ERSA-SARB CONFERENCE

Finding a Path to Growth and Employment in South Africa

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SESSION REPORT

Session 7: Reforming South African Competition Policy

Presentation: Professor Willem Boshoff, Stellenbosch University & Centre for Competition Law and Economics

Panellists: James Hodge (Competition Commission), Thando Vilakazi (University of Johannesburg), Nicola Theron (FTI Consulting)

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Note: This report synthesises the key arguments, ideas, and exchanges from the session. It reflects the substance of what was presented and discussed, not necessarily the settled views of all participants. Panellists participated in their personal capacity. Time constraints meant that not all points could be fully debated or responded to. By convention, individuals are identified only on the title page; arguments and ideas in the body of the report are not attributed to named speakers. Video recordings of the session are available on YouTube, where viewers may find nuance in the views expressed that a written synthesis cannot fully capture.

Key Takeaways

- South Africa's merger control regime has increasingly pursued non-competition objectives alongside competition goals, effectively creating an additional tax on corporate transactions that may deter investment and weaken firm dynamism.
- The growing role of ministerial intervention in merger proceedings — often exercised informally behind the scenes — was raised as a concern for the independence of competition authorities and for investor certainty.
- Recent reforms, including a near-doubling of merger notification thresholds, were welcomed as a step that could remove around 25% of mergers from the notification process, freeing resources for complex cases.
- A strong theme in the discussion was that public interest provisions should be applied more tightly as a closed list, rather than expanded or used as a proxy for broader transformation debates.
- Market inquiries were highlighted as one of the most effective tools for restructuring markets — with outcomes including the removal of exclusive retail leases and a 50% reduction in prepaid data prices — and may deserve greater emphasis in a pro-growth competition strategy.

The Anchor Presentation: Competition-Centred Merger Control

The anchor presentation placed competition at the centre of South Africa's growth challenge. The link between rivalry and productivity is well established in the economics literature: firms that face competitive pressure invest more, innovate more, and improve efficiency. In South Africa's case, the strongest business cycle expansion in recent history — from the mid-1990s to around 2007/08 — followed a period of deliberate deregulation and market opening. When those reform dividends were not renewed, growth stalled.

The core argument was that South Africa's merger control regime has drifted from its original purpose. The Competition Act was designed with competition as the primary objective and public interest factors - including employment, SMME participation, empowerment, and industrial competitiveness - in a secondary role. Over the past fifteen years, and particularly since the 2018 amendments to the Act, those public interest factors have been elevated to equal standing with the competition assessment. This creates what was described as a time-inconsistency problem familiar to central bankers: the ex-ante commitment to promoting competition is undermined once a specific merger is on the table and non-competition objectives become politically salient.

The practical consequences, it was argued, are significant. The number of mergers approved with conditions has risen markedly, with many of those conditions targeting public interest rather than competition concerns. Adjudication timelines have lengthened, particularly for large transactions. And the Minister of Trade, Industry and Competition wields substantial influence over proceedings - formally as an intervener, but often more powerfully through informal negotiations with merging parties. The presentation suggested that this amounts to an additional tax on mergers and acquisitions, one that not only raises costs for transactions that proceed but likely deters many that are never filed.

A more subtle concern was also raised: that the concept of competition itself may be at risk of dilution. In the recent Mediclinic case, which reached the Constitutional Court, harm to a subset of “vulnerable consumers” was held to justify blocking a hospital merger. The caution offered was that while the effects on the poor matter enormously, expanding the competition test to incorporate distributional objectives risks eroding the analytical rigour that makes competition policy effective.

Invoking the Tinbergen rule - one instrument, one target - the presentation proposed that merger control should return to a primary focus on competition, with any ancillary objectives limited to those that align naturally with competition goals, such as narrowly defined industrial policy aims. The EU’s evolving approach was cited as instructive: there, competition assessment is being broadened dynamically (considering how mergers shape future market structure and innovation) without adding entirely separate non-competition objectives.

Panel Discussion

Where Do Delays and Deterrence Actually Come From?

The panel offered a more nuanced picture of where the problems in merger control originate. Data shared during the discussion showed that 94% of mergers are processed within 60 days, and only around five mergers per year exceed 100 days. It was argued that those delays are driven overwhelmingly by complex competition analysis in large, potentially anti-competitive mergers - not by public interest considerations. It was also noted that no merger has ever been prohibited on public interest grounds alone, and that large foreign investments like Heineken and PepsiCo proceeded despite substantial public interest conditions.

At the same time, the discussion recognised that the perception of unpredictability matters as much as the reality. Large firms contemplating transactions need certainty about what conditions will be imposed and how long the process will take. Even if only a handful of mergers face extended timelines, those tend to be the most economically significant, and the signal they send to the broader investment community can be disproportionate. The role of intervenors - rival firms or other parties using the process to secure advantages or obstruct competitors - was identified as a significant contributor to delays at the Tribunal stage.

The Question of Ministerial Influence

The discussion around the Minister’s role touched on both the formal and informal dimensions. Statutory change to remove the Minister’s power of intervention was generally seen as unlikely. A stronger theme was the concern about the informal exercise of that power - particularly the practice of merging parties negotiating packages of public interest commitments directly with the Minister, which are then presented to the Tribunal as a fait accompli. The Heineken-Distell transaction was cited as an example. The argument was made that parties should be able to have confidence that the Competition Commission and

Tribunal will adjudicate on the merits, without needing to pre-negotiate political cover with the Ministry.

