

Can the Commission Fix Competition Problems With Market Inquiries?

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1. Introduction

On 1 April 2013, Section 6 of the Competition Amendment Act 1 of 2009 (“the Amendment Act”) came into effect. The amendments empower the South African Competition Commission (“the Commission”) to conduct market inquiries with extended powers of investigation. There are various markets in South Africa that may require a market inquiry and it may be useful to consider if the Commission can fix the competition problems in various markets with a market inquiry. What is clear from the onset is that the Commission alone cannot fix all the challenges within a particular market through conducting market enquiries. However, it can help to change behaviour in the market place and enable markets to function more efficiently. This paper intends to analyse whether or not the competition related problems in various South African markets can be fixed by a market inquiry. With extended investigation powers and the formalisation of the market inquiries, it is now incumbent upon the Commission to make the market inquiries work. Globally, market inquiries have had mixed success in unearthing behaviour repugnant to competition law and policy, and in changing behaviour in specific markets. It would be prudent for the Commission to learn from previous market inquiries in foreign jurisdictions on how not to fall into the trap of making market inquiries toothless in South Africa, and thus maintain the status quo. Moreover, the Commission can learn valuable lessons to improve the effectiveness of market enquiries from its experience in the Market Enquiry into certain aspects of the retail banking sector that was conducted in 2006 (“Banking Enquiry”).

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2. Empowering Provisions for the Market Inquiry

2.1. What is a market inquiry?

The amendment giving the Commission formal powers to conduct market inquiries was effected through Chapter 4A of the Competition Act 89 of 1998 (“the Act”). In terms of section 43A of the Act, a “market inquiry” should be interpreted to mean:

“A formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm”.

From the outset it is clear that a market inquiry differs from an ordinary investigation initiated by the Commission in terms of Section 49B of the Act. Whilst an investigation may be initiated on the basis of an alleged specified prohibited practice in the Act, a market inquiry is a broader concept geared towards analysing markets where competition is perceived not to be functioning well and to establish concretely if indeed competition is not functioning well or at all, to probe why it is not, and what actions could be taken to increase the transparency and competition in those markets.

The market inquiry may be conducted without targeting specific firms and does not have to specify the conduct contributing to markets not functioning well. This, of course, will be the subject of the market inquiry.

2.2. Commencing the market inquiry

Section 43B of the Act sets out clearly how the Commission may conduct a market inquiry. In terms of Section 43B (1) of the Act, the Commission may, based on its own initiative or in response to the Minister, conduct a market inquiry, where it has reasons to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market, or to achieve the purposes of the Act. In order to proceed with a market inquiry the Commission is required by the Act to publish, 20 days before the commencement of the inquiry, a notice in the Government Gazette

e. The notice should serve as an announcement of the establishment of the market inquiry and set out the terms of reference, as well as an invitation to parties to come forward with information to the market inquiry.² The terms of reference of the market must include a statement that will set out the scope of the inquiry and the timeframe within which it is expected to be completed.³ The Commission is not obliged to publish the terms of reference for comment before its publication in the Government Gazette, but may decide to do so

2.3. Conducting the market inquiry

The Commission is given the leeway in the manner⁴ it conducts a market inquiry⁵ and is able to summons individuals to appear before it, to provide information and to furnish documentation to the market inquiry. The conducting of search and seizure operations or “dawn raids”, has been explicitly excluded in the context of market inquiries.⁶ The presiding officer, at the hearing of a market inquiry may question any person under oath or affirmation and failure to comply may lead to a fine of R2000 or imprisonment of up to 6 months. Confidential information may not be withheld, although allowance is made for in camera proceedings.

A market inquiry can include desk top research, the use of investigation tools such as interviews, request for information and documents, and a public hearing for complex markets. The mode of conducting the market inquiry differ from industry to industry and, the perceived magnitude of the problems in the markets, the effect of the dysfunctional markets on the poor and vulnerable members of the society, the size of the market in question and the possible impact of any remedies that may be proposed in the market inquiry. Thus a market inquiry may be small and not be as high profile and intensive as the market inquiry into the private healthcare or the Banking Enquiry.

