Probing the value of market inquiries from the perspective of the Banking Enquiry

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1 Introduction

With section 6 of the Competition Amendment Act No. 1 of 2009 having come into effect on 1 April 2013, the Competition Commission (the "**Commission**") now has formal powers under the Competition Act No. 89 of 1998 (as amended) (the "**Act**") to conduct an inquiry in respect of the general state of competition in a market for particular goods or services ("**market inquiry**").

With the launch of the Private Health and the Liquid Petroleum Gas ("**LPG**") inquiries signifying intent for market inquiries to assume a material role under the Act, it is vital to identify the potential effectiveness and limitations of market inquiries as an intervention for competition enforcement. Albeit conducted prior to the amendment to the Act, the *Banking Enquiry Report to the Competition Commissioner by the Enquiry Panel* (the "**Banking Enquiry**")[1] provides the only precedent to understand the benefits and pitfalls of using market inquiries.

Despite this precedent value as well as the immense cost and effort dedicated to the participation in and implementation of the Banking Enquiry by industry and government stakeholders, there has been no objective and rigorous post-implementation review of the Banking Enquiry akin to a standard regulatory impact assessment.

The authors set out a comprehensive account and analysis of the impact of Banking Enquiry as a regulatory intervention, in order to identify lessons learnt and assess the overall effectiveness of market inquiries.

In the same way as the Banking Enquiry contributed, albeit together with a range of other economic and regulatory factors, to furthering competition in the retail banking sector, it is submitted that market inquiries can be a very useful tool to shed light on competition in a given sector. However, market inquiries can also play a sub-optimal role if the key lessons from the Banking Enquiry are not taken into account.

Based on the experience of the Banking Enquiry, care must be taken in order to ensure that market inquiries follow an objective evidence based methodology before their outcomes are formulated and then imposed on market participants. Further, market inquiries should avoid an adversarial approach and promote collaboration with industry participants in order to work towards solutions.

In addition, the Banking Enquiry demonstrates that the lack of involvement of sector regulators can lead to uninformed and duplicate outcomes while of course the excessive intervention of sector regulators may jeopardise the independence of a market inquiry. Lastly, a formal post-implementation framework should be installed in order to transparently track the outcomes of market inquiries.

2 Background

There has been very little commentary, if any, over the years on the Banking Enquiry, especially from the perspective of those participants that prepared the various voluminous submissions, populated pages of questionnaires and endured days of hearings and working groups. The following sections intend to provide insight from this perspective on the various phases of the Banking Enquiry.

[1] All the documentation relating to the Banking Enquiry can be accessed at http://www.compcom.co.za/enquiry-in-to-banking

2.1 Pre-Enquiry process

Prior to the Commission's launch of the Banking Enquiry, in May 2003, the National Treasury appointed a task group, chaired by Dr Hans Falkena, to assess the state of competition in the South African banking sector. The task group did not have any formal powers of enquiry and conducted its task on the basis of desktop research, surveys of literature and interviews with certain stakeholders. Critically, it does not appear that the task group comprised of any competition law experts despite the fact that its core function was to assess the level of competition in the banking sector.

The task group released its report entitled "Competition in South African Banking" in April 2004 (more commonly referred to as the "**Falkena Report**")[2]. The Falkena Report made several recommendations, such as, the need for greater and more transparent access to the national payments system ("**NPS**")[3], the need to allow more foreign banks to participate in the South Africa banking sector and the need for more regulatory oversight over bank charges and fees.

Following the Falkena Report and due to consumer concerns over the level of bank charges, the Commission commissioned an economics firm, FEASibility, to conduct an analysis of the NPS and the state of competition in the South African banking sector. FEASibility's report entitled *"The National Payment System and Competition in the Banking sector"* was completed in March 2006 (the "**FEASibility Report**")[4] and highlighted a number of concerns, namely:

- The lack of access to the NPS by second tier banks and non-banks; and
- The level and transparency of charges levied by banks.

The FEASibility Report may be criticised for not being thorough as the concerns identified were not substantiated or thoroughly interrogated further. For instance the FEASibility Report implied that there was an insufficent regulation across the banking sector and, in particular, in the NPS. However, in reality, the NPS was and still is stringently regulated by the South African Reserve Bank ("**SARB**") in terms of the National Payment System Act No. 78 of 1998 (the "**NPS Act**") and over and above compliance with the Banks Act No. 94 of 1990, the banking sector is one of the most intensely regulated sectors of the economy and is subject to oversight by a number of regulators.

