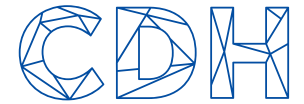


Competition Law

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SOUTH AFRICA

The inquisitorial nature of complaint and merger proceedings under the Competition Act



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The inquisitorial nature of complaint and merger proceedings under the Competition Act

Complaint and merger proceedings under the Competition Act 89 of 1998 (Competition Act) are not conducted in a purely adversarial fashion and rely on inquisitorial processes. This has implications for the status of hearsay evidence and the way in which disputes are identified in pleadings prior to the commencement of a hearing. This article examines the inquisitorial character of proceedings before the Competition Tribunal (Tribunal), located within a South African court system where an adversarial approach prevails, and considers the potential benefits of exploring the extent to which the inquisitorial nature of procedures may be harnessed to achieve greater speed and efficiency in concluding complex proceedings.

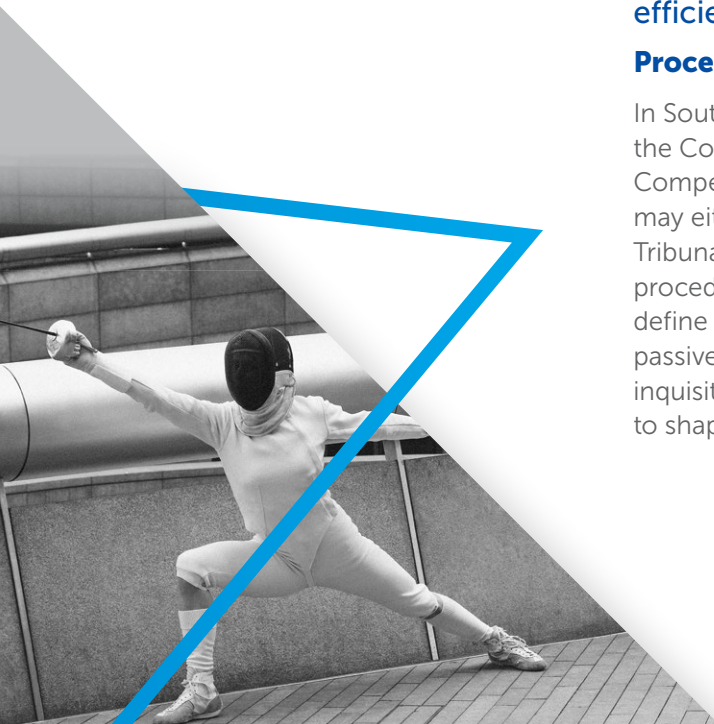
Procedural framework under the Competition Act

In South Africa, the process for handling complaints under the Competition Act begins with an investigation by the Competition Commission (Commission). The Commission may either decline to refer the matter or refer it to the Tribunal for adjudication. Unlike the more rigid, adversarial procedures of the High Court where pleadings strictly define the scope of the dispute and the court acts as a passive arbiter, the Tribunal's proceedings are described as inquisitorial. This means the Tribunal has greater latitude to shape the scope of the inquiry and allow hearsay

evidence to be considered; furthermore, the Commission may expand or amend the scope of the matter which is heard before it. However, this has created uncertainty and disputes in many proceedings.

Disputes frequently arise regarding the permissible expansion of the scope of a matter during litigation before the Tribunal. Notably, in *Senwes Ltd v Competition Commission* (CTT 61/11, [2012] ZACC 6), the Constitutional Court clarified that the Tribunal is not constrained by the language of "charge" and "conviction", nor by the strict rules of pleadings applicable in civil courts. Instead, the Tribunal is empowered to adopt an inquisitorial approach, which may include considering issues that arise during the hearing, provided that procedural fairness is maintained and parties are not prejudiced by late changes in the scope of the inquiry. However, it also held that the parties before it may request a ruling if they object to matters being introduced which extend beyond the scope of the pleadings, in the interests of fairness.

The right to object, contemplated by the Constitutional Court, has been exercised in various cases. In *FirstRand Bank Ltd and Others v The Commission*, WesBank and various Toyota applicants brought strike-out applications (STR161Feb25) to strike out portions of the Commission's witness statements that extended beyond the pleadings or that dealt with issues not contemplated in the pleadings. The Tribunal emphasised that only evidence directly relevant to the pleaded issues should be admitted, and where the Commission sought to introduce new factual allegations not previously pleaded, these were struck out.



The inquisitorial nature of complaint and merger proceedings under the Competition Act

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However, it permitted evidence to be heard which would provide context to the pleaded case. This approach ensured that the proceedings remained focused on the real issues and that parties were not prejudiced by late or irrelevant expansions of the case.

In *MultiChoice v Caxton and Others* (OTH201Feb15/DSM081Aug22), an exception application brought by Multichoice, the Tribunal's inquisitorial mandate was central to its decision to dismiss an exception application, which sought to have the case dismissed solely on the basis of legal arguments without a full factual hearing. The Tribunal in this decision emphasised that in this matter the questions of control under section 12(2)(g) of the Competition Act involve "a fact intensive inquiry" and that "each case must be determined on its own facts". The Tribunal found that the many disputed facts relating to control under section 12(2)(g) "are not well suited for determination by exception and can only be determined in their proper context through the hearing of oral evidence".

However, the hearing of extensive factual evidence is very resource intensive and leads to lengthy and costly cases.

Inquisitorial procedures may result in greater speed and efficiency

In many continental European jurisdictions, competition authorities and courts follow an inquisitorial approach, with the adjudicator playing an active role in defining the issues and gathering evidence.

Contested merger proceedings in South Africa are characterised by the exchange of witness statements prior to the hearing, focusing on issues identified during the Commission's investigation. While expert interactions are intended to narrow factual disputes, in practice, significant disagreements often persist, contributing to lengthy proceedings.

The flexibility inherent in the inquisitorial model could possibly assist to crystallise disputes prior to the commencement of a hearing. There is scope for the Tribunal to play a more active role in identifying the key issues early in contested merger hearings or complaint proceedings, drawing on the experience of continental jurisdictions where inquisitorial procedures are followed. Early case management conferences and more robust mechanisms for narrowing the issues in dispute could enhance both the expediency and robustness of the process. Such measures could be conducted in a way that preserves the right to a fair trial while fostering a swifter resolution of complex questions of competition law.

The Tribunal's inquisitorial powers offer significant potential benefits in terms of flexibility and efficiency but also present challenges in terms of procedural certainty and the timely resolution of disputes. Drawing on both domestic case law and international experience, there may be ways to explore the use of inquisitorial case managed procedures to deliver more speedy and efficient resolution of complex mergers and complaints, despite the natural inclination to lean more towards more familiar adversarial processes.

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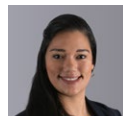
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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