
Abstract

In Senwes (and to a lesser extent in Yara and Loungefoam), the Constitutional Court revisited the fundamental tenets underpinning South African competition law and policy and used these as the starting point for assessing (in the case of Senwes) the Competition Tribunal’s (“Tribunal”) powers. Thus the Constitutional Court applied a broad, purposive approach that was informed by the intended objectives of the Competition Act 89 of 1998 (“Competition Act”) for South African competition law and its enforcement agencies, namely the Competition Commission (“Commission”) and the Tribunal. In light of this purposive approach, this paper examines the objectives of the Competition Act and the historic and economic context in which it came into being in order to assess whether these objectives are being achieved. In making this assessment this paper analyses critically whether the Commission and the Tribunal are fulfilling their intended roles as the ‘teeth’ of South African competition law and whether realisation of the objectives of the Competition Act is being impeded by participants in competition law processes (such as government ministers, trade unions, merger parties and respondents to the Commission’s investigations) that use competition law as a forum to promote non-competition related objectives. The finding that this paper makes as to whether the intended spirit and objectives of the Competition Act are being realised is particularly pertinent as it has now been fourteen years since the Competition Act was promulgated.
I. 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*,¹ heard in November 2011, became the first competition case to be heard by the Constitutional Court. In this case, the 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

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objectives of the Act is being hampered by procedural irregularities and too great a focus on public interest objectives. *Senwes v Competition Commission*\(^2\) is therefore a watershed judgment in that it highlights the importance of remaining cognisant 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.

II. OBJECTIVES OF THE ACT

The broadest objective of competition law is to ‘remedy market failures and to provide a framework for regulating mergers’.\(^3\) Thus in most competition jurisdictions the focus of competition law is on promoting and protecting the competitive process and achieving greater economic efficiency.\(^4\)

According to a survey at the Organisation of Economic and Community Development (“OECD”)\(^5\) 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.\(^6\) In addition, public interest objectives usually fall within the mandate of a government minister or political decision making body.\(^7\) In developing countries, however, developmental goals often play a prominent role alongside the promotion and maintenance of competition\(^8\) and the right to consider public interest concerns frequently vests in the country’s competition authorities.\(^9\)

\(^3\) C Smit *The Rationale for Competition Policy: A South African perspective* (paper read at the biennial ESSA conference 7–9 September 2005) 25.  
\(^5\) *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.  
\(^7\) *Ibid* para 11.  
\(^9\) 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).
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.\textsuperscript{10} 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.’\textsuperscript{11}

South Africa has an economic legacy of state ownership,\textsuperscript{12} protection\textsuperscript{13} import substitution and economic isolation (as a result of sanctions) combined with strong property rights and well-developed markets that differentiates it from other developing countries.\textsuperscript{14} In addition, South Africa’s history of racial discrimination had the effect of \emph{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.\textsuperscript{15}

As a result of these factors, product markets and capital ownership in South Africa were highly concentrated in the past.\textsuperscript{16} In certain aspects, South Africa has a well-developed market economy but there is also a need to reform ‘long-standing habits of central ownership and control’ and a vast discrepancy remains between a wealthy minority and a substantial majority that operate in a far less developed economic environment.\textsuperscript{17}

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\textsuperscript{18} and address both ‘the historical economic structure and encourage broad-based economic growth.’\textsuperscript{19} This dual objective is encapsulated in an address given in

\begin{thebibliography}{99}
\item Smit \textit{ibid} at 25.
\item Hartzenberg \textit{op cit} note 8 at 7.
\item \textit{Ibid}. Historically, South Africa developed around mining conglomerates and economic policies were formed to protect investors (often foreign) in these industries.
\item \textit{Ibid}.
\item \textit{Ibid}; Smit \textit{op cit} note 3 at 2.
\item OECD Peer Review \textit{op cit} note 12 at 10.
\item OECD Peer Review \textit{op cit} note 12 at 10-11.
\item \textit{Ibid} at 14. This refers to the African National Congress’ Policy Guidelines for a Democratic South Africa (1992) which 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.
\end{thebibliography}
February 2009 by the Deputy Minister of the Department of Trade and Industry ("dti") in which it was stated that:

‘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.’

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. The preamble refers to the political background and motivations for the Act, including policies of equity, distribution and efficiency. 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.