The suggestion that the level of banking fees was excessive appears only to have been based on an assumption that banking fees and interchange fees should be purely cost related, without establishing the relevance of other qualitative factors such as 'value add'.[5] In addition, the Feasibility Report also appeared to disproportionately rely on regulatory interventions in other jurisdictions without sufficient regard to the different context applicable in South Africa from a micro and macro-economic and regulatory environment.[6]

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2 *"Competition in South African Banking",* April 2004, <http://www.finforum.co.za/fininsts/ciball.pdf> (accessed on 11 August 2014).

3 The NPS encompasses all the payment-related activities, processes, mechanisms, infrastructure, institutions and users in South Africa that come into play from the moment an end-user, using a payment instrument, issues an instruction to pay another person or a business, through to the final interbank settlement of the transaction in the books of the SARB.

4 *"The National Payment System and Competition in the Banking sector",* March 2006 <http://www.polity.org.za/article/national-payment-system-competition-in-the-banking-sector-may-2006-2006-05-19> (accessed on 11 August 2014).

5 *Ibid*, pages 5 and 179.

6 *Ibid*, pages 25-26 and 34.

The FEASibility Report did not identify any conduct that could be characterised as being of concern under any provisions of the Act. In that regard, it merely acknowledged the *"…complexity in separating out competition (or fairness) concerns and general regulatory concerns…but cannot be said to be primarily about competition."*[7]

The concerns identified in the FEASibility Report appear to have significantly influenced the decision to launch the Banking Enquiry as the Commission sought to assess whether or not any of the concerns amounted to a contravention of the Act.

2.2 Enquiry process

On 4 August 2006, the Commission established the Banking Enquiry and published the Banking Enquiry's terms of reference and the composition of the Panel.[8] Although the Banking Enquiry's resources were housed at the Commission's offices, to ensure independence and impartiality, the Banking Enquiry was provided with dedicated infrastructure and personnel separate and independent from the Commission.

The Commission's legal basis for establishing the Banking Enquiry under the Act was section 21(1)(a), which empowers the Commission to implement measures to increase market transparency and section 21(2)(b) which empowers the Commission to enquire into and report to the Minister on any matter concerning the purposes of the Act. The Banking Enquiry encouraged the voluntary participation of all affected stakeholders.

As stated in its Terms of Reference, the objectives of the Banking Enquiry were to, *inter alia*[9]:

- Increase transparency and competition in the relevant markets;
- Ascertain whether or not there were any grounds for the Commission to investigate any specific contraventions of the Act; and
- Engage with banks, relevant regulators and other stakeholders to determine the feasibility of improving conditions affecting competition including access to the NPS infrastructure.

The Banking Enquiry was conducted in five main phases ranging over 29 months. As part of stage one (August - October 2006), the Panel identified relevant stakeholders (primarily banks, other participants in the NPS and relevant regulatory authorities) from which initial general submissions regarding the state of competition in the banking sector and access to the NPS would be sought.

Stage two (November 2006) consisted of a roadshow of public hearings in several cities across South Africa as a means to involve the public and to understand their perception of retail banking. The Panel invited certain stakeholders to appear during these public hearings to make oral presentations (subject to confidentiality claims) of their written submissions and to answer questions from the Panel.

Stage three (February - March 2007) allowed for further research and culminated in specific questionnaires prepared by the Technical Team, calling for detailed submissions of data and qualitative views from various parties, in particular, the banks.

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7 *Ibid*, paragraph 10.3, page 180.

8 See <http://www.compcom.co.za/terms-of-reference> (accessed on 11 August).

9 See paragraph 6 of the Banking Enquiry terms of reference <http://www.compcom.co.za/terms-of-reference> (accessed on 11 August).

Stage four (April - July 2007) involved further hearings and then specific working group sessions. The hearings focussed on four main topics identified as being of concern to the Panel, namely, (i) ATM charges; (ii) payment card interchange fees; (iii) access to the NPS; and (iv) the level and structure of bank charges. Both banks and non-bank stakeholders (including the card schemes and representative forums of retailers) participated in the hearings.

