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The Inquisitorial Tribunal and the Content of Complaint
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In October 2003 Nutri-flo CC and Nutri-fertilizer CC (collectively referred to as Nutri-flo), producers of fertilizer, lodged a complaint to the Commission about conduct in the fertilizer market. The Commission made a referral against three firms; interlocutory applications were heard by the Tribunal; appealed to the SCA; and then appealed to the Constitutional Court. The matter is now on course to be heard by the SCA. Just less than nine years after Nutriflo complained, the matter remains unresolved.

In September 2007, the Commission initiated a complaint about conduct in the polyurethane foam market. The Commission investigated this complaint; added further complaints in relation to the same industry; and referred the matter to the Tribunal. Attempts to amend the referral led to appeals, the most recent of which involved the Constitutional Court rejecting the application to appeal. Thus, five years later, the matter is unresolved.

In November 2004, a group of liquor wholesalers lodged a complaint against South African Breweries (SAB), claiming it was abusing its dominance. The Commission's referral to the Tribunal was made in December 2007, and on 7 April 2011 the Tribunal dismissed the complaint. The Commission appealed this decision to the Constitutional Court (which refused to hear the matter directly) and the CAC is to hear the appeal in September this year. Eight years after the complaint was initiated, the matter is unresolved.

Indeed - the wheels of justice grind and jolt, and turn slowly. Although sluggishness is a characteristic of all legal processes, the lack of speedy resolutions to competition law matters has elicited particularly outraged reactions. Claims of technical and dilatory procedural challenges are pitted against the freedom to eliminate the cancer of collusion (and other anti-competitive conduct), and speedy justice is the victim of these battles. There are numerous sites of conflict: the specifity with which the Commission is required to craft its initiation documents and referrals; the Tribunal's power to consider conduct not explicitly enumerated in the referral document; the ability of respondents to access the Commission's evidence and documents; the ability to appeal through various courts (with various levels of competition expertise). In all these matters, the procedural protections of targets of investigation restrict the freedom with which the Commission can conduct its investigation and prosecutorial task.

The central controversy that arose in the cases briefly described above, relates to the 'symmetry' between a complaint initiated by the Commission or a third party complainant, and the referral made to the Tribunal (or the case ultimately presented to the Tribunal). The issue at its simplest involves respondents/ targets of investigation contending that if it has to defend a case at the Tribunal which it was not properly notified of in the complaint, then the rule of law has been infringed because the Tribunal is acting beyond its jurisdiction and that the respondents are not being granted their fair procedure protections.

In this paper, we briefly describe the cases identified above, and examine what the courts have said about the balance between procedural protections and the Commission's flexibility to pursue anticompetitive conduct in this context. We describe a few of the core arguments raised by the Commission in arguing for greater flexibility, and consider whether international practice supports these contentions. We finally consider whether the Constitutional Court decision in *Senwes* may predict where the balance will ultimately lie.

1 Clarity in complaint

The first time this issue was addressed was in *National Association of Pharmaceutical Manufacturers and Others v Glaxo Wellcome (Pty) Ltd*.[1] Given that the Commission and Tribunal are 'creatures of statute' and thus only granted power to do that which is allowed in terms of the Competition Act, and section 50(1) of the Act requires that a referral must be of a complaint, the CAC in Glaxo confirmed that the Tribunal only has jurisdiction to consider a matter that is placed before it through referral: '*The Tribunal's wide inquisitorial powers cannot be extended to circumvent the clearly defined complaint procedure set out in the Act.*' In Glaxo, the CAC decided that a complaint must contain the 'facta probanda' of the case ultimately referred in order to avoid circumventing the complaint procedure set out in the Competition Act.

The Tribunal considers this requirement to be very strict[2] but in fact, at the time that the *Glaxo* decision was decided, it did not cause a great stir. A decision of the SCA in *Woodlands*[3] on the other hand, decided in September 2010 caused intense controversy. The difference in reaction can probably be attributed to the fact that more cartel cases have reached Tribunal stage over the last 5 years and the fact that the subjects of those prosecutions have increasingly been raising concerns that the Commission's process was not fair to respondents and targets of investigation. The decision in *Woodlands* thus represented a watershed moment, and an opening of the sluices on procedural challenges to the Commission and Tribunal processes.

The *Woodlands* case involved an investigation of cartel conduct in the milk industry. In this matter, two dairy companies - Woodlands and Milkwood (purchasers of raw milk) raised preliminary procedural points about the validity of summonses issued by the Commission. The relevant facts for the purposes of this paper are that the original initiation document (on which basis the Commission summonsed Woodlands and Milkwood) did not identify those parties, but launched an investigation against 'the milk industry'. The SCA invalidated the summonses and the complaint. It noted that a complaint must contain particularity and clarity[4] and must be based on a reasonable suspicion of the existence of a prohibited practice. It noted that the far-reaching powers of summons and interrogation cannot "*be used by the Commissioner for the purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion*."[5] The decision reiterates that "*a suspicion against some cannot be used as a springboard to investigate all and sundry*."[6]

The *Yara* case[7] related to alleged anticompetitive conduct in the fertilizer industry. The essential facts of this matter are that the complaints lodged by a third party complainant, Nutri-Flo, alleged abuse of dominance by Sasol Chemical Industries. The referral of the complaint by the Commission, however, alleged not only abuse of dominance by Sasol, but also collusion between Sasol, Omnia, and Yara (all firms involved in the manufacture of fertilizer). The procedural issues were ultimately heard by the CAC, which held that the Commission is only entitled to refer the complaint that is initiated or submitted by a complainant. Further, the CAC went on to state that the Act does not make provision for the amendment of a complaint by the Commission and that the Commission therefore should initiate a new complaint if it uncovers additional conduct during its investigation. The Commission applied for leave to appeal directly to the Constitutional Court. The Court refused direct access and the Commission and will argue its application for leave to appeal to the SCA later this year.

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[1] Case No 45/CR/Jul01 available at *http://www.comptrib.co.za/assets/Uploads/Case-Documents/45CRJUL01.pdf*, and 15/CAC/Feb02 available at *http://www.comptrib.co.za/assets/Uploads/Case-Documents/Glaxo%20Wellcome%2015CACFeb02.pdf* accessed on 16 August 2012

[2] *South Africa Breweries Limited and Appointed Distributors and the Competition Commission* available at *http://www.comptrib.co.za/assets/Uploads/134CRDec07-SAB-dismissal.pdf* accessed on 16 August 2012

[3] *Woodlands Dairy (Pty) Ltd and another v Competition Commission* 2010 (6) SA 108 (SCA)

[4] This was supported by a decision of the CAC in *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA and Papercor cc* 23/CAC/Sep02 at Para 35 and 39 that a complaint can relate only to an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant available at *http://www.comptrib.co.za/assets/Uploads/Case-Documents/sappi%2023CACSep02.pdf* accessed on 16 August 2012

[5] Woodlands *supra* note 3 para 20

[6] Woodlands *supra* note 3 para 36

[7] *Yara South Africa (Pty) Ltd and the Competition Commission* 93/CAC/Mar10 available at *http://www.comptrib.co.za/cases/appeal/retrieve_case/1247* accessed on 16 August 2012

Similarly, in the *SAB* case,[8] the respondents contended that the initial complaint conceived of a margin-squeeze case against SAB, but the case that the Commission ultimately referred alleged price discrimination, resale price maintenance, as well as contraventions of sections 4 and 5 of the Act by both SAB and its thirteen 'appointed distributers'. The Tribunal, bound by the precedent set in *Woodlands* and in *Yara*, found that the Commission's case on referral must be based on the initiating documents. The application for dismissal was granted. The Commission, after being denied leave to appeal directly to the Constitutional Court, has filed its notice of appeal to the CAC.

In the *Loungefoam* case,[9] the Commission referred a complaint against Loungefoam and Vitafoam ('the Steinhoff respondents') and Feltex, on the basis that the Steinhoff respondents had reached an agreement to fix the selling prices of polyurethane foam; the same parties had reached an agreement to fix the purchase price of certain chemicals; and that the Steinhoff respondents on the one hand and Feltex on the other hand, had reached an agreement to divide markets.

