

Crouching dragon, paper tiger? Discerning the powers of the Competition Commission in market inquiries

Albert Aukema

Cliffe Dekker Hofmeyr, Johannesburg
albert.aukema@cdhlegal.com

Chris Charter

Cliffe Dekker Hofmeyr, Johannesburg
chris.charter@cdhlegal.com

Alistair Dey-van Heerden

Cliffe Dekker Hofmeyr, Johannesburg
alistair.deyvanheerden@cdhlegal.com

‘Suit the action to the word, the word to the action; with this special observance,
that you o’er-step not the modesty of nature’

Hamlet, Act 3 Scene 2

Antitrust regulation around the world has taken a distinct liking to the prospect of ex ante regulation, in recognition of the fact that markets are not inherently efficient and might, in fact, be the opposite if left to fester. Regulators, professing to be sanguine, will point out that some judicious pruning of the tree will lead to

more branches, lush growth, better blooms and ultimately more fruit. While the traditional antitrust toolbox is predicated on investigating the effects of anti-competitive firm conduct (such as vertical restraints or abuse of dominance) there has been a call to expand the tools of regulation to include an ability to investigate markets that may be *uncompetitive* (even if firms within them are not behaving *anti-competitively* in the sense of any expressly prohibited practice) and take proactive steps to address perceived structural distortions. To belabour the gardening analogy, it is not enough to deal with weeds and pests as they arise, but better to develop and tend a garden that is not conducive to either.

The Schumpeterian nature of digital markets has perhaps been a catalyst for this new form of regulatory intervention. Insofar as these markets move too fast and in too many directions at once for traditional *ex post* prosecutions to address (prosecutions take years, while digital markets can shift several times within that timeframe) the prevailing school of thought is that regulators should impose some sort of *ex ante* intervention to ensure that these markets do not become subject (in particular) to overwhelming dominance. This approach is presumably further informed by an increasing sensibility towards the travails of small businesses and new entrants in modern economies, and a corresponding jaundice towards big business.

While some jurisdictions have elected to introduce sector-specific regulation – the Digital Markets Act in the EU is a case in point – others have sought to leverage a more general type of intervention, namely market inquiries.

However, unlike sector-specific regulation, market inquiries typically have a far broader scope and ambit. In South Africa, Chapter 4A¹ of the Competition Act, 89 of 1998 (Competition Act) sets the statutory rubric for market inquiries. A market inquiry refers to 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’.²

The Competition Commission of South Africa (Commission) may conduct a market inquiry:³

- if it has reason to believe that any feature or combination of features of a market for any goods or services impedes, distorts or restricts competition within that market; or
- to achieve the purposes [sic]⁴ of [the] Act.

1 Chapter 2 deals with prohibited practice and Chapter 3 with merger control.

2 S 43A(1), Competition Act.

3 S 43B(1), *ibid.*

4 As an aside, it is perhaps telling that while S 2 of the Act refers to a singular ‘purpose’ – the promotion and maintenance of competition – with the expectation that this will lead to the outcomes in (a) to (g), S 43B refers to ‘purposes’ in an apparent attempt to expand the Commission’s mandate in the context of market inquiries, to promote any or all of the outcomes as ends in themselves, divorced from the question of maintaining competition per se.

The purpose of the Competition Act⁵ is ‘to promote and maintain competition ... 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;
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons; [and]
- (g) to detect and address conditions in the market for any particular goods or services, or any behaviour within such a market, that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic.’

The Commission has significantly increased the number of market inquiries in recent times, with one recently completed and a further three underway in the past year. This accounts for at least a quarter of all inquiries conducted by the Commission since its establishment. The Commission has also publicly stated that it intends to initiate at least one market inquiry per year, going forward.

The increase in formal inquiries, which are both costly and resource-intensive, gives the impression that the Commission views them as a potent regulatory tool in its arsenal.

This perception is understandable. The Competition Act was amended in 2018, introducing (among other provisions) Section 43D(1) – pointedly headed ‘duty to remedy adverse effects on competition’ – which mandates that, if the Commission identifies adverse effects on competition during a market inquiry, it is empowered to ‘take action’ to address, mitigate, or prevent such effects, provided they are ‘reasonable and practicable’. In this regard, the wording of the amendments echo the ability of the South African Public Protector, which is empowered by Section 182 of the Constitution, 1996, to ‘take appropriate remedial action’ if it identifies ‘any conduct in state affairs, or in the public administration, that is alleged to be improper or to result in any impropriety or prejudice’.

The extent of the Commission’s permissible action is sure to come under scrutiny in short order. It has recently released its final report and recommendations in the Online Intermediation Platform Market Inquiry (OIPMI). In the report,

5 S 2, Competition Act.

the Commission imposes far-ranging remedies, from requiring platforms to clearly indicate which of its results are paid for or organic, to the establishment of funds to support small and medium-sized enterprises. Terms of supply and procurement, as well as established business models, are also targeted for, in some cases, fundamental change.

