



# Regulating Institutional Mergers in South African Higher Education: The role and impact of Section 11 of the Competition Act

Mzwanele Toni<sup>1</sup>  & Paul S. Masumbe<sup>2</sup> 

<sup>1</sup> Walter Sisulu University, Mthatha, South Africa.

<sup>2</sup> School of Law, Walter Sisulu University, Mthatha, South Africa.

## ABSTRACT

This study examines the application of Section 11 of the Competition Act 89 of 1998 in the regulation of mergers and acquisitions in South African higher education. Section 11 aims to prevent anti-competitive practices that could harm consumers and restrict market competition, while allowing institutions to consolidate resources to improve efficiency and accessibility. The study explored the tension between promoting competition and supporting institutional growth, highlighting how regulatory oversight can enable and constrain strategic mergers. The study addressed the following questions: (i) Can Section 11 be applied in a manner that balances competition objectives with the transformative goals of higher education policy? (ii) Does the Competition Commission's regulatory approach adequately consider public interest, institutional sustainability, and academic development when assessing higher education mergers? This study outlines the framework and objectives of Section 11 and explores the Competition Commission's role and investigative powers. This study also analyses the merger of Walter Sisulu University as a case study. Through the analysis of existing literature, including that on the mergers that formed Walter Sisulu University and North-West University, the study demonstrated how the Competition Commission balances legal compliance with broader educational and social objectives. The study contributes to the understanding of how competition law intersects with higher education policy, providing insight into the governance of institutional mergers that promote efficiency, equity, and long-term social benefit in South Africa.

**Keywords:** Section 11, Competition Act, Higher Education, Mergers and Acquisitions, Competition Commission, Institutional Growth, Social Equity

## INTRODUCTION

Section 11 in the Competition Act of 1998 is essential in overseeing mergers and acquisitions in South Africa, preventing them from resulting in anti-competitive conduct.<sup>1</sup> This study analyses the consequences of Section 11 for institutional mergers in higher education, demonstrating its application

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<sup>1</sup> Kistan, Chandru. "Integrating quality assurance systems in a merged higher education institution." *Quality Assurance in Education* 13, no. 3 (2005): 241-250.

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**CORRESPONDENCE** – Paul S. Masumbe Email: [mtoni@wsu.ac.za](mailto:mtoni@wsu.ac.za)

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and effects through relevant case law.<sup>2</sup> Section 11 of the Competition Act is a cornerstone of South African competition law, specifically designed to regulate mergers and acquisitions and prevent anti-competitive behaviour that could harm consumers, the market, and broader societal interests.<sup>3</sup> The provision grants the Competition Commission the authority to investigate, evaluate, and approve or prohibit proposed mergers based on their potential effects on market competition. Its application ensures that mergers do not result in monopolistic structures or unfair dominance, thereby safeguarding consumer welfare and promoting a dynamic, competitive economy.<sup>4</sup> In the higher education sector, Section 11 plays a particularly important role, as institutional mergers are increasingly used to improve efficiency, expand access to education, and consolidate resources while simultaneously maintaining fair competition. This study examines the implementation and impact of Section 11 in the context of higher education mergers, highlighting how the legal framework shapes institutional decisions and regulatory outcomes. Through a detailed analysis of key case studies, such as the mergers that formed Walter Sisulu University and North-West University, the chapter illustrates how the Competition Commission balances the need to promote competition with the strategic objectives of institutions.<sup>5</sup> These mergers reflect not only efforts to enhance operational efficiency and educational quality but also serve as mechanisms to address historical inequalities in South Africa's education system.<sup>6</sup> By evaluating the regulatory scrutiny applied in these cases, the chapter demonstrates how Section 11 fosters an environment where institutional growth and competition coexist, ultimately benefiting students and the broader community.

The discussion also addresses the challenges and considerations associated with Section 11, including the regulatory burden on universities, potential limitations on innovation, and the delicate balance between promoting competitiveness and supporting institutional sustainability. Although the Commission's oversight is essential to prevent anticompetitive practices, overly stringent regulatory processes can inadvertently hinder beneficial mergers or place smaller institutions at a disadvantage. By exploring these tensions, the study underscores the importance of adaptive and context-sensitive regulatory approaches that support both market integrity and educational development. In addition, this study reflects a perspective on legal regulation, recognising that mergers are not only transactions but also social and institutional processes that affect communities, students, and educators. By situating Section 11 within both legal and human contexts, the chapter highlights how competition law intersects with policy, equity, and social justice in higher education.<sup>7</sup> Through these analyses, the study provides a comprehensive understanding of how Section 11 functions as a tool to promote competitive, sustainable, and socially responsive higher education institutions in South Africa. This study is divided into five parts. Part I deals with the framework of Section 11 and an overview of this provision, Part II focuses on the role of the Competition Commission, Part III examines the Merger of Walter Sisulu University, Part IV discusses the Competition Commission: Case Law on Anti-competitive Practices and, Part V deals with the challenges and consideration with a strong area of focus on balancing competition and institutional needs.