The Steinhoff respondents' initial defence was that they were part of the same economic entity, and thus were not competitors who could have engaged in collusive conduct. The Tribunal agreed to hear the parties on this preliminary defence. A week before that preliminary hearing was to be held, the Commission applied for an amendment of the referral to include, amongst other things, allegations that Feltex was also a party to the agreement to fix the purchase price of chemicals.[10] The matter was heard by the CAC, which held that if no complaint is initiated then no complaint can be referred. The CAC stated: '*If no complaint was initiated in respect of Feltex and the chemical cartel, then such a complaint cannot be introduced by way of an amendment because the accepted requirements for a referral are not satisfied*.'[11] As with the *Yara* case, the Commission was denied leave to appeal to the Constitutional Court and has sought leave to appeal to the SCA.

The above cases show a tide of decisions against the Commission which reinforce the procedural protections of respondents, and damage the Commission's ability successfully to prosecute these particular cases.

The reactions to these decisions illustrate the tension that resulted. For instance, the *Woodlands* decision was welcomed by some practitioners, who argued that "*the [Commission's] investigation procedure cannot be a free for all….*"[12] On the other hand, some criticized the *Woodlands* decision as being inappropriate given the Competition Commission's public interest function, noting that, "*what the SCA has succeeded in doing is impose the much tougher standards of criminal prosecutions on the competition authorities. In doing so it has set a standard of legality that is inappropriate for a competition enquiry*."[13]

Below, we set out the central principles and arguments of the Commission and respondents underlying this debate.

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[8] *South African Breweries and* others *v Competition Commission* CT case number: 134/CR/Dec07 available at *http://www.comptrib.co.za/assets/Uploads/134CRDec07-SAB-dismissal.pdf* accessed on 16 August 2012

[9] *Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications* [2011] 1 CPLR 19 (CAC)

[10] The Commission also alleged, in response to the defence raised by Loungefoam and Vitafoam that were part of a single economic entity in terms of section 4(5)(b) of the Act, that if this was the case then the fact that Steinhoff controlled Loungefoam was as a result of a broader collusion between the Steinhoff and Kapp group of companies, and furthermore that to the extent that Loungefoam and Vitafoam were found to have colluded with Feltex, that Steinhoff should be liable for the administrative penalty imposed on them

[11] Loungefoam CAC decision *supra* note 9 para 33

[12] Faaez Samadi 'SA court finds commission actions 'invalid'' *Global Competition Review* 13 September 2010. The article quotes Martin Versfeld, at Webber Wentzel in Johannesburg: "The commission has often adopted too robust an approach to the procedural powers it enjoys when it exercises its right to summons individuals . . . It is hoped that the Supreme Court's decision will put an end to overly expansive requests which fall well outside of the parameters of the original complaint." Chris Charter, at DLA Cliffe Dekker Hofmeyr in Sandton stated: 'It is clear that the [commission's] investigation procedure cannot be a free for all, and must be rooted in reasonable suspicion of actual anti-competitive conduct'.

[13] Davis & Granville 'South Africa' in Fox & Trebilcock (eds) *Process, Procedure and Design of Competition Law Institutions: Global Norms, Local Choices* (2012) OUP, forthcoming.

2 There are limits to the exercise of the Commission and Tribunal's power

As is clear from the decision of the SCA in *Woodlands*, and the decisions of the CAC in *Loungefoam* and *Yara*, the Commission and Tribunal are 'creatures of statute' and thus can only exercise the powers granted to them in terms of the Act.[14] This conclusion is one based on the prescripts of the rule of law.

The rule of law has been developed through the common law in South Africa over many years. It has now been constitutionalised through section 33 of the Constitution, which states that "*everyone has a right to administrative action which is lawful, reasonable and procedurally fair*." The case of *Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others*,[15] describes the concept of legality/lawfulness[16] as follows:

> "*Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness depends on the terms of the empowering statute. If the exercise of public power is not sanctioned by the relevant empowering statute, it will be unlawful and invalid. Lawfulness lies at the heart of administrative justice and underpins the whole Constitution. It is a fundamental principle of the rule of law. The exercise of public power in whatever form can only be legitimate where it is lawful, and the rule of law, at least to the extent that it expresses the principle of legality, is accepted to be a fundamental principle of constitutional law*."

It is thus these principles of legality that restrict the Commission's and Tribunal's power to act outside of the ambit of the Act.[17] The respondents in the cases identified above have made reference to the wording of the Competition Act to identify what those powers are. Section 49B(1) envisages the initiation of a complaint about an alleged prohibited practice by the Commission or the submission of a complaint against an alleged prohibited practice by a private person.

Upon receipt or initiation of a complaint, the Commissioner must, in terms of section 49B(3), direct the investigator to investigate the complaint. In terms of section 50(1), the Commission may at any time refer the complaint to the Tribunal and in terms of section 50(2) the Commission must, within one year after a complaint was submitted to it, refer the complaint to the Tribunal or issue a certificate of non-referral. Finally, the Tribunal is then obliged in terms of section 52(1) to conduct a hearing into every matter referred to it.

It is on the basis of these provisions of the Act that the courts have found that the Tribunal cannot conduct a hearing into issues that extend the ambit of the referral. In turn, a referral has to be a referral of 'the complaint' and therefore cannot differ in its substantial allegations from those contained in the complaint (otherwise it would amount to the referral of another complaint and not 'the complaint'.) Moreover, the Commission can only investigate a complaint that has been initiated, and thus, if it finds evidence of conduct which has not been identified in its initiation, it must initiate a new complaint, otherwise it would not lawfully be conducting an investigation in terms of the Act. It is on this basis that the Woodlands court stated that 'a complaint must contain particularity and clarity[18] and the far-reaching powers of summons and interrogation cannot "*be used by the Commissioner for the purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable*

[14] See also *Competition Commission of SA v Telkom Limited* [2010] 2 All SA 433 (SCA).
[15] 2006(5) SA 291 (T) para 18 Also available at *http://www.saflii.org/za/cases/ZAGPHC/* accessed on 15 September 2011
[16] Hoexter notes that the principles of lawfulness coincide completely with the principles of constitutional legality. Cora Hoexter *Administrative law in South Africa* 2 ed (2010) 254
[17] *Menzi Simelane NO and Others v Seven-Eleven*, Case No.480/2001 at paragraph 12, available at *www.saflii.org/za/cases/ZASCA/*, accessed on 15 September 2011.
[18] This was supported by a decision of the CAC in *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA and Papercor cc* 23/CAC/Sep02 at Para 35 and 39 that a complaint can relate only to an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant available at *http://www.comptrib.co.za/assets/Uploads/Case-Documents/sappi%2023CACSep02.pdf* accessed on 16 August 2012

suspicion."[19] The decision reiterates that "*a suspicion against some cannot be used as a springboard to investigate all and sundry*."[20]

Furthermore, respondents have noted that a 'prohibited practice' must (by logic) be engaged in by a particular firm or firms, and thus 'a complaint' (which has to be of a 'prohibited practice') must identify the firm or firms engaging in the prohibited practice.[21]

In addition to conducting themselves lawfully, the competition authorities must also conduct themselves fairly. The concept of procedural fairness is also a component of the rule of law and of the constitutional right contained in section 33 of the Constitution. Procedural fairness entails, in its simplest form, a fair hearing by an impartial decision-maker. This in turn requires giving people an opportunity to participate in a decision that will affect them and 'crucially - a chance of influencing the outcome of those decisions'.[22]. An opportunity to be heard is only meaningful if the party being heard is aware of the case against it. Thus, being advised of the case against one is a logical component of fair procedure protections.

