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Inquiries about market inquiries

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Abstract

Most of the provisions of the South African Competition Act 89 of 1998 are understood to reflect orthodox notions of competition law. Generally it is accepted that competition law is aimed at promoting consumer interests. However, the history of the Act and the objectives clause, section 2, make it apparent that competition law in South Africa should also address deep structural problems caused by and should promote interest harmed by the apartheid political and economic system. The Competition Amendment Act 1 of 2009 introduced a market inquiry regime, as it holds the potential to address adverse effects on competition in South Africa more holistically. Several inquiries have been held in terms of this provision. The Competition Amendment Bill of 2017/8 attempts to expand the role of competition law in addressing market and ownership concentration and access to markets, especially by historically disadvantaged persons. It is no surprise that this Bill also seeks to bolster and expand market inquiries. The current and proposed provisions dealing with market inquiries are analysed from a comparative perspective in order to expose their strengths and weaknesses. The current and proposed rules regarding initiating, conducting and providing outcomes for market inquiries in South Africa are evaluated from a comparative perspective, with reference especially to Australia, Canada, Germany the United Kingdom and the United States. General conclusions are drawn about the ability of the South African market inquiry framework to achieve the ends for which it was created. Some proposals for improvement of the system are made.

1. Introduction

The substantive provision of the South African Competition Act 89 of 1998, in many respects reflect orthodox notions of competition law. Decisions of the bodies that decide competition law disputes often rely on the learning that hails from the major competition law jurisdictions such as the United States, Europe and the United Kingdom. Nevertheless, the South African competition law regime also has unique features that reflect this country's peculiar history and economic circumstances. The Act is one of the major instruments that were enacted to reform the Apartheid economy in the democratic era. Section 2 sets out a range of purposes of competition law. The Act is to "promote and maintain competition in the Republic in order –
(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social and economic welfare of South Africans;
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons".

This provision and the preamble to the Act indicates that Competition law in this jurisdiction will have to promote a wider range of socio-economic goals that are not at the core of most other competition law systems. The South African competition system has been an unqualified success but few would doubt that more could be done to ensure that the Act achieves its wider goals. In enforcing and promoting competition law, authorities have, on occasion, referred to these socio-economic goals and the unique features of South African competition law, but the jurisprudence does not indicate that they have been integrated into the fibre of this area of law.[1]

A statutory market inquiry regime was added to the Competition Amendment Act 1 of 2009, 10 years after the Competition Act was passed, as part of a package that had to strengthen the ability of the competition law systems ability to promote the broader goals of the Act and address structural problems in the South African economy. The Amendment Act went through Parliament in the latter half of 2008, in the last days before Parliament broke up for the 2009 elections, with two other important pieces of commercial legislation, the Consumer Act and Companies Act.[2] However, the market inquiry provisions came into effect only on 1 April 2013.[3] The delay was probably due to concerns about other provisions in the 2009 Act, and the entire Act has still not come into force. In a further Amendment Bill, published for comment on 1 December 2017 Government has now proposed to upgrade and bolster the market inquiry regime.[4] This Bill has mainly been used as the basis for this article. However, a further version was tabled in Parliament on 5 July 2018 and reference will also be made to it where it differs from the original Bill.[5]

In this paper the legal structure of the market inquiry regime in South Africa will be considered from a comparative perspective and with the aim of drawing conclusions about the attempt to change this structure. There is much to be learn from considering how other jurisdictions conduct market inquiries. These types of studies have been done in the United

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[1] Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (Loose Leaf) 1.10. See also Dennis Davis "Reflecting on the Effectiveness of Competition Authority: prioritization, market enquiries and impact" Presentation Third Annual Competition Law Conference 2009 https://www.comptrib.co.za/assets/Uploads/Speeches/Judge-Davis1.pdf.
[2] The Minister of Trade and Industry Introduced the Amendment Bill into Parliament on 3 June 2008. It was finally passed by the National Assembly on 6 October 2008 and by the Council of Provinces on 20 October 2008. There were fears that other provisions in the Bill were unconstitutional and it was only signed into law on 27 August 2009.
[3] Proclamation 5 of 2013 GG 36221 8 March 2013. For a summary of these provisions, see OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by South Africa 20 June 2017 DAF/COMP/WP3/WD(2017)25 paras 10-16.
[4] GN 1345 in GG 41294 of 1 December 2017.
[5] B-23 in GN 693 GG 41756 of 5 July 2018.

States from the beginning of the 20th century and in Japan from 1947. In 2012 the ICN stated that at least 40 out of a 100 members conduct some form of market inquiry. These inquiries are common to many if not most competition jurisdictions. It will be asked whether this regime assists and will in future be appropriate to assist competition authorities in achieving the objectives of the South African Act. The content of completed market inquiries and questions regarding the manner in which market inquiries should be undertaken will be evaluated only in so far as it is necessary to evaluate the legal structure for market inquiries, possible flaws in that structure and the attempts to change that structure.

2. Background to the establishment of the market inquiry provisions in the 2009 Act and the proposed amendments of 2017/8

Even before the Competition Amendment Act 2009, the Commission conducted research or market studies into sectors of the economy. In a 2008 OECD Report it was noted that: "Market studies have been an approach used by the Competition Commission of South Africa ("CCSA") recently with 4 (four) studies initiated to date, namely in banking, infrastructure inputs, hospitals and food".[6]

This may create a somewhat erroneous impression that South African has a relatively long history with market inquiries. The Commission identified and prioritised these sectors.[7] It did not just do specific investigations in the context of enforcement of specific contraventions of the Competition Act. But outside of the banking sector, the Commission merely conducted informal research and studies into these sectors in order to understand them and to discover more specific contraventions that could then be prosecuted. These studies played, and in fact still play, an important role in the development of South African competition law, but they did not and do not require a legal framework to be effective.[8]

Nevertheless, the Commission conducted a much more formal investigation into the banking sector, referred to as the Banking Enquiry. This investigation was established on the 4th August 2006 in terms of section 21(1)(a) of the Competition Act, which gives the Competition Commission the responsibility to implement measures to increase market transparency and 21(2)(b) of the Competition Act 89 of 1998, which merely grants the Commission broad powers to enquire into and report to the Minister on any issue concerning the purposes of the

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[6] OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 191.
[7] OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 192.
[8] The Supermarket Investigation mentioned in the Competition Commission of South Africa *Annual Report* (2010-2011) 16-17 also falls into this category. See the discussion Derushka Chetty, Yongama Njisane, Michael Mbikiwa and Carmen Martin "'Knowledge is power' The role of market inquiries in assessing the state of competition and facilitating ex ante regulation of markets" Eighth Annual Competition Law, Economics and Policy Conference (4 & 5 September 2014) http://www.compcom.co.za/wp-content/uploads/2014/09/Conference-Paper-Knowledge-is-power-The-role-of-market-inquiries-in-assessing-the-state-of-competition-and-facilitating-ex-ante-regulation-of-markets.pdf (last visited 2018/06/18) text in the paragraph after fn 28 where it is stated that this was an investigation of a complaint.

Act.[9] This investigation constituted a considerable step forward and illustrated the benefits of market inquiries. It perhaps precipitated the establishment of a legislative framework for market inquiries. Although the Commission did not have any specific power to obtain evidence or secure co-operation, the Banking Enquiry did not itself expose the weaknesses of doing in-depth investigation without an appropriate statutory framework. It took considerable effort to secure cooperation and the asymmetry of information between the banks and the Panel of the Banking Enquiry made obtaining the right evidence more difficult.[10] However, the banks in this case co-operated. In the oligopolistic market for banking services the reputational risk of uncooperative behaviour was perhaps too great.[11]

In this respect the Competition Commission was not unique. Several other jurisdictions still do market inquiries even if they do not have clear statutory powers to do so. Canadian and Australian market studies have no explicit legal backing. Reliance for the power to do these studies are simply reduced from general provisions. However, most jurisdictions provide some statutory backing for these inquiries.[12] It is likely that the Competition Commission accepted that the methods that were used for securing co-operation would not have worked in other markets.[13] Although the ICN reported that even those authorities that do not have express powers declare that they are content with their legal frameworks, there appears to be sense in establishing a statutory framework and in-depth consideration of this issue in reviews in Canada and Australia reveal a need for a formal statutory framework.[14]

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[9] The Banking Enquiry Report to the Competition Commissioner by the Enquiry Panel (June 2008) paras 1.2, 1.3.3. See also OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 191-192; Derushka Chetty et al (4 & 5 September 2014) text next to fn 14.

[10] Derushka Chetty et al (4 & 5 September 2014) text before fn 23.

[11] Derushka Chetty et al (4 & 5 September 2014) text in paragraph after fn 22.

[12] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) paras 7-8; International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) paras 1.17, 5.7-5.8.

[13] Derushka Chetty et al (4 & 5 September 2014) text in paragraph before fn 23.

[14] For the development of the law in Canada see OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 229 as well as OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by Canada 20 June 2017 DAF/COMP/WP3/WD(2017)2 para 7 with reference to the "Wilson Report" Government of Canada, "Compete to Win Final Report" (June 2008), available: http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/home. Where it was recommended that a specialized national institution, the Canadian Competitiveness Council, vested with expanded formal advocacy powers should be created but this was not implemented. See also the analysis of developments in Australia.

In the Banking Inquiry the Commission had received assistance from the Office of Fair Trading in the United Kingdom.[15] It is clear that the market inquiry provisions as set out in the 2009 Act were heavily influenced by UK legislation. These market inquiry provision are not out of the ordinary and do not go quite as far as their UK equivalent.[16]

After enactment of the market inquiries provisions the Commission initiated several inquiries. The going has been slow and at times tortuous. The provisional findings in the healthcare inquiry was only published in June 2018 despite dragging on since 2013.

Healthcare Inquiry	- GG 37062 of 29 November 2013 - Revised GG 40480 of 9 December 2016 - Many extensions of the date of publication of recommendation and report	- Provisional Findings and Recommendations Report (Provisional Report) published on 5 June 2018
LPG Inquiry	- GG 37903 15 August 2014 - Revised GG 40307 28 September 2016	- Finalized on 31 March 2017 - Minister 24 April 2017 - Government Gazette 28 April 2017
Land Based Public Passenger Transport	GG 40837 10 May 2017	
Data Services Inquiry	GN 849 *GG 41054* 18 August 2017	
Retail Market Inquiry	GG 41512 23 March 2018	

Without seriously considering the difficulties encountered with some of the market inquiries, a decision has now been made to expand the scope of market inquiries. An Advisory Panel was constituted by the Economic Development Minister Ebrahim Patel, to review the competition law regime in order to ensure that competition authorities could contribute to changing the market structure and racially-skewed ownership patterns in South Africa.[17] This

[15] The Banking Enquiry Report to the Competition Commissioner by the Enquiry Panel (June 2008) para 1.4.
[16] See infra 6.2 for peculiar elements of the UK system.
[17] According to the Memorandum on the Objectives of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 para 4 the Panel included members of the Commission and Tribunal. According to media reports (*Engineering News* 26 May 2017) the Panel consisted of Michelle le Roux, from the Johannesburg Bar, Johannesburg law firm partner Doris Tshepe, Competition Commission chief economist Liberty Mncube and Wits University Commerce Dean Imraan Valodia.

review culminated in the Competition Amendment Bill.[18] In the Background Note to the Bill, its objectives are explained. The premises on which the drafters rely and the coherence of the economic arguments made in the Background note are at times open to some doubt, and can at least be described as unorthodox and controversial.[19] Nevertheless, these aspects will not be addressed here. The justification for proposed amendments proffered by the drafters of the Act, will be taken at face value.