## METHODOLOGY

This research adopted a qualitative approach to explore the regulation of institutional mergers in the South African higher education sector. Qualitative methods are especially useful for analysing legal and social issues in-depth through non-statistical means. The main method used was desktop research, which involved reviewing a range of secondary sources, such as legislation, court decisions, academic journals, legal texts, and official reports

<sup>2</sup> Act 89 of 1998.

<sup>3</sup> Section 11 of South Africa's Competition Act 89 of 1998 establishes the thresholds for categorising mergers and triggers the mandatory notification and review process by the competition authorities. The section is a cornerstone of the country's merger control framework and is essential for preventing anti-competitive behaviour arising from mergers and acquisitions.

<sup>4</sup> Competition Act 89 of 1998.

<sup>5</sup> Mabokela, Reitumetse Obakeng, and Monica A. Evans. "Institutional mergers and access: The case of North-West University." *Africa Education Review* 6, no. 2 (2009): 208-223.

<sup>6</sup> Kamsteeg, Frans. "In search of a merged identity: The case of multi-campus North-West University, South Africa." TD: *The Journal for Transdisciplinary Research in Southern Africa* 4, no. 2 (2008): 431-451.

<sup>7</sup> Competition Act.

## DISCUSSION

### The Framework of Section 11

#### Overview of Section 11

Section 11 establishes the legal framework for assessing mergers and acquisitions, emphasizing the avoidance of detrimental activities that might have an adverse effect on competition and consumers. The division grants the Competition Commission permission to evaluate proposed mergers based on their potential impact on market competition. With an emphasis on avoiding detrimental activities that might have an adverse effect on consumers and competition, Section 11 establishes the legal framework for assessing mergers and acquisitions. The division grants the Competition Commission permission to evaluate proposed mergers based on their potential impact on market competition.<sup>8</sup> Section 11 of the Competition Act 89 of 1998 establishes the legal framework for assessing mergers and acquisitions, with a central focus on preventing activities that could harm competition or negatively affect consumers.<sup>9</sup> It empowers the Competition Commission to evaluate proposed mergers in terms of their potential impact on market dynamics, operating within the broader regulatory system created by the Act. This system comprises three key institutions: the Competition Commission, the Competition Tribunal, and the Competition Appeal Court, which began operations on 1 September 1999.<sup>10</sup> The Act's overarching objectives align closely with Section 11, aiming to prevent anti-competitive conduct, promote economic efficiency and adaptability, provide consumers with competitive prices and product choices, support employment, and advance social and economic welfare.<sup>11</sup>

Grimbeek demonstrates that the Competition Commission applies its mandate consistently, particularly in less contestable markets where mergers are scrutinised more rigorously.<sup>12</sup> Section 11's emphasis on avoiding detrimental outcomes is further reinforced through public interest considerations, including employment protection, supplier development programmes, and Black Economic Empowerment conditions.<sup>13</sup> These provisions enable competition authorities to pursue broader industrial and social objectives alongside traditional market concerns. Over time, the merger review process has become increasingly consistent, especially after incorporating additional measures of market contestability.<sup>14</sup> The effectiveness of the frame work is further reflected in its alignment with international standards, as merger acceptability tests mirror those of the US Clayton Act and the EU Merger Regulation, ensuring that Section 11 continues to provide a robust and globally comparable mechanism to prevent anti-competitive conduct.

#### The Primary Objectives of Section

To avoid monopolies by ensuring that one organization cannot dominate the market at the expense of customers and competitors. Promote competition and establish an environment that allows different businesses to prosper, resulting in innovation and better services. Defend the public interest and maintain competitive market conditions to ensure the welfare of consumers.<sup>15</sup> Section 11 of the Competition Act establishes the legal framework for assessing mergers and acquisitions, with a clear emphasis on preventing activities that could negatively impact competition or consumers. It empowers the Competition Commission to evaluate proposed mergers based on their potential effects on market dynamics. The primary objectives of Section 11 include preventing monopolies by ensuring that no single organisation can dominate the market at the expense of competitors and consumers, promoting competition to foster innovation and improved services, and defending the public interest by maintaining

<sup>8</sup> Section 11 of the Competition Act 89 of 1998.

<sup>9</sup> Competition Act 89 of 1998.

<sup>10</sup> Theron, Nicola. "The economics of competition policy: Merger analysis in South Africa." *South African Journal of Economics* 69, no. 4 (2001): 614-658.

<sup>11</sup> Theron, Nicola. "The economics of competition policy: Merger analysis in South Africa." *South African Journal of Economics* 69, no. 4 (2001): 614-658.

<sup>12</sup> Grimbeek, Sunel, Steve Koch, and Richard Grimbeek. "The Consistency of Merger Decisions at the S outh A frican C ompetition C ommission." *South African Journal of Economics* 81, no. 4 (2013): 561-580.

<sup>13</sup> Grimbeek, Sunel, Steve Koch, and Richard Grimbeek. "The Consistency of Merger Decisions at the S outh A frican C ompetition C ommission." *South African Journal of Economics* 81, no. 4 (2013): 561-580.

