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Competition, Systemic Risk and Financial Inclusion: Assessing the Adequacy of South Africa's Merger Control Framework for Navigating Policy Frictions Arising in the FinTech Industry

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Competition, Systemic Risk and Financial Inclusion: Assessing the Adequacy of South Africa's Merger Control Framework for Navigating Policy Frictions Arising in the FinTech Industry

by

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DECLARATION

I, 1416553, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment 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.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

An adequacy assessment is conducted through outlining a proposed FinTech competition policy that serves as a yardstick in relation to which the merger control framework is evaluated. The adequacy assessment is informed by whether the merger control framework, in theory, facilitates the implementation of the proposed policy principles that are calculated to aid competition authorities to balance competition, systemic risk, and data protection concerns in a manner that optimises financial inclusion. This research report proposes that the balancing exercise built into the merger control framework, the substantial public-interest grounds that factor in industry-specific policies, and the socio-economic framework within which the public-interest provisions should be considered, will enable the competition authorities to navigate policy frictions arising in the FinTech industry. However, the Minister of Finance's power to exclude bank mergers from the purview of the merger control framework and the Prudential Authority's stability-orientated primary objectives, have the potential to undermine competition in the banking sector. Competence and resource constraints aside, regulatory authorities can only be as effective as their mandate is appropriate. To create an appropriate regulatory architecture and optimal jurisdiction allocation, reform permutations that redefine the relationship between the Banks Act 94 of 1990 and the Competition Act 89 of 1998 are suggested. Merger control is as much of a transaction-specific analysis as it is context specific. Therefore, a FinTech-traditional financial market inquiry is recommended to enable the competition authorities and, more broadly, the Intergovernmental Fintech Working Group members, to understand the current state, and trajectory, of the FinTech industry.

I INTRODUCTION

Through operating at the crossroad of two of the world's most powerful industries, finance and technology, FinTech '…has raised the stakes and complexity of competition policy.'[1] The financial sector forms the foundation of every market system and, therefore, constitutes a critical public infrastructure.[2] To promote competition and financial inclusion whilst guarding against systemic risk, competition law and policy must adapt to the dual-industry nature of the FinTech era.[3] The objective of this research report is to assess the adequacy of the merger control framework for navigating policy frictions arising in the FinTech industry. Part II provides an explanation for isolating the merger control framework from the selection of competition tools that will have a bearing on the FinTech industry. To orientate the adequacy assessment, Part III outlines a proposed FinTech competition policy that serves as a backdrop against which the merger control framework is assessed. Part IV explains the mechanics of s 12A of the Competition Act 89 of 1998 (the 'substantive merger analysis'). Part V proposes that the in-built balancing exercise, the substantial public-interest grounds that factor in industry-specific policies, and the socio-economic framework within which the public-interest provisions should be considered, will enable competition authorities to balance competition, systemic risk, and data protection in a manner that optimises financial inclusion. Part VI suggests that the Minister of Finance's power to exclude bank mergers from the purview of the merger control framework and the Prudential Authority's stability-orientated primary objectives, may undermine competition in the banking sector. To create an appropriate regulatory architecture and optimal jurisdiction allocation, reform permutations that redefine the relationship between the Banks Act 94 of 1990 and the Competition Act, are outlined. Part VII outlines recommendations before concluding in part VIII.

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[1] Van Loo Rory 'Making innovation more competitive: The case of fintech' (2018) 65 *UCLA Law Review* 232 at 234, 238, 278. The South African Reserve Bank ('SARB') has opted for a broad functional approach in defining '…fintech as technological advancements that lead to innovation in financial services, including new products and services and/or disruptive business models' (SARB 'Annual report 2019/20' at 32, available at *https://resbank.onlinereport.co.za/2020/documents/south-african-reserve-bank-annual-report-2019-20.pdf*, accessed on 11 March 2022). The South African Competition Commission ('Competition Commission') defines FinTech '…as any company using the internet, mobile devices, software technology or cloud services to perform or connect with financial services' (Competition Commission 'Competition in the digital economy' (policy paper, version 2, last updated 7 September 2020) at 23, available at *http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf*, accessed on 12 March 2022).

[2] Organisation for Economic Co-operation and Development ('OECD') 'Competition issues in the financial sector: Key findings' (Competition Committee policy paper, 30 May 2011) at 7, available at *https://www.oecd.org/regreform/sectors/47836843.pdf*, accessed on 12 July 2022.

[3] Van Loo op cit note 1 at 234 – 6.

II JUSTIFICATION FOR ISOLATING THE MERGER CONTROL FRAMEWORK

The dynamic, fast-moving nature of digital markets and the complexities associated with big data economics, have informed the viewpoint amongst academics '…that any attempt to predict the effects of a big data merger in the future would be arbitrary, so merger control should simply be absent from this debate.'[4]

This raises the following question: from the selection of competition tools that will have a bearing on the FinTech industry, why isolate the merger control framework?

Firstly, mergers not only constitute '…the lifeblood of commercial activity in free market economies',[5] but are equally capable of materially transforming the implicated market's structure and, if left un(der)regulated, may lead to the eventual acquisition of monopoly power.[6]

Secondly, the substantive merger analysis is underpinned by the counterfactual inquiry which is a pre-emptive and probabilistic exercise.[7] Therefore, by promoting a proactive approach to competition regulation, merger control empowers competition authorities, from the outset, to influence the formation of the FinTech landscape.[8] This is important in the FinTech context, particularly in relation to BigTechs, where the adverse effects of anti-competitive practices, including conduct that is the long-term product of merger underenforcement, are challenging or (near) impossible to reverse.[9] The implementation of an effective merger control framework should minimise the need to depend, for damage control, on ex-post competition law enforcement, which lacks the efficacy to exclusively and adequately address the competition concerns that arise within digital platform markets.[10]

Thirdly, the public-interest provisions will likely play a critical role in aiding competition authorities to navigate the complex policy trade-offs associated with the FinTech industry. The

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[4] Hoffmann Jörg & Johannsen Germán 'EU-merger control and big data on data-specific theories of harm and remedies' (Max Planck Institute for Innovation and Competition research paper No. 19-05, 8 June 2019) at 5, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3364792*, accessed on 16 July 2022.

[5] Goodman Isabel, Kelly Luke & Unterhalter David et al *Principles of Competition Law in South Africa* (2016) 18.

[6] Ibid at 163.

[7] Goodman, Kelly & Unterhalter op cit note 5 at 186.

[8] For a discussion on the preventative role of merger control in the big data economy, see Hoffmann & Johannsen op cit note 4.

[9] De la Mano Miguel & Padilla Jorge 'Big tech banking' (2018) 14 *Journal of Competition Law & Economics* 494 at 516-7.

[10] Peitz Martin & Motta Massimo 'How to deal with big tech mergers' (Centre for Economic Policy Research, column on competition policy, 11 February 2020) available at *https://cepr.org/voxeu/columns/how-deal-big-tech-mergers*, accessed on 7 July 2022. OECD 'Ex ante regulation and competition in digital markets' (OECD Competition Committee discussion paper, December 2021) available at *https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm*, accessed on 12 July 2022.

fact that the public-interest provisions are unique to the merger control framework, renders the exploration of the latter a worthwhile exercise.

Fourthly, the potential for the exclusion of bank mergers from the purview of the merger control framework to undermine competition in the banking sector warrants a discussion.

III OUTLINING THE PARAMETERS OF A FINTECH COMPETITION POLICY

As stated by Robert Bork: 'Antitrust [competition] policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals?'.[11] Therefore, to orientate the adequacy discussion, the core principles that are considered necessary to render competition policy fit for FinTech in the South African context are set out below.