The general purpose of the Act is to ‘promote and maintain competition.’ This is intended to promote ‘the efficiency, adaptability and development of the economy’ and ‘achieve a more effective and efficient economy in South Africa.’ Other general objectives aimed at enhancing competition in the economy include:

- the provision of competitive prices and product choices for consumers and providing ‘markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;’
- the restraint of particular trade practices which undermine a competitive economy;
- the establishment of independent institutions to monitor economic competition; and
- giving effect to international law obligations.

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21 Roberts *op cit* note 19 at 7.


23 OECD Peer Review *ibid*.

24 Section 2 of the Act.

25 Section 2(a) of the Act.

26 Preamble to the Act.

27 Section 2(a) of the Act.

28 Preamble to the Act.

29 Preamble to the Act.

30 Preamble to the Act.
In addition the Act recognises that liberalising trade and inviting foreign investment is an important factor in promoting competition.\textsuperscript{32} 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\textsuperscript{33} as well as the creation of a capability and environment for South Africa to compete effectively in international markets.\textsuperscript{34}

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,\textsuperscript{35}
- ensuring that small and medium enterprises have an equitable opportunity to participate in the economy,\textsuperscript{36}
- promotion of a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons\textsuperscript{37} and to provide all South Africans with an equal opportunity to participate in the economy,\textsuperscript{38} and
- regulation of the transfer of economic ownership in keeping with the public interest.\textsuperscript{39}

These diverse goals\textsuperscript{40} reflect that various ‘interest groups have planted their flags in the competition law and process.’\textsuperscript{41} 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.\textsuperscript{42}

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\textsuperscript{31} Preamble to the Act.
\textsuperscript{32} OECD Peer Review \textit{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 \textit{op cit} note 8 at 5).
\textsuperscript{33} Section 2(d) of the Act.
\textsuperscript{34} Preamble to the Act.
\textsuperscript{35} Section 2(c) of the Act.
\textsuperscript{36} Section 2(e) of the Act.
\textsuperscript{37} Section 2(f) of the Act.
\textsuperscript{38} Preamble to the Act.
\textsuperscript{39} Preamble to the Act.
\textsuperscript{40} The Act has been criticised for containing objectives outside the jurisdiction of competition policy (see Smit \textit{op cit} note 3 at 16).
\textsuperscript{41} OECD Peer Review \textit{op cit} note 12 at 19.
\textsuperscript{42} OECD Global Forum \textit{op cit} note 4 para 2.

As set out above, the Act’s objectives include the establishment of ‘independent institutions to monitor economic competition.’ To this end, the South African competition enforcement structure comprises the Commission and the Tribunal. In addition, a Competition Appeal Court (the “CAC”) acts as a court of appeal and review in respect of the Tribunal (it also shares exclusive jurisdiction with the Tribunal in respect of various matters).

The Act draws a clear distinction between the investigative and adjudicative aspects of the complaint procedure - the investigative function in the Act is carried out by the Commission while the adjudicative function is carried out by the Tribunal and the CAC. The strict delineation between investigative and adjudicatory functions is advantageous in that it supposedly ‘shelter[s] the system from administrative and constitutional challenge.’

The Commission’s powers and functions are set out in section 21 of the Act. The Commission’s primary duties as the ‘guardian of the Act’ include implementing measures to increase market transparency and develop public awareness of the provisions of the Act; investigating and evaluating alleged contraventions; granting or refusing exemptions; authorising (with or without conditions), prohibiting or referring mergers; and negotiating and concluding consent agreements. Importantly, the Act provides that the Commission is independent, subject only to the Constitution and the Act and as such it has a duty to be impartial and perform its functions without fear, favour or prejudice of any kind. As the Commission is the primary vehicle by which the objectives of the Act are

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43 Sections 37 and 61 of the Act.
44 Section 62 of the Act sets out the matters in respect of which the CAC has jurisdiction.
47 Structurally, the Commission is made up of a Commissioner and one or more Deputy Commissioners, who are appointed by the Minister (section 19(2) of the Act).
48 The Competition Commission v Yara South Africa (Pty) Ltd and another (2009) 2 CPLR 580 (CT) para 35.
49 Section 21(1)(a) of the Act.
50 Section 21(1)(b) of the Act.
51 Section 21(1)(c) of the Act.
52 Section 21(1)(d) of the Act.
53 Section 21(1)(e) of the Act.
54 Section 21(1)(f) of the Act.
56 Section 22(1)(a) and (b) of the Act.
achieved and the ‘first stop’ for the application of the Act, the Constitutional Court minority in *Competition Commission v Yara South Africa (Pty) Ltd, Omnia Fertilizer Ltd and Sasol Chemical Industries Ltd* went so far as to state that the public role played by the Commission is essential for South African democracy.

