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Policy uncertainty, mergers, and acquisitions in the South African business environment

Anton van Wyk^a, Raymond Parsons^b and Lodewalt Venter^b

^aNWU School of Economic Sciences, Potchefstroom, South Africa; ^bNWU Business School, Potchefstroom, South Africa

ABSTRACT

This study examines policy uncertainty on mergers and acquisitions (M&A) in South Africa, emphasising the extensive regulatory review by the Competition Commission under the ‘public interest consideration’ criterion. It aims to identify the cost implications and uncertainties associated with M&A transactions to propose measures to reduce these uncertainties. Utilising qualitative methodologies, the study gathers empirical evidence through interviews with companies and competition lawyers involved in the M&A processes. The findings reveal significant concerns about economic uncertainty, merger control, and policy and regulation impacting investment decisions. Policy uncertainty, particularly in the context of merger regulation, imposes substantial cost implications and delays on M&A activities, negatively affecting investment, growth, and economic development. It emphasises the necessity for a regulatory framework that minimises disruptions and costs to business participants. The findings suggest that addressing policy uncertainty and streamlining regulatory processes are crucial steps towards enhancing South Africa’s attractiveness as an investment destination and fostering economic growth and development.

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1. Introduction

Policy uncertainty has emerged both globally (Tabash et al., 2023) and domestically as a serious phenomenon affecting business decision-making, especially around investment (Parsons & Krugell, 2022). It has become a universal factor in unpacking economic assessments around the world as well as in South Africa (SA). A valid criticism of much economic theory, including that surrounding monopoly control at present, is that it is usually set around a frictionless process and a background of certainty. Increasingly, regulatory requirements are, therefore, currently being rigorously tested and critically assessed against their economic impact arising from the unintended consequences of elevated uncertainty.

CONTACT Anton van Wyk  anton.vanwyk@nwu.ac.za

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Uncertainty arising from an unduly extended regulatory process may result in either (a) much higher costs or (b) the transaction ultimately being abandoned (van Wyk et al., 2023), particularly where major investment decisions are concerned, as is often the case when a business embarks on a big merger (Gous, 2023). Therefore, it has become increasingly necessary to assess the cost implications and uncertainties that may be associated with merger activity, as the criteria for merger control have steadily expanded to include ‘public interest consideration’. A prolonged and open-ended official merger interrogatory process in these circumstances may then negatively affect investment decisions around mergers and acquisitions (M&As).

With the South African merger legislation, including the ‘public interest consideration’ criterion (Competition Commission, 1998), it has thus become vital to examine the regulatory process currently surrounding mergers, which are subject to approval by the Competition Commission (van Wyk, 2022). Then, the cost implications and uncertainties that may arise from a prolonged investigation, and the risks that the investment potential may be abandoned in the face of changing market dynamics if the outcome is too delayed, affects the decision to merge or not. Remedies can nonetheless be suggested.

It must be emphasised that the focus of this paper is *not* on the broad merits or otherwise of South Africa’s competition legislation and policy, or of merger control. Those are separate issues. The emphasis here is solely on how to ensure that – given the existing legislative framework – the prevailing competition policy regime operates in the most effective way in applying merger control in a manner that lessens uncertainty and minimises costs to business participants.

In most countries in the world, there exists one or other form of anti-monopoly legislation designed to promote competitive forces in their respective economies (Waked, 2016). In South Africa, competition policy and legislation have evolved over many years, driven by the original question of ‘How to make competition work – given the structure of the South African economy.’ Yet, it seems that the policy framework and its application have moved more towards the subsequent question, ‘How do we want competition to work? And what do we in South Africa want it to do for us, and to us?’

It appears that, although the desirability of competition has long been taken for granted, recent developments in both the realms of theory and policy have altered the perspective on several economic objectives within competition legislation and policy. In particular, in South Africa, the widening of the ‘public interest consideration’ in merger control in recent years has begun to open up new areas of research and debate. The amount of time it takes to complete big merger deals has also become a significant factor in the process, and major transactions can be slowed by the need to obtain regulatory approval (Changole & Boshoff, 2022; van Wyk, 2022; van Wyk et al., 2023).

Our knowledge remains largely fragmentary and disjointed. At a time when policy uncertainty in general has emerged as a serious inhibitor of business investment in South Africa (Gous, 2023), it is necessary to examine key areas of legislation or policy to establish where such regulatory uncertainty can be minimised. Competition policy is one important and relevant area of further research.

The point of departure is that, although regulatory discretion obviously has certain benefits, these need to be weighed against the costs of uncertainty. Regulatory uncertainty generally has the potential to be highly uncertain, particularly in merger control, and thus

increase the costs of the transactions involved. It 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.

The research problem and research gap that this paper is seeking to address is therefore the fact that policy uncertainty, particularly in the context of merger control and regulatory processes, significantly affects business investment decisions such as M&As.

Recent literature does not provide a comprehensive understanding regarding the cost implications and perceptions of regulatory uncertainty in the application of merger control in South Africa, despite its recognised effect on business investment decisions which should be further explored. This is the gap this paper focuses attention on as well as to propose measures to reduce these uncertainties. The findings provide important insights into the uncertainties created by the current application of competition policy in South Africa regarding M&As.

2. Literature review

2.1. Policy uncertainty globally and in South Africa

Pioneering and ground-breaking work in the field of policy uncertainty was done by Frank Knight (1921) in his publication, 'Risk, uncertainty and profit'. He stated that it is firstly important to distinguish between the two terms 'risk' and 'uncertainty' before further deductions can be made. It is stated by Knight (1921) that, '... the term, risk, as loosely used in everyday speech and in economic discussion, really covers two things which, functionally at least, in their causal relations to the phenomena of economic organisation, are categorically different'.

The term 'risk' can be briefly described as a situation in which we can accurately calculate the odds of that risk although we do not know the outcome of a given situation. On the other hand, 'uncertainty' is where we are not able to know all the information that is needed in order to set accurate odds (Knight, 1921; Parsons & Krugell, 2022). Policy uncertainty can, therefore, be defined as a broad class of economic risk where the future path of government policy is uncertain (Parsons, 2023). This uncertainty can raise risk premia and compel leading businesses and individuals to delay their spending and investment efforts until the uncertainty in the economy has been reduced or resolved (Parsons, 2023).

