

Submissions on market inquiries

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Market Inquiries Conducted

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| <p>Healthcare Inquiry</p> | <ul style="list-style-type: none"> - GG 37062 of 29 November 2013 - Revised GG 40480 of 9 December 2016 - Many extensions of the date of publication of recommendation and report | <ul style="list-style-type: none"> - Provisional Findings and Recommendations Report (Provisional Report) will be published on 5 July 2018 |
| <p>LPG Inquiry</p> | <ul style="list-style-type: none"> - GG 37903 15 August 2014 - Revised GG 40307 28 September 2016 | <ul style="list-style-type: none"> - Finalized on 31 March 2017 - Minister 24 April 2017 - Government Gazette 28 April 2017 |
| <p>Land Based Public Passenger Transport</p> | <p>GG 40837 10 May 2017</p> | |
| <p>Data Services Inquiry</p> | <p>GN 849 GG 41054 18 August 2017</p> | |
| <p>Retail Market Inquiry</p> | <p>GG 41512 23 March 2018</p> | |

Broad comments about the value of market inquiries

Section 43A

- Although this point is made with regard to section 43A(2) but it extends to section 43B(1)(b)(i) and 43C(1)
 - The Act defines “adverse effect on competition Commission” by stating that it will occur where the structures of the market “impedes restricts or distorts competition”

Section 43A

- It then re-uses impedes restricts or distorts in sections 43B(1)(b)(i) and 43C(1)

Section 43A

- However it is proposed that the drafting can be improved as follows
 - The phrase “adverse effect on competition” is used only in section 43C(2) and 43D(1) but it should for consistency replace the phrase currently used in 43B(1)(b)(i) and 43C(1)
 - The phrase impedes restricts distorts not appropriate for SA we normally use “preven or lessen”
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Section 43B

- Section 43B(1)(b)
 - Commission can initiate “if it has reason to believe” that the features of the market “impedes restricts or distorts competition” (s 43B(1)(a))
 - the Minister may initiate market inquiries but not subject to this constraint

Section 43B

- Section 43B(1)(c)
 - Notices must be published 20 days before commencing an inquiry but it is not clear when an inquiry will commence

Section 43B

- Section 43B(2A)
 - Before publishing a Notices the Commission must notify a “relevant regulatory authority” but not clear which ones will be included
 - This should be fixed with reference to section section 82(1) compare section 43G(1)(d)

Section 43B

- Section 43B(2B)
 - This provision provides that the Commission must appoint a Deputy Commissioner designated in section 23(2)(b) as chair
 - Minister designates in terms of section 23(2)(b)

Section 43B

- Two Problems
 - Unnecessary political intervention
 - Creating the capacity to address all market inquiries

Section 43B

- Section 43B(3)(cA)
 - This is a necessary provision that mostly determines how hearings will be conducted and evidence will be obtained
 - it should be combined with section 43B(3)(d) that currently deals with the issue
 - it tries to cover evidence obtained in terms of section 49A but this is already covered in section 43B(3)(c)

Section 43B

- Section 43B(3A)
 - This provision deals with confidential information however this is already adequately covered in section 44 and section 44 is made applicable here by section 43B(3)(a)
 - This provision should simply be removed especially in the light of the improvements made to section 44
 - If not section 43B(3)(a) should be removed

Section 43B

- Section 43B(4)
 - This provision sets maximum time limits for market inquiries and these time limits are quite strict 18 months with one reasonable extension by the Minister. But two problems
 - This may be too strict perhaps two years more realistic
 - It is not clear when the time period will start to run perhaps it should be from the time of the notice in section 43B(2)(c)

Section 43C

- Section 43C(1)(b) determines that the Commission will determine procedure but the procedure is now relatively strictly fixed by section 43B(3)(cA).
 - Perhaps this provision should be toned down

Section 43C & 43D

- Section 43C and 43D will now allow the Commission to take coercive and non-coercive action in market inquiries
- Non-coercive will take the form of recommendations in terms of section 43C(3)(b) and 43C(3)(c) and coercive actions will be taken in terms of section 43D
- Section 43D is welcomed. This provision will be central to the effective functioning of the new market inquiry function

Section 43C & 43D

- Section 43B(3)(b) apparently deals with recommendations that will be non-coercive.
 - It includes Minister, Regulatory authority and an affected firm but perhaps it should not be limited to these
 - Perhaps some jurisdictional test for recommendation that is not as strict as section 43D is required

