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The impact of competition law remedies on public interest

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ABSTRACT

Public interest considerations have gained increased prominence within South Africa's competition regime. The Competition Act's merger regime now also includes provisions related to enhancing the economic participation of SMEs and HDPs as well as to creating employee share ownership schemes (ESOPs). Despite this, there is limited research evaluating whether public interest conditions have been able to achieve their desired/intended impact or the rationale behind the selection of remedies. This paper attempts to fill this gap by drawing on fieldwork interviews and data. We examined 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 make key recommendations that should be of contemporary policy interest to the competition law and policy practicing community.

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1. Introduction

The prominence of public interest considerations in South Africa's competition law has increased 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] As of 2018, the amended Competition Act also includes provisions related to enhancing the economic participation of SMEs and HDPs as well as serves to create employee share ownership schemes (ESOPs).

There is 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' 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 such choices have been made, how it was negotiated and the underlying reasoning for them being imposed in the relevant markets. This is despite many in the field of competition law identifying a shift over time in the approach taken by the competition authority to public interest conditions.

The purpose of this research is to conduct an ex-post evaluation of the choice of public interest remedies ordered in competition law proceedings and to investigate 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). We draw on data of the Competition Commission of South Africa (CCSA), which is analysed alongside interviews with key intermediaries for business, labour, and society who are all actively engaged in the process of crafting of public interest conditions.

In section 2 we set out the data and methodology used to arrive at our findings. In Section 3, we discuss the standard narrative which has emerged among our respondents in this field, identifying three distinct phases of public interest conditions and provide a brief data analysis to support these findings. In Section 4, we draw from our interviews and dataset to outline and analyse five specific issues where our results suggest findings that should be of contemporary policy interest to the competition law and policy practicing community. Section 5 concludes and sets out our key recommendations.

2. Methodology: merger dataset and interview approach

2.1. The merger dataset

2.1.1. Data sources

The data used in this study were drawn from a non-confidential merger database obtained from the Competition Commission of South Africa. We utilised the most

[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 journal article.

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.

2.1.2. Data limitations

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 fairly 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 our conclusions. Additionally, it is worth noting that small mergers generally do not have to notified unless they are in a sector where the Competition Commission is investigating, providing a further basis for their exclusion from our analysis here.

2.2. Interview data and methodology

2.2.1. 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 (See Klaaren et al, 2023).

A total of 10 online interviews were completed with experienced practitioners. Interviews were conducted from the end of January until February 2023. 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 organisation – 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.

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.

2.2.2. Questionnaire themes

The questionnaire covered the following broad areas[3]:

[3]A sample of the questionnaire provided to competition legal practitioners can be provided on request.

- 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

3. Tracking the evolution of public interest remedies in South Africa

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

This section sketches what we have termed a 'standard narrative' by drawing not from the published secondary literature but rather primarily from our interview data, our merger database, and a small set of five significant and arguably largely representative merger cases that have unfolded before the competition authorities since the establishment of the Act. We use the overlaps in accounts offered by our interviewees to piece together this 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 does it offer an explicit view on how the approach should change or evolve in the future.

This standard narrative incorporates 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). The narrative additionally takes into account the imposition of new public interest conditions through implementation of the 2018 amendments from July 2019. The cases noted and used were chosen for their historical significance, each highlighting significant decisions which had implications for public interest conditions and the competition authorities' approach to them.

The existence and the content of this standard narrative are interesting and significant in themselves. The standard narrative also provides a basis for our later exploration in section 5 of significant contemporary issues of contention in the third current phase of public intertest conditions in this field.

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 the relevant two decades. 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.