The Background Note states that markets in South Africa were highly concentrated during apartheid and remained concentrated despite the advent of democracy. Once concentrated markets were established they tended to increase barriers to entry. Furthermore, high concentration levels had three negative consequences: 1) it allowed firms in the market to capture monopoly rents at the cost of lower employment, production and investment which in turn resulted in slower growth of the economy 2) it reduced the incentive of incumbents to innovate and invest in innovation 3) the monopoly rents achieved were associated with high levels of income inequality and narrower ownership structures. It was nevertheless acknowledged that high concentration levels would not always be harmful but it could also be the result of the realization of scale economies and network benefits, while scale would sometimes be necessary to allow South African firms to compete in the South African market with large foreign firms.[20] Furthermore, the Background Note emphasised the persistent racially skewed ownership profile of the South African economy had to be addressed.

The Background Note further acknowledged that existing competition law tools were inadequate to effectively address these issues and that reforms were necessary to improve this state of affairs. It considered that one approach would have been to propose separate legislation that would impose rigid limits on the levels of untransformed ownership and market concentration and would trigger measures to deconstruct a market or reform an ownership structure. But several reasons were given why this was not a viable inter alia that 1) high concentration levels was sometimes a necessary evil for the reasons already given 2) it would be very difficult to establish what the thresholds should be 3) there was no international precedent for this approach and finally 4) more effective legal tools were available.[21] It would seem that this could not really have been a realistic reform measure but it is perhaps set out in the Note in order to justify other measures that are less far-reaching by comparison.

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[18] The Bill was originally published for comment in GN 1345 in GG 41294 of 1 December 2017.
[19] Centre for Competition Law and Economics *Comments on the Competition Amendment Bill* (2018) www.ccle.sun.ac.za especially 60ff.
[20] Background Note GN 1345 in GG 41294 of 1 December 2017 9-14.
[21] Background Note GN 1345 in GG 41294 of 1 December 2017 9-14.

The issue of conduct in concentrated markets had already occupied the minds of the drafters of the 2009 Amendments Act.[22] Section 10A of that Act deals with so-called complex monopoly conduct. The provision is aimed at addressing oligopolistic conduct that does not constitute an agreement or concerted practice that would be covered by the existing section 4.[23] It was to apply to markets where complex monopoly conduct subsisted. A market would meet these requirements where 1) five or fewer firms together would have a market share of 75% or more 2) at least 2 of these firms conducted their business in a conscious parallel manner[24] 3) the conduct has the effect of substantially preventing or lessening competition in that market 4) the firms engaged in the conduct could not show that the conduct resulted in technological, efficiency or other pro-competitive conduct that outweighed the negative consequences of the conduct.[25] If the Commission were to have reason to believe that complex monopoly conduct subsists in a market, it could investigate the market.[26] It could then apply for a declaratory order against two or more firms that had a market share of at least 25% and were involved in the complex monopoly conduct, if that conduct resulted in "(i) high entry barriers to that market; (ii) exclusion of other firms from the market; (iii) excessive pricing within that market; (iv) refusal to supply other firms within that market; or (v) other market characteristics that indicate coordinated conduct".[27] If the Tribunal were satisfied that the last mentioned requirements were met, it could order respondents to conduct themselves in a manner that would be "justifiable to mitigate or ameliorate the effect of the complex monopoly conduct on the market".[28] The contravention of such a Tribunal order would then constitute a prohibited practice.[29]

Nevertheless, this provision has not been and probably will never be brought into effect. It is badly formulated and impractical.[30] The provision requires compliance with elaborate procedures but only grants the Commission vague conduct and not structural remedies (at least at the outset).The Background Note states that this provision is not sufficiently focused

[22] Background Note GN 1345 in GG 41294 of 1 December 2017 19 on the purpose of this provision.
[23] Memorandum on the Objectives of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 part 2.2.
[24] Competition Amendment Act 1 of 2009, adding section 10A(2) contains a rather contradictory definition of section 10A(2).
[25] Competition Amendment Act 1 of 2009, adding section 10A(1).
[26] Competition Amendment Act 1 of 2009, adding section 10A(3).
[27] Competition Amendment Act 1 of 2009, adding section 10A(4).
[28] Competition Amendment Act 1 of 2009, adding section 10A(5).
[29] Competition Amendment Act 1 of 2009, adding section 10A(6).
[30] Memorandum on the Objectives of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 para 6.1.

on the facts of a particular case, that it will lead to litigation and may be the subject of Constitutional challenges.[31]

The drafters of the 2017/8 Amendments therefore envisage that "market inquiries will become the chief mechanism for analysing and tackling the structural problems in a market, thereby advancing the purposes of the Act".[32] It is with this purpose that the Bill attempts to strengthen the market inquiry provisions.

3. Definition of market inquiry

What is known as market inquiries in South Africa, are known by many names elsewhere.[33] The South African legislator has combined the UK term "market investigation" with the European "sector inquiry".[34]

It is not easy to define a market inquiry but the South African legislator has valiantly attempted to do so.[35] Section 43A(1) determines that a market inquiry means "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".[36]

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[31] Background Note GN 1345 in GG 41294 of 1 December 2017 20 and Memorandum on the Objects of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 63.
[32] Background Note GN 1345 in GG 41294 of 1 December 2017 19. Structural problems are also relevant to market inquiries in other jurisdictions. See the European Commission Press Release *Energy sector competition inquiry – frequently asked questions* MEMO/05/203 Brussels, 13th June 2005 on the role ascribed to concentration, market integration and barriers to entry in its decision to launch the inquiry. See also OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) paras 99-100 where it is stated that structural remedies are rare.
[33] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 1 "Market studies are also known in some jurisdictions as sector inquiries, market inquiries, analyses of competitive situations, fact-finding inquiries, fact-finding surveys, or general studies"; International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 4.2, see also the list of 9 possible purposes in para 4.13ff.
[34] As this is written from a South African perspective the term market inquiry will be used collectively to describe the procedures in different countries.
[35] For other definitions see International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) 1.13ff, 1.48, 2.16, 3.8, part 4, 12.2, 12.9-12.16. See the also the Dutch attempt at definition DAF/COMP/WP3/WD(2017)14 paras 3-4.
[36] The 2017 Amendment Bill GN 1345 in GG 41294 of 1 December 2017 proposes only minor amendments to this provision. See the very similar description in the UK Guidelines on Market Investigations: Their role procedures, assessment and remedies C3 (revised) (April 2013) para 18. The Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 further adds that "the levels of concentration in and structure" of a market must also be considered.

Although it does not do much work, the definition of market inquiry in South Africa is sound and the Competition Amendment Bill does not propose to make material changes too it. Although it refers to competition in a market, the term is probably not used in its technical sense[37] and inquiries into sectors will be allowed in one inquiry although it may be helpful to clarify the issue.[38]

The definition excludes investigations of the conduct of specific firms. This part of the definition is probably meant to exclude specific enforcement procedures. But the line between the two may sometimes be a fine one, for instance where competition authorities investigates cartel conduct of several firms. However, in such a case, the investigation will not be a market inquiry because it concerns specific conduct and not a general investigation.

The definition also specifically excludes informal inquiries. The Commission will still be allowed to do informal studies of markets, albeit without the legal backing of a formal inquiry.[39] The UK, formally distinguishes market studies that are more routine studies of competition flaws in markets from market investigations which are in-depth and allow for stronger remedies to be imposed.[40] The requirements for commencing market studies are not as strict as for market investigations but binding orders to take corrective measures may be granted only in terms of market investigations.[41] No such distinction is drawn under the current law in South Africa, as binding orders may not be granted in market inquiries. The Competition Amendment Bill[42] proposes to change this but it does not also provide for less formal market studies. Nevertheless, it is proposed that the proposed South African

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[37] The Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 proposed section 43C(1)(a) will at least make it clear that one market inquiry can concern more than one relevant market. It speaks of each relevant market.

[38] See the Enterprise Act 2002 section 131(2A) which specifically refers to cross-market studies. See on this topic Richard Whish and David Bailey *Competition Law* 8th ed (2015) 493. See Whish supra 487 market studies do not have to be limited to relevant markets in the strict sense, see OFT Market studies Guidance on the OFT Approach OFT 519 June 2010 para 2.3.

[39] See OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by South Africa 20 June 2017 DAF/COMP/WP3/WD(2017)25 paras 4-9 on scoping studies.

[40] See the Enterprise Act section 130A on market studies added by Enterprise and Regulatory Reform Act 2013; Richard Whish and David Bailey *Competition Law* 8th ed (2015) 483ff. The Enterprise Act section 5 also requires the CMA to ensure that it is informed and this clearly will not only be done in terms of either procedures described here. See also the role which market studies play in Europe OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by the European Union 13 June 2017 DAF/COMP/WP3/WD(2017)20 para 1 and paras 11-17.

[41] See infra 6.2.

[42] GN 1345 in GG 41294 of 1 December 2017.

approach is preferable. A two-tier system would merely over-complicate matters in South Africa while it is doubtful whether it would have any benefits.

4. Initiation of market inquiries

The 2009 South African provisions allow the Commission to initiate market inquiries (i) if it has reason 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 (ii) to achieve the purposes of this Act.[43] The requirements for market investigations in the UK are quite similar. The Enterprise Act, section 131 requires that there must be "reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom".[44] The drafters of the Competition Amendment Bill have proposed to lower the threshold for intervention by replacing the term "prevent" with "impede".[45] However, "impede" is already covered by restrict or distort and it is doubted whether the first change makes sense. Moreover, the legislator has tried to set out a standard that is specially tailored for market inquiries by adding a definition of the term "adverse effect on competition" to section 43A.[46] Due to a drafting error this is not currently reflected in the proposed amendments to section 43B, the provision that deals with initiation, but it is clearly intended that this should be the new threshold for initiation.[47] The reason for this oversight is perhaps that the phrase was taken from UK where it is used in the context of remedies but not in other contexts because of special features in the UK system.[48] It is suggested that this should be done for coherence although it would not really widen the basis upon which proceedings can be initiated as an adverse effect on competition is defined as the type of situations currently mentioned in section 43B(1).

