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## FOURTEEN YEARS LATER: AN ASSESSMENT OF THE REALISATION OF THE OBJECTIVES OF THE COMPETITION ACT 89 OF 1998

### Introduction

The Competition Act 89 of 1998 (“the Act”) is unique in that it is the product of South Africa’s economic, social and political history. As such, it provides for a broad range of economic and developmental objectives and creates the framework for an independent investigatory body (the Competition Commission (“Commission”)) and adjudicatory body (the Competition Tribunal (“Tribunal”)) to give effect to the provisions of the Act and its objectives. In the fourteen years since the Act was promulgated, the Commission and Tribunal have considered numerous mergers and investigated and brought an end to a number of South African cartels and anti-competitive practices that were flourishing in the economic climate prior to the Act.

*Competition Commission v Senwes Limited* CCT [2012] ZACC 6,<sup>1</sup> heard in November 2011, became the first competition case to be heard by the Constitutional Court. In this case, the

<sup>1</sup> “*Competition Commission v Senwes* (2012)”.

Constitutional Court was called upon to consider the nature and scope of the public power conferred on the Tribunal by the Act after the lower courts had given a number of conflicting judgments. In making its determination, the Constitutional Court applied a broad, purposive approach, which returned to the foundations of South African competition law by examining the background to the promulgation of the Act, the objectives of the Act and the roles and powers of the Commission and Tribunal that are envisaged by the Act.

This paper examines the context and objectives of the Act in order to assess whether its substantive objectives are being achieved. In making this assessment, this paper analyses the recent spate of disputes over procedural points that have arisen from the Commission's prohibited practice investigations as well as the current prominence of public interest considerations in the merger review process. This assessment indicates that realisation of the objectives of the Act is being hampered by procedural irregularities and too great a focus on public interest concerns introduced by intervening parties. *Competition Commission v Senwes*<sup>2</sup> is therefore a watershed judgment in that it highlights the importance of the underlying objectives of the Act, an important message in light of indications that the competition authorities may be losing sight of the true focus of the Act.

### *Objectives of the Act*

The broadest objective of competition law is to “*remedy market failures and to provide a framework for regulating mergers*”.<sup>3</sup> Thus in most competition jurisdictions the focus of competition law is on promoting and protecting the competitive process and achieving greater economic efficiency.<sup>4</sup>

According to a survey at the Organisation of Economic and Community Development

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<sup>2</sup> *Ibid.*

<sup>3</sup> C Smit *The Rationale for Competition Policy: A South African perspective* (paper read at the biennial ESSA conference 7–9 September 2005) 25.

<sup>4</sup> Organisation for Economic Co-Operation and Development (OECD) Global Forum on Competition (CCNM/GF/COMP(2003)3) *The Objectives of Competition Law and Policy* (2003) para 20.

(“OECD”)<sup>5</sup> global forum, most developed countries show a shift away from the use of their competition laws to promote broad public interest objectives and focus instead on creating a framework for achieving the efficient use of resources and protecting freedom of economic activity in the market.<sup>6</sup> In addition, public interest objectives usually fall within the mandate of a government minister or political decision-making body.<sup>7</sup> In developing countries, however, developmental goals often play a prominent role alongside the promotion and maintenance of competition,<sup>8</sup> and the right to consider public interest concerns frequently vests in the country’s competition authorities.<sup>9</sup>

It is against this backdrop that South Africa, as a developing country, should be considered. South Africa’s political history and economic background have also had a definitive influence on its competition policy.<sup>10</sup> As summarised by Hartzenberg:

“Competition challenges arose from South Africa’s apartheid history, its economic isolation, financial sanctions and high levels of market and ownership concentration, especially in mining and manufacturing.”<sup>11</sup>

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<sup>5</sup> *Ibid* para 2. Responses provided by participants in the OECD Global Forum indicated that conclusions drawn in a similar review in 1992 held true in 2003, namely that in most jurisdictions the basic objectives of competition law are to maintain and encourage the process of competition in order to promote the efficient use of resources in the market while still protecting the freedom of the economic activities of various market participants. Other uses of competition policy include pluralism, de-centralisation of economic decision making, preventing abuses of economic power, promoting small business, fairness and equity.

<sup>6</sup> *Ibid* para 6.

<sup>7</sup> *Ibid* para 11.

<sup>8</sup> *Ibid* para 7; T Hartzenberg *Competition Policy in SADC* (2002) (Trade and Industrial Policy Strategies (TIPS) 2002 Annual Forum) 1.

<sup>9</sup> OECD Global Forum *op cit* note 4 para 11. Competition policy in developing countries frequently includes objectives that focus on co-ordinating competition policy with other government macroeconomic policies and addressing country specific problems (see Smit *op cit* note 3 at 3).

<sup>10</sup> Smit *ibid* at 25.

<sup>11</sup> Hartzenberg *op cit* note 8 at 7.

South Africa has an economic legacy of state ownership,<sup>12</sup> protection,<sup>13</sup> import substitution and economic isolation (as a result of sanctions), combined with strong property rights and well-developed markets, that differentiate it from other developing countries.<sup>14</sup> In addition, South Africa's history of racial discrimination had the effect of *inter alia* holding down the costs of labour for industries and shielding white farmers and businesses from competition (through reservation of land for white ownership and subsidy preferences for white-owned firms), which concentrated ownership in the hands of the white population.<sup>15</sup>

As a result of these factors, product markets and capital ownership in South Africa were highly concentrated in the past.<sup>16</sup> In certain aspects, South Africa has a well-developed market economy, but there is also a need to reduce concentration in a number of markets, transform patterns of central ownership, and close the gap between a wealthy minority and a substantial majority that operate in a far less developed economic environment.<sup>17</sup>

Consequently, competition law performs a dual role in South Africa – in addition to stimulating competition and achieving market efficiency, it also aims to be an instrument of economic transformation<sup>18</sup> and address “*the historical economic structure and encourage broad-based economic growth*”.<sup>19</sup> This dual objective is encapsulated in an address given in February

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<sup>12</sup> Organisation for Economic Co-Operation and Development (OECD) Peer Review *Competition Law and Policy in South Africa* (2003) 9. State-owned manufacturing enterprises dominated manufacturing by the end of the 1930s largely as the result of government policies aimed at decreasing South Africa's dependence on the mining industry.

<sup>13</sup> *Ibid.* Historically, South Africa developed around mining conglomerates and economic policies were formed to protect investors (often foreign) in these industries.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*; Smit *op cit* note 3 at 2.

