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**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

This document reproduces a written contribution from South Africa submitted for Item 2 of the 125th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 20 June 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm

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JT03414094

South Africa

1. Introduction

1. The Organisation for Economic Cooperation and Development (OECD) has invited contributions to its round table on “*Methodologies for conducting market studies*” that will be held in June 2017. The goal of this roundtable is to identify common techniques and good practices in selecting and applying market study methodologies. This note is prepared to assist in these discussions.

2. The note is structured as follows: The next section provides an overview of the different types of market studies that are carried out by the Competition Commission of South Africa (Commission), namely scoping studies and market inquiries. The remainder of the note sets out case studies of market inquiries that have been initiated by the Commission in three sectors, namely in the liquid petroleum gas, private healthcare and grocery retail sectors respectively. The focus of the case studies provided will be on the types of information gathered by the Commission in conducting these market studies, the information gathering techniques utilised, and the methodologies that the Commission has applied, or intends to apply in its analysis of such data and information. Finally, we conclude by outlining the various lessons learnt by the Commission so far in respect of the methodologies used in the gathering and processing of information and data in these market studies.

2. Types of market studies

3. The Commission mainly conducts two types of market studies, namely scoping studies and market inquiries. These are set out below.

2.1. Scoping studies

4. The Commission conducts scoping studies to provide preliminary evidence as to whether or not there are indications of potential competition concerns in a market, industry or sector.

5. There are a number of benefits associated with conducting scoping studies, including, *inter alia* that scoping studies can enhance the Commission’s understanding and knowledge of specific markets which may form the basis of proactive approach to competition enforcement, enabling the Commission to initiate a formal investigation based on the findings of a scoping study.

6. A scoping study does not constitute an investigation as contemplated in the Competition Act.¹ For example, on 31 July 2013, Mondi instituted proceedings to review

¹ In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* (2010 (6) SA 108 (SCA)), the Supreme Court of Appeal (SCA) ruled that the Commission’s decision to initiate a complaint must pass the test of legality and intelligibility. At the very least, the Commission is required to be in possession of information which could give rise to a reasonable suspicion that a prohibited practice exists. The SCA ruling above paved way for firms that are the subject of an investigation to review the decision of the Commission to initiate a complaint notwithstanding that the SCA in another matter, *Competition*

the Commission's decision to initiate a complaint on the basis of a scoping study. The Commission had conducted a scoping study into anti-competitive practices by Mondi and Sappi in the paper and pulp industry, which had led to an initiation of a complaint. The main concern raised by Mondi is that the scoping study conducted had elements of a formal investigation. Further, the Commission solicited information from specific market participants, and the reliance on the private information gathered prior to a properly initiated investigation infringed provisions of the Competition Act.

7. Whilst the review application is still to be heard, the case has already set a significant precedent being that parties can use the review process to obtain access to the Commission's record even before the Commission commences its investigation.

8. Consequently, there are no statutory powers available to the Commission in conducting scoping studies and as such, the Commission only has three avenues available to it to legally obtain information required by it to conduct a scoping study. These include:

- Information gathered by the Commission from previous investigations;
- The information available in the public domain; and
- The acquisition of third-party data.

9. As an example, the Commission conducted a study in 2016, aimed at understanding dominance in markets. To identify dominant firms in the various sectors of the South African economy, the study examined the Commission's decisions in merger reports. Over 2 150 merger reports were considered from 2009 to March 2016. The definition of dominance in the Competition Act was used to identify dominant firms,² whereby a firm with a market share of more than 45% is presumed to be dominant. The study focused on the following:

- The number of players operating across various markets and industries, using standard industrial classification (SIC) codes; and
- The identification of dominant firms within each market and industries.

2.2. Market inquiries

10. In 2013, the Competition Act was amended to confer broad powers on the Commission to conduct 'market inquiries'. Market inquiries entail an analysis of the state of competition in a particular market rather than focusing on the conduct of individual firms.³

11. The market inquiry provisions allow the Commission to probe markets where there is no evidence of outright prohibited practices taking place, but where market outcomes indicate a lack of effective competition or where there are concerns about the extent, nature and effectiveness of competition.

Commission v Yara (South Africa) (Pty) Ltd and Others (2013) 4 All SA 302 (SCA), held that the decision to initiate a complaint does not affect the rights of any party.

² Section 7 states: "A firm is dominant in a market if (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power."

³ The Commission's powers to conduct market inquiries are contained in section 43B of the Competition Act.

12. The Commission is empowered to initiate and conduct a market inquiry at any time and may also do so at the request of the Minister of Economic Development. The Commission may initiate a market inquiry on the basis of the following jurisdictional facts:⁴

- If the Commission has reason to believe that there exist features or a combination of features in a market, industry or sector that may prevent, distort or restrict competition; and
- To pursue the purpose of the Competition Act, namely to promote competition in South Africa in order to achieve a number of goals.⁵ These goals include, amongst others, (i) providing consumers with competitive prices and product choices; (ii) promoting small and medium-sized enterprises' participation in the economy; (iii) promoting a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons; and (iv) promoting employment and advance the social and economic welfare of South Africans.

