



SECTION27 submission on the draft Competition Amendment Bill, B23-2018

17 August 2018

To the Portfolio Committee on Economic Development

Submitted by email: pmbele@parliament.gov.za

Introduction

1. On 17 July 2018, the Portfolio Committee on Economic Development invited public comment on the Competition Amendment Bill, 2018.
2. SECTION27 is a public interest law centre that uses the law to advance fundamental human rights in South Africa. SECTION27 welcomes the publication of the Bill and the public consultation process that has accompanied the publication as well as the Bill's emphasis on transformation of the economy in the interests of promoting equality.
3. SECTION27 has a particular interest in the third priority identified by the Department of Economic Development ("Department") in the explanatory memorandum - "the provisions relating to market inquiries must be strengthened so that their remedial actions effectively address market features and conduct that prevents, restricts or distorts competition in the relevant markets". SECTION27 has engaged robustly with the Health Market Inquiry (HMI) since its inception, and has recognised the shortcomings of the current regime, particularly the lack of specific timeframes for the conclusion of different aspects of the inquiry, including the public participation process.
4. We provide comments on specific proposed amendment below.

Clause 22

5. Clause 22 amends the definition of a market inquiry in section 43A. The expanded definition will bring greater clarity to stakeholders and to the public as to the nature of a market inquiry. We agree that the more flexible definition will enable the tailoring of a market inquiry to the features of a specific market. It will also enable the Commission to consider the perspective of consumers, particular if the nature of the market involves the application of fundamental human rights as is the case in the Health Market Inquiry.

Clause 23

6. Clause 23 introduces time limits, which is a welcome addition and will resonate with those stakeholders that have been engaging with the HMI for the last four years. However, some markets are so vast and so complex, as is the case with the private health sector, that the complexities may cause the process to go on longer than initially anticipated. The HMI has also stated publicly that the stakeholders, particularly the private hospitals, have been responsible for some of the delays in the conclusion of the HMI. In addition, the HMI was interrupted by court proceedings launched by Netcare Hospital Group¹ in the very early stages of its work. Netcare objected to the Commission's appointment of experts that provided significant support services to the HMI and halted the inquiry for a period of a few months. The Bill should account for delays caused by litigation proceedings and determine how the timeframes will be affected

Clause 25 – new section 43G

7. The proposed section 43G introduces provisions related to participation in and representations to a market inquiry.
8. The proposed amendments seek to distinguish between persons who are entitled to participate in the market inquiry and those who are only entitled to make representations to the market inquiry. Firms and trade unions operating in the market that is the subject of the market inquiry are automatically entitled to participate in the market inquiry.

¹ Netcare Hospitals (Pty) Ltd v KPMG Services (Pty) Ltd and Another [2014] 4 All SA 241.

However, interested parties that are not firms in the market or a trade union must meet a high standard for participation set out in 43G(1)(f):

- “(i) who has a material interest in the market inquiry;
- (ii) whose interest is, in the opinion of the Competition Commission, not adequately represented by another participant; and
- (iii) who would, in the opinion of the Competition Commission, substantially assist with the work of the inquiry”

9. There are two difficulties with the structure of the proposed 43G:

9.1. Participation is not defined; and

9.2. The parties other than firms in the market and trade unions are likely to be civil society, consumer groups and groupings in society that have an interest in the subject of the inquiry. These parties must meet the above three requirements by persuading the Commission that their material interest are different from other participants and that their input will substantially assist the work of the inquiry. How can the Commission pre-judge these requirements before any participant has made submissions and potentially even before the issues are properly defined.

10. We note the similarity between the proposed section 43G and the current section 53 of the Competition Act, which deals with the right to participate in hearings in the Competition Tribunal. We note that the hearings would be in respect of legal proceedings involving a defined dispute between parties rather than a board inquiry. Section 53 provides as follows:

Right to participate in hearings

The following persons may participate in a hearing in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

...

(iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Competition Tribunal, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented (our emphasis)

11. In our view, the Bill should define what it means to participate in the market inquiry, however, in our view, the approach is in any event inappropriate for a market inquiry. A market inquiry "means a formal inquiry in respect of the general state of competition, the levels of concentration in and structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm." The expanded definition and interpretation of a market inquiry proposed in the Bill makes clear the intention to
12. A market inquiry is materially different from legal proceedings that would come before the Competition Tribunal, which focuses on specific conduct or activities of a named firm, with named parties and a defined dispute. In those circumstances, it is possible for the presiding member of the Competition Tribunal to determine whether a party has a material interest, which is not adequately represented already. This will not be practicable in a market inquiry, which is by necessity a broad inquiry into the whole market. In our view the approach taken in the Bill, to exclude interested parties, is not in keeping with the nature of such inquiries.
13. The proposed amendment requires the Commission to determine, at the outset, whether the interests of a person other than a firm or trade union is already represented prior to representations being made by the firms and trade unions. The Commission is also

called upon to determine the usefulness of such parties to the inquiry at the outset. This places an undue burden on parties other than firms and trade unions to prove that they should be entitled to participate in a public inquiry whose purpose is to investigate the general nature of competition and not specific conduct by firms. Importantly, in our view, the effect of the proposed section 43G is to exclude civil society and consumer groups, amongst others, as a matter of principle, which is not in keeping with the open democracy in which market inquiries take place. Given that, according to the proposed section 43A, a market inquiry may inquire into the-

“outcomes observed into the market, including –

(ii) prices, customer choice, the quality of goods or services and innovation”

those parties that may be in a position to provide insight, including consumer groups, for example, should not have to meet a higher standard than the firms participating in the market in order to participate in the market inquiry.

14. In the Netcare case noted above, the South Gauteng High Court found that the Health Market Inquiry was a constitutional measure in terms of section 27 of the Constitution of the Republic, 1996 because of the implications for the right of access to health care service. It is not unusual that commercial activity involves the realisation of human rights and the Department should consider that future market inquiries may have an impact on human rights and therefore approach participation its proceedings in a manner that is in keeping with our open and democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. As an organ of state, the Commission itself is bound by the Constitution and is required to respect, protect, promote and fulfil the rights in the Bill of Rights, this includes the constitutional principles of openness and transparency.

15. We are keenly aware of the amount of time that the HMI has taken and that the stakeholders delays in providing the HMI with information and also requesting underlying data relied upon by the HMI caused delays. However, limiting access to a process that is public by its very nature, is the wrong approach.
16. The panel will be able to regulate its own processes to manage time spent on various aspects of the inquiry, and may do so by, for example, limiting the amount of time given to parties to make oral submissions in the context of an public hearing, holding closed sessions with selected parties as well as seeking specific information from select stakeholders.
17. Lastly, the provision is likely to have a chilling effect on the participation of interested parties in a public process. We would like to emphasise that this approach is not in keeping with the principles of accountability, openness and transparency required of organs of state in terms of section 195 of the Constitution.
18. SECTION27 recommends that the proposed section 43G is redrafted to exclude the high standing requirement for interested parties and, if necessary, to clarify the meaning of participation in a market inquiry.

Conclusion

19. We thank the Portfolio Committee on Economic Development for the opportunity to comment on the Bill.
20. SECTION27 would like to make oral submissions on **29 August 2018** during the public hearings. For more information, please contact Umunyana Rugege at rugege@section27.org.za or 011 356 4100.