Striking the Balance: Reassessing Public Interest Considerations in Africa's Merger Control Regime

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Abstract

Public interest consideration (PIC) is a feature of the merger control regimes in many African countries. PICs help African countries address national-specific interests, such as historical injustices that shape market participation and promote the overall government objective of reducing poverty, increasing job opportunities, and advancing industrial policy. On the contrary, PICs in merger assessment can have adverse effects on foreign direct investment in Africa, undermining the public policy objectives they aim to promote. This article argues that despite the debate for and against the inclusion of PICs in Africa's merger control, PICs will continue to be a key feature of Africa's competition regime. In this scenario, African competition agencies need to strike a balance between the public interest test and the competition standard test in merger control, thereby advancing public policy objectives through targeted remedies. To this end, drawing on South Africa's experience, this paper examines various mergers in which South African competition institutions have addressed public interest concerns and established the legal test for determining when public interest grounds are justified in merger assessment. The findings show that in rare cases, mergers have been prohibited on PICs grounds in South Africa. South Africa's competition institutions will consider whether the likely effect of the merger on specific public interest is substantial and merger-specific, and the appropriate remedies. A merger will only be prohibited on public interest grounds when the remedies are not adequate, appropriate, proportionate and enforceable. Secondly, when the merger does not advance public interest benefits. Consequently, this article advocates for competition agencies to adopt a holistic approach that considers public interest concerns in conjunction with the competition standard test, thereby ensuring that mergers yield pro-competitive benefits, including investment. Moreover, competition agencies should formulate guidelines on public interest in competition law enforcement, specifying the particular public interest and the legal test adopted to enhance regulatory certainty for business firms.

1. Introduction

With its historical roots in the United States (US), competition policy is a regulatory tool that seeks to promote competitive markets and enhance consumer welfare through lower prices, product quality, and greater choice. The US Chicago School of Thought conceptualized consumer welfare as the ultimate goal of competition law.[1] Since then, most competition agencies, following the Washington Consensus, have adopted an economic approach to enforcing competition law, aiming to enhance consumer welfare. However, a growing body of academic research questions whether the goals of competition law extend beyond the traditional goals of economic efficiency and consumer welfare, and include non-competition issues such as social justice,[2] democracy,[3] environmental sustainability,[4] and equality.[5]

Advocates of including non-competition issues in competition law argue that competition law cannot be based solely on economic considerations and should not be disentangled from external, political, and social objectives.[6] According to Lianos, competition law should be 'seen as a tool to be used in various circumstances in order to "correct" market as well as non-market (e.g government) failures, that result from restrictions of competition, to the extent that these affect social welfare'.[7] Furthermore, the goals of competition law are not similar and will vary from one jurisdiction to another to address national-specific interests.[8] This variation is what Ezrachi refers to as the sponge nature of competition law.[9] In his words, Ezrachi defines a sponge-like characteristic of competition law as 'its susceptibility to national peculiarities originating in its design and evident in its application, and its exposure in intellectual and regulatory capture'.[10]

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[1] Robert H Lande, 'A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers and Consumer Choice' (2013) 81 Fordham Law Review 2349;

[2] Sandra Marco Colino, 'Antitrust's Social "Ripple Effect", (2024) 42(2) Berkeley Journal of International Law 172.

[3] Spencer Weber Waller and Jacob E Morse, 'The Political Face of Antitrust' (2020) 15 Brooklyn Journal of Corporate, Financial and Commercial Law 75.

[4] Elias Deutscher and Stravos Makris, 'Sustainability Concerns in EU Merger Control: From Output-Maximizing to Polycentric Innovation Competition' (2023) 11(3) Journal of Antitrust Enforcement 350.

[5] Eleanor Fox, 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41 Harvard International Law Journal 579.

[6] Anu Bradford, Adam S Chilton and Filippo Maria Lancieri, 'The Chicago School's Limited Influence on International Antitrust' (2020) 87 The Univerisity of Chicago Law Review 297.

[7] Ioannis Lianos, 'Polycentric Competition Law' (2018) 71(1) Current Legal Problems 161, 161.

[8] Moohyung Cho and Tim Büthe, 'From Rule-taker to Rule-Promoting Regulatory State: South Korea in the Nearly-Global Competition Regime' 15 Regulation and Governance 513; Umut Aydin and Tim Büthe, 'Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79 Law and Contemporary Problems 1.

[9] Ariel Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49.

[10] Ibid, at 50.

Against this backdrop, in practice, many competition agencies are enforcing their competition laws differently to address specific market and national challenges. Africa is no exception.[11] One of the unique ways African competition agencies are enforcing competition law is by considering public interest considerations (PIC) in their decision-making process. There is no accepted definition of the term 'public interest'. In competition law enforcement, public interest encompass non-competition concerns that extend beyond the economic objective of competition law,[12] which is 'concerned with allocative, productive or dynamic efficiency, in particular, the enhancement of consumer welfare through a process of rivalry (lowering prices, expanding output, improving quality and enhancing innovation)'.[13] Majorly, most African national competition legislations identify the promotion of employment, small and medium enterprises (SME) competitiveness in domestic markets, the protection of specific industries and regions, and the ability of national industries to compete in international markets as key public interest grounds that competition agencies must consider in their decision-making.[14] While some African national competition authorities (NCAs) can consider public interest in cartel conduct, interim relief, and granting exemptions, public interest is more of a norm than an exception in Africa's merger control. [15]

At the regional level, regional competition regimes (RCRs) have also incorporated public interest into their regional competition laws as an additional consideration in their merger control regimes. These RCRs do not identify the specific PICs, but leave it open-ended. For instance, Article 26(4) of the 2004 COMESA Competition Regulations (CCR) requires the COMESA Competition Commission (CCC), in addition to the competition standard,[16] to consider PICs in assessing merger transactions. The CCC is required to consider 'whether any technological, efficiency or other pro-competitive gain will be greater than and offset the anti-competitive effects; and whether the merger can be justified on substantial public interest

[11] Tim Büthe and Vellah Kedogo Kigwiru, 'The Spread of Competition Law and Policy in Africa: A Research Agenda' (2020) 1 African Journal of International Economic Law 41; Eleanor M Fox and Mor Bakhoum, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa (*Oxford University Press 2019); Michal S Gal, Mor Bakhoum, Josef Drexl, Eleanor M Fox, and David J Gerber(eds.), *The Economic Characterstics of Developing Jurisdictions: Their Implications on for Competition Law* (Edward Elgar Publishing, 2015).
[12] Bruce Wardhaugh, 'Crisis Cartels: Non-Economic Values, the Public Interest and Institutional Considerations' (2014) 10(2) European Competition Journal 311.
[13] Patrick Smith and Andrew Swan, 'Public Interest Factors in African Competition Policy' (2014) The African and Middle East Antitrust Review 1, 1.
[14] David Lewis, The Role of Public Interest in Merger Evaluation' International Competition Network, Merger Working Group Naples, September 2002
[15] Baker McKenzie, 'Africa: The Increasing Focus on Public Interest Concerns in Competition Policy' (2 June 2023, Baker McKenzie).
[16] The CCC has to first, consider whether the merger is likely to substantively prevent or lessen competition.

grounds'.[17] Article 26(4) of CCR provides that when determining whether a merger is or will be contrary to public interest, the CCC shall take into account all matters it considers relevant in the circumstances.

PIC in COMESA's merger regime is, therefore, open-ended. While this approach provides the competition agency with flexibility and discretion to consider market dynamics as they emerge, it increases the uncertainty of what constitutes PICs for business firms operating in Africa. It leaves room for vested interests not aligned with competition goals to influence competition decisions. Emerging merger decisions and literature suggest that CCC has considered employment as a key public interest in merger assessment, leading to the approval of mergers at the national level, subject to the condition that merging parties abide by domestic employment law and impose a moratorium on retrenching employees for a specified period. [18] In the 2024 Draft COMESA Competition and Consumer Protection Regulations (CCPR), the CCC provides a list of PICs for merger assessment, which includes the effect of the merger on employment, the ability of SMEs to compete, the ability of the common market to compete in international markets, environmental protections, and sustainability considerations. This will provide merging firms with clarity on the expected PICs that CCC will consider in its merger assessment. At the continental level,[19] Article 10 (8) of the draft African Continental Free Trade Area (AfCFTA) Competition Protocol (CP) requires that in determining whether a merger is likely to distort competition, the AfCFTA Competition Authority should consider all the relevant public interest considerations, including the potential to promote sustainable and inclusive socio-economic and industrial development; employment; the ability of small and medium-sized businesses to become competitive; or the ability of industries in the Market to compete in other international markets.[20]

It follows that PICs will continue to take centre stage in African competition law enforcement, addressing national, regional, and continent-specific interests. As a result of the

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[17] CCR, Art 26(4).