Aligning with the narrative, the data does indeed show this evolution as depicted below in Figure 1. 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

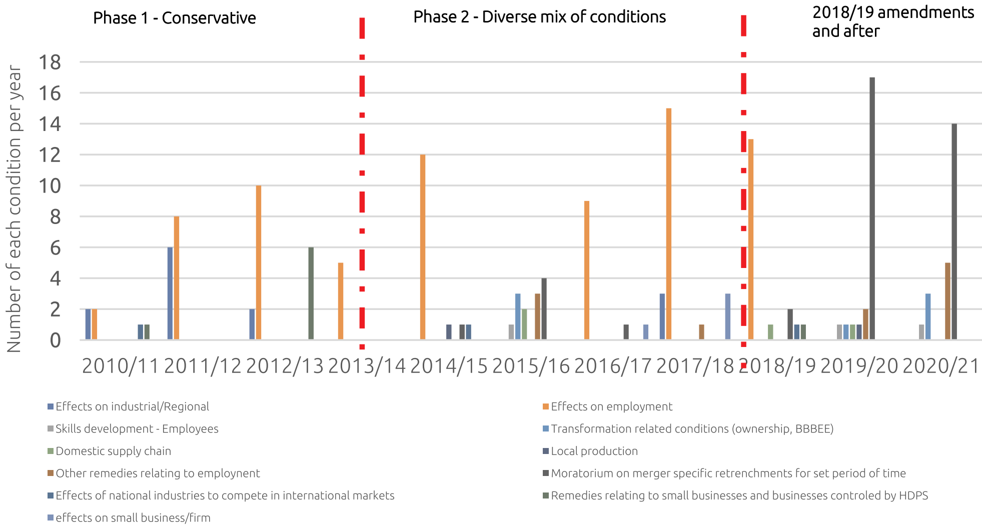

Figure 1. Three phases of the application of public interest conditions imposed in large mergers – 2010/11 to 2020/21. Source: Authors' calculations using data from the Competition Commission of South Africa.

more interventionist in their approach in phase 3. In these phases we therefore can observe a change in the mix of public interest considerations imposed.

The Shell/Tepco case of 2001 was one of the first cases that had public interest concerns and received significant attention in the field. 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'.[4]

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 for these purposes. 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.

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

Ushering in a second and new phase, the high-profile Wal-Mart/Massmart case of 2011[5] 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 evidencing a turnaround in the stance of the Tribunal with regards to their approach to public interest conditions. As can be seen from Figure 1, 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 centred 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 organise and accept unionised 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. For instance, the Coca Cola case of 2015 was approved subject to a number of conditions relating to employment, supplier development funds, SMEs and competitiveness of HDPs.[6] The public interest remedies imposed in this case showed the competition authorities' commitment to 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).

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

[6]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 et al. (2021).

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 narrative form 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 emphasises the need for our study.

3.2. A close look at mergers with public interest conditions

Turning now to a deeper analysis of our quantitative data, our 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.[7]

Focusing on the set of cases approved with conditions, this sub-section first provides in 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 picture of the public interest conditions first in large mergers and then in intermediate mergers. This part of this section concludes by making several key observations regarding patterns of public interest conditions during the period of study.

[7]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.

Table 1. List of public interest remedies on intermediate and large mergers monitored by the Competition Commission of South Africa – 2011/12–2020/21.

Public interest condition	Large mergers	%	Intermediate mergers	%	Both	%
Effects on employment (e.g. job creation)	39	34%	74	45%	113	40%
Moratorium on merger specific retrenchments for set period of time. (Avoids loss of employment due to the merger for a set period)	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.

3.2.1. 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).

The employment condition is the most commonly 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, 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