(a) Principle 1: A flexible and reflective approach

The Fintech industry is characterised by technology-driven services that are constantly evolving and comprises of FinTechs, BigTechs and large financial institutions with hybrid Fintech-traditional business models.[12] The combination of diverse entities, fast-moving product development, and new forms of competitive advantages, means that the FinTech-traditional ecosystem is in a permanent state of flux.[13] Therefore, the FinTech era requires '…regulatory policies that match these dynamics with the versatile application of agile approaches and tools…'.[14]

(b) Principle 2: A nuanced approach that caters for the unfolding competitive dynamics between FinTechs, BigTechs and traditional banks

FinTech platforms tend to focus on niche areas within the financial service value chain and use innovative, technology-led financial products to tap into market segments or clientele that are

[11] Bork Robert *The Antitrust Paradox: A Policy at War with Itself* (1978) 50.
[12] Carmona Alberto, Lombardo Agustín & Pastor Rafael 'Competition issues in the area of financial technology (FinTech)' (European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies study, PE 619.027, July 2018) at 53 - 4, available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2018/619027/IPOL_STU(2018)619027_EN.pdf*, accessed on 27 March 2022.
[13] Ibid at 48.
[14] Brummer Chris & Gorfine Daniel 'FinTech: Building a 21st-century regulator's toolkit' (Milken Institute, Centre for Financial Markets report, 21 October 2014) at 1, available at *https://milkeninstitute.org/sites/default/files/reports-pdf/3.14-FinTech-Reg-Toolkit-NEW_2.pdf*, accessed on 14 July 2022.

underserved by traditional banking institutions.[15] Their ability to 'skim the cream' from the most profitable financial services is a key economic driver for their success.[16] To compete with FinTech platforms' customer-centric business models that are encroaching on their most lucrative business lines, traditional banking institutions will be forced to continue to modernise their legacy information technology systems, to minimise fixed costs by reducing branch capacity where appropriate, and to digitalise their financial service offerings.[17] In broad terms, when deciding between competing or collaborating with FinTechs, incumbents have the following strategic options available to them: mergers and acquisitions ('M&A'), partnerships, and in-house product development.[18]

In its 2022 annual report, the Prudential Authority concluded that, in addition to digitising their financial services, established South African banks had the knowledge, skills and networks required to counteract the competitive pressure exerted by FinTech platforms.[19]

The combination of the 'gatekeeper role' played by incumbent financial institutions in relation to consumer data,[20] barriers to entry, the need to increase scale and access infrastructure, high switching costs, and consumer inertia, has resulted in the formation of FinTech-incumbent partnerships.[21] Unlike M&A which poses the risk of killer acquisition of FinTech start-ups by incumbent banks, partnerships are likely to be 'more symbiotic than combative'[22]. FinTech-traditional partnerships enable FinTech start-ups '…to scale their

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[15] Beck Thorsten 'FinTech and financial inclusion: Opportunities and pitfalls' (Asian Development Bank Institute working paper No. 1165, July 2020) at 11, available at *https://www.adb.org/publications/fintech-financial-inclusion-opportunities-pitfalls*, accessed on 4 July 2022.

[16] Dombret Andreas 'Beyond technology – adequate regulation and oversight in the age of fintechs' in Banque de France 'Financial Stability Review' (Financial stability in the digital era No. 20, April 2016) at 80, available at *https://publications.banque-france.fr/sites/default/files/medias/documents/financial-stability-review-20_2016-04.pdf*, accessed on 12 July 2022.

[17] OECD 'Digital disruption in banking and its impact on competition' (competition study, February 2020) at 37, available *at https://www.oecd.org/daf/competition/digital-disruption-in-banking-and-its-impact-on-competition-2020.pdf*, accessed on 8 July 2022.

[18] Van Loo Rory op cit note 1 at 240.

[19] Prudential Authority 'Annual report 2021-22' at 21, available at *https://www.resbank.co.za/en/home/publications/publication-detail-pages/reports/pa-annual-reports/2022/Prudential-Authority-Annual-Report-2021-2022*, accessed on 16 July 2022.

[20] Competition Commission 'Online intermediation platforms market inquiry: Terms of reference' (GN 330 GG 44432 of 9 April 2021) para 2.7.3, available at *https://www.compcom.co.za/wp-content/uploads/2021/04/44432_09-04_EconomicDevDepartment.pdf*, accessed on 31 March 2022.

[21] Carletti Elena, Claessens Stijn & Fatás Antonio et al 'The bank business model in the post-Covid-19 world' (Centre for Economic Policy Research & IESE Business school banking initiative, the future of banking series part 2, June 2020) at 7, available at *https://media.iese.edu/research/pdfs/ST-0549-E.pdf*, accessed on 7 March 2022.

[22] Ferenzy Dennis, Kelly Sonja & McGrath Allyse 'How financial institutions and Fintechs are partnering for Inclusion: Lessons from the frontlines' (joint report by the Center for Financial Inclusion at Accion and the Institute of International Finance, part one of the mainstreaming financial inclusion: best practices series, July 2017) at 5, available at *https://content.centerforfinancialinclusion.org/wp-content/uploads/sites/2/2018/08/IIF-CFI_FI-Fintech_Partnerships_Final.pdf*, accessed on 16 December 2022.

technology and access capital to grow, while [traditional] financial institutions gain assistance in their efforts to improve product offerings, increase efficiency, and lower costs…', placing the latter in a stronger position to compete with the entry of BigTechs into the financial service sector.[23]

BigTechs share most of FinTechs' advantages with few, if any, of the accompanying disadvantages.[24] 'Data analytics, Network externalities and interwoven Activities', referred to as BigTechs' DNA, form a three-way reinforcing relationship that constitutes the hallmark of their business models.[25] The combination of their established reputation and brand names, stable balance sheets, capacity to comply with stringent banking regulation, and the complementary nature of financial services and e-commerce, search engine and social networking business models, will enable BigTechs, if left unchecked, to leverage their 'DNA feedback loop'[26] to obtain enduring market dominance in the FinTech-traditional financial ecosystem.[27] For instance, payment services that ensure safe transacting on e-commerce platforms generate data that uncovers a web of ties between the recipient and sender, which is then used as inputs to generate credit scores and to improve existing services, such as targeted advertising.[28] In the long term and depending on the extent of regulatory intervention, the entry of BigTechs into the financial services sector may require a re-worked definition, and updated list, of systemically important financial institutions.[29]

BigTechs will have a 'deeper impact' on the restructuring of the financial service sector than most FinTech platforms.[30] Therefore, a nuanced policy approach that reflects the difference between the impact of FinTechs and BigTechs on traditional banks is necessary.

(c) Principle 3: Promoting financial inclusion

It is necessary to state from the outset of this discussion on financial inclusion that this research report does not regard FinTech as a solve-all formula for financial exclusion. Rather, in being

[23] Ferenzy, Kelly & McGrath op cit note 22 at 5, 7.
[24] OECD op cit note 17 at 15.
[25] Bank for International Settlements ('BIS') 'Annual economic report 2019' at 62, available at *https://www.bis.org/publ/arpdf/ar2019e.pdf*, accessed on 6 July 2022.
[26] Ibid.
[27] OECD op cit note 17 at 15; Competition Commission op cit note 1 at 25; De la Mano & Padilla op cit note 9 at 505, 507, 513, 520; BIS op cit note 25 at 62,73.
[28] BIS op cit note 25 at 62.
[29] De la Mano & Padilla op cit note 9 at 497; Carstens Agustín 'Big techs in finance: Forging a new regulatory path' (speech delivered at BIS Big techs in finance – implications for public policy conference, Switzerland, 8–9 February 2023) available at *https://www.bis.org/speeches/sp230208.htm*, accessed on 10 February 2023.
[30] Competition Commission op cit note 1 at 25.

a 'sociotechnological phenomenon',[31] FinTech is viewed as one key variable, in a complex financial inclusion equation, that has the potential to positively contribute to the progressive realisation of financial inclusion.