On the back of that information, various researchers and organisations have gone about creating indices to measure policy uncertainty and its effect on economies and businesses. Work done by Baker et al. (2016) in the United States (US), indicates the creation of a news-based index measuring how frequently the following triple word terms are found in articles published in the 10 leading US newspapers: 'economy' or 'economic'; 'uncertain' or 'uncertainty' along with words such as 'congress'; 'deficit'; 'federal reserve'; 'legislation'; 'regulation' or 'White House'. These word combinations are then used to create an index to see the effect of policy uncertainty on business in the US. It was further extended in later years to include health care and national security policy uncertainty (Baker et al., 2016; Parsons & Krugell, 2022).

Many global economies have developed some form of policy uncertainty index (PUI) to measure the effect of this phenomenon on their economies and their businesses. These

countries include the US, United Kingdom (UK), India and China. Furthermore, the International Monetary Fund (IMF), in collaboration with Stanford University in the US, has created what they call a world uncertainty index (WUI), which measures economic uncertainty in 144 countries worldwide.

The development of a South African PUI was undertaken by the North-West University Business School (NWU-BS) in 2015 and is published on a quarterly basis. It is comprised of a news-based uncertainty measure; surveys given to economists on how they view policy uncertainty in the economy at the point of data collection; and inputs from manufacturers that are surveyed by the Bureau of Economic Research (BER) at Stellenbosch University (Parsons & Krugell, 2022). It gives a good indication of the effect that policy uncertainty can have on the ability to do business in South Africa. The NWU-BS PUI is the outcome of the various positive and negative factors that influence perceptions of policy uncertainty over the relevant quarterly periods. If the PUI goes above a value of 50, it reflects heightened policy uncertainty and a decline in reduced uncertainty, which is more positive for business (Parsons & Krugell, 2022).

Various major economic events have been tracked by the PUI and the effect it has on policy uncertainty, and furthermore, on the economy and investment, such as cabinet reshuffles, land reform, loadshedding and the Covid-19 pandemic (Refer to Figure A1 in Appendix A). In the latest PUI released in the second quarter of 2024 (2Q2024), the value of the PUI remained in elevated terrain (68.3), mainly because of South Africa's recent government elections (NWU Business School, 2024).

These factors show that policy uncertainty can have various negative effects on economies and businesses alike. This study hypothesises that policy uncertainty can also influence local and foreign direct investment (FDI) through mergers and acquisitions, and whether companies will merge in South Africa with heightened levels of policy uncertainty or whether competition policy framework is too much of a burden to undertake.

2.2. Policy uncertainty and its impact on mergers and acquisitions

It is known that policy can create uncertainty, which can have a substantial impact on everyday business operations. In an article by Bonaime et al. (2018), it was found that policy uncertainty is strongly negatively associated with merger and acquisition activity. Policies such as taxes, government spending, and monetary and fiscal policies affect M&A activity negatively (Stock & Watson, 2012; Gulen & Ion, 2016; Nguyen & Phan, 2017; Bonaime et al., 2018). Rodrik (1991), also indicated that private sector firms withhold investment into countries until uncertainty is reduced as it acts as a tax on investment.

Borthwick et al. (2020) replicated the results of Bonaime et al. (2018) amongst Chinese firms for the period 2003–17. The results indicate that for Chinese firms, there is also a high likelihood of decreasing M&A activity due to high levels of policy uncertainty. In another Chinese study by Sun et al. (2022), it is mentioned that Chinese firms are less likely to conduct M&A deals in target countries with high levels of policy uncertainty.

Furthermore, Gregoriou et al. (2021) in a study conducted between 23 countries for the period 2003–16, stated that when countries have high levels of policy uncertainty, the volume of inbound M&A deals decreases, and the volume of outbound deals

increases. These results show that when there are high levels of policy uncertainty, investors tend to not complete M&A transactions in those countries and domestic companies also then go and search for M&A opportunities internationally. These results are also echoed by Paudyal et al. (2021), which indicate that high degrees of economic policy uncertainty have negative effects on M&A volumes in European markets. Furthermore, political uncertainty can also translate to policy uncertainty as countries enter an election year, as the possibility of changing policies after an election is possible and this reduces investment expenditures until after an election (Julio & Yook, 2012).

Little research has been conducted on this topic in the South African scene, specifically regarding policy uncertainty and the impact on M&As. However, there is research done on economic uncertainty in South Africa. Empirical research in the South African framework on policy uncertainty was done by Redl (2015); Hlatshwayo & Saxegaard (2016); Kotze (2017) and Aye (2019). Redl (2015) used a structural vector autoregression (VAR) model to measure the impact of policy uncertainty shocks on the economy with the use of an index constructed from sources such as 'Economist of the Year' data from Media 24, media data based on the frequency that the term 'policy uncertainty' is used in South Africa newspapers; and the mentioning of 'uncertainty' in the 'Quarterly Bulletin' reports of the South African Reserve Bank (SARB). High levels of uncertainty in the democratic transition post-1994 were indicated, as well as the depreciation of the rand in 2001 (Redl, 2015). Binge & Boshoff (2020) also researched the effects of uncertainty in emerging markets and found a negative correlation between uncertainty and real GDP growth.

The literature mentioned above indicates that policy uncertainty has an effect on the ability of a country's economy to grow as well as on its M&As. Roberts (2004) also indicated that competition policy plays a role in the economic development of a country and mentions that competition policy in South Africa centres largely around merger policy. It could be mentioned that just as with other countries, as indicated above, if there are heightened levels of policy uncertainty, the volume of M&A deals in South Africa may also decline. However, it is not possible to justify the claim without clear academic evidence, of which there is currently little in South Africa. Therefore, this article attempts to answer this question in part.

With regards to the South African competition policy framework, it is quite unique compared to the competition legislation found in other countries and creates an uncertainty of its own as a type of policy and legislation. With the inception of the Competition Act (Act 89 of 1998) – except for normal competition guidelines as found in other countries as well – the competition authorities included additional guidelines unique to South Africa, called Public Interest Conditions (PIC). These conditions relate to different social stumbling blocks within the South African context, such as employment, broad-based black economic empowerment (BBBEE), conditions relating to SMMEs, as well as conditions regarding the industrial sector or regions firms operate in.