<sup>16</sup> OECD Peer Review *op cit* note 12 at 10.

<sup>17</sup> OECD Peer Review *op cit* note 12 at 10–11.

<sup>18</sup> *Ibid* at 14. The African National Congress' Policy Guidelines for a Democratic South Africa (1992) state that a key objective of competition policy should be to remedy the concentration of 'economic power' on the basis that this had been damaging to balanced economic development in South Africa.

<sup>19</sup> S Roberts *The role for competition policy in economic development: the South African experience* (2004) (TIPS Working Paper 8–2004) 1.

2009 by the Deputy Minister of the Department of Trade and Industry (“dti”) in which it was stated:

“The active promotion of a more competitive economic environment is fundamental to our objectives in both industrial policy and the protection of consumers – particularly low income consumers.”<sup>20</sup>

South Africa’s competition policy objectives as set out in the preamble and section 2 of the Act are broad and take into account a variety of concerns.<sup>21</sup> The preamble refers to the political background and motivations for the Act, including policies of equity, distribution and efficiency.<sup>22</sup> It also states that the Act seeks to address past practices such as apartheid, which led to excessive concentration of ownership and control, inadequate restraints on anti-competitive trade practices, and unjust restrictions on full and fair participation in the economy.<sup>23</sup>

The general purpose of the Act is to “promote and maintain competition”.<sup>24</sup> This is intended to promote “the efficiency, adaptability and development of the economy”<sup>25</sup> and “achieve a more effective and efficient economy in South Africa”.<sup>26</sup> Other general objectives aimed at enhancing competition in the economy include:

- the provision of competitive prices and product choices for consumers<sup>27</sup> and providing

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<sup>20</sup> K Moodaliyer ‘The Relationship between Public and Private Enforcement in Competition Law – A Comparison of South African, European Union and Swiss Law’ (2010) 127 *SALJ* 141 at 149. This extract is taken from the following speech: R Davies ‘Address to Competition Commission Public Sector Consultative Forum’ (13 February 2009) available at <http://www.info.gov.za/speeches/2009/09021709151005.htm> accessed on 12 August 2012.

<sup>21</sup> Roberts *op cit* note 19 at 7.

<sup>22</sup> OECD Peer Review *op cit* note 12 at 18. The preamble provides a clear reference to the Act’s industrial and developmental objectives – see K Creamer ‘Challenges of the New Competition Law’ (1999) 11 *SA Merc LJ* 342 at 352.

<sup>23</sup> OECD Peer Review *ibid*.

<sup>24</sup> Section 2 of the Act.

<sup>25</sup> Section 2(a) of the Act.

<sup>26</sup> Preamble to the Act.

<sup>27</sup> Section 2(a) of the Act.

“markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire”,<sup>28</sup>

- the restraint of particular trade practices which undermine a competitive economy;<sup>29</sup>
- the establishment of independent institutions to monitor economic competition;<sup>30</sup> and
- giving effect to international law obligations.<sup>31</sup>

In addition, the Act recognises that liberalising trade and inviting foreign investment is an important factor in promoting competition.<sup>32</sup> Thus it includes among its objectives the expansion of opportunities for South African participation in world markets and the role of foreign competition in South Africa<sup>33</sup> as well as the creation of a capability and environment for South Africa to compete effectively in international markets.<sup>34</sup>

Objectives of the Act which speak to more developmental objectives include:

- the promotion of employment and the advancement of the social and economic welfare of South Africans;<sup>35</sup>
- ensuring that small and medium enterprises have an equitable opportunity to participate in the economy;<sup>36</sup>
- promotion of a greater spread of ownership, in particular to increase the ownership stakes of

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<sup>28</sup> Preamble to the Act.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> OECD Peer Review *op cit* note 12 at 20. By including these objectives, the Act recognises the desirability of encouraging Foreign Direct Investment and trade in South Africa (see Hartzenberg *op cit* note 8 at 5).

<sup>33</sup> Section 2(d) of the Act.

<sup>34</sup> Preamble to the Act.

<sup>35</sup> Section 2(c) of the Act.

<sup>36</sup> Section 2(e) of the Act.

historically disadvantaged persons<sup>37</sup> and to provide all South Africans with an equal opportunity to participate in the economy;<sup>38</sup> and

- regulation of the transfer of economic ownership in keeping with the public interest.<sup>39</sup>

Thus, the Act contains objectives focused at promoting a competitive economy and objectives that focus on furthering developmental goals and the public interest. These diverse goals<sup>40</sup> reflect that various “*interest groups have planted their flags in the competition law and process*”.<sup>41</sup> While this is testament to the wide-ranging ambitions of the Act, this also increases the risk of conflicts and inconsistent application of competition policy, as the interests of various stakeholders may conflict with each other.<sup>42</sup>

### **Realisation of the objectives of the Act: Promoting and maintaining competition**

As set out above, the key objective of the Act is to promote and maintain competition and, as recognised by section 2 of the Act, the restraint of particular trade practices (prohibited practices) which undermine a competitive economy is an important element in achieving this objective.<sup>43</sup> The Act provides for the creation of independent institutions to act as the enforcers of competition law in South Africa.

Between 1999 and 2011, the Commission has investigated over 2 800 intermediate mergers and the Tribunal has given decisions in respect of over 750 large mergers.<sup>44</sup> In addition, the

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<sup>37</sup> Section 2(f) of the Act.

<sup>38</sup> Preamble to the Act.

<sup>39</sup> *Ibid.*

<sup>40</sup> The Act has been criticised for containing objectives outside the jurisdiction of competition policy (see Smit *op cit* note 3 at 16).

<sup>41</sup> OECD Peer Review *op cit* note 12 at 19.

<sup>42</sup> OECD Global Forum *op cit* note 4 para 2.

<sup>43</sup> Preamble to the Act.

<sup>44</sup> Competition Commission South Africa *Unleashing Rivalry* (2009) 25; Competition Commission South Africa *Annual Report* (2010/2011) 30; Competition Commission South Africa *Annual Report* (2009/2010) 17.

Commission has referred numerous complaints, consent orders and settlement agreements to the Tribunal.<sup>45</sup> Combined with other economic factors, the result is that the South African economy looks very different today from when the Act was first promulgated, and the competition authorities have made great advances in enhancing competition in South Africa.