In most jurisdictions the jurisdictional requirements for the commencement of inquiries is low.[49] Although they may not form significant legal constraints on market inquiries[50] they may be important in guiding proceedings.[51] The thresholds for suspicion that competition is

[43] Competition Amendment Act 1 of 2009, adding section 43B(1).
[44] See Richard Whish and David Bailey Competition Law 8th ed (2015) 492.
[45] Section 43B(1)(a) Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018.
[46] As Section 43A(2), see GN 1345 in GG 41294 of 1 December 2017.
[47] Background Note GN 1345 in GG 41294 of 1 December 2017 22.
[48] UK Enterprise Act section 134(2) and 134(2A) give somewhat different definitions of the term for different types of inquiries and section 134(4) which deals with remedies then uses the term to allow it to deal with both types of inquiries. It does not use the term in the context of initiations 131(1) and findings s 134(1).
[49] For market studies in the UK see the Enterprise Act section 130A(2).
[50] See Richard Whish and David Bailey *Competition Law* 8th ed (2015) 492 on the UK requirements.
[51] Not only are these constraints widely formulated but it was also stated in Europe that there are limits on the extent to which review applications can be brought, see Carsten Grave &

harmed are often lower than for formal investigations of specific contraventions of competition law. The German Act Against Restrictions on Competition (GWB) determines that an inquiry can be undertaken where "starre Preise oder andere Umstände vermuten [lassen], dass der Wettbewerb im Inland möglicherweise eingeschränkt oder verfälscht ist" (where strict prices or other circumstances create the impression that domestic competition is possibly restricted or prevented).[52] In Germany one of the reasons why a power to do market studies was given to the German Competition Authority, the Bundeskartellamt, was that it would allow the authority to do inquiries or examinations (untersuchungen) of markets where they do not yet have a concrete initial suspicion of a specifc contravention of the Act (konkreten Anfangsverdacht für einen bestimmten Kartellrechtsverstoß) but where they merely make a general assumption that competition is possibly restricted or undermined (Vermutung, dass der Wettbewerb möglicherweise eingeschränkt oder verfälscht ist).[53] It was regarded as particularly important to extend the powers of the German Competition Authority to do these inquiries after the powers of competition authorities to give specific exemptions to firms was abandoned.[54] It was feared that this would reduce transparency and it was felt that firms are often reluctant to complain about anti-competitive actions for fear of retaliation, which may make it difficult to obtain sufficient information for full investigations.[55] Peculiarly the inquiry powers of the German Competition Authority was extended in 2017. It now determines that an inquiry may also be undertaken by the Authority "bei begründetem Verdacht des Bundeskartellamts auf erhebliche, dauerhafte oder wiederholte Verstöße gegen verbraucherrechtliche Vorschriften, die nach ihrer Art oder ihrem Umfang die Interessen einer Vielzahl von Verbraucherinnen und Verbrauchern beeinträchtigen" (If there are reasonable grounds for the Competition Authority to suspect that substantial, lasting or

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Armin Trafkowski "Sector inquiries by the EC Commission" 2005 *International Energy Law & Taxation Review* 288, 290.

[52] Section 32(e)(1).

[53] Bundesrat Stellungeinnahme Gesetzentwurf der Bundesregierung *Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* (Deutscher Bundestag Drucksache 15/3640 15. Wahlperiode 12. 08. 2004) 34 With reference to EU law Carsten Grave & Armin Trafkowski "Sector inquiries by the EC Commission" 2005 *International Energy Law & Taxation Review* 288 have observed that "Sector inquiries become important if there is some suspicion that competition may be distorted, but there is no specific suspicion of an infringement of competition law such as to allow the commencement of infringement proceedings". See also OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note from Germany 27 June 2017 DAF/COMP/WP3/WD(2017)6 para 1.

[54] This was done in Europe in terms of Council Regulation (EC) No 1/2003 of 16 December 2002.

[55] Bundesrat Stellungeinnahme Gesetzentwurf der Bundesregierung *Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* (Deutscher Bundestag Drucksache 15/3640 15. Wahlperiode 12. 08. 2004) 34-35 the second problem is known as "Ross-und-Reiter-Problematik" horse and rider problem. The rider cannot complain about the horse for fear that it will no longer co-operate.

repeated contraventions of consumer law, that because of their nature or extent affects the interests of large numbers of consumers).[56] The German Competition Authority is not a consumer authority like the ACCC (Australian Competition and Consumer Commission) in Australia, the Competition and Markets Authority (CMA) in the UK and the Canadian Competition Bureau. The provision therefore seems somewhat peculiar and it is doubtful whether it would be advisable to follow this approach in countries like South Africa where the competition authority focuses on competition law. Nevertheless it may be asked whether some link between the Consumer and Competition Commissions could be useful in the context of inquiries.

Moreover, these jurisdictional provisions are often meant to make it clear that inquiries are not limited to specific contraventions of traditional competition law prohibitions. The Competition Amendment Bill now adds a wide definition of "features of the market" to strengthen the point and to make it clear that this provision does not only deal with structural aspects of the market.[57] The European wording is equally wide. It determines that an investigation can be done "where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market".[58]

An innovative part of the South Africa provision is that it allows inquiries to achieve the purposes of the Act. This substantially extends the scope of the South African market inquiry provision as the purposes of the Act are very widely formulated in section 2.[59] It allows market inquiries to serve as one of the most important tools for achieving wider goals of competition law in South Africa.

It is important that competition authorities should be able to initiate inquiries.[60] It gives them an opportunity to take the initiative and define the parameters of inquiries. The Competition Commission correctly is the primary initiator of inquiries in South Africa and the Act determines that the Commission may initiate proceedings on its own initiative.[61] Although the ACCC does market studies in terms of its general powers, the Australian Competition and Consumer Act only explicitly provides for market inquiries and price studies to be done at the instigation of the Minister and it determines that the ACCC has to perform studies required by

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[56] This part has been added by the Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen 2017, 9 GWB-Novelle, 9 GWB-ÄndG (Ninth Act to Amend the Act Against Restrictions on Competition 2017) as section 32(e)(5).
[57] GN 1345 in GG 41294 of 1 December 2017. See on this concept in the UK whence it comes Richard Whish and David Bailey *Competition Law* 8th ed (2015) 492-493 and Enterprise Act section 131(2) and 131(3).
[58] Art 17 of Regulation 1 of 2003.
[59] See supra 1.
[60] See infra 4 on Australian law where this has been questioned.
[61] Section 43B(1)(a).

a government body responsible for competition policy called, the National Competition Council.[62] The ACCC has argued for statutory power to institute market studies in the reform process that is referred to as the Harper Review and which culminated in the Harper Report.[63] Nevertheless, the Harper Review changed tack and decided that the entire process of market inquiries should not be in the hands of the competition authority. It will mentioned below that this conclusion is open to criticism.[64] The request of the ACCC to have powers to initiate proceedings is reasonable and it is surprising that it was not accepted.

However, in many jurisdictions competition authorities will have to do inquiries if they are required to so by a Minister, government institutions or other regulatory authorities.[65] In jurisdictions such as the United States investigations will be done by the competition authority if requested but there is no statutory foundation for this.[66] The Act determines that the Minster may request the Commission to initiate proceedings and the Commission may then also initiate proceedings if jurisdictional requirements are met. The Competition Amendment Bill tries to extend the powers of the Minister.[67] It determines that the Minister may require the Commission to conduct a market inquiry after consulting with the Commission and considering the jurisdictional requirements. In such a situation an inquiry may be commenced even if the general jurisdictional requirements in section 43B(1)(a) are not met. It is acceptable to give the Minister the power to initiate proceedings but this power should at least be subject to the same or similar jurisdictional requirements as the Commission. If not the Commission may be forced to conduct inappropriate proceedings and parties may be subjected to invasive proceedings without proper justification.[68]

The South African Act determines that "(2) The Competition Commission must, at least 20 business days before the commencement of a market inquiry, publish a notice in the Gazette

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[62] Section 28, 28(1)(ca) and part VII.
[63] ACCC Submission to the Competition Policy Review *Reinvigorating Australia's Competition Policy* (25 June 2014) 138; ACCC Supplementary Submission to the Competition Policy Review II: Further matters (15 August 2014) 8.
[64] See also Wilson Report" Government of Canada, "Compete to Win Final Report" (June 2008), available: http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/home discussed above where it was proposed that this function should be given to the Canadian Competitiveness Council, see supra 2 **[fn 14]**.
[65] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 9. See also the recommendation: Ian Harper et al *Competition Policy Review* (Final Report March 2015) recommendation 46 p 78 that a wide range of parties including the ACCC and small business should be able to request the Australian Council for Competition Policy to do market studies.
[66] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 9.
[67] GN 1345 in GG 41294 of 1 December 2017.
[68] See the much more careful wording of the UK Enterprise Act section 132, especially 132(3) and see the criticism of Richard Whish and David Bailey *Competition Law* 8th ed (2015) 493.

announcing the establishment of the market inquiry, setting out the terms of reference for the market inquiry and inviting members of the public to provide information to the market inquiry".[69] Europe and the United States require almost no formalities for commencement of market inquiries. The South African and UK regimes probably have the strictest and most elaborate formalities.[70] It makes sense that the UK has strict requirements but some formal publication facilitates the process of evidence gathering and ensures the determination of exact time lines. Formal and publication requirements are important to inform stakeholders about an inquiry, but their value also should not be exaggerated. It is suggested that effective market inquiries will also involve direct and less formal engagements with stakeholders.[71]

5. Operation of market inquiries

One of the difficulties with market inquiries is that they often take very long to complete.[72] Despite this, many jurisdictions do not legally restrict the duration of inquiries, perhaps because of the difficulty of doing this sensibly.[73] On the face of it the South African approach is quite strict. The formal notice of a market inquiry must contain its terms of reference, which must include the duration of the market inquiry. However, the terms of reference can be amended by mere further notice in the Gazette.[74] It is therefore not surprising that the Competition Amendment Bill attempts to set stricter standards. It determines that market inquiries may not extend beyond 18 months, although the Minister is given the power to extend completion of an inquiry for a reasonable period beyond this time.[75]

[69] Section 43B(2). The Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 will also add section 43B(2A) which will require consultation with the relevant regulatory authority. See the definition of this expression in section 1. Perhaps this provision should rather refer to the proposed section 82(1).
[70] For market studies in the UK see Enterprise Act section 130A(1).
[71] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) part 7.
[72] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) paras 1.23, 7.21-7.22.
[73] For market studies in the UK see Enterprise Act section 131B(4). See also generally on time restrictions OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 10.
[74] Section 43B(4) read with 43B(5).
[75] Proposed section 43B(4)(b), GN 1345 in GG 41294 of 1 December 2017. This limitation was copied from the UK Enterprise Act section 137(2) and 137(2A), although the CMA itself may give an extension and although the UK Act allows the CMA to give a 6 month extension. The UK Act clearly allows only for one extension the Competition Act probably does the same. See OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by the United Kingdom 20 June 2017 DAF/COMP/WP3/WD(2017)18 para 19.