[18] Vellah Kedogo Kigwiru, 'Why, How and When Do National Competition Regimes Support Supranational Regional Competition Regimes: A Case of the COMESA Competition Commission' (2025) 74 (3) GRUR International Journal of European and International IP Law 226; Precious N Ndlovu, 'Mergers and Acquisitions and the Incorporation of the Public Interest in Africa's Regional Competition Lawa: A Case Study of COMESA' (2022) 66 (2) Journal of African Law 257.

[19] On literature discussing the AfCFTA CP, see, Vellah Kedogo Kigwiru, 'Supranational or Cooperative? Rethinking the African Continental Free Trade Area Competition Protocol Institutional Design' (2024) 12(1) *Journal of Antitrust Enforcement* 98; Eleanor Fox, 'Integrating Africa by Competition and Market Policy' (2022) 60 Review of Industrial Organization 305; Vellah Kedogo Kigwiru, 'The Cooperation on Competition Policy under the African Continental Free Trade Area' (2020) 1 Manchester Journal of International Economic Law 98.

[20] The AfCFTA is a continental market with 55 African countries which seeks to enhance inter- and intra-regional trade in Africa. The goal is to incentivize African countries to trade with each other.

central role of PICs in Africa's merger control, proponents argue that including PICs in Africa's merger control regime promotes government objectives and policies, such as promoting employment, SME competitiveness, and the ability of national champions to participate in international markets.[21] On the other hand, critics argue that public interest grounds in merger assessment constrain foreign direct investment (FDI) and increase regulatory uncertainty for investors.[22] This article's objective is not to argue for or against the inclusion of PICs in competition law enforcement, but to provide guidance on balancing the public interest and competition standard test in Africa's merger control. *It is this balancing act that is at the core of this article*.

This article recognizes that an appropriate answer to this balancing act raises complex questions about other aspects of competition law enforcement.[23] Focusing on South Africa's mergers involving public interest, this article recommends a legal test and strategies that, if adopted, would promote the specific public interest while also enhancing the pro-competitive gains of merger transactions and other public interests. South Africa's experience shows that, in addition to the likely effect of a merger on specific public interests, competition agencies must take a holistic approach that balances public interests against each other and public interests against the mergers' public benefits. A merger should only be prohibited on public interest grounds if the remedies are not adequate, appropriate, proportionate and enforceable to address the negative consequences of the merger on the specific public interest. Moreover, to enhance regulatory certainty, competition legislations must identify the specific public interest and adopt public interest guidelines that provide the legal test of determining whether a public interest in competition law enforcement is justified or not.

The rest of this article proceeds as follows. Section two discusses in detail the debate for and against PICs in Africa's merger control. Section three provides an overview of the legislative framework on PICs in selected African countries. Section four discusses the South African experience in balancing the PICs and the competition test in its merger control regime. The last section provides the conclusion.

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[21] Yongama Njisane and Hardin Ratshisusu, 'Public Interest Issues in Cross-Border Mergers: Is There a Role for Competition Authorities' in Tembinkosi Bonakele, Eleanor Fox and Liberty Mncube (eds), *Competition Policy for the New Era: Insights from the BRICS Countries* (Oxford University Press 2017) 185-198.

[22]Foreign direct investment takes different forms such as the ability of a foreign firm to establish in a national market or to enter in the national market though mergers and acquisitions.

[23] Arthur M Okun, *Equality and Efficiency: The Big Trade-Off* (Brookings Institution Press 1975).

2. Public Interest Considerations in Africa's Merger Control: The Debate

2.1. Are public interest considerations justifiable in Africa's merger control regime?

Proponents of including PICs in African competition law enforcement argue that the goals of competition law in developing countries will differ from those in developed countries because African markets are different.[24] This market variation is influenced by the fact that African markets are not given; they are affected by economic, social, political, and historical imperatives. For instance, academic work on the effects of colonialism on market structure we observe today has revealed that colonialism left a lot of Africans outside the economic enterprise.[25] Due to the vast agricultural land, most of the agricultural commodities needed in Europe could be produced in Africa.[26] Colonial powers, then, prioritized farming cash crops such as tea, maize, and coffee for export to the detriment of local markets. That is why most African countries strive to enhance the competitiveness of SMEs in the domestic market and the ability of national firms to compete in international markets, thereby mitigating the effects of colonial legacies on African markets.

Colonialism also created market structures that favoured firms owned by a few white elites. For example, in South Africa, the apartheid regime led to a racially skewed market that excluded or limited non-white participation in the market.[27] According to Stewart:

> In Southern African countries, apartheid policies imposed racial segregation, with Africans relegated to the most infertile lands, and resources captured by the white colonizers, condemning the indigenous peoples to extreme poverty that persists today despite the dismantling of apartheid in the 1990s.[28]

To exclude black South Africans from the economic enterprise, during the apartheid regime, firms owned by white elites could access credit to invest in their business from banks.[29] At the same time, black South Africans faced regulatory hurdles in accessing credit, which negatively affected their ability to participate in the market. Unfortunately, favouring certain

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[24] Karissa Moothoo Padayachie, 'Has Competition Law Enforcement Being Effective in South Africa?' (2024) Development Southern Africa 1; Gertrude Makhaya, Wendy Mkwananzi and Simon Roberts, 'How Should Young Institutions Approach Competition Enforcement? Reflections on South Africa' (2012) 19(1) South African Journal of International Affairs 43.

[25] Taimoon Stewart, 'Competition Regimes in the Caribbean Community and Sub-Saharan Africa: A Comparison' (2020) 1 *African Journal of International Economic Law* 84.

[26] Alexander De Juan and Jan Henryk Pirskalla, 'The Comparative Politics of Colonialism and Its Legacies: An Introduction' (2017) 45(2) Politics and Society 159, 159.

[27] Liberty Mncube and Hardin Ratshisusu, 'Competition Policy and Black Empowerment: South Africa's Path to Inclusion' (2023) 11 Journal of Antitrust Enforcement 74.

[28] Stewart above n 25, at 88.

[29] Helena Barnard and John M Luiz, 'The South African Economic Elite and Ownership Changed in Foreign Multinationals' Assents During and After Apartheid-era Sanctions' (2024) 59(5) Journal of World Business 101555.

firms over others did not end with colonialism.[30] Post-independence, as aptly put by Stewart, 'local elites replaced the colonial administrators, patterned their rule by the colonial example, and favoured foreign elites and capitalists rather than seeking the interests of the local population'.[31] In African markets, public interest concerns in competition law enforcement, therefore, serve as a powerful tool to address colonial legacies by including the previously excluded and increasing their opportunities to participate in the market. That is why, after achieving independence, South Africa prioritized equality and inclusivity in its economic development. In its Preamble, the 1998 South African Competition Act emphasizes the central role public interest plays in addressing the injustices of the Apartheid regime, which excluded Black-South Africans from the economic enterprise as stated below:

> Apartheid and other discriminatory laws and practices of the past result in excessive concentration of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.[32]

Proponents of PICs in Africa's merger regime also argue that competition policy enforcement in Africa is a tool geared towards the broader government development goals, such as creating job opportunities, promoting specific sectors and increasing the ability of domestic firms to participate in international markets. Furthermore, markets are dynamic. A monolithic and "one-size-fits-all" approach to enforcing competition law is inadequate. In practice, the entrance of new market participants, climate change, pandemics, protectionism, and global politics influence market dynamics, requiring countries to adopt a nuanced approach and novel methods in regulating markets.[33] For example, new technologies with unique market characteristics, such as network effects and first-mover advantage, have led to the emergence of a few platforms with concentrated economic power. This has raised questions about whether the goal of competition law should be limited to protecting competition or also protecting competitors, especially when an imbalance of power exists between digital platforms and small businesses that are economically dependent on these platforms to reach end-users.[34] Thus, in

[30] Barnard and Lui above n 29.
[31] Stewart above n 25, at 87.
[32] South Africa Competition Act, Preamble, Para 1.
[33] Antonio Capobianco and Gaetano Lapenta, 'The Boundaries of Public Interest in Merger Control: Taking into Account Non-Competition Issues Including Industrial Policy and Environmental Protection' in Ioannis Kokkoris and Claudia Lemus (eds), *Research Handbook on the Law and Economics of Competition Enforcement* (Edward Elgar Publishers 2022) 324-346.
[34] Lazar Radic, Geoffrey A Manne and Dirk Auer, 'Regulate for What? A Close Look at the Rationale and Goals of Digital Competition Regulations' https://laweconcenter.org/resources/regulate-for-what-a-closer-look-at-the-rationale-and-goals-of-digital-competition-regulations/ accessed 2 April 2025.

this case, competition agencies could include PICs in merger assessments that promote the competitiveness of small businesses in the digital markets.

