remedies including an administrative penalty up to 10% and may not exceed 25% of the firm's annual turnover if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice.

In recent years, the minister of the Dtic, and relevant trade unions have played an active role in competition proceedings relating to the public interest remedies. Initially, the success of public interest conditions in the South African competition legislation was largely attributed to the proactive involvement of outside stakeholders in the enforcement process. The Minister and several industrial trade unions have made significant contributions to the improvement of HDPs' capacity to participate in the South African economy and key value areas of the economy by actively advocating for the inclusion and the realization of the public interest objectives of the Act.

The 2018 amendments to the Act have cemented the minister's participation in competition proceedings – the minister can be involved in merger cases in issues of public interest such as employment and issues concerning local industries. The judicial framework plans ministerial involvement and expressly provides for ministerial participation in respect of any of the public interest grounds as set out in section 12A (3) of the Act (Angumuthoo et al., 2020). The amendments further permit the Minister and the Commission to appeal a merger decision by the Tribunal to the CAC, and allows for the Minister to intervene in small merger transactions.

Even though the Minister's interventions in merger cases are primarily and usually aimed at preserving employment – the ministry does not stand as a representative of employees or that of trade unions – these stakeholders generally present their concerns and opinions separately and these concerns are addressed separately with the relevant trade union and/or employee representatives and the Commission (Angumuthoo et al., 2020).

The CCSA exercised its guidance power to issue Guidelines for Public Interest Matters in 2016 and these guidelines covered in part the approach to be adopted by the Commission when analysing mergers and the issue of appropriate remedies for public interest matters (and the types of information it would require). This guideline recognizes that merger analysis is case specific and thus the guidelines also do not prevent the Commission from exercising its discretion to request information. Post the amendments the guideline has not yet been updated.

2.2. The approach to public interest taken by the South African competition authorities in merger cases

Currently, the South African competition authorities are widely recognized for placing various and interventionist criteria on merger deals that influence the South African public interest. According to the South African Competition Act, the competition authorities in

South Africa are specifically required to consider the merger's potential impact on employment, a specific industrial sector or region, the ability of small businesses or firms controlled or owned by historically disadvantaged people to compete, and the capacity of national industries to compete on the global market (Norton Rose Fulbright, 2017). [4]

The application and the approach to public interest in merger cases by the South African competition authorities has evolved from a conservative approach to a more interventionist approach as the Competition Act has been implemented. In its first decade, the Tribunal was conservative in the application of public interest provisions to merger control. For instance, in one of the earliest cases involving public interest, the 2001 Shell/Tepco[5] case, the Commission had recommended that this merger be approved with conditions designed to allay its public interest concerns that the transaction would adversely affect the amount of ownership by HDPs. However, the Tribunal approved the merger without conditions, and stated[6]:

"*the role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments – in this case the Employment Equity Act, the Skills Development Act and the Charter itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they precisely damage those interests that they ostensibly seek to protect*".

As we explore in more depth in section 4 and to some extent in section 5, the Commission's public interest recommendations in mergers prior to the 2018 amendments had been centred on employment concerns, including limiting retrenchments. With the implementation of those amendments, the focus soon shifted to creating more interventionist conditions following a realisation that competition law could be used as a very powerful tool to achieve the dual goals of an efficient and fair competitive environment as stated in the preamble of the Act. These conditions specifically address how effectively SMEs or businesses controlled or owned by HDPs can enter, participate in, or grow within the market, as well as how to increase the levels of ownership by HDPs and workers in firms in the market (Competition Law Alert, 2022).

Similarly, the Dtic Minister has also taken a far more interventionist approach in certain merger cases. Employees and/or trade unions also actively intervene to protect jobs and advance union representation. As a result, to address public interest issues, merging parties may need to interact with the Commission, the government, trade unions, and other third parties on a few fronts (Angumuthoo et al., 2020).

As explored in further detail later, according to recent trends observable in the South Africa competition space, the frequency of merger agreements over which South African competition authorities have imposed conditions to address public interest issues have increased over the years. In 2010–2011, there were just four matters in which public interest conditions were imposed, but in 2011–2012 and 2012–2013, there were 22 and 28, respectively. In recent years, in 2020-2021 the competition authorities approved 33 merger cases with public interest conditions, this number increased substantially in 2021-2022

[4] Please refer to Norton Rose Fulbright 2017 for the full text
[5] See case at https://www.comptrib.co.za/open-file?FileId=29687
[6] Shell/Tepco at paras 51 and 58, Case No.:66/LM/Oct01

where the number of merger cases approved with public interest conditions was a total of 73 cases (as seen in the Commission's Annual Reports, 2020; 2021).

3. Methodology: merger dataset and interview approach

Section 3 is two-fold and begins with an explanation of the merger dataset relied on for the descriptive analysis in Section 4 below. It describes the dataset, its limitations, the data cleaning process and provides a description of the variables relied on for the analysis. The section then proceeds to set out the interview approach relied upon in Section 5 below, the questionnaire adopted, our set of ten interviewees, and the constraints faced in obtaining interviews.

3.1. The merger dataset

3.1.1. Data sources

The data used in this study were drawn from a non-confidential merger database obtained from the Competition Commission of South Africa. This merger database was prepared by the Commission in collaboration with the World Bank Group and synthesizes data contained in the Commission's merger reports for the period January 2011 to March 2021. It is anticipated that new versions of the database will be released and that continued updates will be made to ensure that additional information relating to mergers is captured over time. We utilized the most current version of the dataset, version 2.0, which was last updated in February 2022. The dataset covers large, intermediate, and small mergers and was created for the purposes of allowing an effective review of merger control and to inform research of competition policy in South Africa.

In compiling the dataset, the World Bank commissioned interns to assist in the review and collection of data from the Commission's internal (historical) merger reports. The interns were specifically directed to gather information on the following:

- Merger classification information
- Market characteristics identified as part of the merger investigation
- The factors and approach of the assessment conducted during the merger investigations; and
- The Commission's decision on the merger investigation

The dataset also includes information on the merger approval process and contains information on whether the Competition Tribunal approved, approved with conditions or prohibited the merger. Information was however not gathered on the number and type of firms and other participants in each merger approval process.

A dataset on large mergers was provided by the Competition Tribunal; however, this dataset was not utilized in this version of this study due to data limitations which could not be overcome.

The Dtic's monitoring division had indicated to us that they did have a database which covered outcomes (success stories) post the implementation of public interest conditions. However, at the time of writing we were not able to obtain access to this database.

3.1.2. Data limitations and data cleaning

The February 2022 raw data we obtained had a total of 6 653 observations. After removing duplicates, the number of observations reduced to 3 459 observations. Each observation represents one merger case with the associated merger condition(s) (if any). Even though all data received is important and useful, variables not used for the purposes of the descriptive statistics in this paper were removed. These variables included the relevant product market, geographic market, theory of harm, barriers to entry, and sector information amongst other. It should be noted that the removal of these variables did not, in any way, influence the results obtained.

Initially the focus of our analysis was on large mergers. However, it became apparent during our fieldwork interviews that it was important to expand our scope to include intermediate mergers given that many of the public interest conditions imposed on large mergers were beginning to be imposed on intermediate mergers. We do not consider in this research small mergers approved with conditions. This was because the total number of small merger cases is small, our interviewees focused nearly exclusively on large and intermediate mergers, and it appeared that considering the category of small mergers would not materially influence the conclusions of this version of this working paper.

3.1.3. Description of the variables of focus

The raw data received had 41 variables in total for each observation. The variables were collected as fields of text. These include, but are not limited to, case number, financial year, primary acquiring and target firms, size of the merger, approval status, public interest conditions identified, conditions applied as well as type of competition and public interest conditions applied.

For the purposes of our study, we limited the focus variables in our merger dataset to the following:

- Case number - The Commission's assigned case number presenting the year and month the merger is filed and a unique random four-character code assigned and used to distinguish the specific merger case.
- Size of the merger - The size of the merger based on the merger thresholds of the particular period, see Commission website for classification. Either Large (L), Intermediate (I) or Small (S) merger.
- Public Interest Considerations Investigated – Specification of the type of public interest considerations that were assessed during the Commission's investigation of the merger (e.g., employment, SMME/HDP development, industrial development, national industries to compete on international markets).
- Conditions type – This variable applied only to mergers approved with conditions. If the condition was a competition condition, this variable specifies the type of competition condition imposed, i.e., structural, behavioural, etc. If the condition was a public interest condition, this variable specifies the type of public interest condition imposed, i.e., employment, BEE, small business, etc. The full set of the types of public interest conditions is given in Table 1 below.

- Approval status – This variable described whether the merger was approved, approved with conditions, prohibited, withdrawn or abandoned.

3.1.4. Software used

Microsoft Excel was the software used in this study. The functionality utilized were the 'recommended chart' and 'table' creation functions in excel.

3.2. Interview data and methodology

3.2.1. Sample

Semi structured interviews were conducted with persons drawn from a set of competition law practitioners, representatives of trade unions, and officials of government institutions with experience in mergers. Interviews were conducted from the end of January until February 2023. The initial set of experienced persons to approach was drawn from the personnel involved in ten merger cases identified in dialogue between the Tribunal and the research team as significant merger cases for the purposes of this study. Approaches were made by phone and email to the firms and intermediaries involved in this sample of cases. It became apparent fairly quickly that the firms were hesitant to participate in interviews but that the intermediaries would be willing to assist, albeit without generally discussing information confidential and specific to the firm, trade union, organization or institution they had represented.