Nevertheless, the Commission submitted in its application for leave to appeal to the Constitutional Court in *Competition Commission v Yara South Africa (Pty) Ltd and others* CCT 81/11 [2012] ZACC 14<sup>46</sup> that at present approximately 12 out of 34 prohibited practice cases that have been referred to the Tribunal by the Commission have stalled on procedural grounds. This prolonged litigation on procedural points without reaching resolution on substantive issues raises concerns regarding the extent to which the competition authorities are achieving the objective of promoting competition through the restraint of prohibited practices.

#### *The scope of the Commission's powers*

A number of recent *dicta* have taken the view that the Commission is a creature of statute and as such, is bound to follow the provisions of the Act. The CAC in *Loungefoam (Pty) Ltd v Competition Commission and Others* [2011] 1 CPLR 19 (CAC)<sup>47</sup> confirmed that the Commission is required to follow the sequence of initiation, investigation and referral prescribed by the Act.<sup>48</sup> As the Commission is a statutory body exercising statutory powers in terms of the Act, it is bound to comply with the procedures prescribed by the Act.<sup>49</sup>

In *Woodlands Dairy (Pty) Ltd and another v Competition Commission* [2011] 3 All SA 192 (SCA),<sup>50</sup> the Supreme Court of Appeal (“SCA”) also expressed the view that the Commission’s powers ought to be closely circumscribed. The SCA indicated that the actions of

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<sup>45</sup> *Unleashing Rivalry* note 44 at 41.

<sup>46</sup> “Yara”.

<sup>47</sup> “Loungefoam”.

<sup>48</sup> *Ibid* para 52.

<sup>49</sup> *Ibid* para 54.

<sup>50</sup> “Woodlands”.

the Commission in relation to prohibited practice cases may lead to punitive measures (such as penalties), which it characterised as resembling criminal penalties. As a result, it held that the Commission's powers should be interpreted in a way that least impinges on a firm's constitutional rights to privacy, a fair trial, and just administrative action.<sup>51</sup>

However, the Tribunal has tended to take a broader view of the Commission's powers. It expressed dissent with the restrictive interpretation of the Commission's powers as applied by the SCA in *Woodlands*<sup>52</sup> and the CAC in *Yara*<sup>53</sup> and *Loungefoam*.<sup>54</sup> Although finding in favour of the respondents in *South African Breweries v Competition Commission* [2011] 2 CPLR 403 (CT), based on binding case precedent from the higher courts, the Tribunal delivered a strongly worded *obiter* in which it commented that decisions that impact on the legal requirements for a valid referral threaten to undermine the rights of complainants and access to justice.<sup>55</sup> When the Commission receives a complaint and launches an investigation, it is likely that during the course of its investigation it will identify further information.<sup>56</sup> Prohibited practices are also notoriously difficult to characterise and therefore the contents of the complaint may take on a different aspect during the investigation and this may need to be incorporated in the referral.<sup>57</sup> Thus the Tribunal expressed the concern that the recent decisions by the CAC and SCA may limit the Commission's effectiveness, and instead advocates the following approach:

“Technical failures in the initiating document, of the sort which might require strict adherence in pleadings, need to be reconsidered as a basis for dismissing claims against particular respondents incorrectly cited in the initiating document but not in the later referral.”<sup>58</sup>

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<sup>51</sup> *Ibid* para 10.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Yara supra* note 46.

<sup>54</sup> *Loungefoam supra* note 47.

<sup>55</sup> “*South African Breweries*” para 96.

<sup>56</sup> *Ibid* paras 117–18.

<sup>57</sup> *Ibid* para 119.

<sup>58</sup> *Ibid* para 154.

Although the scope of the Commission's powers has not yet been finally determined, precedent as handed down by the CAC and SCA indicates that the Commission is bound by the procedural rules in the Act.<sup>59</sup> Nevertheless, the Commission has continued to exercise broader investigatory powers, resulting in disputes with respondents on procedural grounds and the stalling or dismissal of prohibited practice cases against respondents.

For example, in *Yara*, Nutri-flo CC lodged a complaint with the Commission against Sasol, Omnia and Yara in respect of allegations of abuse of dominance. Shortly before the hearing against these respondents was due to commence, the Commission brought an application to amend the complaint referral to include allegations of collusive conduct, which it had uncovered during its investigation.<sup>60</sup> The Tribunal granted the Commission leave to amend on the basis that the respondents had not established that they would suffer any prejudice as a result of the amendment.<sup>61</sup> On appeal at the CAC, the Commission's application for amendment was dismissed, as the CAC considered that it was the legislature's intention that the Commission should refer only the complaint that had been initiated and thus only particulars that formed the *facta probanda* of the initial complaint could be included in the referral.<sup>62</sup>

Similarly, in *Loungefoam*, the CAC heard an appeal against two decisions of the Tribunal<sup>63</sup> which allowed the Commission to amend complaint referral documents in order to join an additional respondent and to rebut allegations made by the respondent that it was a single economic entity. The CAC held that the proper procedure would have been for the Commission to apply to the Tribunal under Rule 18(1) of the *Rules for the Conduct of Proceedings in the Competition Tribunal* for leave to amend its referral and simultaneously to seek leave to deliver a

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<sup>59</sup> The Commission contended in *Competition Commission v Yara* that the strict approach to the procedural requirements of the Act that was adopted by the CAC undermines the investigative nature of its powers (*Yara supra* note 46 para 15).

<sup>60</sup> *Yara supra* note 46 para 13.

<sup>61</sup> *Ibid* paras 50 and 60.

<sup>62</sup> *Ibid* paras 39 and 43.

<sup>63</sup> *Loungefoam supra* note 47 para 67.

supplementary affidavit.<sup>64</sup> Furthermore, the CAC held that the Commission does not have general powers of investigation and that its investigatory function is triggered only on initiation of a complaint by the commissioner or on receipt of a complaint from a third party.<sup>65</sup>

In *Yara*<sup>66</sup> and *Loungefoam*,<sup>67</sup> the Commission launched applications for direct access to the Constitutional Court to appeal the CAC's decisions. The Constitutional Court dismissed both applications and referred the matters back to the CAC, with the result that the substantive issues in these cases are still far from being resolved.