The Financial Sector Regulation Act 9 of 2017, the first framework in South Africa that expressly legislates for financial inclusion,[32] defines the concept as '…all persons hav[ing] timely and fair access to appropriate, fair and affordable financial products and services'.[33] FinTech is redrawing the parameters of possibility by using '[m]obile phones, cloud computing, big data analytics, artificial intelligence and blockchain…' to create affordable and efficient financial products and services that meet the financial needs of individuals and small, medium, and micro enterprises ('SMMEs') who are underserved by traditional banking business models.[34]

In recognising that SMMEs have an important role to play in promoting socio-economic transformation, the South African Economic Reconstruction and Recovery Plan has placed an emphasis on creating a supportive environment that is conducive to SMME growth through, among other factors, isolating the need to design appropriate financing products.[35] SMMEs, particularly informal business, are a high-risk investment for traditional banks due to their inability to provide both assets to serve as security and audited, formal financial statements.[36] Innovative credit scoring techniques, that process alternative data, convert soft information retrieved from the digital footprint of an individual or SMME into hard information that informs their credit score.[37] A lack of access to sufficient financing remains the dominant constraining factor for the expansion, survival, and productivity of SMMEs.[38] This

[31] Brown Eric & Piroska Dóra 'Governing fintech and fintech as governance: The regulatory sandbox, riskwashing, and disruptive social classification' (2022) 27 *New Political Economy* 19 at 21.
[32] Van Niekerk Gerda 'Appraisal of financial inclusion in South Africa: Proposing the agent banking model implemented in Malaysia' (2021) 33 *SA Merc LJ* 447 at 461.
[33] Section 1 of the Financial Sector Regulation Act.
[34] Soriano Miguel 'How Fintech Startups succeed in financial inclusion' (2018) 5 *Asian Management Insights* 59 at 60.
[35] South African government 'The South African economic reconstruction and recovery plan' at 34, available at *https://www.gov.za/sites/default/files/gcis_document/202010/south-african-economic-reconstruction-and-recovery-plan.pdf*, accessed on 13 March 2022.
[36] Beck op cit note 15 at 3; OECD op cit note 17 at 13.
[37] Beck op cit note 15 at 12-13; Owens John & Wilhelm Lisa 'Alternative data transforming SME Finance' (Global Partnership for Financial Inclusion ('GPFI'), G20 Germany 2017, SME Finance Forum & World Bank Group report, May 2017) available at *https://www.gpfi.org/sites/gpfi/files/documents/GPFI%20Report%20Alternative%20Data%20Transforming%20SME%20Finance.pdf*, accessed on 16 July 2022. This report works off the premise that the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008, and the Protection of Personal Information Act 4 of 2013, form an important consumer protection framework that is equipped to ensure that FinTech SMME and lower-income household lending will positively contribute to financial inclusion, whilst guarding against reckless credit and the causing of over-indebtedness.
[38] Owens & Wilhelm op cit note 37 at V, VII.

demonstrates that there is a need for the FinTech – SMME credit causal chain for economic growth, in terms of which, extending credit to SMMEs will promote their growth and survival, lead to an increase in job opportunities, and decrease poverty.[39]

In line with the Group of 20 ('G20') High-Level Principles for Digital Financial Inclusion, financial inclusion requires policy leadership and urgent attention if it is to materialise into a lived reality for all South Africans.[40]

(d) Principle 4: Carefully calculated trade-offs between conflicting intermediate policy objectives

The dynamic and innovative nature of the FinTech industry means that '…competition policy tools sit at the cross-roads of a complex policy environment…' [41]. Carefully calculated trade-offs between competition, financial stability, consumer protection and financial inclusion are required.[42]

FinTech poses the following systemic risk concerns: 'single points of failure' that are created through financial institutions' reliance on third-party service providers (such as the market for cloud computing which is dominated by BigTechs);[43] increased risk of cyberattacks;[44] heightened risk taking by incumbent banks in an effort to compensate for a reduction in their profits;[45] BigTechs and FinTechs with big data processing capacity may filter out low-quality loans more efficiently than traditional banks, exposing the latter to greater default risk; [46] moral hazard and adverse loan selection issues associated with intermediation platforms that have '…low stakes in the loans they help to originate…';[47] the entry of BigTechs into the financial sector, due to the structure of their business models, may obscure the line between banking and e-commerce, search engine or social networking activities, causing the

[39] Owens & Wilhelm op cit note 37; OECD op cit note 17 at 13; SARB op cit note 1 at 32.
[40] GPFI 'G20 high-level principles for digital financial inclusion' at 1,7, available at *https://www.gpfi.org/sites/gpfi/files/G20%20High%20Level%20Principles%20for%20Digital%20Financial%20Inclusion.pdf*, accessed on 17 July 2022.
[41] Carmona, Lombardo & Pastor op cit note 12 at 53.
[42] National Treasury 'A safer financial sector to serve South Africa better' (report, 23 February 2011) at 7, available at *https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf*, accessed on 28 February 2022.
[43] Carstens op cit note 29 at 3 – 4; Synergy Research Group 'As quarterly cloud spending jumps to over $50B, Microsoft looms larger in Amazon's rear mirror' (cloud provider market share trends, 3 February 2022) available at *https://www.srgresearch.com/articles/as-quarterly-cloud-spending-jumps-to-over-50b-microsoft-looms-larger-in-amazons-rear-mirror*, accessed on 16 February 2023.
[44] OECD op cit note 17 at 38.
[45] Ibid at 7.
[46] OECD op cit note 17 at 34.
[47] Ibid.

former to be contaminated by the latter three activities.[48] Therefore, regulatory authorities should strive to strike an appropriate balance between innovation and risk in a manner that achieves optimal financial inclusion.[49]

Through strengthening the ties between systemic risk and competition policy,[50] the FinTech industry requires trade-offs between banking law, specifically prudential regulation, and competition law measures, which, although have the shared public-policy goal of social welfare, are underpinned by conflicting intermediate policy objectives.[51] For instance, regulatory authorities must seek out an appropriate middle ground to ensure that regulatory '…compliance does not become a barrier to entry and nor does entry become destabilising.'[52]

The impact of competition on financial stability is '….ambiguous in the academic literature'.[53] The competition-fragility or concentration-stability school of thought proposes that greater competition and lower concentration is associated with greater fragility and instability within a banking system.[54] Conversely, the competition-stability or concentration-fragility view suggests that greater competition is associated with a lower bank failure rate and, therefore, enhanced financial stability.[55]

If the disruptive nature of FinTech is harnessed correctly, it will facilitate enhanced consumer welfare, reduce the number and size of too-big-to-fail banks, and minimise systemic risk in the long-run.[56] If FinTechs are left to grow uninhibited within the financial sector, they '…may reach the kind of digital market dominance seen in Google, Facebook, and Amazon, thereby increasing systemic risk.'[57] The complexity of the competition-stability trade-off is compounded by the DNA feedback loop which will serve as a catalyst in enabling BigTechs to establish enduring market power within the financial sector and could, therefore, turn 'the rule of thumb that encouraging new entry is conducive to greater competition …on its head.'[58] As stated by the Competition Commission, a balance must be struck.[59]

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[48] OECD op cit note 17 at 34.
[49] GPFI op cit note 40 at 9 -10.
[50] Van Loo op cit note 1 at 235.
[51] Restoy Fernando 'Fintech regulation: How to achieve a level playing field' (BIS, Financial Stability Institute occasional paper No. 17, 2 February 2021) at 5, available at *https://www.bis.org/fsi/fsipapers17.htm*, accessed on 5 July 2022.
[52] Carletti, Claessens & Fatás op cit note 21 at 16.
[53] OECD 'Policy roundtables: Competition, concentration and stability in the banking sector' (policy paper, DAF/COMP(2010)9, 3 September 2010) at 9, available at *https://www.oecd.org/daf/competition/46040053.pdf*, accessed on 16 July 2022.
[54] OECD op cit note 53 at 181- 4.
[55] Ibid.
[56] OECD op cit note 17 at 39; Van Loo op cit note 1 at 232, 235 - 6.
[57] Van Loo op cit note 1 at 232.
[58] BIS op cit note 25 at 73.
[59] OECD op cit note 17 at 3, 28.

A lack of competition may result in excessive transaction fees and the under provision of financial services, specifically the extension of credit to SMMEs and low-income households.[60] This does not mean that competition law should be exclusively prioritised, rather an understanding of what is at stake from a competition perspective is necessary to guide policymakers on how best to advance competition alongside financial stability and consumer protection goals.[61]

The strong position in which the South African banking sector, with adequate capital and liquidity buffers, entered the COVID-19 pandemic, can be traced to the financial-stability objectives that prudential regulation is premised on.[62] As put by the South African Reserve bank, '…the financial sector has been a source of stability rather than vulnerability, as it entered this extraordinary period in a sound financial position…'.[63] The stability of the banking sector enabled the Prudential Authority to implement temporary liquidity and capital relief measures, such as reducing the liquidity coverage ratio, to aid the financial sector to continue to provide credit to households and SMMEs in order '…to sustain the local economy and maintain financial stability.'[64]

The ability of both competition and financial stability to contribute to the extension of credit to SMMEs and households, makes it clear that the trade-off between the policy objectives of stability, competition, and financial inclusion still stands even when considered through the narrow frame of the financial service line of lending.