The hearings took the form of presentations by the various participants, including proposals to address the issues being raised by the Panel. Following each presentation, the Panel asked the representatives of the participants, often senior executive management, detailed questions on relevant issues.

Subsequently, specific workgroups between the Banking Enquiry's technical team and the relevant stakeholders took place to explore the feasibility of certain proposals tabled during public hearings, namely (i) direct charging for ATMs; (ii) adopting an objective and transparent process for interchange determination; and (iii) measures to facilitate product comparisons and customer switching. Many of these proposals were made by the banks during the hearings as a constructive means to deal with the issues being raised by the Panel.

Stage five (July 2007 – June 2008) involved analysis and report writing by the technical team. On 25 June 2008, the Commission published the Executive Overview containing a summary of the main findings and the 28 recommendations made by the Panel (the "**Recommendations**")[10]. On 12 December 2008, the Commission released the non-confidential version of the full Technical Report which supported the findings of the Panel.[11] The non-confidential Technical Report, with the confidential information of the participants blacked out but not redacted, was posted on the Commission's website. Due to the lack of encryption, within five days, Wikileaks had posted an un-redacted version of the Technical Report on its website.

2.3 Recommendations

The Recommendations touched upon various aspects of the retail banking sector. As discussed in more detail below, some Recommendations were entirely predictable from the various interactions during the course of the Banking Enquiry. The Recommendations were directed at a range of stakeholders, including the banks, card schemes, the SARB, the Commission, the Payments Association of South Africa ("**PASA**") and the Banking Association of South Africa ("**BASA**"). In some cases, it was not clear as to whom specific responsibility for the implementation of certain Recommendations was allocated.

The Recommendations were as follows:

Area	Substance of Recommendation	Subject of Recommendation
Debit orders	1: R5 cap on returned debit order fees	Banks
	2: Increased channel capability for consumers to cancel debit orders	Banks
ATMs	3–6: Implementation of a direct charging model for off-us ATM transactions	Banks
	7: Consideration of a direct charging model for cash-back and mini-ATM transactions	Commission
Payment cards	8: Regulatory process to consider need for and level of interchange fees for a range of payment streams	Not specified

[10] *"Report to the Competition Commissioner by the Enquiry Panel"* (June 2008) <http://www.compcom.co.za/assets/Banking/Executive-overview.pdf> (accessed on 11 August 2014).

[11] *Ibid*, <http://www.compcom.co.za/technical-report/> (accessed on 13 August 2014).

Area	Substance of Recommendation	Subject of Recommendation
	9: Removal of restrictions on non-bank acquirers	Card schemes
	10: Removal of prohibition of pure cash-back	Card schemes
	11: Removal of honours all products rule	Card schemes
EFT / EDO[12]	12-14: Consideration of interchange for these payment streams vis-à-vis possible investigation or submission to process specified in Recommendation 8	Not specified
NPS governance	13-16: Development of access regime for non-banks in clearing and settlement (with associated membership of PASA)	SARB
	18-19: Chief Executive PASA to decide on membership applications to PASA and new Payments Ombudsman to be created to adjudicate any dispute on application decisions	PASA / SARB
Product transparency	20-21: Development of minimum disclosure standards and standardised terminology	BASA
	22: Creation of standard consumer profiles	BASA
	23: Creation of a centralised banking fee calculator	Not specified
	24: Proposed consideration of relaxation of comparative advertising	Commission
	25: Proposal to develop basic banking products	Commission
	26: Development of a switching code	BASA
	27: Development of a central FICA repository	National Treasury
	28: Increase jurisdiction of Ombudsman for Banking Services over matters relating to Recommendations 20 and 26	Not specified

A number of Recommendations had featured heavily in stage four of the Banking Enquiry and thus gave rise to little surprise to the participants. In particular, material discussions had taken place on some of the main Recommendations, namely Recommendations 3-6, 8 and 20-23. In contrast, the participants were taken by surprise by certain Recommendations that received very little, if any, attention during the Banking Enquiry.

For example, despite its far reaching impact, there had been no consultation or forewarning on Recommendation 1. Whereas debit order fees had formed part of the earlier hearings, there was no discussion on the concept of price regulation or as to the appropriateness of the proposed R5 fee cap.