A total of 10 interviews were completed with experienced practitioners. The sample comprised of persons associated with 1 trade union, 1 public interest law organisation, 1 representative each from the Dtic and the Competition Commission of South Africa and 6 interviews with competition law practitioners including 1 senior counsel. All competition law practitioners working as attorneys work for large corporate law firms in South Africa with established competition practices. While one interviewee – associated with the public interest law organization – had participated in only one merger, the remaining interviewees all had extensive experience, most often over ten or fifteen years of practice in the field.

As noted above, the opportunity to participate in this study was extended through their legal representatives to the merging parties in 10 cases who declined our invitation. The reasons provided for declining the interview included the fear of repercussion from the competition authorities and that the conditions were recently imposed and/or were still subject to monitoring by the Competition Commission.

The views expressed through these interviews have been anonymized in the interest of confidentiality. In preparation for the online interviews, a general questionnaire was provided to interviewees.

3.2.2. Questionnaire themes

The questionnaire covered the following broad areas (See Appenidx 1 for sample of the questionnaire provided to competition legal practitioners):

- Views on competition law and its application (which included issues around the 2018 amendments)
- Case experience in the choice and efficacy of the remedies imposed
- Experience of the Competition Commission/Tribunal/DTIC process for formulating public interest conditions

- Commission's public interest guidelines
- Monitoring and evaluation, and
- The way forward

Given the lack of direct participation by the merging parties and other key stakeholders impacted by the merger (such as trade unions and business associations), the interviews were shaped to cover the choice of remedy and the reasons behind them rather than to deal with the efficacy of the conditions imposed.

3.2.3. Software used

Interviews were conducted online using Zoom and were transcribed via Microsoft Word. The research team took notes during the interviews and used those notes and the transcripts to attempt to convey an accurate understanding of the views of the interviewees. All recordings, notes, and transcriptions of the interviews are confidential.

4. Tracking the evolution of public interest remedies over the period

In section 4, we analyse the increase in the use of public interest conditions under the South African merger control regime and draw from the data a picture of three distinct phases to the evolution of public interest conditions in the decade under study. Later, we provide an analysis of the data obtained from the Commission on merger cases and merger conditions over the period 2010/11 to 2020/21.

4.1. Standard narrative within competition circles of the approach taken by the competition authorities to the public interest in merger cases

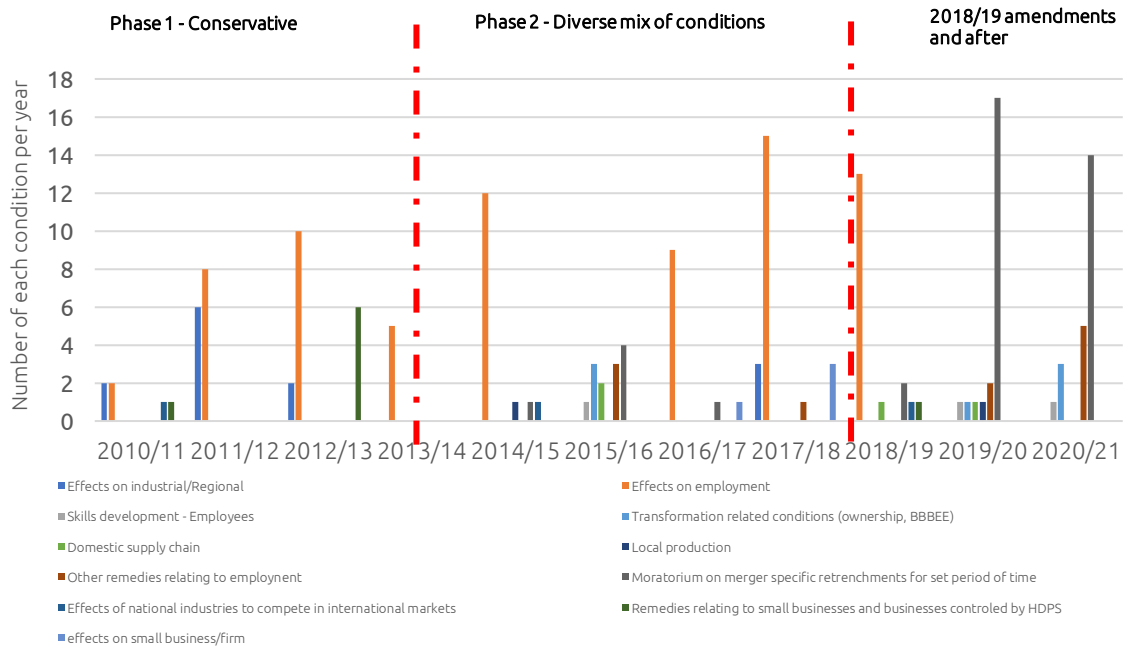
This section draws primarily not from the published literature but rather from the merger database, our interview data and a small set of five significant merger cases that unfolded before the competition authorities since the establishment of the Act. We use the overlaps in accounts offered by our interviewees to piece together what we term "the standard narrative" of the evolution of the approach of the competition authorities to public interest conditions in merger cases over a twenty-year period. This narrative is itself primarily descriptive – describing what the authorities have done – rather than assessing why or how the approach has varied over time nor offering a particular view on how the approach should change or evolve in the future.

This standard narrative is based on five cases, ones where the associated Tribunal decisions occurred in 2001 (Shell/Tepco), in 2011 (Walmart/Massmart), in 2015 (Coca-Cola), in 2016 (AB InBev), and in 2021 (Burger King); it additionally takes into account the imposition of new public interest conditions through implementation of the 2018 amendments from July 2019. The existence and content of this standard narrative are interesting and significant in themselves; the standard narrative also provides a basis for our later exploration of significant contemporary issues of contention in the third current phase.

In this standard narrative, the approach taken by the Competition Tribunal in the interpretation and the application of public interest remedies in merger cases is seen to have evolved over time. The Competition Authorities were initially very conservative in their approach to public interest remedies, with that approach changing to a more interventionist

approach over the years. The data does indeed show this as depicted below. There are 3 distinct phases during the period under observation. One sees first the competition authorities be conservative in their approach to public interest conditions; we then see them use a more diversified mix of public interest considerations following a few precedent setting cases (discussed below) and lastly, become more interventionist in their approach in phase 3.

Figure 1: Three phases of the application of public interest conditions imposed in large mergers- 2010/11 to 2020/21



Source: Authors' calculations using data from the Competition Commission of South Africa

The Shell/Tepco case of 2001 was one of the first cases that had public interest concerns. The Commission determined that the merger did not substantially prevent or lessen competition but upon examining the impact of the proposed merger on public interest found that the merger gave rise to a few public interest concerns and thus recommended that the Tribunal approve the merger with conditions. One of the significant causes of public interest concerns was that Tepco was a firm owned and controlled by HDPs and the transaction resulted in Shell SA acquiring control of Tepco. To remedy this – the Commission recommended conditions that ensured control or partial control of Tepco remained in the hands of the HDPs. The Tribunal's response to the conditions imposed by the Commission was that competition authorities should in practice apply considerable caution in their application of public interest as a base of intervention, especially when there are no competition concerns. The Tribunal further warned that the competition authorities should not pursue the public interest mandate of the Act in an over-zealous manner, "lest they damage precisely those interests that they ostensibly seek to protect".[7]

The approach of the Tribunal to public interest issues was very careful and cautious. In this case, the Tribunal also noted that the role of the competition authorities in defending aspects of public interest is 'secondary' to statutory and regulatory instruments established

[7] Shell/Tepco, Case no. 66/LM/Oct01: para 58.

for these things. The responses by the Tribunal to the Commission's proposed remedies and approval of this merger without conditions suggested that the Tribunal wanted to be cautious in the application of public interest remedies as a tool that can used to alleviate some of the socio-economic issues.

Ushering in a new phase, the Wal-Mart/Massmart case of 2011[8] brought public interest concerns associated with mergers into the spotlight. Additionally, this merger increased the visibility of competition law nationwide and sparked discussion about how it might interact with other areas of government policy, such as industrial policy and general foreign direct investment regulations (Mandiriza et al., 2016). This merger is one of the first matters where we saw a turnaround in the stance of the Tribunal with regards to their approach to public interest conditions. As can be seen from Figure 1 above, additional public interest conditions other than employment were crafted and implemented in this year. Similarly, to the Shell/Tepco case, the proposed merger raised no competition concerns but would have had a negative impact on the public interest. The Commission's specific public interest concerns centered on Massmart's pre-merger layoffs, the merger's impact on suppliers, the overall job market, the merger's impact on the future terms of employment for Massmart employees, and the right to organize and accept unionized labour (Mandiriza et al., 2016). The conditions included in this case, agreed to by the competition authorities, merging parties and other stakeholders included a R200 million investment, a retrenchment moratorium and local procurement issues. This case is a prime example of the shift in the approach by the Tribunal to the public interest.

The Tribunal itself then started becoming more robust and interventionist and started looking at broader public interest issues – issues like employment, the establishment of investment funds and focus on promoting local procurement (Phase 2 in Figure 1). The imposition of similar investment funding commitments increased significantly over these years, from the R200 million fund in the Walmart/Massmart case in 2011 to a R1 billion fund in 2016 in the AB InBev merger.

The AB InBev case raised several public interest concerns – and the conditions imposed ranged from measures to protect small brewers, incentives to emerging farmers and skills development in the supply chain. In this case the Tribunal and the Commission used the public interest element of the Act as an intervention in industrial policy, through the establishment of supplier development. This is also one of the earlier cases with involvement from the Minister; the ministerial involvement related to (1) employment conditions imposed, (2) the Minister's efforts to ensure government conditions were not diluted, and (3) the application of the investment fund (Angumuthoo et al., 2020).