13. When it initiates a market inquiry, the Commission is required to publish a notice in the Government Gazette. The notice must set out the 'the terms of reference' for the inquiry (which include an explanation of the market that is under the subject of the inquiry). Put differently, a market inquiry is initiated once the terms of reference are published in the Government Gazette.⁶

14. The Commission may conduct an inquiry in any manner, but the manner in which it conducts the inquiry must be subject to the application of specific provisions of the Competition Act, which regulate the Commission's powers. For example, the market inquiry provisions give the Commission, for the duration of the market inquiry, the ability to issue summonses and to compel persons to appear before the inquiry to provide evidence which has a bearing on the subject matter to be presented.⁷ However, the Commission is unable to invoke the provisions which empower the Commission to enter and search premises.⁸

⁴ In terms of section 43B of the Competition Act.

⁵ The purposes of the Competition Act, as set out in section 2, reads as follows:

“The purpose of this Act is to promote and maintain competition in the Republic in order –

to promote the efficiency, adaptability and development of the economy;

to provide consumers with competitive prices and product choices;

to promote employment and advance the social and economic welfare of South Africans;

to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;

to ensure that small and medium-sized enterprises have and equitable opportunity to participate in the economy; and

disadvantaged persons.”

⁶ Section 43B of the Competition Act.

⁷ Pursuant to section 49A of the Competition Act.

⁸ Section 43B(2) of the Competition Act.

15. In addition, the market inquiry provisions allow the Commission to make a broader range of evidence-based recommendations to address any factors that the inquiry believes may stifle competition within a market, industry or sector. These may include, amongst other things, recommendations for new or amended policy, legislation or regulations, and recommendations to other regulatory authorities in respect of competition matters. On the basis of information obtained during a market inquiry, the Commission may also initiate a complaint which may be settled or referred to the Competition Tribunal without further investigation, or that may be investigated further. The Commission may also choose to take no action.⁹

16. Upon completing the market inquiry, the Commission must publish a report of the inquiry with or without recommendations in the Government Gazette, and submit the same report to the Minister of Economic Development. The Minister is required to place the report before the National Assembly, within 10 business days of receiving the report. In an inquiry, the role of the Commission is to identify aspects of the market that may result in the restriction or distortion of competition and to make recommendations (if it decides to do so), to the Minister to enable the National Assembly to take steps to make the market more competitive.¹⁰

3. Case studies

17. Since the introduction of the market inquiry provisions, the Commission has initiated three market inquiries in the liquid petroleum gas, private healthcare and grocery retail sectors respectively.¹¹ This section will provide a brief description of these market inquiries, with a focus on the types of information gathered by the Commission in conducting these market studies, as well as the information and data gathering techniques utilized, and the methodologies that the Commission has applied, or intends to apply in its analysis of such data and information. The section will conclude with the various lessons learnt by the Commission so far in respect of the methodologies used in the gathering and processing of information and data in these market studies.

3.1. Case study 1: Liquid petroleum gas

3.1.1. Background

18. The market inquiry into the liquefied petroleum gas (LPG) sector (hereinafter referred to as the “LPG Inquiry”) was initiated in September 2014 in terms of Chapter 4A¹² of the Competition Act and in keeping with the purpose and functions of the Commission as set out in section 2 and section 21 of the Competition Act respectively.

⁹ Section 43C of the Competition Act.

¹⁰ Section 21(3) of the Competition Act requires the Minister to table the report in the National Assembly.

¹¹ In 2006, before the introduction of the Commission’s formal powers to conduct market inquiries, the Commission also conducted a market inquiry into the banking sector. In conducting this inquiry, the Commission relied on its general investigative powers and on voluntary stakeholder participation. Information was collected by engaging with stakeholders and the general public through i) calls for submissions, ii) meetings and iii) questionnaires. The inquiry also held two rounds of public hearings.

¹² Chapter 4A of the Act, which introduces the powers to conduct market inquiries came into effect on 01 April 2013.

19. The Commission initiated the inquiry into the LPG sector, partly as a result of a number of complaints received from sector participants in relation to their ability to switch between LPG suppliers. This, together with other trends observed in the industry gave the Commission reason to believe that there are features of the sector that prevent, distort or restrict competition. The Commission further believed that conducting this inquiry would assist it in understanding how it may promote competition in the LPG sector, in furtherance of the purpose of the Act.

20. The Terms of Reference (ToR) of the LPG Inquiry were published in the *Government Gazette* on 15 August 2014 and identified the following broad themes as the rationale for initiating, and the broad research objectives of the LPG market inquiry:

- Structural features of the market, with the sector characterised by limited supply with imports supplementing the domestic supply;
- High switching costs prevalent within the sector;
- The regulatory environment in the LPG sector, and the impact thereof on competition in the sector; and
- The limited usage of LPG at the household level.

21. The LPG Inquiry was conducted internally by the Commission's own staff complement, comprising of lawyers and economists.

3.1.2. Information gathering and analysis

22. During the information gathering phase of the LPG Inquiry, the Commission contacted more than 90 market participants¹³ operating across the South African LPG industry value chain. Interactions with stakeholders occurred in different forms, namely (i) meetings; (ii) site visits; (iii) teleconferences; (iv) stakeholders' written responses to the LPG Inquiry's calls for submissions; and (v) stakeholders' written responses to the LPG Inquiry's information requests. Market participants provided information that was requested from them, without the Commission having to resort to the issuing of summonses to gather such information. During the inquiry, the Commission published various documents, including draft recommendations for public comment.

