

https://dspace.org/

An exploration of the public interest factors set out in the Competition Act, in particular the policy approach and regulatory application taken in respect of the promotion of a greater spread of ownership

Munyembate, Juliana

2025

University of the Witwatersrand, Johannesburg

https://hdl.handle.net/10539/50133

Munyembate, Juliana . (2025). An exploration of the public interest factors set out in the Competition Act, in particular the policy approach and regulatory application taken in respect of the promotion of a greater spread of ownership [Master's dissertation, University of the Witwatersrand, Johannesburg]. WIReDSpace. https://hdl.handle.net/10539/50133

Downloaded from a DSpace repository. https://dspace.org/

An exploration of the public interest factors set out in the Competition Act, in particular the policy approach and regulatory application taken in respect of the promotion of a greater spread of ownership

by

Juliana Munyembate

845577

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 1 October 2025

Supervisor: Professor Jonathan Klaaren

DECLARATION

I, 845577, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

ABSTRACT

South Africa faces severe problems of unequal economic power and the South African Competition Act No. 89 of 1998, as amended (the "Competition Act"), is currently being used as a tool to facilitate a better solution as the Constitutional Court has emphasised that the Competition Act must align with the Bill of Rights and prioritize socioeconomic transformation.

This research report delves into the foundational principles and practical effects of public interest factors in merger assessments, noting the robust approach adopted by competition regulators. It also examines the policy agenda and regulatory application of the public interest factors within South Africa's competition law framework, with a particular focus on the promotion of a greater spread of ownership. Specific regard is had to the efficacy of employee share ownership plans ("ESOPs") as a tool for fostering broader ownership in South Africa and how competition authorities have interpreted the legislative mandate for promoting greater ownership.

The research report explores the evolving role of third-party stakeholders, such as the Minister of the Department of Trade, Industry and Competition and trade unions, in shaping public interest remedies within South African merger proceedings. In addition, it addresses criticisms from legal experts and economists who argue that the Competition Commission's "overambitious' and "draconian" application of public interest provisions, particularly the latest guidelines on ownership spread, has led to unintended consequences. These include increased transaction costs, difficulties for black private equity firms to unlock value, and a potential disincentive for firms to increase historically disadvantaged persons ("HDPs")/worker ownership outside of merger activity. Concerns are raised about the lack of proportional application of ESOPs across diverse transactions and the elusive nature of predictability due to a lack of guiding jurisprudence.

The report proposes a rethinking of the public interest provisions and advocates for a link between promoting market participation by HDP-controlled firms and fostering a greater spread of ownership. It further suggests that supplier development initiatives could work in tandem with worker ownership to drive broader economic empowerment and highlights the necessity for clearer judicial guidance with a more practical, evidence-based approach to achieving inclusive ownership through supplier development, moving beyond an overreliance on ESOPs.

ACKNOWLEDGEMENTS

To my mother, your sacrifices created the space for my dreams to grow. You may not have had the luxury of taking your studies further, but you have always exceeded in wisdom, grit, and grace. My passion for social justice is a direct reflection of your spirit, and advocating for economic empowerment through this work has been the fulfilment of a lifelong dream. This degree belongs to us both. I love you.

To my late father, you gifted me with the drive to pursue every opportunity with the same relentless ambition you possessed. I am forever indebted to your courage and your unwavering belief in my future. This master's degree began as a tribute to you, and I am so deeply proud to have reached the finish line in your honour.

To my fiancé, thank you for standing by me through every milestone of this journey. You supported me through the stress of my final year doing my LLB, held me steady during my articles, and offered invaluable guidance as I found my way into competition law. I am constantly in awe of your brilliant mind; thank you for the spirited debates and the curiosity that have enriched both my work and my life.

To my sisters, thank you for being my constant source of laughter and light throughout this journey. You have been my safe harbour during the most stressful seasons of my legal career. Your love and sisterhood are the greatest gifts I carry with me, and I am so lucky to share this milestone with you both.

To my friends, especially Matshidiso Tseki, thank you for being the community I needed to cross this finish line. From the late evenings spent on campus or studying, to the much-needed wine breaks, your encouragement kept me grounded. Thank you for keeping me sane when the law didn't make sense, and for challenging me to think more critically about case law and merger specificity. I am so lucky to have shared this journey with people who celebrate my wins as much as their own.

Finally, I would like to express my sincere gratitude to my supervisor, Prof. Klaaren. Beyond your academic guidance, your expertise in competition law challenged me to think more deeply and critically. Thank you for your encouragement and for believing in the importance of this research. Your feedback was essential in shaping this paper, and I am a better researcher and lawyer because of your mentorship. I am deeply grateful for the time and patience you invested in my success. I am honoured to have learned from you.

TABLE OF CONTENTS

No.	Description	Page
I.	INTRODUCTION	6
II.	UNPACKING EMPLOYEE SHARE OWNERSHIP PLANS ("ESOPS")	9
III.	THE COMPETITION COMMISSION'S ("COMMISSION") APPROACH TO THE PUBLIC INTEREST FACTORS, SPECIFICALLY THE GREATER SPREAD OF OWNERSHIP	14
IV.	THE COMPETITION TRIBUNAL'S ("TRIBUNAL") APPROACH TO THE GREATER SPREAD OF OWNERSHIP FACTOR	18
V.	INTERESTED PARTIES' PERSPECTIVES ON THE PROMOTION OF A GREATER SPREAD OWNERSHIP FACTOR	22
VI.	A POSSIBLE APPROACH GOING FORWARD	25
VII.	CONCLUSION	30
VIII.	BIBLIOGRAPHY	32

I. INTRODUCTION

The South African competition law regime is uniquely shaped by the country's profound history of inequality and economic exclusion, which are a direct legacy of apartheid.[1] Unlike many other jurisdictions where competition law primarily focuses on economic efficiency and consumer welfare, the Competition Act No. 89 of 1998, as amended (the "Competition Act") explicitly incorporates public interest objectives aimed at promoting a more inclusive and equitable economy.[2] The Competition Act balances traditional competition goals (efficiency, competitive prices, consumer choice) with broader developmental and public interest objectives.[3]

Initially, the South African competition authorities adopted a fairly conservative approach, focusing on building institutional capacity and establishing foundational legal precedents. However, over time, the role of competition law has evolved significantly, becoming a key tool for addressing economic inequality that emanates from structural imbalances.[4] South African competition authorities have now established a reputation for a robust approach, particularly when reviewing mergers that could impact the public interest.[5]

In 2019, the Competition Act was amended with the critical aim of remedying high levels of concentration, racially skewed ownership, and lack of support for small businesses. In terms of the current merger review section of the Competition Act, the relevant competition authority must consider whether the proposed transaction can or cannot be justified on certain public interest factors. These considerations are the impact that a merger will have on "*(i) a particular industrial sector or region (ii) employment (iii) ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market (iv) the ability of national industries to compete in*

[1] YS Choi and J Moon 'Fairness and equity in South African competition law: A new direction' (2025) 69 *Journal of African Law* pp. 1 - 17
[2] T Dini, N Mia and V Anthony 'South Africa: Sustainability and antitrust' *Perspective on International Antitrust* 2025*,* available at https://www.americanbar.org/groups/international_law/resources/newsletters/2025/south-africa-sustainability-antitrust/#:~:text=89%20of%201998%2C%20as%20amended,foundation%20for%20more%20expansive%20outcomes, accessed on 16 June 2025
[3] Ibid
[4] Jonathan Klaaren, Karissa Moothoo Padayachie & Olwethu Shedi 'The impact of competition law remedies on public interest' (2025) 42(2) *Development Southern Africa* 252
[5] Norton Rose Fulbright 'Competition world -A global survey of recent competition and antitrust law developments with practical relevance' 2017, available at https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world-first-edition-2017-global-law-firm-norton-rose-fulbright.pdf?revision=63441a6c-35ae-44a3-83de-4ec74817d247&revision=5247914457967387904, accessed on 10 September 2023

international markets, and (v) 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."[6]

Unfortunately, the amendments haven't come without controversy due to an inconsistent approach in assessing the public interest factors.[7] The amended public interest factors have sparked intense debate among policymakers and economists, mainly about their practical application in merger reviews.[8] However, from a policy standpoint, these changes - particularly the push for a greater spread of ownership - align with South Africa's constitutional goals that is consistent with the scheme of the Competition Act and one that adopts a context-sensitive approach.[9] Particularly, the South African government has made it clear: we need stronger measures to address structural inequalities and ensure all South Africans can meaningfully participate in the economy.[10]

From a legislative and adjudicative lens, section 2(f) of the Competition Act, as amended, stipulates that the purpose of the Competition Act is to promote and maintain competition in the Republic of South Africa in order to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons ("HDPs"). In addition, the role of the competition authorities as regards the purpose of the Competition Act has been clarified by the Constitutional Court in *Mediclinic*[11] as follows: "*Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal*

[6] Section 12A(3) of the Competition Act
[7] Luke Fraser 'New merger laws in South Africa have a huge problem: experts' *BusinessTech* 10 October 2023, available at https://businesstech.co.za/news/business/724116/new-merger-laws-in-south-africa-have-a-huge-problem-experts/, accessed on 16 July 2025
[8] Boshoff 'The Economics of Public Interest Provisions in South African Competition Policy' (2021) 1
[9] *eMedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another*, (201/CAC/JUN22) [2022] ZACAC 9 (1 August 2022) at para 84
[10] DTIC *Worker Share Ownership, Building a Shared Prosperity: Worker Ownership for an Inclusive South African Economy* (2024) 6
[11] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* 2022 (4) SA 323 (CC)

sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system.[12]

The above context suggests we are operating with social justice legislation, where competition law needs to be viewed through a public interest lens. It is against this backdrop that there is a need to streamline transformational aspirations with effective competition regulation. This research report will explore themes relating to the foundation and effect of the public interest factors in merger assessments, the robust approach taken by the competition regulators, and whether employee share ownership plans ("ESOPs") are an effective tool in promoting a greater spread of ownership in South Africa.

