

Speaking Across Each Other: Institutional Silos and the Limits of South Africa's Deconcentration Project

*Competition Law and Industrial Policy in Post-Apartheid South Africa, with key comparative
Reflections from Kenya and Ghana*

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Abstract

This paper argues that South Africa's two principal instruments for addressing the racialised concentration of economic power Broad-Based Black Economic Empowerment (B-BBEE) policy and competition law were built as institutional siblings without a shared household. Both Acts answer to the same historical diagnosis: that apartheid deliberately fused racial exclusion with market concentration, and that undoing one requires undoing the other. Yet the B-BBEE Commission and the Competition Commission, established under the same government department six years apart, have never been folded into a single enforcement architecture. By drawing on South African merger jurisprudence, national B-BBEE compliance data, and a comparative reading of Kenya's ownership-transfer law alongside Ghana's absent competition regime, this paper positions itself within the conference's industrial policy and competition law track and shows that the coordination gap between these two instruments is not a peripheral administrative oversight but the central reason elite capture persists inside a transformation project that was never designed to fail. The paper closes with institutional proposals for the Commission's consideration.

Introduction

In 1998, and again in 2003, South Africa passed two pieces of legislation that shared a single ambition: to dismantle the concentrated economic architecture apartheid had spent half a century constructing. The Competition Act sought to discipline market power through enforcement. The Broad-Based Black Economic Empowerment Act sought to redistribute ownership through policy. Both instruments are, at root, industrial policy in the fullest sense. A series of deliberate state intervention in who controls productive capacity and on what terms. This paper takes that equivalence seriously and treats B-BBEE as South Africa's foremost instrument of industrial policy, standing alongside competition law as the country's primary instrument for disciplining economic power.

More than two decades later, and nearly a decade since the B-BBEE Commission was established alongside its older counterpart, the two regimes have never been folded into a shared institutional architecture. This paper argues that the persistence of elite capture within South Africa's transformation project is not simply a failure of either instrument in isolation, but a consequence of industrial policy and competition law being designed, administered, and enforced in parallel rather than in conversation. Where B-BBEE measures ownership, competition law measures power; the space between those two measurements is where capture happens. This is precisely the terrain the conference's second track competition law and industrial policy invites academic scholarship to interrogate, and it is the terrain this paper occupies.

The argument proceeds in five movements. In section 2 we situate the coordination problem within South Africa's specific socioeconomic inheritance. Section 3 we trace the parallel design histories of the two regimes. Section 4 we examine through South African merger jurisprudence, the places where competition law and B-BBEE already touch and demonstrates that even this contact is partial, contested, and methodologically incoherent. Section 5 we turn to Kenya and Ghana, using both as comparative shadows that show institutional fragmentation is a continental pattern rather than a uniquely South African failure. Section 6 we dare to propose specific, bounded mechanisms for coordination. The paper closes by returning explicitly to the conference's industrial policy theme.

The Post Apartheid and Socio-historical context

Like anything else, the South African market phenomena taken in isolation becomes inherently ambiguous, thus the need to understand its unique sociohistorical context. South Africa did not emerge from apartheid with a market that merely needed correction at the margins; it emerged with an economy whose ownership structure had been deliberately and legally constructed to exclude majority of its population from capital, credit, and the professions that generate both. So, this was not incidental concentration. It was concentration as policy, sustained across generations, and it produced an economy in which market power and racial exclusion were, quite literally, the same structure viewed from two angles.

This is the condition both pieces of legislation inherited, and it is why treating B-BBEE and competition law as addressing separate problems one social, one economic misreads their shared origin. A market concentrated in

ownership and a market concentrated in power are, in South Africa's specific history, **the same market**. Any policy response that treats them as distinct risks solving neither, nor the socioeconomic reality more than three decades into democracy suggests that risk has materialised. In the first quarter of 2026, more than four in ten young South Africans aged fifteen to thirty-four were neither employed, in education, nor in training, with the NEET rate for that cohort reaching 45.6 percent a burden that fell more heavily on young women, at 39.2 percent among those aged fifteen to twenty-four, than on young men, at 36 percent (Statistics South Africa, 2026). Youth unemployment for the narrower fifteen-to-twenty-four cohort stood at 60.9 percent in the same quarter, against a national unemployment rate of 32.7 percent (Statistics South Africa, 2026). These are not abstractions. They are the lived measure and experience of what happens when an economy's ownership structure and its competitive structure are managed by institutions that do not share a common register of what success looks like.