The Tribunal and the Commission's approach to public interest conditions continued to change over time to a more interventionist approach. One observed this with the Coca Cola case of 2015 – which was approved subject to a number of conditions relating to employment, supplier development funds, SMEs and competitiveness of HDPs.[9] The public interest remedies imposed in this case showed the competition authorities' commitment to

[8] Refer to https://www.comptrib.co.za/case-detail/5520 for the reason of the Wal-Mart/Massmart case

[9] The conditions ordered in this matter were later the subject of variation proceedings where the concept of changed circumstances was interpreted and applied. See Carrim, Mathonsi, and Moothoo-Padayachie, *Handbook of Case Law: The Competition Tribunal's Guide to Select Cases Decided from 1999 to 2021 (Version 2)*, 71–73.

ensuring that local Black Economic Empowerment (BEE) standards are followed because this is the first merger in South Africa in which the competition authorities have specified what stake in a company must be owned by black people (Competition Tribunal, 2016; Norton Rose Fulbright, 2017).

Sparked this time by legislative action, the approach of the Tribunal changed even further with the 2018 amendments to the Act (Phase 3 of Figure 1). In recent cases, including the Burger King case of 2021, we observed the Tribunal being more interested in conditions such as ESOPs. What was noteworthy, and perhaps historic, about the ECP Africa Fund IV LLC; ECP Africa Fund IV A LLC (Burger King) case was that this was the first case where the merger was opposed solely on public interest grounds. This suggests the continued evolution of the approach that the competition authorities have taken in the application of public interest issues over time. The merger raised no competition concerns but would eliminate HDP shareholding from 68% to 0% - the merger was later approved by the Tribunal subject to public interest remedies. These two cases show that the stance of the competition authorities has changed significantly when it comes to the application of public interest remedies (Steyn, 2021).

The above discussion of merger cases maps out in what we call "the standard narrative" the approach of the Commission and the Tribunal to public interest remedies in the period of study. As highlighted in this discussion we have observed that the competition authorities have imposed increasingly diverse and increasingly extensive public interest conditions on merging parties over time in three distinct phases (See Figure 1). The Commission is adopting a more interventionist stance by forbidding mergers between competitors that produce, or have the potential to create, high-market share accretion or a monopolistic position. This is in addition to the tendency of imposing substantial public interest conditions. This interventionist trend is likely to continue, particularly with the 2018 amendments to the Act that have deepened and widened the scope of public interest issues.

The changing nature and increasing significance of the public interest conditions imposed makes it important to understand how and why these conditions were produced and crafted and whether these conditions achieved the desired impact in the market and emphasizes the need for our study.

4.2. A close look at mergers with public interest conditions

The raw dataset had 6 653 observations of large, intermediate, and small mergers spanning over the period 2010/11 to 2020/21. After removing duplications, the number of observations reduced to 3 459 mergers, of which 1007 comprised large mergers, 2322 were intermediate mergers and 130 were small mergers.

Of the 3 459 mergers filed, the competition authorities collectively approved 2 963 mergers without conditions and 347 merger cases approved with conditions over the period.[10]

Focusing on the set cases approved with conditions, this sub-section first provides an analysis of all the public interest conditions on mergers that have been imposed by the competition authorities over the period 2010/11 to 2020/21. We then present the overall

[10] There were a negligible number of cases prohibited and withdrawn over the period. We do not report them here but note that they comprise the remaining categories of cases captured in the dataset.

picture of the public interest conditions first in large mergers and then in intermediate mergers.

4.2.1. Types of public Interest conditions imposed by the competition authorities

In the last decade, the competition authorities have collectively imposed a total of 284 public interest conditions on 245 cases approved with public interest conditions– 59% (168) of these public interest conditions were imposed on intermediate mergers and 41% (116) of these public interest conditions were imposed on large mergers.

Table 1: List of Public Interest remedies on Intermediate and large mergers monitored by the Competition Commission of South Africa – 2011/12 to 2020/21

Public Interest Condition	Large mergers	%	Intermediate mergers	%	Both	%
Effects on employment	39	34%	74	45%	113	40%
Moratorium on merger specific retrenchments for set period of time	28	24%	39	24%	67	24%
Transformation related conditions (ownership, BBBEE)	8	7%	7	4%	15	5%
Remedies relating to small businesses and businesses controlled by HDPs	7	6%	8	5%	15	5%
SMEs	6	5%	0	0%	6	2%
Domestic supply chain	6	5%	4	2%	10	4%
Effects on industrial/Regional	5	4%	13	8%	18	6%
Skills development - Employees	5	4%	3	2%	8	3%
Other remedies relating to employment	5	4%	11	7%	16	6%
Effects on small business/firm	3	3%	0	0%	3	1%
Effects of national industries to compete in international markets	1	1%	3	2%	4	1%
Employee Trust	2	2%	0	0%	2	1%
Local production	0	0%	2	1%	2	1%
	116		**164**		**284**	

Source: Authors' estimation, using Competition Commission data

The employment condition is the most imposed public interest condition accounting for approximately 40% of the total public interest conditions imposed. This is closely followed by the retrenchment moratorium with a share of 24% of all public interest conditions. This reflects the fact that employment related conditions were predominantly the most imposed public interest conditions by the competition authority. This, as discussed above, changed after a few precedent setting merger cases, 2011 Walmart/Massmart, 2015 Coca Cola and the 2016 AB InBev cases, which saw the competition authorities start imposing other public interest remedies. These cases, as discussed in section 4.1 of this paper, involved a variety of public interest conditions some of these conditions, such as the domestic supply chain development in the Coca Cola case, were imposed for the first time in the South African merger regime.

The next commonly used condition on public interest over the period under observation were remedies related to the effect on particular industrial or regional sector with a 6% share of all public interest conditions, this condition makes up 8% for intermediate mergers and 5% for large mergers. Conditions such as transformation related remedies which take up 4% and 7% for intermediate and large mergers, respectively; conditions related to the

ability of businesses owned or controlled by HDPs to remain competitive which account for 5% of all public interest remedies; and conditions related to the domestic supply chain and skills development which account for 4% and 3% of all public interest remedies, respectively. These conditions start being commonly used after the 2011 Walmart/Massmart and Coca Cola 2015 merger which were the first cases to have some of these public interest remedies imposed, we also see these merger conditions gain popularity during the years leading up to and post the 2018 amendments.

4.2.2. The Type of Public Interest conditions by merger size per year

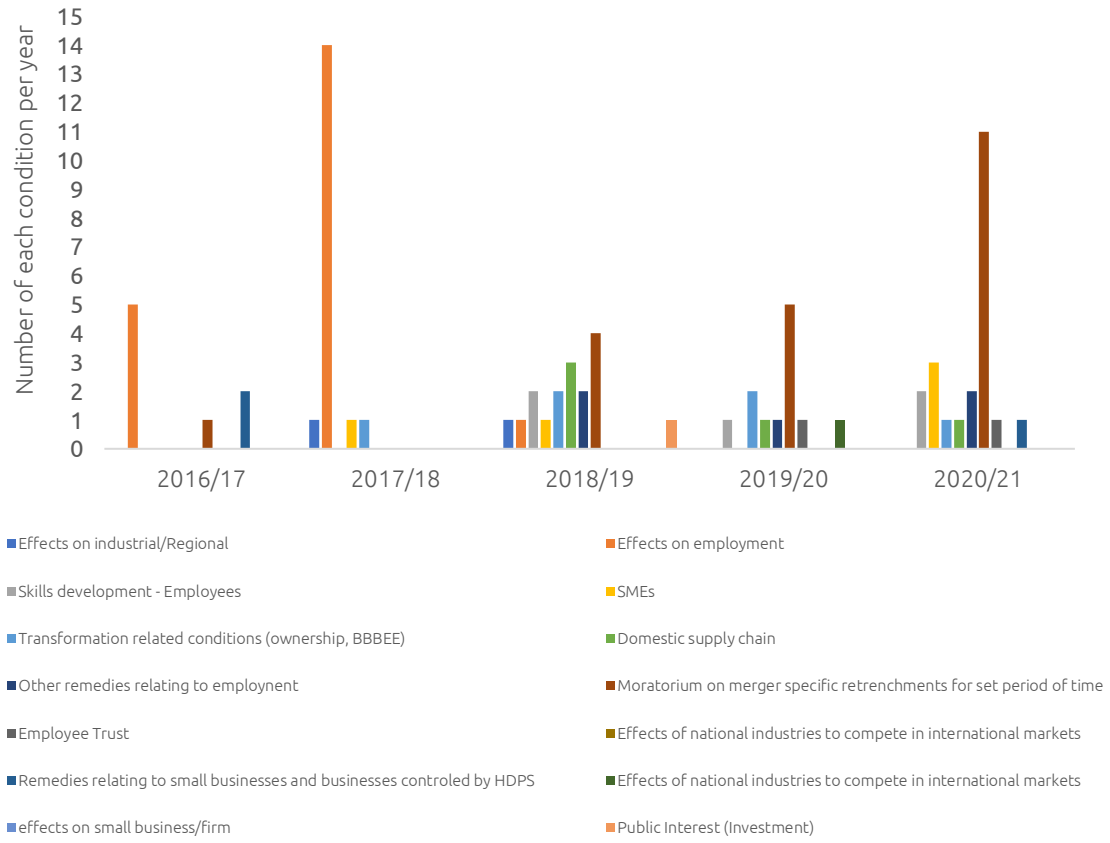
The first part of this section looks at the types of conditions imposed on large mergers and the second looks at intermediate mergers. This exercise shows the evolution of public interest conditions over the 2010/11 to 2020/21 period for large and intermediate mergers respectively. This also allows us to examine the approach taken by the competition authority in the application of public interest conditions before and after the implementation of the 2018/19 amendments.

