

**Template pursuant to Section 3 (a) of the
ICN Framework on Competition Agency Procedures**

[The Competition Commission, South Africa]

The following template is submitted by **The Competition Commission of South Africa** pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

The Competition Commission of South Africa (“the Commission”) is a statutory body constituted in terms of the Competition Act No. 89 of 1998, as amended (“Competition Act”). The Commission is an independent competition regulatory authority established in terms of the Competition Act together with two other regulatory bodies being the Competition Tribunal (“the Tribunal”) and the Competition Appeal Court (“the CAC”). <http://www.compcom.co.za>

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

The Competition Act came into effect in 1999. Its main purpose is to promote and maintain competition. It also provides for the prosecution of anticompetitive conduct, merger control and the granting of exemptions. The Commission is the investigative and enforcement agency, the Tribunal is the adjudicative body that rules on cases referred to it by the Commission and the CAC considers appeals against decisions of the Tribunal. The three competition authorities are independent institutions, but are administratively accountable to the Department of Economic Development.

The South African competition regime has a successful model for adopting and implementing new competition legislation which include anti-monopoly policies that promote competition.

Additionally, in the revisions to competition law in South Africa there is also a strategic legislative policy shift towards the use of market inquiries as a tool for changing the concentrated structure of the economy.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

The procedural rules are not determined by the Commission, but rather by way of the legislative process, by the Courts and the Minister of Economic Development. The investigation and enforcement policies are within the Commission's domain and an example of such a policy is the Commission's Corporate Leniency Policy. However, these policies must be aligned with the Competition Act and procedural rules.

The Competition Act does in certain instances favour domestic persons over persons of another jurisdiction. In this regard section 10(3) of the Competition Act for example favours domestic firms that export and firms controlled or owned by historically disadvantaged persons. Section 12(3) similarly favours small businesses, or firms controlled or owned by historically disadvantaged persons and national industries. The preamble to the Competition Act states the following:

"The people of South Africa recognise:

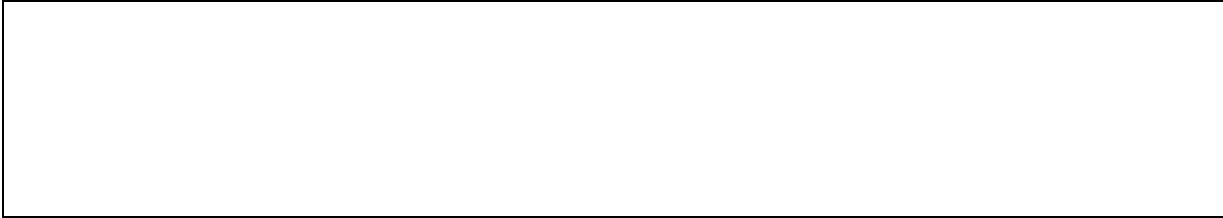
1. That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans;
2. That the economy must be open to greater ownership by a greater number of South Africans.
3. That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.
4. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.

In order to-

1. Provide all South Africans equal opportunity to participate fairly in the national economy;
2. Achieve a more effective and efficient economy in South Africa;
3. Provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
4. Create greater capability and an environment for South Africans to compete effectively in international markets;
5. Restrain particular trade practices which undermine a competitive economy;
6. Regulate the transfer of economic ownership in keeping with the public interest;
7. Establish independent institutions to monitor economic competition; and
8. Give effect to the international law obligations of the Republic.

The Constitution similarly recognises the need to redress the imbalances of the past.

In view of the above it is noted that the Competition Act discriminates in certain instances. However the Commission can commit to not discriminate in its application of the law. This section will have to be redrafted to reflect the aforementioned.



c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

- i. All statutes of South Africa are published and made publicly available. The Competition Act and its Regulations are made publicly available in a statutes register and are also published on the Commission's website. All amendments made are also published in the Government Gazette for public comments and the final legislation is then published.
http://www.saflii.org/za/legis/num_act/ca1998149.pdf
- ii. The South African competition authorities have procedural rules in place that govern the conduct of proceedings.
<http://www.compcom.co.za/the-competition-commission-rules/>
<http://www.compcom.co.za/the-competition-tribunal-rules/>
<http://www.compcom.co.za/the-competition-appeal-court-rules/>
- iii. The Commission's procedural rules (rules for the conduct of proceedings in the Competition Commission) that apply to investigations and enforcement proceedings are publicly available in electronic format and hardcopy (print format in the Act). The rules can be found on the Commission's website (see ii above).
- iv. The Commission follows the applicable procedural rules in investigations and enforcement proceedings. In the event of noncompliance with the prescribed rules,

affected parties may take challenge the Commission's decisions and processes by bringing review applications.