The main aim of my research report is to outline how the competition authorities have approached the legislative mandate of the promotion of a greater spread of ownership, the use of ESOPs as a tool in implementing the transformative ideals of the Competition Act, as well as the implications of policy agendas under the Competition Act in promoting an inclusive economy in South Africa. The report examines the evolving approach by the Competition Commission ("Commission"), to the public interest factors, from initial guidelines to recent pronouncements, highlighting the positive obligation placed on merger parties to promote a greater spread of ownership. In addition, the case law that has emanated from the Competition Tribunal ("Tribunal") in respect of the public interest factors is also discussed.

Furthermore, I examine the evolving complexities surrounding the implementation and taxation of ESOPs, the role of interested stakeholders, particularly the Minister of the Department of Trade, Industry and Competition ("dtic") and trade unions, in shaping public interest remedies within South African merger proceedings. The research report also provides criticisms from legal experts and economists, who argue that the Commission's application of public interest provisions, particularly its latest guidelines on ownership spread, has led to unintended consequences. Finally, I propose using the statutory term "participate", as envisaged in terms of section 12A(3)(c) of the Competition Act, as a pathway to meaningfully increase historically disadvantaged ownership and foster broad-based ownership that can lead to pro-competitive effects such as more employment and more players in the market. This is a suggestion to move away from an overreliance on ESOPs, which are mainly a dividends and capital gains tool, as the correct facilitator for section 12(3)(e).

[12] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* 2022 (4) SA 323 (CC) at para 7

II. UNPACKING EMPLOYEE SHARE OWNERSHIP PLANS ("ESOPS")

To give effect to the transformation ideals of the public interest considerations in the Competition Act, ESOPs have become a popular tool in South Africa for promoting a greater spread of ownership and addressing competition concerns.[13] This section will explore the meaning of ESOPs, their role in South African mergers (particularly as a public interest condition under the Competition Act), and the challenges and benefits of implementing them.

(a) The concept of ESOPs

ESOPs first emerged in the United States in 1957 and made their way to South Africa in 1974, really picking up steam in the 1980s. [14] At their core, ESOPs give workers a percentage of ownership in the company they work for and this ownership accumulation often occurs gradually over time through a process known as vesting.[15] Vesting schedules show how long an employee has to work before they fully own their granted shares or equity, and this system is designed to keep employees loyal and ensure they remain invested in the company's long-term success.[16]

The logic for ESOPs is that when workers have a stake in the company, their interests are aligned with that of the business, and this implies that the employee will take more responsibility for the success of the business.[17] It has been proffered that "*Companies are likely to support ESOP initiatives if ESOPs are good for business. For any responsible corporate citizen, something will be good for business if it's good for the entity itself, good for employees and good for shareholders*".[18]

---

[13] South African government 'Worker Share Ownership - State of the Nation Address' available at https://www.stateofthenation.gov.za/assets/downloads/WSOP-A5-Booklet.pdf, accessed on 12 March 2025
[14] Sinenhlanhla Sithole 'Unpacking Employee Share Ownership Plans ESOPs' *Sam Tambani Research Institute* 2019 at p 2, available at http://satrilibrary.dedicated.co.za:8080/xmlui/bitstream/handle/123456789/114/Introduction%20and%20Unpacking%20ESOPs.pdf?sequence=1&isAllowed=y, accessed on 7 July 2024
[15] Compport 'ESOPs Explained: A Comprehensive Guide to Employee Stock Ownership Plans', 18 August 2023, available at https://www.compport.com/blog/esops-explained-a-comprehensive-guide-to-employee-stock-ownership-plans, accessed on 2 July 2025
[16] Ibid
[17] Sinenhlanhla Sithole 'Unpacking Employee Share Ownership Plans ESOPs' *Sam Tambani Research Institute* 2019 at p 2, available at http://satrilibrary.dedicated.co.za:8080/xmlui/bitstream/handle/123456789/114/Introduction%20and%20Unpacking%20ESOPs.pdf?sequence=1&isAllowed=y, accessed on 7 July 2024
[18] Z Nomafu 'Why companies need to support ESOP initiatives' *presentation IDC* 2012 available at https://www.idc.co.za/wp-content/uploads/2018/11/Zukile_Nomafu_IDC_EO_Conference.ppt, accessed on 14 March 2025

For employees, ESOPs are touted as a tool that can build them wealth and save for retirement, although this depends on how well the company performs.[19] Employees can either buy shares themselves or have the company purchase them on their behalf, sometimes with a loan arrangement. When loans are involved, they need to be paid off before employees start seeing dividend payments. ESOPs can also foster a stronger sense of ownership, loyalty, and commitment among employees, potentially leading to lower turnover and improved morale. The perceived value and effectiveness of an ESOP by employees depends heavily on how well it is communicated and how much employees feel their contributions directly impact the company's success and their own benefits.[20]

At an employer level, research on the impact of ESOPs on company performance has yielded mixed but generally positive results. Some studies suggest that ESOP companies tend to have higher productivity, profitability, and growth rates compared to non-ESOP companies, potentially due to increased employee motivation and alignment of interests.[21] However, the success of an ESOP in driving performance often depends on factors such as the level of employee participation in decision-making, the company culture, and the overall design and communication of the plan.[22]

(b) ESOPs in South African mergers

The use of ESOPs in mergers and acquisitions in South Africa has gained significant traction in recent years, and are frequently used as a remedy, in mergers where the transaction would otherwise lead to a dilution of HDP or worker ownership. For instance, if a foreign entity acquires a South African company with existing HDP shareholding, an ESOP can be

[19] Kruse, DL, Freeman, RB & Blasi, JR (eds) *Shared Capitalism at Work: Employee Ownership, Profit and Gain Sharing, and Broad-based Stock Options*. University of Chicago Press, 2010
[20] Blasi, J. R., Kruse, D. L., & Weltmann, A. (2013) 'The Citizen's Share: Reducing Inequality in the 21st Century'
[21] Kruse, DL, Freeman, RB & Blasi, JR (eds) 'Shared Capitalism at Work: Employee Ownership, Profit and Gain Sharing, and Broad-based Stock Options' (2010) University of Chicago Press
[22] E Carberry 'Employee Ownership and Corporate Performance: Towards Unlocking The Black Box' in E Carberry (ed) *Employee Ownership and Shared Capitalism: New Directions in Research* (ILR Press / Cornell University Press 2011) 177-209

implemented in the merged entity to ensure that a portion of the shares is allocated to workers, thereby mitigating the negative impact on ownership spread.[23]

The eligibility requirements for ESOPs in South Africa vary from plan to plan, by way of design principles.[24] However, some common factors include length of service whereby employees must typically work for the company for a certain period of time before they are eligible to participate in the ESOP; and some ESOPs may only be open to certain job titles, such as levels below management or executive positions.

A key benefit for merger parties implementing ESOPs is South Africa is that an ESOP can significantly increase the likelihood of merger approval by the South African competition authorities, especially in transactions that raise public interest concerns regarding ownership.[25] ESOPs are also a powerful tool for improving a company's Broad-Based Black Economic Empowerment ("B-BBEE") ownership score, which is vital for doing business in South Africa, especially when contracting with government or large corporations.[26]

As ESOPs have become a pivotal element in navigating the South African mergers landscape, moving beyond mere corporate social responsibility to a critical tool for regulatory compliance and fostering inclusive economic growth, it is important to note that they represent a strategic response to South Africa's evolving competition law, which increasingly prioritises not just market efficiency but also the promotion of a more inclusive and equitable economy.[27]

(c) Practical considerations and implications for ESOPs

While ESOPs are intended to transfer ownership, the issuance of new shares can dilute the ownership stake of existing shareholders, including founders and initial investors. In addition, the value of the company stock can fluctuate, which can affect the value of the ESOP shares; and employees may be forced to sell their ESOP shares if they leave the company before they

[23] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024).
[24] *Ardagh Group S.A. and Consol Holdings (Pty) Ltd* (LM132Dec21). See also Webber Wentzel 'The transformative power of Employee Share Ownership Policies (ESOPs)' 21 November 2024, available at https://www.webberwentzel.com/News/Pages/the-transformative-power-of-employee-share-ownership-policies-esops.aspx, accessed on 2 July 2025
[25] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024)
[26] Pioneer Consulting 'Employee Ownership Schemes and BEE' available at https://pioneerconsulting.co.za/employee-ownership-schemes-and-bee/, accessed on 3 July 2025
[27] Webber Wentzel 'The transformative power of Employee Share Ownership Policies (ESOPs)' 21 November 2024, available at https://www.webberwentzel.com/News/Pages/the-transformative-power-of-employee-share-ownership-policies-esops.aspx, accessed on 2 July 2025

are fully vested.[28] As employees accumulate ownership through an ESOP, the question of how and when they receive the financial benefits of their ownership becomes crucial. Distributions and exit strategies outline the methods by which employees access the value of their ESOP ownership upon retirement, separation, or other qualifying events.[29]