Perhaps the most important reason why market inquiries are given a statutory basis is to provide a structure within which persons can be coerced to give evidence to the inquiry.[76] When it comes to the conduct of market inquiries the South African Act is not very prescriptive. It states that the Commission may conduct an inquiry in any manner.[77] However, it extends most of the extensive powers which the Commission would normally have when it investigates contraventions of the Act, to market inquiries. The Commission may summon any person to furnish information or provide documents.[78] Although there is some doubt, the power of the Tribunal to force witnesses to give answers even if they may be self-incriminating do not apply where these summons powers are used.[79] The Act specifically determines that the power of search and seizure is not extended to market inquiries. However, there is nothing that prevents the Commission from using information that was collected in a search and seizure process, which meets the jurisdictional requirements for such a process, in a market inquiry. Unlike a summons in terms of section 49A, search and seizures ordinarily can be conducted outside of complaint proceedings.[80]

A major issue in all jurisdictions that do market inquiries concern the extent to which investigations must be public or at least transparent. The ICN has observed that there is a great need for transparency and it has set out a long list of the types of engagements that

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[76] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 5.9-5.24. See the UK Enterprise Act section 174 and for sanctions 174A. See for the United States and the role of section 6(b) of the Federal Trade Commission Act, OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by the United States 20 June 2017 DAF/COMP/WP3/WD(2017)19 paras 16-21.

[77] Section 43B(3).

[78] Section 43B(3)(c) read with section 49A. See also Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 43G(3) which also allows the Commission to obtain further information through surveys, questionnaires and requests for information. It is not quite clear how this aligns with section 43B(3)(c).

[79] Where a power of summons set out in terms of section 49A is exercised, section 49A(2) specifically provides that a person may refuse to answer self-incriminating questions. Section 56(3) see infra does not apply here. Although a person may not be forced to give a self-incriminating answer it should nevertheless be remembered that proceedings in terms of the Competition Act to impose fines for contraventions of the Act are not criminal, *Competition Commission v Federal Mogul* (33/CAC/Sep03) [2003] ZACAC 9; Competition *Commission of SA v Senwes* [2012] ZACC 6 para 65. It is somewhat odd that section 71 which criminalises failure to attend when summoned in terms of section 49A is not explicitly made applicable here. Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (Loose Leaf) 11.6.9 argue that this criminal provision will apply due to the incorporation of section 49A into this part. See also section 49A(3) self-incriminating answers may not be used in criminal proceedings. Although it should again be borne in mind that normal enforcement proceedings in competition law are not criminal. Section 56(2) which provides that a witness will have the same privileges as in criminal law is not made applicable.

[80] Section 43C(3)(b) which excludes the application of section 46 to 49 in the context of market inquiries.

competition authorities should have with stakeholders when they do market inquiries.[81] Although there is normally no legal provision that requires it, affected parties or even the public are sometimes given an opportunity to consider information, while affected parties are asked to comment on draft or provisional reports in order to increase transparency.[82] In order to ensure participation and openness the South African Act sets out several requirements for market inquiries. They must be announced in the Government Gazette and members of the public must be invited to make representation to the inquiry[83] (although the Competition Amendment Bill will limit this to written submissions in an apparent attempt to limit representations that unnecessarily prolong inquiries in general and hearings in particular).[84] The Competition Commission furthermore must complete an inquiry by publishing a report.[85] The Competition Amendment Bill will further require that that hearings will mostly have to be held in public[86] although the requirement of openness should of course extend beyond hearings. It will also require communication with parties that will be materially affected by any provisional finding, decision or recommendation and consultation with parties that are so affected by remedial actions.[87] This will substantially extend the duration of inquiries but it perhaps is necessary to ensure fairness.

Since the Competition Commission first investigated the Banking Sector, hearings have been used to provide transparency and openness and ensure that evidence obtained is robust in South African inquiries.[88] Although hearings are not obligatory in South Africa, terms of

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[81] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) paras 1.11 and 1.23.

[82] OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 136, 156, see for the United States 150-151; Competition and Markets Authority Supplemental Guidance CMA3 January 2014 para 3.57ff and 3.60ff on response hearings.

[83] Section 43B(2).

[84] See the proposed amendments to section 43B(2), GN 1345 in GG 41294 of 1 December 2017. It is not quite clear how this provision aligns with the Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 proposed section 49G(2) which allows any person to make submissions.

[85] Section 43B(6) discussed in greater detail infra 6.1.

[86] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 section 43B(3)(cA) read with section 52(2)(a), 52(2A) and 52(3).

[87] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 section 43E(4) and 43E(5). It is also stated that this may be done confidentially "if necessary". See also infra 6 on the necessity of this in the context of binding orders.

[88] In the Banking Inquiry public hearings were extensively used. It is made clear in the terms of reference of the Healthcare Inquiry GG 37062 of 29 November 2013 part 6 that hearings would be held and this was clearly done. See Land Based Public Passenger Transport Inquiry GG 40837 10 May 2017 6.1.7 where hearings are envisaged; The LPG Inquiry GG 37903 15 August 2014 where it is stated that public hearings would be held if the need arises although it is later stated that members of the public would be invited to hearings; the administrative time table for the retail inquiry also make it clear that hearings will be held, see http://www.compcom.co.za/wp-content/uploads/2015/06/Grocery-Retail-Inquiry_Revised-Adminstrative-Timetable-003.pdf.

reference often state that the Market Inquiry will also involve public hearings and the Act contains several rules that determine how hearings have to be held.[89] The latest version of the Competition Amendment Bill will equate market inquiry hearings with those of the Tribunal to a much greater extent.[90] These amendments will strengthen the process although 1) the drafting of the relevant provisions can again be improved considerably 2) it may sometimes be difficult to apply rules that are intended for the Tribunal but are merely incorporated by reference here.

The Competition Amendment Bill gives a list of persons who will be able to "participate" in a market inquiry while it also determines that any person may make representations to an inquiry.[91] It is logical that the list includes: firms in the market as well as any person who has a material interest in the inquiry which is not adequately protected by another person and who would in the opinion of the Competition Commission of the inquiry substantially contribute to its work.[92] However, the provision more controversially extends participation to certain trade unions, the Minister of Economic Affairs and any other Minister invited by him if the inquiry "includes or materially affects a sector for which that Minister is responsible".[93] Nevertheless, this appears to be justifiable in terms of the general approach of South African competition law to provide wide standing in order to ensure that the broad objectives of the Act can be realised. The fear that the participation of Ministers will lead to unacceptable political interference is as unwarranted here as it is in the context of mergers, although the Minister of Economics Affairs is only allowed to make inputs on public interest in merger cases.[94] In market inquiries it will be more difficult to separate public interest aspects from pure competition aspects. It is not clear what the term participate will mean in this context but it is suggested that this provision is intended really to apply to hearings. Finally this provision in the 2017 version determines that the Competition Commission may participate in market inquiries but this appears to be clearly wrong as the Competition Commission in terms of the

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[89] Section 43B(3) read with section 54(b), 54(e) and 54(f). See also on hearings in the UK Competition and Markets Authority Supplemental Guidance CMA3 January 2014 para 3.47ff.
[90] See the proposed section 43(3)(cA) which applies section 52(2)-52(3) which allows Tribunal hearings to be inquisitorial but also sets certain basic standards, e.g. that they will mostly have to be public and that rules of natural justice will apply, see supra, 55 which means that hearings will have to follow the same procedure as the Tribunal and 56 which concerns evidence, see infra 5, to market inquiries.
[91] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 Memorandum on the Objects of the Bill para 3.23.8.
[92] GN 1345 in GG 41294 of 1 December 2017 section 43G(1)(f) originally referred to the "presiding member" and "presiding chairman" but this has now been changed to the Commission in the Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 in section 43G(1)(g).
[93] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 in section 43(1)(e) and 43(1)(f) previously proposed section 43G(1) and 43G(2), GN 1345 in GG 41294 of 1 December 2017.
[94] Competition Act section 18(1).

Act should conduct them.[95] The provision in the 2018 version allows officials and staff of the Commission to participate but again is confusing and unnecessary and it shows that there is no clarity on what "participation" is supposed to mean here.

The provisions regarding the rights to obtain evidence in market inquiry hearings is currently surprisingly limited. According to the Act, the Commission (in this context represented by the person presiding at the hearing) may question any person under oath, and it may accept oral evidence or other submissions from any person who participates in the inquiry (although it is not clear what participation will mean here).[96] However, the Act does not currently explicitly allow the Presiding Officer to force witnesses to provide evidence in a hearing.[97] The latest version of the Bill attempts to address this. The Competition Commission will acquire the power to force witnesses to answer questions and even to give self-incriminating answers in market inquiry hearings.[98] However, it extends the protection of witnesses in one respect, they will have the same privileges as in a criminal case.[99]

Furthermore, this demand for transparency and robust investigation must be balanced against the need to protect confidential and sensitive information. Section 43B(3)(a) of the South African Act applies the provisions of confidentiality in enforcement and merger proceedings,[100] to market inquiries. Section 44 allows a person to identify information submitted as confidential. If the description is in writing and specific enough to allow for the identification of the information as confidential, the Commission will be bound by it,[101] unless

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[95] See infra 5 **[last part of this section]**.
[96] Section 43B(3)(d) read with section 54(b), (e) and (f). See also section 43B(3)(e). It applies the criminal provisions in section 72 and 73, that protects the integrity of enforcement proceedings, to market inquiries.
[97] This would be possible only if the witness has been summonsed in terms of section 49A, see supra 5 **[this section]**. Section 56(1)-56(4) which gives the Tribunal the power to force witnesses to give evidence are not currently made applicable to market inquiries. Section 43B(3)(d) currently only applies limited aspects of the hearing rules of the Tribunal to market inquiries.
[98] See the proposed section 43B(3)(cA) Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 which will extend the application of section 56 to market inquiries. Section 56(1) requires that witnesses must answer questions. Section 56(3) allows the Tribunal to force a witness to answer self-incriminating questions although those answers may not be used in criminal proceedings, see section 56(4), which applies section 49A(3), that is to this effect, in this context. The latter provision merely reflects the general legal position.
[99] Section 43B(3)(cA) Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 read with section 56(2).
[100] See the definition of confidential information in section 1. For protection of confidential information in the UK, see Enterprise Act section 244-245. See also generally on confidential information OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 11.
[101] Section 44(1) read with *Competition Commission of South Africa v Arcerlormittal South Africa Ltd* (680/12) [2013] ZASCA 84; [2013] 3 All SA 234 (SCA); 2013 (5) SA 538 (SCA) (31 May 2013) paras 42–43.

the Commission refers the question of confidentiality to the Tribunal or another party requires access to the information and the Tribunal determines that the information is not confidential.[102] When the Commission makes a decision or compiles a report it can then take the confidential information into account. If this would reveal the information the party whose information is used must be given an opportunity to apply to the Tribunal for an order that would protect the information.[103] The OECD report of 2008 similarly states that the FTC tries to disclose information about investigations promptly but that some of the information obtained for these investigations will have to be kept confidential. Information is therefore often aggregated and anonymised.[104] Although market studies are done on an informal basis in Canada, affected parties are often given an opportunity to study them before publication to ensure that confidential information is not disclosed.[105] The Competition Amendment Bill attempts to expand the powers of the Commission in the context of confidential information. The Commission will itself now receive the power to determine whether a claim of confidentiality is valid.[106] The Amendment Bill, also somewhat peculiarly, would allow the Minister of Economic Affairs and any other relevant Minister access to confidential information provided in market inquiries although such a Minister would also have to keep the information confidential.[107] It is suggested that this perhaps goes too far and that the Minister, like any other participant should only be allowed access to non-confidential information.