In an article by Meyer (2017), it is mentioned that the inclusion of these PICs sparked immediate controversy and proved divisive amongst businesses, policymakers, and economists. These conditions create uncertainty, because companies can decide to not form part of M&As in South Africa due to the inclusion of these PICs. In 2018, the Competition Commission amended the guidelines to include further PICs, thus making the

M&A process in South Africa even more difficult. After the amendment to the Competition Act in 2018, the public interest guidelines as set by the Commission are as follows:

When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on:

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market (Section 12A(3)(c) substituted by section 9(e) of Act 18 of 2018);
- (d) the ability of national industries to compete in international markets (Section 12A(3)(d) substituted by section 9(e) of Act 18 of 2018); and
- (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. (Section 12A(3)(e) added by section 9(f) of Act 18 of 2018). (Source: Competition Act [1998] [As amended in 2018])

These PICs put further strain on the M&A process in South Africa as amendments add further conditions that need to be met before mergers are allowed to be approved. In recent years, various companies have also indicated their challenges when taking part in the M&A process in South Africa because of the implementation of these PICs. The CEO of Remgro, Jannie Durand, echoed his frustration with the South African competition authorities taking too long in deciding to approve M&A deals, especially when these deals include PICs (Gous, 2023). He states that the approval of mergers should be quicker, as no competition concerns were raised in a deal where Remgro wanted to take Mediclinic private and delist it from the Johannesburg Stock Exchange (JSE). He stated that unnecessary delays in the M&A process in South Africa, just push up costs, which is unnecessary (Gous, 2023).

In March of 2023, the Dutch brewer, Heineken, was also given the green light to acquire a 65% stake in South African brewer, Distell; they took the company private and delisted it from the JSE. Role players also expressed their concerns and thoughts on the various PICs that were imposed on the merger and that the Commission is starting to use the PIC guidelines to try and solve the social-economic problems that South Africa faces (Stadler, 2023). Furthermore, the involvement of the Minister of Trade, Industry, and Competition (Ebrahim Patel) has also garnered attention from media sources. The Competition Commission states in section 12A of the Competition Act, that the competition assessment and the public interest assessment are equal in status. Research done by Morris (2023) indicates otherwise, where it is shown that the PIC conditions all rank higher in terms of importance than individual competition concerns.

Gumede (2023) reported that energy and chemicals group, Sasol, was also battling with the tribunal to get an acquisition approved with regards to their sodium cyanide business, which was prohibited due to it likely preventing and reducing competition. Sasol and acquirer, Czech firm, Draslovka, stated that the tribunal did not consider the various public interest benefits that the acquisition would create, such as a \$50 million investment to expand and modernise facilities.

Another recent and major cause of uncertainty surrounding M&As is created through the amendment of the Competition Act in 2018 to include the greater spread of ownership of historically disadvantaged individuals with the use of employee share ownership programmes (ESOPs) of 5% or more of the shares when acquiring businesses. According to Section 95(1)(c) of the Companies Act (Act 71 of 2008), 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.

This is a condition that can get imposed on an M&A deal even if the transaction does not have any substantial effect on the public interest (Avery, 2023). Any merger transaction that cannot demonstrate that the overall shareholding of historically disadvantaged individuals will increase post-merger will be met with a list of ESOP demands from the commission that the buyer should give away a certain percentage of shares no less than 5% (Avery, 2023).

None of these extensive conditions have been expanded on or articulated in any formal documents from the commission. That is until the recent invitation to comment by the commission on their revised draft public interest guidelines, which sets out the ‘public interest test’ in detail. The hope of the commission is that these guidelines will better prepare merger parties for the merger process and public interest assessment attached to South African mergers (Bahlmann, 2023). Unfortunately, it does raise concerns about how foreign investors will respond to these requirements and whether the commission can impose stricter conditions than what is already stipulated in the Act. This could drive these companies to decide to not invest in South Africa (Bahlmann, 2023).

3. Research methodology

3.1. Research design

The research conducted used a qualitative research design with the use of open-ended questions, a methodology generally utilised to explore and comprehend difficult-to-quantify phenomena (Creswell, 2014). Open-ended questions are the primary means of information gathering in qualitative interviews, which are frequently referred to as ‘conversations with purpose’ (Mills et al., 2010; Du Plooy-Cilliers et al., 2014). This is essential for a thorough investigation and interpretation of the dynamics around mergers and acquisitions. To eventually communicate key conclusions and themes emerging from the thematic analysis, the researchers utilised open-ended inquiry tools (in this a case semi-structured interview schedule) to collect exhaustive data from a small number of specifically chosen subjects until sufficient information had been obtained (Creswell, 2014).

3.2. Research population and sample

The research population and sample of the study are comprised of companies and competition lawyers that formed part of the M&A process in South Africa. The companies

were firms that were either acquiring firms or target firms during a merger or acquisition in South Africa. The lawyers were from firms that specialise in competition policy and that have consulted for firms on M&A cases in South Africa. The lawyers were identified by using law firm details of firms that specialise in competition policy and M&As in South Africa.

The companies were identified using an official publicly available database from the Competition Commission of South Africa. This database consists of many companies that have completed M&A transactions in South Africa but filtering the specific industries needed the population comprised of 20 companies. The inclusion criteria for the research were that the companies should have formed part of any of the following sectors in which M&As take place: mining, manufacturing, property, wholesale/retail, agriculture, and finance. These sectors were chosen as they are the sectors in which M&As primarily take place and are also mentioned by the Competition Commission in their April 2023 newsletter (Competition Commission, 2023). After imposing the inclusion criteria, the final research population were 20 companies involved in the M&A process, which operate in one of the six main M&A sectors.

Purposive non-probability sampling was used, and to determine the eventual research sample, the companies that formed part of the research population were contacted and invited to form part of the research. This sampling method is used where the researcher uses their judgment to select participants based on a specific set of characteristics or qualities and is useful in qualitative research where the goal is to gain in-depth insights rather than to generalise to a larger population (Bless et al., 2006). The final study sample was dependent on companies and lawyers that accepted the invitation. Of the 20 companies and lawyers initially contacted, 10 high value participants from industry accepted the invitation: seven companies and three competition lawyers. The companies and lawyers interviewed are some of the biggest role players in their respective industries and reputable law firms specialising in competition policy in South Africa.