23. The main types of information collected by the LPG Inquiry mainly included information in relation to the following:

- Pricing of petroleum products;
- Wholesaler sales volume data;
- Supply contracts between refineries and wholesalers, and between wholesalers and end-users of LPG;
- Financial information of wholesalers; and
- Information regarding the regulatory environment of the LPG sector, including inter alia copies of actual regulations that apply to the sector, and stakeholder views as regards various inefficiencies that exist within the regulatory environment.

¹³ These included various refineries, wholesalers, retailers, competitors, customers, Government bodies and regulators operating within the LPG sector.

24. A range of different methodologies – both qualitative and quantitative – were applied to understand the markets, draw conclusions and improve the evidential rigor. The specific uses and analytical methodologies applied in respect of the information gathered by the LPG Inquiry, as listed above, are set out below.

Pricing information

25. The pricing information gathered by the LPG Inquiry were analysed using *inter alia* the following methodologies:

- Price benchmarking of unregulated wholesale LPG prices to that of the regulated prices at the refinery and retail levels of the LPG supply chain, namely the maximum refinery gate price (MRGP) and the regulated retail price of LPG, as a measure of bargaining power at the wholesale level of the supply chain.
- The contribution of LPG to refineries' total revenue, as an indicator of the importance of LPG, as one of many products produced by refineries, and the way in which this affects the volumes of LPG they produce;
- Price correlation analysis to assess the degree of correlation between wholesale prices and whether this is likely to point to coordinated behaviour as between wholesalers.
- An analysis of the degree of cross subsidisation by wholesalers in respect of the sale of LPG using different modes of distribution.

Financial information

26. The financial information gathered by the LPG Inquiry was used to conduct an analysis of margins achieved by LPG wholesalers, as an indicator of the degree of competition at wholesale level of the LPG supply chain.

Sales volumes

27. The sales volume data gathered by the LPG Inquiry was used to estimate wholesaler market shares, and the degree to which these changed or fluctuated over time, as an indicator of wholesaler market power.

Supply contracts

28. The LPG Inquiry's assessment of the terms of the supply contracts between refineries and wholesalers, and between wholesalers and end-users of LPG was mainly conducted with the aim to assess the degree of foreclosure arising from the use of such supply contracts. The most important features of the contracts that were assessed included:

- the duration of the supply contracts;
- the proportion of LPG sales that occur on a contractual basis as compared to spot-sales;
- the price differences between contract and spot-sales of LPG; and
- the degree to which the terms and lack of transparency in the supply contracts impact on the ease with which market participants can switch between LPG suppliers.

Regulatory environment

29. The LPG Inquiry's assessment of the regulatory environment within the LPG sector included a review of the extent to which the regulatory environment may hinder the ability of potential competitors to enter and/or expand in the LPG sector. The review included inter alia an assessment of the degree of regulatory uncertainty in the sector, the lack of monitoring and enforcement of certain regulated prices, and certain regulatory structures that could facilitate coordinated behaviour in the industry.

3.1.3. LPG Inquiry outcomes and way forward

30. The LPG Inquiry's final report, setting out the results of its analysis, and its recommendations to improve competition in the LPG sector was published on the Commission's website on 25 April 2017.

31. Briefly, the Commission's main findings and recommendations included the following:

- There is an overlapping and misaligned regulatory environment between the National Energy Regulator of South Africa (NERSA) and the Transnet National Ports Authority (TNPA), which (i) hinders the ability of competitors to enter and/or expand in the market; and (ii) the speedy investment into import, loading and storage facilities.
Recommendation: NERSA and the TNPA's adjudication processes should be aligned. The Memorandum of Understanding (MOU) signed by the two regulators should be used as a mechanism to give effect to this recommendation. In addition, there should also be a sequencing of legal processes. Furthermore, the Commission recommends a review of the applicable regulatory frameworks, relating to LPG construction and storage facilities at ports, as outlined in applicable legislation, including the Petroleum Pipelines Act and the National Ports Act.
- The LPG Inquiry has revealed evidence of dialogue between market participants on setting uniform deposit fees.
Recommendation: Commission to pursue collusion investigations outside of the inquiry.
- The LPG Inquiry has revealed evidence of a widespread practice of long-term contracts and agreements favouring incumbent large LPG wholesalers over smaller LPG wholesalers with short-term contracts, or LPG wholesalers who rely on the spot market to receive their supply of LPG from refineries. There is evidence of contracts with some large wholesalers that included unlimited renewal clauses. These clauses have the effect of making them "evergreen contracts". Smaller wholesalers are unable to attain economies of scale due to the existence of the long-term contractual agreements in place.
Recommendations: Smaller wholesalers to get preferential access to a minimum of 10% of LPG volume from refineries; contracts to be limited to 10 years and all automatic renewal clauses to be abolished.
- There are restrictions on bulk customers' ability to switch seamlessly due to barriers incumbent LPG wholesalers put in place.
Recommendation: Separation of LPG supply agreement from LPG equipment agreement. The agreement pertaining to the cost and usage of LPG equipment should provide for the end-user to own the installed equipment after the costs

have been fully amortised; or, alternatively, it should be clear that the equipment is subject to a rental agreement.