² Section 43B (2)

³ Section 43B (4)

⁴ Section 43B (3)

⁵ Section 43B(3)

⁶ Section 43B(3)(b)

2.4.Completion of the market inquiry

Upon completing a market inquiry the Commission will be required to submit a report to the Minister of Economic Development which may include recommendations for new or amended policy, legislation or regulation, and regulation to regulatory authorities in respect of competition matter.⁷ Furthermore, the Commission may on the basis of information obtained during a market inquiry, initiate a complaint against any firm for further investigation, initiate and refer a complaint directly to the Competition Tribunal without a further investigation⁸ or take any other action within its powers in terms of the Act.⁹

2.5.Market Inquiry and Enforcement

As a regulator established by the Act to oversee, promote and maintain competition in South Africa the Commission is also subject to the Constitution. Thus the Commission will have to be careful of the manner in which it chooses to use the market inquiry process as one of the many regulatory tools it has at its disposal to carry out its mandate in terms of the Act¹⁰. The ICN in a draft report published by a working group¹¹ emphasises, as a form of good practice, clearly distinguishing market studies from enforcement action. However, the group did note this as being one of the more contentious areas of good practice. This is because there are opposite ends of the spectrum with some ICN members never using market studies for enforcement purposes whilst others commonly or always using market studies as a precursor to enforcement action¹². To get buy in from stakeholders, the advice from ICN members, is for the authority to make clear to their stakeholders the purpose of the market study/inquiry process and also make clear about the links, if there are any, between market studies/inquiries and enforcement action.¹³

⁷ Section 43C(1)

⁸ Section 43C(3)

⁹ Section 43C(3)

¹⁰ Section 21, deals specifically with the functions of the Commission

¹¹ ICN *Draft Market Studies Good Practice Handbook and Market Studies Information Store Road Testing: Report to Conference*. www.internationalcompetitionnetwork.org

¹² Ibid at page 12.

¹³ Ibid at page 12

One authority has cautioned against carrying out a market study/ inquiry in parallel with an enforcement investigation. In its experience running a market study at the same time as an enforcement action had not proved a good thing to do¹⁴. Even when the authority is clear in relaying the different purposes for which the information is being collected the mere fact that a market study is being run in parallel with an enforcement action can blur boundaries and impact stakeholder relations.

2.6.Choice of Industry to conduct a Market Inquiry

There has already been some criticism levelled at the use of the wording reason to believe as being too broad and may result in the Commission going on fishing expeditions at the very costly expense of the institution and stakeholders alike¹⁵. Bearing in mind that market inquiries aim to get to the root causes that hinder transparency and competition and to thereafter make recommendations that will assist in lifting these causes, the starting point of identifying a potential market should be objectively sound. So for instance the Commission will have to consider the number of complaints that it receives about a particular sector to justify why it has singled out that particular sector to be the subject matter of a market inquiry, the criteria for selection should be able to withstand possible review applications by disgruntled stakeholders on the basis of legality on claims of abuse of power by the Commission. The terms of reference will also clearly set out the reasons that gave rise to the Commission selection of a particular sector and what features in that sector are problematic to competition, example sectors where enhancing transparency or reducing switching costs to empower customers to intensify competition amongst service providers, enhancing innovation aimed at lower costs or diversity of choice. The point being that all levels of the process the Commission should be able to justify its decision to conduct a market inquiry.

Section 21 of the Act, deals specifically with the functions of the Commission as having the responsibility to implement measures to increase market transparency, to investigate a

¹⁴ *Ibid* at page 14

¹⁵ Article by Paul Coetser and Rudolph Raath, *Competition Amendment Act paves the way to private healthcare and other market inquiries*. www.werkmans.co.za

nd evaluate alleged contraventions of Chapter 2 and enquire into and report to the Minister on any matter concerning the purpose of the Act. There was no express provision providing a legislative basis for the market inquiry or defining the Commission's powers in relation to market inquiries. In this regard, when the Commission embarked on its first market inquiry into the Banking sector in 2008, it had to rely on its general powers without making use of its investigative powers. Furthermore, it had to rely on voluntary participation by stakeholders. The fact that the Commission did not have a direct mandate found in the Act to conduct market enquiries left the Commission open to criticism, from certain sectors, of acting *ultra vires* and acting beyond its powers. Criticisms about the impact of the Banking Inquiry persist as no regulatory changes or prosecutions have arisen from the recommendations. 16

2.7. Prevalence of Market Inquiries

Many jurisdictions use market inquiries as a way of understanding the conditions of various markets and why competition is not working in a market with a view to recommending the best solutions to get markets functioning well. The OECD conducted a survey on how various jurisdictions conduct market studies and their usefulness in introducing or strengthening competition in the various markets.¹⁷ Below we consider some of the experiences from various jurisdictions that can be useful for South Africa.