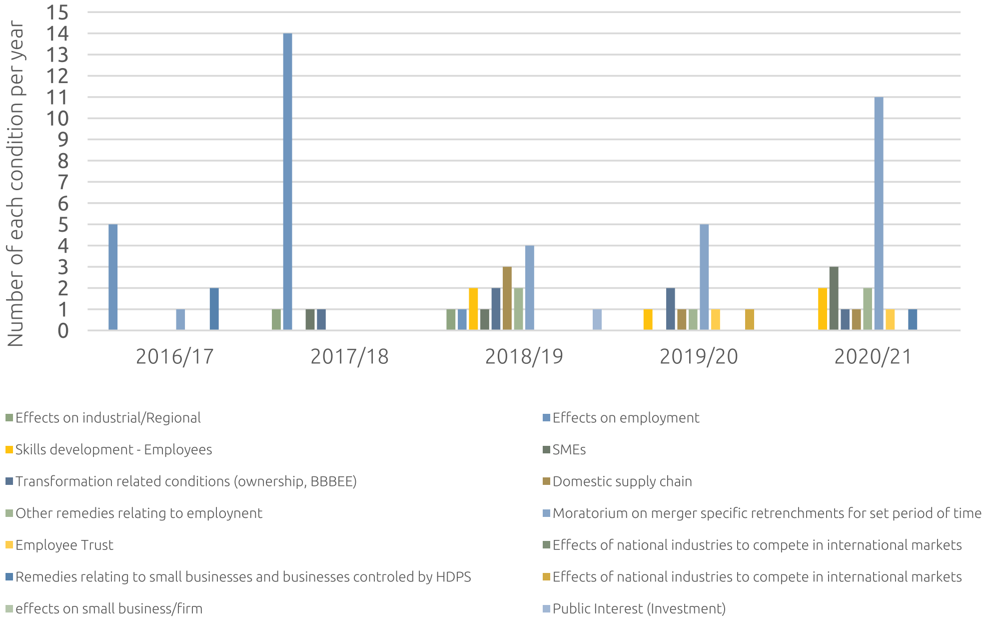

Figure 2. Types of public interest conditions on large mergers imposed by the Commission – 2016/17 to 2020/21. Source: Authors' estimation, using Competition Commission data.

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.

3.2.2. 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.

3.2.2.1. 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 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

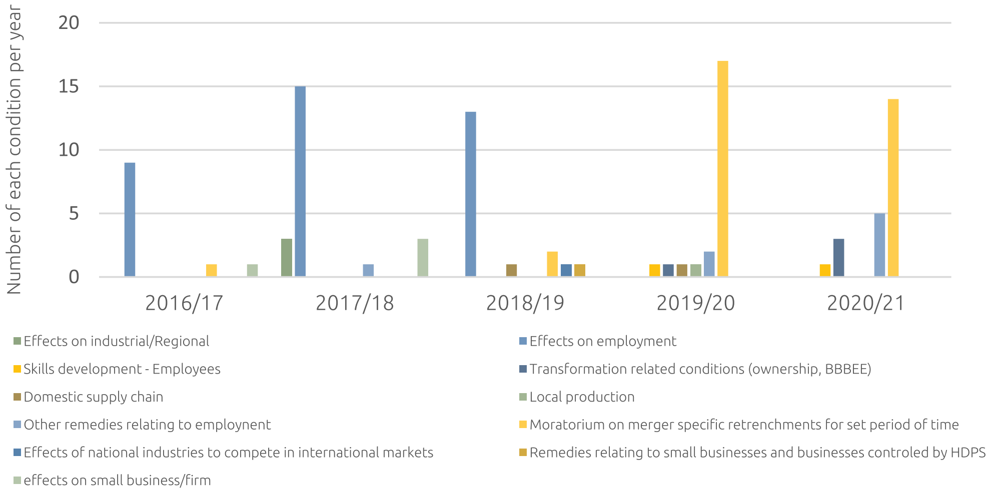

Figure 3. Types of public interest conditions imposed on intermediate mergers by the Commission – 2016/17 to 2020/21. Source: Authors' estimation, using Competition Commission data.

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 their separate mergers which took place in 2019/20.

3.2.2.2. Public interest conditions on intermediate mergers. Turning to intermediate mergers, the same three-phase time pattern characterising 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 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.

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.[8]

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. While the retrenchment moratorium, which serves as an alternative employment condition, is time bound, the other employment related conditions are not generally tied to a specific timeframe and may continue to require ongoing attention.[9] Employee training conditions have also been imposed; however, these have been less frequent.