- v. The Commission has published information explaining and clarifying its investigations and enforcement proceedings. The Commission continuously updates this information. The Commission has also published guidelines, statements, newsletters and practice notes on substantive and procedural matters related to the enforcement of competition laws.

<http://www.compcom.co.za/guidelines-for-public-comment/>

<http://www.compcom.co.za/practice-notes-2/>

<http://www.compcom.co.za/newsletters/>

d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

The procedural rules underpins and informs the Commission's investigation and enforcement policies are not determined by the Commission, but rather by way of the legislative process and by the Courts. Section 4(c) of the MFP requires a focus of investigative requests on information relevant to the competition issues. It should however be noted that in terms of domestic law the Commission's investigative requests on information may also be relevant to public interest and transformation issues and may not necessarily be confined to competition issues. Section 4(c) of the MFP, insofar as it requires that the focus of investigative requests on information should be on competition issues, is inconsistent with domestic law.

There is no right to *audi alteram partem* during the Commission's investigation. This section creates the right to *audi alteram partem* which does not exist in law. The right only arises once the matter is referred to the Tribunal. This section is accordingly partially inconsistent with domestic law.

The Supreme Court of Appeal in the matter of Simelane & Others v Seven Eleven Corporation 2003 (3) SA 64 SCA, stated the following:

“The respective functions of the Commission and the Tribunal

[11] The main underlying legal dispute is whether the Act provides for a dichotomous procedure for the resolution of a complaint. The appellants say that there are two distinct stages. The role of the Commission is investigative, whereas that of the Tribunal is adjudicative. The Commission receives a complaint, investigates it and then determines whether it should be referred to the Tribunal. If it does refer it, then it appears before the Tribunal as prosecutor. The Tribunal, on the other hand, conducts a trial in order to determine whether the complaint is well-founded, and if it is found to be so, it decides what steps are to be taken.

Seven-Eleven, by contrast, contends that the reliance on such a dichotomy constitutes the fundamental flaw in the argument of the appellants. The functions of the Commission are said to be both investigative and adjudicative and, particularly, adjudicative in the respects with which this appeal is concerned. Reliance is placed on cases such as *Greub v The Master and Others* 1999 (1) SA 746 (C) at 750A-751D. In order to determine which of these contentions as to dichotomy is correct, brief reference to the statute needs to be made.

12] Both the Commission and the Tribunal are creatures of statute, the statute being the Act. Both bodies must exercise their functions in accordance with the Act (s 19(1)(c) and s 26(1)(d)). The Commission consists of a Commissioner and one or more Deputy Commissioners as may be necessary, appointed by the Minister of Trade and Industry (s 19(2)). It must be independent and impartial and must perform its functions without fear, favour, or prejudice (s 20(1)). Among its functions are the investigation and evaluation of alleged contraventions of Chapter 2 (in which is contained sections 4 to 9) and the referral, where appropriate, of complaints to the Tribunal (sections 21(1)(c) and (g)). Having so referred a matter it is then its duty and right to appear before the Tribunal and participate in its proceedings (s 20(1)(g) and s 53(a)). Section 24(1) empowers the Commission to appoint inspectors. Upon the Commission's receiving a complaint of a prohibited practice (a practice prohibited under Chapter 2) the Commissioner must appoint an inspector to investigate it 'as quickly as practicable' (s 45(1)). The inspector is entitled to question people and they must answer, unless the answer is self-incriminating (s 45(3)). Whilst an investigation is in progress the Commissioner is entitled to summon any person for interrogation and may require production of books and documents (s 45(4)). Powers of entry, search and seizure are conferred by sections 46 to 49. After 'completion' of the investigation the Commission must refer the matter to the Tribunal if it 'determines' that a prohibited practice 'has been established' (s 50(a)) (emphasis supplied). (The argument on behalf of Seven-Eleven is largely based upon the words 'determines' and 'established'. Seven-Eleven contends that these words indicate that a part of the Commission's functions is determinative or adjudicatory. I shall return to this aspect.) Section 50(b) goes on to provide that if a positive determination is not made the Commission must issue a notice of non-referral. If it does so the complainant may refer the matter directly to the Tribunal (s 51(1)).