An example where the Commission's failure to adhere to procedure has led to the dismissal of a prohibited practice complaint is *Woodlands Dairy Ltd v Competition Commission*. In *Woodlands*, the respondents disputed the validity of two summonses issued by the Commission pursuant to its investigation of firms in the milk industry and the validity of the Commission's referral to the Tribunal on the basis that the respondents had not been specifically named in the initiation documents that preceded the summons and referral.<sup>68</sup> The SCA held that it was impermissible for a suspicion against one firm to be used as a 'springboard' to investigate the whole industry.<sup>69</sup> The SCA referred with approval to the CAC's decision in *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA and Papercor* [2003] 2 CPLR 272 (CAC), where it was held that the Commission is not empowered to investigate conduct that it generally considers to be anti-competitive – a complaint must relate to an alleged contravention of the Act as specifically contemplated by a specific provision.<sup>70</sup> The SCA acknowledged that the Commission might, subsequent to a valid investigation, obtain information about other transgressions or additional respondents. However, it should then amend the complaint or initiate a new complaint,

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<sup>64</sup> *Ibid* para 16.

<sup>65</sup> *Ibid* para 42.

<sup>66</sup> *Yara supra* note 46.

<sup>67</sup> *Loungefoam supra* note 47.

<sup>68</sup> *Woodlands supra* note 50 paras 1 to 8.

<sup>69</sup> *Ibid* para 36.

<sup>70</sup> *Ibid* para 32; "*Sappi*" paras 35 and 39.

as it was impermissible simply to add respondents to the referral.<sup>71</sup> Ultimately, the SCA held that the Commission had not followed the correct procedure, and the referral against these respondents was set aside.<sup>72</sup>

Thus, until a final determination is given on the scope of the Commission's powers, failure on the part of the Commission to follow procedure is doing grave harm to the promotion of competition through the restraint of prohibited practices in South Africa.<sup>73</sup>

### *The scope of the Tribunal's powers*

The Tribunal is unique as an adjudicatory structure in that it enjoys inquisitorial powers and conducts its proceedings with a degree of informality. These elements "*specifically free[s] the Tribunal from some of the more constraining elements of high court rules as regards the preparation of pleadings and the admissibility of evidence*",<sup>74</sup> which is intended to enhance the effectiveness of the Tribunal as an instrument of competition policy. Nevertheless, in the same way that extended litigation regarding the scope of the Commission's powers has inhibited enforcement in prohibited practice cases, prolonged litigation regarding the extent of the Tribunal's powers, primarily in *Senwes v Competition Commission*, has also led to procedural delays.

In *Competition Commission of South Africa v Senwes Ltd* [2009] 1 CPLR 18 (CT),<sup>75</sup> the Commission's case comprised of two forms of abuse of dominance: (i) an

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<sup>71</sup> *Woodlands ibid* note 50 para 36.

<sup>72</sup> *Ibid* para 44.

<sup>73</sup> The CAC in *Loungefoam* commented that following the correct procedure would not hamper the Commission in discharging its mandate and in many cases where the Commission has encountered technical difficulties, this has been the result of failure to follow the procedural requirements of the Act (*supra* note 47 paras 52–53).

<sup>74</sup> Competition Tribunal South Africa Challenges/objectives faced by competition authorities in achieving greater economic development through the promotion of competition (2004) (background note prepared for the OECD Global Forum on Competition, February 2004) available at <http://comptrib.co.za/assets/Uploads/Speeches/oecd20oct.pdf> accessed on 12 August 2012 at 2.

<sup>75</sup> "*Competition Commission of South Africa v Senwes* (2009) (CT)".

inducement abuse; and (ii) a margin squeeze abuse.<sup>76</sup> Although only the inducement aspect had been specifically pleaded by the Commission, the Tribunal found the respondents to have engaged in conduct that constituted a margin squeeze.<sup>77</sup> Consequently, the CAC was asked to consider whether the Tribunal had the power to consider matters not included in the Commission's referral. With reference to sections 52(1), (2) and 55 of the Act, the CAC concluded in *Senwes Ltd v the Competition Commission of South Africa* [2009] 2 CPLR 304 (CAC) that the purpose of the Act is to ensure that the Tribunal would not be constrained by the law relating to pleadings in the same way as a civil court during a trial. The CAC held that a party is entitled to sufficient information to determine the nature of the prohibited practice alleged against it, but that in this case, Senwes knew before the commencement of the hearing the nature of the evidence that would be led against it, and therefore the case had been alleged with sufficient specificity to allow Senwes to prepare a defence.<sup>78</sup> The CAC thus confirmed the Tribunal's approach holding that:

“[t]he finding seeks to achieve a balance between a party such as the complainant being placed in the position of knowing the case it is required to meet and not imposing unnecessary procedural rigidity upon the Tribunal”.<sup>79</sup>

In *Senwes Ltd v Competition Commission* [2011] 1 CPLR 1 (SCA)<sup>80</sup> the SCA, however, disagreed, and took the approach that the Tribunal is a creature created by the Act and it has no inherent powers. In terms of section 52(1) of the Act, the Tribunal must conduct a hearing subject to its rules in respect of any matter referred to it, and the Tribunal therefore has no power to enquire into and to decide a matter that has not been referred to it.<sup>81</sup> The SCA held that a hearing

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<sup>76</sup> *Ibid* para 42.

<sup>77</sup> *Ibid* para 305.

<sup>78</sup> *Senwes Ltd v Competition Commission* (2009) (CAC) paras 37–43.

<sup>79</sup> *Ibid* para 44.

<sup>80</sup> “*Senwes Ltd v Competition Commission* (2011) (SCA)”.

<sup>81</sup> *Ibid* para 51.

must be confined to matters set out in the referral.<sup>82</sup> Therefore it concluded that the Tribunal had exceeded its powers under the Act when it ruled that Senwes had contravened section 8(c) by engaging in a margin squeeze.<sup>83</sup>

Ultimately, the Constitutional Court was called on to examine this issue. Largely ignoring the conflicting judgments of the lower courts, it took a purposive approach and examined the provisions of section 27 of the Act (which sets out the Tribunal's powers). From a plain reading of section 27 it held that the Tribunal is empowered to "*adjudicate in relation to any conduct prohibited in terms of Chapter 2*", "*determine whether prohibited conduct has occurred*" and "*adjudicate on any matter that may in terms of the Act be considered by it*". It held that the Tribunal had the competence to adjudicate on the margin squeeze issue.<sup>84</sup> The Constitutional Court further commented in *Competition Commission v Senwes* that the interpretation given by the SCA was at odds with the scheme of the Act read in its entirety – the Tribunal is given the power to adopt an inquisitorial approach to a hearing and confining a hearing to matters raised in a referral undermines this power.<sup>85</sup>

The Constitutional Court's judgment provides much-needed clarity on the scope of the Tribunal's powers, which should reduce the scope for future procedural disputes. However, the Constitutional Court held in relation to the margin squeeze issue that "[a] straightforward process was, however, complicated by what turned out to be a red herring",<sup>86</sup> and that the Tribunal had erred in not giving a ruling on Senwes's objection to the evidence led by the Commission at the time that this came into dispute.<sup>87</sup> The minority judgment also indicated that the Tribunal had failed in its obligation to determine the proper ambit of the referral early on in

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<sup>82</sup> *Ibid* para 52.