(a) Public Interest Conditions on large mergers

We note that it is important to show several types of public interest conditions imposed over time and the frequency with which these conditions have been applied by the competition authorities as this allows us to study the evolution of the application of public interest conditions over the period under observation. Figure 2 below shows the mix of public interest conditions between 2016/17 and 2020/21 for large mergers – we chose this period as it allows us to capture the change in public interest conditions before and after the 2018 amendments. Based on the figure below, 2018/19, 2019/20 and 2020/21 had very similar conditions– except for the investment requirement which is only imposed in 2018/19.

Post amendments we observe the mix of public interest remedies shift to include conditions that are more interventionist in nature. We observe the competition authorities start consistently asking for skills development, employee trusts and supplier development/local supplier related conditions. Post 2018 amendments we also see the number of times the competition authorities ask for ownership related conditions rise – this is partly because the amendments specifically ask for the 'promotion of ownership'. We see, from the data under observation, most of the BEE and ownership conditions were mostly imposed on South African firms, such as for example Simba (Pty) Ltd and Senwesbel Limited in 2019/20.

Figure 2: Types of Public Interest conditions on large mergers imposed by the Commission - 2016/17 to 2020/21



Source: Authors' estimation, using Competition Commission data

(b) Public Interest conditions on intermediate mergers

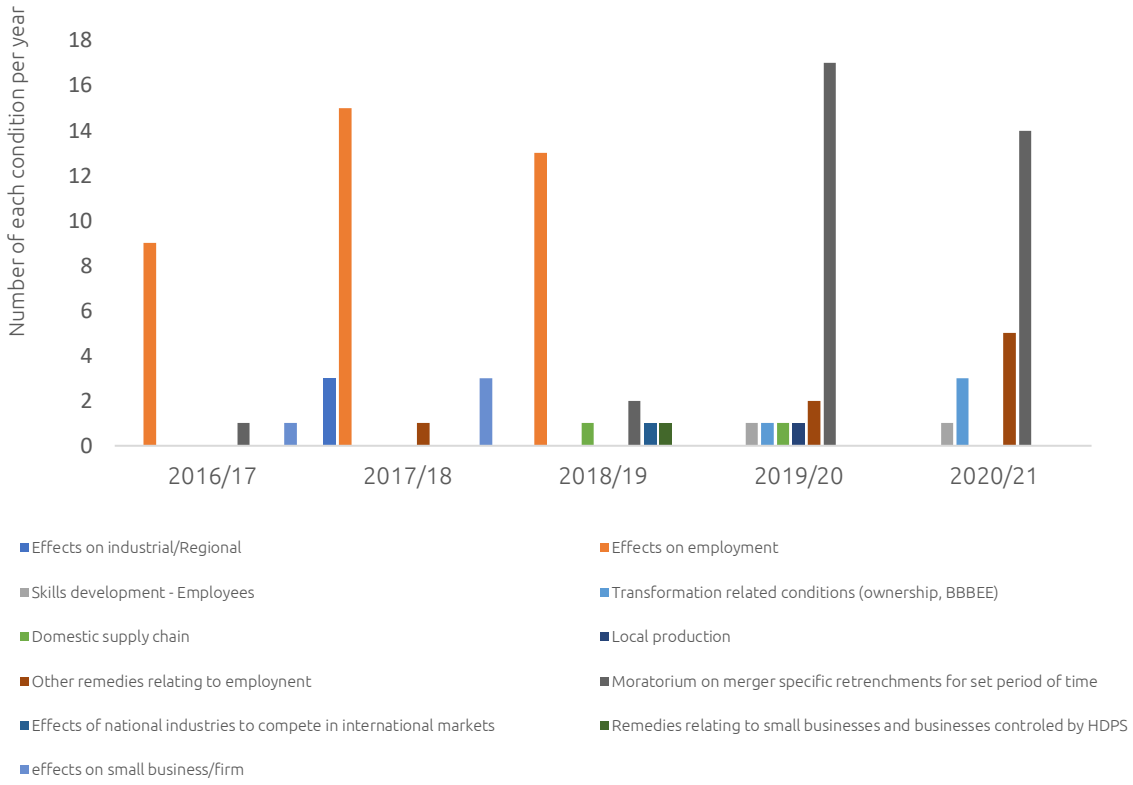
Turning to intermediate mergers, the same three-phase time pattern characterizing the application of public interest conditions is present in intermediate mergers. In fact, we observe the same types of public interest conditions being imposed on large mergers in intermediate mergers, this is despite the fact that intermediate mergers have a lower turnover threshold than large mergers. The Commission classifies intermediate mergers as proposed mergers and acquisitions with the value of or above R600 million (calculated as the annual turnover of both firms or their assets) and the annual turnover or asset value of the target firm is at least R100 million; while large mergers are classified as mergers with annual turnover for both firms that is valued at or above R6.6 billion with the turnover or assets of the target firm at least R190 million (Competition Commission, 2017).

Figure 3 below shows the split of public interest remedies applied to intermediate mergers per year. Similarly, to large mergers, public interest conditions related to the 'effect of the mergers on employment' are the most dominant conditions throughout the period.

We start observing a more diverse mixture of public interest remedies in intermediate mergers, this is after the large precedent setting cases mentioned above. The mixture of public interest conditions starts including for the first time in intermediate mergers skills development, ownership and BBBEE conditions, investment efforts towards the domestic supply chain and a retrenchment moratorium.

Most of these conditions (such as ownership and BBBEE and a skills development) unlike in large mergers, are not as prominent in intermediate mergers as we observe them being common only post the 2018 amendments. Similarly, to large mergers, we observe that the ownership and BBBEE conditions are mostly imposed on domestic firms.

Figure 3: Types of Public Interest conditions imposed on intermediate mergers by the Commission – 2016/17 to 2020/21



Source: Authors' estimation, using Competition Commission data

Even though the conditions imposed on large mergers are the same as the conditions imposed on intermediate mergers – there are conditions that are unique to intermediate mergers and large mergers. Conditions unique to intermediate mergers include conditions relating to promotion of local production by merging parties and the effects of national industries to compete in international markets. Conditions unique to large mergers include conditions relating to the establishment of employee trusts and investments.

From both large and intermediate mergers, we observe that the competition authorities' mix of public interest conditions remains heavily weighted towards employment conditions – with employment related conditions taking up a large number of public interest conditions imposed over the years. With that, we have seen the competition authorities collectively practice creativity in their application of the employment condition. In 2018/19 we have seen conditions such as considering previous employees for positions impacted by the merger and creating job opportunities for employees impacted by the merger. The retrenchment moratorium, as an alternative of the employment condition is time bound, but these conditions are not time specific and remain an ongoing concern. Employee training conditions have also been imposed; however, these have been less frequent.

4.2.3. Key patterns observable from the data

The above discussed data provides support to the claims that the competition authorities' application of public interest conditions has become interventionist over time. This is but a broad and overarching observation, studying the data further we see a few key observations emerge – these are briefly outlined as follows:

- Even though large and intermediate mergers have to meet different thresholds, and are therefore not the same, competition authorities impose the same conditions on large and intermediate mergers.
- We observe that ownership and BBBEE conditions imposed in large mergers are mostly imposed on domestic firms – examples of this include the imposition of BBBEE conditions to the Senwesbel Limited & Senwes Limited merger in 2019/20 and 4 Racing Proprietary Limited merger mergers in 2020/21 – two firms incorporated in South Africa.
- We also observe creativity in the competition authorities' application of certain conditions – for instance the employment conditions. Over time we observe the authorities become creative by not only asking for no job losses but in instances where saving jobs is not possible, we see conditions such as giving 'first preference to retrenched employees' for positions being used more widely.
- Finally, one notable observation from the data is that even though the amendments came into effect in July 2019, the competition authorities mix of public interest conditions in large mergers changed quite significantly in 2018/19. 2018/19 is the year in which the authorities had the most diverse mix of remedies – they imposed a total of 9 different remedies – the highest number observed from the available data. This could possibly mean that, the authorities were prone to be more rigorous in the interpretation and application of public interest conditions.

5. Intermediaries for business, labour, and society: views and analysis from those working the system crafting public interest conditions

This section presents and interprets the views of our interviewees. As discussed above, our interviewees spanned South African society, although the majority came from the circle of legal practitioners working daily in this field. We cover five areas: issues of interpretation of the new public interest conditions in the 2018 amendments (in two sections, including that of merger specificity), issues of transparency and consistency, institutional changes subsequent to the 2018 amendments, and the system's capacity to monitor and evaluate the public interest conditions approved.

5.1. Interpretative questions regarding the 2018 amendments to the Competition Act about public interest conditions

It is trite that the mandate of South African competition law is dual in nature and that the authority's remit has always transcended competition issues to include the public interest to achieve economic transformation. There is certainly no current debate amongst competition law practitioners and stakeholders whether public interest considerations are as important as competition issues. Many interviewees spoke with pride of the inclusion of public interest factors as a distinctive and globally influential feature of South Africa competition policy.

