

30 June 2016

Health Market Inquiry
Supplementary Guideline No. 3
Stakeholder Meeting Protocol

Introduction

1. This Supplementary Guideline No. 3 is to be read with the Guidelines issued previously in connection with the Health Market Inquiry (“HMI”). It takes effect on the date indicated above and has no application beyond the scope of the HMI.
2. To date the HMI has held 19 days of public hearings, receiving oral submissions from 69 stakeholders, in many cases accompanied by written submissions and presentations in addition to those made previously. In the further course of the HMI additional hearings will be held, concentrating in more detail on specific issues. Since the initial public hearings some stakeholders have sought meetings to clarify aspects of their oral and written submissions, either as a direct follow-up to questions that were posed by the HMI Panel or, in certain instances, to augment information that was submitted. The Panel itself is in the process of identifying further follow-up questions arising from subject-matter canvassed during the initial public hearings and in stakeholders’ written and oral submissions, as well as further questions arising more generally from the Revised Statement of Issues published on 11 February 2016. Some of the questions can best be addressed in the course of further formal hearings before the Panel, whether in sessions open to the public or in closed sessions in the case of information subject to claims of confidentiality in terms of the Competition Act. Some of the necessary clarifications and augmented information by stakeholders can best be provided during those further hearings, where a supplementary written submission by arrangement with the HMI would not suffice. However, in some instances, a more expeditious process of meetings with stakeholders as envisaged in paragraph 11(c) of the Guidelines for Participation in the HMI published on 1 August 2014 may be appropriate. This Supplementary Guideline provides a protocol to be followed by the HMI in relation to such meetings.

Preliminary formal steps

3. Where, at any time during the course of the HMI, a stakeholder wishes:
 - 3.1 to make a further submission, whether written or oral, for consideration by the Panel in arriving at its conclusions in due course; or

- 3.2 to clarify a submission already made or an answer or answers already given in response to questions by the Panel,
the stakeholder concerned must lodge a written request in that regard to the HMI.
4. The request must state concisely:
 - 4.1 the intended subject-matter of the further submission or clarification;
 - 4.2 whether or not, in the opinion of the stakeholder, a further submission or clarification in writing will suffice;
 - 4.3 if not:
 - 4.3.1 why a further submission or clarification in writing will not suffice;
and
 - 4.3.2 whether the stakeholder wishes to make the requested oral submission—
 - (a) at a further hearing before the Panel; or
 - (b) at a meeting conducted in accordance with this Supplementary Guideline.
5. The Panel will then consider the stakeholder's request and convey its decision to the stakeholder in writing.
6. Once the Panel has published a schedule for the holding of further hearings on specific issues, it will in that regard:
 - 6.1 notify relevant stakeholders in writing as to where and when they are requested to appear; and/or
 - 6.2 where it considers this to be necessary, approach the Commissioner in order to make use of the power of summons provided for in section 49A of the Competition Act, read with section 43B(3)(c) thereof.
7. The Panel must necessarily limit itself in terms of paragraph 6 above to stakeholders whom it considers can materially assist it in coming to conclusions on key issues of the HMI. Stakeholders who find, contrary to their expectations, that they have not been requested or summoned to attend a particular hearing at which they would wish to make a relevant submission or submit to questioning in order to clarify a submission already made, may take the steps set out in paragraphs 3 and 4 of this Supplementary Guideline above. The Panel will then respond as indicated in paragraph 5.

8. In addition to the foregoing, and at any time during the course of the HMI, the Panel may, for the purpose of obtaining further information in writing or oral answers to questions on a specified subject or subjects:
 - 8.1 request a stakeholder in writing to attend a meeting with a member or members of the HMI team, to be conducted in terms of this Supplementary Guideline; and/or
 - 8.2 where it considers this to be necessary, approach the Commissioner in order to make use of the power of summons provided for in section 49A of the Competition Act, read with section 43B(3)(c) thereof.
9. Where the Panel initiates the process envisaged in paragraph 8 above, the HMI must ensure that the stakeholder who is requested to attend a meeting, or any person summoned for questioning pursuant to section 49A, is given sufficient notice of the subject-matter to be dealt with so as to allow a reasonable opportunity for preparations.
10. Where a meeting takes place pursuant to a request by a stakeholder as envisaged in paragraphs 3 and 4 above, the stakeholder must ensure that all documents which it intends to refer to during the meeting are furnished (or, if already furnished, have their relevant passages identified) sufficiently in advance of the meeting so as to allow those attending on behalf of the HMI a reasonable opportunity for preparations.