The effectiveness of ESOPs in achieving their objectives – whether it's improving performance, facilitating ownership transition, or promoting economic empowerment – depends heavily on their design, implementation, and the specific context in which they operate.[30] Merger parties often need to agree on the funding mechanism for the ESOP (e.g., vendor financing, sometimes interest-free) and the valuation methodology for the shares. Furthermore, ESOPs require continuous administration, communication with employees, and robust governance structures (e.g., independent trustees) to ensure transparency and accountability.[31]

One of the most significant long-term implications of an ESOP is that it can provide the participating company, as well as employees, tax benefits.[32] However, due to the complexity of South African tax legislation and the potential for unintended consequences, specialist legal and tax practitioners are generally involved when designing and implementing an ESOP in South Africa, including ongoing valuation and administrative costs.[33]

From an employee's perspective, ESOPs are taxed at two primary points: when the employee exercises the option to purchase shares, and when the employee later sells those shares.[34] The specifics of these tax events can vary significantly depending on the type of company (startup, listed, unlisted) and the jurisdiction.[35] When an employee sells their ESOP shares, any profit made (the difference between the selling price and the fair market value at the time of exercise)

---

[28] Compport 'ESOPs Explained: A Comprehensive Guide to Employee Stock Ownership Plans', 18 August 2023, available at https://www.compport.com/blog/esops-explained-a-comprehensive-guide-to-employee-stock-ownership-plans, accessed on 2 July 2025
[29] Ibid
[30] Gamble, JE, Culpepper, R & Blubaugh, MG, 'ESOPs and employee attitudes: The importance of empowerment and financial value', (2002) 31 *Personnel Review* 9
[31] Compport 'ESOPs Explained: A Comprehensive Guide to Employee Stock Ownership Plans', 18 August 2023, available at https://www.compport.com/blog/esops-explained-a-comprehensive-guide-to-employee-stock-ownership-plans, accessed on 2 July 2025
[32] A Ganti 'Employee Stock Ownership Plan (ESOP): What It Is, How It Works, Advantages', *Investopedia* 5 November 2025 available at https://www.investopedia.com/terms/e/esop.asp, accessed on 3 May 2025
[33] P van der Zwan 'Employee share schemes: South African tax considerations' *Taxfaculty* 2 November 2023, available at: https://taxfaculty.ac.za/news/read/employee-share-schemes-south-african-tax-considerations, accessed on 15 June 2025
[34] C Rosen 'Retirement security and wealth accumulation in S ESOP companies' (2005) The National Center for Employee Ownership
[35] Ibid

is subject to capital gains tax.[36] The tax rate for capital gains depends on the holding period of the shares (short-term or long-term).The length of time an employee holds their ESOP shares significantly impacts the capital gains tax rate.[37] Employees can defer taxes on the proceeds from the sale of their ESOP shares until they receive distributions, often during retirement.[38] Furthermore, it is still to be determined if employees in South Africa purchase additional shares in an ESOP but if so, when an employee exercises their ESOP, the difference between the fair market value of the shares and the exercise price is typically considered a taxable perquisite.[39] This is often taxed as part of the employee's income.

For companies, contributions made to the ESOP are tax-deductible and in South Africa, the company can deduct the interest paid on loans made to the ESOP and may be able to defer taxes on the sale of shares to the ESOP.[40] This is a major benefit because it lowers the company's taxes, freeing up more capital for operations and a key caveat is that if the ESOP is debt-financed, the company must stay below certain debt thresholds because going over these limits can negate the tax benefits, leading to unintended tax consequences.[41]

It's important to note that the modern-day ESOPs in South Africa, especially those implemented under the B-BBEE framework, are explicitly designed to benefit a broad base of employees, with a particular focus on historically disadvantaged persons, in order to address the very historical inequalities that the question alludes to. Since ESOPs have to follow specific rules and regulations, failing to comply with them could result in legal issues and fines.

[36] C Rosen 'Retirement security and wealth accumulation in S ESOP companies' (2005) The National Center for Employee Ownership
[37] Ibid
[38] Compport 'ESOPs Explained: A Comprehensive Guide to Employee Stock Ownership Plans', 18 August 2023, available at https://www.compport.com/blog/esops-explained-a-comprehensive-guide-to-employee-stock-ownership-plans, accessed on 2 July 2025
[39] SARS, 'Interpretation Note: No 55 (Issue 2) Taxation of Directors and Employees on Vesting of Equity Instruments' 30 March 2011, available at: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-55-Taxation-Directors-Employees-Vesting-Equity-Instruments.pdf, accessed on 2 July 2025
[40] Income Tax Act, No. 58 of 1962
[41] Compport 'ESOPs Explained: A Comprehensive Guide to Employee Stock Ownership Plans', 18 August 2023, available at https://www.compport.com/blog/esops-explained-a-comprehensive-guide-to-employee-stock-ownership-plans, accessed on 2 July 2025

III. THE COMPETITION COMMISSION'S ("COMMISSION") APPROACH TO THE PUBLIC INTEREST FACTORS, SPECIFICALLY THE GREATER SPREAD OF OWNERSHIP

In its early stages (pre-2019), the application of the public interest factors in section 12A(3) of the Competition Act by the Commission faced considerable debate and was often secondary to traditional competition assessments or narrowly focused on employment in routine transactions. Despite this, cases such as *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Limited*[42] and *Harmony Gold Mining Company Limited and Gold Fields Limited*,[43] established that mergers could be prohibited purely on public interest grounds, even without competition concerns - and conversely, anti-competitive mergers could be approved if they brought significant public interest benefits. The challenge during this period was finding the right balance between protecting traditional competition goals, such as consumer welfare, and advancing broader social goals.[44]

The Commission's framework for applying and enforcing the Competition Act's public interest provisions is clearly articulated in its public interest guidelines. The Commission's approach to the public interest assessment in mergers has evolved from its initial guidelines which focused on the impact a merger could have on specific industries, regions, jobs, small businesses, HDPs, and international competitiveness; to the current position which includes an assessment of a merger's effect on the promotion of a greater spread of ownership, which has been included in its revised guidelines.

The evolution of the Commission's approach to the public interest assessment in mergers is unpacked below.

(a) Initial guidelines

In May 2016, the Commission published its Guidelines on the Assessment of Public Interest Provisions in Merger Regulation[45] ("Initial Guidelines") to provide guidance on the

[42] *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Limited* (08/LM/Feb02)
[43] *Harmony Gold Mining Company Limited and Gold Fields Limited* (93/LM/Nov04)
[44] Jacqueline Church 'Investors beware — public-interest considerations in merger review are significant: The Burger King matter' (2024) 141 *SALJ* 454-465
[45] Final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 31 May 2016

Commission's approach to analysing mergers and evaluating public interest grounds of the Competition Act.[46]

In the Initial Guidelines, the Commission indicated that it recognizes that merger analysis is dependent on the facts of a specific case and, as a result, the guidelines should not be interpreted as preventing the Commission from exercising its discretion to request information, or assessing other factors not indicated in this guideline, on a case-by-case basis.[47]

The Commission explained that, in general, it would adopt the following steps when analysing each of the public interest provisions: assess the merger's likely public interest effects; determine if these effects are merger-specific and substantial;[48] weigh positive and negative impacts; and consider possible remedies for any major concerns. [49]

(d) Revised guidelines

Since the Amendment Act came into effect in 2019,[50] the public interest aspects of merger control in South Africa have grown in prominence, with an increasing number of merger decisions appearing to hinge on public interest issues. The amendments to section 12A of the Competition Act, by way of Section 12A(1A) of the Competition Act, now make it explicit that a merger's effect on each individual public interest factor must be assessed to reach an overall determination on the merger's justifiability or otherwise, on substantial public interest grounds.

On 20 March 2024, the Commission published its revised public interest guidelines relating to merger control ("Revised Guidelines") which sets set out the Commission's approach to the public interest assessment contemplated in section 12A of the Competition Act.[51] The Commission holds the position that its approach to section 12A of the Competition Act is informed by the imperative of transformation enshrined in the Competition Act.[52] The manner in which the Commission considers the current public interest factors is similar to the approach

[46] Final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 31 May 2016 at para 1.2
[47] Ibid at para 1.3
[48] Section 12A(1)(b) of the Competition Act
[49] Final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 31 May 2016 at para 6.1
[50] Competition Amendment Act 18 of 2018
[51] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024)
[52] Ibid

set out in the Commission's Initial Guidelines, but now with the added consideration of the promotion of a greater spread of ownership.