Furthermore, often referencing the implementation of the public interest conditions prior to the 2018 amendments, the sentiment amongst most practitioners is that public interest conditions should only be imposed where the merger is likely to cause a negative public interest outcome.[11] This perspective easily fits with attention from the competition authorities where the merger will raise employment concerns and where the ability of small businesses to participate and expand within markets is constrained. Indeed, both of these policy objectives are encompassed within the 'standard narrative' identified and outlined above.

More diversity was apparent upon attempting to place competition policy within economic regulation more generally. While many would also agree that competition law and policy is a tool to be used in conjunction with other industrial policies, some interviewees raised a concern to what extent the promotion of structural and economic transformation rests solely with the competition authorities. In particular, some questioned whether it was the role of merger control (which impacts upon firms at a particular point in their organization lifecycle) to drive change and achieve broader socioeconomic outcomes, the better-fitting policies for which arguably may lie in the hands of other government agencies (or departments).[12]

The 2018 amendments to the Competition Act have clearly been a response to the concentrated nature of South Africa's key economic sectors and the lack of transformation since democracy. The amendments were crafted to not only deconcentrate these sectors but also open the economy to more players.[13]

The amendments included enhancing the ability of small business to effectively enter and participate in markets (s 12(3)(c)), the ability of national industries to compete in international markets (s 12(3)(d)), as well as increasing the spread of ownership for workers and previously disadvantaged persons through merger control (section 12(3)(e)). The wording of each of these clauses differs significantly and we emphasize in this working paper s 12(3)(e)).

Indeed, it is the latter of these three amended clauses – regarding the spread of ownership in 12(3)(e) and the remedies constructed to achieve this (i.e. ESOPs) – that has been the most controversial. The amended clause now states that when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect the merger will have on: "*the promotion of a greater spread of ownership, in particular, to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*"

For our interviewees, the 2018 amendments themselves were not in contention. Taken as a package, these amendments facilitate structural transformation and open the economy to greater participation. This was highlighted by all persons including the legal practitioners interviewed in this process.

[11] Interview with senior counsel (Int617Feb2023).
[12] Interview with competition law practitioner (Int302Feb2023)
[13]Competition Amendment Bill Briefing by Minister Patel dated 21 August 2018. Available: https://pmg.org.za/committee-meeting/26852/

Instead, our interviews brought to light questions around whether or not the competition authorities are correctly interpreting the degree of obligation associated with this provision.

Regarding the correct legal interpretation of s 12(3)(e), it was suggested by the legal practitioners that the formulation of the condition may be open to misinterpretation and manipulation by the authorities which could have dire consequences for large merger transactions and deter foreign investors in South Africa. This concern did not relate to the details of its implementation – for instance questions such as whether an ESOP could be instituted by the target firm or whether an ESOP could hold JSE rather than firm-specific shares. These sorts of questions were understood to be usual for a just-introduced provision, although worth watching since interviewees agreed the ESOP provision is a significant one.[14]

Instead, it is the degree of obligation that is controversial. The Commission appears to have interpreted the specific wording of s 12(3)(e) as meaning that every merger transaction requires a condition related to the spread of ownership -- or should enhance the public interest in some other at least equivalent way. This interpretation maintains that the framing of the provision imposes a positive obligation of merger parties to promote a greater spread of ownership regardless of whether there is or is not a merger-specific change (dilution of ownership) associated with the merger.[15] Here, it has been argued that the framing of s12A(3)(e) is markedly different to that of the other public interest provisions in that it is the only provision that specifically speaks to the *promotion* of a public interest element. For example, s12A(3)(b) simply states that the Commission must assess the effect of the merger on "employment" and not on, say, the promotion or preservation of employment. This textual difference seemingly points to the 'positive obligation' as being intended and deliberate.

Competition law practitioners hold the view that this is not in line with the amendment given that it places a burden on merger parties especially where the same is not required of their competitors (or those not engaged in merger transactions). According to one practitioner noting the use of the word "promotion" in s 12(3)(e), "promote" does not mean "ensure" or "achieve".[16]

This is not an abstract matter of legal interpretation. A number of our interviewees agreed that there appears to be a policy shift in the approach to merger transactions by the competition authorities subsequent to the 2018 amendments. The new approach holds that merger transactions, even where there is no public interest concern, should nonetheless strive to "*make the world a better place*".

Interviewees observe that this has to some extent become a "*cost of doing business in South Africa*" which was not a consequence intended by the drafters of the amendment Bill. The argument is that large merger transactions – which more often than not although not always have a foreign firm as part of the merging parties -- already have a significant price tag. Paradoxically, for such firms, the imposition of public interest conditions is thus

[14] Int30Jan2023.
[15] Submission (written) and case law
[16] Interview with senior counsel (Int617Feb2023).

tolerated – understood either as a tax, as naked rent-seeking or as corruption, but in any event as just a number. This phenomenon may have parallels in other jurisdictions.[17]

In discussing the interpretive issue here, a number of interviewees distinguished clearly between large and intermediate mergers. It was pointed out to us that merger parties in intermediate mergers at times take issue with the post-2018 amendment public interest conditions. While we discuss the reasons for this in the next sub-section (on merger specificity and concerns of economic policy related to the 2018 amendments), this resistance to the amendments among intermediate merging parties may in part be due to the underlying uncertainty of the conditions required to remedy the public interest. This is especially so in instances where it is argued that the merger does not raise public interest harms.

ESOPs required by the authorities in merger approvals to date appear not to have been formulated on the basis of some underlying threshold or framework applied to the particular circumstances of the merger at issue. The underlying interpretive uncertainty with s12(3)(e) may have contributed to this. Instead, it appears that the Burger King transaction is being used as the precedent for the establishment of a 5% ESOP in each and every transaction. It is not clear from our discussions whether this figure is appropriate or should be higher or lower or what the methodology is behind it. Burger King was of course the first transaction to be prohibited (at least in the sense of opposed by the Commission) solely on public interest grounds (e.g. where there were no competition issues raised).

Whether or not the correct interpretation of s 12(3)(e) is that the competition authorities are empowered (or indeed obliged) to insist on a condition related to the spread of ownership such as an ESOP regardless of competition harms of course remains to be clarified by the CAC, and other courts.

5.2. Merger specificity and policy concerns re South Africa's economic growth

South Africa's merger notification process requires that merging parties disclose whether their merger will raise public interest concerns for example job losses. For a long time, many of the public interest conditions imposed in such mergers in which public interest conditions were aimed indeed protecting workers and preventing job losses. In a number of instances, companies struggled to reconcile their operational needs with the need to obtain merger approval. This is not to suggest that the competition authorities have misinterpreted the Act by approving moratoriums on employment but rather that in some instances companies had to enter into section 189 proceedings post approval.

The baseline understanding of merger specificity references this employment context. Indeed, in terms of the Commission's public interest guidelines (which largely consolidate pre-existing Tribunal caselaw), merging parties are required to explain the cause and motivation for job losses and the expected retrenchments from the merger transaction. This concept of merger specificity is thus part of the Tribunal's early legacy of giving a "*proper law*

[17] For instance, there may exist parallels with EU equivalents of 'public interest' such as the CMA imposing conditions that protect market space for mom-and-pop food shops in grocery retail; or recent debates about inclusion of crosscutting issues like COVID remedies or climate change related provisions in western competition laws.

and economic meaning" to the text of the Act.[18] With the 2018 amendments, it is now moving from the sphere of employment into the sphere of ownership.[19]

Nonetheless, the concept of merger specificity (and inevitably its application in particular cases) is and has been far from settled. Instead, the doctrine appears to function as a flexible and contested concept in the system. It is, in our view, a legal doctrine of adjudication essentially within the control of the Tribunal, subject only to control by the Competition Appeal Court. It is thus appropriate to discuss the concept separately from discussing the substantive public interest 2018 amendments in the above section.

It's interesting to note that the Tribunal's position on merger specificity was quite clear in the Walmart/Massmart transaction, in which it stated the following[20]: "*Whilst in this case protecting existing collective rights is a legitimate concern that our public interest mandate allows us to intervene on because we are protecting existing rights from the apprehension that they may be eroded post-merger, we must be careful how far down this path we go. Protecting existing rights is legitimate, creating new rights is beyond our competence*".

In the same matter, in perhaps its most infamous view on merger specificity and the public interest, the Tribunal stated that when evaluating the public interest in competition matters before it, merger specificity was crucial and paramount in the assessment. It made the following statement[21]: "*Subject matter and substantiality are not the only limitations in considering public interest. A further consideration is that the public interest must be merger specific. Expressed in less technical language, unless the merger is the cause of the public interest concerns, we have no remit to do anything about them. Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction*" (own emphasis).

With the 2018 amendments to the Competition Act and the Tribunal approval of the conditions agreed to by the parties in the recent Burger King transaction, a question which has been raised by competition law practitioners is whether a merger specificity filter is still being used by the Tribunal in the case of the public interest.

Some of our interviewees perceive the Tribunal's requirement for merger specificity as having been discarded. In their view, it does not appear to be applied any longer. Instead, there is now a requirement on merger parties to create a set of opportunities in the public interest, through the establishment of for example an ESOP, even where the merger does not raise a public interest concern. This is the view of the Commission – that even without seeing a trigger of a reduction in a number of black and/or worker owners, there is a specific positive obligation on the merger transaction to spread ownership.[22] "*Specificity is triggered even where there is no dilution.*"[23] An official of the Commission also pointed out that if s12A(3)(e) of the Act were to apply only to mergers that result in a substantial dilution of ownership by HDPs and/or workers (and not to mergers that have a neutral effect), it would

[18]Interview with competition law practitioner (Int0717Feb2023).
[19] Int15Feb2023.
[20] Walmart/Massmart, at para 68.
[21] Walmart/Massmart, at para 32.
[22] Int15Feb2023.
[23] Int15Feb2023, p. 8.

arguably place an undue and unfair limitation on the ability of firms that are owned or controlled by HDPs and/or workers to sell all or part of their businesses.