Finally, trade globalization raises the question of how Africa's local suppliers can compete with international firms. Through vertical integration, African formal markets are dominated by multinational corporations (MNEs) in key sectors. This makes it difficult for SMEs to enter and participate in the market. Focusing solely on safeguarding competitive markets and consumer welfare will limit the ability of small and medium-sized enterprises (SMEs) to participate in international markets. This explains why promoting national firms in international markets is a key public interest concern in most of the African competition regimes.

2.2.The criticism against PICs in Africa's merger control regime

A common criticism against PICs in Africa's merger control is that they constrain foreign direct investment (FDI) in various ways.[35] Firstly, this occurs when PICs are utilized as an industrial policy tool to favour domestic firms or national champions over foreign firms, thereby undermining the merger's pro-competitive benefits, including enhanced investment and public benefits.[36] Industrial policy with protectionist goals will thwart national firms' competitiveness in global markets if other countries pursue the same policy in their domestic markets. As aptly put by OECD:

> …there is scant evidence that a policy of promoting national champions will be beneficial for national welfare even in the short run, and much less so in the wrong run. On the contrary, one might argue that fierce competition at home will induce firms to be innovative and cost efficient. This in turn, will pave the way for success in an international market. Moreover, promoting national champions by one state may induce neighbouring states to pursue the same policy. [37]

Secondly, including PICs in merger assessments prolongs the merger transaction.[38] This could lead to regulatory uncertainty and increase business costs, negatively affecting investments.[39] Unfortunately, a lengthy merger assessment process can cause some firms to

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[35] Anton van Wyk, Anmar Pretorius and Derick Blaauw, 'Evaluating Public Interest Considerations in South African Merger Enforcement: An Overview of the Last Decade' (2023) 47(4) Studies in Economics and Econometrics 374.

[36] Generally, industrial policy aims to enhance the competitiveness of domestic firms and promote selected sectors to increase their competitiveness in international markets. Industrial policy encompasses granting state aid and subsidies to domestic firms to enhance their competitiveness and address market failures.

[37]OECD, *Roundtable on Competition Policy, Industrial Policy and National Champions*, DAF/COMP/GF(2009)9, at 134.

[38] Anton van Wyk, Raymond Parsons and Lodewalt Venter, 'Policy Uncertainity, Mergers, and Acquisitions in the South African Business Environment' (2024) 41(6) Development Southern Africa 1137

[39] Prince M Changole and Willem H Boshoff, 'Non-Competition Goals and their Impact on South African Merger Control: An Empirical Analysis' (2022) 60 Review of Industrial Organization 361; A Jones and J Davies, 'Merger

abandon their investments.[40] According to Wyk and others,[41] regulatory uncertainty in merger assessment 'could even lead to otherwise economically beneficial mergers and associated investment proposals being abandoned because of regulatory uncertainty and protracted delays in reaching an adjudicated decision'. Reader also notes that when uncertainty exists on the specific PICs in a merger transaction, it prompts:

> Firms to second guess the legitimacy of their transactions by having to speculate on the possible effects of their transaction on an, as yet, unspecified public interest concern. The uncertainty that this would create for firms will mean that merger activity is likely to stagnate and, in turn, potential foreign acquirers may seek alternative investments in countries with a more robust and predictable domestic merger regime.[42]

Critics of PICs in merger control also argue that, in cases where a merger affects different public interests, competition agencies will find themselves in a complex position where they must balance specific PICS against each other.[43] For instance, a merger transaction may result in job losses. Still, in the wrong run, it could enhance the development of a particular industry or sector, ultimately leading to more job opportunities in the future. Merging parties can retrench workers, leading to job losses, but the same merger will promote a public interest in protecting failing firms.

Others point out that in some instances, competition agencies could intrude into areas falling outside the scope of competition legislation.[44] For instance, industrial policy objectives as a public interest consideration in merger control are a realm of national government and not a competition agency. Ultimately, the decision on industrial policy should rest with the government, rather than a competition agency. While employment is a public interest concern, the regulation of employment does not fall under the purview of competition legislation. Competition agencies should therefore adopt a cautious approach, avoiding overextension into

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Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10(3) European Competition Journal 453.

[40] On how policy uncertainty in merger control negatively affects businessess incentives to invest, see, Alice Bonaime, Huseyin Gulema and Mihai Ion, 'Does Policy Uncertainty Affect Mergers and Acquisitions' (2018) 129(3) Journal of Financial Economics 531; James Borthwick, Searat Ali and Xiaofei Pan, 'Does Policy Uncertainty Influence Mergers and Acquisitions Activities in China? A Replication Study' (2020) 62 Pacific-Basin Finance Journal 1.

[41] Wyk and others, above n 38, at 1137.

[42] David Michael Reader, *Revisiting the Role of the Public Interest in Merger Control* (PhD thesis, University of East Anglia 2015), 131.

[43] Albert Aukema and Ruan Jacobs, 'Striking the Balance: The Correct Approach to Competing Public Interest Considerations' (14 June 2023) Available https://www.cliffedekkerhofmeyr.com/news/publications/2023/Practice/Competition/competition-law-alert-14-june-striking-the-balance-the-correct-approach-to-competing-public-interest-considerations accessed 17 April 2025.

[44] Ignatious Nzero, 'The Implications of Public Interest Considerations in the Interpretation and Application of the Failing Firm Doctrine in South African Merger Analysis' (2017) 80 *THRHR* 602.

other regulatory realms. In the Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd (2002) ZACT 13, the Competition Tribunal held that:

> Our view is that this argument, though self-evident in many respects, should be advanced with considerable caution when the competition authorities use public interest as a basis for their intervention, particularly when competition is unimpaired…The role played by the competition authorities in defending those aspects of the public interests listed in the Act is, at most, secondary to other statutory and regulatory instruments –in this case the Employment Equity Act, the Skills Development Act and the Charter itself immediately spring to mind. The competition authorities, however well informed, *are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protec*t.[45] (Emphasis added).

Also, as a result of PIC's malleability, PICs could allow different stakeholders to pursue vested interests in the merger transaction through the back door. As noted by Budzinski and Stohr, in other cases, 'vested interests may hide behind ostensible public interests in order to protect and/or create non-competitive rents– at the expense of society'.[46] In the real world, therefore, competition agencies must adopt a cautious approach in incorporating PICs into competition law enforcement to ensure that unrealistic vested interests do not undermine the pro-competitive benefits of transactions. The involvement of third parties who make representations on public interest concerns affecting the merger can also lead to an unduly lengthy regulatory process.

Furthermore, because PICs are used to advance political and socio-economic policy objectives, competition agencies could prioritize and rank public interest considerations over competition concerns. In his study, Morris found that, although the Competition Commission South Africa (CCSA) has consistently argued that competition concerns and PICs have equal status in South Africa, in practice, this is not the case.[47] Morris concluded that PICs in South Africa's merger control rank higher than competition concerns. There is a need for further research to determine whether South Africa prioritizes PICs in its merger control regime or balances them with the competition standard test. The reason is that African countries need foreign investment and should be open to investment without adding unjustified PIC as an additional business cost. Hence, PICS in the merger assessment should not be ranked higher

[45] Shell South Africa/Tepco Petroleum Merger para 58.
[46] Oliver Budzinski and Annika Stöhr, 'Public Interest Consideration in European Merger Control Regimes' (2019) 25(130) Ilmenau Economics Discussion Papers at 4.
[47] R Morris, 'The Predictive Power of Public Interest vs Competition Concerns for Merger Adjudication in South Africa' (Webinar, Stellenbosch University South Africa 2023).

than the competition assessment. That is why, in contributing to this debate, this article argues that the public interest and the competition standard test should be balanced against each other.

3. Public Interest Considerations in Africa: An Overview

Before delving into how to balance the public interest test and the competition standard test in merger control, it is important to have a general view of the characteristics of PICs in Africa's competition regime.[48] First, not all African competition laws have public interest provisions. For instance, the Ugandan and Seychelles Competition Acts do not have public interest provisions. Several African countries without public interest provisions are currently adopting, amending, or repealing competition legislation to incorporate these provisions. Section 42 of the new 2024 Malawi Competition and Fair Trade Act (CFTA) requires the Competition and Fair Trade Commission (CFTC) to consider public interest considerations during merger assessment. They include the mergers effect on: a particular industrial sector or region; employment; SMEs and historically disadvantaged persons market competitiveness; national industries ability to compete in the market; exports; rate of economic developlement; technological advancement of Malawi enterprises; lower production and distribution costs; lower prices for consumers; promote the transfer of skills; improve the production or distribution of goods, digital products, or the provisions of services in Malawi; and save a failing firm. The Malawi CFTA was enacted in 2024, at a time when competition agencies are grappling with regulating digital markets. That is why the promotion of digital markets has been identified as a key public interest. This is also an indication that African countries are likely to consider public interest in digital markets.