The Tribunal, on the other hand, is an adjudicatory body empowered by the Act to, *inter alia*, adjudicate on any prohibited conduct in the Act; hear appeals from, or review any decisions of, the Commission that have been referred to it; and make any ruling or order necessary or incidental to the performance of its functions in terms of the Act. The functions of the Tribunal are set out in section 27 of the Act.

Between 1999 and 2011, the Commission has investigated over 2800 intermediate mergers and the Tribunal has given decisions in respect of over 750 large mergers. In addition, the Commission has referred numerous complaints, consent orders and settlement agreements to the Tribunal. Combined with other economic factors, the result is that the South African economy looks very different today to when the Act was first promulgated and the competition authorities have undoubtedly taken huge strides in enhancing competition in South Africa.

However, despite the advances made in the past, an examination of recent case law in respect of prohibited practices and mergers (as set out in more detail below), suggests that the competition authorities are no longer purely focused on achievement of the substantive objectives of the Act. Consequently, the objectives of the Act are, at present, not being fully realised.

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57 OECD Peer Review *op cit* note 12 at 36.
59 *Ibid* para 49.
60 The Tribunal is made up of a chairman, and three to ten other members appointed by the President (section 26(2) of the Act) all of whom must have suitable qualifications and experience in the disciplines of economics, law, commerce, industry or public affairs (section 28(2)(b) of the Act).
61 Hartzenberg *op cit* note 8 at 8.
62 Section 27(1)(a) of the Act.
63 Section 27(1)(c) of the Act.
64 Section 27(1)(d) of the Act.
66 *Unleashing Rivalry* *ibid* at 41.
IV. THE RESTRAINT OF PROHIBITED PRACTICES

As set out above, a key objective of the Act is to promote and maintain competition. Achieving this requires the restraint of particular trade practices (prohibited practices) which undermine a competitive economy. According to a report published in the Mail & Guardian, currently between 12 and 34 prohibited practice cases which the Commission has referred to the Tribunal are not progressing due to procedural issues. These statistics seem to correlate with the recent spate of prohibited practice cases, culminating in Senwes v Competition Commission, that have resulted in prolonged litigation on procedural grounds without reaching resolution on the substantive issues.

a) Investigations and referrals by the Commission

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 confirmed that the Commission needs to follow the sequence of initiation, investigation and referral prescribed by the Act. 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.

In Woodlands Dairy (Pty) Ltd v Competition Commission, the Supreme Court of Appeal ("SCA") expressed the view that the Commission’s powers ought to be closely circumscribed. The SCA indicated that the actions of 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.

Notwithstanding precedent indicating that the Commission is bound by the procedural rules in the Act, the Commission has continued to exercise broader investigatory powers.
This has resulted in a number of disputes relating to the procedure followed by the Commission in initiating and referring complaints of prohibited practices to the Tribunal. This prolonged litigation on interlocutory issues has not only delayed resolution of prohibited practice cases but in some instances, has even resulted in their dismissal.

In *Yara v Competition Commission*, 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 also include allegations of collusive conduct, which it had uncovered during its investigation. 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. 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 only refer the complaint that had been initiated and thus only particulars that formed the *facta probanda* of the initial complaint should be included in the referral.

Similarly, in *Loungefoam (Pty) Ltd v Competition Commission* the CAC heard an appeal against two decisions of the Tribunal 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 to simultaneously seek leave to deliver a supplementary affidavit. Furthermore the CAC held that the Commission does not have general powers of investigation and that its investigatory function is only triggered on initiation of a complaint by the commissioner or on receipt of a complaint from a third party.