3. LESSONS FOR SOUTH AFRICA

This section will explore the key lessons on making market inquiries to be effective in South Africa. These lessons shall be derived from the Banking Enquiry, experiences in the

¹⁶ *ibid.*

¹⁷ See OECD Policy Roundtables: Market Studies, 2008 accessed at <http://www.oecd.org/regreform/sectors/41721965.pdf>

UK, EU and US. Most of these lessons are from the UK, which has conducted the most market inquiries.

3.1.Experiences from the Banking Enquiry

The South African Competition Commission conducted a market enquiry into certain aspects of the retail banking sector. The Banking Enquiry was established in August 2006 and concluded its work in 2008.¹⁸

3.1.1. Lessons on post-market inquiry implementation framework

While the Banking Enquiry received a lot of publicity, there are perceptions in the media and the public that recommendations seem not to have been followed through more thoroughly as the enquiry had done. This is exacerbated by the absence of formal post-market inquiry implementation framework and lack of communication with the public on the progress made on the recommendations. Griffiths and Gumbie¹⁹ state that feedback was more often given informally on a powerpoint presentation and the information was not available to those who were not involved in the implementation of the recommendations. Very few public statements were given regarding the progress of implementation of the recommendations.²⁰ Gumbi and Griffiths argue that the intensified by speeches from National Treasury on various occasions which did not acknowledge the progress made to date.²¹ In the future, there is need of a formal post implementation framework within which industry participants can report on the progress made in implementing various recommendations.

¹⁸ See <http://www.compcom.co.za/assets/Banking/Executive-overview.pdf>. Further documentation on the Banking Enquiry can be accessed from <http://www.compcom.co.za/enquiry-in-to-banking> or <http://www.compcom.co.za/2008-media-releases/>

¹⁹ M Griffiths and Wiri Gumbie, Probing the Value of Market Inquiries from the Perspective of the Banking Enquiry” accessed on <http://www.compcom.co.za/wp-content/uploads/2014/09/Banking-Enquiry-Griffiths-Gumbie.pdf> at p7.

²⁰ See for example the comprehensive press statement from National Treasury: “Facilitating the implementation of the Recommendations of the Banking Enquiry Panel” National Treasury, http://www.treasury.gov.za/comm_media/press/2010/2010060102.pdf

²¹ Griffiths and Gumbie *Ibid* at p 7.

In the future it is imperative for the Commission to put in place a formal post implementation structure where feedback on implementation will be formally given. In formulating recommendations it is important to ensure that the stakeholders responsible for spearheading the implementation of a particular recommendation are properly identified.²²

3.1.2. Lessons on Staffing

The Commission has accepted that one of the problems with the Banking Enquiry is that it was staffed with a lot of external experts and the transfer of the skills from the experts to the Commission staff was very difficult or did not happen at all.²³ This poses a problem in terms of the implementation of the recommendations of the market inquiry team. To alleviate this problem it is beneficial to mix the Commission's staff with the external independent technical experts to ensure that the skills and knowledge of the industry is retained and utilised. Should the market inquiry team recommend prosecution, it would be more beneficial if the Commission staff that was part of the market enquiry team can carry through the prosecution. It will be very profitable for the Commission team that was involved in the market inquiry to participate or even spearhead the implementation or monitoring of the recommendations of the market inquiry team for a sustainable period post the market inquiry.

3.1.3. Lessons on the participation of sector regulators

The Banking Enquiry showed the need for the cooperation of sector regulators in the market inquiries. After the 28 recommendations of the panel, more than half of the recommendations were rejected by the National Treasury and the Reserve Bank.²⁴ Once those recommendations were rejected there was no further action taken on them. Of those that were endorsed, others had to be amended. Gumbi and Griffiths argue that the Commission attempted to get the participation of the Reserve Bank and the latter refused citing that it is

²² Some recommendations did not specify who exactly would be responsible for spearheading implementation.