Second, what constitutes PICs varies across African countries, as shown in Table 1.

Table 1: Public interest provisions in selected African competition legislations

Public Interest	Botswana	Malawi	Namibia	Nigeria.	South Africa	Zambia	Kenya
Employment	√	√	√	√	√	√	√
Exports	√	√	√			√	
Particular industrial sector or region	√	√	√	√	√		√
SME's competitiveness		√	√	√	√	√	√
National industries to compete in	√	√	√	√	√		√

[48] Kamal Dawar and Ndaba Ndlovu, 'A Comparative Assessment of Competition in Africa: Identifying Drivers of Reform in Botswana, Ethiopia and Nigeria' (2018) 6 Journal of Antitrust Enforcement 150.

international markets							
Improve or prevent *a decline in the production,*or distribution of goods or the provisions of services;	√	√	√			√	
Public benefit	√		√			√	√
Promote technical or economic progress of specific industry	√					√	
Advance citizen empowerement initiatives	√		√				
Sustainable and inclusive socio-economic and industrial development						√	
Historically disadvantaged persons market competitiveness		√	√		√		
Saving failing firms		√				√	
Technological advancements		√					

Source: Author, 2025.

Across all the African countries mentioned in Table 1 above, they consider employment, SME competitiveness, the protection of specific industries and regions, and the ability of national industries to compete in international markets as key public interest concerns.[49] Some countries identify additional PICs, such as the specific role of PICs in promoting public benefit, exports, citizen advancement, and technological advancement. In Southern Africa, for instance, South Africa, Namibia and Malawi require competition agencies to consider the participation and inclusion of HDPs in the market. The promotion of historically disadvantaged persons

[49] Indeed, in practice, most competition agencies consistently consider the impact of merger transactions on employment.

(HDP) competitiveness in markets in the Southern African region is as a result of the apartheid regime which favoured the whites participation in markets leading to a racially screwed economic system. This analysis reveals that PICs will vary from one country to another. This variation reflects the diverse concerns of politics, society, economy, technology, and security. Hence, when discussing what constitutes public interest in competition law enforcement, one has to ask oneself, what does this particular country value?

Third, some African countries provide a *closed list* of PICs. This enhances clarity on what public interest grounds merging parties should consider in their transactions.[50] In Nigeria, according to Section 94(4) of the Federal Competition and Consumer Protection (FCCP) Act, when determining whether a merger or proposed merger can or cannot be justified on grounds of public interest, the FCCPC shall the consider the effect that the merger or proposed merger will have on: a particular industrial sector or region; employment; ability of national industries to compete in international markets; and the ability of small and medium enterprises to become competitive.

Fourth, in other African countries, public interest factors are among an extensive list of considerations for competition agencies. They could include any factor that the competition agency considers fundamental outside what is stipulated in the competition legislation. In Kenya, for example, the 2010 Competition Act of Kenya requires the Competition Authority of Kenya (CAK) to consider the impact of the merger on public benefit, the industrial sector, or the region, as well as its effect on employment and small and medium-sized enterprise (SME) competitiveness in the market. The Kenyan Consolidated Merger Guidelines require CAK to consider the effect of the merger on foreign direct investment. Section 46(2) of the Competition Act grants CAK the power to consider *any criteria* which it considers relevant to the determination of the merger. In some legislations, such as the East African Competition Act, while competition agencies are required to consider public interest, the specific public interests *are not described*.

Fifth, in most African countries, third parties such as trade unions, the government, businesses, and any stakeholder affected by the merger can provide information to the competition agency on PICs, which the competition agency will consider in its decision-making process. In most countries, trade unions play a great role in merger assessments. In South Africa, although any third party affected by a merger can make representations to the

[50] See Section 94(4) of the Federal Competition and Consumer Protection (FCCP) Act.

CCSA, trade unions are given greater prominence in merger transactions that affect jobs.[51] Section 13A (2) of the South African Competition Act requires the merging parties to provide a non-confidential version of their merger application to the trade unions representing their employees. The Competition Act requires proper service on trade unions, and CCSA merger review will not commence until trade unions or employee representatives are properly served.

Government intervention in most African merger transactions ensures that mergers do not undermine overall government policies, such as industrialization and the competitiveness of SMEs in the domestic market. In South Africa, the CCSA is required by legislation to notify the government's Ministry of large mergers received, for the Minister to consider whether to make any representations on public interest. In Botswana, when a merger raises public interest concerns, the Minister of Investment, Trade and Industry is invited to provide written comments. The Nigerian Federal Competition and Consumer Protection Act provides that the Minister of Industry, Trade and Investments is entitled to make presentations to the FCCPC on public interest issues in a merger transaction. At the regional level, most RCRS, such as ECOWAS, COMESA, and CEMAC, do not provide for government intervention in merger control. The consideration of national-level PICs in merger control occurs through NCA representations, which reflect the overall policies of the national government.[52]

Finally, outright prohibitions of mergers based on PICS in Africa are rare. When a merger has a negative impact, most African countries impose conditions to *mitigate* the adverse effects on public interest. The conditions enable a country to benefit from the merger's pro-competitive gains while also addressing the merger's negative impact on specific public interests. This is an indication that while PICs are central in Africa's competition enforcement, competition agencies do not consider public interest grounds in isolation, but balance them against competition standard tests and public interest benefits, as the South African experience shows in the next sections.

4. Balancing Public Interest Considerations and Competition Standard Test: Lessons from South Africa

The legal test for justifying public interest in merger assessments has evolved through various merger decisions at the Competition Commission of South Africa (CCSA), the Competition Tribunal (Tribunal), and the Competition Appeal Court (CAC). In this paper, I collectively refer to CCSA, the Tribunal, and CAC as South Africa's competition institutions. The legal

[51] Changolle and Boshoff above n 39.
[52] Kigwiru, above n 18.

test for assessing public interest in South African merger assessments by the CCSA was set out in the 2016 Guidelines on the Assessment of Public Interest Provisions in Merger Regulation, under the Competition Act No. 89 of 1998.[53] In Section 6 of the 2016 PIC Merger Guidelines, the CCSA outlined five steps for determining whether a merger will be conditionally/unconditionally approved or prohibited based on PICs. These steps are: the *effect* of the merger on the public interest ground; the effect of the merger on the public interest must be *merger-specific*: the effect of the merger has to be *substantial*; the positive or negative effects of merger on public interest grounds; and finally, the most appropriate *remedies* to address the negative effects of a merger on public interest grounds. In 2024, the CCSA published the Revised Public Interest Guidelines Relating to Merger Control (2024 PIC Merger Guidelines).[54] The legal test of determining whether a merger will be justified or not on public interest grounds is provided for under Paragraph 5.4, as shown in Table 2 below.

Table 2: Legal test of determining the justifiability of PICs in South Africa's merger control regime.

The CCSA and Tribunal will follow the general approach set out below: 5.4.1 Determine the *likely effect* of the merger on each Public Interest ground; 5.4.2 Determine whether such effect on each Public Interest ground, if any, is *substantial*; 5.4.3 Where the merger has an effect on a Public Interest ground and is substantial,consider *possible remedies* to remedy that effect; and 5.4.4 where the effect contemplated in paragraph 5.4.3 cannot be remedied, the Commission may, on a case-by-case basis, *consider other equally weighty countervailing Public Interest grounds* identified. These must be measurable and monitorable and thus must be tendered in the form of conditions.

Source: CCSA 2024 Public Interest Merger Guidelines.

The 2024 PIC Merger Guidelines were objected to on the ground that they increased uncertainty and were likely to undermine investment and even the public interest, which the CCSA seeks to further. An analysis of the 2024 South Africa's PICs Merger Guidelines and the jurisprudence emanating from the CCSA, Tribunal and CAC decisions shows that five themes

[53] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998' Government Gazette No 40039, 30 May 2016) Available at https://www.compcom.co.za/wp-content/uploads/2022/09/Guidelines-for-the-Assessment-of-Public-Interest-Provisions-in-Mergers.pdf accessed 10 May 2025.