In *Yara* and *Loungefoam* the Commission launched applications for direct access to the Constitutional Court to appeal the CAC’s decisions. The Constitutional Court

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75 *Yara supra* note 48 para 13.
76 *Ibid* paras 50 and 60.
77 *Yara South Africa (Pty) Ltd v Competition Commission and Others* [2011] 1CPLR 78 (CAC) paras 39 and 43.
78 *Competition Commission v Loungefoam (Pty) Ltd* [2010] 1 CPLR 174 (CT) para 67.
79 *Loungefoam supra* note 70 para 16.
80 *Ibid* para 42.
81 *Yara supra* note 58.
82 *Competition Commission v Loungefoam and others* CCT 90/11 [2012] ZACC 15.
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 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. The SCA held that it was impermissible for a suspicion against one firm to be used as a ‘springboard’ to investigate the whole industry. The SCA referred with approval to the CAC’s decision in *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA and Papercor* 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. 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 as it was impermissible to simply add respondents to the referral. Ultimately the SCA held that the Commission had not followed the correct procedure and the referral against these respondents was set aside.

A further example of a prohibited practice case that was dismissed is *South African Breweries v Competition Commission*, where the respondents sought dismissal of the complaint referral on the basis of lack of jurisdiction as the complaint referral was not founded on the complaint it was purported to be based upon. The Tribunal found that the ambit of the complaint initiating document was not the same as the referral and in light of previous case precedent (most notably *Woodlands*), it dismissed the referral.

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83 *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* [2009] 1 CPLR 250 (CT) paras 1 to 8.
84 *Woodlands* supra note 73 para 36.
86 *Woodlands* ibid para 36.
87 Ibid para 44.
88 *South African Breweries v Competition Commission* [2011] 2 CPLR 403 (CT).
89 The referral was based on a complaint lodged in November 2004.
90 *South African Breweries supra* note 88 para 1.
91 *Woodlands* supra note 73.
92 *South African Breweries supra* note 88 para 95.
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.\(^{93}\) The Tribunal has also expressed dissent with the restrictive interpretation of the Commission’s powers as applied by the SCA in *Woodlands*\(^{94}\) and the CAC in *Yara*\(^{95}\) and *Loungefoam*.\(^{96}\)

Although finding in favour of the respondents in *South African Breweries v Competition Commission* 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.\(^{97}\) 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.\(^{98}\) Prohibited practices are also notoriously difficult to characterise and so the contents of the complaint may take on a different aspect during the investigation and this may need to be incorporated in the referral.\(^{99}\) 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 approach that:

‘[T]echnical 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.’\(^{100}\)

Nevertheless, 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 enforcement of the Act and the restraint of prohibited practices in South Africa. As illustrated above, failure to follow procedure by the Commission has led to the stalling and dismissal of a number of prohibited practice cases that ought to have been be considered by the competition authorities and potentially penalised. The CAC in *Loungefoam* commented that following the correct procedure would not hamper the Commission in discharging its

\(^{93}\) *Yara supra* note 58 para 15.
\(^{94}\) *Woodlands supra* note 73.
\(^{95}\) *Yara supra* note 77.
\(^{96}\) *Loungefoam supra* note 70.
\(^{97}\) *South African Breweries supra* note 88 para 96.
\(^{98}\) *Ibid* paras 117-18.
\(^{100}\) *Ibid* para 154.
mandate\textsuperscript{101} 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.\textsuperscript{102}

b) The powers of the Tribunal

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’\textsuperscript{103} which enhances 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 been harmful to the restraint of prohibited practice cases, prolonged litigation on the scope of the Tribunal’s powers in \textit{Senwes v Competition Commission} has also impeded the realisation of certain of the Act’s objectives.

In \textit{Senwes v Competition Commission},\textsuperscript{104} the Commission’s case comprised of two forms of abuse of dominance: (i) an inducement abuse; and (ii) a margin squeeze abuse.\textsuperscript{105} 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.\textsuperscript{106} 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 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.\textsuperscript{107} The CAC thus confirmed the Tribunal’s approach holding that:

\textsuperscript{101} \textit{Loungefoam supra} note 70 para 52.
\textsuperscript{102} \textit{Ibid} para 53.
\textsuperscript{103} Competition Tribunal of South Africa \textit{op cit} note 46 at 2.
\textsuperscript{104} \textit{Competition Commission of South Africa v Senwes Ltd} [2009] 1 CPLR 18 (CT).
\textsuperscript{105} \textit{Ibid} para 42.
\textsuperscript{106} \textit{Ibid} para 305.
\textsuperscript{107} \textit{Senwes Ltd v the Competition Commission of South Africa} [2009] 2 CPLR 304 (CAC) paras 37 – 43.
‘The 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.’