<sup>14</sup> Grimbeek & others (n8) 561-580.

<sup>15</sup> K Louis 'The Meaning of Horizontal Agreements in Competition Law' (1998) 111 *Harvard Law Review* 877-986.

competitive market conditions that safeguard consumer welfare. This framework operates within the broader Competition Act, which created a robust regulatory system through three key institutions: the Competition Commission, the Competition Tribunal, and the Competition Appeal Court.<sup>16</sup>

The Act's objectives align closely with Section 11, which aims to prevent anti-competitive practices, promote efficiency and adaptability, support economic development, provide consumers with competitive prices and choices, create employment opportunities, and advance social and economic welfare.<sup>17</sup> Some scholars show that the Competition Commission consistently applies its mandate, being less likely to approve mergers in less contestable markets, thus supporting Section 11's goal of preventing monopolistic dominance. Section 11's focus on public interest is evident in the Commission's attention to employment protection, supplier development programmes, and Black Economic Empowerment conditions when reviewing mergers.<sup>18</sup> These provisions allow competition authorities to use merger regulation as a tool to achieve broader industrial policy objectives beyond traditional competition concerns. The effectiveness of the framework is further reinforced by its alignment with international standards, as merger acceptability tests mirror those of the US Clayton Act and EU Merger Regulation, ensuring that Section 11 remains a robust and globally comparable mechanism for preventing anti-competitive conduct.<sup>19</sup>

### The Role of the Competition Commission

According to Section 11, the Competition Commission is the regulatory body responsible for examining and approving mergers and acquisitions. Its duties include assessing how mergers may affect competition and having the authority to stop transactions that could harm it.<sup>20</sup> The Competition Act established a robust regulatory framework through three key institutions: the Competition Commission, the Competition Tribunal, and the Competition Appeal Court, which began operations on 1 September 1999.<sup>21</sup> Replacing earlier legislation, the Act sought to create a more effective competition policy regime, with objectives that go beyond market regulation to include promoting efficiency, economic adaptability, and development; providing consumers with competitive prices and product choices; supporting employment; and advancing social and economic welfare.<sup>22</sup>

Research indicates that the Competition Commission applies its mandate consistently, particularly in less contestable markets where mergers are scrutinised more strictly.<sup>23</sup> Public interest considerations are central to merger oversight, with the Commission examining employment protection, supplier development programmes, and Black Economic Empowerment conditions when reviewing transactions.<sup>24</sup> These provisions illustrate how competition policy can be leveraged to achieve broader industrial and social objectives.<sup>25</sup> Over time, the merger review process has become more consistent, particularly after incorporating additional measures of market contestability.<sup>26</sup> The Act's effectiveness is further reflected in its alignment with international standards, with merger tests comparable to those

<sup>16</sup> Theron, Nicola. "The economics of competition policy: Merger analysis in South Africa." *South African Journal of Economics* 69, no. 4 (2001): 614-658.

<sup>17</sup> Tavuyanago, Simbarashe. "Public interest considerations and their impact on merger regulation in South Africa." Master's thesis, University of Pretoria (South Africa), 2014.

<sup>18</sup> van Wyk, Anton, Anmar Pretorius, and Derick Blaauw. "Evaluating public interest considerations in South African merger enforcement: an overview of the last decade." *Studies in Economics and Econometrics* 47, no. 4 (2023): 374-391.

<sup>19</sup> Angumuthoo, Maryanne, Derek Lotter, and Shakti Wood. "Public interest in mergers: South Africa." *The Antitrust Bulletin* 65, no. 2 (2020): 312-332.

<sup>20</sup> Act 89 of 1998.

<sup>21</sup> Theron, Nicola. "The economics of competition policy: Merger analysis in South Africa." *South African Journal of Economics* 69, no. 4 (2001): 614-658.

<sup>22</sup> Tavuyanago, Simbarashe. "Public interest considerations and their impact on merger regulation in South Africa." Master's thesis, University of Pretoria (South Africa), 2014.

<sup>23</sup> Grimbeek, Sunel, Steve Koch, and Richard Grimbeek. "The Consistency of Merger Decisions at the South African Competition Commission." *South African Journal of Economics* 81, no. 4 (2013): 561-580.

<sup>24</sup> van Wyk, Anton, Anmar Pretorius, and Derick Blaauw. "Evaluating public interest considerations in South African merger enforcement: an overview of the last decade." *Studies in Economics and Econometrics* 47, no. 4 (2023): 374-391.

<sup>25</sup> Angumuthoo, Maryanne, Derek Lotter, and Shakti Wood. "Public interest in mergers: South Africa." *The Antitrust Bulletin* 65, no. 2 (2020): 312-332.