<sup>83</sup> *Ibid* para 59.

<sup>84</sup> *Competition Commission v Senwes* (2012) *supra* note 1 para 25.

<sup>85</sup> *Ibid* para 50.

<sup>86</sup> *Ibid* para 40.

<sup>87</sup> *Ibid* para 51.

the case.<sup>88</sup> Even in ordinary courts, the Constitutional Court commented, the trend is towards a “*court-driven case management so as to ensure that time and resources are not wasted and that only the real issues between litigants are adjudicated*”.<sup>89</sup> Therefore, where issues were in dispute (as in *Senwes*), the Tribunal had a duty to determine the dispute in a pre-hearing or, if necessary, at the hearing.<sup>90</sup> The Tribunal’s failure to make a timely ruling on the scope of the referral, leading to prolonged litigation on a technical ground, can therefore be criticised for wasting time and resources and delaying the resolution of the substantive issues.

### **Respondents and technical point-taking**

Costly and time-consuming litigation on procedural grounds also results from respondents in investigations raising a smoke-screen of technical objections to avoid engaging with the merits of the case against them.

For example, in *Competition Commission of South Africa v Senwes*, *Senwes* was criticised by the Tribunal and the CAC for refusing to engage on the margin squeeze issue. *Senwes* had argued that as margin squeeze was not specifically pleaded by the Commission and as the Commission had not brought a formal application to amend its pleadings to incorporate this allegation, *Senwes* was not obliged to respond to the margin squeeze allegation.<sup>91</sup> Although not specifically alleged in the referral, reference was made to margin squeeze in the Commission’s expert witness statement, which was served on *Senwes* before the hearing commenced. However, *Senwes* did not seek to supplement its witness statements to deal with this point or bring an objection to the evidence led – instead it merely refused to engage with the issue.<sup>92</sup> The Tribunal held on this point that “*to allow Senwes the benefit of its tactical election would be manifestly*

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<sup>88</sup> *Ibid* paras 77–9.

<sup>89</sup> *Ibid* para 78.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Competition Commission of South Africa v Senwes* (2009) (CT) *supra* note 75 para 279.

<sup>92</sup> *Competition Commission v Senwes* (2012) *supra* note 1 para 52. The Constitutional Court held that “*Senwes* was afforded adequate opportunity to deal with those matters and raise whatever defence it desired to advance. Its failure to ward off the charge of contravening section 8(c) cannot be attributed to the Tribunal’s omission”.

*unfair to the Commission and the public interest in competitive markets that it represents”.*<sup>93</sup>

The raising of technical points by respondents to the exclusion of dealing with the merits of the case is a concern that has been noted previously by the competition authorities. For example, in *Woodlands Dairy (Pty) Ltd v Competition Commission 88/CAC/Mar09*, the CAC commented on the “*veritable forest of interlocutory paper [that] is generated in order to prevent cartel disputes from being determined on their merits*”.<sup>94</sup>

Respondents in an investigation have the right to raise any defence available to them, including objections on technical grounds. Nevertheless, if the competition authorities were more scrupulous in following the procedural requirements of the Act, this would go a long way towards denying respondents the opportunity to raise procedural objections in an effort to avoid the consequences of their anti-competitive acts.

#### **Consequences of a focus on procedural aspects**

The Act’s intention is that matters before the competition authorities should be resolved as expeditiously as possible. The CAC acknowledged this in *Woodlands*, where it commented that “*cartel conduct requires expedition as once it is investigated it is to the advantage of consumers that these cases be determined as soon as possible*”.<sup>95</sup> Prolonged disputes on procedural grounds prevent the speedy resolution of prohibited practice cases, delaying relief for consumers.

Procedural litigation of this nature also wastes resources. As there are limited resources available for the enforcement of the objectives of the Act, expenditure on procedural disputes, when there is a need for resources to enforce other aspects of the Act (for example, prosecution of abuse of dominance cases) undoubtedly hampers the full realisation of the Act’s objectives.

The Tribunal noted in *South African Breweries v Competition Commission* that there is an increasing number of cases in which applications for dismissal have been made in prohibited practice cases that will, as a result, never be decided on their merits. By not bringing a case to

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<sup>93</sup> *Competition Commission of South Africa v Senwes 2009 (CT) supra* note 75 para 304.

<sup>94</sup> *Woodlands Dairy* (application for clarification of order granted 26 August 2009) 8.

<sup>95</sup> *Ibid* at 7.

finality, the complainant suffers the disadvantage of never knowing whether its complaint was well founded, and the respondents are denied the chance the chance to clear their names of the reputational damage of alleged anti-competitive conduct.<sup>96</sup>

Consequently, procedural litigation is impeding enforcement in prohibited practice cases, which the objectives of the Act realise is an important aspect of effectively promoting and maintaining competition. In so far as these technical disputes result from failure by the Commission and Tribunal to follow procedure, they are falling short in their role as the ‘teeth’ of competition law in South Africa.

### **Realisation of the objectives of the Act: Public interest considerations**

As discussed above, the Act was a response to a specific set of historical and economic circumstances and was designed to encompass a wide-range of objectives, including certain objectives that speak to public interest and developmental aspects. The application of public interest objectives appears to be particularly relevant in relation to merger review proceedings, as this process involves a public interest aspect. In terms of section 12A(3) of the Act, in every merger, the competition authorities are required to consider “*whether the merger can or cannot be justified on substantial public interest grounds*” by assessing the effect that the merger, once implemented, will have on: (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small businesses to compete; and (iv) the ability of national industries to compete in national markets.<sup>97</sup> These considerations are designed to advance the developmental objectives incorporated in the Act of employment creation, economic transformation, and the development of small and medium-sized businesses.

In *Harmony Gold Mining Company Limited v Goldfields Limited* [2005] 2 CPLR 484 (CT),<sup>98</sup> the Tribunal established that, in theory at least, the competition authorities could reach a conclusion regarding approval of a merger on public interest grounds that was not the same as the

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<sup>96</sup> *South African Breweries supra* note 55 para 99.