3.3. Data collection and informed consent

The main method of data collection relied on interviews with individuals from companies and lawyers involved in M&As in South Africa, which were guided by semi-structured interview schedules and audio recorded. Semi-structured interviews are an effective method and tool for capturing detailed and nuanced qualitative data while maintaining enough structure to facilitate analysis and comparison and provide the flexibility to explore new topics related to the research as they arise (Mills et al., 2010; Du Plooy-Cilliers et al., 2014). The semi-structured interview schedule also guarantees that questions are not misunderstood or misinterpreted by participants (Bless et al., 2006). The questions posed were shaped by insights and knowledge garnered through a thorough literature review and the expertise of the authors in the research field. Written informed consent was given by the participants and the study adhered to all ethical requirements as set out by the North-West University's Economic and Management Sciences Ethics Research Committee (EMS-REC) with approved ethics number: NWU-00649-23-A4. The interviews were conducted via MS Teams where meetings were held with the participants on dates and times that suited them. Interviews ranged

anywhere from 30 min to no more than one hour and were conducted by two of the authors of the paper.

3.4. Data analysis

Creswell (2014) proposed a multi-level interactive approach to analysing qualitative data. The coding of the data and the identification of themes are both components of qualitative data analysis. Braun & Clarke (2006) distinguish between a top-down or theoretical thematic analysis, which is guided by the initial research questions, and a bottom-up or inductive analysis, which is driven by the evidence itself. Both methods were used in this study to guarantee that the research goals had been achieved but also that all relevant themes had been identified. Firstly, the data were collected as mentioned above in section 3.3, whereafter the recorded audio was transcribed using Microsoft Word's 'Transcribe' tool. Transcriptions were also subjected to post-processing to ensure accuracy. The transcribed text results were then thematically analysed with the use of the ATLAS.ti 23 software package.

To ensure the trustworthiness of the data we implemented clear segregation of duties. The authors were jointly responsible for developing the interview schedule, two of the authors were responsible for conducting the interviews and the third author was responsible for conducting the thematic analysis and subsequent writing up of the results, with all authors commenting and giving inputs on the completed drafts of the article. This thematic analysis allowed the researchers to identify patterns or themes within the responses collected during the interviews. The thematic analysis (Braun & Clarke, 2006) yielded the following results and findings as discussed in the next section.

4. Results

4.1. Analysis and concepts

As mentioned before, ten participants agreed to take part in the study and the interview process. The cohort of participants consisted of seven companies and three lawyers from established firms. The industry distribution of the participants was as follows: four were from the financial services industry, two from the agricultural industry, and one from the retail and wholesale industry, with three lawyers each from their own reputable firm. For context regarding the questions asked during the interviews, please see Appendix B.

A total of 10 text documents were imported and analysed with the use of ATLAS.ti 23. The AI coding feature of ATLAS.ti was used to code these documents, with the authors identifying the most relevant concepts and themes pertaining to the study. 17 codes were pinned down, which were collated into three main themes, namely, 'Economic Uncertainty', 'Merger Control' and 'Policy and Regulation'. Economic uncertainty had four sub-themes (codes), Merger Control had three sub-themes and Policy and Regulation consisted of four sub-themes. It is unfortunately impossible to use all quotes extracted from the interview text, therefore, a rigorous screening process was conducted to select the 29 quotes that were used in the reporting of the results.

The Concepts Cloud function of ATLAS.ti identifies noun phrases as tokens and then counts them. The words are then shown in the concepts cloud in terms of token



Figure 1. ATLAS.ti concepts cloud.

frequency. The biggest words are then those that are identified the most. As can be seen from [Figure 1](#), some of the most prominent words identified are related to the paper topics, such as merger, policy, uncertainty, and condition.

4.2. Thematic analysis

A network was generated for each theme (category code), and all codes and quotes were inspected to determine their relevance regarding the study topic. Many codes were merged together to focus on the key subthemes within the major themes at hand. The following themes and subthemes were identified to be discussed.

- Economic Uncertainty
 - Economic Concerns
 - Merger Reasons
 - Public Interest
 - Investment
- Merger Control
 - Investment
 - Mergers and Acquisitions (M&A)
 - Employee Share Ownership Programmes (ESOP)
- Policy and Regulation

- Economic Policy
- Competition Policy
- Negotiation and Collaboration
- Challenges

Many of the quotes identified appear in more than one of the major themes and sub-themes identified. This allows for the golden thread of the data to run through the results to show how the different themes have an influence on each other as well as on mergers and acquisitions. Each major theme has specific quotes pertaining to policy uncertainty, as well as its influence on mergers and acquisitions, which serves to reveal the golden thread of the research at hand. Some interviewee responses had to be recapitulated for accurateness during the audio capturing and transcription process, but the context of the results is unaltered.

4.2.1. Theme 1: Economic uncertainty

Theme 1 consists of 4 subthemes, as shown in Figure 2.

4.2.1.1. Economic uncertainty: Merger reasons. Mergers and acquisitions are conducted for certain reasons, and it is important to highlight those reasons as most of the time, they are done to better the position of the companies involved in the processes, which in turn, can have positive economic effects on a country. Literature provides us with many reasons for why companies choose to take part in the M&A process, such as synergies, strategy, improvement of product offerings, etc. (Srinivasan & Mishra, 2007; van Wyk et al., 2023). The results from the interviewed participants echoed the same reasons, where the M&As conducted were for strategic reasons, such as innovation, supply, maintaining quality products as well as cost-saving opportunities.

Company E: The merger aligns with our strategic priority ... It allows us to own a facility for innovation, secure supply, maintain high-quality products, and unlock cost-saving opportunities.