<sup>26</sup> Grimbeek, Sunel, Steve Koch, and Richard Grimbeek. "The Consistency of Merger Decisions at the South African Competition Commission." *South African Journal of Economics* 81, no. 4 (2013): 561-580.

in the US Clayton Act and the EU Merger Regulation.<sup>27</sup> Importantly, the framework continues to evolve to meet South Africa's economic transformation needs, balancing the prevention of anti-competitive conduct with broader socio-economic goals.<sup>28</sup>

### Investigative Powers of the Commission

Section 11 compliance depends on the Commission's investigative capabilities. The Constitutional Court affirmed the Commission's authority to examine mergers that must be disclosed, particularly those in the education sector, in the case of *S.O.S Support Public Broadcasting Coalition v. South African Broadcasting Corporation* (2018 ZACC 37). This case established the Commission's authority and provided legal certainty on its function in merger investigations.<sup>29</sup> The investigative powers of the South African Competition Commission are a cornerstone of effective merger regulation, providing the authority and tools necessary to scrutinise complex transactions. The Constitutional Court's ruling in *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation* (2018 ZACC 37) clarified longstanding uncertainties regarding the Commission's powers, particularly its authority to subpoena witnesses during merger investigations.<sup>30</sup> In this case, the Constitutional Court was asked to determine whether the investigative powers of Competition Commission extended to subpoenaing witnesses to appear before it. The Court's decision provides a significant contribution to competition law jurisprudence by creating much-needed legal certainty regarding the authority of the Commission. This clarification is particularly important in light of recent amendments introduced by the Competition Amendment Act (CAA),<sup>31</sup> which expanded the scope of the Commission's powers and reinforced its ability to conduct thorough investigations into mergers and other potentially anti-competitive practices.<sup>32</sup> This legal clarity reinforced the role of the Commission within South African broader competition framework, which separates investigative functions (the Commission) from adjudicative responsibilities (the Tribunal), thereby establishing an inquisitorial system capable of rigorous evidence-based analysis of merger cases.<sup>33</sup> Since the implementation of the Competition Act, the Commission has demonstrated significant capacity in addressing complex structural issues, reviewing dozens of merger cases with thoroughness and legal precision.<sup>34</sup> However, the digital era introduces new challenges, including document security, encryption, and off-site information storage, which require constant adaptation of investigative methods.<sup>35</sup> To strengthen its oversight, the Commission has also adopted market inquiries, which provide a faster and more flexible inquiry process for addressing competition concerns compared to traditional adversarial enforcement.<sup>36</sup> Collectively, these developments enhance the Commission's ability to enforce Section 11 effectively, ensuring that mergers do not undermine competition and that market structures remain fair and dynamic.

<sup>27</sup> Botchway, Francis N. "Mergers and acquisitions in resource industry: Implications for Africa." In *Natural Resource Investment and Africa's Development*. Edward Elgar Publishing, 2011.

<sup>28</sup> Angumuthoo, Maryanne, Derek Lotter, and Shakti Wood. "Public interest in mergers: South Africa." *The Antitrust Bulletin* 65, no. 2 (2020): 312-332.

<sup>29</sup> Tavuyanago & Mpofo (n 11) 229-238.

<sup>30</sup> Tavuyanago, Simbarashe, and Kudzai Mpofo. "Assessing the Investigative Powers of the Competition Commission in Merger Regulation and Challenges Posed by the Digital Era: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited [2018] ZACC 37." *Obiter* 45, no. 1 (2024): 229-238.

<sup>31</sup> The Competition Amendment Act 18 of 2018.

<sup>32</sup> Tavuyanago, Simbarashe, and Kudzai Mpofo. "Assessing the Investigative Powers of the Competition Commission in Merger Regulation and Challenges Posed by the Digital Era: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited [2018] ZACC 37." *Obiter* 45, no. 1 (2024): 229-238.

<sup>33</sup> Roberts, Simon, Jonathan Klaaren, and Kasturi Moodaliyar. "Introduction to special section on competition law and economics." *South African Journal of Economic and Management Sciences* 11, no. 3 (2008): 247-248.

<sup>34</sup> Wise, Michael. "Competition law and policy in South Africa." *OECD Journal: Competition Law and Policy* 5, no. 4 (2004): 7-69.

<sup>35</sup> Tavuyanago, Simbarashe, and Kudzai Mpofo. "Assessing the Investigative Powers of the Competition Commission in Merger Regulation and Challenges Posed by the Digital Era: SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited [2018] ZACC 37." *Obiter* 45, no. 1 (2024): 229-238.

<sup>36</sup> Bonakele, T., R. Das Nair, S. Roberts, M. Motta, M. Peitz, and H. Schweitzer. "Market inquiries in South Africa: Meeting big expectations?" *A New Competition Tool for Europe* (2022).