[13] The Tribunal is a tribunal of record (s 26(1)(c)). When a complaint is referred to it, it may adjudicate in order to determine whether any conduct prohibited in terms of Chapter 2 has occurred, and, if so, it may impose a remedy provided for in Chapter 6 (s 27(1)(c)). The Tribunal must conduct its hearings in public in an inquisitorial manner and in accordance with the principles of natural justice (s 52(2)). It must issue written reasons for its decisions (s 52(4)). Powers of summoning, interrogation and production are given (s 54). A witness must answer questions (s 56). The Commission, the complainant and the person whose conduct is the subject of complaint are entitled to legal representation (s 53).

[14] The nature of the functions allotted to the Commission and the Tribunal has been the subject of detailed consideration by the Tribunal itself, in *Norvatis SA (Pty) Ltd and Others v The Competition Commission and Others* (CT 22/CR/B/Jun 01, 2.7.2001 paras 7 and 35-61). The reasons for the Tribunal's decision in the *Norvatis* case deal at length not only with the underlying question whether the functions of the Commission are determinative as opposed to investigative, but also with more specific questions which have arisen in the appeal before us. Speaking generally and without reference to all conceivable specific cases, I approve of these reasons. Once they are adopted, in my opinion they largely dispose of all but one of the arguments raised by Seven-Eleven. That argument will be dealt with separately in paras [40] and [41] below. It relates to whether the decision-making body within the Commission was properly constituted. Putting it aside for the moment, the contentions raised by Seven-Eleven may be listed.

[15] They are:

1. The referral by the Commission constituted an administrative decision affecting Seven-Eleven's rights, such as is subject to review.
2. The Commission acted on a 'hotch-potch' of complaints without investigating whether there was substance in them.
3. The Commission must observe the *audi alteram partem* rule and failed to do so.
4. The persons making the decisions were biased and motivated by malice.
5. Further, they were moved by an ulterior purpose.

The Norvatis case

[16] The following paragraphs of the Tribunal's reasons are relevant to this case:

'40. *The Commission argues that its decision to refer a complaint is neither final nor does it have any consequences for the applicants. Its powers are of a preliminary and investigative nature, comparable to those of the police services or the Directorate of Serious Economic Offences. Accordingly, the Commission submits, it has not engaged in unfair administrative action.*

41. *To decide whether an administrative action has been taken fairly it is crucial that the decision-making process be viewed as a whole. The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises. An essential feature of the context is the empowering statute, which creates the discretion,*

as regards both its language and the shape of the legal and administrative system within which the decision is taken.

42. In *Brenco*¹² the Supreme Court of Appeal had to consider, inter alia, whether the Board on Tariffs and Trade (BTT) had violated the principles of natural justice by making recommendations to the Minister of Trade and Industry without giving the respondents access to all information at its disposal or the opportunity to respond thereto prior to making the recommendation. The Court held that no single set of principles for giving effect to the rules of natural justice is applicable to all investigations, official enquiries and exercises of power. The Court emphasized the need for flexibility in the application of the principles of fairness depending on the context. The Court quoted the dicta of Sachs L.J. in *In re Pergamon Press Ltd*¹³ where he stated:

“In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand ... It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate ... the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.”