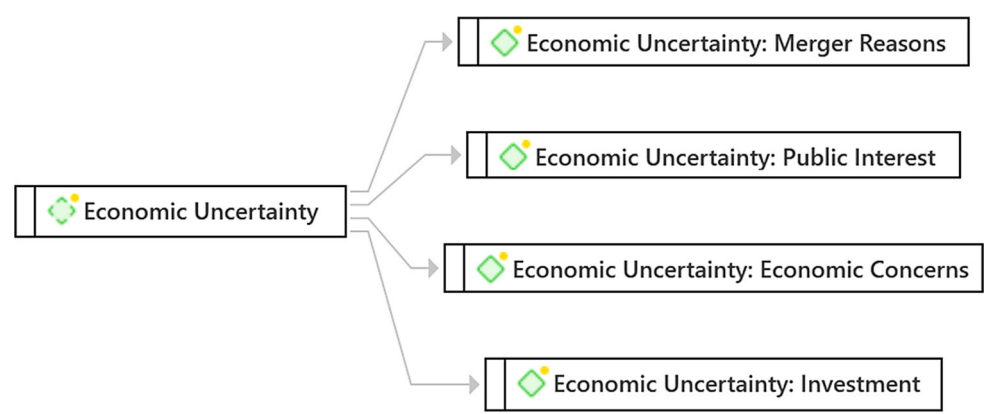


Figure 2. ATLAS.ti category code network: economic uncertainty.

- Company A: So, typically the reason is to fulfil and effect the strategy that the company's board and management have chosen to implement. And so, acquisitions tie into the company's strategy, which is obviously the plan they have in place to deliver the best returns for their shareholders. And that is the primary underlying reason for the majority of acquisitions that we see.
- Lawyer Firm B: But we are already seeing global companies doing well, I want to buy this business, but I do not want the South African piece. Because I do not want to have to go through a merger process in South Africa. So, let us find a way to do this deal that I only buy the European and American and Asian businesses and then the seller must find another home for the South African bit.

Unfortunately, M&A reasons could also have a negative impact on a country as shown in the quote above. It can sometimes be that companies want to acquire a 100% stake in another company, but due to uncertainties that are created by the M&A legislation in South Africa, such as the PIC conditions, they do not want to acquire the South African arm of that specific company. This is where South Africa's legislation on M&As could create problems, where the participants felt that South Africa can lose out on valuable foreign direct investment into the country due to this legislation being put in place. This result echoes the findings by Meyer (2017), where it is stated that the introductions of PICs created increased debate and uncertainty regarding the M&A process in South Africa.

4.2.1.2. Economic uncertainty: Public interest. The public interest test (see Competition Commission (1998) for PICs) is an important part of South African competition legislation, one which is responsible for much or even most of the uncertainty regarding the M&A process in South Africa. The commission itself has indicated that the public interest test is seen as equal to the competition test, but our participants were of the opinion that there is a large focus on the public interest test as seen below, which is also found to be the case by Morris (2023).

- Company D: There's much more weighting that they put on the public interest matters rather than the true commercial and economic factors.
- Lawyer Firm A: Merging parties have to understand that there is a public interest lens which is not secondary to the competition test; it is a self-standing standalone issue. As early as possible, when considering your transaction, start thinking about the public interest.
- Company G: They are very much concerned about, you know, the unemployment rate which we do agree with, but it also makes it extremely difficult. Especially with the failing firm aspect where you can't merge with the company and then have duplicate staff and employees. So, it remains a challenge, you know, so you are not really able to harvest synergies and save costs immediately because of that fact that the big aspect in terms of variable costs is to save on employee costs.

The participants mentioned that it is understandable that the competition authorities are focused on the public interest test due to the social challenges faced by South Africa, such as high unemployment. When employment is listed as a condition for a merger, it often means that the merging entities will not be allowed to reduce their workforce for a certain

period of time after the merger (e.g. three years). This can also create uncertainty as shown in the above quote where it could be difficult in special circumstances as with a failing firm merger, where a firm is acquired or merged with to stop that firm from going under. Companies also felt that they cannot afford duplicate job levels as mentioned, but due to a possible employment condition, they are not allowed to reduce their workforce, which puts a strain on their operations. The question here (with unemployment in the country currently sitting at 32.9% (Statistics South Africa, 2024)) is then, after the imposed condition-timeline has run its course, what will happen to the duplicate jobs and, more importantly, the associated employees, and does this condition really help to address unemployment issues in South Africa?

4.2.1.3. Economic uncertainty: Economic concerns. The public interest condition of the M&A process does create uncertainty, but there are also external factors outside of the competition legislation that can add to uncertainty regarding taking part in a M&A transaction in South Africa, namely, economic uncertainty or concerns.

- Company E: No, I mean, it's substantial. If I said substantially, I'm talking about several hundred million rands just in pure diesel costs ...
- Company F: I think maybe the one point to make about just where the M&A world is at the moment is it is in a very constrained environment. So, cash is very expensive at the moment. There aren't many companies that have very strong balance sheets to be able to do M&A by themselves. So, M&A activity is at a little bit of a downturn.

Economic challenges, such as loadshedding,¹ are a big deterrent for inbound M&A activity. Companies are concerned that when they merge with or acquire a South African-based company that operates out of the country, they are going to have to fork out additional funds to mitigate the devastating effects of loadshedding on their businesses and the economy. Many companies do not have the necessary funds to add on top of the funds that have to be paid to notify and eventually merge with, or acquire another company, to add solar systems or diesel generators to keep the operating processes of those companies running, which creates uncertainty and in turn, could make them decide to not continue with a merger or acquisition in South Africa.

4.2.1.4. Economic uncertainty: Investment. The final subtheme to be discussed under economic uncertainty is investment, of which an M&A is a form. The main idea behind a M&A transaction is that it will be an investment for a firm to enter a new or existing market to create further opportunities for growth. See below some responses from participants.

- Company B: So, policy uncertainty is the biggest issue around foreign investors not investing in the jurisdiction. In our case, we should become more business friendly. We should open the doors for foreign investors. It's almost as if ... we look at foreign investors and go, you're evil, we don't want you here. In some cases, yes, that may be true. But in a lot

¹Loadshedding is a term in South Africa where the electricity generator Eskom, cannot keep up with demand for electricity due to power station failures and other factors. Electricity is then turned off for hours on end to optimally manage the energy that is available to maintain system stability.

of cases, we actually want the foreign investor because he brings capital into the country.

Lawyer Firm C: I think uncertainty in the traditional sense – when investors look at South Africa as a market, they are obviously, you know, they are obviously questioning, at what point in time would policy changes come to pass to affect those things, and what does that look like?

Local and foreign companies do tend to keep an eye on the economy, politics, and policies of a country before they decide that it would be a worthwhile investment to conduct an M&A transaction in that country, and if the feeling is that those policies or politics create too much uncertainty, then investment will not take place. Participants were of the opinion that the country should make it worthwhile for investors to decide to conduct M&As in South Africa and not employ policies that would create uncertainties and deter them from doing so; they are also concerned that changing policies will have an effect on them at a later stage after a merger has taken place.