What is the impact of this shift in the understanding of merger specificity as applied to s 12(3)(e)? One aspect noted by one public official is the inauguration of a new set of issues of sufficiency of remedy – of the form, content, and interrelatedness of the public interest conditions agreed to and approved. In this view:

"*Parties are resisting remedying this particular problem [of ownership], so now they are giving us all kinds of other commitments. You know, they'll invest in their employees, they'll spend on their suppliers, et cetera. They're funding other public interest commitments that could countervail their failure to promote the greater spread of ownership.*"[24]

Here, the concept of merger specificity relates to and constrains the competition authorities' authority to accept as substitutes for a greater spread of ownership other offered remedies.[25]

The above aspect overlaps with a second aspect of the impact of this shift also noted:

"So, in our interpretation, I think the other challenge is that we go further than even the BEE act because remember the BEE Act doesn't necessarily require ownership. You know, so there are other aspects like if you are a foreign owned firm, you can do equity equivalents, you know, so in a sense, the effect of the amendment, the way that this amendment was drafted is that we are requiring more than what you would [from] what you may call the sector regulator for transformation."[26]

For a number of legal practitioners, as a general concern, the shift in applying the concept of merger specificity has the potential to deter investment. For example, for those foreign firms within the large merger category, the uncertainty over merger specificity may deter foreign investment into South Africa. In one or two instances related to us by legal practitioners, merger parties were reportedly not comfortable to agree to a share ownership scheme especially where the merger specificity of the requirement was not proven; in another the legal practitioner was asked to investigate lawful steps towards taking South Africa out of the multi-jurisdictional transaction.[27] It is also worth noting that in the view of these interviewees, the form of the public interest condition also matters. In some cases, merger parties are also being requested to divest of part of their businesses to black owned firms in situations where for example a franchise option would have better served the new entrant.[28]

The specific concerns of economic policy may differ according to the large versus intermediate size category of the merger and the local/foreign nature of the merging parties. According to most of the legal practitioners, the requirement to better the world through public interest conditions at the time of merger had only been observed in large

[24] Int15Feb2023, p. 7.
[25] Int15Feb2023, p. 8.
[26] Int15Feb2023, p. 9.
[27] Int17Feb2023; Int20Feb2023.
[28] Had we been able to speak to beneficiary firms involved in these remedies we may have been able to work out if a supplier support arrangement or investment commitment had more net societal benefit than other categories of public interest remedies. As noted below in the section on monitoring and evaluation, this topic is appropriate for an impact assessment.

mergers prior to the 2018 amendments. However, from our interviews with several legal practitioners, this is also now extending to intermediate mergers with s 12(3) of the Act.

The articulated concern is that intermediate mergers are smaller transactions involving firms with constrained resources when compared to the deep pockets of firms closing large merger transactions. They are also more often more locally based transactions.

Whether or not the approach of the Commission based on the new amendments as developed in large mergers and extended to intermediate mergers is putting an undue economic pressure on firms in intermediate mergers remains to be seen as data is difficult to obtain. In any case, the intuition behind this perception also raises a question of fairness in the ability of firms in intermediate mergers to make similar commitments as it relates to ESOPs and the establishment of skills development funds. This question of fairness is heightened by the involvement of large international firms with significant resources available to them in some of the substantial public interest commitments observed being mirrored in intermediate mergers.

5.3. Degree of transparency and consistency: rule of law concerns

One overarching theme arising in our research had to do with the degree of transparency and the consistency with which the Commission and DTIC involve themselves in transactions.

With respect to transparency, there does not appear to be a significant degree of public participation in the process through which most public interest conditions are arrived at, with the exception of trade union participation. While we did not analyze our data to specifically speak to this point, it does not appear that very many of the merger cases with public interest conditions were the result of participation by intervening parties from civil society apart from trade unions.

Our data do not indicate the percentage of public interest conditions negotiated under conditions of confidentiality, but the general norm appears to be that of confidentiality. Thus, most of the public interest conditions are being negotiated effectively in private with the Competition Commission and with the DTIC. The DTIC has in some cases involved other government departments.

This pattern, the confidential nature of the process of negotiating public interest conditions as well as its speed all affect the likelihood and character of participation by civil society actors, even if they are welcomed by the Tribunal once present. According to one NGO lawyer:

"*We were only brought in very late, so that the Tribunal had already commenced. We had heard about it and we just basically showed up and said we should be here on the first day. And the Commissioner [Tribunal Member] allowed it and said he also sees the significant public interest. The mines were very taken aback by this. The unions welcomed it, sort of. They allowed it, but the mines didn't like it. The advocates that were representing them were very disappointed that that now there was another area they had to handle. The Tribunal was difficult because we were constantly fighting for our right to be there.*"[29]

A highly significant exception to the above concerns trade union participation in the public interest conditions process. In contrast to the NGO lawyers, the trade unionists have repeat

[29] Int26Jan2023, p. 4.

player status in this space. Indeed, our trade unionist interviewee had negotiated around 50 competition matters with his union having done 86 since 2001.[30] The trade union concerned had also been directly involved in processes around the legal framework. Indeed, this particular trade union appears to be an exception as the interviewee noted "*in general, many trade unions are confused by competition matters, mergers and acquisitions. They see them as simply as threats …*"[31] Generally, the trade unions are themselves notified by the merging parties directly at the time of merger notification and do not generally depend on the Commission for notice.

Given that there is little to no transparency in how the conditions were arrived at nor broad public participation in the process, the precedential value of the public interest conditions approved in specific cases and the conditions themselves may be unclear.

In theory, the Act provides for transparency (in the sense of clarity) and consistency in part through the mechanism of guidelines. In respect to the subject matter of this study, the Commission's public interest guidelines have not been updated since 2016/2017 when they were formulated and published. The Commission is currently in a process to revise and update these public interest guidelines, which has taken some time due to the complexity of the issues.[32]

With respect to consistency, the concerns expressed by our interviewees were of three separate types: consistency with the empowering legislation, consistency of involvement of the Minister, and undue consistency with respect to the differing sizes of mergers. The first two types are discussed in this section. The third type, the perception of undue consistency particularly in relation to intermediate mergers, has been discussed in the previous sub-section above in relation to economic policy. It additionally raises a concern of undue consistency belonging in this "rule of law" section e.g. it is irrational for policy makers and the competition authorities to apply to intermediate mergers a policy developed in respect of large mergers.

One concern expressed by the interviewees related to the consistency of interventions by the Minister with the empowering legislation. This view was often bolstered by reference to the standard narrative (see above) of the evolution of competition law and policy. Often the mergers most scrutinized are large mergers involving international firms looking to expand their African footprint (for example the PepsiCo/Pioneer merger) or trying to consolidate their operations.

This regulatory scrutiny has undoubtedly had an impact on the length of the negotiations and the type of conditions arrived at (See Changole and Boschoff, 2022).

In two or three cases related to us, investors have chosen not to conclude deals that include South Africa due to the requirements to be attached and the "hassle".[33]

As we have noted above, it is undisputed that the inclusion of the public interest considerations in South Africa's competition law has led it to become a leader in this area with other jurisdictions adopting a similar approach to competition policy. Yet, based on our

[30] Int30Jan2023, p. 4.
[31] Int30Jan2023, p. 5.
[32] Int15Feb2023, p. 10.
[33] Interview with competition law practitioner (Int0717Feb2023).

interviews, some legal practitioner voices in the business sphere must be understood to be asking to what extent are the competition authorities pushing the appropriate boundaries to achieve industrial transformation goals through competition policy. In other words, to what extent has the recently increased attention to and implementation of the public interest provisions been politically motivated to achieve industrial and economic transformation which has not to date been able to be achieved through other forms of government intervention.

Given that the competition authority has often been lauded as being a regulator that has been able to achieve its objectives, a concern for both critics and defenders of the authorities is whether they are now being manipulated. At base, this is a rule-of-law concern relating to legality and consistency with the empowering framework properly interpreted.

The specific questions posed often overlap with the interpretative questions we have noted above, but also bring in contextual factors. For instance, does the legal framework provide for the substantial commitments that are being required of foreign firms closing deals in South Africa and the fact that some of these have included non-merger specific commitments? This specific question brings in not only consistency of the intervention with the legislation but also questions the pattern with which the Minister intervenes, an issue discussed further in the next section.

5.4. Roles and Relationships: the Minister, the Department, and the Commission

In addition to amending the public interest grounds, the 2018 amendments to the Competition Act also saw additional powers being afforded to the Minister relating to the process of formulating public interest conditions. The Minister may now appeal a decision of the Tribunal to the CAC and also has an automatic right to intervene in small merger transactions in addition such an option to participate as prescribed in intermediate and large mergers, with large mergers being automatically brought to Ministerial attention. Our interviewees described to us some significantly changed features of the respective roles of the Minister, the Department and the Commission subsequent to the amendments as well as the dynamics of their interaction. The Tribunal did not feature prominently in these comments, except as continuing to perform its independent adjudicative function.

With respect to the Minister and Dtic: It was a general perception among our interviewees that the types of transactions that the Minister has typically intervened in and obtained substantial public interest commitments have generally been in large transactions and often with foreign investors. We have not confirmed this correlation with our dataset. A number of interviews however suggested there is little to no discernible pattern to indicate when and if the Minister will intervene in certain transactions.