Hoexter states that there is nothing to stop procedural fairness from being acknowledged as an independent of the principle of legality.[23] The SCA has also found that preliminary action, in other words action prior to a decision is made also requires procedural fairness. In this regard, the SCA has stated that:

> '*It is settled law that a mere preliminary decision can have serious consequences in a particular cases ,inter alia where it lays '… the necessary foundation for a possible decision…' which may have grave results In such case, the audi rule applies to the consideration of a preliminary decision.* '[24]

Therefore Commission and the Tribunal understand that they are subject to the rule of law, and that their processes must be fair.[25] However, as Hoexter explains, procedural fairness is a variable and contextual concept and what is considered fair is highly dependent on the circumstances of each case.[26] Respondents in the matters identified above consider that fairness requires that they be advised of the essentials of the case before referral. In the various cases described above, respondents only knew of the case against them either at referral stage, or at hearing stage, or even after hearing had started. Thus they consider that they have been prejudiced by the procedures followed by the Commission and/or Tribunal and unable to properly defend themselves.

The Commission has expressed concern that these legal principles are being used by respondents to delay cases and to undermine the purposes of the Act. It argues that the Act specifically chose to create an adjudicative process that was less formal than a High Court process, so that cases could be decided quickly, and so that the Act's other public interest objectives could be achieved.

3 A speedy and informal process enables the pursuit of the Act's public interest objectives

The South African law and procedures were designed to render a classically adversarial legal system more accessible to the general public.[27] The Competition Act provides that the Competition Tribunal is not bound by the formalities observed in court proceedings. It is allowed to conduct its proceedings informally, and in an inquisitorial manner. The Tribunal is empowered to:

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[19] Woodlands *supra* note 3 para 20
[20] Woodlands *supra* note 3 para 36
[21] Feltex heads pg 18
[22] Ibid para 363
[23] Hoexter op cit note 16 at page 420
[24] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) para 17 quoting dictum of Schreiner J in Van Wyk NO v Van der Merwe 1957 (1) SA 181 (A) at 189A-B; Hoexter op cit note 16 at 438
[25] OECD 'Procedural fairness and transparency' available *at http://www.oecd.org/daf/competition/mergers/50235955.pdf* accessed on 16 August 2012
[26] Hoexter op cit note 16 at page 365
[27] Davis & Granville op cit note 13

- conduct its hearings informally or in an inquisitorial manner (52(2)(b));
- determine the procedure applicable in a particular hearing and condone any technical irregularity or non-compliance with its Rules (section 55(1));
- direct or summon any person to appear before it, and question him or her under oath (section 54(a) and (b) and
- accept evidence even where it is not given or proven under oath or affirmation or where it would be inadmissible in ordinary court proceedings. (section 55(3)).

Through these provisions, the Act frees the Tribunal from some of the more constraining elements of high court rules and grants it inquisitorial powers, not only to achieve administrative efficiency and make the process as expedient as possible, but also to reduce the burden on poorly resourced complainants.

These goals are amongst many of the Competition Act's equity objectives. These in turn are a consequence of the idiosyncratic South African context, and the place that competition law fits into the South African narrative, as described by Lewis. Lewis notes:

> "*In South Africa the dominant narrative that underpinned the struggle for democracy was naturally the racially assigned privilege that marked every sphere of life. And, to a significant extent, it is behaviours of a range of non-governmental and private institutions, that continues to define and underpin the activities and discourse that predominantly seek their legitimacy in their efforts to confront the inequity of the past and the poverty and dispossession that remain its most powerful manifestation…. The Competition Act… has deep roots in this dominant narrative. In particular, it is rooted in the concentration of ownership of private wealth in the hands of a small number of large corporations – for the most part, highly diversified conglomerates – that were in turn controlled by a select group of white families"*.[28]

This is reflected in the preamble to the Act which provides:

> "*The people of South Africa recognise:*
>
> > *That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.*
> >
> > *That the economy must be open to greater ownership by a greater number of South Africans.*
> >
> > *That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.*
> >
> > *That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.*"

In line with these founding values, the objectives of the Competition Act are not only to "*promote the efficiency, adaptability and development of the economy"* and to "*provide consumers with competitive prices and product choices"*, but also to "*promote employment and advance the social and economic welfare of South Africans"*, and to "*promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons"*.

[28] David Lewis *Thieves at the Dinner Table* (2012) at page 5

The competition authorities identify their task to pursue anticompetitive conduct as a fundamental plot line within this greater South African narrative. Thus, restrictions on their powers and on their flexibility to pursue anticompetitive conduct, result not only in sluggishness when the Act intended speed and not only in levels of procedural formality when the Act intended informality, but in the perpetration of inequality.

The controversy over procedure can be cast in these terms because the targets of competition investigation are invariably well resourced, well-entrenched businesses. They tend to be represented by large corporate law firms, well-versed in traditional high court procedure, and accustomed to using the law (and indeed the rule of law) to defend their clients. In the debate on clarity in the complaint/referral, the Commission relies largely on its role as the representative of the consumer against the powers of big business to justify why procedural fairness requires less rather than more in these circumstances. This is pitted against the role of respondents and their lawyers as the representatives of private wealth, trying to reinforce a highly legalistic enforcement culture, which frustrates the advancement of the social and economic welfare of South Africans.

It is in this context that the Commission considers that the targets of investigation pay lip service to the rule of law and constitutional protections and use procedural challenges as legal tricks delay the hearing of cases on the merits.[29] Lewis refers to 'deliberately conceived obstructive legal stratagem[s]' as a reason for slow progress in competition cases. He states:

> *"As I write this, it is difficult not to hear the derisory laughter of seasoned lawyers who employ these tactics every day. It is difficult not to hear the standard arguments trotted out in patronizing terms: every client is entitled to the most thorough-going defence even if it entails skirting as close as possible to abuse of the adjudicative process; that the price of the powerful dominating the exercise of these rights is worth paying because it also establishes the standards that underpin the law's avowed purpose of protecting the powerless against abuse by the powerful…. It's little wonder that the law and the Constitution – and its accompanying high-minded principles of fairness and justice – are held in such low regard by the public when what is most frequently on display is the cynical distortion and abuse of these principles by well-heeled lawyers representing powerful clients in business and politics."*[30]

Indeed, the South African contribution to an OECD roundtable on procedural fairness, suggests that "*[l]egal representatives appearing before the Appeal Court and the Tribunal have duties towards their clients, but as officers of the court they also owe a duty to the integrity of the legal system.*" The implication of these comments are that procedural challenges, or the use of legal principles to defend respondents in competition law cases amounts to obstructive delay techniques which frustrate the Act's objectives.

Thus the reactions to *Woodlands* and the cases that followed it focused on the resources of defendants and the lawyers who defended them. For instance, the Commissioner, Shan Ramburuth, in a hearing before Parliament after the SCA Woodlands decision, complained that the judgement by the SCA would encourage companies being investigated by the competition authorities to delay the implementation of any finding by pursuing technical legal points through the courts. He stated that "*people with deep pockets have more access to the courts. If respondents in competition cases believe they can delay the outcome by pursuing technical legal points, then they will*."[31] A report in a South African business newspaper suggested that "*the chief beneficiary of the SCA ruling is the legal profession. The ruling provides scope for lawyers to generate even more legal fees as cartel cases get clogged up in technical legal challenges.*"[32]

[29] OECD op cit note 25 at page 47-48
[30] Lewis op cit note 28 at page 57
[31] Ann Crotty 'Rich firms will Use Courts to Drag Out Cases, Says Commission' *Business Report* 16 September 2010
[32] Ann Crotty 'SCA Ruling on Watchdog Helps Cartels, Not Public' *Business Report* 22 September 2010 The judgment has also created further confusion in its apparent conflation of the requirements for a valid complaint and a summons issued by the Commission to secure evidence. In particular, the question arises as to the specificity now required of a complaint, particularly one brought by a member of the public; Davis & Granville op cit note 13

Similarly, the responses to the dismissal of the SAB case suggested that technical decisions were hindering the investigatory role of the Commission and bowing to the demands of well-resourced business. A business paper proclaimed that a "*deliberately informal system has been clubbed over the head by a more traditionally legalistic approach*."[33]