<sup>97</sup> Section 12A(3) of the Act.

<sup>98</sup> “*Harmony*”.

conclusion reached on consideration of the competition issues.<sup>99</sup> Although there has never yet been an instance where a merger has been prohibited on public interest grounds, *Wal-mart Stores Inc v Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT)<sup>100</sup> is an example of a transaction where the public interest inquiry occurred even though the merger raised no competition concerns. The Tribunal confirmed in *Wal-mart v Massmart*:

“One of the unusual features of the Competition Act, 1998 (Act 89 of 1998, as amended) (‘the Act’) is that despite the fact that a merger may raise no competition concerns, it may still be susceptible to prohibition, or approval subject to conditions, on public interest grounds.”<sup>101</sup>

An OECD Peer Review comments that to achieve coherent results in competition policy with wide-spread goals requires disciplined choice between the application of these goals.<sup>102</sup>

However, at the time of the drafting of the Act, the dti indicated in its Proposed Guidelines that competition policy should achieve both competitiveness and developmental goals, without promoting one set of objectives at the expense of the other.<sup>103</sup>

Thus, *Harmony* indicates that ‘a blinkered approach’ should not be applied to the public interest inquiry and that the Tribunal’s public interest mandate is linked to its competition analysis.<sup>104</sup> This approach was accepted by the Tribunal in *Wal-mart v Massmart*, and the

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<sup>99</sup> *Ibid* para 56.

<sup>100</sup> “*Wal-mart v Massmart*” para 34.

<sup>101</sup> *Ibid* para 28.

<sup>102</sup> OECD Peer Review *op cit* note 12 at 18.

<sup>103</sup> Government of South Africa, Department of Trade and Industry The Evolution of Policy in SA: Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development (1997) available at <http://www.compcom.co.za/assets/Files/ProposedGuidelinesforCompetitionPolicy.htm> accessed on 10 August 2012 para 1.4; OECD Peer Review *op cit* note 13 at 18.

<sup>104</sup> *Harmony supra* note 98 para 56. The Tribunal held that:

“The public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first.

Tribunal commented that “[o]ur job [as the Tribunal] in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction”.<sup>105</sup> The competition authorities have traditionally taken the view that despite the diverse objectives included in the Act, the public interest provisions of the Act ought to be narrowly interpreted<sup>106</sup> and applied with circumspection, as in *Daun et Cie AG v Kolusus Holdings Ltd* [2003] 2 CPLR 329 (CT),<sup>107</sup> and conditions imposed ought to be merger specific<sup>108</sup> in order to give effect to both the competition and developmental objectives of the Act.

The public interest conditions imposed in certain recent high profile mergers, however, seem to extend beyond a narrow, merger-specific application of the public interest objectives of the Act and are increasingly reflective of the interests of third party interveners in the proceedings. This raises questions as to whether the competition authorities are finding the balance between competition and public interest considerations that is envisaged by the Act and whether their status as “*independent institutions to monitor competition*” is being compromised by too great a focus on the interests of third party interveners.

For example, in *Kansai v Freeworld* 53/AM/JUL11,<sup>109</sup> the public interest conditions imposed on the merging parties by the Commission and confirmed by the Tribunal included that:

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Hence section 12A makes use of the term ‘justified’ in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion.”

<sup>105</sup> *Wal-mart supra* note 100 para 32.

<sup>106</sup> *Wal-mart supra* note 100 paras 32–4

<sup>107</sup> “*Daun et Cie AG*” para 124.

<sup>108</sup> A *Business Day* report of 5 April 2012 reports that during the Commission’s investigation of the transaction it found that most of Massmart’s merchandise was imported and only two brands were manufactured locally – in so far as the conditions develop mechanisms to remedy pre-existing conditions (such as Massmart’s minimal procurement from local suppliers) and not conditions arising specifically from the merger, they are not merger specific. See A Visser ‘Broadside for Patel’s “competition meddling” *Business Day Live* 5 April 2012 available at <http://www.bdlive.co.za/articles/2012/04/05/broadside-for-patel-s-competition-meddling> accessed on 10 August 2012.

<sup>109</sup> “*Kansai v Freeworld* “. This was an intermediate merger.

(i) Freeworld must conclude a Black Economic Empowerment (“BEE”) equity transaction within two years of the clearance date;<sup>110</sup> and (ii) Freeworld must continue to manufacture all proprietary coatings currently manufactured in South Africa together with any complementary products for a period of ten years from the clearance date and continue to maintain and expand its current decorative and refinish automotive coatings operations in South Africa.<sup>111</sup>

The dti made submissions to the Commission in respect of the merger and also applied for and was granted leave to intervene in the request for consideration proceedings (in respect of the divestiture condition imposed by the Commission) before the Tribunal. Even though the dti ultimately withdrew from the request for consideration proceedings on the basis that the Commission would sufficiently represent its concerns,<sup>112</sup> the dti’s influence can be felt in the conditions imposed (the dti’s policies include promotion of economic transformation and local manufacturing).

The Act’s objectives include economic transformation and promotion of a greater spread of ownership. However, these objectives have a narrow scope, the Tribunal having taken the view in *Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 that “*the role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments*”.<sup>113</sup> The Tribunal has previously held, in relation to a proposed equity ownership condition, that this would be more appropriately pursued through other mechanisms (such as the Employment Equity Act 55 of 1998, the Skills Development Act 97 of 1998 and the BEE Charter).<sup>114</sup> Therefore the interests of the dti, advanced by the BEE condition, extend beyond the intended scope of the developmental objectives of the Act and would more appropriately have been advanced outside the competition

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<sup>110</sup> *Ibid* para 8.

<sup>111</sup> *Ibid* para 4.

<sup>112</sup> *Ibid* para 12.

<sup>113</sup> “*Shell v Tepco*” para 58. In *Shell v Tepco*, the proposed transaction was expected to have a negative impact on the competitive position of a firm controlled by historically disadvantaged persons.

<sup>114</sup> *Ibid*.

forum.