43. The Court then examined the provisions of the BTT Act¹⁴ as part of the context to determine what the requirements of fairness are in BTT investigations. It found that in terms of that Act BTT performs both an investigative and determinative function. It went on to hold that:

“Whilst BTT has a duty to act fairly, it does not follow that it must discharge that duty precisely in the same respect in regard to the different functions performed by it. When BTT exercises its deliberative function, interested parties have a right to know the substance of the case that they must meet. They are entitled to an opportunity to make representations. In carrying out its investigative functions, BTT must not act vexatiously or oppressively towards those persons subject to investigation. In the context of enquiries in terms of sections 417 and 418 of the Companies Act 61 of 1973, investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner.”

44. The Court was of the view that when BTT carried out its investigative functions fairness did not demand that “every shred of information provided to BTT should be made available to the respondents”¹⁵. The standard applicable in the conduct of the investigative function is the general principle that an interested party must know the “gist” or the substance of the case that it has to meet.

45. Another complaint made in this matter against BTT was that its inspectors had obtained information from a party and that the information had not been given to the respondents so that they could test its correctness. On this point the Court held:

“There is no requirement that BTT in the investigation of a matter must inform the parties of every step that is to be taken in the investigation and permit parties to be present when

the investigation is pursued by way of the verification exercise. There is no unfairness to the respondents in permitting the officials of BTT to clarify information without notice to the respondents. To hold otherwise would not only unduly hamper the exercise of the investigative powers of BTT, but would seek to transform an investigative process into an adjudicative process that is neither envisaged by the BTT Act, nor what the audi principle requires".¹⁶

46. The Court found that BTT had not engaged in unfair procedural action when, in making the recommendation to the Minister, it relied on information that it had not disclosed to the respondents.

47. Nor is the result in Brenco surprising or novel. It represents the practical and flexible approach our courts have taken on many occasions to administrative fairness challenges.

48. In *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A), Van den Heever JA placed a significant emphasis on the theme of administrative efficiency and held that proceedings of administrative bodies could be endlessly protracted were such "right" (in this case the right to reply) to be held to exist. Whilst the case deals with a different set of procedures not analogous to those in this case it does illustrate the consistent approach of our courts in striking a compromise between fairness and practical concerns of efficiency.

49. The same could be said of the Competition Commission – the administrative efficiency of the Commission in rendering its duties could be severely affected if, in exercising its discretion in terms of section 50(2), its every action would be subject to scrutiny under the principle of administrative review in the manner suggested by the applicants in this matter.

50. Moreover, there is no express provision in the Act requiring or compelling the Commission to furnish reasons or to afford the applicant the opportunity to be heard prior to the Commission referring the restrictive practice complaint to the Tribunal. It would have to be inferred, and it seems to be difficult to read into the Act a necessary inference which compels the Commissioner to afford the applicant the right to be heard.

51. In *Park – Ross v Director for Serious Economic Offences* 1998 (1) SA 108 (C) Farlam J had to decide whether an applicant subject to a proceeding in terms of the Serious Economic Offences Act was entitled access to written statements given by witnesses to the Director of Serious Economic Offences. In coming to the conclusion that he was not, he remarked:

"It is convenient to deal with the right to be heard first. I agree with ... that the applicant has no right at this stage to invoke the audi alteram partem rule. In my view, it is clear that the powers of the respondent are as Mr Gauntlett argued, of a preliminary and investigative nature. In essence, in this context, they do not differ from those vested in members of the police service."¹⁷

52. In *Van der Merwe and Others v Slabbert NO and Others* 1998 (3) SA 613 (N), Booysen J, stated the principle that:

"It is so that bodies required to investigate only need in general not observe the rules of natural justice and that bodies are required to investigate facts and make

recommendations to some other body or person with the power to act need not necessarily apply the rules of natural justice, depending on the circumstances.”¹⁸

53. *We turn now to the application of the above conclusion to the above circumstances of the present case.*

54. *The Brenco decision is entirely in point in relation to the matter at hand. It is our view that the distinction drawn by the Court between an investigative and a determinative function performed by public bodies is crucial in ensuring that public bodies are not unduly restrained in their work where the exercise of their powers carries no serious or final consequences for affected parties.*