Another article, entitled 'Big money sways Lady Justice',[34] firmly placed the debate within this narrative:

> *"The target of a commission investigation is most likely to be a private company suspected of abusing a dominant position and/or participating in a cartel. The victims in such cases are usually at a considerably greater disadvantage than the perpetrators of anticompetitive conduct.... In South Africa, the inequalities are pernicious. The prospect of victims receiving compensation resulting from civil damages claims is slim. Consider the victims of the bread cartel, or any small business that has been excluded by a dominant firm and suffered. Also, in contentious competition law cases, the typical respondent has all the advantages that come with deep pockets. Not so for the typical complainant.*"

The article concludes that it is only with a '*strong'* investigative agency that victims of anticompetitive conduct could achieve justice, since the detection and prosecution of anticompetitive conduct is the '*only'* way to address economic imbalances in South Africa. This represents a sliding slope argument that the consequences of the courts' rulings will inhibit not only the Commission's powers to refer complaints but also to initiate them. Nevertheless, it visibly illustrates the role of the unique South African context to this debate, and the manner in which that context is pitted against the '*one-sided perspective of the legal fraternity*'.[35]

This narrative provides important context for the debate on where the balance between procedural protections and prosecutorial flexibility should lie. It firstly explains why a usually dry consideration of procedural legalities has caused such friction and turned into an emotive debate. It secondly provides a basis for the Commission's contentions that the competition authorities are discharging a public duty, and thus should be granted maximum flexibility in their processes.

It is true that the content of fairness is dependent on context, but importantly, it is not dependent on the identity of the party having reference to it. The structures and processes developed by the competition law jurisprudence cannot assume that (a) the Commission will always be representing the disenfranchised against the "powerful dominating the exercise of these rights" and (b) the Commission will always reach the right conclusions.

A complaint of anti-competitive conduct will not always be levied against 'big business' and in this regard, the principle of the rule of law and procedural protections should apply equally to all respondents. A small or BEE business can just as easily be on the receiving end of a claim of anticompetitive conduct as any other business. A complainant can just as easily be a dominant well-funded firm concerned about cartel conduct eroding its market share, as it can be a sole trader or consumer.

The rule of law also plays a practical role of ensuring the right outcome of a matter. In this regard, the OECD has noted that "[t]ransparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement decisions"[36] and "transparency leads to faster, better informed and more robust casework and decision making by following processes that are more consistently applied and better understood by those participating."[37] Ex-Attorney General Christine Varney has also noted that "a fair predictable, and transparent process bolsters the legitimacy of the substantive outcome

[33] Michael Bleby 'SAB's win a blow to the little guy's day in court' *Business Day* 8 April 2011
[34] Kasturi Moodliyar 'Big Money Sways Lady Justice' *Mail and Guardian* 13 July 2012.
[35] Ibid
[36] OECD op cit note 25 page 23
[37] Ibid page 42

and helps us to make better enforcement decisions by exposing our thinking to informed criticism" and "focusing all parties on the real issues in dispute."[38]

A recent article in the Mail and Guardian quoted numerous practitioners who supported the CAC decisions in *Loungefoam* and *Omnia*, and the Constitutional Court's dismissal of the applications for leave to appeal. The article quotes one lawyer who stated that the Commission should initiate its complaints "more carefully and conduct better investigations", while another noted that "the Commission could do much more thorough investigation", and that "sometimes the Commission referred cases before it was certain what the case was". Another noted that "the Commission was reluctant to admit that if they did their work properly, they wouldn't have these problems."

An initiation of a complaint affords the firm that is the target of the investigation an opportunity to engage with the Commission, dispel its concerns, and demonstrate that it has not engaged in conduct prohibited by the Act. It also provides a firm with the opportunity to conduct its own internal investigation and enter into settlement negotiations with the Commission if necessary. As the Commission's own statistics show, many charges of anticompetitive conduct prove to be unfounded, and there are thus reasons to enable such firms to avoid the reputational and financial risks that arise with allegations of anticompetitive conduct. In addition, both the Commission and respondent could potentially avoid the costly and protracted litigation that inevitably follows a referral

While this may perpetuate the Commission's concern that "technical" points are successful in delaying justice, practitioners contend that the resolution of these procedural issues (in addition to protecting the procedural rights of targets of investigation) can reduce the time to conclude proceedings, either through limiting the points or through dismissal.[39] Granting targets of investigation these opportunities would help strengthen enforcement by ensuring cases were accurate, relevant and universally respected by all parties.[40]

An article in a business paper suggests that:

> *The protection of rights enshrined in law is non-negotiable…. This means the system will sometimes be played by well-resourced companies to get themselves off the hook. The best defence against such cynical manipulation of constitutional rights will be for the commission to be more rigorous and disciplined; to leave as little scope as possible for claims based on technicalities.*[41]

Even if the Commission were to be as rigorous as possible and try and leave little scope for procedural challenges, it suggests this is impossible in the circumstances where a referral has to substantially reflect the allegations made out in a complaint, because the Commission cannot be expected to know the case it wishes to prosecute at the beginning of its investigation.

4 The purpose of investigation is to uncover contraventions

There is no doubt that the Commission has an important task, which involves investigating and prosecuting allegations of anticompetitive conduct. Most fundamentally, the purpose of investigation is to find or confirm the existence of a contravention of the Act. The Commission contends not only that it is not appropriate to require an initiation to identify the essentials of the alleged conduct that is ultimately prosecuted, but also that it is simply impossible to do so. This is because at the time of initiation, the Commission is not in possession of this information. This concern arises particularly in cartel cases, which are characterized by covert conduct.

In the South African submission to the OECD roundtable discussed below, the delegation noted that:

[38] Christine Varney 'Procedural Fairness' *Speech at the* September 2009, *available at: www.justice.gov/atr/public/speeches/249974.htm* accessed on 16 August 2012
[39] Ibid page 11: "in the absence of procedural irregularity, the need for protracted interlocutory or review proceedings would be nullified."
[40] Ron Knox 'ICN - the due process debate continues' *Global Competition Review* 2 August 2012.
[41] Michael Bleby 'Shot across the bows of the state: Competition watchdog on the wrong side of the law' *Business Day* 11 April 2011.

> *"The strict approach requiring that a complaint lodged by a complainant or self-initiated by the Commission to be the same (sic) as the referral to the Tribunal ignores the fact that a complaint marks the beginning of an investigation and presupposes that either the Commission or a complainant possesses 'full knowledge' of the facta probanda (main facts) necessary to support the allegation of a prohibited practice at the time of instituting a complaint…. [while in fact] the nature of the conduct complained of and its effects often crystallizes during the investigation process…"*

The difficulty of proving anticompetitive conduct, given its often covert nature, has been cited not only as a reason not to inform parties of the cases against them at the time of initiation, but also as a reason to withhold evidence at the time of hearing. The Tribunal has implied that, at the time of referral or hearing, the 'ambushing' of respondents may be justified, because of the covert nature of cartel conduct.[42] The Tribunal made these comments in the *Cape Gate/Mittal* matter relating to access by respondents to the Commission's documents and evidence post-referral. It has been suggested that the Tribunal's decision in that matter implies that, since collusive activity is regarded as the most egregious form of competition contravention and is by its nature hardest to detect, it may be appropriate to soften 'ordinary rules' of evidence, so that a respondent may be caught out on the stand.[43] This decision did not relate to the issue of symmetry between complaint and referral, but it illustrates the competition authorities' concerns that cartel activity in particular is not easy to detect, and thus strict procedural proscriptions may prevent the prosecution of such conduct altogether.

And indeed (at least in relation to 'clarity in the complaint'), this is the simplest and most compelling argument of the Commission. The Commission accepts that it and the Tribunal must follow fair processes, which include providing respondents with information of the case against them, such that they can meaningfully be heard and defend themselves. But there is no clear principled reason why the referral does not provide this opportunity.