(e) Principle 5: A coordinated and inter-regulatory approach

The Competition Commission has expressed that competition and public-interest considerations within the Fintech context 'are best addressed through a collaborative approach with other regulators'.[65] A coordinated, inter-regulatory approach will ensure that competition goals are not sought after to the detriment of data-related security concerns or prudential

[60] Simatele Munacinga 'Market structure and competition in the South African banking sector' (2015) 30 *Procedia Economics and Finance* 825 at 826.
[61] Van Loo op cit note 1 at 249.
[62] SARB 'Financial stability review' (First edition, 2021) at 16, available at *https://www.resbank.co.za/content/dam/sarb/publications/reviews/finstab-review/2021/financial-stability-review/FSR%20May%202021%20Digital%20Version.pdf*, accessed on 27 July 2022.
[63] Ibid.
[64] Prudential Authority 'Directive 1 of 2020' available at *https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/pa-deposit-takers/banks-directives/2020/9821*, accessed on 16 July 2022; Prudential Authority 'Directive 2 of 2020' available at *https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/pa-deposit-takers/banks-directives/2020/9843*, accessed on 16 July 2022.
[65] Competition Commission op cit note 20 para 2.8.

regulatory objectives.[66] Recognising the importance of adopting coordinated FinTech policies and regulatory stances, resulted in the establishment of the Intergovernmental Fintech Working Group (the 'IFWG'), whose members comprise of: the South African Reserve Bank, the Financial Intelligence Centre, the Financial Sector Conduct Authority, the National Treasury, the National Credit Regulator, the South African Revenue Service and the Competition Commission.[67] The IFWG is an important platform that will facilitate effective collaboration between regulatory authorities and, in turn, should pave the way for '…a clear and unified approach to risk, innovation and competition…'[68].[69]

(f) Principle 6: A holistic and integrated approach

FinTech markets operate at a regulatory crossroad and, therefore, simultaneously trigger the application of competition, banking and finance, and consumer protection law.[70] Therefore, it is necessary to adopt a holistic and integrated approach that factors in the cumulative effect of, and the interplay between, the regulatory frameworks that have a bearing on the FinTech industry.

For instance, when assessing the value of data, data processing capacity, and the bundling of data sets through a merger, as a source of market power in the digital economy, it is important to consider the open finance policies proposed by the IFWG, which may reduce data-related competition concerns and, therefore, have a bearing on the substantive merger analysis.[71] Similarly, in line with '…submissions from some stakeholders [who] cautioned [the Competition Commission] against the presumption that the accumulation of data, on its own, can be used as a tool for eliminating competition', the processing-limitation condition (including the minimality principle and the need for a lawful ground to justify the collection of personal information), the purpose-specification condition, and the further-processing-

[66] Competition Commission op cit note 20.
[67] SARB website 'FinTech' (overview of key FinTech developments and projects) available at *https://www.resbank.co.za/en/home/quick-links/fintech,* accessed on 31 March 2022; SARB 'Annual Report 2021/22' at 64, available at *https://www.resbank.co.za/en/home/publications/publication-detail-pages/reports/annual-reports/2022/SARB-Annual-Report-2021-22,* accessed on 16 July 2022.
[68] Canadian Competition Bureau 'Technology-led innovation and emerging services in the Canadian financial services sector' (report, last updated on 20 January 2022) available at *https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/technology-led-innovation-and-emerging-services-canadian-financial-services-sector#section1,* accessed on 19 January 2023.
[69] Competition Commission op cit note 20 para 2.8; SARB op cit note 67 at 64.
[70] SARB op cit note 67 at 64.
[71] IFWG 'Articulating the policy rationale and policy imperatives for open finance in South Africa' (policy paper, November 2021) available at *https://www.ifwg.co.za/IFWG%20Documents/IFWG_Articulating-the-policy-rationale-and-policy-imperatives-for-Open-Finance-in-South-Africa_November-2021.pdf,* accessed on 6 March 2022.

limitation condition, as set out in the Protection of Personal Information Act, must inform the degree to which data and data processing capacity can be viewed as a source of market power.[72]At the same time, the competition authorities must be awake to any efforts by BigTechs '…to enhance their leverage and competitive advantage over complementors and rivals under the guise of enhancing consumers' privacy.'[73]

The regulatory approach adopted in relation to FinTech business models that do not fit the mould of, or challenge, existing financial sector legislation will influence the nature of the competition between FinTechs, BigTechs and traditional financial institutions.[74] The Competition Commission should have a policy of being proactive in honouring its obligation, as set out in s 21(1)(k) of the Competition Act, to influence the financial sector regulatory trajectory.[75] Equally, the following regulatory permutations will influence competition policy: whether the financial sector regulation is activity-based, entity-based, risk-orientated, technology-neutral, or a combination thereof; whether the objective is to achieve a level playing field between incumbents and entrants or to favour entrants; or the implementation of a 'lexicographic order of objectives', in terms of which, creating a level playing field is ranked below higher-priority goals.[76] However, the impact of financial sector regulation on the competitive dynamics in the FinTech-traditional financial ecosystem will only become clear once South Africa progresses beyond the early experimental stage of regulatory sandboxes.[77]

[72] Competition Commission op cit note 1 at 22-3. See Kira Beatriz, Sinha Vikram & Srinivasan Sharmadha 'Regulating digital ecosystems: Bridging the gap between competition policy and data protection' (2021) 30 *Industrial and Corporate Change* 1337; The Banking Association of South Africa 'Code of conduct for the processing of personal information by the banking industry' available at *https://www.banking.org.za/wp-content/uploads/2021/06/Banking-Industry-Code-of-Conduct_VFinal_20210521.pdf*, accessed on 20 April 2022.
[73] Kira, Sinha & Srinivasan op cit note 72 at 1347.
[74] OECD op cit note 17 at 3, 27.
[75] Competition Commission op cit note 1 at 49.
[76] Restoy op cit note 51.
[77] See IFWG 'Feedback on the Intergovernmental Fintech Working Group's first regulatory sandbox initiative' (report, 12 October 2022) available at *https://www.ifwg.co.za/IFWG%20Documents/FirstSandboxReport_20221012.pdf*, accessed on 7 January 2023.

IV THE MECHANICS OF S 12A OF THE COMPETITION ACT: THE SUBSTANTIVE MERGER ANALYSIS

Section 12A of the Competition Act outlines 'three separate but related inquiries'[78] that make up the substantive merger analysis.

Firstly, the Competition Commission or Competition Tribunal must establish if, with reference to the s 12A(2) non-exhaustive list of relevant factors, the proposed 'merger is likely to substantially prevent or lessen competition' (the 'threshold test'[79]).[80] The threshold test is informed by assessing 'the strength of competition' in the implicated market and the probability that, post-merger, firms operating in the implicated market will 'behave competitively or co-operatively'.[81]

Defining the market is an important preliminary step to the first inquiry and is the main reference point that anchors the substantive merger analysis.[82] The s 12A(2) relevant factors, in relation to the implicated market, consist of: existing, and potential, import competition levels; barriers to entry; the degree and patterns of concentration and historical occurrence of collusion; the extent of countervailing power; dynamic competition characteristics; the scope of vertical integration; whether the target or acquiring firms' business, or part thereof, has or will likely fail; the elimination of an effective competitor; whether a party to the proposed merger owns, or is related to, other firms that operate within connected markets; and any additional mergers engaged in by a party to the proposed merger, until the period specified by the Competition Commission has lapsed.[83]

The s 12A(2) non-exhaustive list and the incorporation of both static and dynamic competition considerations into the threshold test, in line with principle 1, affords the competition authorities the flexibility and discretion needed to isolate changing and new sources of market power that may lead to enduring market dominance in the FinTech-traditional financial ecosystem.[84]

Secondly, if the threshold test is met (that is, the proposed merger will likely result in the substantial prevention or lessening of competition), then the Competition Commission or

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[78] *Association of Mineworkers and Construction Union v Competition Tribunal of South Africa* [2019] 1 CPLR 143 (CAC) para 25.
[79] *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* [2001–2002] CPLR 84 (CAC) at 87.
[80] Section 12A(1) of the Competition Act.
[81] Section 12A(2) of the Competition Act.
[82] *Medicross Healthcare Group (Pty) Ltd v Competition Commission* [2006] 1 CPLR 1 (CAC) para 25.
[83] Sections 12A(2)(a)-(k) of the Competition Act.
[84] See OECD 'Merger control in dynamic markets' (policy paper, 2020) at 7, available at *https://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf*, accessed on 29 January 2023; Carmona, Lombardo & Pastor op cit note 12 at 52 - 3.