In addition, the Panel made some far-reaching comments on the suitability of interchange fees on the EFT payment stream without material discussion within the public hearings. Whereas the appropriateness of interchange fees for the ATM and payment card payment streams was a major preoccupation of the Panel, EFT interchange fees were never discussed in the hearings and only featured in a number of questions in the stage three questionnaires.

It bears further mention that by the time the Recommendations were published in June 2008, the SARB had already made significant progress in creating and implementing a framework to allow non-banks greater access to the NPS (as clearing participants of the NPS), including amendments to the NPS Act, which largely rendered academic Recommendations 13-19 pertaining to NPS access and governance.

[12] The acronyms EFT and EDO means Electronic Funds Transfer and Early Debit Orders respectively. EFTs cover both credit transfer and debit order payments, while EDOs are a form of debit orders.

2.4 Post-Recommendations

In the immediate aftermath of the publication of the Recommendations and of the Technical Report, there was uncertainty on behalf of industry stakeholders as to the institutional framework for the implementation of the Recommendations and, in particular, which regulatory body / government department would take the lead and overall accountability. A steering committee led by the National Treasury and comprised of representatives from the Commission, the Department of Trade and Industry and the SARB was eventually pulled together to consider the Recommendations. The workings of the steering committee were not shared with the industry stakeholders and, for a time, there remained a lack of clarity as to the way forward.

The discussions within the steering committee ultimately led to the National Treasury reaching out to the banks with a proposed joint position as regards the progress made since the Recommendations were published, which remaining Recommendations should be taken forward and to how specifically they should be implemented. After several drafts were circulated to the banks, on 1 June 2010, National Treasury issued a press release with the following details:[13]

Area	Number	Comment
Debit orders	1	Recommendation rejected. Instead, the National Treasury recognised the lowering of fees and encouraged their further lowering
	2	Recommendation endorsed but modified to include improved debit order management within PASA.
ATMs	3–7	Recommendation rejected. Instead, the National Treasury supported the bank's proposal for increased transparency on ATM transactions (including ATM screen message).
Payment cards	8	SARB to take forward.
	9-11	Recommendations endorsed.
EFT / EDO	12-14	SARB to take forward.
NPS governance	13-16	Recommendations partially rejected in relation to non-bank access to the settlement system. National Treasury noted the amendments already passed by the SARB on access to clearing.
	18	Recommendation endorsed.
	19	Recommendation rejected.
Product transparency	20, 21, 26 & 28	Recommendations endorsed.
	22, 24 & 27	Recommendations rejected.
	23	Recommendation rejected. Instead, the National Treasury required banks to make their own fees calculators available across a number of channels.
	25	Recommendation rejected. Instead, the National Treasury required banks to develop own low income products

As can be seen above, from the 28 Recommendations, 12 Recommendations were rejected in their entirety and a further four Recommendations were partially rejected, while only nine Recommendations were endorsed. In relation to the remaining Recommendations (i.e. Recommendations 8 & 12-14), the SARB subsequently announced that it would take formal ownership of the review of interchange fees.

[13] *"Facilitating the implementation of the Recommendations of the Banking Enquiry Panel"* National Treasury, <http://www.treasury.gov.za/comm_media/press/2010/2010060102.pdf> (accessed on 13 August 2014).

A number of Recommendations were redrafted in order to be rendered more pragmatic based on feedback from the banks. As the banks were committed to these modified Recommendations they were labelled as the Commitments. As the Commitments were the course of action eventually agreed between the steering committee and the banks, it is against the Commitments that the impact of the Banking Enquiry must be measured.