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. The SCA held that a hearing must be confined to matters set out in the referral. 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.

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. The Constitutional Court further commented 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.

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’ and that the Tribunal had erred in not giving a ruling on Senwes’ objection to the evidence

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108 Ibid para 44.
110 Ibid para 51.
111 Ibid para 52.
112 Ibid para 59.
113 Ibid para 59.
114 Ibid supra note 1 para 25.
115 Ibid para 50.
led by the Commission at the time this came into dispute.\textsuperscript{116} The minority judgment also indicated that the Tribunal had failed in its obligation to determine the proper ambit of the referral early on in the case.\textsuperscript{117} Even in ordinary courts, the Constitutional Court held, 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.’\textsuperscript{118} Therefore where issues were in dispute (as in \textit{Senwes}) the Tribunal had a duty to determine the dispute in a pre-hearing or if necessary, at the hearing.\textsuperscript{119} The Tribunal’s failure to make a timeous 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 competition law issues.

c) Respondents that hide behind technical point-taking

Responsibility for the failure to deal expeditiously and effectively with alleged prohibited practices in order to restrain such practices, give relief to consumers and promote a competitive economy is not borne by the Commission and Tribunal alone. This is shared by respondents in investigations that raise a smoke-screen of technical objections to avoid engaging with the merits of the case against them.

For example, in \textit{Senwes v Competition Commission}, Senwes was criticised by the Tribunal and the CAC for refusing to engage on the margin squeeze issue. Senwes argued that as margin squeeze was not the case pleaded by the Commission and as the Commission was not permitted to alter its case without a formal application to amend the pleadings, it was not obliged to respond to the margin squeeze allegations.\textsuperscript{120} 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 margin squeeze issue.\textsuperscript{121} The Tribunal held on this point that ‘To allow Senwes the benefit of its tactical election

\textsuperscript{116} \textit{Ibid} para 51.
\textsuperscript{117} \textit{Ibid} paras 77-9.
\textsuperscript{118} \textit{Ibid} para 78.
\textsuperscript{119} \textit{Ibid}.
\textsuperscript{120} \textit{Senwes supra} note 104 para 279.
\textsuperscript{121} \textit{Senwes 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.’
would be manifestly unfair to the Commission and the public interest in competitive markets that it represents.'

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 authorities. For example, in Woodlands, 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.’

Respondents in an investigation have the right to raise any defence open to them, including technical objections. Nevertheless, if the competition authorities, in particular the Commission, strictly followed the procedural requirements of the Act, this would go a long way toward denying respondents the opportunity to raise procedural objections in an effort to avoid the consequences of their anti-competitive acts.

d) Negative effects of disputes on technical aspects

The prolonged litigation resulting from technical disputes in relation to the scope of the powers of the Commission and the Tribunal frustrates the Act’s intention that matters before the competition authorities should be resolved as expeditiously as possible. To this end, the CAC in Woodlands makes the point 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.'

Prolonged litigation of this nature also wastes resources. In a country where 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 are 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 finality the complainant suffers the disadvantage of never knowing whether

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122 Senwes supra note 104 para 304.
123 Woodlands Dairy (Pty) Ltd v Competition Commission 88/CAC/Mar09 (application for clarification of order granted 26 August 2009) 8.
124 Ibid at 7.
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.125

Consequently procedural litigation in prohibited practice cases clearly impedes the achievement of the objectives of the Act. 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.

V. MERGER PROCEEDINGS: CONSIDERATION OF PUBLIC INTEREST

As discussed in section II 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.126

Certain recent high profile mergers have seen a marked increase in the intervention of third parties, in particular government, trade unions and public interest bodies, on the basis of the public interest considerations provided for in section 12A(3). In most instances, the public interest objectives advanced fall outside the objectives of the Act.

a) Interveners in the merger process

i) Government intervention

In terms of section 18(1) of the Act, the Minister127 may participate as a party in any intermediate or large merger in order to make representations on the public interest grounds.

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125 *South African Breweries supra* note 88 para 99.
126 Section 12A(3) of the Act.
127 Defined as the Minister of Trade and Industry although the Commission now reports to the Economic Development Department (“EDD”) and it is therefore the Minister of the EDD that has exercised this power in recent mergers.
set out in section 12A(3). Recent high-profile mergers where government has intervened are
the merger between Kansai Paint Co., Ltd (“Kansai”) and Freeworld Coatings Ltd (“Freeworld”) and the transaction involving Wal-mart Stores Inc (“Wal-mart”) and Massmart Holdings Ltd (“Massmart”).