²³ OECD *Ibid* at p194.

²⁴ Griffiths and Gumbi *Ibid* at p6-8.

the regulator with the sole responsibility for the banking sector.²⁵ It is advisable in the future to ensure that sector regulators participate in the market inquiries. In order to avoid the sector regulators negatively affecting the independence of the market inquiries, their interaction with the Commission on a regulator-regulator should be limited to the beginning of the process and the framing of workable remedies.²⁶ Where the sector regulator can make submissions and participate like any other industry players, those should be welcome and they should be assessed just like any other submission received from various industry stakeholders.

The great advantage of getting the participation of sector regulators at the beginning of the process is that they are a repository of knowledge and have views on what is happening in the market and why things are done the way they are. The great benefit of sector regulator involvement in formulating recommendations or remedies is that in most instances they will be the ones to champion the implementation of the recommendations and, as a result, should buy into the remedies. This is not to say that whatever they disagree with should be discarded as this will affect the independence of the market inquiry. However, the concerns of sector regulators and those of market participants on recommendations or remedies should be carefully weighed in light of the evidence gathered throughout the investigation phase of the market inquiry.

3.2.Experiences from the UK

The UK has conducted numerous market enquiries than many countries. The structure of the UK “market inquiries” is split into two, namely, market studies and market investigations. Market studies are akin to the South African Competition Commission’s scoping studies but the latter is more case specific and usually results in a recommendation to initiate a complaint. Market investigations are more akin to the South African Market enquiries than are market studies.

²⁵ Griffiths and Gumbi *Ibid* at p11.

²⁶See Speech by Alex Chisholm, *CMA: How we intend to use market investigations to extend the frontiers of competition*, 9 September 2014, Merton College, Oxford, accessed at <https://www.gov.uk/government/speeches/cma-how-we-intend-to-use-market-investigations-to-extend-the-frontiers-of-competition>.

In the UK the main responsibility for enforcing competition laws lies with the Competition and Markets Authority (“CMA”) established through the Enterprise and Regulatory Reform Act 2013 (ERRA 13).²⁷ The CMA took over the responsibility from two independent competition authorities, namely, the Office of Fair Trading (OFT) and the Competition Commission. The CMA has the responsibility to investigate and report on a market and in which problems are identified, can make a reference for a full market investigation. The market study and market investigation assess why competition in a market is prevented, restricted or distorted, and to take any necessary action to remedy, mitigate or prevent those effects.²⁸

The UK has several lessons but this paper will only focus on a few.

3.2.1. Lessons on structuring the market investigation

The UK investigation structure seems adequate to yield more and better results. From the current market investigations, it is evident that the UK follows an established structure to its investigations.²⁹ The structure of the investigation is generally as follows:

- Reference made by the CMA
- Initial information requests
- Initial submissions from main and third parties
- Publication of initial issues statement
- Site visits, Issue questionnaires
- Hearings with third parties
- Publication of relevant working papers and annotated issues statement
- Main party hearings
- Deadline for all parties’ responses/submissions required before provisional findings
- Notify provisional findings and possible remedies (if required)

²⁷ On 1 April 2014, the functions of the Competition Commission and many functions of the Office of Fair Trading were transferred to the CMA and those bodies were abolished. Documents relating to market studies and market investigations in the UK can be accessed on <https://www.gov.uk/competition/markets>.

²⁸ Under section 132 of the Enterprise Act 2002.

²⁹ See for instance http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/private-healthcare-market-investigation/120928_revised_administrative_timetable.pdf.

- Publish final report
- Statutory deadline†

It appears as if the market inquiries in South Africa are modelled on the UK structure with appropriate modifications in certain aspects to suit the local environment. Following this structure, albeit with modifications, has enabled the Commission not to be overwhelmed with tons and tons of unnecessary information. It bears mentioning that the structure on its own is not what brings the desired output, but careful implementation of the structure, formulating the relevant substantive questions and surveys, and limiting the quantity of submissions to only the relevant and critical issues.