4.2.2. Theme 2: Merger control

Theme two consists of three subthemes as shown in Figure 3.

4.2.2.1. Merger control: Investment. As previously mentioned, M&A is a form of investment that is, and can be, extremely beneficial for the economy of a country to assist in fostering growth. However, there are economic concerns that can create uncertainty and deter investment. It is mentioned by participants that, before companies take part in the M&A process in South Africa, they have to factor in the general, political, and social uncertainties our country is faced with that will also have an impact on the M&A process. It is also mentioned that it is difficult to make long-term investment decisions as the climate is too uncertain and companies are wary that policy will change. As mentioned, one positive is the liquid capital markets in South Africa and financial infrastructure.

Company B: So, you kind of wrap your mind around all of the difficulties of investing in a country like South Africa, you have to price in all of our general, political, and social uncertainty. So, it is not a tremendously attractive investment destination, but we have, you know, we have liquid capital markets, and we have good infrastructure, etc. So, that counts in our favour.

Lawyer Firm A: And you do hear clients talking about the difficulties of trying to make 15 or 10-year investment decisions based on whatever the current policy is.

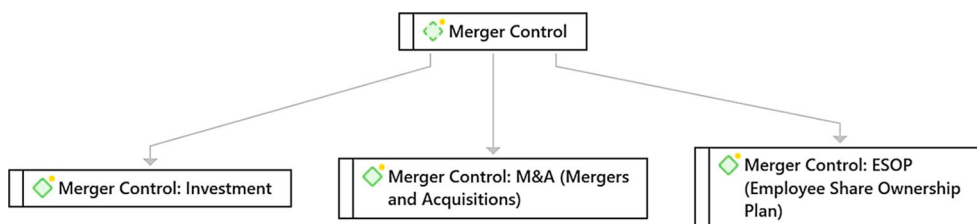


Figure 3. ATLAS.ti category code network: merger control.

Because there is this kind of underlying assumption that policy may change.

Lawyer Firm C: I think that is going to have a considerable effect not just on investor sentiment, but on the actual ability of people to be able to make the kind of investments that we need to get our economy back on track.

4.2.2.2. Merger control: Mergers and acquisitions. Further uncertainty is created by the M&A process itself in South Africa. When conditions are imposed on mergers it can mean that these transactions end up being more expensive. It is also noted that when conditions are imposed, the duration of the merger decision by the competition authorities is also longer, which can be a negative aspect for merging parties. These results are also found in the literature by researchers such as Oxenham (2012) and are also mentioned by company representatives in media reports (Gous, 2023).

Lawyer Firm B: It is fair to say that there is a high degree of policy uncertainty. In the sense of it, it is no longer possible to predict as an advisor exactly what kinds of concerns either the competition authority or the Department of Trade, Industry and Competition will identify as arising from your transaction.

Company D: Sometimes, they might end up being a little bit more expensive if you have a condition, for example, as part of your competition approval, that wasn't expected or priced in upfront.

Lawyer Firm B: So, there is no doubt that the increasing level of debate about PIC's has significantly lengthened merger review timetables.

Merging parties are also concerned about the high levels of current policy uncertainty in South Africa, which has an influence on their investment decisions. With policy uncertainty in South Africa currently calibrated at high levels over 65 (NWU-BS PUI, 2024), companies may be deterred to invest in our economy.

4.2.2.3 Merger control: ESOP. With the amendment of the competition act in 2018, section 12A (3)(e) was added, which states, 'the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market'. This led to the inclusion of a new type of public interest condition by the competition authorities named the employee share ownership programme (ESOP).

Lawyer Firm C: This year has seen an unprecedented push for public interest conditions and specifically to create employee share ownership programs for workers.

Company C: Think about, you know, if you cannot free up equity for a, you know, to replace that level investment, think about an ESOP. You know what I mean, start thinking about other investments that you can make in the value chain. Think about these things early on.

Company D: We introduced an employee share scheme at the target level, and what we were able to do is give the competition authorities comfort that we do have ESOP schemes and specific transformation strategies at play within the group as part of business as usual, which in combination with our transformation plan with that new target, once it comes into

the fold would result in the BEE ownership credentials improving over the next short while.

After the amendment to the act, the commission began to impose these ownership conditions more regularly, where a percentage of the shares are to be transferred to the employees when merged. These ESOPs are used to assist with the ownership levels of historically disadvantaged persons. It would be beneficial for merging parties to agree to an ESOP beforehand, so as to not delay the merger transaction any longer than necessary, especially if it is known that the merger will have an impact on the BEE levels and ownership. As the third quote indicates, the company introduced the ESOP at the target level, which assisted with the merger process.

4.2.3. Theme 3: Policy and regulation

Theme three has four subthemes (Figure 4).

4.2.3.1. Policy and regulation: Economic policy. Economic policies are used to create strong and stable economies by attempting to achieve macroeconomic goals, such as stable markets, price stability and economic growth. One way of achieving some of these goals is through M&As.

- Company D: So, when SA has to think about how it gets foreign direct investment, that's the context within which we actually have to think about setting policy and giving comfort to scarce capital sitting elsewhere, that this is a safe haven for you to actually put your scarce capital into.
- Company A: You know when the economy has been healthier, we have a tremendous amount of merger activity in that mid-cap space, we had incubator funds. And we had all sorts of people saying let us get money into this, let us innovate, let us try and do things differently and better. When the economy is where it is now all of that dries up.