In the Kansai v Freeworld merger, 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, the dti’s influence can be felt in certain of the conditions imposed on the merging parties (as explained in more detail below).

A further example of government intervention is found in Wal-mart v Massmart, where the Minister of the EDD, the Minister of the dti and the Minister of the Department of Agriculture, Forestry and Fisheries intervened in the proceedings before the Tribunal. The Ministers subsequently brought a review application in respect of the Tribunal proceedings to the CAC on procedural grounds (this was dismissed by the CAC).

The EDD took a particular interest in the Wal-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, employment, the welfare of local manufacturers and small businesses would be affected by the transaction. The EDD engaged directly with the parties and on failing to obtain any binding commitments from them, ultimately intervened in the Tribunal proceedings.

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128 53/AM/JUL11. This was an intermediate merger.
129 Ibid para 12.
130 [2011] 1 CPLR 145 (CT).
131 Ibid para 18. The Commission recommended unconditional approval of the merger but as this was a large merger this required confirmation from the Tribunal.
132 Minister of Economic Development & others v Competition Tribunal and others [2012] JOL 28640 (CAC) 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.
133 Ibid para 90.
134 Ibid paras 36 and 37.
135 Ibid paras 38, 45 and 46.
ii) Trade union intervention

Trade unions are also given a formal role in the merger review process as, in terms of section 12A(3), they are able to raise concerns about potential loss of employment resulting from a transaction.\(^\text{136}\) In *Unilever Plc v Competition Commission and CEPPWAWU*\(^\text{137}\) the Tribunal explicitly recognised that the Act extended to employees and that trade unions have the right to timeous information about the potential impact of a merger on employment.\(^\text{138}\)

In *Wal-mart v Massmart*, the trade unions played a particularly prominent role in the proceedings. Intervening trade unions in the Tribunal hearing included 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).\(^\text{139}\) In response to employment concerns, the Tribunal: (i) imposed a moratorium on merger-related retrenchments for a two year period post the effective date; (ii) agreed to give preference to 503 employees that had been retrenched in 2010 when employment opportunities arose at the merged entity in the future; and (iii) imposed an obligation on the merging parties to honour existing labour agreements and Massmart’s practice not to challenge SACCAWU’s position as the biggest representative trade union for a three year period post the effective date.\(^\text{140}\) SACCAWU, however, appealed this decision to the CAC on the basis that the Tribunal should also have ordered reinstatement of the retrenched employees.\(^\text{141}\)

iii) Public interest organisations

Increasingly, non-profit public interest organisations have also been intervening in the merger review process. For example, *Wal-mart v Massmart* saw the intervention of the Small and Medium Enterprise Forum in the proceedings.\(^\text{142}\) In the merger between Pioneer Hi-Bred International (“Pioneer”) and Pannar Seed (Pty) Ltd (“Pannar”), the African Centre for

\(^{136}\) OECD Peer Review *op cit* note 12 at 19.


\(^{138}\) *Ibid* para 43.

\(^{139}\) *Wal-mart supra* note 130 para 18.

\(^{140}\) *Ibid* Annexure A paras 1.1 to 1.3.

\(^{141}\) *Wal-mart supra* note 132 para 18.

\(^{142}\) *Wal-mart supra* note 130 para 18.
Biosafety (“ACB”)\(^{143}\) made submissions in the Tribunal\(^{144}\) and the CAC\(^{145}\) in relation to the negative effect that a potential increase in hybrid-seed prices could have on subsistence and small-scale farmers.\(^{146}\) 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.\(^{147}\)

b) Public interest conditions imposed on merging parties: have the competition authorities gone too far?

The increase in the number of parties making submissions in merger reviews has forced the competition authorities to consider, in terms of section 12A(3), public interest issues that extend beyond the core objectives of the Act.

In *Harmony Gold Mining Company Limited v Goldfields Limited*\(^{148}\) 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 conclusion reached on consideration of the competition issues.\(^{149}\) Although there has never yet been an instance where a merger has been prohibited on public interest grounds,\(^{150}\) *Wal-mart v Massmart* 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* that:

> ‘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.’ \(^{151}\)

However, *Harmony Gold v Goldfields* indicates that ‘a blinkered approach’ should not be applied to the public interest inquiry and that the Tribunal’s public interest mandate is linked

\(^{143}\) Biowatch South Africa also intervened in the proceedings but withdrew during the Tribunal hearing.