The legality of the Commission's remedial actions will require an exercise in delimiting the scope of what the Competition Act considers 'action' that the Commission is empowered to exercise as well as the assessment of the impact of the remedial action. Does it overstep the separation of powers? Does it unduly infringe on a particular party's rights, or amount to an unjustified delegation of rule-making powers? Does it allow the Commission to sidestep the inquisitorial and adjudicative powers of the Competition Tribunal (Tribunal) and directly impose obligations or interdict market conduct?

The Commission will no doubt argue that this is the precise intention of the amendments – to give the Commission greater powers to enforce and preserve competition (not to mention the anticipated positive externalities of economic transformation and reduced barriers to entry for small or Black-owned companies). Although the wording of the section providing for the Commission's remedial powers shares a similar point of departure and linguistic terminology with the powers afforded to the Public Protector, they differ in certain fundamental respects.

The Commission's powers in terms of the Competition Act

As an unfortunate starting point, the Commission's remedial powers in market inquiries are poorly defined in the Competition Act and lack any specific enforcement mechanisms. This is in contradistinction to legislation such as the Digital Markets Act, which clearly sets out the parameters of the European Commission's powers in the context of the DMA as well as the specific criteria to identify gatekeepers and their obligations – little is left to the 'whim' of the regulator.

The text of section 43D empowers the Commission to 'take action' to remedy, mitigate or prevent the adverse effect on competition. The vagueness of the provision is stark when compared to the text regulating its investigatory, prosecutorial and enforcement abilities throughout the rest of the Competition Act. Take, for instance, its ability, after considering intermediate mergers, to 'approve, prohibit, or approve subject to conditions' the transaction; or the binary power to refer or non-refer a complaint of a prohibited practice to the Tribunal.

To add to the uncertainty, section 43E covers the ‘outcome of [a] market inquiry’ and provides for the following specified outcomes:

- (1) [The Commission] must publish ... and submit [a] report to the Minister with recommendations, which may include, but are not limited to—
 - (a) recommendations for new or amended policy, legislation or regulations; and
 - (b) recommendations to other regulatory authorities in respect of competition matters.
- (2) On the basis of information obtained during a market inquiry, the Competition Commission may—
 - (a) initiate a complaint and enter into a consent order with any respondent, in accordance with section 49D, with or without conducting any further investigation;
 - (b) initiate a complaint against any firm for further investigation, in accordance with Part C of Chapter 5;
 - (c) initiate and refer a complaint directly to the Competition Tribunal without further investigation;
 - (d) take any other action *within its powers in terms of this Act* [emphasis ours] recommended in the report of the market inquiry; or
 - (e) take no further action.’

If (2) above is treated as a closed list of outcomes (and rules relating to the interpretation of statutes suggests that they should be) it is arguable that the ‘action’ that may be taken is limited to:

- recommendations for new policy, legislation or regulations (and advice to other regulators to step in);
- its usual powers of referral to the Tribunal; and
- other action within its powers in terms of the Competition Act.

In terms of the latter, the question remains as to what, precisely, those powers are. We would submit that such powers should be clearly described and delineated in the Competition Act itself (such as, for instance, the powers of search and summons, which incidentally are specifically excluded in the context of market inquiries) and should not be inferred or treated as inherent.

Further, the Competition Act does not make it an offence to ignore the Commission’s findings as to remedial action in a market enquiry (unlike the way it does for orders of the Tribunal). Neither does it make refusing to abide by remedial action a ground for the imposition of an administrative penalty. Throughout the OIPMI remedial actions, the Commission threatens that, where parties do not comply with the remedial actions, it will approach the Tribunal for ‘an appropriate order’. In the absence of any legislated enforcement actions, or

the establishment of facts warranting a complaint referral in the ordinary course, it is unclear what this appropriate order might be, or under what section of the Competition Act this will be done.

Finally, the amendments seem to single out remedial action relating to divestiture, requiring that an application be made to the Tribunal for an order of divestiture. Principally, there is little difference in ordering a party to sell a component of its business and requiring such a party to fundamentally alter the way it engages with its customers, for instance, through a mandated amendment to contractual relationships. Both forms of intervention implicate rights enshrined in the Bill of Rights in the Constitution. Indeed, section 65 (1) of the Competition Act provides that ‘nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void’.

A Tribunal process envisages a full, contested hearing with evidence and cross-examination in the spirit of *audi alteram partem*⁶ while the market inquiry provisions require a far less robust process, much of which takes place behind closed doors. It is arguably contrary to the rules of natural justice to permit the Commission to impose binding obligations of an almost unlimited scope under such nebulous circumstances.

Interpreting Parliament’s intentions

Detractors of an empowered Commission would argue that this vague and overly broad rubric should prove that Parliament did not intend the Commission to assume far-reaching and deep-cutting powers; that the Competition Act does not – and cannot – grant the Commission the authority to function as a prosecutor and judge, even within the context of market investigations. They would argue that what the Competition Act envisions as ‘action’ is either referring certain conduct to the Tribunal for prosecution, where the actions of the parties fall foul of Chapter 2 or recommending that certain key regulators impose regulation through executive or legislative channels.