- The cylinder exchange practice prevalent in the LPG industry acts as a potential barrier to entry into the cylinder market as it is governed through bilateral agreements and participation by new entrants has been difficult.

Recommendation: The cylinder exchange practice should be more inclusive, any unjustifiable restrictions in place should be removed. No wholesaler should unreasonably be denied the opportunity by another party to enter a bilateral agreement to facilitate the exchange of cylinders.

32. The publication of the LPG’s final report will be followed by advocacy measures to ensure the effective implementation of the Commission’s recommendations.

3.2. Case study 2: Private healthcare

3.2.1. Background

33. In South Africa, healthcare is a constitutional right that is delivered through both public and private sector entities.

34. The private healthcare sector in South Africa is made up of several interrelated markets. These involve the financing of healthcare (including health insurance entities such as medical schemes¹⁴ and private insurance companies supported by administration and managed care companies¹⁵), healthcare goods (including medical devices such as medical goods and pharmaceutical products) and healthcare services provided by hospitals, practitioners and other intermediaries/agents.

35. Various parts of the private health sector have progressively consolidated over the past two decades. This is evident with respect to medical schemes, medical scheme administrators, hospital groups and pathology firms.

36. The Commission initiated an inquiry into the private healthcare sector (hereinafter referred to as the “HMI”) in 2013, in response to concerns about the functioning of private healthcare markets in South Africa as a result of the fact that healthcare expenditure and prices across key segments were rising above headline inflation.¹⁶¹⁷

37. The purpose of the HMI is to determine whether or not there are any features of the private healthcare sector that prevent, distort or restrict competition within that market. The HMI is still ongoing.

38. The HMI is being conducted by a panel of experts in the subject matter, and supported by a technical team made up of the staff of the Commission and consultants.

¹⁴ Broadly speaking, an organisation which does the business of a medical scheme charges a premium or contribution in exchange for undertaking a liability to assist in obtaining healthcare services or in covering the expenditure incurred while receiving healthcare services.

¹⁵ Direct purchasers of healthcare goods and services also constitute a form of personal healthcare funding.

¹⁶ Private healthcare is defined as that portion of healthcare services that is funded by private patients themselves, either through medical schemes, insurance, or out-of-pocket payments.

¹⁷ Similar to the LPG Inquiry, the HMI was initiated in terms of chapter 4A of the Act, and in keeping with the purpose and functions of the Commission as set out in section 2 and section 21 of the Act respectively.

39. The HMI's Statement of Issues (SOI), published on 1 August 2014, identified a number of theories of harm to competition in the South African healthcare sector, broadly including issues of market power, barriers to entry into and expansion within, imperfect information, and the regulatory framework prevalent at the various levels of the private healthcare value chain. In a subsequent Revised Statement of Issues (RSOI), published after considering stakeholder comments and submissions made in respect of the SOI, the evidence gathered and analyses undertaken by the HMI up to that point, the HMI refined its areas of focus to the following factors that warrant further examination:

- Private health insurance markets are generally understood to face structural vulnerabilities that restrict the completeness of risk-pooling in the absence of regulatory interventions. The adequacy of the regulatory framework towards this end therefore needs to be fully examined.
- Consumers are unable to make informed choices in the selection of health products (i.e. insurance, services and products) due to lack of transparency in the healthcare sector. The HMI intends to explore the extent to which, if any, information weaknesses reduce the ability of consumers to make informed decisions, and whether this has any implications for competitive behaviour within the sector.
- The accumulation of market power and its possible exercise, arising from market concentration of both funders and providers as well as coordinated conduct (vertical and horizontal) if found to exist, may restrict choice and competition so as to preserve a market dynamic that diminishes the role of the consumer in making informed purchasing decisions.
- The strong imperative that consumers have to access healthcare services when needed removes or reduces the ability of consumers to defer or withhold demand as costs increase. Although insurance makes access affordable in the short term, poorly incentivised health insurance markets may be accommodating the cost increases of service providers — reducing affordability over the longer-term.
- The coherence of the existing configuration of regulatory interventions on the supply-side (services and products) requires careful review to assess the extent to which contradictory objectives are currently pursued with harmful effects for efficient competition. The Commission's previous interventions in the sector, including its abolishment of the practice of collective bargaining, the dismissal of the National Reference Health Price List (NHRPL) in the industry, and the likely effects of this on the degree of unequal bargaining power between players at the various levels of the industry will also be probed.

3.2.2. Information gathering

40. To date, the HMI has gathered information through (i) general stakeholder engagements aimed at properly understanding the private healthcare sector in South Africa and the relevant role-players involved in the sector; (ii) targeted consultations with stakeholders to gather specific data and information required by it to complete its analysis; (iii) calls for written submissions from stakeholders in respect of the Inquiry's SOI and RSOI; (iv) public hearings; (v) information and data requests; (vi) desktop research; and (vii) surveys.

41. The sections below provide further information as regards the HMI's public hearings, consumer survey and its data and information requests.