\(^{144}\) 81/AM/Dec10 para 12.

\(^{145}\) 113/CAC/NOV11 para 72.

\(^{146}\) *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 144 para 59).

\(^{147}\) *Pioneer supra* note 145 para 80.

\(^{148}\) [2005] 2 CPLR 484 (CT).

\(^{149}\) *Ibid* para 56.

\(^{150}\) *Wal-mart supra* note 130 para 34.

\(^{151}\) *Ibid* para 28.
to its competition analysis.\textsuperscript{152} This approach was accepted by the Tribunal in Wal-mart v Massmart and the Tribunal commented that ‘Our 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.’\textsuperscript{153} However, recent conditions imposed by the competition authorities have called into question whether the competition authorities are applying their public interest mandate with sufficient restraint.

In Kansai v Freeworld public interest conditions imposed on the merging parties by the Commission and confirmed by the Tribunal included that: (i) Freeworld must conclude a Black Economic Empowerment (“BEE”) equity transaction within two years of the clearance date;\textsuperscript{154} 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.\textsuperscript{155}

As a result of South Africa’s political and economic history, provision is made in the Act for objectives relating to development and transformation. However, the Tribunal has previously taken the view 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.’\textsuperscript{156} As such, it 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).\textsuperscript{157} The Tribunal appears to have lost sight of this reasoning when imposing the BEE condition in Freeworld v Kansai.

\textsuperscript{152} Harmony supra note 148 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. Hence section 12 A 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.’

\textsuperscript{153} Wal-mart v Massmart supra note 130 para 32.

\textsuperscript{154} Kansai v Freeworld Tribunal order 53/AM/Jul11 para 8.

\textsuperscript{155} Ibid para 4.

\textsuperscript{156} Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd 66/LM/Oct01 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.

\textsuperscript{157} Ibid.
Similarly, the local manufacturing condition advances interests that go beyond the public interest mandate of the Act and bear more of a relation to government policy than to the objectives of the Act. Consequently, this condition has been criticised for being heavily reflective of the dti’s objective of promoting local manufacturing, particularly as the dti had opposed the merger during the proceedings on the basis that it was a ‘direct threat to the state-backed localisation drive, especially in the strategic automotive sector.’

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. On appeal before the CAC, the CAC amended this condition to impose an obligation on the parties to commission a study 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. 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 conditions imposed in relation to the development of local suppliers extend beyond any of the objectives of the Act. In imposing these conditions, the CAC and the Tribunal appear to have lost sight of the principles that the public interest provisions of the Act ought

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160 *Wal-mart supra* note 130 Annexure A para 1.4.

161 *Wal-mart supra* note 132 CAC’s 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, 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.

to be narrowly interpreted,\textsuperscript{163} applied with circumspection\textsuperscript{164} and conditions imposed ought to be merger specific.\textsuperscript{165}

The Tribunal has also 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 of policy intervention’.\textsuperscript{166} Consequently in developing a framework by which local suppliers can participate in Wal-mart’s global value chain, the CAC would seem to have overstepped its public interest mandate in terms of the Act.

During the proceedings the EDD focused 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 low-cost foreign (particularly Asian) producers. Remedies suggested included imposition of an import quota.\textsuperscript{167} 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.\textsuperscript{168}

In relation to employment, the CAC imposed a far-reaching condition in terms of which the merged entity is obliged to reinstate 503 employees dismissed from Massmart in June 2010, in addition to the other employment conditions imposed by the Tribunal.\textsuperscript{169} In \textit{Unilever v Competition Commission}, 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 indicated that for employment concerns that extend beyond this, the Labour Relations Act 66 of 1995 or private collecting bargaining