The ownership data compounds the picture, and it does so in a way that is itself instructive about coordination failure. For much of the past decade, the B-BBEE Commission's own annual compliance reporting has recorded black ownership of JSE-listed entities fluctuating in the high twenties and low thirties as a percentage 27 percent in 2017, a decline to 25.2 percent in 2018, a rise to 29 percent by 2019, and a widely cited figure of 39 percent average black ownership across JSE-listed entities in 2022 (B-BBEE Commission, 2024; SAnews, 2023). An independent 2026 analysis for the Black Management Forum found that direct black ownership across South Africa's sixty largest listed companies stood at just 6.9 percent of South African assets at the end of 2024, a figure the report attributes to structural loopholes in the B-BBEE Codes that permit companies to claim credit for the Public Investment Corporation's passive pension-fund holdings and for indirect ownership that has never translated into active shareholding or influence (Gqubule, 2026, as reported in *Businessday.co.za*, 2026a, 2026b). The gap between the two figures is not a rounding error; it is a governance problem, because the entity charting national transformation progress and the entity assessing ownership consequences in merger review are, as the next sections show, working from different definitions of the very thing both are meant to be measuring.

The Policy Design

The Competition Act of 1998 and the B-BBEE Act of 2003 were not conceived in the same room, and their divergent institutional histories tell part of the coordination story on their own. The Competition Act established the Competition Commission and Competition Tribunal as independent, quasi-judicial bodies with a primary mandate to prevent the substantial prevention or lessening of competition, alongside a secondary but constitutionally significant public interest mandate including, under what is now section 12A(3)(e), a requirement that merger review consider the effect of a transaction on the promotion of a greater spread of ownership, particularly among historically disadvantaged persons (Cliffe Dekker Hofmeyr, 2023; Bowmans, 2024).

The B-BBEE Act, by contrast, emerged five years later as a broader socioeconomic transformation framework rather than a competition instrument, and for its first decade it operated without any dedicated enforcement body at all. Where the Competition Act built enforcement teeth into its founding architecture, B-BBEE's teeth came late. In 2013,

an amendment to the Act criminalised fronting and created the B-BBEE Commission, whose establishment task team was appointed in August 2015, and which began operations on 1 April 2016 (Parliamentary Monitoring Group, n.d.; Hogan Lovells, n.d.). In its first two years, the newly formed Commission received 334 complaints, 83 percent of which concerned fronting rather than ownership shortfalls directly evidence that the young institution's early priority was policing circumvention rather than reshaping structural ownership (Parliamentary Monitoring Group, n.d.).

What is striking, and what complicates a simple story of total institutional silence, is that the two bodies did in fact attempt formal contact early on. Parliamentary briefing records show that in the 2016/17 and 2017/18 financial years, the B-BBEE Commission concluded a Memorandum of Understanding with the Competition Commission, alongside a similar arrangement with the National Gambling Board, while equivalent memoranda with the South African Revenue Service and the National Prosecuting Authority remained under negotiation (Parliamentary Monitoring Group, n.d.). Such details matter for the argument of this paper, because it shows that the two institutions recognised, at the level of formal gesture, that their mandates overlapped.

What the public record does not show in the years of B-BBEE Commission reporting, Competition Commission case law, or academic commentary reviewed for this paper is any evidence that the memorandum produced shared data systems, joint investigative protocols, or a common definition of the ownership metrics each institution is meant to be advancing. A memorandum of understanding is not the same as an institutional architecture. The two bodies agreed, in principle, to speak. What they did not build was a shared vocabulary for the conversation.

Where and how they speak across each other

The clearest evidence that this coordination gap has real consequences comes not from an absence of contact between B-BBEE and competition law, but from the character of the contact that does exist. South African merger control is, on paper, one of the more transformation-conscious regimes globally: section 12A(3)(e) of the Competition Act imposes what the Commission's own guidelines describe as a positive obligation on merging parties to promote a greater spread of ownership, and the Commission has, in a series of cases, treated a merger's effect on historically disadvantaged ownership as grounds for prohibition or conditional approval (Werksmans Attorneys, 2026).