[54] Liberty Mncube, 'Has the Public Interest Factor in South Africa;s Merger Guidelines Gone too Far' https://www.lexology.com/library/detail.aspx?g=483fd45a-5b73-4342-97c0-ebcfd7bc2d6d accessed 10 May 2025.

emerge in South Africa's PICs during merger assessment. First, merger assessment takes a two-way approach, starting with the competition standard test, followed by the public interest test. Second, South Africa's competition institutions will consider the likely effect of the merger on the specific public interest. Third, such an effect on the PIC must be *merger-specific* and *substantial.* Fourth, even when a merger has negative effects on a specific public interest, the competition institutions will consider appropriate *remedies*. Finally, the 2024 PIC Merger Guidelines allow CCSA to consider other *equally countervailing public interest grounds.* What this fifth test does is to allow the CCSA to balance the public interest against each other, taking a holistic approach. This article discusses each of these legal tests.

4.1. The competition standard and public interest test are analysed separately but interrelatedly.

According to Section 4.1 of the 2024 PIC Merger Guidelines, the CCSA considers the public interest and the competition standard in equal status, as noted, 'Section 12A of the Act makes it explicit that the competition assessment and the Public Interest assessment are equal in status and that the Commission must assess the effects of all mergers on both competition and Public Interest grounds'.[55] Accordingly, PICs in South Africa's merger regime take a three-way analysis that is separate but interrelated. The first analysis is to identify the competition concerns. In this analysis, the CCSA and Tribunal will consider whether the merger will prevent or lessen competition by adopting the Substantial Prevention or Lessening of Competition (SPLC) test. In considering the SPLC test, the CCSA and the Tribunal will assess the coordinated and vertical effects of the merger, the presence of a failing firm, market consolidation both before and after the merger, and the likely removal of an effective competitor.[56] This analysis ensures that the merger promotes economic efficiency.

If the first analysis is answered in the negative, in the second step, CCSA and Tribunal must determine, 'whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented'.[57] This provision implies that an anti-competitive merger with potential technological, efficiency and pro-competitive gains is unlikely to be prohibited in South Africa. Merging parties, thus, must from the outset determine the merger's

[55] OECD, 'Efficiencies in Merger Control: Note by South Africa' DAF/COMP/WP3/WD(2025) 13.
[56] Changole and Boshoff above n 39, at 380.
[57] See Section 12A of South Africa Competition Act.

pro-competitive gains, such as consumer benefits, job creation, and lower production costs, that they can rely on to justify the approval of a merger if their merger is found to be anti-competitive.

Whether the merger lessens competition or not, or whether it yields technological, efficiency, or pro-competitive gains, in the third analysis, the CCSA and Tribunal must assess whether the merger can or cannot be justified based on PICs. During the third inquiry, the CCSA and the Tribunal will determine the effect of the merger on a specific public interest ground. An anti-competitive merger with positive public interest effects can be approved, while a competitive merger with negative public interest effects could be prohibited or approved with conditions. This three-step inquiry is conducted on a case-by-case basis and involves a balance of probabilities.

The objective of assessing the competition standard and public interest test separately is to treat both as having an equal status. Thus, competition agencies should not rank PICs higher than the competition standard test. Rather, they should analyze the two separately, but consider them interrelated. As noted by Mncube and Ratshisusu:

> The fact that competition law explicitly encompasses both efficiency and public interest goals requires implementation coherence. There are nuanced ways to strike a balance between the short run trade-offs, but in a meaningful way. First, the Competition Act specifies what qualifies as a public interest to address the problem of discretionary bounds. Secondly, in merger control for example, a complete competition analysis (which focuses on balancing competition harms with efficiency) is done first and separately. The competition analysis is followed then by a public interest analysis. This separation keeps it clear what competition requires and makes it possible to observe trade-offs.[58]

4.2. Effect of a merger on the particular public interest ground

In determining whether a merger will be approved conditionally, unconditionally, or prohibited, the CCSA and the Tribunal will consider the effect of the merger on the specific public interest. Merging parties are required to provide qualitative and quantitative evidence showing the likely effect of the merger on each of the public interests set out in Section 12A(3) of the South African Competition Act. According to Article 5.1 of the 2024 PIC Merger Guidelines, the CCSA notes that:

> In this regard, the outcome of the assessment must be more probable than not, and the parties will be required to provide qualitative and quantitative evidence for any claims regarding the effect of a merger on Public Interest.[59]

[58] Mncube and Ratshisusu above n 27, at , 79.
[59] See Para 5.1.

The likely effect of a merger on a particular industry is determined on a case-by-case basis and varies with the specific PIC. The 2024 PIC Merger Guidelines outline the likely impact of a merger on every public interest, which every merging party must be aware of. For instance, when analysing the likely effect of a merger on employment, the CCSA will consider the 'potential retrenchments considered at the time of the merger, retrenchments that have been considered, retrenchments that have been implemented from the time of the initiation of merger discussions to the date of filing'.[60] Concerning SMS/firms owned by HDPs' competitiveness, the CCSA will consider:

> Entry conditions or expansion opportunities within a market including raising or lowering barriers to entry expansion; preventing or granting access to key inputs, services, pricing and supply conditions; whether the merger parties will continue with purchasing from/supplying to the SMEs/HDPs firms; and preventing or allowing training, skills upliftment, and development in the industry; and denying or granting access to funding for business development and growth.[61]

Merging parties must, therefore, identify the likely effect of the merger on a particular public interest. The next step is to determine whether the likely effect of the merger is substantial and merger-specific, as discussed in the next section. It is at this stage that the detrimental effects of the merger on public interest will determine whether it is prohibited or justified on public interest grounds.

4.3. The merger's effect on the public interest should be substantial and merger-specific

In South Africa, the effect of the merger on public interest grounds must be substantial and merger-specific. A public interest is deemed to be merger-specific if the effect is causally related to, or results/arises from, the merger. Actually, a causal relationship exists if it is shown that if the merger had not occurred, the public interest ground would not be observed. Hence, the effect on the public interest is a direct consequence of the merger and does not exist independently.[62] If the effect is likely to exist in the absence of the merger, such an effect will be considered non-merger-specific, and the competition institutions analysis stops there. As aptly noted by Capobianco, in South Africa:

> In determining the likely effect of a merger on each of the public interest grounds, the Commission must determine whether such effect, if any, is merger specific and substantial.

[60] Article 6.2, 2024 PIC Merger Guidelines.
[61] Article 6.3, 2024 PIC Merger Guidelines.
[62] Dimension Data and MWEB Connect LM188Jan17.

> If the effect is found to be non-merger specific, the enquiry stops at that stage. If the effect is found to be merger specific but not substantial, the enquiry should stop at that stage.[63]

Generally, South Africa's competition institutions have had to address the question of whether retrenchments before and after a merger transaction were merger-specific and substantial. In 2012, Wal-Mart, a US retail company, sought to acquire 51% of Massmart's (a South African supermarket) ordinary share capital.[64] Wal-Mart had no presence in South Africa or Africa as a whole. Hence, the Wal-Mart/Massmart merger provided Wal-Mart with an opportunity to enter and invest in the African market. South African trade unions –South African Commercial, Catering and Allied Workers Union (SACCAWU), National Union of Metalworkers of South Africa (NUMSA), the South African Clothing and Textile Workers Union (SACTWU), Congress of South African Trade Unions (COSATU), the Food and Allied Workers Union (FAWU) and the South African Small and Medium and Micro Enterprise Forum (SMMEF)– raised public interest concerns. South African Ministries – the Minister for Economic Development Department (EDD), the Minister from the Department of Trade and Industry (DTI), and the Minister from the Department of Agriculture, Forestry, and Fisheries (DAFF) – were also involved in the merger proceedings. Other stakeholders involved in the merger proceedings were EarthLife and the Trade Law Centre for Southern Africa.[65]

The first public interest concerned the effect of the merger on employment. The assumption that this merger would lead to job losses in South Africa was based on Walmart's business model and its reputation for cost-cutting. Additionally, before this merger, in June 2010, Massmart had retrenched 503 employees from its Game Store in Nelspruit. According to Massmart, the retrenchment was due to operational reasons and re-engineering of its regional distribution centres. Contesting Massmart's argument, the trade unions argued that the retrenchment at Massmart was intended to demonstrate to Wal-Mart its cost-cutting potential. Furthermore, due to Wal-Mart's reputation of not honouring existing trade union agreements in other countries, particularly in the United States, it was feared that the merger would lower employees' labour standards.[66] The trade unions also argued that for Massmart's competitors,

[63] Antonion Capobianco, 'Efficiencies in Merger Control: Note by South Africa (OECD, Working Paper No.3 on Co-operation and Enforcement, May 2025), 10.

[64] SAFLI, Walmart Stores Inc v Massmart Holdings Ltd (73/LM/Dec10) (2011) ZACT 42 (29 June 2011).