One constructive suggestion was made for guidance (such as a policy statement) by the Minister or the DTIC to assist merging parties to understand when and what the procedure would be if the Minister were to intervene in their transaction. This guidance was mentioned by the Minister in a speech at the Commission's conference in August 2022. However, following our discussions with the Dtic's monitoring team, we could not confirm whether or not drafting of this guideline had begun. This is required apart from the Dtic's policy

statement on competition policy in SA, which describes how the Dtic intended to participate in mergers.[34]

One interviewee suggested that grafting an interventionist role for the Minister onto the Act's core feature of independent regulatory institutions has been "*a complete nightmare from a design point of view*" and has undermined the independence of the institutions in two ways: by concluding framework agreements with the Minister which are then rubberstamped by the authorities and by allowing the Minister to function in a position second-guessing the Commission (functioning nearly as an appeals body).[35]

Procedurally, the Minister's involvement has at times prolonged the transactions close which has in the past had significant financial consequences for merging parties. In substance, when the Minister is involved, merger parties have often maintained the view that the process has become extractive in nature. However, public officials argue that the Dtic involvement – from the time of Walmart – has had a positive influence:

"*Pre-Walmart, there wasn't really an understanding around how you could craft remedies using the public interest that are actually pro-competitive, you know that promote suppliers into value chains etcetera. So there was, I think, an important change in thinking about how powerful and transformative the public interest elements can be.*"[36]

Still regarded as a new competency, the Department's relevant functions in this area include supporting the Minister, monitoring merger transactions and associated conditions, and information exchange and coordination with the competition authorities. The Department aims to build the capacity to conduct economic impact assessments.[37] Officials from both the Dtic and the Commission accepted that these two bodies are still in the process of putting in place their best institutional arrangements for working together.

The characterization of extractive action was also leveled against the Commission although in the reverse from inconsistency[38]: "*I don't think the authorities are doing nearly enough to actually understand the market. Competitive dynamics -- what's actually going on in the supply chain? And how it engages with potential other concerns? -- So they've just, they've got their boilerplate now and they're incredibly aggressive about extracting it.*"

A nuanced view on the extractive nature of the process came from the trade union interviewee, who used that term for the party to party process (e.g. between merging parties and the trade union party) by which commitments were surfaced and turned into conditions by agreement but not for the role/function exercised by the Commission and the Tribunal in breaking deadlocks between the parties and finalizing conditions.[39]

For its part, the Commission rejected the framing of its activity as extractive but rather as proactive and following the transformative and de-concentration purposes of the law (as discussed above). The Commission also aims to study the impact of the public interest conditions and is interested in several topics in this respect including the impact of

[34] Available: 20210519_Competition_policy.pdf (thedtic.gov.za)
[35] Interview with senior counsel (Int617Feb2023).
[36] Int15Feb2023, p 11.
[37] Int22Feb2023, p. 11.
[38] Interview with senior counsel (Int617Feb2023).
[39] Int30Jan2023, p. 8.

divestiture of single stores unaffiliated to a chain; the impact of sponsoring new firm entry; the value of the 'no merger-specific retrenchment' condition; and the long-term trade-off between competition and public interest concerns, accepting that in this space public interest concerns are competition concerns.[40]

5.5. Monitoring and evaluation

As part of the public interest conditions finally approved by the Tribunal, practically all merger transactions will include monitoring and evaluation conditions. The general form of these condition requires the merging parties to feedback to the Commission on the implementation of their conditions. This is theoretically an important phase of the regulatory process as this surfaces information for potential enforcement by the authorities.

However, amongst stakeholders and lawyers alike there is doubt whether or not monitoring by the Commission, in any substantive sense beyond self-monitoring, submitting compliance reports, actually takes place.

Again, the significant exception relates to the public interest conditions related to employment. For these conditions, at least some trade unions do proactively monitor compliance. As one interviewee explained:

"*And our attitude has been, … informally, that the responsibility is largely on us, you know, to the extent that it's about employment issues and that's mostly because the Commission at various times has said that to us in other cases. You know, like, hey, listen, you know, you're the ones on the ground. You need to go and determine what's happening. And also out of a sense that it's the best way to do it.*"[41]

For one interviewee, the monitoring around employment conditions and, at least potentially, Esops, could be done with efficacy by trade unions.[42]

It is the relatively rare merger case that has allegations of non-compliance. Indeed, most interviewees agreed that the degree of compliance, even without close monitoring, is in fact high. However, several interviewees advised that most instances of non-compliance were triggered by stakeholders' complaints to the Commission as opposed to the Commission monitoring the activities of merging parties.[43]

The Commission's representative did not dispute these claims and instead highlighted that there were over 300 cases with conditions it was currently monitoring. The Commission's monitoring and evaluation function is arguably currently under-resourced; if it were at full strength, it would be run by a Principal, a Senior, two Graduates and two Analysts, with responsibilities to track and monitor compliance and to investigate allegations of breach. Given the increased complexity of cases coming to the Commission post the 2018 amendments and insufficient resources, this unit's capacity has been directed instead to casework.[44] The Commission is in the process of re-establishing a dedicated monitoring and

[40] Int15Feb2023.
[41] Int30Jan2023, p. 11.
[42] Int30Jan2023, p. 15.
[43] We have not in this study examined, for instance, the compliance reports of a representative sample of the mergers approved with public interest conditions.
[44] Interview with representative from the Competition Commission (Int0815Feb2023)

evaluation unit which will focus on the monitoring of conditions, reviewing reports, assessing compliance, investigating breaches and reporting back to external parties.

Government officials were of the view that information derived from monitoring compliance with public interest conditions could be better coordinated. This included information derived from framework agreements negotiated in the first instance by the Minister.[45] The proliferation of diverse monitoring structures in terms of different agreements, including boards with third parties, poses challenges to monitoring effectiveness and the coordination of information.[46]

Monitoring was of interest particularly to intervening parties (esp. civil society and labour participants). Stakeholders indicated that even where they have been involved in the development of public interest conditions that directly affect them, they receive no information whether merging parties are indeed adhering to the conditions or not.[47] They suggested that some kind of feedback or review regarding compliance would be a worthwhile additional activity for the competition authorities.

One representative of an NGO that became involved in competition processes for the first time was disappointed with the monitoring and compliance process:

"*To my knowledge, the Tribunal has played very little or no part in following up in the fulfilment of these conditions, I've been part of many of these engagement forums and no one from the Tribunal has ever been represented there. So I don't know if something happens outside of like the public engagements or the civil society engagements, but the site visits and all of that, no tribunal member has ever been to that. I thought there would be more of a follow up process in terms of: "let's meet back here in a year. You tell me that you've done XY&Z." It kind of became our problem. It became our problem to follow up, our problem to make sure that that these things are set up. Maybe that's the way it was designed. Maybe the Tribunal just gives us the tools for us to then ensure and participate. I thought it would be more of a hands-on approach to be honest.*"[48]

From one public official's point of view as well, "*there is scope for more comprehensive reporting on compliance with conditions. At present, conditions are public in Reasons (Tribunal website for Large, Government Gazette for intermediate) and in the Commission's newsletters. Thereafter it is only the closure of conditions that is reported in the newsletters. Compliance with and impact of remedies imposed should be reported periodically, particularly where groups of firms/third parties who are not 'organised' are affected by the conditions.*" [49]

This restricted circle of compliance information presents a risk given that the Commission is under-resourced to monitor and do their own investigations of a potential breach. Without a rigorous and independent assessment of compliance documents (whether by the Commission or by third parties), merging parties may have scope to manipulate the process

[45] Int22Feb2023, p. 12.
[46] Int15Feb2023, p. 5-6.
[47] It appears to be the case that the typical set of merger conditions gives standing to such intervening parties (third parties) but requires the merging parties to send their reports only to the Commission. Int26Jan2023. It would be possible to widen the circle of those receiving compliance reports through the Commission identifying best practice. Int30Jan2023.
[48] Int26Jan2023.
[49] Int15Feb2023.

post-implementation. Despite this structural feature, it bears repeating that most interviewees agreed that across the entirety of the set of mergers approved with conditions non-compliance was very low.

6. Conclusion and recommendations

This working paper researched the choice of public interest conditions in mergers approved by the competition authorities since the passage of the Competition Act, drawing upon a database of mergers from 2011 to 2021 as well as interviews with experienced public officials, legal practitioners, and civil society stakeholder (including trade union) representatives.

Several relevant points emerged with clarity from our research. First, it was clear from our discussions that there exists a common set of issues that are currently in contention across the board. The current moment – part of a distinct third phase of approach to public interest conditions by the competition authorities since the implementation of the 2018 amendments -- is a clear time of change and transition for this regime. Second, while initially it was intended that the focus of this study would be on large mergers, it soon became clear that many of the issues raised by interviewees also related to intermediate mergers and indeed also to the distinction between large and intermediate mergers. Therefore, the scope of the study widened. Third, there are a number of possible improvements and steps that can be taken within the current legislative framework to improve the choice and efficacy of public interest conditions in merger approvals.

It is necessary to reiterate that there is no doubt that there has been a lack of structural transformation in South Africa and that the skewed ownership profile has left the majority of South Africans excluded from meaningful participation in the economy. As in other parts of the world, competition law and policy has been leveraged to address issues of economic transformation and inequality, and it is on this basis that the 2018 amendments to the Competition Act were enacted. It is accepted – and was accepted by all our interviewees -- that competition law seeks to achieve both competition and public interest objectives, however the contours of the marrying of these objectives remains a debate amongst lawyers, merger parties and the authorities and perhaps has led to livelier debates in recent times.