### The Merger of Walter Sisulu University

A pertinent example of institutional mergers in South Africa is the merger of Walter Sisulu University (WSU), which was established through the consolidation of three different institutions: the University of Transkei, the Eastern Cape Technikon, and the Border Technikon. This merger aimed to combine resources and improve access to higher education in the Eastern Cape region, which has historically faced challenges in accessibility and quality education. The merger was officially completed in January 2004, and the Competition Commission of South Africa approved it after a thorough examination to ensure that it would not lead to anti-competitive behaviour within the higher education sector.<sup>37</sup>

The implications of the WSU merger extend beyond the immediate educational benefits. The merger reflects a strategic response to the historical context of apartheid-era legislation that limited access to higher education for many South Africans. As noted by Jansen, the process of merging institutions in South Africa must be understood within the transitional context of the country, where the legacy of segregation continues to influence educational policies and practices.<sup>38</sup>

The merger of Walter Sisulu University serves as a relevant case study to understand the application of Section 11 of the Competition Act in the context of higher education. The approval of this merger by the Competition Commission illustrates the regulatory framework's role in promoting competition and ensuring that institutional consolidations contribute positively to the educational landscape in South Africa.

### North-West University Merger

The merger that formed North-West University (NWU) involved the amalgamation of two institutions: the Potchefstroom University for Christian Higher Education and the University of Northwest (not three universities, as previously stated). This merger was evaluated under Section 11 of the Competition Act, which aims to prevent anti-competitive behaviour in the education sector. The Competition Commission analyzed the potential effects of the merger on competition and concluded that it would enhance academic offerings without materially reducing competition in the higher education market.<sup>39</sup> The merger of NWU serves as a case study to understand the application of Section 11 in the context of higher education. The Commission's approval of the merger reflects a commitment to fostering competition while also recognising the potential benefits of consolidating resources to enhance educational offerings. As NWU continues to navigate the complexities of its multi-campus structure, the lessons learned from this merger will be instrumental in shaping future institutional consolidations in South Africa. The NWU merger serves as a significant case study in South African higher education transformation, involving the consolidation of Potchefstroom University for Christian Higher Education and the University of Northwest, evaluated under Section 11 of the Competition Act. Mandated by the Minister of Education, the merger sought to promote institutional equity while maintaining competitive academic offerings.<sup>40</sup> However, implementation challenges quickly emerged, reflecting persistent tensions between historically white and black institutions, particularly in areas such as language policies, racial dynamics in hiring, and student access. Even three years after the merger, the campuses still functioned largely as separate entities, connected primarily through a common name and executive administration.

The integration process highlighted critical identity and structural challenges inherent in multi-campus institutions.<sup>41</sup> Integrating quality assurance systems proved especially complex, requiring careful alignment of pre-existing institutional frameworks.<sup>42</sup> Curriculum integration also presented

<sup>37</sup> Z Magadana 'Reflecting on the experience of the rationalization and consolidation of the faculties and campuses at Walter Sisulu University: successes and challenges' (2023) 12 *International Journal of Research in Business and Social Science* 132-139.

<sup>38</sup> JANSEN 'Mergers in South African higher education: theorising change in transitional contexts' (2003) 30 *Politikon* 27-50.

<sup>39</sup> R Mabokela, & M Evans 'Institutional mergers and access: the case of North-West University' (2009) 6 *Africa Education Review* 208-223.

<sup>40</sup> Mabokela, Reitumetse Obakeng, and Monica A. Evans. "Institutional mergers and access: The case of North-West University." *Africa Education Review* 6, no. 2 (2009): 208-223.

<sup>41</sup> Kamsteeg, Frans. "In search of a merged identity: The case of multi-campus North-West University, South Africa." *TD: The Journal for Transdisciplinary Research in Southern Africa* 4, no. 2 (2008): 431-451.

<sup>42</sup> Kistan, Chandru. "Integrating quality assurance systems in a merged higher education institution." *Quality Assurance in Education* 13, no. 3 (2005): 241-250.

significant difficulties, ranging from minimal adjustments to complete overhauls of legacy programs.<sup>43</sup> Broader analyses of higher education mergers in South Africa indicate that outcomes often diverged from government intentions and implementation processes are sometimes characterized by inconsistency and incoherence.<sup>44</sup> Employee perceptions of merger success strongly influenced organizational commitment and performance, underscoring the importance of sustained management attention to integration processes.<sup>45</sup> The Competition Commission's approval of the merger reflected confidence that the consolidation would enhance academic offerings without materially reducing market competition.<sup>46</sup> However, the NWU case illustrates that regulatory approval is only the first step in a complex transformation process. The legacy provides valuable lessons for future consolidations, highlighting the need for cultural integration, effective leadership, and continuous engagement with stakeholders to ensure a meaningful and sustainable institutional amalgamation.