Following the June 2010 press release, there were no further comprehensive media statements on the implementation of the Recommendations/Commitments by the National Treasury or another member of the steering committee. There were, however, a few sporadic comments made over the years. For example, in the context of the Banking Enquiry, in the 2011 budget speech, the then Minister of Finance, Pravin Gordhan, stated

> *I believe it is time to put in place measures that will ensure that banking charges are fairly set, are transparent and do not create undue hardship.*[14]

In addition, in a policy document, the National Treasury still motivated the need to strengthen market conduct supervision and the ombuds system and to expand the scope of the Financial Services Board to cover market conduct in retail banking with reference to the type of conduct examined in the Banking Enquiry.[15]

Further, in August 2012, the National Treasury stated

> *The Minister noted progress the banks had made in meeting some of the recommendations of the Banking Enquiry. There was more to be done to ensure that all South Africans had access to fair and cost-effective banking services. The services offered to middle- and low-income South Africans must be guided by simplicity, comparability, transparency, accessibility and competitive costs.*[16]

As opposed to recognising the considerable progress made by the banks, these statements are implicit that the Commitments did not seemingly go far enough, in the National Treasury's opinion, in dealing with the underlying regulatory concerns regarding the level and transparency of banking charges.

In addition to the lack of any press statements, transparency was further hindered by the lack of any formal process through which the banks or other stakeholders were required to or could report on the implementation of the Commitments to the steering committee. In practice, an informal process was set up whereby the banks provided feedback to senior management at the National Treasury on their responsible actions. These meetings took place every six months during the course of approximately three years. Feedback was informally provided by the banks, for example, by means of a powerpoint presentation covering actions under each of the applicable Commitments. The National Treasury provided informal feedback on the level of compliance with the Commitments. At one point, a scorecard on the overall level of compliance with the Commitments was developed by the National Treasury, which was circulated to stakeholders for comment. Although it was mooted that the scorecard would be published together with a press release, there was no subsequent publication.

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[14] Budget Speech, Minister of Finance, Pravin Gordhan, 23 February 2011, Page 12, http://www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf (accessed on 24 August 2014).

[15] *A safer financial sector to serve South Africa better, National Treasury*, 23 February 2011, Page 32, http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf (accessed on 24 August 2014).

[16] Media Statement on Finance Minister's Meeting With The Banking Industry, National Treasury, 27 August 2012, http://www.treasury.gov.za/comm_media/press/2012/2012082702.pdf (accessed on 25 August 2014).

In May 2013, the Commission informed the banks that it would undertake a post-implementation review of the Banking Enquiry to understand, amongst other things, the implementation of the Recommendations and the extent to which the Banking Enquiry achieved its objectives in order to inform future market inquiries. However, despite limited interactions with certain stakeholders, it appears that the proposed post implementation review has been superseded by the Commission's current market inquiries into the Private Healthcare and LPG sectors.

2.5 Status of the Commitments

Due to the lack of public announcement by the National Treasury, it is difficult to provide an overview of the status of the implementation. It is however possible to comment on those Commitments that required industry collaboration and regulatory intervention, which accounted for the majority of the Commitments.

In relation to the Commitments requiring industry / regulatory involvement, it is possible to observe the following:

Area	Number	Comment
Debit orders	2	Completed - a range of improved debit order management was undertaken within PASA.
ATMs	3–7	Completed - the banks implemented the required ATM screen message.
Payment cards	8	Completed - The SARB completed its review of the level of interchange fees for payment cards.
	9-11	Completed - The card schemes implemented the proposed rules changes.
EFT / EDO	12-14	Completed - The SARB considered the impact of the interchange fee review to the EFT / EDO payment streams.
NPS governance	13-16	Completed - the SARB enabled access to Designated Clearing Participants.
Product transparency	20, 21, 26 & 28	Completed - The Code of Banking Practice has been revised by the banks in order to incorporate the switching code, the minimum transparency standards and the standardised terminology requirement. As part of this revision, the content of the code was modernised in order to benefit consumers as a whole (e.g. inclusion of a consumer bill of rights).

3 Lessons learnt from the Banking Enquiry

Although a significant number of Recommendations were not implemented after consultation with industry and regulatory stakeholders, the Banking Enquiry still contributed to the furthering of competition in the retail banking sector. Together with raising the profile of the debate, it also provided a platform for all stakeholders to voice their concerns and be heard by the Panel. It equally provided opportunities for the banks to, where possible, contextualise the concerns of stakeholders and to confront these concerns by developing consumer-centric solutions.

In the latter regard, building on the impact of specific Recommendations, the greatest achievement of the Banking Enquiry was to change the mindset of the banks to become responsive to consumer and regulatory concerns. This impact was further reinforced over the years by a range of factors such as increased consumer activism, the lack of growth in the economy, the increased media profile on fees and charges through pricing surveys, the emergence of challenger banks, the increased penetration of non-banks and the increased scope and depth of multiple regulations (such as the implementation of the National Credit Act).