Applying Public Interest Provisions with Greater Discipline

Rather than reducing the list of public interest factors, a prominent theme in the panel was the case for tighter, more consistent application of the existing framework. A recent Competition Appeal Court decision in the Vodacom–Maziv merger was cited as reinforcing that the five public interest criteria (employment, SMMEs, industrial competitiveness, empowerment, and the ability of national industries to compete internationally) constitute a closed list. A clear message from the discussion was that this boundary should be maintained - the list should not be expanded by creative judicial interpretation or by parties leveraging the process for their own ends.

The “vulnerable consumer” doctrine introduced in the Mediclinic judgment drew particular attention. While no one disputed that the effects of mergers on the poor are important, concern was expressed that allowing distributional considerations to migrate from the public interest test into the competition test itself risks blurring the analytical framework. If different consumer groups are to be assessed differently, it was suggested that this should be done within a properly defined market using rigorous economic analysis, not through ad hoc judicial reasoning.

Competition, Inclusion, and the Broader Regulatory Landscape

An important thread in the discussion reframed the objective from pro-growth to pro-inclusive growth. It was noted that South African SMEs account for just 22% of total turnover, compared to an OECD average above 50%. Black-owned businesses continue to face exclusion through entrenched networks and oligopolistic market structures. From this perspective, building a more dynamic ecosystem of entrepreneurs and smaller firms was presented not as a distraction from competition but as central to it. Many of the public interest provisions, particularly those supporting SMME participation and procurement from historically disadvantaged firms, were defended as broadly pro-competitive when applied proportionally.

The panel also explored the idea that the competition authorities’ role should extend well beyond merger control. It was argued that these authorities possess unique insight into how firms and markets actually work — access to internal cost data, efficiency projections, due diligence documents, and market dynamics. This knowledge, it was suggested, should be feeding into broader policy processes: the design of competitive markets in electricity and freight, the development of a new industrial policy, and the identification of regulatory barriers to entry across sectors. A concern was raised that these connections are not currently being made systematically, representing a missed opportunity.

Recent steps in this direction were noted, including exemptions for pro-competitive cooperation in exports, logistics, and energy, and joint work between the competition authorities and departments including Agriculture, Health, and Communications. However, the broader point remained that competition policy needs to be embedded in a whole-of-government approach to regulatory reform, not treated as a standalone enforcement function.

Audience Discussion

The audience discussion raised several important points. The decision to raise merger notification thresholds was contrasted with the international trend towards lowering them, driven by concerns about incumbents acquiring startups. In response, it was noted that a

retrospective analysis of mergers below the old thresholds showed 75% were unconditionally approved with minimal competition or public interest issues, and that the power to call in smaller mergers where concerns arise has been retained. In the South African context, reducing the administrative burden was judged to be the greater priority.

A question on enforcement of merger conditions - particularly the industrial development commitments attached to transactions like the SAB–InBev and PepsiCo–Pioneer mergers - highlighted a concern that weak enforcement has undermined the intended outcomes. It was acknowledged that this is an area requiring more capacity and better evidence, and that research on employee share ownership programmes is forthcoming, with a study on procurement conditions to follow.

A particularly rich contribution drew parallels between the competition regime's struggle to balance competitive and non-competitive factors and similar tensions in government procurement under the Preferential Procurement Policy Framework Act, as well as successive waves of BEE policy. The observation was that government has accumulated considerable collective wisdom about these trade-offs across different policy domains, but the cross-pollination of lessons between them remains weak.

The effectiveness of market inquiries drew strong interest from the floor. Concrete outcomes were cited: the removal of exclusive retail leases following the grocery inquiry, a 50% reduction in prepaid data prices from the data inquiry, the onboarding of over 800 black-owned businesses onto platforms following the online inquiry, and benefits to media companies from the platform access inquiry. The distinguishing feature highlighted was that market inquiries restructure markets to make them more competitive, whereas merger control and abuse-of-dominance cases are largely defensive — preventing things from getting worse rather than making them better.

Implications for Growth and Employment

This session surfaced a tension that ran through the broader conference: South Africa's policy framework tends to ask individual instruments to do too many things at once. Competition policy is being asked to simultaneously promote rivalry, protect employment, advance transformation, support SMMEs, and further industrial policy. The Tinbergen problem is real — overloading a single instrument risks diluting its effectiveness on every front.

Yet the session also illustrated that a purely technocratic "strip it back to competition" approach may be neither politically feasible nor necessarily desirable in a country with South Africa's history and levels of exclusion. A more productive path forward may lie in applying existing provisions with greater discipline, investing in the evidence base for what works, building the Tribunal's capacity, and — crucially — ensuring that the expertise within competition authorities feeds into the broader project of regulatory reform.

For the growth and employment agenda, the most immediately actionable ideas to emerge from the session include: implementing the threshold reforms swiftly and reviewing them regularly; expanding and better resourcing market inquiries as a tool for structural reform; constraining the informal power of ministerial intervention in practice even if the statute remains unchanged; strengthening the enforcement and evidence base for merger conditions; and systematically sharing the lessons from competition enforcement across government to inform industrial policy, trade policy, and the design of newly competitive markets in electricity and logistics.