3.2.2. Lessons on recommendations/remedies: Success of the Groceries Market Investigation

The UK market studies and market investigations will result in one or more of the following: a clean bill of health for the industry, consumer focused action, recommendations to business, recommendations to Government, investigation and enforcement action, and remedies relating to various aspects of the market like divestiture.³⁰ One of the successful market investigations was the inquiries in the groceries market.

The UK has conducted two major enquiries in the groceries market.³¹ The first market investigation was conducted in 2000 which led to the creation of a Code of Practice aimed at regulating the relationship between the largest supermarkets and their suppliers. After receiving many complaints, the OFT referred the market to the Competition Commission for a second time in May 2006. The Competition Commission recommended the revision and strengthening of the Code of Practice, to be enforced by an independent ombudsman.³² The Competition Commission recommended that Government should establish an ombudsman after having failed to reach voluntary agreement with the supermarkets. On 25 J

³⁰ Alex Chisholm *Ibid*.

³¹ Antony Seely, *Supermarkets: competition inquiries into the groceries market*, 2 August 2012.

³² See details at <http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm>.

une 2013, the Groceries Adjudicator Act 2013 came into forces, establishing the independent ombudsman named ‘Groceries Code Adjudicator’.³³

The success on the implementation of the remedies in the UK can be partially attributed to consultations with stakeholders prior to releasing recommendations. Input is sought to ensure that the remedies are practical and can be implemented. There is still scope in the UK to get more participation from sector regulators. In South Africa, there was consultation on some aspects of the Banking Enquiry recommendations but there some recommendations were not canvassed with the market players eg the reduction of dishonoured debit orders to R5. The end result was the rejection of the recommendations by the National Treasury and the Reserve Bank.³⁴

Unlike in the UK, the Commission cannot impose remedies on market participants. It can make recommendations to various stakeholders and if need be, prosecute those firms believed to have contravened the Act. The Commission can ask for remedies like structural remedies in the context of the prosecution that follows. In South Africa, there have been very few cases where structural remedies were discussed in the context of abuse or cartel cases. As a result, although the structural remedies are very useful in some instances, they may not be used in South Africa as much as they are used in the UK.

3.2.3. Legal challenges

The OFT makes decisions on market investigations and affected parties can only review the OFT decision. The decisions of the OFT have been challenged. The first challenge to a CC market investigation was successful. The challenge was brought by Tesco against the CC’s recommendation that a “competition test” be introduced to the planning system. Further, in May 2009 BAA announced an appeal of the Commission’s decision requiring it to divest three major UK airports. These challenges prolong the implementation of remedies.

³³See <https://www.gov.uk/government/consultations/statutory-guidance-on-how-the-groceries-code-adjudicator-will-carry-out-investigation-and-enforcement-functions>. The functions of the Groceries Code Adjudicator include to ensure that supermarkets treat their main suppliers lawfully and fairly; investigate complaints; and to arbitrate in disputes.

³⁴ Griffiths and Gumbi *Ibid* at p11.

dies proposed and that may lead to conditions in the market changing thus rendering academic the remedies sought.

3.3.Experiences from the EU

The EU has conducted a number of market enquiries referred to as sector inquiries. The EU has had much success in discussing with market participants the preliminary remedies before finalisation of the report. For instance, following the publication of the preliminary report on the findings of the sector inquiry into retail banking, several market players took voluntary action to address some of the problems identified.³⁵

Once it has begun a sector inquiry the EU follows a very strict path which includes information gathering, analysis, public presentation of the preliminary report, consultation with stakeholders during which further information can be collected, the adoption of a final report and recommendations.³⁶ Sometimes the EU conducts inspections during the sector inquiries and at one time the EU conducted a search and seizure procedure when it was starting a market enquiry. Search and seizure powers have been explicitly excluded by the Amendment Act.

The great disadvantage with sector inquiries in the EU is that the EC Commission cannot impose remedies but often follows up with individual competition investigations or recommendations for regulatory changes at EU level. This disadvantage seems to apply to the Commission in that the Commission does not have power to impose any remedy but to suggest a series of remedies that can be carried through by government, and/or market players. The potent weapon in the Commission arsenal is litigation after concluding a market enquiry. However, that has its pros and cons, for instance, the length of time it takes to conclude a prosecution.