Procedure at meetings with stakeholders

11. Unless decided otherwise by the Chairperson of the Panel, the Inquiry Director or a member of the HMI staff designated by the Inquiry Director will preside at any meeting with a stakeholder or stakeholders.
12. An agenda for the meeting and a list of all those present (with their respective designations) must be recorded in writing before the meeting proceeds.
13. The person presiding may postpone or adjourn the meeting to a later date and/or to a different venue where it appears to him/her to be appropriate to do so.
14. At the outset of the meeting, or upon its resumption if this has not already been done, the person presiding must read out one or other of the following statements (**A** or **B**, depending on which is applicable), or must otherwise satisfy himself/herself that all those present are aware of its contents:

A

This is an off-the-record discussion, to culminate in formal minuting for the record of specific information and/or questions and answers.

Initially, the discussion at this meeting will be off the record. Neither the HMI nor any stakeholder or other person is bound by anything said during this part of the meeting, and all statements made are to be regarded as ‘without prejudice’. The purpose is to enable issues to be clarified and relevant information to be identified in the most expeditious way.

It follows that nothing stated during the off-the-record discussion is to be regarded as information submitted for consideration by the Panel in arriving at its conclusions on the subject-matter of the HMI. This position is unaffected even if one or more Panel members are present during the meeting.

The off-the-record discussion will culminate in a formal minute of the meeting for the record. In addition to recording any information to be submitted to the Panel for consideration in arriving at its conclusions, the minute will also record the fact of the meeting, its date and time, its general subject-matter, the name of the person presiding, the names and designations of other persons present, the fact that this statement was read out or otherwise brought to the attention of participants, and any further procedural or related matters agreed upon by those present or otherwise decided upon by the person presiding.

The minute will form part of the public record of the HMI save to the extent that its contents may be subject to a claim of confidentiality in terms of the Competition Act. Any claim of confidentiality must be formally made by way of Form CC7 at the time when the minute is adopted, being the time when the information is submitted to the Commission as contemplated by section 44(1)(a) of the Competition Act.

Those present must endeavour to reach consensus on the wording of an appropriate minute before the meeting ends or as soon as possible thereafter. If they are unable to agree on the content of the minute, the HMI on the one hand and the stakeholder on the other will record their respective versions, and both versions will form part of the public record of the HMI. However, the stakeholder will be regarded as having submitted the information contained in a minute only to the extent that it has accepted that part of the minute as correct. If there is a disagreement regarding the minuting of information claimed by the stakeholder to be confidential, only the stakeholder’s version thereof may be included in any minute for the record.

(Alternatively—)

B

The proceedings at this meeting are on the record of the HMI.

The record of these proceedings will be placed before the Panel for consideration in arriving at its conclusions. The record will include a transcript of any questions asked and answers provided during the meeting, as well as any written information submitted. This will not preclude the same questions being asked of the same person or persons during a hearing before the Panel, should the Panel consider that necessary.

Where a stakeholder claims that information to be submitted during the meeting, whether in writing or orally in answer to a question, is confidential information as

defined in the Competition Act, this must be stated immediately and the claim must be supported by the lodging of Form CC7 in that regard without delay. Subject only to claims of confidentiality duly made, the record of these proceedings will be made public.

The record will also reflect the fact of this meeting, its date and time, its general subject-matter, the name of the person presiding, the names and designations of other persons present, the fact that this statement was read out or otherwise brought to the attention of participants, and any further procedural or related matters agreed upon by those present or otherwise decided upon by the person presiding.

15. In appropriate circumstances, a meeting which has begun as an off-the-record discussion as contemplated in paragraph 14 (part **A**) above, may be brought to a conclusion and followed immediately by proceedings on the record as contemplated in paragraph 14 (part **B**), provided that the person presiding at the meeting has satisfied himself/herself that no material prejudice to the relevant stakeholder or stakeholders will result from the adoption of this procedure.
16. Where the meeting takes place for purposes of the questioning of any person pursuant to a summons as provided for in section 49A of the Competition Act read with section 43B(3)(c) thereof, the proceedings are on the record of the HMI as contemplated in paragraph 14 (part **B**) above. The questioning will then be conducted in accordance with the summons and the provisions of section 49A, and the person summoned may be required to testify under oath or affirmation. (This does not preclude the power of summons being used to compel any person to appear for questioning at a hearing before the Panel as contemplated in paragraph 6.2 above, or to deliver or produce any book, document or other specified object in terms of section 49A.)
17. Persons questioned pursuant to a summons in terms of section 49A are entitled to have a legal representative present. Anyone wishing to exercise this right is responsible for making the necessary arrangements timeously so as to ensure that the legal representative is available on the date and at the time set for the questioning.
18. The Chairperson of the Panel may permit deviations from this Guideline on the same basis as is provided for in paragraph 7 of the Guidelines for Participation in the HMI published on 1 August 2014.