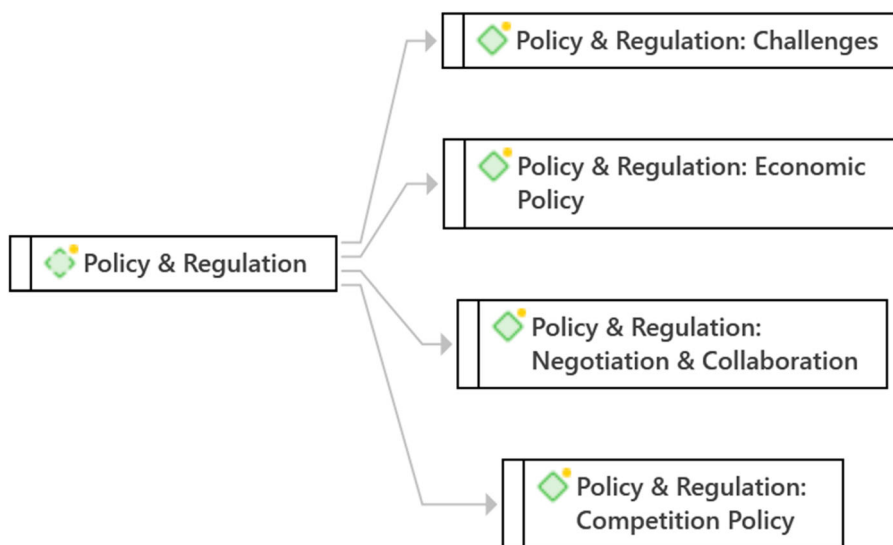


Figure 4. ATLAS.ti category code network: policy and regulation.

Company C: The government should realise that they need businesses to create employment, contribute to economic development, and generate taxes.

That is why it is important that sound economic policies should exist in the country in order to attract foreign investors to conduct M&As in South Africa. The second quote is a good example, where in times of a healthy South African economy, it is the participant's opinion that there was more merger activity. If there are sound economic policies that stimulate growth, an increase of M&A activity is possible, and if not, it adds to creating more uncertainty, which will deter M&A activity and suppress economic growth.

4.2.3.2. Policy and regulation: Competition policy. As has been stated numerous times in the results of the study at hand, there are many uncertainties regarding the M&A process in South Africa, as well as what creates these uncertainties, such as companies not being sure which conditions are going to be imposed during the process. This said, the participants were also of the view that this is not the fault of the competition authorities.

Company A: What I can say though from the M&A process in a more traditional sense is that the topic of competition approval is absolutely at the forefront of policy uncertainty because of the nature of the process and at the moment, as you work through the process, be it as a target or acquirer, you almost go through the process with a bit of a 'wait-and-see' approach because you are not sure what the ask is going to be

Company G: Like I was saying, uncertainty created by the application of the competition legislation is a very prevalent issue. It does have an enormous impact in terms of any business growth prospects or growth plans.

Company B: That is because the Commission is efficient and well-resourced and staffed with dedicated people who do their jobs properly. More of the policy goals and political goals are being pushed into the realm of the competition authorities, so the Commission is tasked with dealing with, but we see all these kinds of transformation goals being shifted into the merger reviews.

The participants were of the view that the competition authorities, such as the commission and tribunal themselves are efficient, well-staffed and include dedicated employees that do their job well within a comprehensive competition act. What the participants feel aids in creating uncertainty as shown in the third quote is where the social problems and political goals of the country are pushed into the realm of the competition authorities.

4.2.3.3. Policy and regulation: Negotiation and collaboration. Participants felt that knowing the potential employment effects and shareholding implications of a merger beforehand, can assist with crafting appropriate employment conditions and ESOP programmes, which can, in turn, assist with the transaction. Entering into the discussions prepared and knowing how to approach the authorities can go a long way in reducing the uncertainty of the process of dealing with the commission.

Company D: And that does, I think, set us in a position where we don't see this as a once-off transaction and ongoing relationship both with government but also with the societies and the ecosystem and in which we operate. We would always engage and push back and try and find practically what works and

what definitely ensures that our boards of directors meet their fiduciary duties under the Companies Act when it comes to doing a deal based on certain conditions.

Company C: And it is collaborative, not because it necessarily starts out that way. Uh, just from a general commercial perspective and how capital is deployed, we always work off the premise that when we engage any regulator – the regulator can impose conditions, but those conditions can't result in the business becoming no longer commercially sound. So, where they impose conditions on whether it's a 500-million-rand fund, whether it is no retrenchments in a particular point. It comes back to how you approach and how you engage with the Commission.

As indicated in the participant responses above, most of the participants were also of the view that in order to assist in reducing some of the uncertainty regarding the M&A process, it is important to employ negotiation and collaboration strategies when converging with the authorities.

4.2.3.4. Policy and regulation: Challenges. Knowing all the uncertainties that can arise when conducting M&As in South Africa and dealing with competition authorities, South Africa's economic situation and policies can assist during the process, but there are still challenges that are faced. It is important to reiterate some that were previously mentioned.

Lawyer Firm A: They've got to do whatever they need to do within that timeline. These other regulatory bodies sometimes it's just a guideline, and that's the difficulty of doing it. So, where I'm hoping to do or close deal in a year, probably now, it's unlikely. You know, if you're starting after June, we're never getting that deal done this year. In fact, you got to start in January to finish by December.

Company F: You really want to expand and create employment, do it in a sensible and commercial way while still earning your returns. But you know, given the structural and economic challenges that's already there in terms of infrastructure and load shedding it is difficult.

The duration of a merger decision is one of the major uncertainties and challenges faced by the participants where it is never certain how long a merger transaction will take due to not knowing the conditions that will be imposed; Therefore, it can become a lengthy process. Lastly, as mentioned in many of the other themes, the structural and economic challenges that are faced by participants in South Africa create major challenges and uncertainties for participants when deciding to take part in the M&A process in South Africa.

5. Summary and conclusion

The 'public interest' considerations introduced into South Africa's competition law inevitably opened up a robust debate as well as injected additional uncertainty about mergers and acquisitions becoming subject to the Competition Commission's surveillance of these putative business transactions. The more aggressive approach to using competition law to promote broader public interest considerations in merger regulation therefore brought its own fresh challenges. It posed wider questions of consistency and

predictability in the Competition Commission's merger decisions, which lie beyond the remit of this research.

In light of recent literature not providing a comprehensive understanding regarding the cost implications and perceptions of regulatory uncertainty in the application of merger control in South Africa, the aim of this article was to identify these implications and uncertainties and to propose measures to reduce these uncertainties. It examined the relationship between the prevalence of persistent overall policy uncertainty in South Africa on the one hand, and the uncertainty and business costs generated by the Competition Commission's often unnecessarily prolonged 'public interest' interrogation of mergers and acquisitions on the other. The empirical evidence from business participants suggests that excessive delays and uncertainties around even this rather narrow process can, nonetheless, have broad negative effects on investment and growth, as well as on South Africa's global competitiveness.