In addition, the local manufacturing condition has been criticised for being heavily reflective of the dti's objective of promoting local manufacturing.<sup>115</sup> In particular, the dti had opposed the merger during the Commission's investigation on the basis that it was a "*direct threat to the state-backed localisation drive, especially in the strategic automotive sector.*"<sup>116</sup>

In *Wal-mart v Massmart*, the Tribunal imposed an undertaking (tendered by the merging parties) that the merging parties would establish a programme for the development of South African suppliers including small and medium enterprises for a fixed amount of R100 million, to be contributed and expended within three years of the effective date of the order.<sup>117</sup> On appeal before the CAC in *Minister of Economic Development & others v Competition Tribunal and others* [2012] JOL 28640 (CAC), the CAC amended this condition to impose an obligation on the parties to commission a study<sup>118</sup> by three experts (to be appointed by the trade unions, the government and the merging parties) to determine the most appropriate means and mechanism by which local South African suppliers could be empowered to respond to the challenges of the merger.<sup>119</sup> The CAC intends to use this report to craft a condition setting out the programme to be established for the development of local South African suppliers.

The Economic Development Department ("EDD") took a particular interest in the *Wal-*

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<sup>115</sup> A speech given by Rob Davies of the dti in June 2011 emphasised the importance of local industrial development. See R Davies 'National Council of Provinces (NCOP) Budget Vote Speech delivered by the Minister of Trade and Industry' (2011) available on <http://www.dti.gov.za/editspeeches.jsp?id=2237> accessed on 11 August 2012.

<sup>116</sup> M Allix 'SA not opposed to foreign investment – dti' *Business Day Live* 5 April 2011 available at <http://www.bdlive.co.za/articles/2011/04/05/sa-not-opposed-to-foreign-investment---dti> accessed on 10 August 2012.

<sup>117</sup> *Wal-mart supra* note 100 Annexure A para 1.4.

<sup>118</sup> *Minister of Economic Development & others v Competition Tribunal and others* [2012] JOL 28640 (CAC) order para 2.1.4. The study shall canvass the best means by which South African small and medium sized suppliers can participate in Wal-Mart's global value chain as well as training programmes that can be established to train local South African suppliers on how to conduct business with the merged entity and Wal-Mart and the costs which would reasonably be incurred in so far as the development of such a programme is concerned.

<sup>119</sup> *Ibid.*

*mart v Massmart* transaction. After Wal-mart's announcement of the merger and notification to the Commission, the EDD appointed an expert panel to conduct research on the implications of the proposed merger, which reported that, owing to the size and international exposure of Wal-Mart, the transaction would impact on employment, the welfare of local manufacturers, and small businesses.<sup>120</sup> The EDD engaged directly with the parties and, on failing to obtain any binding commitments from them, ultimately intervened in the Tribunal proceedings.<sup>121</sup> During the proceedings, the EDD made submissions on the impact of the proposed transaction on procurement and expressed the concern that the transaction would result in a shift away from the merged entity purchasing the products of South African manufacturers to the products of low-cost foreign (particularly Asian) producers. Remedies suggested included imposition of an import quota.<sup>122</sup> The Minister of the dti and the Minister of Agriculture, Forestry and Fisheries also intervened in the proceedings before the Tribunal.<sup>123</sup> The Ministers subsequently brought a review application in respect of the Tribunal proceedings to the CAC<sup>124</sup> on procedural grounds (this was dismissed by the CAC).<sup>125</sup>

The Tribunal has previously cautioned that the legislature could not have intended that a competition authority, in essence an administrative body, “*should impose its own framework and substantive provisions on a firm that came before it*” as this would constitute “*an intolerable level*”

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<sup>120</sup> *Ibid* paras 36 and 37.

<sup>121</sup> *Ibid* paras 38, 45 and 46.

<sup>122</sup> *Wal-mart supra* note 100 para 73. SACTWU also made submissions on this issue.

<sup>123</sup> *Ibid* para 18. The Commission recommended unconditional approval of the merger but as this was a large merger, this required confirmation from the Tribunal.

<sup>124</sup> *Wal-mart supra* note 118 paras 28 and 29. The Ministers contended in their application that the merger and its conditions should be set aside on the basis that: (i) the Tribunal erred in making a discovery order by failing to order the merging parties to discover all documents sought by the Minister which were material to the determination; and (ii) the Tribunal erred in making scheduling decisions which precluded the Ministers from properly venting their concerns and making submissions.

<sup>125</sup> *Ibid* para 90.

*of policy intervention*".<sup>126</sup> Consequently, in developing a framework by which local suppliers can participate in Wal-mart's global value chain, the CAC seems to have overstepped its public interest mandate in terms of the Act. As a result, concerns have been raised that the conditions imposed relating to the development of local suppliers reflect pressure from the EDD rather than the independent exercise of the mandate of the Tribunal and CAC in order to give effect to objectives of the Act.<sup>127</sup>

Five trade unions intervened in the *Wal-mart v Massmart* Tribunal hearing, namely the South African Commercial Catering and Allied Workers' Union ("SACCAWU"), the Congress of South African Trade Unions (COSATU), the Food and Allied Workers' Union (FAWU), the National Union of Metal Workers in South Africa (NUMSA) and the South African Clothing and Textile Workers' Union (SACTWU).<sup>128</sup> As a result of submissions made by the trade unions (in particular by SACCAWU, which also made submissions during the CAC proceedings), the CAC imposed various employment conditions, including a condition in terms of which the merged entity was ordered to reinstate 503 employees dismissed from Massmart in June 2010.<sup>129</sup>

In *Unilever v Competition Commission and CEPPWAWU [2001–2002] CPLR 336 (CT)*, the Tribunal indicated that its role in relation to employment concerns arising from a transaction is limited to balancing the impact on competition with the impact on employment. It held that the Labour Relations Act 66 of 1995 or private collective bargaining agreements were more appropriate channels to pursue employment concerns that were not competition related.<sup>130</sup> The *Wal-mart* condition would therefore have been more appropriately canvassed before a specialist labour court, particularly as the link between the merger and the retrenchments was somewhat

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<sup>126</sup> *Daun et Cie AG supra* note 107 para 125. Also see C Avidon and C Azzarito 'Being pushed to promote government policies' *Without Prejudice* February 2012 11–2.

<sup>127</sup> K Davie 'Bargaining with Independence' *Mail & Guardian* 5 May 2012 accessed at <http://mg.co.za/article/2012-05-04-bargaining-with-independence/> on 11 August 2012.

<sup>128</sup> *Wal-mart supra* note 100 para 18.

<sup>129</sup> This was despite the existence of some doubt as to whether or not these retrenchments had been connected to the merger. *Wal-mart v Massmart supra* note 118 the CAC's order para 2.

<sup>130</sup> "*Unilever*" para 43.

tenuous. As such, the competition authorities appear to have overstepped their role in respect of employment considerations as envisaged by the Act and imposed a condition that reflects the interests advanced by the trade unions during the proceedings.