On the other hand, it is also important to bear in mind that the Commission has the Corporate Leniency Policy ('CLP') at its disposal to assist in detecting cartel conduct. The CLP envisages a 'process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity'.[44] The CLP has been hugely successful with the Commission receiving 143 leniency applications between April 2004 and March 2011[45]. The Commission has also stated that during the 2010/2011 financial year it formed a specialised cartel unit in the Enforcement and Exemptions Division. The unit's primary focus for that year was 'the investigation of cartel activity emerging from applications in terms of the Commission's CLP. The CLP continues to be an effective tool in identifying and investigating cartels.'[46] I t is therefore clear that the Commission is heavily reliant on the CLP and that this process goes a long way to easing the burden of detecting cartel conduct. Moreover, once the Commission learns about potential contraventions of the Act from information received from a leniency applicant and initiates its own complaint it can make use of it wide-ranging investigative powers, for example, a summons or conducting a dawn raid.

Nevertheless, the Commission's stance on this issue may be supported by the current processes in other jurisdictions.

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[42] Tribunal record:
CHAIR: "But is ambushing always unfair in our law, or are there circumstances where you are looking at a balance of interest and the interest is naturally detecting the covert activity, may justify ambushing? Don't some of the discovery rules allow some discovery to be held back even at the time of trial in certain circumstances to do precisely that?"

[43] Ann Boniwell 'Should an Old Dog Learn New Tricks? A Revision of the Rules of Evidence relevant to Competition Proceedings' *Competition Law Sibergramme* 20 December 2010 at page 8; Davis & Granville op cit note 13

[44] Section 3(1) of the Corporate Leniency Policy in General Notice 628 in GG 31064 of 23 May 2008

[45] Competition Commission Annual Report 2010/2011 at page 26 available at *http://www.compcom.co.za/assets/Publications/Annual-Reports/CC-Final-Annual-Report-2010-2011-lowres3.pdf* accessed on 20 August 2012

[46] Ibid at page 25

5 International position

We have not conducted a thorough analysis of international precedent. However, we note that concerns regarding procedural fairness in competition enforcement systems are a live issue in numerous jurisdictions. A Global Competition Review report notes that '*as competition law enforcement continues to grow around the world, so too has the chorus of voices claiming that some trustbusters - including those in major jurisdictions - don't respect the due process rights corporations expect to receive when defending themselves against accusations of wrongdoing*.'[47] The report notes that despite attempts by the US Department of Justice to encourage enforcers from other jurisdictions to reach consensus on the appropriate level of due process, the issue has been one of '*supreme sensitivity among enforcers, as legal and cultural divides have clouded efforts to establish procedural fairness standards*.'

The issues have been debated in an OECD forum in three separate round tables, held in 2010 and 2011. The OECD produced a report[48] identifying the enforcement procedures in OECD countries around the world. While antitrust agencies almost universally agreed that transparency and due process benefit everyone involved in a process, it seems that differences in legal systems and culture remain insurmountable hurdles to reaching consensus in approach.[49]

The GCR report notes that the US Chamber of Commerce drafted a list of recommended best practices which was presented to the OECD. The recommendations suggest that a '*firm cannot address the allegations made and claims being pursued against it unless the competition authority informs the firm of the allegations, the claims, and the evidence supporting the claims*'. The paper recommends that during an investigation, and well before a statement of objections or other similar charges are issued, enforcers should engage with the companies involved.

These recommendations appear to reflect the movement of many agencies toward more regular and earlier engagement with targets of investigation. In the year between the first OECD roundtable and the third, numerous agencies began to establish increased protections for companies under investigation. Many instituted new guidance that revised or clarified procedures. Agencies from Canada, Spain, Korea, Japan, Greece and others offered businesses further explanations and descriptions of their investigative processes.[50] The EC adopted new guidelines in October 2011 for non-merger investigations, which recommend earlier opening of formal proceedings; state of play meetings at key points in the proceedings: early access to key submissions; and announcing various stages of the process publicly.[51] The OFT, in its 2011 Procedure Guidance provides for the OFT to send a case initiation letter to targets with details of the conduct under investigation, the relevant legislation and indicative time scales, staff contacts and decision-maker information. The OFT further plans to routinely offer more state of play meetings in order to update parties on the OFT's progress in an investigation, to give them an opportunity to make their points of view known throughout the proceedings.[52]

What these changes reflect is that current processes do not necessarily envisage early engagement with targets of investigation. It is usually useful to consider the approach in the EU (given that South African competition law borrowed a significant amount of substantive provisions from the EU, and also shares a similar underlying philosophy). Unfortunately, the enforcement systems are not suitably comparable to provide conclusive guidance. Most significantly, the EU does not have separate independent institutions to prosecute the alleged contraventions and adjudicate on those allegations. The European Commission (EC) is the policeman, prosecutor and judge in infringement cases of Articles 101 and 102 TFEU (the equivalent of the prohibited practices provisions in the South African Competition Act). As such, the EC document that contains allegations which precedes the decision in

[47] Knox, op cit 40.
[48] OECD op cit note 25
[49] Knox op cit note 47
[50] Ibid
[51] OECD op cit 25 at page 11-12
[52] Office of Fair Trading 'A guide to the OFT's investigation procedures in competition cases' March 2011 available at *http://www.oft.gov.uk/shared_oft/policy/oft1263.pdf* accessed on 20 August 2012

the EU (a 'statement of objections' (SO)) is not directly comparable to a South African complaint or referral.

To the extent that the SO is comparable to the referral, the EC process would support the Commission's contention that complete and detailed allegations need only be contained in the referral and not the complaint. This is because in the EU, it is the SO which must show some 'symmetry' with the decision, as there is no written initiation document which is provided to parties.

It is nevertheless worth noting that there is strong EU precedent around how the SO is fundamental to the procedural rights of targets of investigation. The SO must contain all objections on which the EC intends to rely upon in its final decision.[53] In the case of *Atlantic Container Line AB and Others v the Commission*,[54] the Court of First Instance provided a comprehensive summary of the case law on the need for clarity in the SO. In particular, the court noted that:

- The decision is not necessarily required to be an exact replica of the SO - the Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the SO, and must be able to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains.

- It is only if the final decision alleges that the undertakings concerned have committed infringements other than those referred to in the SO, or takes into consideration different facts that there will be an infringement of the rights of the defence.

Similarly in *CMA CGM and Others v Commission of the European Communities*[55] the Court of First Instance noted that:

> *It should be noted that, according to settled case-law, the statement of objections must be couched in terms which, even if succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (*cited cases omitted*). Furthermore, it is settled case-law that that obligation is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the complaints and only takes into consideration facts on which the persons concerned have had the opportunity of making known their views…."*

If the SO were found to be comparable to a South African referral, the international practice supports the Commission's case that it is only at referral stage that the respondents can claim a right to be fully advised of the case against them. However, it is not at all clear that the SO is the equivalent of a referral. The SO is issued at a relatively preliminary stage of the investigation compared to a referral and the EC can still 'change its mind' about the existence of an infringement after having received comments from the undertakings concerned. In contrast, a referral sets out the Commission's

[53] Article 19(1) of EEC Council Regulation No 17 'First Regulation implementing Articles 85 and 86 of the Treaty, Article 18(3) of the COUNCIL REGULATION' (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

[54] Joined cases T-191/98, T-212/98 to T-214/98 at paragraphs 191-196. See also *Irish Sugar v Commission* Case Y-228/97 para 35; *Petrofina v Commission Case* T-2/89 para 39, where the court holds that:

> '*The Decision may not under any circumstances contain new objections in addition to those contained in the statements of objections addressed to the applicant nor fresh evidence in addition to that mentioned in those statements of objections or appended to them*'

See also *Ahlstrom Osakeyhtio and Others v Commission* Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 para 40-54 and para 152- 154, which reveals a strict interpretation of these requirements. It notes that even though the SO identified a particular addressee in the factual section of the document, it failed to draw conclusions regarding that party in the legal assessment, and thus the decision against that party had to be annulled.