Section 43C & 43D

- The Act should more effectively allow the Commission to reach agreements on the steps that they should take to address adverse effects on competition
 - These agreements should bridge the gap between coercive and non-coercive actions
 - This is currently not dealt with in section 43C, 43D and although there is some attempt to do address it in section 49D which deals with settlements, refinement will be needed to achieve this effectively

Section 43D

- It perhaps should be made clearer that section 43D provides for coercive actions
 - In the UK they are called “enforcement orders”
 - In other parts of the Bill they are called “remedial actions”

Section 43D

- Section 43D(1) read with 43D(2) and section 60(2)(c) would allow the Commission to recommend to the Tribunal to make a divestment order again this power is welcomed but it requires some work

Section 43D

- Perhaps the term recommendation should not be used to avoid confusion with section 43C
- At the moment the recommendation provision may read to operate in the same way as section 14A read with section 16 in the context of mergers but that would lead to trial and rehashing

Section 43D

- Perhaps the market inquiry power in section 43D must be better aligned with normal enforcement actions.
 - It should not replace enforcement of more specific provisions

Section 43D

- Two proposed solutions:
 - Just set out that this is one of the factors that have to be taken into account in determining whether action can be taken in terms of section 43D(4)
 - Only allowing enforcing of prohibited conduct by means of normal enforcement proceedings (see section 43E(3)). Preferable but perhaps too late for that
- Suspension of complaint proceedings concerning matters before an inquiry should be considered (Netcare case)

Section 43D

- Although section 43C(3) makes it clear that recommendations can be made to Ministers and regulatory authorities the Commission would also now have the power to order them to take regulatory action 43D as long as it complies with the law
 - The effect of this has to be carefully considered with examples like SOEs

Section 43D

- The Bill currently does not deal effectively with the consequences of non-compliance with coercive orders
 - They will probably in terms of general provisions have the same status as court orders (section 64)
 - It should be considered whether other sanctions such as administrative fines should not apply here

Section 43D

- Section 60(3) determines that the CAC has to confirm divestment but it is not made applicable here
 - It perhaps should be asked whether it is correct to deprive the CAC of its final authority to confirm divestment as would be the case for very serious contraventions of Competition law

Section 43D

- It perhaps should be asked whether all coercive remedies should not be finally ordered by the Tribunal
 - Facts as found in the market inquiry should be taken as read but the question whether the remedy meets the requirements of the Act should perhaps be left to the Tribunal. It would better reflect the structure of our competition system

Section 43E

- Section 43E(1) determines that report that must be published at the end of proceedings may contain recommendations
 - Comes out of the current Act where these are the only remedial consequences of market inquiries
 - This provision must be updated to reflect the more expansive remedial consequences provided for in the Bill

Section 43F

- This provision allows for appeals on the record to the Tribunal from any determination made in an inquiry.
- Section 43F(6) then provides for further Appeals to the CAC
- But this provision must still be aligned with section 62 which concerns when ordinary courts will also have jurisdiction over matters

Section 43G

- Gives a list of persons who may participate in market inquiries but not clear what participate means
- Section 43G(1)(c) states that witnesses who in the opinion of the Commission would substantially assist an inquiry could participate in a market inquiry but it should be considered whether being a witness is participation and if so whether witnesses that other participants may want to call should be included

Section 43G

- It does seem strange that section 43G(1)(c) also determines that officials and staff of the Commission may be participants. This seem somewhat strange in the light of the broader role which the Commission plays in inquiries

Section 43G

- Section 43G(3) obliges participants to respond to surveys, questionnaires and requests for information but there is unnecessary overlap with section 43C(3)(c) which gives the power to summons and require parties to answer questions as well as section 43C(3)(d) and (cA) which requires answering of questions.
 - Perhaps this provision should apply only to surveys and questionnaires

Section 49D

- The current changes are redundant in the light of the wording of section 43E(3)(a)
- This provision should be reworded to allow for agreements in the context of market inquiries
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Section 82(1)

- The Bill tries to provide for agreements with regulatory authorities in the context of market inquiries that concern their industries but the wording of the amendment currently will not achieve this
 - The regulatory authorities that are relevant here must be clarified. It concerns a regulator of an industry that is or will be subject to a market inquiry
 - Section 21(1)(h) must be amended to allow the Commission to conclude these agreements



Conclusion