Despite the relative contribution of the Banking Enquiry to furthering competition, a number of salient points emerged from the process which, in our opinion, must be taken into account for market inquiries going forward, such as the objective standard

as a threshold for intervention in market inquiries, the involvement of industrial and regulatory stakeholders and the need for a transparent post-implementation framework.

3.1 Objective standard

Although perhaps not surprising given the lack of formal regulatory framework underpinning the Banking Enquiry, there was material uncertainty throughout the process as to the relevant legal test to evaluate the status of competition and hence ultimately justify the need for any proposed intervention. While the legal test has been clarified in section 43B(1) of the Act, it is submitted that the nature of market inquiries lend themselves to discretionary and arguably subjective means to intervene in markets.

As stated above, despite the wide scope of the Recommendations, the material discussions during the Banking Enquiry were primarily limited to the legitimacy of ATM and payment card interchange fees and the promotion of transparency measures of current accounts and basic bank accounts. The nature of these discussions varied significantly across these topics ranging from legal debates on the application of section 4 of the Act to wider policy discussions on retail banking regulation. At no point during the Banking Enquiry was there any discussion as to the appropriate legal test to justify intervention by means of a market inquiry.

Limited evidence was produced in relation to the application of the Act to ATM and payment interchange fees as the debate was mainly focussed on the characterisation of these inter-bank agreements. The evidence sought by the Panel was limited to the manner in which ATM interchange fees were introduced by the parties as it was not disputed as to how the then regime of payment card interchange fees had been implemented.

Whilst the debates on interchange fees were fairly familiar to competition lawyers, the discussions on the other Recommendations were less structured. For example, the discussions on the appropriate level and manner of disclosure to consumers during the hearings did not rely on any evidence relating to the impact on the existing level of the product descriptions. The discussions were rather based on anecdotal views on the desirability of product disclosure. As an example of this approach, the Panel concluded that

> *While improvements in transparency and disclosure of product and price information should help reduce search costs, the Enquiry found that more direct and proactive measures are needed to simplify comparisons between the prices and product offerings of different banks.*[17]

These types of policy findings stray dramatically from the typical roles played by the Commission in the enforcement of the Act against cartels or dominant companies or even in the context of mergers. In a way, this is a given as market inquiries are intended to deal with areas of general concern that do not fit within the other provisions of the Act. It is of course thus accepted that market inquiries play a fundamentally different role than these typical enforcement roles. In this regard, it is not submitted that market inquiries must be forced in the same legal straightjacket as other sections of the Act. It is however suggested that market inquiries must, as an application of a statute intervening with the legitimate right to do business, follow an objective and evidence based methodology.

[17] *Report to the Competition Commissioner by the Enquiry Panel"* (June 2008), Ppage 499 <http://www.compcom.co.za/technical-report/> (accessed 22 august 2014).

This suggestion does not have any less significance now that the specific legal test for market inquiries has been clarified in section 43B(1) of the Act, which states that the Commission may conduct a market inquiry

> *(i) if it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market; or (ii) to achieve the purposes of this Act.*

With reference to the first limb, as demonstrated by the experience of market studies and market investigations by the Office of Fair Trading and the Competition Commission respectively under the UK competition regime, a feature could amount to almost anything and does not materially raise the evidential burden on the Commission. In any event, the second limb allows for a broader application in a manner akin to the underpinning of the Banking Enquiry under the Act.

The risk with a potentially low evidential burden under section 43B(1) of the Act is that it allows the Commission a potentially unhindered ability to intervene into markets. Touching upon the type of discussions regarding the purpose of the Act before the Competition Tribunal and the Competition Appeal Court in the *Walmart/Massmart* merger[18], it must be clear whether the market inquiries are intended to remove hindrances to competition or indeed promote other recommendations that seek, at least in the eyes of the Commission, to make the world a better place. In the context of the policy discussions necessarily surrounding market inquiries, the boundary between both objectives might not be immediately apparent.