In some legal systems there are limits on the extent to which information obtained in an inquiry may be used for other purposes such as enforcement proceedings, and to what

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[102] Sections 44(2) and 44(3) and 45.
[103] Section 45A. As the provision is only made applicable to market inquiries by indirect reference it is not clear exactly to what types of actions this provision will apply in the context of market inquiries, but it is probably to decisions and reports.
[104] See also on the limited disclosure of confidential information in the UK Competition and Markets Authority Supplemental Guidance CMA3 January 2014 para 3.34. See for the United States OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by the United States 20 June 2017 DAF/COMP/WP3/WD(2017)19 para 23.
[105] OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 148. See also 17, 34 on the position in Canada but this is common to many jurisdictions. See also generally International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 7.18-7-20.
[106] Oddly the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 does this twice. It continues to require the application of section 44 in terms of section 43B(3)(a) and section 44 is amended to provide for this. But it also adds section 43B(3A) which specifically sets out the powers of the Commission in the context of market inquiries. These two provisions cannot apply together harmoniously and this will hopefully be addressed in the further versions of the Bill.
[107] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 44(2)(a) read with 45(3).

extent such information may be made available to third parties.[108] It may be both unfair and difficult to obtain evidence in market inquiries, for enforcement, especially if an inquiry is used as a fishing expedition.[109] Nevertheless, it is difficult to see why information should be restricted outside of those situations. Hence there are no constraints outside of the protection of confidential information, in South Africa.[110]

Finally, it may be asked if and to what extent market inquiries should be conducted by competition authorities. The Harper Review in Australia accepted that competition authorities do market studies in most jurisdictions[111] and it ascribed an important role to market studies. It felt that the ACCC as the enforcer of competition law had a conflict of interest and therefore was not the appropriate body to do market studies. It proposed the creation of a new policy body, the Australian Council for Competition Policy (ACCP) that would do market studies.[112] The ACCC has opposed this proposal.[113] It has noted that advocacy and engagement with government institutions is an inherent part of the function of competition authorities in most jurisdictions. It concluded that "the identification of important problems and the appropriate response is essential to maximising the benefits for Australians from the resources available to the ACCC".[114] This proposal in the Harper Report has not yet been implemented, but the Government has accepted the proposal for the creation of a new competition policy body, although it seems to read the report as suggesting that the power to do studies should merely be extended to the new body.[115] Nevertheless, it is suggested that, at most, there could be a minor conflict of interests when it comes to studies that concern competition policy. It seems that the Harper Review was particularly concerned with these types of studies.[116] However it is suggested that even these types of studies could be assigned to the Commission without any major concern that it would be influenced by bias. In South Africa

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[108] Carsten Grave & Armin Trafkowski "Sector inquiries by the EC Commission" 2005 *International Energy Law & Taxation Review* 288, 290-291

[109] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 12.13.

[110] See also for a broader perspective OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 11 with reference to OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 211-212.

[111] Ian Harper et al *Competition Policy Review* (Final Report March 2015) 447.

[112] Ian Harper et al *Competition Policy Review* (Final Report March 2015) see recommendation 44-46 p 77-78, 447-451. It was recommended that this council should replace the National Competition Council which was established in terms of the Competition and Consumer Act 2010, see Harper review supra 452, recommendation 43 and 44.

[113] ACCC Submission to the Competition Policy Review – *Response to the Draft Report* (26 November 2014) 87-91.

[114] ACCC Submission to the Competition Policy Review – *Response to the Draft Report* (26 November 2014) 11, 89

[115] Australian Government Response to the Competition Policy Review (2015) 35-36.

[116] Ian Harper et al *Competition Policy Review* (Final Report March 2015) 450 "The Panel notes that the ACCC will continue to investigate particular markets as part of its routine assessments".

the Competition Commission is often involved in the formulation of policy. Their knowledge of competition law and the competition process and their role in applying makes their participation necessary.

Furthermore, jurisdictions differ when it comes to the extent to which these inquiries must be performed by the competition authority itself and the extent to which they may make use of third parties to conduct market inquiries.[117] The first market inquiry in South Africa, the banking inquiry has its origin in a Task Group Report that was commissioned by National Treasury to determine the competitiveness of the banking industry.[118] One of the recommendations of this Panel was that the Commission should "investigate the possibility of a complex monopoly in the governance and operation of the payments system". An economic research firm Feasibility (Pty) Ltd was then requested to research issues around the payment system.[119] The company produced a Research Report titled "The National Payment System and Competition in the Banking Sector" in March 2006. Although the report highlighted the efficiency of the South African payment system, it also exposed some flaws in the system. The Commission decided to hold a public inquiry to investigate these concerns further. Financial constraints dictated that use had to be made of the Commission's infrastructure and some Commission staff were seconded to the inquiry, but it operated separately and independently from the Commission.[120]

In South African market inquiries it is inevitable that special skills from outside the Commission will frequently have to be bought in. It is necessary to increase the level of technical expertise of inquiries, and to create an equality of arms with firms who are able and may have the incentive to purchase expensive sophisticated skills. However, this practice also entails risks. In a small economy such as South Africa it may be difficult to find local experts that have the necessary independence, skills transfers will have to be carefully managed.[121] Where foreign consultants are used an inquiry may also fail to strengthen

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[117] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 7.23-7.26. On Panels in the UK see Richard Whish and David Bailey *Competition Law* 8th ed (2015) 496. See also for Canada OECD Policy Roundtable Market Surveys DAF/COMP(2008)34 (2008-11-21) 17-18, 20; for the Netherlands see OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by the Netherlands 31 May 2017 DAF/COMP/WP3/WD(2017)14 paras 20-21.

[118] Competition in South African Banking (April 2004).

[119] The Banking Enquiry Report to the Competition Commissioner by the Enquiry Panel (June 2008) para 1.3.3.

[120] The Banking Enquiry Report to the Competition Commissioner by the Enquiry Panel (June 2008) paras 1.3, 1.5.

[121] See the problems encountered by the inquiry in *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd* (47505/2013) [2014] ZAGPJHC 186 (22 August 2014).

knowledge in South Africa and it may be more difficult to get skills transfers from those consultants.

Moreover, there may be risks in delegating top level functions in market inquiries. Especially in cases where hearings are held, it may be useful to have judicial skills on the panel that conducts the inquiry. If the Commission has to perform all inquiries, its resources may be stretched to a breaking point. But it also holds risks if third parties are allowed to conduct market inquiries on behalf of the Commission. It may be argued that the extensive powers that exist for market inquiries should only be exercised by the government body specifically entrusted with them.[122] The South African Act appears to have decided this issue in favour of requiring that the *Commission* must undertake a market inquiry. It may be suggested that an inquiry therefore could no longer be farmed out in the manner that was done in the banking inquiry. However, the Commission has continued to appoint a Chairman and panel of experts who are not employees of the Commission in the Healthcare Inquiry. [123] This methodology was apparently justified on the basis that experts were appointed by the Commission to perform the inquiry on its behalf.[124] Nevertheless, the Competition Amendment Bill makes it even clearer that it is the Commission must conduct inquiries and it will probably be even more difficult to delegate the power to do market inquiries once this Bill is enacted. The Amendment Bill will extend the powers of delegation within the Commission. But it will not allow delegation to outside parties.[125] The Bill apparently provides for the appointment of a further full-time or part-time Deputy Commissioner or Deputy Commissioners who will now take responsibility for chairing market inquiries,[126] although the Bill also allows for the additional appointment of suitably qualified experts.[127]

6. Outcomes of market inquiries

Internationally, a wide range of outcomes are envisage for market inquiries. Orthodox competition law is concerned with specific prohibited practices and mergers. However,

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[122] See the comments about the UK in OECD Policy Roundtable Market Surveys DAF/COMP(2008)34 (2008-11-21) 26. But see *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd* (47505/2013) [2014] ZAGPJHC 186 (22 August 2014) para 67 on consequences that would ensue if a firm acted for the Commission.
[123] GG 37062 of 29 November 2013 part 6. See *Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd* (47505/2013) [2014] ZAGPJHC 186 (22 August 2014) para 11.
[124] See the terms of reference GG 37062 of 29 November 2013 part 8 where it is stated that the Panel will report to the Commissioner.
[125] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 proposed sections 22(3A)-22(3C).
[126] Competition Amendment Bill B-23 2018 GN 693 GG 41756 of 5 July 2018 part 3 summary of the provisions of the Bill para 3.1.2 with reference to clause 14. See section 19, and 22(2B). Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 will now add and section 23(2)(b) which will allow the Minister to designate a Deputy Commissioner who will be responsible for conducting market inquiries and this provision will have to be read with the new section 43B(2C).
[127] Ibid.

market inquiries allow competition authorities to obtain comprehensive information about markets and sectors. Without market inquiries this type of broader information will often not be available, especially in developing countries, where up to date information is often not effectively collected by government, industry or academia.[128]

Broader information is useful if not necessary for policy-making, [129] advocacy[130] and enforcement.[131] It serves as a bridge between completion law and policy.

Competition authorities can effectively use the information obtained in market inquiries when they engage with stakeholders.

- In their advocacy and policy engagements with government bodies, the information obtained in market inquiries can be used to address regulatory weaknesses or promote regulatory reforms.[132] Similarly market inquiries can be used to foster co-operation between regulators.[133]

- Inquiries can be used in advocacy engagements with market participants to get them to change current behaviour without having to resort to formal enforcement proceedings or to prevent the emergence of future anti-competitive conduct.[134]

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[128] See generally the benefit of having better information about markets: International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 1.37.
[129] ACCC Submission to the Competition Policy Review *Reinvigorating Australia's Competition Policy* (25 June 2014) 138 with reference to UK CMA; Ian Harper et al *Competition Policy Review* (Final Report March 2015) 447 "However, there are occasions where competition concerns arise within a market that do not fall within the bounds of the law. In these cases, a comprehensive review of the market can help policymakers better understand the competitive landscape and determine whether policy changes are needed".
[130] This is seen as a major benefit of market inquiries International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 1.37.
[131] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 1.4 "either as a lead-in to enforcement action when anticompetitive behaviour is suspected in a sector but competition authorities do not know the exact nature and source of the competition problem; or as a lead-in for competition advocacy, where no violation of competition laws is suspected but it appears that the market is not functioning well for consumers". Although advocacy is perhaps given its proper place other purposes are too narrowly defined.
[132] OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note from Germany 27 June 2017 DAF/COMP/WP3/WD(2017)6 para 9.
[133] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) paras 2, 3, 5; International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) paras 1.4, 1.5.
[134] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 2.