55. *In the context of this application the distinction drawn by the Court between investigative and determinative administrative conduct by public bodies disposes of the applicants’ case. In terms of the decision in the Brenco case the violations of natural justice alleged by the applicants against the Commission can only be upheld if the complaint referral by the Commission constitutes a determinative action. Our view is that it does not. Section 21 of the Act, which deals with the functions of the Commission, states that the Commission has the power to investigate and evaluate alleged contraventions of Chapter 2. Chapter 2 deals with prohibited practices. The Commission therefore is empowered to investigate and evaluate alleged prohibited practices, and, in terms of section 50(2), refer to the Tribunal those complaints that in respect of which, it “determines”, a prohibited practice has been established. The Commission is an investigative body, which in referring the complaint to the Tribunal is only instituting the initial procedural step on the road to a hearing.*

56. *The Tribunal, on the other hand, is specifically empowered by section 27(a) of the Act to adjudicate on prohibited practices and to determine whether a prohibited practice has actually occurred. In terms of section 52(2)(a) the Tribunal is explicitly enjoined to apply the rules of natural justice. A respondent in proceedings before the Tribunal clearly is afforded administrative justice rights; in terms of the Tribunal Rules it may request information prior to a hearing and be represented. The Tribunal clearly exercises a determinative action as it is empowered to do by the Act and therefore it is enjoined to conduct its proceedings in accordance with the tenets of natural justice. The Commission is not subject to the same requirement precisely because the legislature, like the Court in Brenco, sought, in this Act, to distinguish between investigative and adjudicative procedures.*

57. *Thus if one looks at the complaint procedure holistically, in accordance with the analysis in the Brenco case, and not in piecemeal fashion, one comes to the conclusion that, on existing case law which is binding on the High Court, the applicants’ argument that it is entitled to administrative justice at the complaint referral stage has no prospect of success before the High Court. Their application attempts to transform an investigative process into an adjudicative process which, in the words of the court in the Brenco case “is neither envisaged by the BTT Act (read Competition Act), nor what the audi principle requires”.*

58. *Furthermore, this application incorrectly assumes that if the applicants were in anyway prejudiced by the complaint referral, such prejudice cannot be remedied through the processes in the Tribunal. This is clearly not the case. As a matter of fact MSD, one of the*

respondents in the complaint referral, has applied to the Tribunal for a dismissal of the complaint referral on various grounds. The applicants have therefore ignored the fact that

Tribunal Rules and procedures provide them with remedies if the referral is approached holistically.

59. If one examines the grounds of the applicants' complaint about why the Commission proceeded unfairly we will see that all three are accommodated in the Tribunal's procedures as set out in the Act and the Tribunal's Rules. Thus, in the proceedings before the Tribunal, the applicants would have to be given access to material evidence adverse to them, would be given a hearing to dispute adverse evidence and the Commission would have to be able to substantiate its allegations otherwise its case would fail.

60. If the applicants' contentions are correct the complaint referral process would amount to two sets of hearings, one before the Commission prior to its act of referring the complaint and then the process before the Tribunal. The investigator, the Commission, would be asked to adjudicate over what it had thus far investigated despite the fact that it is not the final arbiter. A more pointless and inefficient process is hard to imagine. At the time that the Commission makes its referral the respondent firm (ie the applicants in this case) is not required to defend itself. That takes place when the hearing procedures evolve as part of the Tribunal process, that is, after the step of referral. Fairness is not compromised by denying natural justice prematurely; it is only compromised if it is ultimately denied.

61. In order to get around the difficulties occasioned by the case law and in particular the Brenco decision the applicants argued that in referring a complaint to us the Commission exercises a determinative action. Their argument revolves around the wording of section 50(2), which states that the Commission shall refer a complaint to the tribunal "if it determines that a prohibited practice has been established" (our underlining). In the applicants' argument the use of the word "determines" is proof that a complaint referral by the Commission is a determinative function. In our view the applicants are emphasizing form over substance. On the basis of its investigation the Commission determines whether or not a prohibited practice has occurred. If the Commission determines that a prohibited practice has occurred it cannot impose a fine or any other remedy, it must refer the complaint to the Tribunal. Referring a complaint to the Tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the Tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice. Even where the Commission decides not to refer a complaint this decision is also not determinative of the complaint – in terms of section 51(1) of the Act the complainant has the right to refer the complaint to the Tribunal directly. We repeat what we have stated above that the decision by the Commission to refer a complaint is merely one of the steps in the resolution of a complaint; it may be the most important one but it is not determinative of the complaint. The respondent gets an opportunity to state its case before the Tribunal. The decision of the Tribunal is determinative of the complaint as a whole and this is why the Act entitles a respondent in Tribunal proceedings to the principles of natural justice. In the light of the above and the Brenco decision, we see no prospect of this argument succeeding in the High Court.'