As a point of departure, the Commission considers that the framework for merger assessment contemplated under the Competition Act requires a determination into the merger's *likely* effect on each public interest factor set out in section 12A(3).[53] In this regard, the outcome of the assessment must be more probable than not, and parties will be required to provide qualitative and quantitative evidence for any claims regarding the effect of a merger on public interest.[54] Furthermore, if a merger has an effect on a particular public interest factor, the Commission will require remedies that specifically address the effect identified (e.g., an effect on employment should be addressed by a remedy that addresses the employment harm and not, for instance, by a remedy advancing another public interest factor).[55] However, if the effect on the public interest factor cannot be remedied, the Commission may, on a case-by-case basis, consider equally weighty countervailing public interest factors that outweigh the effect identified.[56] For the avoidance of doubt, the Commission considers that the public interest factor contemplated in 12A(3)(e) of the Competition Act creates a positive obligation to promote a greater spread of ownership in every merger. Therefore, a merger that does not promote a greater spread of ownership is not responsive to the obligation arising under section 12A(3)(e) of the Competition Act.

In respect of the above, the Commission holds the position that the amendments to the Competition Act intend to advance the economic transformation agenda intended in the Preamble to the Competition Act and that the Amendment Act envisages that merging parties "…*proactively address concentration and ownership representativity concerns arising in markets in which they are active*."[57] Given the foregoing, the Commission's point of departure will be that all mergers are required to promote a greater spread of ownership and that a finding that a merger does not promote a greater spread of ownership as contemplated by this public

[53] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024)
[54] Ibid at para 5.1.
[55] Ibid
[56] Ibid
[57] See the Explanatory Note to the Amendments which explains that same are "…*aimed at addressing two key structural challenges in the South African economy: concentration and the racially-skewed spread of ownership of firms in the economy*."

interest ground will inform the Commission's determination of whether the merger can or cannot be justified on substantial public interest grounds.[58]

Although the outcome in *Burger King*,[59] predates the Revised Guidelines,[60] the Revised Public Interest Guidelines, aligns closely with this case whereby the Commission prohibited ECP Africa's acquisition of Burger King South Africa and Grand Foods solely due to public interest concerns. The merger would have reduced the HDP shareholding in Burger King South Africa from approximately 68% to 0% which, according to the Commission, could not be justified on public interest grounds due to its substantial negative effect on the spread of ownership criterion in section 12A(3)(e) of the Competition Act. Therefore, the Commission concluded that post-merger, neither the acquiring nor target firms would have HDP or worker ownership, and sought remedies from the merger parties, particularly B-BBEE commitments, to address this public interest concern.

The merger parties argued that the ESOP requirement could unintentionally force HDP shareholders to divest at a discount, as buyers would factor in the economic effects of an ESOP requirement in the pricing of deals. However, the Commission disagreed, stating that any return on investment for HDPs would be a private gain, not a public interest benefit. Instead, the Commission emphasised the greater public interest in promoting broader ownership, especially by HDPs and workers in the market. Following the prohibition, the merger parties made various public interest commitments, including one relating to the establishment of an ESOP that would provide an effective 5% interest to workers in Burger King South Africa. This was supported by the Commission.

As a reflection of the above developments, the Commission has pronounced that it considers that unlike the other public interest factors, section 12A(3)(e) confers a positive obligation on merger parties to promote or increase a greater spread of ownership, in particular by HDPs and/or workers (workers as defined in section 1(1) of the Competition Act) in the economy.[61] Although the Revised Guidelines are not binding, they are somewhat prescriptive as to how 'acceptable' ESOPs are to be, with design principles in respect of structure, cost to workers,

[58] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024) at paras 6.5.3. and 6.5.4.
[59] Competition Commission 'Media Statement for Commission Prohibits Acquisition Between ECP Africa Fund, Burger King South Africa And Grand Foods' 1 June 2021, available at https://www.compcom.co.za/wp-content/uploads/2021/06/COMMISSION-PROHIBITS-ACQUISITION-BETWEEN-ECP-AFRICA-FUND-BURGER-KING-SOUTH-AFRICA-AND-GRAND-FOODS-.pdf, accessed on 10 September 2023
[60] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024)
[61] Ibid at para 6.5.2.

governance, duration, participants, participation benefits, as well as value and funding. However, ESOPs are not the only tool which the Commission has identified to promote a greater spread of ownership. Merger parties may also propose a divestiture of a business or assets of a merging party or the merged entity to HDP purchasers within a reasonable period post the implementation of the merger or community or other investment trusts that hold shareholding in an operational firm, for the benefit of HDP beneficiaries.[62]

It is therefore not clear whether the Commission is in fact of the view that an ESOP is an effective tool for section 12A(3)(e), given their detailed nature to implement, but what is clear is that South Africa's competition law is increasingly pursuing black empowerment, especially by focusing on opportunities that workers would benefit given the fact that the expectation is that all law in South Africa should contribute to, amongst other things, economic transformation and redress the imbalances created by past racial divisions, and more important foster the participation of the previously marginalized people to participate in the mainstream economy.[63]

IV. THE COMPETITION TRIBUNAL'S ("TRIBUNAL") APPROACH TO THE GREATER SPREAD OF OWNERSHIP FACTOR

In this section, I explore how the Tribunal evaluates the public interest factors in the Competition Act and highlight how its stance differs from the Commission's view that section 12A(3)(e) confers a positive obligation on merger parties to promote or increase a greater spread of ownership. I conclude that the Tribunal has not definitively stated that ESOPs are the best approach for achieving this promotion of ownership, as envisioned by section 12A(3)(e).

(a) Pre-amendments

In its early decisions, the Tribunal seemed to suggest that when a public interest issue fell under the jurisdiction of another governmental agency, the competition authorities should play a secondary role. For example, in 2002, during the merger between Shell and the black empowerment oil company Tepco, the Commission aimed to uphold the Competition Act's public interest factors. It proposed that the merger be approved only if Tepco's independence was maintained, with joint control by Thebe and Shell. The Commission argued that losing

[62] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024) at paras 6.5.13.4 and 6.5.13.4.
[63] L Mncube & H Ratshisusu 'Competition policy and black empowerment: South Africa's path to inclusion' (2023) 11 *Journal of Antitrust Enforcement* 74.

Tepco's independence would hinder a company led by historically disadvantaged individuals from becoming competitive. However, the Tribunal rejected this recommendation. It pointed out that when Parliament enacted specific legislation addressing issues mentioned in section 12A(3) of the Competition Act, those laws and their respective institutions are better equipped to handle these issues than the Tribunal. The Tribunal cited the Employment Equity Act, [64] the Skills Development Act, [65] and the Petroleum Charter[66] as more suitable legislative tools and cautioned the Commission on its role in pursuing its public interest mandate in an '*over-zealous manner lest they damage precisely those interests that they seek to protect*'.[67]

In *Distillers*,[68] the Tribunal emphasised that its public interest analysis under section 12A(3) of the Competition Act should be holistic. This means that each public interest factors listed in section 12A(3) should be assessed individually and then weighed against other to reach a net conclusion on the public interest effects of a merger.

(b) Post-amendments

Following the 2019 amendments, the Tribunal has continued to apply a holistic approach when assessing the public interest factors in proposed mergers. For instance, in the merger between *Simba (Pty) Ltd and Pioneer Food Group Ltd,*[69] the Tribunal's first decision involving the new public interest factor of section 12A(3)(e) of the Competition Act, included conditions for promoting a wider ownership spread. The Minister of the dtic and the merger parties agreed that the Pioneer workers' trust stock would be held in PepsiCo but after five years must be converted into a direct 13% shareholding in Pioneer. However, the Tribunal simply stated that it found no reason to disagree with the submissions.

The Tribunal, in respect of section 12A(3)(e) of the Competition Act and speaking through the post-script drafted by former deputy Chairperson, Enver Daniels, in *DSV South Africa (Pty) Ltd and Globeflight Worldwide Express SA,*[70] stated that: "*I do not read section 12A(3)(e) as prescribing a greater spread of ownership only for historically disadvantaged persons. Rather*

[64] Employment Equity Act 55 of 1998
[65] Skills Development Act 97 of 1998
[66] The Charter for the South African Petroleum and Liquid Fuels Industry is also known as the Liquid Fuels Charter, annexed to the Petroleum Products Amendment Act (Act No 58 of 2003)
[67] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* case no 66/LM/Oct01 at para 58
[68] *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd,* (08/LM/Feb02)
[69] *Simba (Pty) Ltd and Pioneer Food Group Ltd*, (LM108Sep19)
[70] *DSV South Africa Proprietary Limited and Globeflight Worldwide Express SA Proprietary Limited* (LM169Dec20) at para 45

the focus is a on a greater spread of ownership by South Africans, particularly historically disadvantaged persons and workers."

I will now delve into case law to show how the Tribunal's approach to ESOPs as merger conditions has evolved, concluding that there is no ruling from the Tribunal stating ESOPs are the definitive method when attempting to promote a greater spread of ownership.

As stated earlier, the first merger to be prohibited by the Commission on purely public interest grounds, the Tribunal had to consider *Burger King*.[71] Following a reconsideration application, the merger parties entered into discussions with the Commission and the Department of Trade, Industry and Competition (the dtic), seeking to remedy concerns around the effect of the merger on the promotion of a greater spread of ownership and increasing levels of ownership by HDPs and workers in firms in the market. The merger parties made various public interest commitments, including an ESOP which would provide an effective 5% interest to workers in Burger King South Africa. However, the Tribunal was concerned that some conditions lacked the details needed for effective assessment and monitoring. For instance, the Tribunal sought clarification on the ESOP's mechanism, including share funding plans and criteria for beneficiaries.