The Burger King case illustrates the point sharply. In 2021, the Competition Commission initially prohibited the proposed acquisition of Burger King South Africa and Grand Foods Meat Plant by the private equity fund ECP Africa on public interest grounds alone, because the transaction would have reduced historically disadvantaged shareholding in the target firms from 68.56 percent with 22.87 percent held by black women to zero (De Rebus, 2022). The merger was ultimately approved only after the acquiring parties agreed to establish a five percent employee share ownership scheme, invest R500 million in capital expenditure, create sixty new outlets, increase historically disadvantaged employment by at least 1,250 positions, and improve the merged entity's B-BBEE scorecard (Norton Rose Fulbright, n.d.). A similar pattern shaped the Competition Tribunal's 2020 approval of PepsiCo's acquisition of Pioneer Foods, where the merging parties committed to a R5 billion investment in the local economy, a workers' trust intended to lift

historically disadvantaged and worker equity toward 12.9 percent, and R600 million for a five-year small business and agricultural development fund (Cliffe Dekker Hofmeyr, 2020).

These cases demonstrate that competition law can, when it chooses to, act as a genuine instrument of ownership transformation. But they also expose exactly where the silo begins. First, the remedies negotiated in merger review are deal-specific and episodic: a five to ten percent employee share ownership plan, or a divestiture of twenty-five percent plus one share to historically disadvantaged purchasers, applied to the handful of transactions large enough to trigger notification thresholds (Bowmans, 2024). B-BBEE, by contrast, is meant to operate as an economy-wide, continuously monitored compliance system under the Codes of Good Practice. The two frameworks measure the same underlying concept: historically disadvantaged ownership using different thresholds, different triggers, and, critically, no shared register that would allow an ownership gain secured through merger conditions to be reconciled with a firm's separate B-BBEE scorecard rating.

Second, and more troublingly, the legal certainty underpinning even this partial engagement is now being narrowed from within the competition law system itself. A 2026 Competition Tribunal decision concerning the acquisition of Baxter International's kidney care business by CP Spruce Holdings found that ownership remedies were not warranted for a foreign-to-foreign transaction with no South African shareholding, no local operations, and no negative effect on existing historically disadvantaged ownership, prompting commentary that the Commission's guidelines, which frame ownership promotion as a positive obligation on all mergers, are not binding on the Tribunal and may be legally uncertain in their own right (Werksmans Attorneys, 2026).

This uncertainty is compounded by a broader critique, voiced publicly by Supreme Court of Appeal Judge David Unterhalter, that South African merger control has allowed public interest considerations to consume too much of what merger review is meant to be about, creating unpredictability that unsettles both investors and the transformation objective itself (ThinkBRG, n.d.). The institutional consequence is a competition law regime that is simultaneously the only place where ownership and market power are assessed together, and a regime whose own tribunal is actively narrowing when that assessment applies.

Third, and most fundamentally, the two systems cannot even agree on how to count. The 2026 Transformation Lens analysis found that the headline discrepancy between the B-BBEE Commission's reported 39 percent average black ownership of JSE-listed entities and the 6.9 percent figure derived from company annual reports traces to specific, identifiable design choices in the B-BBEE Codes: a rule permitting companies to exclude mandated pension and provident fund investments and state ownership up to a combined maximum of forty percent when calculating their denominator, and a separate rule allowing indirect ownership including the Public Investment Corporation's R1.1 trillion in passive JSE Top 60 holdings to be counted as black ownership credit regardless of whether it confers any influence over company strategy (Gqubule, 2026, as reported in *Businessday.co.za*, 2026b).

Nedbank's 2024 annual report, for instance, disclosed direct black ownership of 0.6 percent, while its B-BBEE certificate for the same period recorded 36.59 percent (*Businessday.co.za*, 2026a). No equivalent methodology exists

inside the Competition Act's public interest guidelines, which work instead from deal-specific shareholding percentages disclosed at the point of transactions.