- Inquiries can be used in engagements with consumers to create awareness of market failures or to show that certain markets do not pose competition concerns even though they may be viewed with suspicion by consumers because of features such as rising prices.[135]

Furthermore, information obtained in market inquiries can be relevant to enforcement actions. They allow a competition authority to gain information about sectors that can be used in enforcement and merger cases. The information obtained may serve as background for future reference in enforcement and merger cases.[136] However, it may be applied directly to conduct specific enforcement cases.[137]

The determination of priorities and the establishment of some priority sectors often precede market inquiries. However, the ICN market studies report on market inquiries, has stated that authorities see the enhanced ability to identify market failures and do targeted enforcement as major benefits of these inquiries.[138] Inquiries therefore also allow competition authorities to establish priorities.[139] This will be particularly important in new or fast-changing markets.[140] Moreover, market inquiries may also indicate to competition authorities how they could best spend their limited resources for advocacy.

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[135] OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 8; OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) paras 2, 3, 101-103; International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 1.5 although these two sources do not see it as an advocacy issue; ACCC Submission to the Competition Policy Review *Reinvigorating Australia's Competition Policy* (25 June 2014) 138.
[136] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 3.
[137] See infra 6.1 and for the further discussion of the mechanism by which this is done in South Africa. OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 4; OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note from Germany 27 June 2017 DAF/COMP/WP3/WD(2017)6 para 2. But see the limits to this discussed supra 4 **[operation of market inquiries and the question whether information gained in market inquiries can be used for enforcement]**.
[138] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 1.37.
[139] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 4.13-4.14 on the importance of priorities.
[140] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 1.5. See further on having information in fast-changing markets.

Furthermore, market inquiries may be used to determine the effectivity of interventions such as merger decisions and enforcement actions[141] as well as of advocacy efforts.[142] The Competition Amendment Bill in South Africa will specifically grant the Commission in South Africa the power to study the impact of decisions by it the Tribunal or Appeal Court.[143] However, broader market inquiries will also remain useful for this purpose.

Outside of the information that is obtained in a market inquiry, the contacts made during market inquiries, that are not as adversarial as enforcement actions but not as informal as general advocacy engagements, will be useful to achieve an effective competition law and policy. Interactions with officials, firms, customers and suppliers in inquiries may create contacts with them, which will allow them to understand how the competition authority views the sectors in which they operate. It may convince parties to provide the authority with leads, lodge complaints or bring leniency applications.[144] It may also create trust that would promote more effective advocacy.[145]

6.1. Rules regarding outcomes of market inquiries[146]

The South African Act requires that market inquiry be completed with the publication of a report in the Government Gazette and its submission to the Minister, with or without recommendations.[147] Although the Act does not limit the types of recommendations that may

[141] OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) paras 5, 101-104.
[142] OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note from Germany 27 June 2017 DAF/COMP/WP3/WD(2017)6 para 10 where it is stated that the effectiveness of legislative interventions may also be tested by means of these inquiries.
[143] Section 21A, GN 1345 in GG 41294 of 1 December 2017; Background Note GN 1345 in GG 41294 of 1 December 2017 23-24.
[144] OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 20-21; International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 1.5.
[145] See however infra 6.2. As the implications of market inquiries become more formal and remedies become more expansive, these benefits may be lost.
[146] For a very good summary of the ways in which outcomes are regulated in different systems, see OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) part 6.
[147] Competition Amendment Act 1 of 2009, adding section 43C(1). The report must meet the same formality requirements as a report submitted in terms of section 21(3) (section 42C(2)). Section 21(1)(k) requires that the Commission must "over time, review legislation and *public regulations*, and report to the *Minister* concerning any provision that permits uncompetitive behaviour". Section 21(2) inter alia establishes that Commission must "enquire into and report to the *Minister* on any matter concerning the purposes of *this Act*". In terms of this section 21(3), reports by the Commission in terms of section 21(1)(k) and reports in terms of section 21(2) that deals with a substantial aspect regarding the purposes of the Act must be tabled by the Minister in the National Assembly, within a certain time after it has been

be made, it specifically mentions recommendations for new or amended policy, legislation or regulations and recommendations to other *regulatory authorities* in respect of competition matters.[148] It is clear that the Act envisages engagement with government institutions for purposes of addressing concerns discovered in a market inquiry. This reflects international practice. It has been stated that "recommendations addressed to regulators and policymakers are among the most common outcomes of market studies".[149] Although the Act does not specifically mention it, recommendations to change conduct may also be made to firms. Recommendations will not be binding, but the Commission probably has the power to conclude agreements with firms to give their undertakings binding force. However, contravention of these agreements will not be contraventions of competition law and there perhaps is a need to provide for this explicitly.[150]

Furthermore, a market inquiry can lead directly into enforcement proceedings.[151] The Act in South Africa provides mechanisms for taking enforcement action after a market inquiry.[152] Normally, enforcements of the Act will consist of four steps. The first three concern the Commission. It will initiate a complaint or receive one that is submitted by a complainant,[153] investigate the complaint[154] and then refer it to the Tribunal for adjudication or allow a complainant to refer it.[155] Final decisions regarding contravention of the Act will have to be made by the Tribunal. Where a complaint is settled by the Commission it will only have legal

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received from the Minister. For the broadly similar approach in the UK see Enterprise Act section 136, although the publication requirements there are less formal.

[148] Competition Amendment Act 1 of 2009, adding section 43C(1). See section 1 of the Competition Act for a definition of regulatory authority.

[149] For a very good summary of the outcomes that can result from market inquiries, see OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018)6 para 83.

[150] See on agreements with firms OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018)6 para 97 where it is stated that some agreements may be concluded on the basis that the competition authority would otherwise take an enforcement actions against a firm.

[151] OECD Policy Roundtable *Market Surveys* DAF/COMP(2008)34 (2008-11-21) 7.The International Competition Network Advocacy Working Group *Advocacy and Competition Policy* (Naples Italy, 2002) 25 has defined advocacy as "those activities conducted by the competition agency related to the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition". See also OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018)6 para 6 on when competition authorities should rather proceed with direct enforcement actions.

[152] See also supra 5 on the extent to which evidence from a market inquiry can be used in enforcement proceedings.

[153] Section 49B(1) and (2).

[154] Section 49B(3) and 49B(4).

[155] Section 50 and 51.

effect once it is confirmed by the Tribunal in a consent order.[156] The Act determines that the Commission may on the basis of information discovered in a market inquiry:[157]

"a) initiate a complaint and enter into a consent order with any respondent … with or without conducting any further investigation;

(b) initiate a complaint against any firm for further investigation;

(c) initiate and refer a complaint directly to the Competition Tribunal without further investigation."

The Commission may therefore follow the full or an abbreviated enforcement procedure, where it obtains evidence of contraventions of the Act during an inquiry, albeit that the ordinary jurisdictional requirements for initiating complaints will apply here.[158]

Nevertheless, the relationship between market inquiries and enforcement procedures in South Africa is not worked out carefully enough. As previously mentioned, the South African Act allows third parties to submit complaints that the specific competition prohibitions have been contravened, with the Commission. The Commission will prosecute such complaints unless it issues a notice of non-referral, in which case the complainant may itself prosecute the contravention before the Tribunal.[159] If the Commission considers a complaint and determines that the Act has been contravened it must take the complaint further by investigating it and referring it to the Tribunal.[160] However, the Commission has refused to prosecute complaints that concerned sectors that are subject to open market inquiries.[161] This appears to be in conflict with the law. Although the adjudicatory bodies have not yet pertinently decided the issue,[162] they have suggested that these refusals could be reviewed. At least it is clear that where complainants take complaints further after refusal by the Commission, proceedings will not be stayed pending the outcome of an inquiry. In these situations it was found that the nature of market inquiries is different from enforcement proceedings and that consumers should not endure further harm just because a market

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[156] Competition Act section 49D.

[157] Section 43C(3). It is proposed that this will become Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43E(3).

[158] Sutherland & Kemp *Competition Law of South Africa* (Loose Leaf) 11.6.5.

[159] Competition Act section 51(1) read with section 50.

[160] Competition Act section 50(2)(a).

[161] Except for the cases that are mentioned elsewhere the following cases also mentioned that the Commission had issued notices of non-referral where complaints matters concerned issues that were subject to market inquiries: *Council for Medical Schemes v The South African Paediatric Association and The South African Medical Association* 018580, 018598, 018788 01/12/2014; *South African Medical Association v Council for Medical Schemes* CRP065Jul13/DSC197Dec16 21/04/2017.

[162] *South African Medical Association v Council for Medical Schemes* CRP065Jul13/PIL001Apr16 15/08/2016 para 15 where it was suggested that a review application was available to the complainant.

inquiry is pending. There is no risk of conflict of findings as the Tribunal is the only institution with adjudicatory powers over complaint proceedings.[163]

Moreover, the Act states that the Commission can "take any other action within its powers in terms of this Act recommended in the report of the market inquiry".[164] This probably does not concern enforcement actions but it rather refers to advocacy activities, although it perhaps may be argued that the Commission may be able to apply for certain remedies such as interdicts, without having to go the route of complaint proceedings.[165]

Finally, the Act states that the Commission may take no enforcement action at all.[166] This provision is somewhat perplexing. It is unclear why the legislator felt the need to explicitly provide for this. Perhaps the Act foresees that the Commission should specifically make a decision not to take steps and that follow-up steps are the natural outcome of enforcement.

6.2. Proposed amendments to ensure that market inquiries have effective outcomes

It would therefore appear that the current market inquiry regime does not provide a unique enforcement mechanism in the context of market inquiries. It merely allows for non-binding, to follow on a market inquiry. South Africa has this in common with most other jurisdictions.[167] The Competition Amendment Act 1 of 2009 did not drastically expand the powers of the Commission to address uncompetitive conduct and market structures discovered in market inquiries. In the *Shoprite Checkers* case[168] the Tribunal confirmed that: "Market inquiries are not adjudicative processes nor are they in any way determinative of issues or rights of parties. The outcome of a market inquiry is recommendatory in nature.

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[163] *Council for Medical Schemes v South African Medical Association* [2015] ZACAC 6 (11 December 2015) para 38 "granting a stay in circumstances where harm to consumers would continue due to contraventions of the Act was undesirable. The Act required the Tribunal to deal expeditiously with alleged anti-competitive conduct in the interests of consumers"; *South African Medical Association v Council for Medical Schemes* CRP065Jul13/PIL001Apr16 15/08/2016 para 16 where it was stated "the fact that there is an Inquiry underway in the rising costs of healthcare in general ought not to be a basis for delaying the enforcement of specific allegations of anti-competitive conduct and the addressing of possible harm to consumers due to contraventions of the Competition Act"; *Shoprite Checkers Proprietary Limited v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) [2016] ZACT 74 (1 September 2016) paras 21-22.