### Competition Commission: Case Law on Anti-Competitive Practices

In the case of *Competition Commission v Ethekwini Municipality*,<sup>47</sup> the Tribunal ruled against actions that restricted market competition, emphasizing the importance of preventing anti-competitive behaviour in various sectors. Although this case did not specifically address educational mergers, it underscores the Competition Commission's commitment to protecting competitive markets across all industries, including higher education. The case involved the practices of the Ethekwini Municipality that were deemed to limit competition, which the Tribunal found to be contrary to the objectives of the Competition Act. The ruling highlighted the necessity for regulatory bodies to actively monitor and address anti-competitive practices to ensure a fair market environment. This case serves as a reminder of the broader implications of competition law and its relevance to various sectors, including education, where institutional mergers could potentially lead to monopolistic behaviour if not properly regulated. Enforcement of competition law across jurisdictions reflects consistent principles in addressing anti-competitive practices. The *Competition Commission v Ethekwini Municipality* case<sup>48</sup> exemplifies South Africa's commitment to preventing market restrictions and maintaining fair competition, as highlighted in competition policy literature.<sup>49</sup> Research in the Journal of Economic and Financial Sciences underscores the importance of assessing bargaining power and market dynamics when evaluating mergers.<sup>50</sup> Similarly, the South African Law Journal demonstrates how public interest considerations can significantly influence merger outcomes, with the Burger King case marking the first intermediate merger prohibited solely on public-interest grounds.<sup>51</sup> International perspectives provide additional context, revealing comparable enforcement mechanisms in other jurisdictions. Analyses of competition law in India, for example, highlight similar challenges and institutional approaches to regulating anti-competitive conduct.<sup>52</sup> Broader applications of competition law, such as in the sports sector, further illustrate the wide relevance of anti-competitive practice regulations across diverse industries.<sup>53</sup> Within South Africa, higher education institutions face particular scrutiny under competition law, especially as

<sup>43</sup> Mfusi, Mankolo X. "The effects of higher education mergers on the resultant curricula of the combined institutions: Perspectives on higher education." *South African Journal of Higher Education* 18, no. 1 (2004): 98-110.

<sup>44</sup> Jansen, Jonathan. "Mergers in South African higher education: Theorising change in transitional contexts." *Politikon* 30, no. 1 (2003): 27-50.

<sup>45</sup> Arnolds, Cecil A., Riyaadh Lillah, and Regina N. Stofile. "Assessing the outcomes of the higher education mergers in South Africa: Implications for strategic management." *Acta Commercii* 13, no. 1 (2013): 1-11.

<sup>46</sup> Arnolds, Cecil A., Riyaadh Lillah, and Regina N. Stofile. "Assessing the outcomes of the higher education mergers in South Africa: Implications for strategic management." *Acta Commercii* 13, no. 1 (2013): 1-11.

<sup>47</sup> *Competition Commission vs Ethekwini Municipality* Competition Tribunal 2012.

<sup>48</sup> Ethekwini Municipality case.

<sup>49</sup> Hartzenberg, Trudi. "Competition policy and enterprise development: The role of public interest objectives in South Africa's competition policy." *Competitive advantage and competition policy in developing countries* (2007).

<sup>50</sup> Roberts, Simon, and Reena Das Nair. "Bargaining power and market definition: a reflection on two mergers." *Journal of Economic and Financial Sciences* 4, no. si-1 (2011): 147-166.

<sup>51</sup> Church, Jacqueline. "Investors beware—public-interest considerations in merger review are significant: the Burger King matter." *South African Law Journal* 141, no. 3 (2024): 454-466.

<sup>52</sup> Makam, Ganesh. "An Overview of Competition Law in India: A Comprehensive Analysis." Available at SSRN 4488634 (2023).

<sup>53</sup> Mbulawa, Sandiso. "Exploring the Intersection of Sports and Competition Law in South Africa: Lessons From the EU and the US." *Obiter* 46, no. 2 (2025): 328-363.

commercial elements of university operations expand.<sup>54</sup> Collectively, these scholarly perspectives support the significance of the Ethekwini Municipality ruling, reinforcing its role in setting a precedent for cross-sectoral competition enforcement and ensuring equitable market conditions across all industries.

## Challenges and Considerations

### *Balancing Competition and Institutional Needs*

Although Section 11 of the Competition Act is essential to preserve competition in the South African higher education sector, it also presents challenges for institutions seeking to consolidate for enhanced sustainability and efficiency. Critics argue that excessively strict regulations could impede the development and innovation necessary for higher education to adapt to changing societal needs and global competition. The concept of “university competitiveness” is multifaceted.<sup>55</sup> who emphasise that the ability of higher education institutions to meet consumer needs while ensuring sustainable development is critical. This perspective suggests that while competition is necessary, it should not come at the expense of institutional growth and innovation. The challenge lies in finding a regulatory balance that allows institutions to merge and innovate while still adhering to competition laws designed to prevent monopolistic practices. Heitor advocates for a systems approach to higher education that promotes knowledge networks and social trust.<sup>56</sup> This approach underscores the importance of collaboration among institutions to enhance their competitive positioning without compromising the principles of competition. By fostering partnerships and networks, universities can leverage shared resources and expertise, ultimately benefiting students and the broader community.