A recent decision which dealt the subject matter of ESOPs and their effectiveness was *DP World Logistics FZE And Imperial Logistics Ltd*.[72] Although the non-confidential reasons for decision are still pending, the matter was subject to a public hearing where it was submitted that the transaction was found to unlikely substantially prevent or lessen competition in any market in South Africa and was approved subject to public interest-related conditions.[73] One of the imposed conditions was the establishment of an ESOP through which employees in South Africa will have an effective 5% interest in Imperial Logistics South Africa Group (Pty) Ltd ("ILSA"), a subsidiary of Imperial Logistics Ltd.

In assessing the proposed merger, the Tribunal considered submissions by the merger parties, the Commission and the dtic. It considered public interest concerns arising from the merger and the remedies proposed relating to a greater spread of ownership by workers and HDPs.

---

[71] *ECP Africa Fund IV LLC and Others v Competition Commission of South Africa* (IM053Aug21)
[72] *DP World Logistics FZE And Imperial Logistics Ltd* (LM070Sep21)
[73] Ibid. Also see press release by Competition Tribunal 'Tribunal Approves Dubai Ports World's Acquisition Of Imperial Logistics Subject To Public Interest Conditions, Including Worker Ownership' 24 February 2022, available at https://www.saflii.org/za/cases/ZACT/2022/50.html#:~:text=TRIBUNAL%20APPROVES%20DUBAI%20PORTS%20WORLD'S,years%2C%20ending%2030%20June%202025, accessed on 5 August 2024

Before approving the transaction, the Tribunal sought clarification and enhancements on certain proposed conditions.

During the Tribunal hearing, both the merger parties and the Commission provided clarity on the ESOP's design principles. Key enhancements included a 5% shareholding in a trust for employees, shares at no cost to employees, a 50% share of declared dividends for employees with the rest servicing vendor financing, employee representation on the Imperial Logistics board, and the ESOP being separate from a B-BBEE transaction. However, the proposed conditions did not include oversight by the Commission for establishing the ESOP. The dtic suggested that further foundational details be agreed upon later by the Commission and merger parties. The Tribunal was concerned about resolving disputes over ESOP beneficiary criteria outside the design principles. This was addressed in revised conditions, offered during the hearing, stipulating that the merged entity must consult the Commission regarding any additional ESOP principles and must not implement the ESOP without the Commission's written approval.

The Tribunal, in *Epiroc,*[74] clarified its approach to the public interest assessment in terms of the Competition Act, and in particular how it treats a transaction in which there is a dilution in HDP ownership. In this case, the Tribunal found that the significant reduction in HDP ownership of the target firm (from 98.65% to 28.2%) resulting from the proposed merger must be balanced against the positive public interest effects brought about by the merger in relation to the other factors listed in section 12A(3).[75] Although, the Commission did recommend an establishment of a 5% ESOP in this merger, the Tribunal concluded that the 2019 amendments did not affect the holistic approach to public interest factor assessment.[76] Furthermore, even if a merger would substantially negatively affect section 12A(3)(e), positive effects on other section 12A(3) factors could outweigh it even if, on a consideration of all the evidence.[77] In fact, the merger parties had agreed to increase their supplier development and enterprise development spend post-merger to enhance the public interest benefits of the proposed merger. Therefore, it is clear that the Tribunal does not hold the view that ESOPs are the sole means of promoting a greater spread of ownership, as envisioned by section 12A(3)(e). A holistic approach to public interest factors is always necessary.

[74] *Epiroc Holdings SA v K2022596519 (South Africa) (Pty) Ltd and Another* (LM148Nov22)
[75] Ibid at para 78
[76] Ibid at para 76
[77] Ibid at para 77

In my view, while the Commission may recommend ESOPs for approval following engagements with merger parties, sometimes alongside the dtic, the proposed ESOPs are still subject to enhancements or modifications by the Tribunal. The Tribunal often believes that offered ESOPs can be improved for effectiveness.[78] As seen in *Epiroc,* the Tribunal made the decision to amend the proposed ESOP condition to provide that the beneficiaries of the ESOP will only cease to participate for bad leaver events such as resignations and dismissals, and that resignations or retirements in the ordinary course of business and death will not affect participation in the ESOP. However, whether ESOPs are the most effective tool for broader ownership promotion remains to be determined.

V. INTERESTED PARTIES' PERSPECTIVES ON THE PROMOTION OF A GREATER SPREAD OWNERSHIP FACTOR

A merger process involves many stakeholders. I will now discuss their engagement and views on the promotion of a greater spread ownership factor. I will also present the counterarguments that have been raised in respect of the Commission's Revised Guidelines.

(a) Minister of the dtic and trade unions

In recent years, the Minister of the dtic, and relevant trade unions have played an active role in merger proceedings relating to the public interest remedies, particularly for to the improvement of HDPs' capacity to participate in the South African economy. In the past, the success of public interest conditions in the South African competition legislation was largely attributed to the proactive involvement of outside stakeholders in the merger process.

In *Burger King,* during the Commission's investigation, the dtic raised concern that the merger would negatively affect Burger King's B-BBEE levels as a result of the reduction in its controlling owner's shareholding. To remedy this concern, the dtic proposed that the ECP should set-up an ESOP valued at a minimum of 5% of the issued share capital of the target firms. Separately, the Southern African Clothing and Textile Workers' Union ("SACTWU") had sought clarity about any plans the merger parties may have had to set up workers trusts to benefit employees in the target firms as part of the transaction, and they also sought details of the worker ownership thresholds being considered.

[78] *Net1 Applied Technologies South Africa (Pty) Ltd and Ovobix RF (Pty) Ltd and Luxanio 227 (Pty) Ltd* (LM121Nov21)

Furthermore, at a five-day hearing for *Sunside Acquisitions (Pty) Ltd And Namibian Breweries Investment Holdings Ltd And Distell Group Holdings Ltd*,[79], trade unions, including the National Union of Metalworkers of South Africa ("NUMSA"), made submissions on the proposed ESOP condition. The unions also argued that the ESOP should be fully funded by the merged entity, rejecting the notional/vendor loan model being proposed by the merger parties and relied on precedence set by previous transactions such as *Simba (Pty) Ltd And Pioneer Food Group Ltd*[80] and *Burger King*. In addition, the trade unions also requested representation on the board of trustees for the ESOP.

Even though the above examples show how trade unions engage on ESOPs, there is a gap in the literature when it comes to accessing literature on organized labour pertaining to ESOPs.[81] Whilst most merger hearings convened by the Tribunal have shown that the majority of trade unions endorse ESOPs as a means for empowering workers, by boosting their earnings and enhancing their savings, despite guiding principles on how the union would prefer companies to structure their schemes, there is still a real task on how to establish ESOPs in a manner that they create the desired value and wealth for workers.[82]

(b) Legal practitioners

Many lawyers have criticised the Commission's interventionist approach, including former Judge President of the Competition Appeal Court ("CAC"), Dennis Davis, who has stated that the Commission is overambitious in its application of the Competition Act. A key issue he has identified is the "*removal of any reference to net effects in the guidelines regarding public interest*"[83] which in his view means the Commission no longer undertakes a holistic approach when assessing the impact of a merger, which can result "*in rent-seeking, rather than the promotion of an inclusive economy.*"[84]

---

[79] *Sunside Acquisitions (Pty) Ltd And Namibian Breweries Investment Holdings Ltd And Distell Group Holdings Ltd* (LM136Dec21). Also see Competition Tribunal 'Tribunal approves Heineken-Distell merger subject to competition and public interest-related conditions' 9 March 2023, available at https://www.comptrib.co.za/info-library/case-press-releases/tribunal-approves-heineken-distell-merger-subject-to-competition-and-public-interest-related-conditions, accessed on 14 August 2024

[80] *Simba (Pty) Ltd And Pioneer Food Group Ltd* (LM108Sep19)

[81] Sinenhlanhla Sithole 'Unpacking Employee Share Ownership Plans ESOPs' *Sam Tambani Research Institute* 2019 at p 2, available at http://satrilibrary.dedicated.co.za:8080/xmlui/bitstream/handle/123456789/114/Introduction%20and%20Unpacking%20ESOPs.pdf?sequence=1&isAllowed=y, accessed on 7 July 2024

[82] Ibid

[83] Dennis Davis 'Competition Commission aims too high in applying act' *Business Day* 18 July 2024, available at https://www.businesslive.co.za/bd/opinion/2024-07-18-dennis-davis-competition-commission-aims-too-high-in-applying-act, accessed on 10 August 2024

[84] Ibid

In respect of the implications of the Commission's approach to section 12A(3)(e), lawyers that often represent merger parties have raised issue with ESOPs being imposed because this drives up the costs associated with implementing a transaction in the South African market.[85] Another glaring area of concern is HDP-owned businesses and how HDP private equity firms will unlock the full value of their investments if they can only sell to buyers with even higher HDP ownership levels.[86] The argument is that enabling these investors to reinvest sale proceeds also serves the public interest by fostering economic growth. Some argue that creating value for HDPs should count for something even if percentage ownership drops - but the Revised Guidelines do not address this.[87] The rigid rules might backfire, pushing companies to minimize black ownership before deals or skip South Africa entirely in global transactions.[88] Furthermore, legal representatives have also criticised the Commission's guidelines for their rigid approach, which doesn't seem to account for the variety of commercial deals. [89] For instance, forcing a 10% ESOP or 25% HDP shareholding may be beneficial in some contexts but commercially unviable in others, such as when buying property rights or a minority interest.