While they have always been part of South Africa's democratic competition regime, public interest remedies came to national attention in 2011 in the seminal case involving Walmart's acquisition of Massmart. This case marks a shift in the approach of the government towards the public interest and the use of it to drive broader industrial policy goals. The large merger cases which followed in the form of Coca Cola and AB Inbev set the tone for establishing the types of conditions which would be required to achieve approval from the competition authorities. Especially after the implementation of the 2018 amendments to the Act and their introduction of new public interest grounds and corresponding new types of public interest conditions, questions have been raised as to whether and to what extent the competition authorities are pushing the boundaries of their remit, given the substantial commitments being required to achieve approval. These points are featured in the 'standard narrative' we have distilled and identified above, consistent with the three phases of the competition authorities' approach to the use of public interest conditions in merger proceedings, which was revealed by our data analysis.

From our discussions with interviewees, five main areas of concern arose. These cover the interpretation of the amendments; merger specificity; consistency and transparency; the role of the Minister, the Department and the Commission, and monitoring and evaluation. The sub-sections of Section 5 above give the outline of the issue and our conclusions and findings in each of these areas. Of these issues, we might select one to discuss by way of conclusion, the interpretation of the new amendments, given that some of the issues related to interpretation have also filtered down into the other areas of contention.

The post-2018 amendments were broadly welcomed by our interviewees as having the potential for positive outcomes for South Africa, in particular through assisting entry and participation by HDPs and SMEs. However, it does appear to us from our discussions with our interviewees that there is significant contestation and debate regarding the import of the wording of the provision related to spread of ownership. While the Commission has arguably taken the wording to imply an obligation to improve the spread of ownership among HDPs and workers at the time of a merger, the legal fraternity have different and varying views, some focused on merger specificity, some on the role of the Dtic and the Minister, and some focused on the differential efficacy of this condition regarding innovation and investment in the distinctive categories of large and of intermediate mergers.

This debate was clearly evident in the Burger King transaction which for all intents and purposes can be considered as part of the paradigm in this third phase approach of the authorities to public interest considerations. What is required of merger parties is not yet clear nor of common understanding and there is not yet a clear methodology by which the authorities impose conditions which then leads to issues and debates of consistency and transparency. For instance, in some cases, it was suggested that parties only agreed to substantial commitments (for example the % of the ESOP), following private negotiations with the authorities and in order to obtain approval. These cases are then used as a benchmark for setting public interest conditions for future transactions.

The commercial realities are that these transactions, are time bound and are forced to undergo lengthy merger approval processes which cause parties to incur substantial legal costs for approval. This also feeds into the narrative amongst competition law practitioners that we have reached a point in South Africa where the authorities have overstepped their mark and have shaped this process to become an extractive process for merging parties.

It goes without saying that the competition authorities in South Africa have been quite successful in enforcing competition law. However, given the broad scope of public interest conditions, the fact that B-BBEE/HDP ownership is likely to be the focus of the competition authorities going forward, and the recently-emerged dissensus in the professional field, it may well be that the competition authorities need to do more to engage with intermediaries, external stakeholders, and other parts of the state to provide a more commonly-understood way forward.

The clarity, transparency and consistency needed speaks to many facets which also includes the role of the Minister, the types of conditions required and most importantly the position of the Commission going forward in terms of interpretation.

Recommendations

The picture that emerges from the above findings points to the need for some changes to be made. We make the following recommendations:

- *Clarity, transparency and consistency.* The Commission needs to provide merger parties with guidance in terms of its requirements as it relates to conditions needed for the approval of large and intermediate mergers One possibility is for updated public interest guidelines to be finalised and released. Another is for a less formal communication or engagement mechanism to be instituted. Initial proposals from all parties regarding conditions should be encouraged as early in the process as possible in order to craft appropriate conditions.
- *Guidelines on the participation of the Minister.* As has been promised, clarity is needed from the Minister in terms of the types of transactions and requirements which merging parties will need to meet in order obtain Ministerial support. Often the process involving the Minister is not clear and can be quite lengthy for parties. The DTIC's 2021 policy is a step in such a direction.
- *Interpretation of the new amendments*. While the adjudicative process is one that takes time and parties willing and competent to take matters beyond the Tribunal, an opportunity to provide clarity in the interpretation of the provision related to the spread of ownership and whether this is an obligation by merging parties should be welcomed.
- *Improve monitoring mechanisms*. The Commission does not currently have the resources to properly monitor conditions and requires a complaint to be filed in order to trigger a response by the Commission to non-compliance; proper resources should be provided for the key monitoring and evaluation function.
  A knowledge resource system which tracks public interest conditions within a sectoral or industrial framework needs to be developed. South Africa needs to keep up with this in order to also motivate (and demonstrate) its true impact on the public interest.
- *Regular empirical assessments of the impact of public interest*. Desktop research revealed that, while South Africa has a very robust Competition Act and quite a successful regulatory body, to date no systematic, empirical assessment of the impact of public interest conditions in mergers has been conducted. In part this monitoring gap may be due to a lack of resources on the part of the authorities to track impact which has led to the lack of data available. Comparable competition authorities which have conducted such assessment have greater resources than the South African competition authorities. However, other factors may also be contributory, including the changing role of the competition authorities within South Africa's economic policy and the still-evolving relationship between the Dtic and the competition authorities.
- *Research on the threshold value of ESOPs and the underlying methodology.* Given that the rise in the imposition of ESOPs is recent, and that this is a major area of contention amongst practitioners, research could be conducted to understand the underlying approach (methodology) of the Commission in arriving at the desired percentage share ownership required and whether this has had a positive impact. Without such a body of research, this issue is likely to remain contentious with little guidance and underlying reasoning to support this remedy.

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1. Appendix

Appendix 1

CCRED
CENTRE FOR COMPETITION, REGULATION AND ECONOMIC DEVELOPMENT

the dtic
Department:
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

General Questionnaire

Competition law and public interest - IDTT 6 (2022-23)

The Department of Trade, Industry and Competition (the Dtic) has partnered with the University of Johannesburg's Centre for Competition, Regulation and Economic Development (CCRED) to conduct an ex-post evaluation of the impact of public interest remedies in competition law proceedings. This study thus considers the form and the choice of remedy as well as the remedies' various impacts on jobs, SME or HDP ownership, investment commitments for HDPs, and Employee Share Ownership Plans (ESOPs).

We would like to thank you once again for agreeing to participate in our research project. Please note that the responses provided in this interview will be kept anonymous. All interview notes and recordings will be destroyed at the end of the project and will not be shared outside of the organisation.

Interview topics

1. Background of interviewee
   1.1. Name of the interviewee and position occupied
   1.2. Number of years the interviewee has been with the firm/broadly in the industry (professional position)
   1.3. Experience in the Commission and Tribunal process.
2. Views on competition law and its application
   2.1. What are your views on the new (2018) amendments to the Competition Act as they relate to the public interest? We are interested particularly but not exclusively in the ability of SMEs and HDP firms to participate in a market (s 12A(3)(c)) as well as the promotion of a greater spread of ownership, with a view to increasing the ownership by HDPs and workers in firms in the market (s 12A(3)(e)).
   2.2. Since the amendments, has there been a noticeable policy shift in focus by the competition authorities towards the public interest more generally? To the degree

this is the case, how has this impacted the ability of your clients to structure and close their transactions?

2.3. What have been some of the challenges faced by merging parties in negotiating and crafting public interest conditions (e.g. remedies) in line with the new amendments?

2.4. In your opinion, to what extent are the Competition Authorities respecting or pushing the bounds of merger specificity as it pertains to public interest conditions?

2.5. Do you think public interest conditions have become too onerous for merging parties or do you think they are achieving their purpose as intended by the Act?

2.6. Do you think there is a danger in the new amendments deterring future merger transactions?

2.7. What in your opinion can be done to improve the negotiation process of public interest conditions between merger parties and the Competition Commission and/or Tribunal/stakeholders?

3. Case Experience – Can be general or specific

3.1. In your case experience, what could be done to improve the level of involvement of stakeholders in the development of public interest conditions?

3.2. From your case experience, are the competition authorities choosing the right remedies/conditions suited to the public interest facts of the cases?

3.3. From your case experience, do you think the competition authorities are achieving impact through the public interest conditions imposed?

3.4. Is there a transaction that you are aware of that did not go far enough to promote the public interest or that ordered an inappropriate or bad remedy?

3.5. Would you have wanted additional public interest conditions to be imposed on the merging parties and if so, what would these have been?

4. Experience of the Competition Tribunal process

4.1. What was your experience of the Tribunal process and the development of public interest conditions?

4.2. Do you think merging parties need more engagement with the Competition Commission/Tribunal/stakeholders to develop suitable remedies?

4.3. What advice would you give the Tribunal as it exercises its discretion to craft suitable remedies (as merger conditions for public interest factors)? Are there particular factors it should take into account?

5. Commission's public interest guidelines

5.1. Do you have any views on the Competition Commission's public interest guidelines?

5.2. Did you observe any noticeable impact from the implementation of these guidelines on merger transactions?

6. Monitoring and evaluation of merger remedies

6.1. In your opinion, do you think the Commission is doing an effective job monitoring the compliance of remedies?

6.2. Do you think there is scope to improve transparency for stakeholders in respect of compliance with the conditions imposed? If so, do you have any thoughts on how this can be achieved?

7. Forward looking

7.1. Any other comments relevant to our research project?