The CAC<sup>131</sup> in *Pioneer v Pannar 113/CAC/NOV11* also imposed far-reaching public interest conditions, which were tendered by the parties in response to various public interest concerns raised during the proceedings. These conditions included:

- A commitment by Pioneer to establish an International Research and Technology Hub in South Africa by 2016<sup>132</sup> and to invest up to R62 million by 2015 to develop the research and technology hub.<sup>133</sup>
- A commitment by the parties to work with institutions (in particular the Agricultural Research Council) to increase understanding and application of advanced breeding skills in relation to improving expertise in crops important to South Africa and to partner with public institutions to co-ordinate areas of co-operation and advisory services to such institutions.<sup>134</sup>
- A commitment by the parties to partner with communities and government to establish programmes in the interests of developing farmers and improve know-how about effective farming practices and the use of maize seeds. Pioneer agreed during discussions with ACB at the time of the Tribunal hearing to commit R20 million<sup>135</sup> over the next six years to foster partnerships, endeavours and collaborations in order to increase the productivity, knowledge and welfare of small-scale and developing farmers.<sup>136</sup>

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<sup>131</sup> “*Pioneer*” para 72.

<sup>132</sup> *Ibid* Appendix C para 4.1.

<sup>133</sup> *Ibid* para 85.

<sup>134</sup> *Ibid* Appendix C para 4.2.

<sup>135</sup> *Ibid* para 86.

<sup>136</sup> *Ibid* para Appendix C para 5.

The African Centre for Biosafety (“ACB”)<sup>137</sup> made submissions at the Tribunal<sup>138</sup> and the CAC in relation to the negative effect that a potential increase in hybrid-seed prices could have on subsistence and small-scale farmers.<sup>139</sup> In their heads of argument before the CAC, ACB proposed a structural remedy in terms of which the merging parties would be required to set up a fund from their own resources to improve open-pollinated maize varieties in collaboration with public institutions and farmer organisations.<sup>140</sup> The onerous obligations placed on the parties in respect of developing farming expertise and small-scale farmers extend beyond a narrow interpretation of the public interest objectives of the Act and seem more calculated to address the interests and concerns raised by the ACB during the proceedings.

In summary, the conditions imposed in *Kansai v Freeworld*, *Wal-mart v Massmart* and *Pioneer v Pannar* give effect to interests that extend beyond the scope of the Act. These are arguably more aligned with the interests of third party interveners in the merger review process than the developmental objectives in the Act, which previous decisions have indicated ought to be interpreted with circumspection.

The increase in interveners in the merger review process and the imposition of onerous public interest conditions has the practical side-effect of a general lengthening of the time period for merger clearance, as the imposition of contentious conditions increases the scope for appeals and requests for consideration. As noted by the CAC in *Woodlands*:

“Were cases to have been heard by three, potentially, four courts (if a constitutional challenge can be conceived), most mergers would never take place, even in the case of a merger which has no uncompetitive concerns. This delay can then work to the great disadvantage of the economy.”<sup>141</sup>

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<sup>137</sup> Biowatch South Africa also intervened in the proceedings but withdrew during the Tribunal hearing.

<sup>138</sup> 81/AM/Dec10 para 12.

<sup>139</sup> *Ibid.* In the Tribunal hearing, ACB contested that “a small but significant increase in maize seed prices as a result of the proposed deal would have a detrimental effect on small-scale commercial and subsistence farmers in South Africa” (*Pioneer supra* note 138 para 59).

<sup>140</sup> *Pioneer supra* note 131 para 80.

<sup>141</sup> *Woodlands supra* note 94 at 8.

In addition to discouraging transactions that contribute to the growth of the economy, onerous public interest conditions also have a chilling effect on foreign direct investment (particularly as the three transactions discussed above all resulted in conditions imposed on foreign-based firms seeking to acquire South African firms). The Act's objectives recognise the importance of creating opportunities for foreign investment and the imposition of onerous conditions that are likely to deter investors is counter-productive to the achievement of this objective.

A narrow, merger-related application of the public interest provisions in the Act has previously been considered the most effective way to promote transactions that are beneficial to the economy while still protecting the public interest, thus fulfilling both the competition-related and developmental objectives of the Act. However, the overly broad interpretation of the public interest component in recent merger conditions to give effect to interests introduced by interveners that are often outside the scope of the Act suggests that the competition authorities are failing to achieve the balance required to realise the diverse objectives of the Act.

In addition, the growing perception that the competition authorities may not be exercising their public interest mandate independently but are giving in to pressure from interveners promoting their own interests and policies is of great concern. David Lewis (former Tribunal chairperson and current head of Corruption Watch) expressed concerns at a workshop on the Wal-mart/Massmart deal held at WITS Law School on 4 April 2012 that the EDD was "*using the competition authorities to leverage concessions out of international investors*".<sup>142</sup> Lewis has also commented that "[t]heir [the competition authorities'] decision-making powers and their independence has been attacked in the most destructive manner".<sup>143</sup> In order to enforce and promote competition effectively, as envisaged by the Act, it is important that the competition authorities are perceived as "*independent institutions to monitor economic competition*". Perceptions that the independence of the competition authorities is under threat is therefore exceedingly damaging to the competition authorities' role as the enforcers of the objectives of competition policy in South Africa.

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<sup>142</sup> Visser *op cit* note 108.

<sup>143</sup> Davie *op cit* note 127.

## Conclusion

Fourteen years after the Act has been promulgated, countless advances have been made by the competition authorities in promoting competition policy in South Africa and furthering the objectives of the Act.

However, examination of recent prohibited practice investigations leads to the conclusion that the effective enforcement of the Act in this respect has been clouded by disputes over failure to follow due process on the part of the competition authorities. In addition, conditions imposed by the competition authorities in recent merger approvals have raised concerns that interests advanced by third parties during the merger proceedings are obtaining undue prominence in merger consideration, and this has tainted the independence with which the competition authorities are viewed as exercising their public interest mandate. In combination, this suggests that, at present, the competition authorities are falling short in their duties under the Act and consequently that the Act's objectives are not being fully realised.

*Senwes v Competition Commission*<sup>144</sup> represents a turning point in that it returns focus to the core ideology of the Act and its objectives. The Constitutional Court's decision therefore provides an opportunity for the competition authorities to regain a clear sense of the underlying objectives of the Act in order to work toward fully realising these objectives in the future.

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