[65] On information relating to the trade unions and other stakeholders presentation and submission, see, Parliamentary Monitoring Group, 'Walmart/Massmart Merger: Public Hearings' Available at https://pmg.org.za/committee-meeting/13153/#:~:text=The%20South%20African%20Clothing%20and%20Textile%20Worker's,suppliers%20to%20lower%20their%20prices%20and%20Walmart accessed 15 April 2025.

[66] OECD, 'Does Competition Kill or Create Jobs? Contribution from South Africa' DAF/COMP/GF/WD/(2015) 22.

such as Shoprite Checkers and Pick n Pay, to compete against Walmart, they had to reduce costs, which included the potential retrenchment of workers.

In addition to job losses, it was noted that the merger would also negatively impact the competitiveness of SMEs in the retail, agriculture, agroprocessing, and clothing sectors. There was concern that Walmart's reputation for sourcing inexpensive products worldwide could lead to a shift in its procurement towards import substitution and the closure of local suppliers in South Africa.[67] In response to the public interest concerns, the merging parties made commitments that they would comply with South African domestic employment laws and procure most of their products locally.[68] Following these commitments, the CCSA approved the merger without conditions.[69] The CCSA also noted that the effect of the merger on employment, which led to the retrenchment of 503 employees, was not merger-specific and substantial to warrant the prohibition of the merger on public interest grounds.[70]

The Tribunal had to address the question of whether Massmart's retrenchment of 503 employees from its Game Store in Nelspruit in June 2010, before the merger notification, was merger-specific and substantial. The trade unions and government ministries argued that these retrenchments were connected to the merger, as it was geared at making Massmart more attractive to Wal-Mart. Hence, the retrenchment was merger-specific. In response, the Tribunal in the Wal-Mart/Massmart merger reiterated that an effect on public interest consideration must be merger-specific and stated that:

> Expressed in less technical language, unless the merger is the *caus*e of the public interest concerns, we have no remit to do anything about them. *Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of specific transaction.* This narrow construction of our jurisdiction has not always been appreciated by some of the intervenors who have sought remedies whose ambition lies beyond our purpose. It is not our task to determine whether those ambitions are legitimate public policy goals: only whether they lie within our powers. The fact that a concern *exists independently of a specific merger,* however weighty that concern may be, does not bring it within our jurisdiction in performing merger adjudication.[71] (Emphasis added).

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[67] Tembinkosi Bonakele, Dave Beaty, Fathima Rasool and Drikus Kriek, 'Examining the Entry of Walmart into South Africa: A Stakeholder Management Perspective' (2014) 38(2) South African Journal of Labour Relations 78; Paresh Soni and Anis Mahomed Karodia, 'Unpacking the Wal-Mart Debate: A Discussion of the International Trade Process, Issues and Implications of Wal-Mart's Entry into South Africa' (2014) 1(10) International Journal of Accounting Research 7.

[68] CCSA, Final merger report on *Wal-Mart/Massmart* merger, Case number 2010Nov5445.

[69] CCSA, 'Commission Submits its Recommendation on Wal-Mart/Massmart Merger to the Tribunal' (14 February 2011, Press Release).

[70] John Oxenham, 'Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainity' (2012) 9 US-China Law Review 211, 221.

[71] Competition Tribunal, Wal-Mart/Massmart Merger 32-33.

In reaching its decision that the retrenchment was not merger-specific, the Tribunal argued that there was no evidence that Wal-Mart was involved in Massmart retrenchment decisions. Neither was there evidence from internal documents of the merging parties that the retrenchment was a consequence of the merger. Additionally, the retrenchment had taken place before the negotiations between Wal-Mart and Massmart had occurred. In particular, Massmart's decisions to implement regional restructuring occurred in 2002, and the subsequent decision to build distribution structures was made in 2008. There was no evidence that Wal-Mart was involved in Massmart's retrenchment decision. Rather, it was a coincidence that the retrenchment occurred at a time when Walmart and Massmart were in discussions. It was the Tribunal's view that:

> The coincidence in timing of the deal's imminence with the retrenchments is not strong enough to show its connection. Even if the operational justification for the retrenchments were exaggerated – we express no view on this - this might make, at best for the union, an unfair retrenchment scenario, *but not a merger linked one*. There is no evidence for instance that Walmart was requiring Massmart to engage in these particular retrenchments or that it knew of them at the time.[72](Emphasis added).

Additionally, the Tribunal emphasized that the retrenchment was part of a restructuring process that would lead to more job creation, as Massmart had demonstrated. Hence, in the Tribunal's view, to argue that the retrenchment was not necessary and had a negative effect on employment should be taken with caution. Another important aspect to note in the Wal-Mart/Massmart merger is that whoever alleges a public interest concern must demonstrate that it is merger-specific; then, the burden of proof shifts to the merging parties.[73] As discussed below by the Tribunal:

> The union would first need to show that retrenchments were merger specific. Only then would the burden of justification shift to the merging parties. The difficulty for the union is that they have not been able to cross this first hurdle. Massmart has given plausible reasons for the retrenchments that are not merger specific. The union would need to show on a balance of probabilities that this explanation is untrue and that but for the merger, the prior retrenchments would not have happened. It has not been able to prove this.[74]

On appeal to CAC, CAC agreed with the Tribunal's reasoning that the effect on the public interest must be linked to the merger. CAC, however, stated that although the Tribunal had relied on the fact that Massmart's retrenchment occurred before the merger, in some cases,

[72] Ibid, Para 54.
[73] Ibid, Para 59.
[74] Ibid, Para 51.

an effect on public interest will have a nexus with a specific merger, even if it took place before the merger was consummated. CAC, therefore, argued that:

> A retrenchment, which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broader merger decision making process and would, accordingly, be sufficiently closely related to the merger in order to demand that the merging parties must justify their retrenchment decision.[75]

The question of the effect of a merger on a particular public interest, to be specific, was also addressed in the case of BB Investment Company (PTY) Ltd (BB) and Adcock Ingram Holdings (Adcock).[76] BB sought to acquire the sole control of Adcock Ingram Holdings in South Africa. The merger raised no competition concerns but was likely to have an impact on employment, as Adcock Ingram indicated that it would result in the redundancy of 51 employees out of a total of 2,227. Initially, the CCSA had no issue with Adcock's redundancy strategy, as it had followed a rational and fair process in identifying the redundant positions. Additionally, it was not substantial as it accounted for only 2.4% of the employees. However, later, it came to the attention of the CCSA from the BB's controller (Bidvest) that, post-merger, it would institute further retrenchments beyond the 51 positions.

Following this revelation, CCSA recommended to the Tribunal that the merger be prohibited, subject to the condition that, post-merger, the parties' retrenchment be limited to only 51 employees. The merging parties contested CCSA's recommendation on the ground that the retrenchment was not merger-specific.[77] The Tribunal, in determining whether the contemplated retrenchment post-merger was merger-specific, defined what constitutes merger-specific as:

> Means conceptually an outcome that can be shown, as a matter of probability, to *have some nexus associated* with the incentives of the controller. But firms are dynamic institutions. Not every change that results post-merger is necessarily attributed to the merger. Such an approach is far too mechanistic. Thus, we can conceive of changes in a firms' behavior even post-merger that would have happened in any event and can be thought of as not being merger specific.[78]

Concerning the effect of the merger on employment, the Tribunal emphasized that one must distinguish between 'employment loss associated with the merger nexus, referred to as "merger specific" employment loss and those in the second category of non-merger specificity, often referred to as "operational" employment loss'.[79] In this case, employment loss that is a

[75] Ibid, para 140.
[76] BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd (case:18713) paragraphs 109 - 110.
[77] Ibid, para 82.
[78] Ibid para 55-57.
[79] Ibid para 58.

result of firm realignment to cut operational costs or reduce duplication of roles does not have a nexus with the merger. Such an effect on employment is not merger-specific but operational-specific. In this case, the Tribunal found that post-merger, the retrenchment was expected to be substantial in terms of actual numbers and percentage of work voice. According to the Tribunal:

> However the comparison with the planned retrenchments of 51 0or 2.4% of the workforce under…is so glaring, as to lead one to legitimately draw the inference that the difference in these orders of magnitude can no longer be explained by operational requirements, but a change in a policy that is merger specific. There is no other reasonable way to account for this difference…[80]

Against this backdrop, if merging parties were to argue that the effect on the public interest is not merger-specific, they must show that no nexus exists between the strategies adopted and the conclusion of the merger. In this case, the merging parties can demonstrate that such a strategy was purely for operational reasons. Furthermore, as noted in the BB/Adcock merger, even if the effect is merger-specific, it will not automatically lead to the prohibition of the merger, as the merging parties can propose specific justifications.[81] For example, in the case of retrenchment, Article 6.2.12 of the 2024 PIC Merger Guidelines provides that when merging parties submit a public interest justification for job losses, then the CCSA will consider the following arguments: saving a failing firm, lowering costs for efficiency and lowering costs for consumers. The merging parties could invoke the factors mentioned earlier to justify the merger-specific public interest effects. Alternatively, the merging parties could adopt remedies, which this paper discusses in the next section.