[164] Section 43C(3)(d). It will become Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43E(3)(d).

[165] See the power of the Tribunal to grant interdicts, section 58(1)(a). It may be possible for the Commission to apply for an interdict without following the formal complaints procedure.

[166] Section 43C(3)(e). It will become Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43(E)(3)(e).

[167] For a very good summary of the outcomes that can result from market inquiries, see OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) part 6.

[168] *Shoprite Checkers Proprietary Limited v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) [2016] ZACT 74 (1 September 2016) paras 20-21

Furthermore, the issues to be determined by the complaint referral and the market inquiry are not the same."

However, one of the core objective of the Competition Amendment Bill is to change this. The new provisions on enforcement will not be set out in detail here. Only, the outlines of the proposed enforcement mechanism and the problems with it, will be described.

The Competition Amendment Bill provides that the Commission must decide whether a feature or combination of features of every relevant market investigated impedes, restricts or distorts competition.[169] As with initiations it is not quite clear why the legislator does not simplify the provision by using the terms "adverse effect to competition". Again it is probably due to the influence of the UK Enterprise Act.[170] The legislator is aiming to use market inquiries to address structural problems in the South African economy. It therefore also specifically mentions that the Commission must have regard to adverse effects on small businesses or firms controlled by historically disadvantaged persons.[171] This means that the Commission will enter a completely different realm once the market inquiry provisions are amended. Under the current regime the Commission is not forced to make decisions about adverse effects on competition. Under the new regime this becomes the key outcome of a market inquiry. Decisions about the market will have to be made with reference to a specific set of criteria, that are related to but not quite the same as the criteria that will have to be considered when prohibited practices or mergers are considered.

If the Commission decides that there is an adverse effect on competition, in the manner described previously, it must determine two issues.[172] First, it must decide whether and if so what recommendation it must make to any Minister, regulatory authority or affected firm. A recommendation must be that the addressee should take steps to remedy, mitigate or prevent the adverse effect.[173] Secondly, the Commission must determine the enforcement

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[169] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 section 43C(1). Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43C(1) used the term "prevent" instead of impede, see the discussion of this change supra 4. See the description of "features of the market" in section 43A(3).

[170] This provision has been reworded somewhat in the Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 which makes it even more unnecessarily elaborate than the 2017 Bill. The equivalent provision in the Enterprise Act is section 134(1). See supra 4 on the reason for the use of this terminology in the UK.

[171] Section 43C(2).

[172] The UK equivalent in Enterprise Act section 134(4) is not as strictly phrased as its South African equivalent. It does not require that the CMA must take any of the steps set out. This is somewhat odd in the light of the strict wording of section 138(1) and 138(2). Richard Whish and David Bailey *Competition Law* 8th ed (2015) 497 with reference to 1104/6/8 *Tesco Plc v Competition Commission* [2009] CAT 6 para 57, nevertheless state that it is unlikely that no remedial action will be taken.

[173] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 sections 43C(3)(b) and 43C(3)(c). See the definition of regulatory authority in section 1 of the Competition Act and the proposed amendment of section 82(1).

actions that it must take in terms of section 43D.[174] If this provision is interpreted strictly it will mean that the Commission will always have to impose a remedy in terms of section 43D for every adverse effect found. Of course the Commission will be able to balance the positive and negative aspects of potential interventions and it will not be allowed to take steps that will do more harm than good, but it will have to manufacture some or other response even if it comes to the conclusion that that the feature which has an adverse market effect still produces the best possible outcomes in the circumstances. The drafters of the Competition Amendment Bill in 2017 made it clear that this was their intention. They included the duty to take steps in order to impose "discipline" on inquiries.[175] But it is concluded that this is not how the Act should be interpreted, as it would create more problems than it will solve. In the 2018 version of the Bill the legislator apparently realised this as section 43D(1) itself has been amended to determine that the Commission "may" rather than the previous "must" take steps to address adverse effects in terms of this provision.[176] The UK Enterprise Act section 138(2) determines that the Competition Authority in that jurisdiction "shall" takes steps to address adverse effects on competition[177] and even this strong language is apparently interpreted merely to mean that the panel conducting the authority has a duty to consider whether a remedy which is reasonable and practicable can be imposed.[178]

So what remedies are available in terms of section 43D? On the face of it, the provision looks innocuous. It determines that:
"Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition".[179]

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[174] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43C(3) in the opening part and section 43C(3)(a).
[175] Memorandum on the Objects of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 68. See also Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 Memorandum on the Objects of the Bill para 3.23.1. Para 3.23.4 states that 43D places a duty on the Commission to Act.
[176] Section 43D(1) of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 used the term "must". The Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 replaced it with may. See also the Memorandum on the Objects of the Bill para 3.23.1 which merely states that the Commission must expressly consider and decide issues and 3.23.3 which is to the same effect.
[177] See also on this provision Richard Whish and David Bailey *Competition Law* 8th ed (2015) 499.
[178] Competition and Markets Authority Supplemental Guidance CMA3 January 2014 para 4.1; Christian Ahlhorn & Daniel Piccinin "Between Scylla and Charybdis: Market Investigations and Consumer Interests" in Barry Rodgers *Ten Years of UK Competition Law Reform* 173-174. See Centre for Competition Law and Economics *Comments on the Competition Amendment Bill* (2018) www.ccle.sun.ac.za 40-41. The relationship with section 134(4) in the UK in particular differs from the relationship in SA with section 43C(3).
[179] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 the previous version, the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43D(1) also referred to government policy.

It perhaps could be read to mean merely that the Commission must use its existing powers to address adverse effects on competition. However, on closer reading it appears that that this new provision will inter alia give the Commission the power to require actions that will address adverse effects on the market. The following reasons can be given for this conclusion: 1) The provision would be redundant and repetitive if it only asserted that the Commission should exercise the powers it already has and the relationship between 43D(1) and 43C(3)(b) would be difficult to understand; 2) Section 43D(2) states that one of the powers which the Commission will now have in terms of section 43D(1) is the power to recommend to the Tribunal to order that a firm must divest of a business or assets, which clearly shows that the Commission's powers are extended as this power did not exist before;[180] and 3) The provision allows for appeals from decisions made in terms of section 43D(1) which would not have been necessary if the Commission were only to exercise existing powers, as those powers would have been subject to its own constraints.

The initial Competition Amendment Bill of 2017 clearly does not properly constrain the power of the Commission to grant binding orders. It refers to three limitations on the section 43D(1) powers of the Commission. First, the Commission cannot exercise its powers in a manner that conflicts with any law.[181] Secondly, the Commission must "consider [the order] to be reasonable and practicable in order to remedy, mitigate or prevent the adverse effect on competition".[182] Thirdly, actions taken in terms of section 43D must accord with a decision of the Competition Commission in its market inquiry report that there are certain adverse effects on competition, although the Commission may depart from this requirement if it has a justifiable reason to do so.[183] Although a person who is materially and adversely affected by a decision of the Commission may appeal a determination made in terms of section 43D to the Tribunal,[184] these weak limitations would leave such a party with limited protection.[185] In this respect the 2018 version of the Bill is a considerable improvement. It now requires

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[180] Read with section 60(2)(c).
[181] In the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 43D(1) reference was also made to "government policy but this has been removed in the Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018.
[182] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43D(1).
[183] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43D(3). Moreover, it determines that this restriction will not even apply where circumstances have changed. See the equivalent UK provision in the Enterprise Act 138(3).
[184] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017 section 43F. The Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 allowed an "aggrieved person" to bring this remedy.
[185] The Enterprise Act provides that only the orders set out in Schedule 8 and "supplementary, consequential or incidental provision" as is considered appropriate, may be granted. However, this schedule is also broadly formulated. See on this power Competition and Markets Authority Supplemental Guidance CMA3 January 2014 para 4.10ff. See also Christian Ahlhorn & Daniel Piccinin "Between Scylla and Charybdis: Market Investigations and Consumer Interests" in Barry Rodgers *Ten Years of UK Competition Law Reform* 173-174.

merely that “the action must be reasonable and practicable”. Actions can now be judged according to objective criteria. The Bill also sets out a long and somewhat convoluted set of factors that will have to be taken into account for this purpose.[186] The fairness of the coercive power of the Commission will further be promoted by the new proposal in the 2018 version of the Competition Amendment Bill which requires that the Commission must consult with parties that are materially affected by remedial actions in terms of section 43D(1) and 43D(2).[187]

However, some concerns regarding the section 43D powers remain.
- The new powers provided in South Africa are still in some respects inaccurately formulated, especially when they are compared to the equivalent provisions in the United Kingdom Enterprise Act,[188] which served as the inspirations for the introduction of these wide powers in South Africa.[189] There is no space to list all the drafting flaws but most importantly, the operative provision, section 43D, does not properly distinguish steps that do not involve coercion or require consent of parties who have to act, from those steps that compel parties to act.[190] This will lead to unnecessary litigation and disputes. First, there is a need to give a specific name to coercive actions granted in terms of this provision, to distinguish it from non-binding recommendations or steps that parties have agreed to take. In the United Kingdom they are referred to as enforcement orders.[191] The 2018 version of the Bill in some places calls these orders “remedial actions” but this or the preferable term enforcement actions should be used more consistently and in the core parts of section 43D.[192] Secondly, there is a need to set out the consequences of non-compliance with coercive orders in terms of section 43D(1). Perhaps it should be treated like any contravention of the standard competition law prohibitions.[193] Finally it is not clear whether Ministers, other regulators or government departments may be coerced to take certain steps in terms of this provision. There are no clear indications that actions in terms of section 43D cannot be taken against

[186] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 section 43D(4).
[187] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 section 43E(4) and (5) see supra 5.
[188] Especially the Enterprise Act sections 134(1), 134(4), 138(2), 161.
[189] See the Centre for Competition Law and Economics *Comments on the Competition Amendment Bill* (2018) 39-42 www.ccle.sun.ac.za. See also section 43E(1) which is not aligned with section 43C and 43D.
[190] Compare the more comprehensive Enterprise Act section 138(2) read with section 159 and 161.
[191] UK Enterprise Act section 164.
[192] Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 sections 43D(4)(d) and 43E(4).
[193] Currently there is a proposed amendment to section 58(1)(a) which allows for orders in appeals to the Tribunal in terms of section 43F, but there is no remedy for contravention of actions taken in terms of section 43D. it could perhaps be argued that these decisions should be treated like court orders in terms of section 64.

these parties.[194] If so, it might create some very difficult conflicts between government bodies and concurrent regulators.