A firm can therefore be simultaneously B-BBEE compliant by the Codes' measurement convention and the subject of a Competition Commission finding that its merger would substantially reduce historically disadvantaged ownership by a different, stricter measure because the two institutions responsible for tracking the same national transformation objective have never agreed on what counts as ownership in the first place. This is the institutional silo in its purest form: not two agencies refusing to speak, but two agencies speaking different languages about the same word.

Our comparative lens: Kenya and Ghana put into perspective.

South Africa's coordination gap is not a uniquely South African pathology. A brief comparative look at Kenya and Ghana suggests that institutional fragmentation between ownership-transformation policy and competition law is closer to a continental default than an exception which sharpens, rather than dilutes, the urgency of the argument this paper makes for South Africa specifically.

Kenya offers a mirror-image case. Since June 2016, the Companies Act 2015 has required foreign companies newly registering in Kenya to cede at least thirty percent of their shareholding to Kenyan citizens by birth, with penalties of five million shillings for non-compliance (UNCTAD Investment Policy Hub, 2016). This is, in substance, an ownership-transformation instrument comparable in ambition to B-BBEE's ownership element. Yet it sits entirely outside Kenya's Competition Act of 2010, which is administered by the Competition Authority of Kenya and whose stated objects include promoting the competitiveness of national undertakings in world markets and enhancing consumer welfare, but which contains no cross-reference to the domestic ownership requirement at all (Kenya Law, 2022; Woadvocates, n.d.). The Companies Act's ownership rule is enforced through company registration and Treasury regulation; the Competition Act's merger review is enforced through the Authority's own thresholds and public interest tests, which unlike South Africa's do not appear to incorporate an ownership-spread requirement as a distinct statutory ground for merger assessment. Kenya has, in other words, built the same two-track structure as South Africa: an ownership-transformation instrument and a competition instrument, administered by different bodies, without a formal bridge between them.

Ghana presents the inverse and, in some ways, more instructive case: an ownership-transformation instrument operating with no competition-law counterpart at all. Ghana has never enacted comprehensive competition legislation. Its only general-purpose statute touching the field, the Protection Against Unfair Competition Act of 2000, has been widely described by legal practitioners and jurists as largely ineffectual, and repeated policy roundtables convened by civil society organisations such as CUTS International have called for its replacement without success (CUTS International, n.d.; Ghana News Agency, 2023). Legal commentary attributes the resulting regulatory landscape to fragmentation across sector-specific regimes telecommunications legislation contains dominance thresholds that no equivalent statute applies to other sectors compounded by a documented lack of political will to enforce even the instruments that exist (Nartey Law Firm, 2024). Ghana nonetheless has ownership-transformation policy: its

Petroleum (Local Content and Local Participation) Regulations, first issued in 2013 and amended in 2022, require every petroleum agreement or licence to include a minimum five percent equity participation for indigenous Ghanaian companies, structured through mandatory joint ventures with foreign service providers (Lex Africa, 2022). Ghana has therefore built industrial policy sector-specific, ownership-conscious, and genuinely enforced within its narrow domain with no competition law regime to coordinate it against at all. Where South Africa's problem is two commissions that do not speak to each other, Ghana's is one commission that has no counterpart to speak to in the first place.

Read together, these two cases suggest that South Africa is, paradoxically, ahead of much of the continent in having built a competition law regime that formally engages ownership at all the section 12A(3)(e) obligation, whatever its current legal uncertainty, has no true equivalent in either comparator. The lesson for the conference's African-market framing is therefore not that South Africa should import Kenyan or Ghanaian solutions wholesale, but that the coordination architecture this paper proposes in Section 6 would represent a genuine advance not only for South Africa but as a possible template for a region where the pattern of institutional fragmentation appears to be the norm rather than the exception.

What Aligned Institutional design could look like.

The preceding sections show a specific, mechanism-level failure: two institutions with overlapping mandates, a formal memorandum of understanding that appears to have produced no operational integration, incompatible measurement methodologies for the same underlying concept, and a competition law regime whose own tribunal is narrowing the scope of ownership remedies even as the B-BBEE Commission's ownership statistics face credible public challenge. This section proposes four bounded, specific mechanisms rather than a general call for closer cooperation, because vague coordination rhetoric has already been tried the 2016/17 memorandum was exactly that and has not produced institutional change.