Merger decision delays matter if South Africa wants to be a preferred investment destination. Merger regulation should not be immune from the overall commitment to reduce the costs of doing business in South Africa as a policy goal. These concerns are reinforced as the economic and business environment has become even more challenging and all possible obstacles to job-rich growth in South Africa need to be reduced or minimised. Policies do matter, but so also do the institutions and mechanisms through which they are approved and implemented.

Investor sentiment can be negatively affected in this way at a time when South Africa's fixed capital formation trends are well below desired levels. Whatever the merits of the 'public interest' clause in South African competition law, it has become more necessary than ever before that any regulatory framework should be implemented expeditiously and with minimal disruption to investor confidence. Research points to the desirability of enforcement and compliance costs being kept as low as possible in competition law and policy.

Nevertheless, from this study it has also emerged that there is a clear reciprocal obligation on firms engaging with the Competition Commission on merger issues. Several respondents emphasised that dealing with the Commission is a 'collaborative process' – of sharing information and encouraging a critical path analysis, with an anticipated definitive outcome one way or the other. Therefore, it is helpful for investors to understand in advance the guidelines, procedures and protocols that govern the manner in which the Commission deals with putative merger and acquisition transactions of this kind. Familiarity with the dynamics around the 'public interest' mandate could thus assist firms in navigating the requirements of the Commission.

It has also emerged that adding to the potential risks of excessive delay in merger and acquisition decisions by the Commission is now also the much higher cost of borrowing. The global economy – and South Africa – are no longer in a cheap money era. Although interest rates will decline from their current high levels as inflation unwinds, the general consensus is that they will not revert to previous low levels in the foreseeable future. Inevitably, this now heightens the 'cost of waiting' for some investors who may be subject to the Commission's merger and acquisition interrogations that are unnecessarily delayed. Therefore, the risk of discouraged, thwarted, or abandoned potential investment transactions is higher, unless the Commission decisions are reasonably rapidly forthcoming.

The research findings resonate with the broader macro-picture concerns about the role of policy uncertainty in the South African economy. The overriding need for all

relevant state agencies in South Africa to reduce uncertainty in their activities for investors and other stakeholders was specifically reinforced; for example, by the National Planning Commission (NPC) in its recent Ten-Year Review of the National Development Plan. The NPC strongly urged that ‘in the immediate term, South Africa needs to deal with policy uncertainty and significantly enhance coordination and coherence’ (National Planning Commission, 2023).

This paper contributes to the body of literature by elaborating on the various uncertainties faced by firms taking part in the M&A process in South Africa and can assist various stakeholders such as the Competition Commission in reviewing its merger framework as well as assisting business participants in identifying the possible uncertainties and cost implications for merging in South Africa.

It is acknowledged that this research also had its limitations, where the research was limited to ten participants being interviewed as well as restricted to certain industries. It is recommended that further research focus on a larger sample and maybe not restrict the study to certain industries but to complete an industry wide project on all industries in South Africa. While acknowledging the limitations above, we are confident that the findings do identify the uncertainties and implications of taking part in the M&A process in South Africa. Finally, addressing policy uncertainty and streamlining regulatory processes are crucial steps towards enhancing South Africa’s attractiveness as an investment destination and fostering economic growth.

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Appendices

Appendix 1

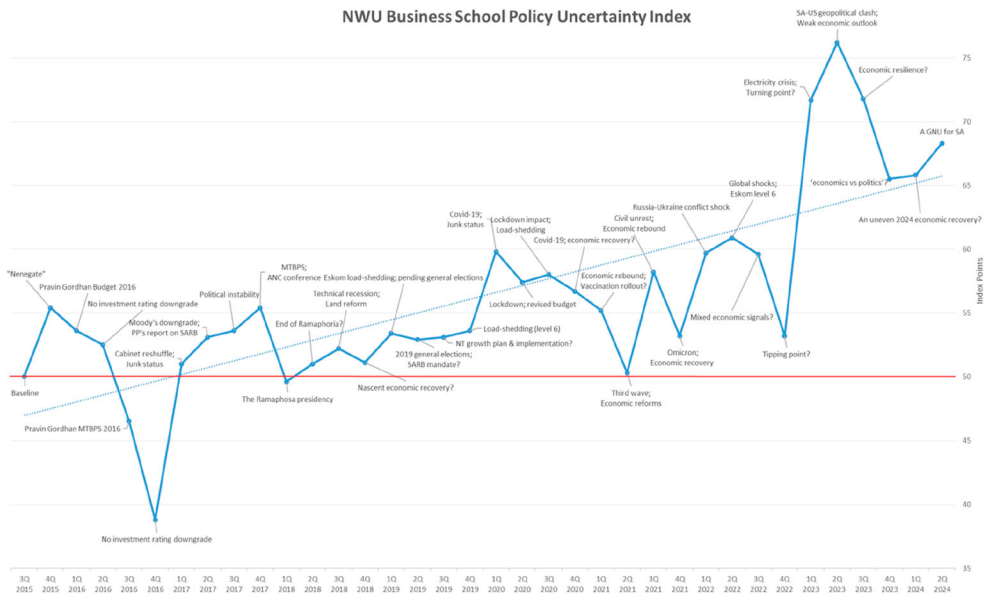


Figure A1. NWU-BS policy uncertainty index for 2Q2024. Source: NWU Business School (2024).

Appendix 2. Semi-structured interview questions

1. What sector does your company form part of?
2. Are your headquarters located in South Africa or in another country?
3. Has your company formed part of the merger and acquisition (M&A) process in South Africa, if yes what was the merger size of your latest transaction?
4. Were you the acquiring or target firm?
5. Based on your answer to question 3, why did you merge / why would you want to merge / why would you not want to merge?
6. If you were part of an M&A transaction, were there any public interest conditions (PICs) imposed, if yes what type (Employment, BBBEE, SMME, Industrial sector or region, Supplier Development Fund, Other)?
7. What impact does broad policy uncertainty have on your M&A decision making process?
8. What other regulatory/policy related factors do you believe have an impact on the M&A process in South Africa?
9. In your case, did policy implications or outside intervention extend/delay the merger decision and ended up making the merger more expensive?
10. From your company's experience do you have any suggestions to improve the official interventions/policy framework in the M&A process or not?