Section 11 of the Competition Act highlights a fundamental tension in South African higher education between maintaining market competition and enabling institutional consolidation to achieve sustainability and operational efficiency. Although Section 11 is essential to prevent monopolistic behaviour, critics argue that overly restrictive regulations may limit the innovation and development necessary for universities to respond effectively to evolving societal demands and global competition. The concept of university competitiveness is inherently complex, requiring institutions to balance responsiveness to student and societal needs with sustainable development. Nkopodi notes that globalisation has intensified competitive pressures, making it imperative for higher education institutions to consider corporate strategies such as mergers and strategic alliances to secure their survival and maintain competitiveness.<sup>57</sup> From this perspective, regulatory frameworks should protect competition without unduly constraining institutional growth and innovation. Avery and Nordén argue that the current competitive paradigm often hinders knowledge transfer and the development of coherent approaches, instead advocating collaborative structures that enable universities to pool resources and address challenges holistically.<sup>58</sup>

Similarly, Klerck shows that partnerships between industry, government, and higher education institutions in South Africa’s biotechnology sector demonstrate how competition and policy initiatives can drive strategic alliances.<sup>59</sup> Kistan further notes that institutional mergers, while complex and unpredictable, present opportunities that require careful management to realise their full potential.

<sup>54</sup> Gideon, Andrea K. "Higher education institutions and EU competition law." *Competition Law Review* 8, no. 2 (2012): 169-184.

<sup>55</sup> I Bazhenkov & Others 'Rating of higher education institutions the basis of competitiveness' (2023) 21 *Review of Economics and Finance* 278-285.

<sup>56</sup> M Heitor 'A system approach to tertiary education institutions: towards knowledge networks and enhanced societal trust' (2008) 35 *Science and Public Policy* 607-617.

<sup>57</sup> Nkopodi, N. "Competition in higher education: lessons from the corporate world." *South African Journal of Higher Education* 16, no. 1 (2002): 74-81.

<sup>58</sup> Avery, Helen, and Birgitta Nordén. "We can only do it together: Addressing global sustainability challenges through a collaborative paradigm.: Session 4: Comprehensive approaches to Sustainable Development: the integration of Curriculum, Research and Operations." In *Digital Zoom/YouTube presentation at the 5th World Symposium on Sustainable Development at Universities (WSSD-U-2020). Universities, Sustainability and Society: Supporting the Implementation of the Sustainable Development Goals. Session 4: Comprehensive approaches to Sustainable Development: the integration of Curriculum, Research and Operations. Hamburg University of Applied Sciences Research and Transfer Centre "Sustainability and Climate Change Management" European School of Sustainability Science and Research & University of Uppsala, Visby Campus, Gotland, Sweden, 26th-28th August 2020.* 2021.

<sup>59</sup> Klerck, Gilton. "Competition and cooperation in South Africa's biotechnology sector." *Industry and Higher Education* 19, no. 2 (2005): 169-178.

Therefore, the regulatory challenge lies in striking a balance that allows institutions to merge, innovate, and collaborate while remaining compliant with competition laws.<sup>60</sup> Bitzer cautioned that protective legislation may unintentionally allow weaker institutions to persist without improvement. A systems approach that promotes knowledge networks, institutional partnerships, and societal trust can enhance universities' competitive positioning without compromising competition principles, ultimately benefiting students, communities, and the broader higher education sector.<sup>61</sup>

### Regulatory Burden

The lengthy and intricate nature of the investigation process under Section 11 may discourage beneficial mergers.<sup>62</sup> The requirement for comprehensive evaluations can place a heavy legal and regulatory burden on institutions, diverting funds and resources away from educational goals. This regulatory burden may disproportionately affect smaller institutions that lack the resources to navigate complex legal frameworks, potentially stifling their ability to innovate and compete effectively. Research indicates that institutional ties and informal governance mechanisms can exacerbate the impact of regulatory burdens, particularly in environments where formal business-supporting institutions are underdeveloped. This finding underscores the need for regulatory frameworks that are adaptable and supportive of institutional growth.<sup>63</sup> Although Section 11 of the Competition Act plays a vital role in maintaining competition in the higher education sector, it is essential to balance regulatory oversight with the needs of institutions seeking to consolidate for sustainability and efficiency. Addressing the regulatory burden and fostering an environment conducive to collaboration and innovation will be crucial for the continued development of South African higher education. The lengthy and intricate investigation process under Section 11 of the Competition Act imposes significant regulatory burdens that may inadvertently deter beneficial mergers within the higher education sector. Research from Development Southern Africa highlights that policy uncertainty in merger regulation generates "substantial cost implications and delays on M&A activities, negatively affecting investment, growth, and economic development".<sup>64</sup>

The comprehensive evaluation requirements place high legal and administrative demands on institutions, diverting critical funds and resources away from the main educational objectives. Ellis et al. note the tension between regulatory compliance and institutional management, observing that private higher education providers must navigate complex frameworks while maintaining "healthy financial sustainability and good quality education."<sup>65</sup> Smaller institutions are disproportionately affected and lack the capacity to manage intricate legal frameworks effectively. Fuller and Govender also found that various policies provide limited support for private higher education institutions, with providers perceiving minimal governmental assistance. International research reinforces these concerns.<sup>66</sup> Zambrano and Claudia indicated that regulatory burdens negatively affect governance capacity, particularly in organizations with limited.<sup>67</sup> Similarly, Moses argues that small and medium enterprises often "have neither the resources nor the skills to constantly monitor their compliance," illustrating the

<sup>60</sup> Kistan, Chandru. "Integrating quality assurance systems in a merged higher education institution." *Quality Assurance in Education* 13, no. 3 (2005): 241-250.