First, the existing Memorandum of Understanding between the Competition Commission and the B-BBEE Commission should be reactivated and converted from a bilateral goodwill gesture into an operational data-sharing protocol. Concretely, this means the B-BBEE Commission's certificate portal data and compliance reports under section 13G of the B-BBEE Act should be made automatically accessible to Competition Commission merger analysts at the point of notification, so that a firm's existing B-BBEE ownership status is a documented input into public interest assessment rather than information reconstructed anew in each transaction, as current practice appears to require.

Second, the two institutions together with National Treasury and the Johannesburg Stock Exchange, given the JSE's own role in reporting listed ownership should establish a joint technical working group tasked specifically with harmonising the definition and measurement of historically disadvantaged and black ownership across the B-BBEE Codes and the Competition Act's public interest guidelines. The 2026 Transformation Lens findings on pension-fund exclusions and indirect ownership counting provide a ready-made technical agenda for this working group; the objective would not be to weaken the B-BBEE Codes' methodology but to ensure that an ownership remedy secured

through merger conditions and an ownership gain reported through B-BBEE compliance reporting are measuring the same thing, so that neither institution's data can be cited as contradicting the other's without a shared technical basis for adjudicating the disagreement.

Third, formal cross-referral thresholds should be established in both directions: where a B-BBEE Commission fronting investigation reveals evidence of market concentration or anti-competitive conduct, referral to the Competition Commission should be mandatory rather than discretionary, and the reverse should apply where merger review surfaces evidence of fronting or scorecard misrepresentation. This would convert the existing but dormant memorandum into an active investigative pipeline rather than a filing-cabinet document.

Fourth, the legal uncertainty identified in the CP Spruce/Vantive line of cases should be resolved through joint guidance issued by the Department of Trade, Industry and Competition and the Competition Commission not a Commission guideline alone, which the Tribunal has already signalled it need not treat as **binding** clarifying precisely when the section 12A(3)(e) positive obligation applies and when it does not, particularly for foreign-to-foreign transactions with no South African ownership base to disturb. This directly answers the strongest counterargument against this paper's proposals: that closer institutional coordination between competition law and industrial policy risks regulatory overreach, chilling investment, or exceeding either body's current statutory mandate. The proposals above are not a call to merge the two commissions or to expand either one's jurisdiction. They are a call to make explicit, bounded, and jointly authored what is currently implicit, inconsistent, and unilaterally interpreted which should reduce uncertainty for investors and merging parties rather than add to it, precisely because Judge Unterhalter's concern about public interest considerations consuming merger review stems from unpredictability, not from the existence of an ownership mandate itself. Clear joint guidance addresses the unpredictability without abandoning the mandate.

Conclusion

The conference theme asked how competition policy can be deployed to build inclusive, resilient, and competitive African markets, and situates that question explicitly within the relationship between competition law and industrial policy. This paper has argued that South Africa's most consequential industrial policy instrument, B-BBEE, and its most consequential competition instrument, the Competition Act, were built to answer the same historical wound but have never been given a shared institutional voice.

The evidence is not that these two regimes ignore each other entirely the section 12A(3)(e) obligation, the Burger King and Pioneer Foods remedies, and the 2016 memorandum of understanding all show genuine points of contact. The evidence is that this contact has been partial, methodologically incoherent, and increasingly contested from within the competition law system itself, even as independent analysis suggests the B-BBEE Commission's own headline ownership statistics may substantially overstate the transformation the policy has achieved.

Kenya and Ghana suggest this is not a uniquely South African failure but a pattern worth naming continentally: ownership-transformation policy and competition law, wherever they coexist on the African continent, appear to have been built by different hands, for different files, answering to different ministers. South Africa's Competition Commission and B-BBEE Commission, precisely because they already share a department, a founding historical diagnosis, and however dormant a memorandum of understanding, are better positioned than most African regulators to close this gap. Doing so would not require new legislation or an expanded mandate for either body. It would require the harder, less visible work of building a shared data architecture, a common measurement standard, and joint guidance that turns two institutions that currently speak past each other into two institutions that, for the first time in South Africa's transformation project, actually speak and work across parallels. Building a strong domestic economy should be every government's immediate priority.

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