[55] *CMA CGM and Others v Commission of the European Communities* Case T-213/00 para 109

conclusions post-investigation. Therefore, if it were only at referral stage that the Commission granted respondents an opportunity to be heard, it would seem to undermine the Commission's investigatory role, since the Commission would not have taken into account all necessary facts from relevant parties (principally the targets of the investigation) during the investigation. The Commission's own statistics show that many charges of anticompetitive conduct prove to be unfounded.[56]

What is clear is that the stated purpose of the SO is first and foremost to act as a procedural safeguard to give parties to the proceedings the opportunity to be heard on the matters to which the EC has objected.[57] This brings to the fore the other core argument raised by the competition authorities – i.e. that the purpose of the initiation document is not to act as a procedural safeguard.

6 The purpose of a complaint is not to inform respondents, but to create rights for third parties

This argument is most strongly presented by the Tribunal in Part B of its judgement in *SAB*[58]. The Tribunal notes that the Act designed a system in terms of which private litigation in the High Court was limited to an assessment of the amount and awarding of damages. But a determination of the merits was reserved by the Act for specialist bodies – the Commission, the Tribunal and the CAC: "*Because a determination on the merits was a prerequisite for a damages claim, a method had to be devised for determining this aspect of private claims within the competition system, whilst at the same time not compromising the public enforcement preference for the Commission*."[59] The answer apparently lay in the creation of the complaint procedure, so that private parties can make a complaint, and then the Commission is given a 'right of first refusal' – it can choose to prosecute the complaint itself. If it chooses not to, it is only at that point that the private litigant is entitled to prosecute the claim itself.

The Tribunal asserts that "*while the existence of a complaint was a necessary prior jurisdictional fact to referral, its content was intended to regulate [the inter-relationship between private and public enforcement] and not meant to confer rights upon a respondent*."[60] It goes on to state that the "*initiating document has become transformed into something it was never intended to be. The complaint, in and of itself, does not require a respondent to answer. There is no obligation for it to do so under the Act, and no procedure for this under the rules. It may ignore a complaint without any legal prejudice to its rights.*"[61]

Thus, the Tribunal's point is that the purpose of having a complaint procedure in the Act was *only* to enable private parties to have a means to prosecute their claims if the Commission chose not to. If this was the intended purpose of the complaint, the Tribunal implies, the purpose could not be to create rights for targets of investigation and could not be to inform targets of investigation of the complaint against them.

However, the Tribunal does concede that the initiating document has to meet certain requirements in order to achieve the purpose it has identified:

- it must be clear whether it is a complaint of the Commission or a complaint of a third party;
- "*for the purpose of section 67(2), which deals with a limitation of actions, one must know whether the initiating document was the complaint now being pursued against a respondent, for the sake of interpreting this section sensibly if there were a later challenge of double jeopardy*"[62] and

[56] In the 2010/2011 financial year, the Commission finalised 143 of the 172 considered by it. In respect of the 143 complaint finalised, 116 were non-referred at screening, and a further 24 were non-referred following an investigation. 29 complaints were carried over to the next year, Commission's Annual Report op cit at note 45 at page 26
[57] Article 27(1) of Regulation 1/2003 and Article 10 of EC Regulation 773/2004.
[58] SAB decision *supra* note 8
[59] SAB decision *supra* note 8 at para 103
[60] Ibid at para 109
[61] Ibid at para 110
[62] Ibid at para 113

- it must not deprive the Commission of the opportunity to be the prosecutor of first choice. Thus it must contain all the complaints the complainant wants to make, and not allow the complainant to keep part of the complaint in its pocket, and on non-referral, prosecute a complaint it did not tell the Commission.

Once the Tribunal accepts that a complaint (at least that of a third party) has to meet the requirements identified above, it seems difficult to see why it must not meet the requirements demanded by the SCA in *Woodlands* and the CAC in *Yara* and *Loungefoam*. If a referral does not, in substantive terms, 'mirror' the contentions in a complaint, it would not serve the purpose of determining whether the same complaint is being made as has been made before, in terms of section 67(2). If the complaint does not contain all the essential allegations which are ultimately referred, then it would not meet the requirement that the complainant should not be able to hide an extra complaint in its pocket. The Tribunal seems to suggest that the complaint must be clear enough so that a claim of double jeopardy can be decided, and so that the Commission can understand what the precise allegations are. It is not clear how it could achieve that without being precise enough for a target of investigation to know the allegation.

These requirements imply a greater level of precision from a complaint from a third party than one initiated by the Commission. This is despite the Tribunal's suggestion that it is much harder for third party complainants to make a precise allegation or identify infringing conduct than it is for the Commission, because "*the problem complainants frequently have is of seeing the tip of the iceberg and not what lies beneath the sea.*" For instance, a party may notice high prices in the market, but not know whether those high prices are the result of collusion or unilateral conduct.

This may well be true, but indeed, high prices may be the result of no anti-competitive conduct at all. It cannot be that the Act envisaged third parties (or the Commission) prosecuting outcomes and not contravening conduct. The Act makes plain in ss 49B(1) and (2) that a complaint relates to 'an alleged prohibited practice'. As the respondents in *Loungefoam* noted, the protestation that prices in a market are too high, does not constitute a complaint that an alleged prohibited practice is taking place (although it may constitute a submission of information on which the Commission can base a complaint).[63]

And indeed, it is ultimately the scheme and wording of the Act which places the greatest obstacle to the Commission being granted the degree of prosecutorial flexibility it contends is appropriate.

7 Prescription

A consequence of the SCA's and CAC's jurisprudence is that the Commission must initiate a new complaint whenever it discovers new conduct or new parties involved in a prohibited practice. Respondents complain that this is a simple and unburdensome task.[64] The Commission responds that it is a pointless formality.[65] Neither is correct because the implications of initiating a complaint and the timing thereof is fundamental.

Section 67(1) of the Act provides that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased. In the absence of the initiation of the substantive elements of the allegation, the foundation for invoking section 67(1) is absent. This would make the provision meaningless and purposeless.

The legislature made a conscious decision to include a prescription provision. It may have done so for a number of reasons. The South African Law Reform Commission[66] states that prescription is based on fairness, certainty and public policy. Most fundamentally, prescription serves the public purpose of having disputes resolved as quickly as possible, and it protects the rule of law value that there be

[63] Steinhoff heads para 46.
[64] Steinhoff heads para 49
[65] Commission's founding affidavit in Loungefoam case at para 24.3.3
[66] South African Law Reform Commission Discussion Paper 126 (Project 125) *Prescription periods* (2011) at page 11

certainty in legal affairs.[67] As noted by the respondents in *Loungefoam*, the Constitutional Court itself has emphasised the "*vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication"* and that inordinate delays in litigating damage the interests of justice.[68]

Moreover, prescription provides practical solutions to the problems of evidence deteriorating over time and witnesses forgetting. This is particularly problematic in section 4(1)(a) and section 5(1) where the Commission has to prove the anti-competitive effects of a respondent's conduct. Abuse of dominance cases are equally difficult to prove, especially when long periods of time have passed e.g. where the Commission has to rely on evidence in order to discharge its onus of proving anticompetitive effects in the economy, or where a respondent has to rely on evidence in order to discharge its onus of proving the existence of any pro-competitive gains in its defence. Trying to do this, years after the economy has changed is virtually impossible.

Prescription also ensures that the Commission allocates its limited resources appropriately to priority cases and does not focus on conduct that has ceased. As the Commission emphasises, its public role must not be lost sight of. Its role is to police the economy now, and to benefit consumers now. Targeting conduct that has long since ceased, does not benefit consumers as it misdirects the Commission's resources towards punitive prosecutions rather than prosecutions which will amend behaviour and benefit the economy. The prescription provision thus focuses the Commission's gaze on conduct that is currently harming consumers.