Competition Tribunal is obliged to establish if: the proposed merger will likely trigger 'any technological, efficiency or other pro-competitive gain' that will not only exceed and counteract the anti-competitive effect, but would, in addition, be forgone, or unlikely obtained, should the merger be prohibited;[85] and, if, with reference to s 12A(3) of the Competition Act, the proposed 'merger can or cannot be justified on substantial public interest grounds'.[86]

Thirdly, despite the determination made in s 12A(1), the Competition Commission and Competition Tribunal must determine if, with reference to the s 12A(3) closed list of factors, the proposed 'merger can or cannot be justified on substantial public interest grounds'.[87] The s 12A(3) relevant factors are limited to considering the impact of the proposed merger on: an implicated industrial sector or region; employment; the ability of SMMEs, or firms that are controlled or owned by historically disadvantaged individuals, 'to effectively enter into, participate in or expand within the market'; the capacity of national industries to compete within international markets; and fostering 'a greater spread of ownership', particularly in relation to historically disadvantaged individuals and workers employed by firms conducting business within the implicated markets.[88] Therefore, s 12A(1A) of the Competition Act may operate to prohibit a competition neutral or pro-competition merger that gives rise to substantial public-interest concerns.[89]

The effect on the closed list of public-interest grounds must be substantial and causally linked to the proposed merger.[90] In the event of multiple implicated public-interest grounds with substantial and conflicting outcomes that cannot be reconciled, a weighing up exercise that is internal to the s 12A(3) inquiry must be conducted to arrive at a net public-interest conclusion, before then turning to the second balancing exercise which weighs up the outcome the competition-specific inquiry (the threshold test) and the net public-interest conclusion.[91]

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[85] Section 12A(1)(a) of the Competition Act.
[86] Section 12A(1)(b) of the Competition Act.
[87] Section 12A(1A) of the Competition Act.
[88] Sections 12A(3)(a) - (e) of the Competition Act.
[89] *DSV South Africa (Pty) Ltd / Globeflight Worldwide Express SA (Pty) Ltd* [2021] 2 CPLR 280 (CT) ('*DSV South Africa*') para 52.
[90] *Walmart Stores Inc / Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT) paras 30, 32 - 3; Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act 89 of 1998 in General Notice 309 GG 40039 of 2 June 2016 paras 6.1.2. – 6.1.3.
[91] *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) [2003] ZACT 15 (19 March 2003) *('Distillers Corporation')* paras 216 -7, 245; *Harmony Gold Mining Company Ltd / Gold Fields Ltd* [2005] 2 CPLR 484 (CT) para 54.

V THE PUBLIC-INTEREST PROVISIONS

(a) Balancing traditional, competition-specific considerations with the substantial public-interest grounds

Competition law is a specialised branch of law that is underpinned by complex economic theory and intricate legal principles.[92] The legislature's decision to craft a traditional, competition-specific inquiry as one layer in a tiered merger analysis, in line with principle 4, enables competition authorities to first understand what is at stake from a traditional competition perspective as measured against the consumer welfare standard, before assessing if the broader public-interest override should operate to prohibit or permit a merger (the 'public-interest override'[93]).[94] The conclusion on whether to permit or prohibit a merger on substantial public-interest grounds, is justified in relation to, and not in isolation from, the outcome of the competition-specific inquiry.[95] Read holistically, ss 12A(1)-(3) of the Competition Act require a casuistic balancing exercise, that factors in the impact of the proposed merger on both competition and the public interest, to be conducted.[96]

In FinTech policy terms, the balancing mechanism built into the merger control framework allows for a calculated trade-off to be made between competition, on the one hand, and financial stability, data-related security concerns or financial inclusion, on the other hand. For instance, when assessing the impact of a merger on the implicated industrial region or sector, the Competition Commission will consider, amongst other factors, the importance of the region or sector to the broader economy and if the merger frustrates or positively contributes to the realisation of industry-specific public policy goals.[97]

For example, take the financial service line of lending discussed under section III. To arrive at a net public-interest detriment or benefit conclusion, the SMME credit causal chain for economic growth will need to be balanced against the bundling of data sets or enhanced data-processing capacity that poses security or consumer privacy concerns and stability implications related to adverse loan selection. This paves the way for competition authorities

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[92] Goodman, Kelly & Unterhalter op cit note 5 at 2; Loxton Lauren 'Merging the unmergeable: The contortion of competition law principles by constitutional rights in the Constitutional Court' (SSRN paper No. 4251850) at 1,9, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4251850*, accessed on 9 January 2023.
[93] *Imerys South Africa (Pty) Ltd v Competition Commission* [2017] 1 CPLR 33 (CAC) paras 37- 8.
[94] *Minister of Economic Development / Competition Tribunal; South African Commercial, Catering and Allied Workers Union / Walmart Stores Inc* [2012] 1 CPLR 6 (CAC) ('*Minister of Economic Development*') para 97.
[95] *Harmony Gold Mining Company* supra note 91 para 56.
[96] Competition Commission op cit note 90 paras 5.5 - 5.6; *DSV South Africa* supra note 89 para 52; *Minister of Economic Development* supra note 94 para 97; *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* Case no. 66/LM/Oct01 ('*Shell South Africa*') para 37.
[97] Competition Commission op cit note 90 para 7.2.3.1.

to exercise their discretion to permit an anti-competitive merger that may substantially promote financial inclusion or to prohibit a pro-competition merger that will have a substantially negative impact on financial stability within the FinTech-traditional financial sector or that poses substantial data-related consumer protection concerns. Therefore, the in-built balancing exercise equips competition authorities to jointly implement principle 3 and 4. The cumulative effect being the balancing of competition, financial stability and data-related concerns in a manner that optimises financial inclusion.

Furthermore, the legislative design of s 12A empowers the competition authorities to balance the short-term pro-competitive effects of a merger that enables a BigTech company to enter a specific service line within the financial value chain against the long-term market dominance and systemic risk concerns associated with BigTech's DNA feedback loop.[98] Therefore, the broad nature of the competition-specific inquiry and the substantial public-interest grounds that factor in industry-specific characteristics, facilitates the implementation of principle 2. That is, a nuanced approach that caters for the unfolding competitive dynamics between FinTechs, BigTechs and traditional banks.

(b) The role of deference in the competition authorities' public-interest mandate

The Competition Tribunal, a view supported by the Competition Appeal Court, has described the public-interest mandate as limited and residual.[99] In the *Shell South Africa* case, the Competition Tribunal held that competition authorities are required to demonstrate deference to other regulatory authorities whose mandates have a bearing on considerations that fall within the ambit of s 12A(3) of Competition Act.[100] The rationale being that the competition authorities' public-interest mandate is ranked as '…secondary to the statutory and regulatory instruments…' that have been carefully designed to effectively and directly address public-interest considerations, that, although arise in the merger control analysis, are pre-existing socio-economic concerns within South Africa.[101]

The Competition Tribunal further expressed concern that an 'over-zealous' approach to the public-interest provisions may have the undesirable outcome of competition authorities unintentionally counteracting or frustrating efforts to protect public interests by domain-specific legislation, such as the Employment Equity Act 55 of 1998 and the Skills Development

[98] See Carstens op cit note 29 at 3.
[99] *Minister of Economic Development* supra note 94 para 21; *Distillers Corporation* supra note 91 para 237.
[100] *Shell South Africa* supra note 96 para 58.
[101] Ibid.