Public hearings

42. The HMI held public hearings in Pretoria, Cape Town and Durban where interested parties were invited to make oral and written submissions, in a public setting, on the key issues identified by the Panel in the RSOI. The HMI's public hearings took place during the first half of 2016.

43. The public hearings provided a platform for stakeholders to present their views on aspects of the market that impede competition, as well as matters that adversely affect the market. It also provided an opportunity for the HMI Panel to probe issues of concern in the sector. General issues discussed during these hearings included:

- Understanding the nature of competition in the private healthcare sector;
- How stakeholders interact with each other;
- How consumers access, evaluate and use information about the sector;
- How healthcare services are provided and funded; and
- The regulatory regime of the private healthcare sector.

44. The Panel heard varying submissions, including personal accounts from consumers about their experiences with stakeholders, including medical schemes, where they raised concerns related to the non-payment of their medical bills. Practitioners shared stories, including those of their relationships with hospitals. Medical schemes and their administrators described how they interact with their members and healthcare providers. Hospitals expressed concerns regarding shortages of nurses and specialists in the country. Regulators shared their experiences and challenges faced in fulfilling their duties.

45. The hearings were open to members of the public, who could either attend the hearings or watch via live streaming. This provided an opportunity for them to learn more about how the private healthcare sector operates.

Information and data requests

46. To date, the HMI collected significant data and information through targeted requests to key stakeholder groups, namely: hospital groups; pathology providers; radiology providers; registered medical schemes; administrators of medical schemes; managed care organisations; health insurance product providers; brokers, Government, regulators and industry bodies. Summonses were issued to some stakeholders, in some instances to facilitate their handing over of information to the HMI that do not belong to them, but to third parties such as their respective consumers, or in instances where there was insufficient cooperation from the relevant stakeholder.

47. The information and data gathered related to *inter alia* the following:

- Detailed medical scheme claims data from the large majority of medical schemes in South Africa;
- Detailed financial information in respect of the largest medical scheme administrators, hospitals and practitioner groups in South Africa;
- Medical scheme membership details including membership numbers, demographics and fees;
- Tariffs; and
- A range of qualitative data was also gathered to assess the structure of the sector, the regulatory environment within the sector, the costs of consumers to switch between healthcare providers, and further information with regards to the barriers to enter into and expand within the healthcare sector.

48. The information was gathered from over 175 individual stakeholders and is one of the most comprehensive datasets ever gathered on the private healthcare sector in South Africa.

Consumer survey

49. The HMI commissioned a consumer survey to understand the degree to which consumers in the South African healthcare markets are informed.¹⁸ The survey sought to understand the following:

- The types of information that is available to patients in the private healthcare sector;
- How patients make decisions regarding service providers;
- The consequences of these decisions as elucidated in the consumer's experiences;
- The types of additional information, if any, and in what form, patients would like to have to be able to make better decisions; and
- The role that market participants (e.g. brokers, practitioners, funders) play as agents to consumers and the extent to which these participants disseminate information and advice to consumers.

50. The HMI also sought to bolster the consumer survey results and place them into context by making use of focus groups. To this end, the HMI found that, though many of the responses in the quantitative study yielded certain results, the discussion in the focus groups provided context and clarity. For example, in some instances, it became clear that where consumers had responded to the survey indicating that they had sufficient information to make appropriate decisions, the focus group discussions revealed that they either did not know the full extent of the information that was available or even how to process the information. This suggests that the consumers may not currently be best placed to fully understand the extent of the information that is available in the private healthcare sector or even how to process and understand it effectively.

51. The results of this survey and focus group discussions will be considered with the appropriate consideration of its limitations and in conjunction with other research and information that is relevant for the HMI's analysis.

3.2.3. Information analysis

52. The HMI is currently in its information analysis phase where it is utilising the information and data collected through its various stakeholder engagements, consumer survey, public hearings and information and data requests to assess the state of competition in the healthcare sector, and specifically the key questions highlighted in the RSOI.

53. Since the commencement of the HMI's analysis phase, it has published, for stakeholder comment, a number of papers setting out various methodologies to be applied by the HMI in its analysis, as well as some of the preliminary results of the analysis already conducted.

54. These are set out below.

¹⁸ <http://www.compcom.co.za/wp-content/uploads/2014/09/Summary-of-Results-Healthcare-Consumer-Survey-18-November-2016.pdf>

Methodology Paper: Approach to Assessing Market Power of Health Facilities

55. In August 2016, the HMI published a document, for stakeholder comment, outlining the methodologies that the HMI will employ in analysing the market power of healthcare facilities at the local level.

56. The main objective of the document is to generate a representative and unbiased overview of the relevant facility markets, in order to assess local market concentration of the South African private hospital sector.

Profitability analysis methodology paper

57. In September 2015, the HMI published a “Profitability Analysis” methodology paper which presented an overview of the various approaches to be applied by the HMI in its assessment of the profitability of firms providing healthcare services in South Africa. Interested parties were invited to make comments on the proposed methodology.

58. As explained in the profitability analysis methodology paper, the HMI will make use of profitability analyses as one of the indicators of the competitive conditions in the healthcare sector. In conducting its profitability analysis, the HMI will seek to understand both the current levels of profitability earned by firms providing healthcare services in South Africa, and how various market changes and events have affected the profitability of such firms over time.