See also *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others* (CT 08/CR/B/May 01, 23.8.01 paras 31-35), *Brassey et al Competition Law 301 and cf The Master v Deedat and Others 2000 (3) SA 1076 (N)* at 1082F-1084I.

Administrative decision or no – Point 1

[17] *I cannot do better than refer to what is said in the Norvatis case. For the reasons there stated it is clear that in a case such as the one we are concerned with the function of the Commission is investigative and not subject to review, save in cases of ill-faith, oppression, vexation or the like. Seven-Eleven should husband its powder for the contest before the Tribunal.”....*

“*Audi alteram partem* – Point 3

[22] *Seven-Eleven contends that the Commission, already at the investigation stage, should have put its cards on the table, should have told it what its evidence was, and should then have held a hearing at which Seven-Eleven would have been given the opportunity to refute the evidence. For the reasons set out in the Brenco and Norvartis judgments, as set out above, I consider that there is no merit in these submissions....”*

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

The time period for merger investigations and third party complaints is regulated by statute.

The Commission always endeavor to conclude its investigations of complaints and mergers with a reasonable time.

With regard to merger investigations, the Competition Act affords 20 business days for investigation and consideration of small and intermediate mergers. The Commission is permitted to extend the initial period of 20 business days by a single period not exceeding 40 business days. In respect of large mergers, the Commission is afforded 40 business days to investigate and consider the merger and to make a recommendation to the Competition Tribunal. This period can also be extended, however, the Tribunal may not grant an extension of more than 15 business days at a time.

With regard to complaints, the Commission must investigate the complaint as quickly as possible upon initiating or receiving it. The Competition Act does not prescribed time frames for investigations of complaints initiated by the Commission. On the other hand, the Commission is required to finalise its investigation of a complaint submitted to it within one (1) year. Finalization of the investigation includes either issuing a non-referral notice or referring the matter to the Tribunal for adjudication.

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f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

<p>Section 44 of the Competition Act provides that any person submitting information may identify and claim that information as confidential information. The Commission is bound by a claim of confidentiality but may refer such claim to the Tribunal to determine whether the information is indeed confidential.</p> <p>In the event that a person seeks access to information that is subject to a claim of confidentiality, that person may apply to the Tribunal in a prescribed manner and form, and the Tribunal may make a determination whether the information is confidential. If the Tribunal finds that the information is confidential, the Tribunal may make an appropriate order concerning access to that information.</p>
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g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

<p>The Commission and its staff are subject to the generally applicable rules against conflict of interest and misuse of confidential information. Section 20 of the Competition Act provides that the Commission must be impartial and must perform its functions without fear, favour or prejudice.</p> <p>Section 32 of the Competition Act provides that a member of the Tribunal may not represent any person before a panel of the Tribunal, and if during a hearing it appears to a member of the Tribunal that a matter concerns a financial or other interest of that member, the member must immediately and fully disclose that fact and must withdraw from further involvement in the matter.</p>

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental*

entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.

- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.

The procedural rules that underpin and inform the Commission's investigation and enforcement policies are not determined by the Commission, but rather by way of the legislative process and by the Courts.

There is no right to *audi alteram partem* during the Commission's investigation. This section creates the right to *audi alteram partem* which does not exist in law. The right only arises once the matter is referred to the Tribunal. This section is accordingly partially inconsistent with domestic law.