The lack of consistent legal precedent, sometimes seemingly far removed from the legal requirement of "merger specificity", combined with a variety of negotiated public interest commitments, has also made the process unpredictable. This has led to concerns that "*ESOPs are not being used as a genuine or even effective tool for a greater spread of ownership spread but rather as a way to simply get deals approved.*"[90]

(c) Economists

Finally, economists have also voiced concerns when the Commission's draft amended guidelines were put up for public comment, and these guidelines largely remained unchanged upon adoption as the Revised Guidelines. RBB Economics,[91] in particular, warned that parts

[85] Norton Rose Fulbright 'Competition world -A global survey of recent competition and antitrust law developments with practical relevance' 2017, available at https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world-first-edition-2017-global-law-firm-norton-rose-fulbright.pdf?revision=63441a6c-35ae-44a3-83de-4ec74817d247&revision=5247914457967387904, accessed on 10 September 2023

[86] Susan Meyer and Robin Henney 'New merger guidelines: In the 'public interest' to comment' 6 October 2023, available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Practice/Competition/competition-law-alert-6-october-new-merger-guidelines-in-the-public-interest-to-comment, accessed on 15 March 2024

[87] Ibid

[88] Ibid

[89] Ibid

[90] Ibid

[91] RBB 'Response to South African Commission's draft guidelines for public interest in merger control' 20 November 2023 at p 2, available at *https://www.rbbecon.com/publication/article/rbb-response-south-africa-commission-draft-guidelines-public-interest-merger-control/*, accessed on 12 July 2024

of the guidelines ignore established economic principles and could have unintended consequences, such as undermining business certainty and stifling procompetitive mergers and investments.[92] These effects may contradict the Amendment Act's goals and ultimately harm the very stakeholders it aims to protect. [93] Firstly, the Revised Guidelines, while aiming to advance empowerment, may create a significant barrier for highly empowered companies looking to sell to firms with a lower HDP ownership.[94] If an acquisition would dilute the overall ownership held by HDPs or workers, the merger may be blocked. This approach, while narrowly maintaining ownership percentages, could prevent HDPs and workers from realizing the value of their ownership and generating wealth.[95] *Burger King*, where HDP ownership was diluted to zero, is a prime example of this counterintuitive outcome. Secondly, the Revised Guidelines could discourage firms from increasing HDP ownership in the first place.[96] By limiting potential merger partners to those with equal or higher levels of empowered ownership, firms that increase their HDP/worker ownership would simultaneously shrink the pool of eligible buyers or targets, making future mergers less likely.[97] This could ultimately be prejudicial to the very people the guidelines aim to assist.

VI. A POSSIBLE APPROACH GOING FORWARD

As seen in the above sections, the debate around expanding ownership through merger assessments is complex and nuanced. The use of an ESOP in tandem with supplier development initiatives, as done in *Epiroc*, may be the best solution as a holistic approach and one that moves beyond simply relying on ESOPs, which have real-world impacts that are complex, with mixed results in practice.

In light of the Commission being cautioned about an overzealous pursuit of public interest mandates and the availability of other legislative tools, it is worth reconsidering how the public interest factors are applied. I suggest creating a stronger connection between sections 12A(3)(c) and 12A(3)(e), where "*enter into, participate in and expand within the market*" as per section 12A(3)(c) can naturally align with broader ownership distribution.

---

[92] Ibid
[93] Ibid
[94] Ibid at para 27
[95] RBB 'Response to South African Commission's draft guidelines for public interest in merger control' 20 November 2023 at p 2, available at *https://www.rbbecon.com/publication/article/rbb-response-south-africa-commission-draft-guidelines-public-interest-merger-control/*, accessed on 12 July 2024
[96] Ibid
[97] Ibid

(a) The real impact of ESOPs as merger conditions

Although ESOPs in South Africa have surged in recent years, impacting over 211 000 employees since 2019,[98] I agree with the view that the Revised Guidelines appear to be focussed on ownership in percentage terms, rather than the absolute value of any ownership that might be transferred or created.[99] There is little research on whether public interest conditions have been able to achieve their desired/intended impact in the market.[100]

The use of ESOPs as merger conditions follow the same logic as usual merger remedies, which are generally imposed to remedy some form of harm that has been identified during the assessment of the merger.[101] An ESOP would be considered a structural remedy as it involves a permanent change in the ownership structure of a company.[102] Structural remedies are measures that alter a company's fundamental structure to address an anti-competitive problem and are typically "once-off" interventions that directly change the market's competitive landscape.[103] The most common example is a divestiture, where a company is forced to sell off a part of its business. Structural remedies offer finality and reduced monitoring by directly altering market structure.[104] However, they are disruptive and irreversible. By giving employees a direct financial stake in the business, an ESOP fundamentally alters who owns and controls the firm. This is a one-time, irreversible change that, once implemented, does not require ongoing behavioural monitoring from a competition perspective. However, it appears that a majority of ESOPs as required by the South African authorities in merger approvals to date do not appear to have been formulated on the basis of some underlying threshold or framework applied to the particular circumstances of a certain merger.[105] The underlying interpretive uncertainty with section 12(3)(e), and what is meant by "promotion" of a greater

[98] Ramjettan D and Patel S 'The transformative power of Employee Share Ownership Policies (ESOPs)' *MoneyMarketing* 21 November 2024, available at https://issuu.com/newmediab2b/docs/moneymarketing_february_2025, accessed on 13 May 2025
[99] RBB 'Response to South African Commission's draft guidelines for public interest in merger control' 20 November 2023 at p 2, available at *https://www.rbbecon.com/publication/article/rbb-response-south-africa-commission-draft-guidelines-public-interest-merger-control/*, accessed on 12 July 2024
[100] Jonathan Klaaren, Karissa Moothoo Padayachie & Olwethu Shedi "The impact of competition law remedies on public interest" (2025) 42(2) *Development Southern Africa* 252
[101] M L Polemis & A Oikonomou 'How effective are remedies in merger cases? A European and national assessment' (2018) 14(2-3) *European Competition Journal* 216
[102] M Motta 'Competition Policy: Theory and Practice' (2005) New York: Cambridge University Press
[103] Ibid
[104] G. Robb and A. Ngwenya 'Theory and Practice in the Use of Merger Remedies: Considering South African Experience.' *The South African Journal of Economic and Financial Sciences*, (2011) 4: 203–220
[105] Ibid at p 19

spread of ownership may have contributed to this. Instead, it appears that *Burger King* is being used as the precedent for the establishment of a 5% ESOP in most transactions.[106]

Notwithstanding the various benefits that may emanate from ESOPs, it is important to recognize that ESOPs are not appropriate for every firm or circumstance as there is an aspect of risk with ESOPs as one of the most significant drawbacks of ESOPs is the issue of funding or financing ESOPs.[107] Another concern that has been raised by trade unions in relation to ESOPs is the appointment of independent trustees and the costs of their services in managing the ESOP trust because these trustees are paid from the ESOPs trust's gains, resulting in lower pay-outs for employees/participants.

A more unfortunate, unintended consequence of an ESOP being imposed on a firm is that HDPs and workers with a substantial pre-existing interest in said firm would be faced with the disadvantage of only being able to sell their existing interests to the subset of potential investors who are local and more empowered, and not a full set of potential investors (which would not only include less empowered local investors, but also the much larger contingent of foreign investors).[108] This is likely to substantially reduce the value of those pre-existing interests and the ability of HDPs and workers to monetise their investments, and more indirectly, any HDPs/workers acquiring new interests in a firm would know that they are acquiring assets that have limited resale potential, as they would be permitted to only resell those assets to a narrow pool of potential future investors.[109] Therefore, a policy that aims to improve the quality of life of all South African citizens, and aims to provide the greatest possible opportunities for all (in particular considering the opportunities for HDPs and workers), should more strongly weight the absolute value of ownership transferred, its profitability, and prospects for growth (which are ultimately the bases of long-term value creation).[110]

Employees ought to have straightforward participation in ESOPs. This was not the case in the merger of *Coca-Cola Beverages South Africa (Pty) Ltd and Anhauser Inbev SA/INV and 3*

---

[106] Jonathan Klaaren, Karissa Moothoo Padayachie & Olwethu Shedi 'The impact of competition law remedies on public interest' (2025) 42(2) *Development Southern Africa* 252 at p 19
[107] Cliffe Dekker Hofmeyr 'Corporate & Commercial Alert' 14 July 2021, available at https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Corporate/Downloads/Corporate-Commercial-Alert-14-July-2021.pdf, accessed on 7 September 2023
[108] Ibid
[109] RBB 'Response to South African Commission's draft guidelines for public interest in merger control' 20 November 2023 at p 2, available at *https://www.rbbecon.com/publication/article/rbb-response-south-africa-commission-draft-guidelines-public-interest-merger-control/*, accessed on 12 July 2024
[110] Ibid at para 33

others,[111] wherein an issue arose from the exclusion of former SABMiller employees, who had become Coca-Cola Beverages South Africa (Pty) Ltd (CCBSA) employees due to the merger, from a top-up allocation of benefits under the SAB Zenzele Scheme (Scheme). CCBSA argued that this exclusion violated the merger conditions, which stipulated that these employees should not lose any benefits from the Scheme due to the transaction. The merger parties had confirmed former employees would not lose any benefits of the Zenzele Scheme by virtue of the second CCBSA transaction and confirmed that CCBSA employees will have the opportunity to benefit in a new ESOP arrangement to be completed within a period of 4 years from the approval date of the first CCBSA transaction. The Tribunal granted an order requiring the Scheme to hold the benefits in abeyance and not distribute R52 million from the 2019 top-up benefits for the former SABMiller employees pending final determination of the Commission's investigation. This case shows that employees are not always guaranteed a smooth participation when granted ownership, which somewhat hinders the notion of a greater spread of ownership.