4.4.Remedies

The debate on the PICs in Africa's merger control sometimes paints a misleading picture, suggesting that mergers will be automatically prohibited if they harm a specific public interest. Yet, there are few mergers where African competition institutions have prohibited a merger solely on the grounds of its negative effects on the public interest. Instead, if a merger harms a particular public interest, the African competition institutions require the merging parties to propose suitable remedies. The goal of remedies in merger control affecting public interest is to address the merger's negative impact on public interest grounds, while at the same time, allowing the merger's pro-competitive gains. It is only when the remedies cannot address the

[80] Ibid, para 84.
[81] Ibid para 94.

negative effects on the public interest that the competition institutions prohibit the merger, as noted by the Tribunal in the Wal-Mart/Massmart merger that:

> A survey of the merger decisions since the Act came into being shows that in no case has an adverse public interest condemned an otherwise unproblematic merger, nor has a problematic merger from a competition perspective been rescued on public interest grounds. This does not mean that no public interest grounds have been found to exist in a merger context. Rather these have been thought adequately addressed by the imposition of conditions on a particular transaction.[82]

Appropriate remedies are considered on a case-by-case basis depending on the particular public interest affected by the merger. When it comes to employment, possible remedies include a retrenchment moratorium for a specific period of years post-merger, or placing a cap on the number of job losses, reskilling the affected workers to improve their prospects of being employed by other firms or making a commitment to give preference to the affected workers when new positions arise within the firm. The merging parties will be required to establish an Employee Share Ownership Programme (ESOP). According to Section 95(1)(c) of the Companies Act (Act 71 of Citation2008), an ESOP is:

> A scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees, officers and other persons closely involved in the business of the company or a subsidiary of the company, either by means of the issue of shares in the company, or by the grant of options for shares in the company.

Regarding SMEs and firms owned by HDPs, possible remedies include the development of a supplier development fund (SDF) for technical, financial, or other forms of assistance. For instance, the merging parties were required to establish the Massmart SDF as a condition for approving the 2012 Walmart/Massmart merger.[83] The SDF constituted both financial and skill development support to local suppliers. The SDF had been initiated by the merging parties, following the Tribunal's decision in May 2011 to support SMEs from disadvantaged communities. During the CAC hearing, the merging parties proposed an SDF of R100 million. The government proposed a funding range of R500 million to R2 Billion for a period of 5 to 10 years. CAC ordered that a maximum amount of R200 Million be allocated to Massmart to support and integrate local suppliers into Wal-Mart's global value chain.[84] In addition to the specified programmes, through the SDF, Massmart provided support to suppliers to meet specific retail requirements such as food safety compliance and business management training

[82] Para 34.
[83] Thulani Mandiriza, Thembalethu Sithebe and Michelle Viljoen, 'An Ex-Post Review of the Wal-Mart/Massmart Merger' (CCSA Working Paper CC2016/03).
[84] 10/CAC/Jun11 and 111/CAC/Jun11 (9 March 2012), page 28

through its Services to Suppliers Programme. The SDF, as contemplated by CAC, was designed to increase local suppliers' participation through market access and enable them to benefit from capacity development.[85]

A case analysis by South African competition institutions has revealed that adopting remedies alone is insufficient. The remedies adopted must be merger-specific. If the remedies reflect strategies in the firm's internal documents, South Africa, in several cases, has considered such remedies as not merger-specific. For instance, ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC and the Burger King (South Africa) RF (Pty) Ltd, Grand Foods Meat Plant (Pty) Ltd and Competition Commission of South Africa IMO 53 Aug21(Burger King merger), ECP Africa Fund IV LLC and ECP Africa Fund IV A LLd C, private equity funds registered in Mauritius, notified the CCSA of their intention to acquire 95.78% of the issued share capital of Burger King South Africa and 100% of the issued share capital of Grand Foods Meat. Following the assessment, the CCSA determined that the merger posed no competition concerns.[86] The CCSA also found that the merger had no negative effect on employment. Neither did the merger negatively affect employment, as the merging parties provided an unequivocal undertaking that there would be no retrenchments. [87] However, the CCSA prohibited the merger because, post-merger, the shareholding of HDPS would decrease from 68% to 0%.[88]

To mitigate the impact of the merger on the spread of HDP firms' ownership, the merging parties proposed investment expansion commitments. For example, they proposed to increase the number of Burger King outlets in South Africa to at least 150 from 90 by the end of 2026. The CCSA rejected this proposal, arguing that it did not address the specific public interest concern, namely the elimination of firms owned by HDPs. This commitment was already contained in Burger King's internal documents, which reflected its expansion goals and were independent of the merger. The Tribunal approved the merger, subject to the condition that the merged firm establish an employee share ownership program, entitling employees to an effective 5% interest in the target firm. This remedy was merger-specific as it increased the

[85] Ratshidaho Maphwanya, *Supplier Development Funds as Merger Remedies: An Expost-Review of the Walmart-Massmart Merger Remedies* (Masters Degree, University of Pretoria 2019).
[86] Jacqueline Church, 'Investors Beware: Public Interest Considerations in Merger Review are Significant: The Burger King Matter" (2024) 141(3) The South African Law Journal 437.
[87] Daryl Dingley, 'Competition Commission's Decision on Burger King Merger Creates Uncertain Future for M/A Transactions' (Lexology 21 October 2021).
[88] Pieter Steyn, 'The Increasing Importance of Broad-Based Black Economic Empowerment (BBBEE) in South African Competition Law' (2 May 2022, Kluwer Competition Law Blog).

spread of ownership of firms owned by HDPs. Hence, this analysis requires that, in formulating remedies, merging parties should aim at addressing the specific public interest concern.

The remedies must also be adequate, appropriate, proportionate and enforceable. In the Wal-Mart/Massmart merger, the question arose whether the import quota, which would hold Massmart's existing local procurement for a specific period, was appropriate. [89] In contestation, the merging parties argued that the procurement condition via the import quota was in contravention of South Africa's international trade obligations.[90] In particular, General Agreement on Tariff and Trade (GATT) 1947 Article III (4) and (5). Also, the import quota created an unjustified asymmetry between the merged entity and its rivals with the potential to import. Additionally, the remedy to procurement conditions was not merger regulation; other specific industrial policy instruments could suffice. In rejecting the import quota, the Competition Tribunal stated that, 'for this reason we do not consider that the conditions proposed, even in the more nuanced form finally put forward by SACTWU, are *appropriate, proportional, rational or enforceabl*e'.[91] (Emphasis added). Instead of an import quota, the merging parties offered an investment remedy of R100 million. In this investment remedy, as noted by Mandiriza and others,[92] would lead to:

> Establishment of a R100 million programme aimed exclusively at the development of local South African suppliers, including SMMEs. In addition, the merged entity would establish a training programme to train local South African suppliers on how to do business with the merged entity and Wal-Mart.

The Tribunal noted that, unlike the import quota, the investment remedy would not insulate the local manufacturers from international competition but integrate them into international markets. Moreover, the investment remedy was appropriate, proportionate and enforceable.[93] Also see *Competition Commission of South Africa v Mediclinic Southern Africa and Another (CT 31/20) [2021] ZACC 35 (15* October 2021) ('Mediclinic'), where the Tribunal in prohibiting the merger on public interest grounds held that the remedies adopted by the parties were not adequate, proportionate or enforceable and categorically stated that:

> However, after engagement with the merging parties on potential remedies, and taking into account the concerns raised by medical schemes, we have found that the proposed behavioural remedies offered by the merging parties did not address the source of the competitive harm, were limited in duration and were also inappropriate or inadequate in

[89] Competition Tribunal, Wal-Mart/Massmart Merger, para 73.
[90] See Merging Parties written submissions dated 16 May 2011 pages 67-74
[91] Competition Tribunal, Wal-Mart/Massmart Merger, para 117.
[92] Mandiriza and others, above n 83.
[93] Competition Tribunal, Wal-Mart/Massmart Merger, para 121.

> a number of other respects, including that the Commission would not be able to effectively monitor and enforce the various behavioural condtions.[94]

Remedies, therefore, are used as a tool to balance public interest concerns and the pro-competitive gains of the merger.