The Supreme Court of Appeal in the matter of *Simelane & Others v Seven Eleven Corporation* 2003 (3) SA 64 SCA, stated the following:

"The respective functions of the Commission and the Tribunal"

"The main underlying legal dispute is whether the Act provides for a dichotomous procedure for the resolution of a complaint. The appellants say that there are two distinct stages. The role of the Commission is investigative, whereas that of the Tribunal is adjudicative. The Commission receives a complaint, investigates it and then determines whether it should be referred to the Tribunal. If it does refer it, then it appears before the Tribunal as prosecutor. The Tribunal, on the other hand, conducts a trial in order to determine whether the complaint is well-founded, and if it is found to be so, it decides what steps are to be taken.

Both the Commission and the Tribunal are creatures of statute, the statute being the Act. Both bodies must exercise their functions in accordance with the Act (s 19(1)(c) and s 26(1)(d))."

In *Norvatis SA (Pty) Ltd and Others v The Competition Commission and Others* (CT 22/CR/B/Jun 01, 2.7.2001) the court held that *"there is no express provision in the Act requiring or compelling the Commission to furnish reasons or to afford the applicant the opportunity to be heard prior to the Commission referring the restrictive practice complaint to the Tribunal. It would have to be inferred, and it seems to be difficult to read into the Act a necessary inference which compels the Commissioner to afford the applicant the right to be heard."*

The parties against which a Referral is lodged with the Tribunal is notified of the Referral within 3 business days. The respondent then has an opportunity of 20 business days to file an answering affidavit in response to the issues raised by the complainant and interveners (if any). After the Complainant has filed its replying affidavit, the pleading stage closes.

Following the close of pleadings, the parties are required to produce and exchange documents that are relevant to the dispute by means of a discovery process.

Every respondent has the right to fair administrative process, and as such is entitled to be heard and to respond to allegations made against him in terms of the Competition Act. Section 53 of the Act provides that a respondent may participate in a hearing in person or through a representative and may put questions to witnesses and inspect any books, documents or items presented at the hearing. This hearing is a Tribunal process, and not a Commission process.

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

Any firm or person that comes before the Commission, the Tribunal or the Competition Appeal Court ("the CAC) has a right to adequate legal representation. The Constitution of the Republic of South Africa affords everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Furthermore, the Act permits a respondent to participate in a hearing as a matter of right – either in person or with a legal representative. The competition authorities all abide by the doctrine of legal privilege. Communications between persons and their legal representatives are recognised as legally privileged and are treated accordingly.

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant*

will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.

The right to decisions in writing are regulated by statute and regulation as well as Courts.

The principle is more applicable to the Competition Tribunal and it is only within the Commission's domain as far as decisions to refer or non-refer investigations to the Competition Tribunal and decisions in respect of small and intermediate mergers are concerned

The Commission can commit to publishing a decision or an order, but it is administratively burdensome to commit to providing findings of fact and conclusions of law in circumstances where this is not required by domestic law.

Decisions or orders issued by the Tribunal or the CAC are issued to the parties to a proceedings in writing. The Tribunal issues the Reasons for its decisions in writing, setting out its findings of fact, conclusions of law, and any applicable remedies or sanctions. In the case of the CAC, the decision and findings are contained in a written judgment.

Non-confidential versions of decisions and reasons for the decisions of the Tribunal are available publicly on the Tribunal's website. The judgments of the CAC are also made publicly available, save for any confidential information.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

As stated above, the South African competition regulatory authorities consist of the Commission, the Tribunal and the CAC. These regulatory bodies are responsible for the enforcement of the Competition Act, and although they interact, they are independent of each other.

The function of the Commission is to implement measures to increase market transparency and public awareness of the Act. It also investigates business conduct.

The Tribunal adjudicates competition matters is independent from the Commission and is subject to the Constitution of the Republic of South Africa. It is tasked with assessing and adjudicating large mergers which are referred to it by the Commission; hearing appeals and reviews of any decision of the Commission that may be referred to it; assessing and adjudicating complaints regarding any conduct prohibited by the Act; considering consent/settlement agreements entered into between the Commission and another party; granting interim orders; granting exemptions from the provisions of the Act; and granting orders.

The CAC reviews any decision of the Tribunal concerning legal error or jurisdiction. It may confirm, amend or set aside a decision or order of the Tribunal. It may also remit a matter to the Tribunal for a further hearing on any appropriate terms.