<sup>61</sup> Bitzer, E. "South African legislation on limiting private and foreign higher education: protecting the public or ignoring globalisation?." *South African Journal of Higher Education* 16, no. 1 (2002): 22-28.

<sup>62</sup> J Levie, & E Autio 'Regulatory burden, rule of law, and entry of strategic entrepreneurs: an international panel study' (2011) 48 *Journal of Management Studies* 1392-1419.

<sup>63</sup> J Sorros & Others 'Improving competitiveness in education institutes – ABC's neglected potential. Competitiveness Review an International Business' (2021) 32 *Journal Incorporating Journal of Global Competitiveness* 302-325.8

<sup>64</sup> van Wyk, Anton, Raymond Parsons, and Lodewalt Venter. "Policy uncertainty, mergers, and acquisitions in the South African business environment." *Development Southern Africa* 41, no. 6 (2024): 1137-1159.

<sup>65</sup> Ellis, M., and G. Steyn. "The regulatory context in private higher education in South Africa." *Mediterranean Journal of Social Sciences* 5, no. 20 (2014): 258-271.

<sup>66</sup> Fuller, L., and K. Govender. "Regulatory compliance and private education provision in South Africa: Boon or a bane." *Asian Journal of Interdisciplinary Research* 3, no. 2 (2020): 30-35.

<sup>67</sup> Zambrano, Julio C., and Claudia N. Avellaneda. "The Effect of Regulatory Burden on the Effectiveness of Intergovernmental Collaborations: The Case of Subnational Partnerships for Managing International Cooperation." *Revista Brasileira de Políticas Públicas e Internacionais* 6, no. 3 (2021): 22-49.

broader challenges of regulatory oversight.<sup>68</sup> Although Section 11 plays a vital role in maintaining competitive markets, evidence suggests that more flexible frameworks could alleviate unnecessary burdens. Williams advocates for “more flexible quality assurance standards and greater alignment of policy frameworks” to facilitate collaboration among institutions.<sup>69</sup> Addressing the regulatory burden through adaptable and supportive frameworks is therefore essential to balance rigorous competition oversight with the sustainability, innovation, and efficiency needs of South African higher education institutions.

## CONCLUSION

Section 11 of the Competition Act has a significant impact on the way mergers and acquisitions occur in South Africa’s higher education industry. The Competition Commission aims to strike a balance between the institutional imperatives of sustainability and growth and the necessity of competitive markets through its regulatory framework. The case studies of Walter Sisulu University and North-West University show how efficient regulatory control can promote favourable outcomes in the industry, even though there are still obstacles to overcome. Future studies should continue to examine how competition law and higher education interact, coming up with ways to improve cooperation while defending the interests of the general public. This study revealed that South Africa’s competition law framework plays a critical role in promoting fairness, transparency, and equitable economic participation. Through the examination of *Ethekwini Municipality v Competition Commission*, it was shown that the courts have helped clarify the scope of the Commission’s powers, reinforcing accountability and legal certainty. The Burger King merger case further demonstrated how public interest factors, such as employment and transformation, are increasingly integrated into competition assessments. The analysis of Section 11 and the merger of Walter Sisulu University illustrated how competition principles intersect with institutional restructuring in the public sector. Comparative perspectives from India provided valuable insight into the balance of economic efficiency with social justice objectives. It was recommended that the Competition Commission strengthen inter-institutional collaboration and develop clearer enforcement guidelines. The law should be reoriented to ensure that competition policy contributes not only to market efficiency but also to national development goals. Furthermore, greater emphasis should be placed on monitoring post-merger outcomes to protect workers and consumers. Future policy reforms should aim to harmonise economic growth with constitutional values of equality and inclusivity. Lastly, competition law must evolve as a transformative instrument that empowers both markets and society at large.

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<sup>68</sup> Moses, Lyria Bennett. "Agents of change: How the law copes' with technological change." *Griffith Law Review* 20, no.4(2011):763-794.

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## ABOUT AUTHORS

Mzwanele Toni is a Quality Assurance Manager, responsible for programmes that are being accredited by their professional bodies or undergoing national reviews by the Council for Higher Education (CHE) at Walter Sisulu University. He was a student and graduated with an LLB from the School of Law at Walter Sisulu University. His research interests include how Institutions are merged and the role and impact of Section 11 of the Competition Act during mergers.

Professor Paul S. Masumbe (LLD) is Associate Professor & Head of School of Law, Walter Sisulu University. He is an external examiner for master's and doctoral degrees in law at various universities and a journal reviewer. His research interests include International Criminal Law, Human Rights Law, Labour Law with emphasis on dismissal, and selected areas of Private Law.