In respect of an ESOP's monetary benefit, there does not seem to be a great advantage that workers are deriving from ESOP dividends. During Pepsico's acquisition of Pioneer Foods in 2019,[112] the company agreed to a request from the Minister of the dtic for an employee shareholding arrangement, as part of the public interest commitments made in terms of the Competition Act. Therefore, PepsiCo South Africa launched the Basumi Trust as a R1,655 billion ESOP that benefits approximately 11 000 workers.[113] Since its inception, the Basumi Trust has distributed a total of R50 million in dividends to workers, averaging R16,7 million disbursed annually. This equates to each worker earning a total of R1 473 per year through the ESOP. This equates to about R123 a month benefit for a worker.[114] Although extra money in the pocket is always welcomed, in an unequal society such as South Africa, this benefit does not necessarily produce a tangible promotion of a greater spread of ownership.

(b) Suggestion of using supplier development in tandem with ESOPs

In its Revised Guidelines, [115] the Commission states that merger parties may also propose a divestiture of a business or assets of a merging party or the merged entity to HDP purchasers

[111] *Coca-Cola Beverages South Africa (Pty) Ltd and Anhauser Inbev SA/INV and 3 others* (URG164Mar20)
[112] *Simba (Pty) Ltd v Pioneer Food Group Limited* (LM108Sep19)
[113] South African government 'Worker Share Ownership - State of the Nation Address' available at https://www.stateofthenation.gov.za/assets/downloads/WSOP-A5-Booklet.pdf, accessed on 12 March 2025
[114] Ibid
[115] The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024) at paras 6.5.13.4 and 6.5.13.4

within a reasonable period post the implementation of the merger, where a merger does not promote greater spread ownership as contemplated by section 12A(3)(e). Therefore, there is scope for competition authorities to develop local economies through supplier development, to increase ownership levels in South Africa.

Supplier development initiatives as a public interest condition are often as a result of merger parties being required to create funds with specific financial contributions over a defined period to support the development of HDP-controlled suppliers. These funds can provide technical, financial, or other forms of assistance. For instance, in *Heineken-Distell*,[116] a condition was imposed to establish a new supplier development fund with a significant financial contribution over five years to invest in HDP-controlled suppliers, in addition to an establishment of an ESOP. Supplier development public interest conditions serve as important tools to promote the participation of HDP-owned businesses in the economy, foster broader economic empowerment, and address historical inequalities. Thus, supplier development conditions can work in tandem with increasing worker ownership, whereby the financial assistance/contribution to HDP businesses can result in the growth of ownership in the country by HDPs and a byproduct of this would also lead to more employment of HDP employees, as well as, the eventual training and participation of these HDP employees also entering the market. However, ensuring that supplier development public interest conditions are effectively implemented and monitored can be challenging. Robust mechanisms are needed by the Commission to track compliance and measure the impact of these conditions.

A more focused approach on supplier development spend may very well be the key to ensure that the nation's transformational objectives are met instead of an overreliance on ESOPs which at times have some unintended consequences.[117] Perhaps, an ESOP should be paired with a corresponding supplier development initiative(s), as seen in *Epiroc*, in the event that the ESOP is not established in accordance with the principles established in *Burger King* whereby it is, *inter alia,* evergreen, pays dividends from day one, is open to a broad base of workers, and have zero cost implications to participating employees. To give effect to this, we need better coordination between the Commission, merger parties, trade unions and the dtic during merger investigations, as well as when making submissions before the Tribunal, for the financial aspects and monitoring provisions of ESOPs to be more beneficial and efficient for employees.

[116] *Sunside Acquisitions (Pty) Ltd And NBL Investment Holdings Ltd and Distell Group Holdings Ltd* (LM136Dec21)
[117] Ibid

This will further facilitate the Tribunal's merger-specific and holistic approach to the public interest factors, as well as redirect the constant use of the ESOP tool when promoting a greater spread of ownership, at a time where there is still no clear indication of its benefit to employees.

VII. CONCLUSION

When creating ESOPs, policymakers should carefully consider ways in which the HDPs and workers' participation are strengthened and ensure that they are treated as owners and shareholders, rather than beneficiaries.[118] This can further be enhanced by educating participants in ESOPs on what it means to be a shareholder and have shares in a firm, as often participants are seen as only beneficiaries. The duty of educating participants in ESOPs should not be solely placed on trade unions but also on businesses.

The biggest issue around the use of ESOPs to promote a greater spread of ownership is that neither the Commission nor the dtic has undertaken a programme of research equivalent to impact studies done by similar competition authorities.[119] 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.[120] Whether or not the correct interpretation of section 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, remains to be clarified by the CAC and other courts.[121]

A reimagining of how competition authorities and merger parties approach section 12A(3)(e) is necessary in the coming years. A more practical approach, focusing on supplier development programs, could help evolve how we spread ownership to ensure meaningful participation by HDPs and workers. The Commission and dtic should look beyond simple share ownership to find ways that truly benefit these groups. After all, South Africa's goal is to create inclusive,

---

[118] Sinenhlanhla Sithole 'Unpacking Employee Share Ownership Plans ESOPs' *Sam Tambani Research Institute* 2019 at p 2, available at http://satrilibrary.dedicated.co.za:8080/xmlui/bitstream/handle/123456789/114/Introduction%20and%20Unpacking%20ESOPs.pdf?sequence=1&isAllowed=y, accessed on 7 July 2024

[119] Jonathan Klaaren, Karissa Moothoo Padayachie & Olwethu Shedi 'The impact of competition law remedies on public interest' (2025) 42(2) *Development Southern Africa* 252at p 1

[120] Ibid

[121] Jonathan Klaaren, Karissa Moothoo Padayachie & Olwethu Shedi 'The impact of competition law remedies on public interest' (2025) 42(2) *Development Southern Africa* 252 at p 1

practical, and evidence-based HDP ownership. The Competition Act makes it clear: reducing inequality isn't enough - we need to specifically address racial economic disparities.[122]

[122] Du Plessis 'The Role and Nature of the Public Interest in South African Competition Law' (2020) 32 SA Merc LJ 234

IX. Bibliography

Cases

eMedia Investments Proprietary Limited South Africa v Multichoice Proprietary Limited and Another, (201/CAC/JUN22) [2022] ZACAC 9 (1 August 2022)

Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another 2022 (4) SA 323 (CC)

Ardagh Group S.A. and Consol Holdings (Pty) Ltd (LM132Dec21)

Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Limited (08/LM/Feb02)

Harmony Gold Mining Company Limited and Gold Fields Limited (93/LM/Nov04)

Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd, (66/LM/Oct01)

Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd, (08/LM/Feb02)

Simba (Pty) Ltd and Pioneer Food Group Ltd, (LM108Sep19)

DSV South Africa Proprietary Limited and Globeflight Worldwide Express SA Proprietary Limited (LM169Dec20)

ECP Africa Fund IV LLC and Others v Competition Commission of South Africa (IM053Aug21)

DP World Logistics FZE And Imperial Logistics Ltd (LM070Sep21)

Epiroc Holdings SA v K2022596519 (South Africa) (Pty) Ltd and Another (LM148Nov22)

Sunside Acquisitions (Pty) Ltd And Namibian Breweries Investment Holdings Ltd And Distell Group Holdings Ltd (LM136Dec21)

Simba (Pty) Ltd And Pioneer Food Group Ltd (LM108Sep19)

Net1 Applied Technologies South Africa (Pty) Ltd and Ovobix RF (Pty) Ltd and Luxanio 227 (Pty) Ltd (LM121Nov21)

Coca-Cola Beverages South Africa (Pty) Ltd and Anhauser Inbev SA/INV and 3 others (URG164Mar20)

Simba (Pty) Ltd v Pioneer Food Group Limited (LM108Sep19)

Books and Chapters

Blasi, J. R., Kruse, D. L., & Weltmann, A. (2013). *The Citizen's Share: Reducing Inequality in the 21st Century*

Boshoff 'The Economics of Public Interest Provisions in South African Competition Policy' (2021) 1