Act 97 of 1998.[102] The residual ambit attributed to the public-interest provision is best described as '…an innovation of the Tribunal'.[103] The legislature has made the public-interest provision as much a part of the competition authorities' mandate as the threshold test and technological or efficiency analysis contained in s 12A(1)(a) of the Competition Act. The deference caveat read into s 12A(3) of the Competition Act was not explicitly incorporated by the legislature. Arguably, it is not up to the Competition Tribunal to exercise its discretion to favour one component of its mandate over another. The residual approach to the public-interest provisions poses the risk that an overly broad interpretation of the ambit of another legislative framework or regulatory authority's mandate '…may result in public-interest issues falling between the cracks.'[104]

Subsequently, in *Metropolitan Holdings Ltd/Momentum Group Ltd*,[105] the Competition Tribunal 'adopted a more involved approach',[106] through stating that the degree of deference exercised should not be informed by whether there is an overlap in the subject matter of the regulatory authorities' mandates, but rather should be assessed in relation to the timeframe that each legislative framework allows for intervention by the relevant regulatory authorities. To demonstrate this point, the Competition Tribunal used the example of retrenchment proceedings during which the Labour Tribunal will, broadly speaking, consider a firm's operational requirements and whether the fair process condition has been adhered to.[107] Conversely, the competition authorities are tasked with deciding the preliminary question of whether to permit a merger, that will trigger the retrenchment of employees, in the first place.[108]

Through playing to the strengths of the legislative tools that each regulatory authority is equipped with, the Competition Tribunal's interpretation of the public-interest provisions in *Metropolitan Holdings*, and the accompanying limited scope for deference, recognises that regulatory authorities' public-interest mandates are not mutually exclusive but rather play a complementary role in addressing public-interest considerations from different angles. Factoring in the strengths of the merger control framework and the intervention limitations

[102] *Shell South Africa* supra note 96 para 58.
[103] Goga Sha'ista, Hodge James & Moahloli Tshepiso 'Public interest provisions in the South African Competition Act: A critical review' in Moodaliyar Kasturi and Roberts Simon (eds) *The Development of Competition Law and Economics in South Africa* (2012) 11.
[104] Ibid.
[105] [2010] 2 CPLR 337 (CT) ('*Metropolitan Holdings*') para 111.
[106] OECD 'Public interest considerations in merger control' (Working Party No. 3 on Co-operation and Enforcement, note by the South African government, 30 May 2016) at 4, available at *https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)13&docLanguage=En*, accessed on 13 December 2022.
[107] *Metropolitan Holdings* supra note 105 para 111.
[108] Ibid.

inherent to other regulatory frameworks, in line with principle 6, demonstrates the importance of adopting a holistic and integrated approach to understand the cumulative effect of, and interplay between, the implicated legislative frameworks. Viewed in this context, it is apparent that a robust application of the substantial public-interest provisions does not amount to '…duplicating the role of another regulator.'[109] This view is shared by the Competition Commission who has stated that it would be a mistake to rely exclusively on data protection law, as the consumer protection authorities cannot deal with data-related concerns '…when they arise in mergers or exploitative abuses.'[110] Showing deference to the financial sector authorities should not amount to failing to recognise that the competition authorities are uniquely and strongly positioned to intervene at the merger-control stage, which is crucial to proactively influencing the formation of the FinTech landscape.

The Competition Tribunal's interpretation of the public-interest provisions, in the *Metropolitan Holding* case, is in line with the Competition Commission's stance that competition and public-interest considerations within the FinTech context are most effectively addressed through a joint regulatory effort.[111] Accordingly, such interpretation of the public-interest provisions is broad enough to implement principle 5, which calls for a coordinated, inter-regulatory approach.

(c) The socio-economic framework within which the public-interest provisions should be considered

In setting out 'a social justice-sensitive economy' as the main backdrop against which the Competition Act should be understood, the Constitutional Court has stated that '[i]t does not require an award-winning and world-acclaimed economic scientist to be persuaded that almost everything of consequence turns on the economy, here and across the nations of the earth.' [112] The elimination of poverty and the creation of an environment that is conducive to business growth and employment opportunities will remain '…a pipe dream in the absence of an inclusive, ethical, truly human rights-oriented and vibrant or prosperous economy.'[113]

One of the main objectives stipulated in the preamble of the Competition Act is 'to provide all South Africans equal opportunity to participate fairly in the national economy'. Similarly,

[109] *Metropolitan Holdings* supra note 105 para 111.
[110] Competition Commission op cit note 1 at 9.
[111] Competition Commission op cit note 20 at para 2.8.
[112] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* 2022 (4) SA 323 (CC) ('*Mediclinic Southern Africa*') para 2.
[113] *Mediclinic Southern Africa* supra note 112.

one of the purposes of the Competition Act is to 'ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy'.[114] The South African Economic Reconstruction and Recovery Plan has isolated the digital economy as a key channel for promoting the inclusion of SMMEs into the mainstream economy.[115] It is against this backdrop that the ability of FinTech to positively contribute to inclusive economic growth and sustainable development through facilitating financial inclusion, particularly the FinTech-SMME credit causal chain for economic growth, should be understood.[116]

The following related questions and statements, although framed differently, are manifestations of the same underlying issue --defining the standard of reference against which, or metric in terms of which, the substantial public-interest grounds are to be measured: the merger control framework provides '…no criteria as a yardstick for their [the public-interest grounds] evaluation…' ;[117] what weight should be allocated to the s 12A(3) factors '…to trump a finding based on more traditional considerations of consumer welfare as captured in section 12A(2)';[118] and a holistic reading of the Competition Act reveals that economic efficiency, or total welfare, should be understood as the single standard of reference and primary objective.[119]

In *Mediclinic Southern Africa*, the Constitutional Court adopted an approach of pivoting the merger control analysis through orientating the public-interest provisions within a socio-economic framework underpinned by the Constitution of the Republic of South Africa, 1996, rather than assessing the public-interest provisions through a traditional competition law lens and in relation to the consumer welfare standard.[120] The Constitutional Court held that the public-interest provisions must be understood within a socio-economic framework of s 27 read with s 39(2) of the Constitution, that is, '…to promote the spirit, purport and objects of the right to have access to health care services.'[121] Therefore, the Constitutional Court considered Mediclinic's predicted post-merger tariff hike in the context of the s 27 constitutional right, the reality of South Africa's 'huge inequalities', and the limited access to medical services in the private sector.[122] In this respect, the Constitutional Court approved of the Competition

[114] Section 2(e) of the Competition Act.
[115] South African government op cit note 35 at 31.
[116] National Treasury op cit note 42 at 7; SARB op cit note 67 at 64.
[117] *Distillers Corporation* supra note 91 para 236.
[118] *Minister of Economic Development* supra note 94 para 99.
[119] Du Plessis Quentin 'The role and nature of the public interest in South African competition law' (2020) 32 *SA Merc LJ* 234 at 235, 239.
[120] *Mediclinic Southern Africa* supra note 112 paras 71-8.
[121] Ibid paras 71-2.
[122] *Mediclinic Southern Africa* supra note 112 paras 73-4.

Tribunals finding that '…the constitutionally-inspired public interest consideration would be harmed rather than advanced by the proposed merger.'[123]

Understood in this manner, the correct socio-economic framework becomes the yardstick for the evaluation of the substantial public-interest grounds. The overarching question is then whether the substantial impact of the merger on public-interest grounds, considered within the appropriate socio-economic framework, contributes to, or frustrates, the realisation of industry-specific public policy objectives and implicated constitutional rights. Therefore, the Constitutional Court's approach to the public-interest inquiry, in *Mediclinic Southern Africa,* facilitates the implementation of principle 3 and 4, by allowing a policy that strikes a balance between competition, stability, data protection and financial inclusion to draw the boundaries of a FinTech socio-economic framework within which the substantial public-interest grounds should be assessed.

It could be argued that a long-term policy approach does not meet the mandate of the merger control framework which requires a transaction-specific analysis. However, in finding that the Competition Tribunal's '…policy-oriented predictive decision should…have been left unaltered',[124] the Constitutional Court has shown support for a long-term, policy-orientated approach to the substantive merger analysis.

[123] *Mediclinic Southern Africa* supra note 112 para 81.
[124] Ibid para 70.