- Perhaps more can be done to avoid having to take coercive action. It is suggested that undertakings by parties to take steps to address adverse effects on competition will be particularly useful and effective in resolving problems regarding the operation of markets.[195] In reality coercive remedies should not be used frequently but should rather serve to give the Commission some bargaining power in getting parties to agree to the steps that should be taken.[196]

- The new powers of the Commission in market inquiries are not properly aligned with its powers to prosecute contravention of competition law prohibitions in terms of the more traditional complaint procedure.[197] Although there are already problems with this issue in the current regime,[198] these difficulties will increase exponentially if the proposed changes to it are accepted. If the Commission is given these wide enforcement powers in market inquiries, why would it go to the trouble of going through the rigorous process of pursuing contraventions of competition law before the adjudicatory bodies for competition law? One answer to this is that administrative fines can only be imposed in these prosecutions.[199] But the other remedies that may be imposed for breaches of competition law could become redundant. It is conceivable that the Commission could in future prefer to enforce competition law by means of market inquiries, even in those cases that concern clear contraventions of traditional competition law. But this would be a retrograde step. It is dangerous and in many ways inaccurate to view the history of South African competition law as a continuous process. After apartheid a new Competition Act that made a clear break with the past, was devised. This Act replaced many of the discretionary powers which the competition authority had before.[200] The thrust of the new Act was that the law should consist of clear norms and that contravention of those norms should be prosecuted by the Commission. The expanded market inquiries provision therefore would mark a partial return to a competition law based on ad hoc discretionary powers. It may be argued that this is acceptable as the supreme

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[194] Section 43C(3) contrasts actions in terms of section 43D and recommendations to these types of persons in section 43C(3)(a) and 43C(3)(b) but the latter provision also includes affected firms which means that it does not exclude parties from the application of 43D.
[195] See the UK Enterprise Act section 159-160.
[196] It may even be useful to allow for the operation of consent orders in terms of section 49D in this context.
[197] See the comments on the most appropriate remedies , OECD Directorate for Financial and Enterprise Affairs Competition Committee *Guide on Market Studies for Competition Authorities* DAF/COMP/WD(2018)26 (23 May 2018) para 6.
[198] See supra 6.
[199] Richard Whish and David Bailey *Competition Law* 8th ed (2015) 489 points out that sanctions for past conduct cannot be obtained in market investigations in the UK but the line between sanctions and remedies to address them may be vague.
[200] Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (Loose Leaf) 3.2.2-2.3.3.

sanctions for contraventions of competition law, namely administrative penalties and criminal convictions cannot be imposed in market inquiries. However, the Competition Amendment Bill makes it clear that the Commission may recommend that a firm divests some of its assets in the wake of a market inquiries,[201] which is an extreme remedy that can be granted only in carefully delineated circumstances, in cases that concern contraventions of ordinary competition law.[202] Although divestiture is commonly required as conditions for mergers and in cases where mergers are implemented before approval (so-called gun-jumping),[203] this is a rather different context. In the first case merging parties still have the choice whether they want to proceed with a merger on this basis or not in the second the status quo ante before the contravention must be restored. It is therefore suggested that the market inquiry provisions should be aligned with the Commission's enforcement powers. The Commission should only be allowed to grant conduct orders to address situations that would not entail contraventions of competition law prohibitions or if the ordinary powers that are available to address contraventions are not adequate. Where contraventions of competition prohibitions are discovered, they should be prosecuted by means of a normal or abbreviated procedure as envisaged in terms of the Competition Amendment Act 2009.[204] The CMA in the United Kingdom will not conduct market investigations where an adverse effect on competition can be addressed by means of ordinary enforcement proceedings, even though the law does not require it.[205] - Finally, the market inquiry provisions in the South African Act and the Competition Amendment Bill are intended to promote a wide range of goals and to address a wide range of structural problems in the economy.[206] The Competition Amendment Bill states that the Commission must have regard to adverse effects on small businesses or firms controlled by historically disadvantaged persons[207] and that it must have regard to the need to achieve as comprehensive a solution as is reasonable practicable.[208] Market inquiries have undoubted benefits but they also have definite draw-backs. Market inquiries are

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[201] Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017, section 43D(2) read with section 60(2)(c).
[202] Competition Act section 60(2)(b).
[203] For this remedy in the context of gun-jumping, see section 60(1).
[204] See supra 3 **[Initiation: the discussion of the fact that many competition authorities will only initiate proceedings if there is not suspicion of a particular contravention]**.
[205] Richard Whish and David Bailey *Competition Law* 8th ed (2015) 494 with reference to OFT Guidance Market Investigation References: Guidance About References under Part 4 of the Enterprise Act OFT 511 March 2006 para 2.3.
[206] The UK apparently follows a narrower approach, see Christian Ahlhorn & Daniel Piccinin "Between Scylla and Charybdis: Market Investigations and Consumer Interests" in Barry Rodgers Ten Years of UK Competition Law Reform 174, it focuses on consumer interests.
[207] Section 43C(2) of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017.
[208] Section 43C(4) of the Competition Amendment Bill GN 1345 in GG 41294 of 1 December 2017. This provision is a copy of the UK Enterprise Act section 134(6) and 138(4).

extremely resource intensive[209] and it may be difficult to determine the boundaries of inquiries that aim to meet these goals and to establish and interpret the facts that are necessary to support imposing sweeping remedies that would transform entire sectors of the economy. This perhaps is not a strong enough reason to reject the proposed amendments of the market inquiry provisions. But too much should not be expected of the outcomes that can be achieved by applying them. The Commission must be careful when it makes use of these provisions. It is likely that coercive actions in terms of section 43D, if used to its full extent will also - and perhaps even to a greater extent than the complex monopoly provisions - result in endless litigation that will include constitutional challenges while it will undermine the creditability of the Commission.[210] Due to these risks, the Commission should use its market inquiry powers sparingly.

South Africa will not be unique if it provides binding powers to the Commission in market inquiries. Some competition authorities, notably the CMA in the United Kingdom can grant binding orders in market investigations.[211] But this is relatively rare. Although the Australian ACCC has argued for a strengthening of their market study powers in the Harper Review that was conducted from 2013-2015, they have not agitated for powers to take binding action.[212] Despite the UK precedent, the system created by the Competition Amendment Bill is by international standards an extraordinary one. The South African competition law enforcement system is quite different from the one that exists in the United Kingdom. The Commission unlike the CMA in the UK is mostly a prosecutorial body.[213] It prosecutes contraventions before the adjudicatory bodies.[214] Adjudicative decisions are made by the Tribunal and Competition Appeal Court. There are only two minor exceptions.[215] The Commission evaluates small and intermediary mergers and it may provide exemptions from the prohibitions of anti-competitive conduct.[216] The CMA is a typical European competition

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[209] OECD Directorate for Financial and Enterprise Affairs: Competition Committee Working Party No. 3 on *Co-operation and Enforcement Methodologies for Conducting Market Studies* – Note by the European Union 13 June 2017 DAF/COMP/WP3/WD(2017)20 para 4.
[210] See the discussion of the complex monopolies provision section 10A of the Competition Amendment Act supra 2.
[211] International Competition Network Advocacy Working Group *Market Studies Project Report* (Presented at the 8th Annual Conference of the ICN Zurich, June 2009) para 8.17; 489. This will not be possible in UK market studies, see Richard Whish and David Bailey *Competition Law* 8th ed (2015) 488-489.
[212] ACCC Submission to the Competition Policy Review *Reinvigorating Australia's Competition Policy* (25 June 2014) 139, 449-450.
[213] The exceptions are exemption decisions in terms of s 10 and decisions on small and intermediate mergers in terms of section 13 and 14.
[214] See the description above *Shoprite Checkers Proprietary Limited v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) [2016] ZACT 74 (1 September 2016) para 22.
[215] Competition Act sections 58-60.
[216] Competition Act sections 10 and 14. The argument in the Memorandum of the Bill Competition Amendment Bill B-23 GN 693 GG 41756 of 5 July 2018 para 3.20.4 that this is

authority. It also adjudicates competition matters. It is probably not appropriate to entrust the Commission, which is a prosecutorial body with power to impose remedies in the manner proposed. This flaw is not adequately remedied by the provision of an appeal to the Tribunal.[217] Parties affected will, on appeal, already be confronted by a decision against them and the Commission may not be able to defend its decisions before the Tribunal as it will have acted as adjudicator. Perhaps the schemes used for applications to divest and the scheme that was devised for enforcing the failed complex monopoly provision should be extended more widely.[218] The Commission should only be allowed to apply to the Tribunal for orders to force persons to address adverse effects on competition.

7. Conclusion

Market inquiries can be an effective tool for promoting market competition. However, it requires a careful legal framework and cautious consideration of the role that market inquiries should play.

Clarity will become particularly important once the powers of the Commission in market inquiries are expanded by the Competition Amendment Bill. Perhaps it would be advisable to follow the example of the UK of issuing comprehensive guidelines that describe how market inquiries should be conducted.[219] A fine balance should be struck between the broad framework rules set out in the Act and the more detailed procedural rules that can be set out in Guidelines or regulation in order to ensure some flexibility.

A competition law system that enforces clear competition laws should not be supplanted by the market inquiry regime. But in a jurisdiction such as South Africa where there is a dire need for structural reforms of the economy, it may also be necessary to expand the powers of competition authorities to conduct market powers, to allow them to find holistic solutions that promote a competitive economy and allows proper access for all. The limits of the competition law regime to do this through market inquiries should also be kept in mind. The competition authority must refrain from becoming a mere political instrument, which makes arbitrary decision on the basis of incomplete or even flimsy facts to achieve drastic changes to the economy. Like many developing countries, many institutions in South Africa are dysfunctional. In contrast, the Commission has acquired a reputation as a proactive and competent regulator. It is understandable that there is a temptation to grant the Commission

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the same as the power of the Commission in mergers is incorrect. The Commission only decides intermediate mergers.

[217] Compare the broad review powers that exist under the Enterprise Act section 179.

[218] See supra **[this part]**.

[219] See UK Guidelines on Market Investigations: Their role procedures, assessment and remedies C3 (revised) (April 2013); Competition and Markets Authority Supplemental Guidance CMA3 January 2014; OFT Guidance Market Investigation References: Guidance About References under Part 4 of the Enterprise Act OFT 511 March 2006; OFT Market studies Guidance on the OFT Approach OFT 519 June 2010.

further powers in order to expand its ability to remedy the many and pressing ills of the South African economy. But the Commission and the competition law regime cannot be the panacea for all the ills of the South African economy. Moreover, the cost of market inquiries both financially and in terms of other resources should not be overlooked. If comprehensive power such as those proposed in South Africa are introduced, there is the danger that the competition authority may become pre-occupied with one or two inquiries while other contraventions of competition law may be neglected.

Comparison with the market inquiry regimes of other jurisdictions, especially the UK, has played an important role in the development of this area in South Africa. The UK is probably the gold standard for market inquiries. Still care must always be taken when rules are taken over from other jurisdictions. It appears that the transplanting of rules from the UK into South Africa was not always done with sufficient care.

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