\textsuperscript{163} \textit{Wal-mart supra} note 130 paras 32-4  
\textsuperscript{164} \textit{Daun et Cie AG v Koulosus Holdings Ltd} [2003] 2 CPLR 329 (CT) para 124.  
\textsuperscript{165} \textit{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 \textit{A Visser ‘Broadside for Patel’s “competition meddling’” Business Day Live} 5 April 2012 available at \url{http://www.bdlive.co.za/articles/2012/04/05/broadside-for-patel-s-competition-meddling} accessed on 10 August 2012.  
\textsuperscript{166} \textit{Daun et Cie AG supra} note 164 para 125. Also see \textit{C Avidon and C Azzarito ‘Being pushed to promote government policies’ Without Prejudice} February 2012 11-2.  
\textsuperscript{167} \textit{Wal-mart supra} note 130 para 73. SACTWU also made submissions on this issue.  
\textsuperscript{169} This was despite the existence of some doubt as to whether or not these retrenchments had been connected to the merger. \textit{Wal-mart v Massmart supra} note 132 the CAC’s order para 2.
agreements were more appropriate channels to raise such concerns.\textsuperscript{170} The reinstatement of employees is an example of a concern that would appear to have been more appropriately canvassed before a specialist labour court.

The CAC in \textit{Pioneer v Pannar} also imposed a far-reaching conditions aimed at responding to various public interest concerns raised during the proceedings. These included:

- A commitment by Pioneer to establish an International Research and Technology Hub in South Africa by 2016\textsuperscript{171} and to invest up to R62 million by 2015 to develop the research and technology hub.\textsuperscript{172}

- 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.\textsuperscript{173}

- 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 over the next six years to foster partnerships, endeavours and collaborations to increase the productivity, knowledge and welfare of small-scale and developing farmers.\textsuperscript{174}

Despite precedent indicating that a narrow interpretation of the public interest provisions of the Act is appropriate, the conditions imposed in \textit{Kansai v Freeworld}, \textit{Wal-mart v Massmart} and \textit{Pioneer v Pannar} give effect to public interest objectives that extend far beyond the scope of the Act and are arguably more aligned with the interests of third party interveners in the merger review process than the objectives of competition policy. The imposition of onerous conditions of this nature has negative effects as it discourages transactions that contribute to the growth of the economy and has a chilling effect on foreign direct investment (particularly as the three transactions discussed above all relate to conditions imposed on foreign-based firms seeking to acquire a South African firm).

\textsuperscript{170} \textit{Unilever supra} note 137 para 43.
\textsuperscript{171} \textit{Pioneer v Pannar supra} note 145 Appendix C para 4.1.
\textsuperscript{172} \textit{Ibid} para 85.
\textsuperscript{173} \textit{Ibid} Appendix C para 4.2.
\textsuperscript{174} \textit{Ibid} para 86.
\textsuperscript{175} \textit{Ibid} para Appendix C para 5.
In addition, encouraging intervention in the merger review process results in a lengthening of the time period for merger clearance. 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.’\(^\text{176}\)

Although the Act provides for developmental objectives, the intention was never that these should be promoted at the expense of competition-related objectives in the Act. 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.\(^\text{177}\) 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.\(^\text{178}\) The recent prominence given to public interest conditions in the merger review process and the conditions imposed by the competition authorities justifiably raise concerns about whether this balance is being achieved.

A further concern is a 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. 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.’\(^\text{179}\) Lewis has also commented that ‘Their [the competition authorities’] decision-making powers and their independence has been attacked in the most destructive manner.’\(^\text{180}\) As indicated above, it is a key objective of the Act that the competition authorities are perceived as ‘independent institutions to monitor economic competition’. Perceptions that the independence of the competition authorities is at threat is therefore exceedingly damaging to realisation of the objectives of competition policy in South Africa.

\(^\text{176}\) Woodlands supra note 123 at 8.
\(^\text{177}\) OECD Peer Review op cit note 12 at 18.
\(^\text{179}\) Visser op cit note 165.
\(^\text{180}\) Davie op cit note 168.
VI. 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 procedural disputes over failure to follow due process on the part of the competition authorities. In relation to the merger review process, conditions imposed by the competition authorities in recent merger cases as a result of intervention by third parties have raised concerns that public interest objectives are obtaining undue prominence in the authorities’ merger consideration and have 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 may be falling short in their duties under the Act and consequently that the Act’s objectives are not being fully realised.

*Senwes v Competition Commission*\(^\text{181}\) represents a turning point in that it returns focus to the core ideology of the Act and its objectives. Competition law in South Africa is still relatively young and this therefore provides an opportunity for the competition authorities to regain a clear sense of the underlying intentions of the Act in order to work toward fully realising the objectives of the Act in the future.

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\(^{181}\) *Senwes supra* note 1.
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