Moreover, the point of departure of a market inquiry is to look at markets where there is no immediate sense of anti-competitive firm conduct to investigate and prosecute in the ordinary course – it would present an enormous enforcement loophole to purport to allow the Commission to attribute guilty conduct and achieve by mere dictum in a market inquiry report what it would otherwise need to prosecute more robustly, and on a balance of probabilities. Although there is

6 An important principle of natural justice requiring that no person be ruled against without a fair hearing.

express provision for appeals to the Tribunal against findings in a market inquiry, that effectively reverses the onus, which is itself fraught with constitutional nuance.

Advocates for finding broader powers for the Commission would argue in response that the empowerment to ‘take remedial action’ must be read to give the Commission more powers than it had before. It cannot be that the legislature sought to amend the Competition Act substantially around market inquiries, only to require the Commission to assume its conventional role as prosecutor before the Tribunal or advisor to the legislature and regulators. The amendments certainly seem to envision that these are roles the Commission’s inquiry *can* fulfil, but do not seek to limit the Commission’s inquiries to these functions only.

Further, Section 43D(4) establishes a framework for remedial action, requiring it to be reasonable and practicable, considering several relevant factors, which include:

- the nature and effect of the adverse effect on competition;
- the nature and extent of remedial action;
- the relation between the adverse effect on competition and the remedial action;
- the likely effect of the remedial action on competition in the market;
- the ability of less restrictive means to remedy, mitigate, or prevent the adverse effect on competition; and
- any other relevant factors.

In the face of such a vast array of relevant factors guiding the exercise of its powers, the Commission would argue that this demonstrates the legislature’s clear intent to grant it any and all power it requires (assuming of course, it falls within the defined guard rails above). Why else would the legislature define how conduct should be performed if it only intended the Commission to perform pre-defined functions?

The Commission and the Public Protector

In support of its cause, the Commission would likely invoke the similarities in wording between its remedial powers and the Public Protector’s. In the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, the Constitutional Court considered the scope of the Public Protector’s remedial power. It held that:

‘Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. It connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint.’

The Commission would, undoubtedly, look to this definition and the presence of similar wording ('take remedial action') in Section 43D(4) in defining what action it is empowered to take.

However, perhaps this look should not be too eager. Even after accounting for the respective legislative constructions, there are certain key differences in the Public Protector's remedial powers and the Commission's.

First, the Public Protector's empowerment to take remedial action is derived from the supreme law, the Constitution of 1996; the Commission's power is derived only from the Competition Act. Where an errant State President ignores the order of the Public Protector, the Constitutional Court has found that they breach the Constitution. The same cannot be said about the Competition Act.

Second, the Public Protector, as a Chapter 9 institution, enjoys a greater level of independence from the executive and legislature than the Commission does. As a Chapter 9 institution, the Public Protector is accountable only to the National Assembly. In terms of the Competition Act, important appointments are made by, or on recommendation of, the Minister of the Department of Trade, Industry and Competition – a department with greater policy stakes in the decisions of the Commission than the comparative Department of Justice and Corrections has with the Public Protector. A court would thus be wise to interpret the remedial actions of the Commission more restrictively and contextually than it would those of the Public Protector.

Third, the Public Protector has a clearer mandate, which (in theory) is less susceptible to policy interference than the Commission. It's clear what constitutes 'incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles'. As such, these objectives are far less malleable to the machinations of policy than action which 'distorts competition within a market'.

The interpretation of what constitutes 'action' in the Competition Act is bound to be a battleground between the Commission and parties seeking to avoid the obligations brought about by the Commission's remedial actions.

Layered onto this battleground are considerations around whether the Commission's remedial actions should be interpreted to afford it the ability to engage in rule-making. The Commission's overtures in its OIPMI report are that it believes it does. Take for example, the cross-cutting 'leading platform' remedial actions proposed, which require the likes of Google to clearly indicate to users which of its results are organic, and which are paid for, as well as which of the results are South African, as opposed to international results. These remedies materially impact the way firms interact with their users and the nature of this obligation is clearly regulatory in nature.

This remedy raises questions around whether the Commission is empowered to make subordinate regulation through the process of market enquiries. If it does, parties now need to treat every market inquiry as a quasi-legislative process, a fact which in and of itself begs certain questions regarding the propriety of such wide powers in the hands of a regulator.

Conclusion

Delimiting the scope of the Commission's market inquiry remedial power is bound to be a fraught exercise. The Commission will undoubtedly pursue a broad interpretation of its powers, with affected parties seeking to limit the scope at every turn.

Where parties underestimate the Commission's powers, they run the risk of having onerous obligations placed on the manner in which they conduct business. Where the Commission overreaches, it creates fertile ground for judicial intervention and the unfavourable limitation of the scope of its power.