4.5.Holistic approach to public interest assessment in mergers?

Although South African competition institutions take a proactive stance towards PICs in merger assessments, public interest is not assessed in isolation. A merger that has a substantial effect on a particular public interest can be approved conditionally or unconditionally, provided it generates public interest benefits, such as efficiencies, consumer welfare, and other public benefits. Furthermore, the CCSA has stipulated in its 2024 PIC Merger Guidelines that where the likely effect of a merger cannot be remedied, on a case-by-case basis, it will consider other equally weighty countervailing public interest grounds.

When the effects of a merger on each public interest are assessed separately, then they are assessed collectively in deciding whether to approve the merger or not; this approach is referred to as holistic. According to Mncube, a holistic approach ensures that 'the different public interest factors are assessed separately and then, if necessary, weighed against each other to arrive at a net conclusion on the public interest effects of the merger'. [95] Furthermore, a holistic approach to PICs ensures that no PIC has precedence over the other. As noted by Mncube and Ratshisusu, that:

> In merger reviews, the Tribunal is required to consider all five of the public interest factors in making its determination – however, one factor does not take precedence over another factor when determining whether the merger can or cannot be justified on public interest grounds. They should all be considered together to strike a reasonable equilibrium between the different factors.[96]

A holistic approach should be the preferred method for assessing whether a merger should be prohibited or approved based on PICs. In 2000, the *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group Ltd* (the Distillers/SFW merger) merger involved Distillers seeking to acquire the assets and liabilities of SFW, subject to shareholder approval in the proprietary spirits market in South Africa. [97] The merging parties argued that the merger should be approved on public interest grounds as it created an internationally

[94] Mediclinic Merger para 19.
[95] Liberty Mncube, 'Has the Public Interest Factor in South Africa's Merger Guidelines Gone Too Far?'(BRG 2025) Available https://www.thinkbrg.com/thinkset/has-the-public-interest-factor-in-south-africas-merger-guidelines-gone-too-far/ accessed 12 May 2025.
[96] Mncube and Rathisusu above n 27, at 88.
[97] Distillers/SFW merger, 08/LM/Feb02 (2003) ZACT 15 (19 March 2003).

competitive firm and promoted the spirit sector. Trade unions, on the contrary, argued that the job losses occasioned by the merger negatively affected employment, and that the merger should be prohibited. The Tribunal had to decide how to balance these competing public interests.

In the Tribunal's view, these public interests pulled them in opposing directions. In this case, 'multiple public interest grounds are implicated, which suggest contradictory outcomes'.[98] When public interests are at war with each other, the Tribunal noted that balancing and reconciling contradicting PICs can be difficult and identified two scenarios where contradiction can manifest:

> One is when the opposite *interests collide head on*, like two medieval knights in a jousting contest where only one can emerge as the victor and continue his course. This is where we are faced with a stark choice of whether to prohibit or to approve. The other situation is where the *opposite interests avoid one another* like two vehicles bypassing each other in opposite directions on a dual lane road. They pass one another without affecting their respective opposite courses. In this case, unless we find that the employment grounds justify prohibition, the unions' public interest and those of the parties do not collide hence we have no jousting, contest and the opposing interests can travel past one another on the road in their separate lanes.[99]

When public interests contradict, the best approach according to the Tribunal is:

> …each public interest ground asserted should be viewed *in isolation to see if it is substantial*. Assuming that the answer to that is in the affirmative and that more than one ground exists which contradicts the other/s, we need to see, first, if they can be reconciled and, if not, we must then balance them and come to a net conclusion.[100]

To the Tribunal, thus, emphasized that the likely effect of the merger should be substantial. The South African Competition Act does not stipulate how to evaluate what constitutes a substantial effect. It is upon the competition institution's discretion and on a case-by-case basis to determine what constitutes a substantial effect. In this merger, the Tribunal found that the merger's effects on employment were not substantial enough to warrant prohibiting it, as only 16 out of 1,414 job losses were contested by employees. Neither were they so adverse that no other law or regulator could remedy them. Moreover, the Tribunal was of the view that the retrenchment package offered by Distell in response to job losses was sufficient and reasonable. In a balancing approach, the Tribunal stated that:

> In our view, although the loss of jobs is significant, the overwhelming acceptance of voluntary retirement and retrenchment packages has lessened the adverse effects, and

[98] Ibid para 216.
[99] Ibid paras 221-223
[100] Ibid para 217-218.

we cannot conclude that, on balance, the final effect on employment constitutes a substantial public interest ground that would justify the prohibition of the merger.[101]

In the Distillers/SFW, the Tribunal's approach shows that it is critical to determine whether the effects of the merger on the specific public interest are substantial. Additionally, in this specific merger, there were no concerns regarding competition. In the Tribunal's view, when there is no balancing between competition concerns and specific public interest, then there is no need for that specific public interest to be balanced with other public interests. In this case, the Tribunal concluded that:

Note also that the public interest benefits to the industry and the country that the parties claim are not negated by any conditional remedies that might be imposed in the affected markets, and, hence, no evaluation of them is needed if no balancing is required between the competitive concerns and the public interest asserted. The same justification for our not evaluating the alleged efficiency gains is equally applicable here.

Unlike the Distillers/SFW merger, where the likely effect of the merger on employment was not substantial to warrant a balancing act, in the 2023 Tribunal reasoning in Epiroc Holdings Ltd and K2022596519 (South Africa) (Pty) Ltd and Polkadots Properties 117 (Pty) Ltd,[102] In this specific merger, the Tribunal had to weigh the impact of the merger on reducing the ownership share of HDPs compared to increasing employment opportunities and SME's competitiveness in the market. The Tribunal reiterated the need for a holistic approach, with each public interest weighed against each other and stated that:

As regards the public interest analysis under section 12A(3) of the Act, the Tribunal has previously explained that it is a holistic one, in terms of which the different public interest grounds listed in section 12A(3) must be separately assessed, and then, if necessary, weighed against each other in order to arrive at a net conclusion on the public interest effects of the merge.[103]

Against this backdrop, a negative effect of a merger on a specific public interest should be 'mitigated or outweighed by positive effects in relation to one or more of the other factors listed in Section 12A(3)'.[104] Moreover, the public interest must be balanced against the remedies adopted by the merging parties. In approving the merger with conditions, the Tribunal held that:

In this case, therefore, the significant reduction in HDP ownership of New Aard that will result from the proposed merger must be balanced against the establishment of an ESOP to promote worker ownership as well as against the positive public interest effects brought about by the merger (having regard to the enhanced conditions tendered by the merging parties) in relation to the other factors listed in section

[101] Ibid para 242.
[102] LM148Nov22
[103] Ibid, para 75.
[104] Ibid para 77.

> 12A(3)…Holistically...we are satisfied with the public interest commitments of the merger parties.[105]

In conclusion, competition agencies should adopt a holistic approach when assessing public interest grounds in merger assessment. This entails balancing public interest grounds against one another, as well as against potential public interest benefits. Additionally, public interest should only justify prohibiting the merger if the likely effect of the merger on public interest is substantial and the remedies are inadequate.

5. Conclusion

Public interest is a central feature of Africa's competition law enforcement, and it will remain so. PICs enable African competition agencies to address national-specific market failures and legacies of colonialism on markets. If used appropriately, public interest as a tool can increase the participation and inclusion of Africa's industries and businesses in local and global markets. However, public interest that is not well-defined or assessed poses a barrier to investment, as it creates regulatory uncertainty. To benefit from the merger transactions and create a conducive environment for business investment, public interest and competition standards in merger assessment should be viewed as interrelated and complementary, rather than conflicting. In this scenario, public interest is viewed as a tool to remedy market failures and inequalities while facilitating the goals of competition law. In this mutual interrelationship, competition agencies apply a legal test promptly to ensure that the pro-competitiveness of mergers is upheld. The legal test, as the South African merger regime has revealed, should focus on merger-specific effects, the substantiality of the merger, and the inadequacy of remedies. Even when the remedies are adequate, competition agencies should strike a balance between countervailing public interests.

To enhance regulatory certainty in competition law enforcement, competition legislation must identify the specific public interest grounds. It should be expeditious when analysing mergers to prevent merging parties from abandoning their investment due to a lengthy merger assessment delayed by public interest considerations. There is also a need for competition agencies to adopt guidelines that outline the legal test used to determine whether a merger will be prohibited, approved conditionally, or unconditionally, based on public interest. Businesses applying for merger transactions and exemptions must anticipate public interest concerns to be raised. They should identify how their transactions affect specific public

[105] Ibid para 78.

interests as identified in the competition laws and devise strategies to remedy their impact on public interest