3.4.Experiences from the US

³⁵ OECD *Ibid* at p154.

³⁶ OECD *Ibid* at p156.

In the US, market studies have been a very useful tool in competition policy and law.³⁷ These are conducted by the Antitrust Division of the U.S Department of Justice (“DoJ”) and the U.S Federal Trade Commission (“FTC”). Most of the market studies have been conducted by the FTC. The Federal Trade Commission Act (“FTC Act”) explicitly authorises the Commission to “gather and compile information concerning ... the organisation, business, conduct, practices and management” of persons and of corporations.³⁸ Unlike the DoJ, the FTC has powers to compel submission of information.

At times the two agencies collaborate in conducting market studies.

The market studies in the US go back as far as early 1900s and have had mixed success. What bears mentioning in this paper is that the U.S has learnt various lessons which are beneficial to South Africa and we will only focus on a few.

In the first instance, the US has learnt that an agency must spend time designing a study so that it yields useful results. If there is no proper and considered planning, the agency conducting the market enquiry may end up with a lot of unnecessary information that it will not be able to process. As a result, the remedies proposed would be of little or no utility. For instance, the Commission conducted an extensive Congressionally-mandated investigation to consider whether the gasoline prices were being affected by “manipulation” and to determine whether “price gouging” occurred following Hurricane Katrina.³⁹ Although the Commission used a vast amount of resources including attorneys, economists, financial analysts, and other personnel with specialised expertise in the petroleum industry, the Commission could not meaningfully use the information obtained during the market enquiry as the data were vast and broad in scope. The Commission ended up focusing on specific aspects of the petroleum industry from previous investigations and studies, as well as inputs from knowledgeable observers.⁴⁰

Secondly, the FTC attempt in the 1970s to conduct a study abroad swath of the economy was less successful. There were numerous fights regarding the market study which led to suspension of data collection and subsequent termination of the market study without issuing a report.

³⁷ The Federal Trade Commission reports are available to the public at <http://www.ftc.gov/opp/reports.shtm>.

³⁸ 15 U.C.C. 46(a).

³⁹ Federal Trade Commission, Investigation of Gasoline Price Manipulation and post-Katrina Gasoline Price Increases (Spring 2006), available at http://www.ftc.gov/ftc/oilgas/comptn_reports.htm.

⁴⁰ OECD *Ibid* at p143

From the above experiences, the FTC has not conducted any economy-wide studies, instead targeting its resources by focusing on aspects of particular industries.⁴¹

In the US the DoJ and the FTC, do not use market studies as a substitute for conducting investigations and initiating enforcement.⁴² Thus market studies do not use studies as the basis for enforcement actions.⁴³ This is where the US market studies differ to the South African market enquiries. The SA market enquiries explicitly states that after a market enquiry, the Commission can initiate a complaint and refer to the Tribunal without further investigations.

The choice of a market to conduct market studies is useful. The DoJ and FTC conduct market enquiries on industries that they have a lot of expertise based on past enforcement actions.⁴⁴ This helps an agency to assess the likelihood of the success of the remedies.

4. Conclusion

While it is clear that a market inquiry cannot solve all the competition problems in a specific market, it brings a lot of change in how business is conducted in various markets. When the market inquiry is announced and conducted, there is a lot of focus on the market participants. Though the inquiry may not bring results in the short run, the focus on the market participants force them to change their behaviours in the marketplace. For a market inquiry to achieve great results, great care must be taken in choosing the industry to be subjected to the market inquiry, designing and implementing the project plan, ensuring that there is participation from all key stakeholders including sector regulators, and implementing a proper formalised follow up and reporting mechanisms after the inquiry. It is imperative that the Commission gives great emphasis to the follow up strategies after the conducting of the market inquiry to achieve demonstrable results.

⁴¹ OECD *Ibid* at p143

⁴² In its study of generic pharmaceutical drugs, the agency stated that it “... *would not exercise its enforcement authority solely on the basis of information collected in response to the [compulsory process] Orders. Rather, it would do so only after gathering additional information from a company and/or other sources through an investigation separate from the proposed study.*” 72 Fed. Reg. 25304, 25312 (May 4, 2007).

⁴³ OECD *Ibid* at p146

⁴⁴ OECD *Ibid* at p145