Market definition for the financing of private healthcare

59. In November 2016, the HMI also published a document setting the its definition of the various relevant markets within the broader category of financing of healthcare, particularly the relevant markets within which medical schemes, medical scheme administrators and managed care organisations (MCOs) participate.

60. In defining these markets, the HMI considered the following aspects (i) key provisions of the Medical Schemes Act No. 131 of 1998 (MSA); (ii) characteristics of the product; (iii) preceding Commission cases and Competition Tribunal (Tribunal) decisions and (iv) the views of stakeholders.

Reports on the analysis of medical schemes claims data

61. One of the objectives of the HMI is to analyse the drivers of expenditure in the private healthcare industry. The data held by medical schemes provides the best basis to form as holistic a view as possible of expenditure in the private sector, and hence is the primary source of data for many of the expenditure analyses undertaken by HMI.

62. The HMI has published, during the course of November and December 2016, the first two of a set of reports in relation to its analysis of the medical schemes claims data, for stakeholder comment. The first report provides a descriptive analysis of the medical schemes claims data gathered by the HMI. The second report provides an outline of the HMI’s initial attribution analysis, which describes how various factors influence costs and change in costs over time. Further reports, aimed and providing a more detailed analysis of the medical schemes claims data gathered by the HMI are forthcoming.

3.2.4. Next steps

63. The results of the information gathered will all be taken into consideration by the HMI, as it continues its work and preparations for its provisional findings.

64. The HMI's final report, setting out the results of its analysis, and its recommendations to improve competition in the South African private healthcare sector will be released in December 2017. The final report will be preceded by a draft report for stakeholder comment.

3.3. Case study 3: Grocery retailing

3.3.1. Background

65. The Commission initiated a market inquiry into the South African grocery retail sector (GRMI) in November 2015. The GRMI is still ongoing. The initiation of the GRMI was prompted largely by increased complaints to the Commission regarding the prevalence of exclusivity clauses in lease agreements between property developers and national supermarket chains, and the extent to which this constitutes a barrier to enter into or expand within the grocery retail sector.

66. The purpose of the GRMI is twofold, namely (i) to ascertain whether there exist features within the grocery retail sector that may lessen, prevent, restrict or distort competition; and (ii) to pursue the objectives of the Act, which include the promotion and maintenance of competition within South Africa in order to provide consumers with competitive prices and product choices, and to promote public interest goals. As indicated previously, these public goals include, *inter alia*, the increased participation of small and medium-sized enterprises in the economy, a greater spread of ownership (in particular to increase the ownership stakes of historically disadvantaged persons), the promotion of employment, and the advancement of social and economic welfare of South Africans.

67. For the purposes of the GRMI, the definition of the grocery retail sector includes the activities of all traders that predominantly sell fast-moving consumer goods (such as food, toiletries, and liquor). Whilst the GRMI will assess the sector generally, it will have a specific focus on competition dynamics in townships, peri-urban areas, rural areas and the informal economy and the impact of barriers to entry and expansion on small and independent retailers who are active within this sector.

68. The GRMI's main research objectives, as set out in its ToR and SOI are as follows:

- The impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;
- The impact of long term exclusive leases on competition in the sector;
- The dynamics of competition between local and foreign owned small and independent retailers;
- The impact of regulations, including *inter alia* municipal town planning and by-laws on small and independent retailers;
- The impact of the buyer power of buyer groups and other large purchasers of FMCG products on small and independent retailers in townships, peri-urban areas, rural areas and the informal economy; and
- The impact of certain identified value chains on the operations of small and independent retailers.

69. The GRMI is being conducted by a Panel of experts in the subject matter, assisted by a technical team comprising of the Commission's own staff complement.

3.3.2. Information gathering and analysis

70. The GRMI is currently in its information gathering phase and is in the process of gathering information primarily through stakeholder engagements, taking the form of (i) initial consultations and calls for submissions; (ii) targeted stakeholder consultations and data and information requests; (iii) site visits; (iv) public hearings; and (v) consumer and small business surveys conducted in the township, per-urban and rural areas of South Africa.

71. Further details as regards each of these information gathering techniques are set out below.

Initial consultations and calls for submissions

72. During the initial phases of the inquiry, the GRMI commenced with initial consultations with various stakeholders and a review of the literature already conducted and available in the sector.

73. The purpose of such consultations and research were to obtain an initial overview of the competition and public interest issues prevalent in the grocery retail sector. In addition, the research and consultations allowed the GRMI to compile a database of research that had already been conducted by researchers, policymakers and other stakeholders in the industry, allowing the GRMI to identify specific gaps in the existing research and data that it would need to focus on.

74. The initial consultations were mainly conducted with the following stakeholder groups: (i) research institutions and consulting houses; (ii) universities; (iii) small business associations; and (iv) government institutions.

75. The information obtained through the initial consultations were used to inform the GRMI's SOI, a draft of which were published for public comment in May 2016. The final SOI, incorporating comments received from stakeholders, were published on 15 July 2016, with a call for stakeholder submissions on the substantive issues set out in the final SOI.