VI THE AMBIT OF THE MERGER CONTROL FRAMEWORK

(a) The exclusion of bank mergers from the purview of the Competition Act

The South African banking sector's high concentration level, [125] requires stricter scrutiny of bank mergers. However, identifying the appropriate analytical framework to guide such scrutiny is an important preliminary step.[126]

Section 18(2)(b) of the Competition Act empowers the Minister of Finance to exclude mergers, as contemplated in ss 37 and 54 of the Banks Act, from the jurisdiction of the Competition Act's merger control framework, provided it is in the public interest for the merger to be solely regulated by the Banks Act.[127]

Section 37 of the Banks Act regulates transactions that involve the acquisition of shares, or voting rights in respect of such shares, that exceed 15% of the total nominal value, or the total voting rights in respect of all the issued shares, of the issuing bank or controlling company. Consent for the conclusion of a s 37(1) transaction must not be granted unless the Prudential Authority or, where relevant, the Minister of Finance,[128] is satisfied that such transaction will not be contrary to: the public interest, and the interest of the issuing bank, its depositors, or the controlling company.[129] Prior to granting permission in terms of s 37 of the Banks Act, the Minister of Finance or the Prudential Authority may consult with the Competition Commission.[130]

Section 54 of the Banks Act regulates transactions which involve a bank as one of the principal parties and that take the form of amalgamations, mergers or arrangements dealt with in chapter 5 of the Companies Act 71 of 2008 (titled 'Fundamental transactions, takeovers and offers'), or an arrangement which has the effect of transferring more than 25% in the same financial year of assets and/or liabilities of a bank to another person. Consent for the conclusion of a s 54(1) transaction must not be granted unless the Minister of Finance: is satisfied that the proposed transaction 'will not be detrimental to the public interest', and the amalgamation does

[125] See Simatele op cit note 60 at 826.
[126] Baer Greg 'A new executive order is spurring the Justice Department and bank regulators to revisit their merger approval process. But is bank consolidation a problem for consumers?' (American Banker Magazine, September 2021) at 5, available at *americanbanker.com*, accessed on 13 January 2023.
[127] Section 18(2)(b) read with s 18(2)(a)(i)-(ii) of the Competition Act.
[128] The Prudential Authority (Minister of Finance) is responsible for overseeing transactions that will result in the acquisition of shares or voting rights in respect of the issued shares that exceed 15% but do not exceed 49% (that exceed 49%).
[129] Section 37(4) of the Banks Act.
[130] Section 37(2)(b) of the Banks Act.

not involve a non-bank entity, or the assets and/or liabilities are transferred to another bank or person approved by the Prudential Authority.[131]

Biggar and Heimler argue that subjecting the banking sector to the full force of competition law, as implemented by a national competition authority, is appropriate and compatible with an effective financial sector regulatory framework.[132] Allocating a competition mandate to a sector-specific regulatory authority, in comparison to a national competition authority that is independent from a particular industry, poses the risk that the former will superimpose an understanding of competition that fails to distinguish between industry-specific interests and the broader public interest.[133]

Competence and resource constraints aside, regulatory authorities can only be as effective as their mandate is appropriate. The objectives of the Prudential Authority are fourfold: to safeguard the 'safety and soundness' of financial institutions and market infrastructures; shield consumers from financial institution default risk; and to maintain financial stability.[134] Listed as a function to achieve the Prudential Authorities' objectives, is its obligation to contribute to 'sustainable competition' in the financial service sector through a joint, coordinated effort with the Competition Commission.[135] It is reasonable to infer that competition may be seen as simply a means to achieve the primary objective of stability and not as a self-standing goal. This raises the concern that the Prudential Authority's stability-orientated design and primary objectives will dominate the merger analysis.[136]

Although the Competition Act permits the Minister of Trade and Industry to make representations on the s 12A(3) public-interest grounds by participating as a party to the relevant merger proceedings, the final decision-making power vests in the competition authorities.[137] In doing so, the Competition Act guards against the risk of overbearing political interference.[138] Understood against this background, the Minister of Finance's s 18(2)(b) power to exclude the s 18(2)(a) transactions from the purview of the Competition Act's merger control framework and the decisive decision-making power on public-interest grounds that is allocated

[131] Section 54(2) of the Banks Act.
[132] Biggar Darryl & Heimler Alberto 'An increasing role for competition in the regulation of banks' (International competition network antitrust enforcement in regulated sectors subgroup 1, June 2005) at 18, available at *https://centrocedec.files.wordpress.com/2015/07/an-increasing-role-for-competition-in-the-regulation-of-banks-2005.pdf*, accessed on 3 February 2023.
[133] Ibid at 20.
[134] Section 33 of the Financial Sector Regulation Act.
[135] Section 34 of the Financial Sector Regulation Act.
[136] This discussion does not apply to the transactions listed in s 18(2)(a)(iii)-(iv) of the Competition Act as the same institutional design concerns do not arise in relation to the Financial Sector Conduct Authority.
[137] Section 18(1) read with 12A(1)(b), 12A(1A) and 12A(3) of the Competition Act.
[138] Goga, Hodge & Moahloli op cit note 103 at 2, 5.

to the Minister of Finance by ss 37 and 54 of the Banks Act, opens the door for political interference in the merger assessment process. This observation is further supported by the argument '…that over time, through the sustained lobbying efforts of the industry, sectoral regulators tend to be influenced by the specific interests of the industry they regulate.'[139]

The Minister of Finance and Prudential Authority's mission conflict between stability and competition may translate into anti-competitive transactions being tolerated to maintain the stability of banks in the long run.[140] That is, reducing competition prevents a decline in profit and in turn shields the capital buffers of banks, thereby maintaining their capacity to withstand a financial crisis.[141] Reduced to its simplest form, a profitable bank is less likely to fail than an unprofitable counterpart.[142] The incumbency advantage often manifests in pre-emptive buyouts.[143] This poses the risk that the acquisition of multiple FinTech start-ups (with bank licenses), in the form of merger creep or killer acquisitions, to protect the competitive edge of incumbent banks, will pass the stability test and, therefore, be regarded as in the public interest. Consumer welfare is likely to decrease as consumers are deprived of alternative consumption choices and more efficient, affordable financial products and services.[144] Therefore, inhibiting the disruptive potential of FinTech through indiscriminately prioritising stability will have a detrimental long-term impact on financial inclusion and competition within the financial sector.[145]

(b) Reform permutations

The following reform options are proposed to address the inadequacy of the relationship between the Banks Act and the Competition Act:

Firstly, criteria that provide guidance on when it will be in the public interest for the Minister of Finance to invoke their s 18(2)(b) power to exclude ss 18(2)(a)(i)-(ii) transactions from the Competition Act.

Secondly, the Minister of Finance's s 18(2)(b) power to displace the jurisdiction of the Competition Act should be limited to instances where the proposed merger is closely tied to imminent systemic-risk concerns. This narrow interpretation is in line with the South African

[139] Biggar and Heimler op cit note 132 at 20.
[140] Van loo op cit note 1 at 257.
[141] Ibid.
[142] Van loo op cit note 1 at 257.
[143] See Argentesi Elena, Buccirossi Paolo & Duso Tomaso et al 'Merger policy in digital markets: An ex post assessment' (2021) 17 *Journal of Competition Law & Economics* 95 at 114-5.
[144] Parker Geoffrey, Petropoulos Georgios & Van Alstyne Marshall 'Platform mergers and antitrust' (2021) 30 *Industrial and Corporate Change* 1307 at 1319.
[145] Ibid.

High Court's approach of interpreting financial sector legislation by '…having regard to the financial realities and the importance, indeed the vital importance, of maintaining the integrity and security of banks and building societies.'[146] Furthermore, the simple two-pronged test and the broad public-interest provisions contained in ss 37 and 54 of the Banks Act are fitting for urgent decision-making in the face of imminent systemic risk.