Thembalethu Buthelezi, James Hodge, and Mpumi Tshabalala. 'Appropriate Legal Standards in Competition Law: A South African Perspective.' In Antitrust and the Digital Economy – Legal

Standards, Presumptions, and Key Challenges, edited by Y Katsoulacos, 161–214. Athens Greece: Concurrences, 2023

Fox 'South African, Competition Law and Equality: Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed' (2019) CPI Antitrust Chronicles

Kruse, DL, Freeman, RB & Blasi, JR (eds) *Shared Capitalism at Work: Employee Ownership, Profit and Gain Sharing, and Broad-based Stock Options*. University of Chicago Press, 2010

E Carberry 'Employee Ownership and Corporate Performance: Towards Unlocking The Black Box' in E Carberry (ed) *Employee Ownership and Shared Capitalism: New Directions in Research* (ILR Press / Cornell University Press 2011) 177-209

Rosen, C. *Retirement security and wealth accumulation in S ESOP companies*. The National Center for Employee Ownership, 2005

Journal Articles

YS Choi and J Moon 'Fairness and equity in South African competition law: A new direction' (2025) 69 *Journal of African Law* pp. 1 - 17

Gamble, JE, Culpepper, R & Blubaugh, MG, 'ESOPs and employee attitudes: The importance of empowerment and financial value' (2002) 31 *Personnel Review* 9

Jonathan Klaaren, Karissa Moothoo Padayachie & Olwethu Shedi 'The impact of competition law remedies on public interest' (2025) 42(2) *Development Southern Africa* 252 at p 19

Boshoff, W, Dingley, D & Dingley, J 'The Economics of Public Interest Provisions in South African Competition Policy' (2014) 131 SALJ 551

M Hantke-Domas 'The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?' (2003) 15(2) European Journal of Law and Economics 131–141

Nzero 'The Implications of public interest Consideration in the Interpretation and Application of the Failing Firm Doctrine in South African Merger Analysis' (2017) 80 THRHR 602

Du Plessis 'The Role and Nature of the Public Interest in South African Competition Law' (2020) 32 SA Merc LJ 234

Jacqueline Church 'Investors beware — public-interest considerations in merger review are significant: The Burger King matter' (2024) 141 *SALJ* 454-465

M L Polemis & A Oikonomou 'How effective are remedies in merger cases? A European and national assessment' (2018) 14(2-3) *European Competition Journal* 216

L Mncube & H Ratshisusu 'Competition policy and black empowerment: South Africa's path to inclusion' (2023) 11 *Journal of Antitrust Enforcement* 74
M Motta 'Competition Policy: Theory and Practice' (2005) New York: Cambridge University Press

G. Robb and A. Ngwenya 'Theory and Practice in the Use of Merger Remedies: Considering South African Experience.' *The South African Journal of Economic and Financial Sciences*, (2011) 4: 203–220

Legislation, Policies and Government Papers

The Competition Act 89 of 1998

Competition Amendment Act 18 of 2018

Income Tax Act, No. 58 of 1962

Employment Equity Act 55 of 1998

Skills Development Act 97 of 1998

The Charter for the South African Petroleum and Liquid Fuels Industry is also known as the Liquid Fuels Charter, annexed to the Petroleum Products Amendment Act, Act No 58 of 2003)

DTIC *Worker Share Ownership, Building a Shared Prosperity: Worker Ownership for an Inclusive South African Economy* (2024) 6

Final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 31 May 2016

The Competition Commission *Revised Public Interest Guidelines relating to Merger Control* (2024)

Internet references

T Dini, N Mia and V Anthony 'South Africa: Sustainability and antitrust' *Perspective on International Antitrust* 2025*,* available at https://www.americanbar.org/groups/international_law/resources/newsletters/2025/south-africa-sustainability-antitrust/#:~:text=89%20of%201998%2C%20as%20amended,foundation%20for%20more%20expansive%20outcomes, accessed on 16 June 2025

Norton Rose Fulbright 'Competition world -A global survey of recent competition and antitrust law developments with practical relevance' 2017, available at https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world-first-edition-2017-global-law-firm-norton-rose-fulbright.pdf?revision=63441a6c-35ae-44a3-83de-4ec74817d247&revision=5247914457967387904, accessed on 10 September 2023

Luke Fraser 'New merger laws in South Africa have a huge problem: experts' *BusinessTech* 10 October 2023, available at https://businesstech.co.za/news/business/724116/new-merger-laws-in-south-africa-have-a-huge-problem-experts/, accessed on 16 July 2025

South African government 'Worker Share Ownership - State of the Nation Address' available at https://www.stateofthenation.gov.za/assets/downloads/WSOP-A5-Booklet.pdf, accessed on 12 March 2025

Sinenhlanhla Sithole 'Unpacking Employee Share Ownership Plans ESOPs' *Sam Tambani Research Institute* 2019 at p 2, available at http://satrilibrary.dedicated.co.za:8080/xmlui/bitstream/handle/123456789/114/Introduction%20and%20Unpacking%20ESOPs.pdf?sequence=1&isAllowed=y, accessed on 7 July 2024

Z Nomafu 'Why companies need to support ESOP initiatives' *presentation IDC* 2012 available at https://www.idc.co.za/wp-content/uploads/2018/11/Zukile_Nomafu_IDC_EO_Conference.ppt, accessed on 14 March 2025

Webber Wentzel ‘The transformative power of Employee Share Ownership Policies (ESOPs)’ 21 November 2024, available at https://www.webberwentzel.com/News/Pages/the-transformative-power-of-employee-share-ownership-policies-esops.aspx, accessed on 2 July 2025

Pioneer Consulting ‘Employee Ownership Schemes and BEE’ available at https://pioneerconsulting.co.za/employee-ownership-schemes-and-bee/, accessed on 3 July 2025

Compport ‘ESOPs Explained: A Comprehensive Guide to Employee Stock Ownership Plans’, 18 August 2023, available at https://www.compport.com/blog/esops-explained-a-comprehensive-guide-to-employee-stock-ownership-plans, accessed on 2 July 2025

A Ganti ‘Employee Stock Ownership Plan (ESOP): What It Is, How It Works, Advantages’, *Investopedia* 5 November 2025 available at https://www.investopedia.com/terms/e/esop.asp, accessed on 3 May 2025

P van der Zwan ‘Employee share schemes: South African tax considerations’ *Taxfaculty* 2 November 2023, available at: https://taxfaculty.ac.za/news/read/employee-share-schemes-south-african-tax-considerations, accessed on 15 June 2025

SARS, ‘Interpretation Note: No 55 (Issue 2) Taxation of Directors and Employees on Vesting of Equity Instruments’ 30 March 2011, available at: https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-IntR-IN-2012-55-Taxation-Directors-Employees-Vesting-Equity-Instruments.pdf, accessed on 2 July 2025

Competition Commission ‘Media Statement for Commission Prohibits Acquisition Between ECP Africa Fund, Burger King South Africa And Grand Foods’ 1 June 2021, available at https://www.compcom.co.za/wp-content/uploads/2021/06/COMMISSION-PROHIBITS-ACQUISITION-BETWEEN-ECP-AFRICA-FUND-BURGER-KING-SOUTH-AFRICA-AND-GRAND-FOODS-.pdf, accessed on 10 September 2023

Competition Tribunal ‘Tribunal Approves Dubai Ports World's Acquisition Of Imperial Logistics Subject To Public Interest Conditions, Including Worker Ownership’ 24 February 2022, available at https://www.saflii.org/za/cases/ZACT/2022/50.html#:~:text=TRIBUNAL%20APPROVES%20DUBAI%20PORTS%20WORLD'S,years%2C%20ending%2030%20June%202025, accessed on 5 August 2024

Competition Tribunal ‘Tribunal approves Heineken-Distell merger subject to competition and public interest-related conditions’ 9 March 2023, available at https://www.comptrib.co.za/info-library/case-press-releases/tribunal-approves-heineken-distell-merger-subject-to-competition-and-public-interest-related-conditions, accessed on 14 August 2024

Dennis Davis ‘Competition Commission aims too high in applying act’ *Business Day* 18 July 2024, available at https://www.businesslive.co.za/bd/opinion/2024-07-18-dennis-davis-competition-commission-aims-too-high-in-applying-act, accessed on 10 August 2024

Susan Meyer and Robin Henney ‘New merger guidelines: In the 'public interest' to comment’ 6 October 2023, available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Practice/Competition/competition-law-alert-6-october-new-merger-guidelines-in-the-public-interest-to-comment, accessed on 15 March 2024

RBB 'Response to South African Commission’s draft guidelines for public interest in merger control’ 20 November 2023 at p 2, available at *https://www.rbbecon.com/publication/article/rbb-response-south-africa-commission-draft-guidelines-public-interest-merger-control/*, accessed on 12 July 2024

Ramjettan D and Patel S ‘The transformative power of Employee Share Ownership Policies (ESOPs)’ *MoneyMarketing* 21 November 2024, available at https://issuu.com/newmediab2b/docs/moneymarketing_february_2025, accessed on 13 May 2025

Cliffe Dekker Hofmeyr ‘Corporate & Commercial Alert’ 14 July 2021, available at https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Corporate/Downloads/Corporate-Commercial-Alert-14-July-2021.pdf, accessed on 7 September 2023