Targeted stakeholder consultations, data and information requests

76. The GRMI is in the process of gathering specific data and information required by it to assess the inquiry's research objectives, set out in paragraph 60 above. Targeted information and data requests have been sent to a number of stakeholders, including grocery retailers of various sizes, suppliers of grocery retail products, buyer groups, wholesalers and Government institutions, requesting information and data in respect of a number of factors, including *inter alia*:

- Retailer sales data, to be used for market definition purposes and to calculate retailer market shares;
- Information and data as regards the relevant store catchment areas of various retailers;
- Retailer and supplier pricing data, as well as other information relating to the relationship between large national supermarket chains and suppliers of grocery retail products;
- Data and information (including both qualitative and financial information and data) as regards the degree to which smaller retailers have been excluded from entering and/or expanding their operations in shopping centres as a result of the

exclusivity clauses of the lease agreements entered into between large national supermarket chains and the relevant shopping centre landlords;

- Data and information in respect of the various regulations impacting on the grocery retail sector; and
- Various types of qualitative and quantitative information relating to the various barriers to entry and expansion in the grocery retail sector.

Site visits

77. It is clear from paragraph 60 above that most of the GRMI's research objectives are focused on the business operations of small and independent retailers within townships, peri-urban areas, rural areas and the informal economy.

78. The GRMI's initial consultations and literature review revealed very limited information and data in respect of the businesses operations of small and independent retailers within townships, peri-urban and rural areas within South Africa.

79. On this basis, the GRMI identified the need to consult directly and widely through site visits in order to interact directly with, and obtain the views of small and independent retailers (both formal and informal) as regards the barriers they have experienced to enter into and expand their businesses in the grocery retail sector.

80. The site visits were subsequently set up to focus on meetings with small and independent retailers (either formal or informal), provincial government departments and municipalities; buyer groups and cash & carries throughout South Africa. The site visits were also followed up with re-visits to each site with the aim to engage in more focused discussions to gather some of the detailed information required by the GRMI in its analysis of the six research objectives, as set out in paragraph 60 above.

Public hearings

81. The GRMI will also gather information through public hearings, to be held in Cape Town, Durban and Gauteng over the course of May 2017 – July 2017, where interested parties have been invited to make oral and written submissions, in a public setting, on the key issues identified in the GRMI's ToR and SOI, as set out in paragraph 60 above.

82. The purpose of the public hearings is to provide a platform for stakeholders to present their views on aspects of the market that impede competition, as well as matters that adversely affect the market. The hearings will be open to members of the public.

Surveys

83. The GRMI has identified the need to supplement the information gathered during its site visits with representative survey data for (i) small and independent retailers in townships, peri urban and rural areas across South Africa; and (ii) consumers in these areas.

84. The consumer survey, which has recently been completed, were conducted using intercept interviews at transport nodes and around shopping centres in a representative sample of township, peri-urban and rural areas across South Africa. A total of 1 558 South Africans, located in these areas, participated in the survey. Broadly, the survey sought to better understand the trends in the nature and dynamics of competition in the grocery retail sector within these areas, with a particular focus on the following:

- Consumer spending amounts and patterns;
- Consumers' access to various types of grocery supermarket retailers in the areas in which they reside, ranging from access to large national supermarket chains located in shopping centres, to access to small, independent and often informal grocery retailers such as spaza shops and hawkers;
- The consumers' primary reasons for visiting grocery retailers of various sizes and the differences in product and service offerings of these grocery retailers;
- Consumer switching patterns; and
- Trends in the number and ownership of grocery retailers in the areas in which the consumers reside.

85. The small business survey, which is currently underway, will be conducted in one pre-determined site in each of South Africa's nine provinces. The sites were selected to be representative of the various township, peri-urban and rural areas within South Africa.

86. Using a small area census approach, the surveys will be conducted in a standardised survey sample area of ~10 000 households, equal in size to approximately 2km². The objective of the research will be to survey the entire population of spaza shops and grocery retailers situated within each site boundary. It is estimated that the number of surveyed businesses will range from 100 – 200 per site. The GRMII will therefore survey between 900-1 800 shops across the 9 selected sites within the 9 provinces of South Africa.

87. The research sites will follow Statistics South Africa (StatsSA) enumeration boundaries as used in the population census of 2011. This will enable the GRMI to access allied data from the 2011 population census. Moreover, the GRMI has purchased historical data in respect of small grocery retailers that have previously been gathered, using the same methodology and approach, for four of the nine pre-determined sites that will be surveyed. This will enable the GRMI to conduct historical comparisons of the state of small grocery retailers within these areas.

88. The purpose of the small business survey is primarily to collect information as regards the following:

- The state, nature and trends in competition between grocery retailers within the areas surveyed, with a focus on small, independent and often informal grocery retailers; and
- The various developments and features of the grocery retail sector that have impacted on the operations of small and independent grocery retailers, and the factors that may constitute barriers for small and independent retailers to enter into, expand and effectively compete in the sector.

89. The data gathered through the consumer and small business surveys will be considered with the appropriate considerations of their respective limitations and in conjunction with other research and information gathered during the course of the GRMI, most notably the information gathered through the GRMI's site visits and other stakeholder submissions received by the GRMI.