Therefore, aside from the proposed limited exclusion, the remainder of transactions, that but for the proposed amendment would have fallen outside the ambit of the Competition Act, will be subject to the merger control framework outlined in the Competition Act. The layered substantive merger analysis, the threshold test, the in-built balancing exercise, the efficiency and technological gains analysis, and the substantial public-interest grounds that factor in industry-specific characteristics and policy considerations, render the Competition Act's merger control framework suitable for such a task. This is cemented by the Competition Commission's responsibility to 'advise, and receive advice from, any regulatory authority', which includes the option to consult with the Minister of Finance or any member of the IFWG if sector expertise is required.[147]

Thirdly, the Minister of Finance should be afforded the same opportunity to make representations on public-interest grounds as the Minister of Trade and Industry in instances where, but for the second proposed amendment, ss 37 and 54 of the Banks Act would apply.

As with the Competition Act, 'public interest' is not defined in the Banks Act. However, unlike the Competition Act, no grounds to guide the public-interest inquiry have been incorporated. When dealing with a sector-specific regulatory authority, and not an independent national authority, that has been assigned a dual mandate with potentially conflicting policy considerations, the legislature should not make effective implementation of the merger assessment dependent on broad powers that are purely a subjective exercise of discretion. Therefore, fourthly and as an alternative to the above reform options, a more comprehensive merger control framework that is on par with the Competition Act should be incorporated into ss 37 and 54 of the Banks Act in order to assign the Prudential Authority and Minister of Finance a clearly defined public-interest mandate that balances competition, financial stability, data-related security concerns and financial inclusion.

[146] Stated in the context of interpreting s 37 of the Deposit-taking Institutions Act 94 of 1990 in *Nuwe Suid-Afrikaanse Prinsipale Beleggings (Edms) Bpk v Saambou Holdings Ltd* 1992 (4) SA 696 (W) at 706 I – J.
[147] Section 21(1)(j) of the Competition Act.

(c) Concurrent jurisdiction

The Competition Act establishes concurrent jurisdiction when transactions that trigger the application of the merger control framework are simultaneously subject to the jurisdiction of a sector or industry-specific regulatory authority.[148] The Competition Commission and sector or industry regulatory authority are mandated, where possible, to negotiate agreements designed 'to coordinate and harmonise the exercise of' such concurrent jurisdiction over the FinTech industry in order to ensure that the principles of the Competition Act are consistently applied.[149] In relation to merger transactions, the concurrent jurisdiction will only be operative between the Competition Commission and the Financial Sector Conduct Authority or Prudential Authority, if the Minister of Finance does not invoke their s 18(2)(b) power to displace the jurisdiction of the merger control framework.

The pending amendment goes a step further than the existing concurrent jurisdiction provision in delineating primary authority to the sector-specific regulator to 'establish conditions within the industry that it regulates', as mandated by the relevant sector-specific legislation, and primary authority to the Competition Commission to review mergers in terms of the merger control framework built into the Competition Act.[150] Through outlining when each regulator will have primary authority, the pending amendment, in line with principle 5, shifts the focus from a 'turf war'[151] to productively channelling resources towards policy and regulatory coordination as facilitated by the IFWG.

[148] Section 3(1A)(a) of the Competition Act.
[149] Sections 21(1)(h) read with s 82(1)-(2) of the Competition Act.
[150] Section 3(3) of the Competition Amendment Act 1 of 2009.
[151] See Competition Commission 'Concurrent jurisdiction in the banking sector: Turf war or constructive co-operation?' (the official newsletter of the Competition Commission, edition 6, December 2001) available at *http://www.compcom.co.za/wp-content/uploads/2014/09/Dec-01-Newsletter.pdf*, accessed on 10 January 2023.

VII RECOMMENDATIONS

The last banking market inquiry was undertaken in 2006 and focused on retail banking, specifically personal transaction accounts and related payment services.[152] As part of the market power analysis, the Competition Commission concluded '…that banks in South Africa operate not as a cartel but rather as oligopolists that maximise their profits by avoiding outright price competition where they can…'.[153] The scope of the recent online intermediation platforms market inquiry ('OIPMI') specifically excluded '…Fintech platforms except insofar as the role of payment services in facilitating transactions on the online intermediation platforms.'[154]

The limited scope of, and time that has lapsed since, the 2006-2008 banking market inquiry, the exclusion of FinTech markets from the OIPMI, and BigTech platforms entry into the financial service sector, calls for a FinTech-traditional financial market inquiry. In this respect, it is suggested that the Competition Commission revisit its categorisation of the digital platforms market. To define the scope of the OIPMI, the Competition Commission divided digital platform markets into three broad categories: goods and services intermediation platforms, 'Free' platforms (such as search engine and social media platforms), and FinTech markets.[155] Arguably, to adequately address BigTechs' participation in the financial services sector, a fourth category that entails the merging of the latter two categories is required. To facilitate a coordinated and inter-regulatory approach, it is further suggested that the terms of reference be formulated after consultation with the IFWG members.

The report generated from conducting a FinTech-traditional market inquiry, will enable the competition authorities (and, more broadly, IFWG members) to better understand the current state, and trajectory, of the FinTech-traditional financial ecosystem, which is critical given that merger control requires '…a high-level view of industry dynamics …to be combined with a case-specific inquiry.'[156] That is, merger control is as much of a transaction-specific analysis as it is context specific. As observed by the Competition Tribunal, '[i]t would be a particularly abstracted regulator that blinded itself to the broader characteristics of the market

[152] Competition Commission 'Enquiry into competition in banking: Composition of the enquiry and terms of reference' at 512-3, available at *https://www.compcom.co.za/wp-content/uploads/2017/11/9-Appendices_non-confidential1.pdf*, accessed on 16 December 2022.
[153] Ibid at 28.
[154] Competition Commission op cit note 20 para 3.3.
[155] Ibid para 2.6.
[156] Tarullo Daniel 'Regulators should rethink the way they assess bank mergers' (Brookings Institution, 16 March 2022) available at *https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/*, accessed on 15 July 2022.

under examination – to, *inter alia*, the nature of the product or service rendered or to the broader policy environment.'[157] Therefore, a proposed merger must be assessed within the broader context of long-term policy objectives, intersecting legislative frameworks, and the current and projected state of the relevant market.

The market inquiry report will also assist the legislature to isolate which of the above-listed reform options is best suited to address the relationship between the Competition Act and the Banks Act.

VIII CONCLUSION

The s 12A(2) non-exhaustive list, in line with principle 1, affords the competition authorities the flexibility and discretion needed to isolate changing and new sources of market power that may lead to enduring dominance in the FinTech-traditional financial ecosystem. The broad nature of the competition-specific inquiry and the substantial public-interest grounds that factor in industry-specific characteristics, facilitates the implementation of principle 2. That is, a nuanced approach that caters for the unfolding competitive dynamics between FinTechs, BigTechs and traditional banks. The balancing exercise built into the merger control framework will play a critical role in enabling competition authorities to navigate the policy frictions arising in the FinTech industry. The Constitutional Court's approach, in the *Mediclinic Southern Africa* case, facilitates the joint implementation of principle 3 and 4, through allowing a policy that balances competition, financial stability, data protection and financial inclusion to draw the boundaries of a FinTech socio-economic framework within which the public-interest provisions should be considered. The *Metropolitan Holdings* case, in line with principle 5, promotes a collaborative effort by authorities that are jointly responsible for the regulation of an implicated market. Understanding the limits of other legislative frameworks and the strengths of the merger control framework, in line with principle 6, requires a holistic and integrated approach that factors in the cumulative effect of the regulatory frameworks that have a bearing on the FinTech industry. Although the legislative design of s 12A of the Competition Act, in theory, is compatible with the proposed core principles, their implementation will depend on how the competition authorities, in practice, apply and interpret the merger control framework.

[157] *Telkom SA Ltd/Business Connexion Group Ltd* [2007] 2 CPLR 433 (CT) para 301.

The Minister of Finance's power to exclude bank mergers from the purview of the merger control framework and the Prudential Authority's institutional design, poses the risk of financial stability being indiscriminately prioritised to the detriment of competition and financial inclusion. To establish a fit-for-purpose regulatory architecture and appropriate jurisdiction allocation, legislative reform, that redefines the relationship between the Competition Act and the Banks Act, is necessary.

Merger control is as much of a transaction-specific analysis as it is context specific. Accordingly, a FinTech-traditional market inquiry is recommended to enable the competition authorities (and, more broadly, IFWG members) to better understand the current state, and trajectory, of the FinTech-traditional financial ecosystem.

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