As was witnessed during the Banking Enquiry, there is tendency to use market inquiries for industry re-engineering purposes (such as the proposed upheaval of ATM inter-bank model in Recommendations 3-6). The Commission is not best placed in a parliamentary democracy to take such crucial policy decisions on the future of a given sector. These concerns might be exacerbated by the possibility that market inquiries could allow for further political interference to be incorporated into the application of the Act as they should not be used to circumvent the formulation of sector regulation.

The requirement for an objective and evidence based methodology provides a vital safeguard to ensure that the use of market inquiries is appropriately restrained.

3.2 Stakeholder involvement

Although a particular feature of the Banking Enquiry due to its voluntary nature, the involvement of the industry participants plays a critical role in the success of any market inquiry.

In the Banking Enquiry, banks were apprehensive and suspicious at the outset of the process as it coincided with the Commission's enforcement of the Act in a number of high profile cartel cases, in particular, the bread cartel.

In addition, many stakeholders, particularly banks, voiced concerns over the treatment of confidential information and initially made excessive confidentiality claims over the content of their written and oral submissions. This issue threatened to jeopardise the Panel's ability to conduct the Banking Enquiry by way of public hearings and the Panel subsequently challenged the excessiveness of the confidentiality claims, resulting in many stakeholders agreeing to provide non-confidential versions of their submissions.

[18] *Minister of Economic Development and Others and Wal-Mart Stores Inc and Others* [110/CAC/Jul11].

Notwithstanding their initial apprehension towards the Banking Enquiry, during the course of the process, the banks changed their stance to the point that they became intimately involved in the process and made a significant number of submissions to the Panel which culminated in over a third of the Recommendations and many of the Commitments.

The Banking Enquiry demonstrates the necessity of the industry participants' active and constructive involvement for the success of a market inquiry. Looking forward to future market inquiries, this involvement will only be achieved if market inquiries are held in a non-adversarial manner and not to simply rubber-stamp a seemingly inevitable outcome, especially in politically sensitive topics such as the provision of healthcare.

Another vital aspect of stakeholder involvement regarding market inquiries relates to the participation of sector regulators. In the case of the Banking Enquiry, it is understood that, at the outset, the SARB refused to participate in the Banking Enquiry process, ostensibly due to the fact that the SARB considered itself, as the sector specific regulator for the banking sector and the NPS, as having the sole mandate to make any interventions necessary to address any concerns emanating from the banking sector. It also bears mention that, at the time of the Banking Enquiry, the ways of work between the Commission and sector regulators were yet to be established.

Undoubtedly, the failure of the SARB to participate in the Banking Enquiry deprived the Panel of the SARB's technical expertise and may have contributed to some duplication since some of the Recommendations (especially those pertaining to access to the NPS) were already in the process of being addressed by the SARB.

Moreover, in the SARB's absence, the relevance or appropriateness of the other Recommendations pertaining to market conduct and the various payment streams could be called into question. For example, the lack of technical involvement from the National Treasury and the SARB led to the rather fanciful nature of Recommendation 27 relating to the proposed creation of a FICA repository, a project that had been considered many times in the past and abandoned for technical and legal complexities. Handed this hospital pass, the National Treasury only set up one meeting with the industry relating to Recommendation 27 before taking no further action.

The relationship between the Commission and the SARB at the outset of the Banking Enquiry appears to materially differ from the relationship between competition authorities and sector regulators in other jurisdictions. For example, the Competition Authority of Kenya is closely working with the National Treasury and Central Bank of Kenya in relation to the sectoral study into competition and consumer protection in the Kenya banking sector,[19] while the Competition Commission of Mauritius at least consulted with the Bank of Mauritius on the terms of reference regarding its market investigation into the bundling of insurance and credit products in the banking sector.[20]

It is of course accepted that the involvement of sector regulators in a market inquiry can of course lead to unintended consequences, the primary one being the undermining of the independence of the process in the first place. Given that a market inquiry will evaluate the level of competition in a given sector, which ordinarily has been materially influenced by the pre-existing regulation, the involvement of a sector

[19] *"Competition and Consumer Protection in the Kenya banking sector",* Terms of reference, Competition Authority of Kenya, March 2013.

[20] *"The Bundling of Insurance and Credit Products in the Banking Sector, Final Report of the Executive Director"*, Competition Commission of Mauritius, 30 August 2012.

regulator may ensure it is too close to the Commission for the latter to openly criticise the regulation.