3.2.3. 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. While this is but a broad and overarching observation, studying the data, we see a few key observations emerge. These are briefly outlined as follows:

- Even though large and intermediate mergers are categorised as such based on different thresholds of turnover, and are therefore not the same, competition authorities may be observed to impose the same conditions on large and intermediate mergers.
- Post the 2018 amendments, 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, also advancing and using more widely conditions such as giving 'first preference to retrenched employees' for positions.
- One final 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

[8]This finding pertains to the period under review based on the data available.

[9]Post the 2018 amendments to the Act, there was an introduction of a moratorium on retrenchments as an alternative to traditional employment conditions for intermediate mergers.

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 diversification could possibly mean that the authorities became more rigorous in the interpretation and application of public interest conditions during the legislative process regarding the amendments.

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

4.1. 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 or not 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.[10] 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 about the extent to which the promotion of structural and economic transformation rests solely with the competition authorities. Some questioned whether it was the role of merger control (which impacts upon firms at a particular point in their organisation 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).[11]

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.[12]

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

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 for our purposes we have chosen to emphasise (s 12(3)(e)).

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.

Instead, our interviews brought to light questions around whether 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 newly-introduced provision, although worth watching since interviewees agreed the ESOP provision is a significant one.[13]

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.[14] 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'.[15]

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

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

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 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.[16]

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 subsection (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.

4.2. 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

[16]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.

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 and economic meaning' to the text of the Act.[17] With the 2018 amendments, it is now moving from the sphere of employment into the sphere of ownership.[18]

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 is 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[19]:

> 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[20]:

> 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,

[17]Interview with competition law practitioner (Int0717Feb2023).
[18]Int15Feb2023.
[19]Walmart/Massmart, at para 68.
[20]Walmart/Massmart, at para 32.

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.[21] 'Specificity is triggered even where there is no dilution.'[22] 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 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.[23]

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.[24]

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.[25]

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.[26] 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

[21]Int15Feb2023.
[22]Int15Feb2023, p. 8.
[23]Int15Feb2023, p. 7.
[24]Int15Feb2023, p. 8.
[25]Int15Feb2023, p. 9.
[26]Int17Feb2023; Int20Feb2023.

their businesses to black owned firms in situations where for example a franchise option would have better served the new entrant.[27]

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 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.

4.3. 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 analyse 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.

[27]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.

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 player status in this space. Indeed, our trade unionist interviewee had negotiated around 50 competition matters with his union having done 86 since 2001.[28] 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 … '[29] 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.[30]

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 scrutinised 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 & 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'.[31]

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 interviews, some legal practitioner voices in the business sphere must be

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

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.

4.4. Roles and relationships: the minister, the department, and the commission

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.[32]

[32] Available: 20210519_Competition_policy.pdf (thedtic.gov.za).

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).[33]

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.[34]

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.[35] 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 characterisation of extractive action was also levelled against the Commission although in a manner opposite to the allegation of inconsistency[36]:

> 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 finalising conditions.[37]

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 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

[33]Interview with senior counsel (Int617Feb2023).
[34]Int15Feb2023, p 11.
[35]Int22Feb2023, p. 11.
[36]Interview with senior counsel (Int617Feb2023).
[37]Int30Jan2023, p. 8.

between competition and public interest concerns, accepting that in this space public interest concerns are competition concerns.[38]

4.5. 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.[39]

For one interviewee, the monitoring around employment conditions and, at least potentially, Esops, could be done with efficacy by trade unions.[40]

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.[41]

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.[42] 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.[43]

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

[38]Int15Feb2023.
[39]Int30Jan2023, p. 11.
[40]Int30Jan2023, p. 15.
[41]We have not in this study examined, for instance, the compliance reports of a representative sample of the mergers approved with public interest conditions.
[42]Int22Feb2023, p. 12.
[43]Int15Feb2023, p. 5–6.

not.[44] 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.[45]

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.[46]

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 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.

5. Conclusion and recommendations

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.

[44] 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.

[45] Int26Jan2023.

[46] Int15Feb2023.

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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