Regardless of the particular underlying reason for including prescription in the Competition Act, what is clear is that it was intended by the legislature to be included. Indeed, the legislature contemplated the fact that prescription places a severe restriction on the Commission's power to prosecute, and it is for this reason that it made prescription attach to the date of complaint and not the date of referral. This gives the Commission the opportunity to conduct a thorough investigation without fear of prescription.[69] The Tribunal decision of *Competition Commission and Clover Industries Ltd* [70]clarifies that a complaint initiated by the Commissioner is not subject to the time-period limitations contained in section 50 of the Act. Thus the Commission has an unlimited period in which to complete an investigation post-initiation. If prescription had attached to the date of referral, the Commission would be far more hamstrung to complete investigations in time periods which may not be practical.

It is worth noting that although the existence of the prescription provision provides strong support for the contention that there should be symmetry between the complaint and referral, the Tribunal and CAC will not easily uphold a prescription defence. Thus, prescription itself should not be viewed as unduly restrictive of the Commission's ability to prosecute conduct. Indeed, the Tribunal in the Pioneer[71] and Paramount[72] cases (supported by the CAC) in Paramount, have imposed requirements that make it particularly difficult for a respondent to succeed in a prescription defence, unless the facts are cut and dried.

In Paramount, numerous parties were alleged to have engaged in cartel conduct in the maize milling market. On of those respondents, Paramount, applied for the dismissal of the case, because (amongst other reasons) it was time-barred. Paramount noted that the complaint against it was initiated more than three years after the latest date (2006) on which the Commission alleged that Paramount had entered a price fixing agreement. The Tribunal dismissed this prescription point on the ground that Paramount had failed to provide evidence that its conduct ceased after the particular 2006 contravention identified by the Commission. Paramount appealed and the CAC dismissed the appeal, noting that one cannot assume that conduct ceases with the agreement fixing the selling price. (Indeed, the CAC seems to support the Commission's argument in this matter that you can assume

[67] JS Saner 'Prescription' in *The Law of South Africa* vol 21 Second Edition para 104
[68] Foam heads at para 42, and cases cited there at FN 50 and 51
[69] Foam heads pg 24
[70] *Competition Commission and Clover Industries Ltd and others* 103/CR/Dec06.
[71] *The Competition Commission and Pioneer Foods (Pty) Ltd* Case no: 15/CR/Feb07 and 50/CR/May08 available at *http://www.comptrib.co.za/assets/Uploads/Case-Documents/15CRFeb07%20Pioneer.pdf* accessed on 20 August 2012
[72] *Paramount Mills (Pty) Ltd and the Competition Commission and others* Case no: 112/CAC/Sep11 available at *http://www.comptrib.co.za/assets/Uploads/112CACSep11.pdf* accessed on 20 August 2012

that implementation occurs after the date of agreement and the effect thereof is felt thereafter).[73] The CAC and Tribunal's decision in this regard supports the finding in Pioneer that the respondent has the burden of proving that the infringing conduct ceased.[74]

In light of the above, it is clear that the legislature intended the initiation and not the referral to be the document which targets of investigation would look to for details of the complaints against them (as noted by the CAC in *Yara*).[75]

8 Likely analysis by the Constitutional Court

We note the Commission has applied for leave to appeal to the SCA against the CAC's decision in both the *Loungefoam*[76] and *Yara*[77] matters. Furthermore it has also filed its notice of appeal to the CAC in the *SAB* case[78]. These cases are likely ultimately to be heard by the Constitutional Court. And the Commission has shown its willingness to go to the Court to clarify its duties.[79]

If the *Yara*, *Loungefoam* and *SAB* cases ultimately get heard by the Constitutional Court, will the Court agree with this view? The point at issue in the Senwes matter was slightly different from the issues in Yara, Loungefoam and SAB. It partly dealt with the symmetry between a complaint and referral, but it mostly addressed the power of the Tribunal to make a decision on conduct different from that identified in the referral by the Tribunal. We briefly examine the facts of Senwes and the Constitutional Court's decision which may well impact on the Consitutional Court's decision in *Yara* and *Loungefoam*.

9 Senwes

In the *Senwes* matter, the Commission referred a complaint to the Tribunal on the basis that Senwes, a dominant supplier of grain storage, had engaged in conduct that amounted to price discrimination, an inducement not to deal with competitors and an exclusionary act. It later came to light for the first time in the form of the Commission's expert witness statements that the Commission was also relying on a margin squeeze complaint. The Tribunal ultimately decided that Senwes was guilty of a margin squeeze.

Senwes appealed to the CAC[80] and then to the SCA[81] on the basis that the margin squeeze did not form part of the referral and that the Tribunal could not decide on matters that went beyond the referral.

The SCA decided that '*the referral, with or without extension constitutes the boundaries beyond which the Tribunal may not legally travel*'. It stated further that to do so would violate the principle of legality and would go beyond its powers set out in the Act. It specifically referred to section 52 of the Act that states that the Tribunal must adjudicate matters referred to it.

This decision overturned the decision of the CAC which had held the referral '*had set out sufficient facts to indicate to a reasonable reader of the referral affidavit, possessed with a reasonable knowledge of competition law that the nature of the alleged practice was predicated on conduct which was alleged to have been pursued by the appellant.*'[82]

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[73] Ibid para 44
[74] Neil Mackenzie and Stephen Langbridge 'Continuing cartel infractions: Drawing the line' presented at the Fourth Competition Law conference (September 2010)
[75] Yara CAC decision *supra* 7 para 38
[76] Loungefoam case *supra note* 9
[77] Yara case *supra* note 7
[78] SAB case *supra* note 8
[79] Commissioner Shan Ramburuth has stated that the matters had to be clarified and the Commission would use the legal options available to it, Legalbrief Issue 3065 Today 'ConCourt gives commission short shrift' 27 June 2012
[80] *Senwes v the Competition Commission of South Africa* 87/CAC/Feb09 available at *http://www.comptrib.co.za/assets/Uploads/Case-Documents/87CACFeb09.pdf* accessed on 16 August 2012
[81] *Senwes Limited v the Competition Commission of South Africa* 2011 JDR 0594 (SCA)
[82] Senwes CAC decision *supra* note 80 para 41

The SCA's decision was recently overturned by the Constitutional Court.[83] Writing for the majority, Justice Jafta stated that it was in the interests of justice (which is a jurisdictional requirement for the Constitutional Court to adjudicate on a matter) to hear this appeal. He justified this by making reference to the equity objectives of the Act; the Commission's task of pursuing anti-competitive conduct while also taking account of the Act's social objectives; and the Competition Act's objectives to promote a greater spread of business ownership so as to increase access to it by historically disadvantaged people. Jafta noted that the Tribunal therefore plays a vital role in creating an open economic environment in which all South Africans can have equal opportunities to participate in the national economy and that a correct interpretation of its powers is essential to the effectiveness in the fight against anticompetitive practices.

Jafta explicitly links these equity objectives to whether it is in the interests of justice to hear the matter. These preliminary comments are important in setting the debate within the wider South African context, and in validating the Commission's perspective that the competition authorities' public interest objectives are relevant to the determination of these issues.

Thereafter, it is difficult to determine whether the Court in fact supports the core arguments of the Commission. The majority's comments about the inquisitorial powers of the Tribunal by the Act imply that it will prefer an interpretation that grants the competition authorities extensive flexibility in deciding on the existence of anti-competitive conduct. It states:

> "The fact that section 52(1) expressly states that the Tribunal must conduct a hearing into every matter referred to it does not necessarily mean that the Tribunal has no power to entertain a matter not included in the referral…. It is clear from the reading of the section as a whole that the Tribunal cannot initiate a hearing. But this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral."[84]

The majority goes on to state that the SCA has conflated matters of jurisdiction and procedure – ie the Court states that section 52 does not define the powers of the Tribunal, it deals with the procedure to be followed by the Tribunal when conducting a hearing. Therefore, the Tribunal is obligated by section 52 to conduct a hearing when a referral is placed before it (as a matter of procedure), but the section says nothing about the Tribunal's powers of decision making. The majority suggests that this interpretation gives effect to the Tribunal's freedom to adopt any form it considers appropriate for a particular hearing, which may be formal or informal and it gives effect to the Tribunal's power to adopt an inquisitorial approach to a hearing. The majority concludes that "*confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry*".