However, notwithstanding this risk, unless falling squarely within the realms of competition enforcement, the Commission is ultimately powerless to implement any recommendations arising from a market inquiry. In contrast to competition authorities in other jurisdictions, the Commission is only empowered to make recommendations to regulatory stakeholders. As the Banking Enquiry demonstrates, in the absence of any involvement by the sector regulators, the vast majority of recommendations may either be rejected or significantly modified before implementation. Any lack of alignment between the Commission and the sector regulator inevitably places industry participants in an unenviable position.

3.3 Lack of post-implementation framework

As mentioned above, there was no formal process through which the banks or other stakeholders were required to or could report on the implementation of the Commitments to the steering committee. The lack of such a process prevented stakeholders (beyond those intimately involved in the implementation process) from being appraised on the considerable efforts being made on the Recommendations and Commitments. The default assumption by media commentators was that nothing had been done to implement them. For example, rather than fully understand the institutional framework arising from the formation of steering committee, a media report alleged that,

> *The banks' response to the panel's recommendations has been considered so lacklustre and "tardy" that in 2010, Mr Gordhan called their heads together and read the riot act.*[21]

The perception from consumers and media stakeholders that little had been achieved from the Banking Enquiry is somewhat unfair given the considerable management time, expense and effort since the launch of the Banking Enquiry in August 2006 to the present day where activities on aspects of some Commitments (such as the review of interchange fees) are still ongoing.

It is also suggested that the failure for the National Treasury to unconditionally sign-off on the implementation of the Banking Enquiry encouraged the situation where it motivated further material regulation based on the concerns discussed in the Banking Enquiry without any acknowledgement of the measures implemented subsequently.

The lack of the formal closure on the implementation of the Commitments also left uncertainty as to the ownership and status of the Recommendations as a whole. For example, in May 2012, the former National Consumer Commissioner (NCC) contacted the banks in relation to the level of ATM fees and, in particular, the revival of the ATM direct charging model (Recommendation 3-6). Although it is understood that some meetings between the NCC with the banks took place, other meetings were postponed following the intervention of the SARB and the National Treasury.

Going beyond the Banking Enquiry, a transparent post-implementation framework is imperative for future market inquiries under the Act. Such frameworks are, at the very least, required from the perspective of routine regulatory impact assessments in order to quantify the benefits arising from the inquiry compared to the costs of intervention incurred by the industry, the Commission and other regulatory stakeholders.

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[21] *'Banks at the crossroads in treating their customers fairly',* Business Day, 31 August 2012, http://www.bizcommunity.com/Article/196/513/80966.html, accessed on 25 August 2014.

4 Concluding remarks

Building on the tangible impact of the specific Commitments, the greatest achievement of the Banking Enquiry was to change the mindset of the banks to become responsive and accountable to consumer and regulatory concerns. This mindset was evident from manner in which the banks embraced the Banking Enquiry by playing a vital role in proposing the majority of the Commitments. As mentioned above, together with a range of factors, the Banking Enquiry played an important role in furthering competition in the retail banking sector. Despite this successful impact, it is argued that the Banking Enquiry was sub-optimal in a number of critical aspects.

It is submitted that the Banking Enquiry did not follow an objective evidence based methodology before the Recommendations were formulated and then imposed on market participants.

In addition, the lack of involvement of the National Treasury and the SARB ensured that over half of the Recommendations were ultimately either rejected in full or partially by the regulators themselves.

Further, the lack of any formal post-implementation framework failed to bring any attention to the considerable efforts made by all parties, including industry stakeholders, to implement the Recommendations and Commitments. In this regard, the default impression of stakeholders was that nothing happened as a result of the Banking Enquiry. Such an impression would only seem to be entrenched by the subsequent comments by the National Treasury around the 2011 Budget Speech.

In the same way as the Banking Enquiry contributed, albeit together with a range of other economic and regulatory factors, to furthering competition in the retail banking sector, it is submitted that market inquiries can be a very useful tool to shed light on competition in a given sector so long as the key lessons from the Banking Enquiry are learnt. These lessons must be heeded as they are not specific to the informality of the Banking Enquiry given that they touch upon the inherent features of market inquiries.