3.3.3. Way forward

90. The GRMI is still underway, and is currently in its information gathering phase. Once the gathering of the various types of data and information, as set out above have been finalised, the GRMI will proceed to the analytical phase of the inquiry. During this

phase, the GRMI will conduct both a qualitative and quantitative assessment of the information gathered by it to broadly understand the degree, nature and trends of competition in the grocery retail sector of South Africa, with a focus on each of the Inquiry's research objectives, as set out in paragraph 60 above.

91. The GRMI's final report, setting out the results of its analysis, and its recommendations to improve competition in the South African grocery retail sector will be released in March 2018.

3.4. Lessons learnt: methodologies used in the gathering and processing of information and data

3.4.1. Overview

92. This section will set out the key lessons learnt by the Commission so far in respect of the methodologies used by it in the gathering and processing of information and data in the market studies that it is in the process of conducting (namely the HMI and GRMI), and the market study that has been finalized, namely the LPG Inquiry.

3.4.2. Background research and initial consultations important and useful

93. As indicated in section 3.3 above, the GRMI first conducted initial consultations with various stakeholders and a review of the literature already conducted and available in the sector, before conducting more intensive data and information gathering.

94. Such initial consultations and research were particularly useful in obtaining an initial overview of the competition and public interest issues prevalent in the grocery retail sector, and allowing the GRMI to compile a database of research that had already been conducted by researchers, policymakers and other stakeholders in the industry. This allowed the GRMI to identify specific gaps in the existing research and data that it would need to focus on during its more intensive data and information gathering phase.

3.4.3. Methodologies for gathering information significantly influenced by the types and profiles of the relevant stakeholders involved.

95. The Commission's experience thus far in respect of the LPG Inquiry, HMI and GRMI has revealed that the methodologies used in the gathering information will be significantly influenced by the relevant industry that is probed and the types of stakeholders involved. For example:

- Survey data is often a useful and necessary tool to gather data, especially in industries or sectors where data is not readily available or does not exist.
- Site visits and physical interactions with stakeholders may be necessary where stakeholders (i) are not familiar with the Commission's mandate; and (ii) do not have the necessary capacity to compile written responses to formal information requests. In planning for such site visits and interactions, sufficient time should be allowed to educate stakeholders as regards the Commission's mandate, the purpose of the Inquiry, and the type of information the Inquiry would require from stakeholders. Site re-visits may be required to further build on the Commission's relationship with such stakeholders, and to gather additional information.

- Written information and data requests are often more efficient, and preferred by both the stakeholder and the Commission, where the relevant stakeholder has the capacity to provide written responses to such information and data requests.

3.4.4. Handling and managing of large datasets containing sensitive and confidential information

96. As indicated in section 3.2 above, the HMI has collected significant data and information from over 175 individual stakeholders, and has enabled it to collate one of the most comprehensive datasets ever gathered on the private healthcare sector in South Africa. The experience gained through this process has revealed the following:

- The handling and managing of large datasets containing sensitive and confidential information must be properly planned for upfront. In particular, the HMI found it to be a costly and challenging task to pull large datasets submitted to it by multiple stakeholders into a central database and to ensure that sensitive and confidential patient data are anonymised, whilst still enabling meaningful analysis of such data.
- A clear and decisive approach is required in respect of the management of stakeholders seeking access to confidential information that are used as a basis for the analysis conducted by the Inquiry.
- The powers of the panel of experts that may be appointed by the Commission to conduct an Inquiry (as has been done in the HMI and the GRMI) must be clarified, particularly as regards, for example, issues such as the granting of access of sensitive and confidential information to its stakeholders.

3.4.5. Differences in information gathering approaches for market inquiries compared to enforcement cases

97. The Commission's experience has also revealed that the approach taken in market inquiries is often one that is less adversarial, and which is more focused on encouraging cooperation from stakeholders to participate and to provide data on a voluntary basis, rather than the Commission having to resort to the issuing of summonses to gather such information. However, the Commission's powers to issue summonses have been useful, particularly in respect of the HMI, in the following instances:

- To facilitate the handing over of information by stakeholders to the Commission where such information does not belong to the stakeholder in question, but rather to third parties such as their respective consumers.
- In instances where there is insufficient cooperation from the relevant stakeholder.

3.4.6. Sufficient stakeholder consultation with stakeholders regarding the findings and recommendations of the Inquiry

98. The Commission's experience in the LPG Inquiry, as the first market inquiry that has been completed under the new market inquiry provisions of the Competition Act, has also revealed the importance of planning and allowing for sufficient time for consultation with stakeholders with regards to the findings and recommendations of the Inquiry.

3.4.7. Reliance on external industry experts and panels

99. The Commission has also learnt lessons in respect of the degree of reliance on industry experts and panels when conducting a market inquiry.

100. Specifically, at the core of market inquiries is a competition analysis, and over reliance on external industry experts or panels to conduct this task can lead to long lead times where these experts must first learn the approach to antitrust analysis, sometimes leading to tensions with the competition authority officials.

101. Market inquiries must find a home within the relevant competition agencies and be subjected to the same tools of analysis the agency uses for other antitrust cases, rather than being viewed as special projects requiring a different set of expertise. Care should also be taken to guide against over reliance on industry experts whose thinking is often captured by industry conventions, which would deprive the competition agency its usual open minded and fairly standard principles in its analysis of these cases.