These comments imply that, in the context of cases like *Yara*, *Loungefoam* and *SAB*, the Tribunal could decide a different contravention has occurred to one identified by the Commission in a referral. This in turn would support the Commission's case that it could alter the essential elements of its complaint right up until decision by the Tribunal – it could bring new evidence either before or during hearing which the Tribunal may consider and ultimately use as the basis for its decision.

But the ratio of the Court's decision in Senwes in fact implies the opposite. The Majority makes its decision, not on the basis of the Tribunal's inquisitorial powers, but on the opposite – on the fact that the Tribunal found the existence of the very contravention which the Commission had named in its referral. The Court finds that one of the allegations made by the Commission in its referral was that Senwes engaged in exclusionary conduct in contravention of section 8(c). It states that there are three essential elements to establishing a section 8(c) contravention, and the Commission established all three:

- The dominant firm engaged in an 'exclusionary act' (in this case, the Commission alleged in its referral that Senwes charged differential fees for storage which impeded or prevented CTH and other grain traders who compete with Senwes from expanding within the downstream market for grain);

[83] *Competition Commission of South Africa v Senwes Limited* 2012 JDR 0579 (CC)
[84] Ibid para 48

- The alleged contravention is not one of the enumerated types of exclusionary conduct in section 8(d); and

- the anticompetitive effect of the conduct outweighs its technological, efficiency or other pro-competitive gains'.

The majority finds that, since these three elements had been established in evidence, the Tribunal was obligated to find that section 8(c) has been violated.[85] Thus, the majority concluded, the SCA erred when it held that the Tribunal considered a complaint which was not covered in by the referral.[86]

However, the majority goes on to note that: "*[t]he Tribunal need not put any label on the contravention…. [T]he error made by the Tribunal was to call it a margin squeeze*[87]*…. What gives rise to controversy was the label attached to it by the Tribunal*[88]*…. In this regard the Tribunal erred because the complaint submitted to it did not refer to margin squeeze nor does the section on which it was based*."

This finding essentially undermines the majority's comments on the flexibility granted by Act to the Tribunal. By stating that the Tribunal 'erred' in finding a margin squeeze contravention, the Court implies that the Tribunal cannot travel beyond the ambit of the allegations made in the referral. The fact that it did was a mistake. One would have to ask: if the finding of a margin squeeze (conduct which is naturally 'housed' under the terms of section 8(c) of the Act) is wrong, even where a section 8(c) allegation is made, what would the Constitutional Court decide if the Tribunal decided to find a cartel infringement, in the circumstances where the Commission had identified a section 8(c) contravention?

The majority goes on to note that (as opposed to the Minority) a remittal to the Tribunal is not necessary because there is no prejudice or unfairness to Senwes flowing from the finding that it contravened section 8(c) in circumstances where the referral covered section 8(c).[89] The implication is that when the referral does not cover the contravention which the Tribunal eventually decides on, then the respondent does (or could potentially) suffer prejudice.

How do these schizophrenic approaches in the Majority decision get reconciled? It seems the answer may lie in the Minority's judgement. The minority proposes that the matter should be referred back to the Tribunal in order to make a proper ruling on the ambit of the referral, in order for the hearing to proceed on the basis of that ruling. The Minority holds that The Tribunal has an obligation to determine the proper ambit of the referral and an obligation to ensure that its determination of that issue is made in a manner and at a time that is fair to the parties.

This suggestion has two important implications. Firstly, that the Tribunal cannot conduct a hearing which addresses issues outside of the ambit of a referral; and secondly, the ambit has to be set out at a time that is fair to the parties. This approach does not undermine the Majority's finding that the Tribunal is allowed to conduct a flexible and inquisitorial process, as it suggests that the Tribunal has sufficient flexibility, upfront, to determine what the ambit of the referral is. It does however contradict the Majority's obiter comments that the Act does not restrict the Tribunal's power to make decisions on contraventions outside of the referral.

10 Conclusion

We consider that something nearing the *Senwes* Minority's approach is likely to be accepted by the Constitutional Court in future cases. It will not discard the prescripts of legality and procedural fairness, but it will view these requirements in light of the circumstances of each case. It will try to advance the objectives of the Act, while having fidelity to the scheme of the Act. It is most likely to

[85] Ibid para 29 and 39
[86] Ibid para 39
[87] ibid para 39
[88] Ibid para 44
[89] Ibid para 55

prefer an interpretation that gives flexibility to the Commission and Tribunal to achieve the objectives set out in the Act. This will undoubtedly require less formality and procedural protections than those of a High Court process. In this regard, the minority decision penned by Froneman in the Constitutional Court's dismissal of leave to appeal in the *Yara* case is indicative of that perspective:

> *"As I understand its essence, that is exactly what the Commission's complaint against the recent judgments of the CAC and Supreme Court of Appeal amounts to, namely that the economic expertise of the Commission and the Tribunal is being undermined by what is regarded as an overly formalistic interpretation of their powers and functions under the Act.*
>
> *I doubt that this argument can be squarely and substantively met by asserting that legality (the powers of the Commission) is a purely "legal" question. Underlying any legal determination of the powers of the Commission and the Tribunal is some understanding of what role economics, and what kind of economics, should play in the process."*

Nevertheless, we consider that in cases where there are substantial or fundamental differences between the case which the parties were informed of, and the case which is ultimately prosecuted or decided, it would be highly surprising (in light of the arguments addressed above about the purpose of the rule of law, and the prescription provision) if the Court would prefer the authorities' prosecutorial flexibility above the fundamental prescripts of fairness. The balancing should involve consideration of a range of issues:

- How substantially different is the complaint to the referral to the decision?
- Is the complaint initiated by a third party (in which case less precision may be accepted)?
- Is the matter an abuse of dominance allegation (which requires significantly more time to prepare a defence, and the collection of more extensive and case-specific evidence)?
- Is the matter a cartel allegation (where the requirements of proof are already highly tailored toward easy prosecution by the Commission)?
- Does the referral or decision identify different parties to those named in a complaint (in which case there can have been no chance to be advised of the allegation against that party)?

Thus, the procedural boundaries of competition law processes will not be determined in a short time period. But this is not an unacceptable or an unusual outcome. As noted above, the requirements of the rule of law/ due process are still being thrashed out in competition law jurisdictions around the world – including in the oldest and most established ones. Lewis acknowledges that "*it was inevitable that our early years would have been preoccupied with actions aimed at clarifying the parameters and procedures of a new Act in a new constitutional dispensation*."[90] We may be beyond the 'early years' that Lewis has in mind, but in fact the jurisprudence on cartel infringements in particular, is still in its early years. The debates surrounding how these allegations are prosecuted are thus also in their adolescence, and the jurisprudence still needs to be developed and crystallised. Froneman J's words in *Yara* are apt:

> "*For my part, I would value as much articulation and debate of these often unarticulated premises by all concerned, before making a final determination on the issue. It is a matter of regret that this means more time has to be taken before the issue can finally be determined, but much is at stake*…"[91]

To the extent that the Court prefers the Commission's view that the Act does not require substantial symmetry between complaints, referrals and decisions, respondents will have to be prepared to meet

[90] David Lewis, Chairperson Competition Tribunal, Competition Law Enforcement in South Africa, Paper presented to IBA Conference Cape Town (March 18, 2002), http://www.comptrib.co.za/Publications/Speeches/lewis7.pdf.
[91] *Competition Commission v Yara South Africa (Pty) Ltd* 2012 JDR 1118 (CC) para 81

any range of allegations at referral stage. The initiation of a complaint into any conduct should trigger a thorough internal investigation to determine what a referral may contain at the earliest stage possible. Furthermore, respondents should insist on a ruling from the Tribunal in a hearing in which the ambit of the referral is unclear,

If the Court agrees with the contentions of respondents, then the Commission will have to re-evaluate the way it in which complaints are initiated, received, investigated and referred. It will have to ensure, in the case of a complaint submitted by a third party, that it initiates further conduct before the time bar in terms of section 67(1) becomes applicable.