

Chapter 1

The Enquiry Process

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1.1 Introduction

This is the report of the Panel of the Banking Enquiry which was established by the Competition Commission on the 4th August 2006 in terms of Section 21 of the Competition Act No.89 of 1998 to examine certain aspects of competition in retail banking in South Africa.

In the first chapter of the report, entitled **The Enquiry Process**, an overview of the Enquiry is provided. The chapter deals with certain historical events leading up to the establishment of the Enquiry, the engagements with stakeholders, the various submissions received, the Technical Team engagements and the public hearings and exploratory meetings that were held.

Chapter 2 deals with **Market Power in the Provision of Personal Transaction Accounts**. It examines market structure, barriers to entry and expansion, regulatory requirements and product differentiation in the South African banking sector. The chapter also highlights information asymmetries, switching and search costs as well as the nature of strategic interaction among participants.

In Chapter 3, on **Costing and Pricing**, an analysis of the charging practices of South African banks is undertaken. The relationship between the prices for transactions and the costs of providing them is examined.

In Chapter 4, the Panel examines the issue of **Penalty Fees** confining its analysis to the fees charged by banks to their individual retail customers when a customer's payment order is refused, usually due to a lack of funds. These fees, commonly referred to as "dishonour fees", are charged for rejected cheques, debit orders, and stop orders. The analysis concentrates on the fees charged by the major banks for rejected debit orders, an area where there are clear indications of growing abuse. The amount of revenue of almost R1 billion (of about R11 billion non-interest revenue for personal transaction accounts) that was generated by the big four banks in 2006 from around 24 million dishonoured or rejected transactions is highlighted. In our view, the abuse of debit order dishonour fees needs to be addressed without delay.

In Chapter 5, the issue of **ATMs and Direct Charging** is considered. Issues dealt with include the history and evolution of ATMs; interoperability and the history of interbank carriage fees in South Africa; arguments for the direct charging model and the implications thereof; and revenue and pricing of the current ATM model in South Africa. International precedents and other pricing models are also examined.

Chapter 6 on **Payment Cards and Interchange**, examines payment cards in the South African market; merchant service charges and merchant acquiring; the necessity of interchange fees and the setting thereof; and the card scheme rules governing the payment

card systems. The chapter furthermore considers the potential abuse and the need for regulation of interchange. The application of this is also extended to interchange fees in other payment streams.

Chapter 7 examines **Access to the Payment System**. An historical overview is provided followed by an in-depth analysis of the payment system and the regulation thereof. Certain matters of concern in the payment system are identified. The possibilities for enhancing the access of non-banks and non-clearing banks to the national payment system (NPS) are also explored.

Chapter 8 contains the **Conclusion and Recommendations**, in which particular recommendations identified in each chapter are set out.

At the end of the report, the **Appendices**, a **List of References** and a **Glossary of Terms** is presented.

As this Enquiry has been established against the background of competition law, it is necessary to highlight some of the reasons for the enactment of the Competition Act in South Africa and its purpose as well as the functions of the South African Competition Commission where these may be relevant to this Enquiry.

1.2 The Act and the Commission

The Competition Act 89 of 1998 was enacted in order to provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa; provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; create greater capability and an environment to compete effectively in international markets; restrain particular trade practices which undermine a competitive economy; regulate the transfer of economic ownership in keeping with the public interest; establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.¹

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

- (a) to promote 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;

¹ Preamble of the Competition Act.

- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.²

Some of the functions of the Competition Commission (hereinafter referred to as the Commission), are:

- (i) to implement measures to increase market transparency;
- (ii) to implement measures to develop public awareness of the provisions of the Act;
- (iii) to investigate and evaluate alleged contraventions of certain listed prohibited practices;
- (iv) to refer matters to the Competition Tribunal, and to appear before the Tribunal;
- (v) over time to review legislation and public regulations and to report to the Minister concerning any provision that permits uncompetitive behavior.³

In addition to these functions the Commission may also:

- (vi) report to the Minister on any matter relating to the application of the Act;
- (vii) enquire into and report to the Minister on any matter concerning the purposes of the Act;
- (viii) perform any other function assigned to it in terms of this or any other Act.⁴

To obtain a better understanding of the establishment of the Enquiry, it is important to sketch some of the events leading up to its launch.

1.3 Historical perspective

1.3.1 The Task Group report

During May 2003, a Task Group⁵ was established by the National Treasury to undertake a study on the competitiveness of the South African banking industry. This report entitled *Competition in South African Banking* was released in April 2004. It is not the intention of the Panel to deal in great detail with the Task Group's report save to highlight any recommendations that were made that may be relevant to the subsequent decisions made by the Commission in the establishment of this Enquiry.⁶

² Section 2 of the Act.

³ These functions are listed amongst others in Section 21 (1) (a) to (l) of the Act.

⁴ Section 21(2) of the Act.

⁵ Members of this Task Group were Dr Hans Falkena (Chairman), Mr Gabriel Davel, Dr Penelope Hawkins, Mr David Llewellyn, Mr Christo Luus, Mr Elias Masilela, Mr Geoff Parr, Mr Johnny Pienaar and Mr Henry Shaw.

⁶ The full recommendations of the Task Group are contained in Chapter 12 of the Task Group Report.

Some of the recommendations made by the Task Group were that:

- Access by second tier banks to the payment system on competitive terms should be facilitated
- Interoperability in the payment system and transparency of access requirements should be extended
- Penalty fees, charges for essential services or charges for services not open to competition should be on a cost-plus basis and open to regulatory oversight
- Government should prohibit any preferential processing mechanisms for payments
- The Competition Commission should investigate the possibility of a complex monopoly in the governance and operation of the payments system.

Following on these recommendations of the Task Group, the Commission reached a decision that a more comprehensive and comparative study into the issues around the payment system was essential. FEASibility (Pty) Ltd, an economic research company headed by Dr Penelope Hawkins, and Prof Olu Akinboade of UNISA were appointed to provide such a study, with distinct areas of work being specified to each of the parties.⁷ This report has become known as the FEASibility Report.

1.3.2 The FEASibility report

The FEASibility Research Report titled *The National Payment System and Competition in the Banking Sector* was completed and handed to the Competition Commissioner during March 2006.

In the Commission's response to the report,⁸ which will be dealt with in more detail hereinafter, the Commission stated that the FEASibility report presented a comprehensive analysis of the national payment system (NPS). The Commission went on to say that the report revealed that the South African NPS is a highly efficient and sound system and perhaps more advanced than similar networks in more economically developed countries. But an efficient and sound system may nevertheless lack features which could ensure fairness as far as consumers are concerned.

The FEASibility Report highlighted the following regarding the state of the banking industry at the time of the report:

- The banking industry earned roughly 38 per cent of its revenue from fees related to the payment system. Any link that there might be between the operating costs associated with a payment transaction and the charges made by banks for that

⁷ The main body of the report presents the research efforts of FEASibility while the research annex dealing with international comparisons is the work of Prof Akinboade.

⁸ The Commission's official response is set out in the Press Statement release to the media on the 20 April 2006 which statement is available on the Enquiry's website www.compcor.co.za/banking.

transaction was not transparent. It thus might be the case that bank fees have less to do with the cost of the payment system and more to do with the market power of the big banks in setting fees.

- Not only the clearing banks but also those that participate under the auspices of the clearing banks in the NPS appeared to find their activities in that regard very profitable — indeed this might explain the clamour of others to gain access. Only the SAMOS system⁹ within the NPS, operated by the Reserve Bank and limited to participation by registered banks, appeared to work on a cost recovery basis.
- Apart from SAMOS, the pricing arrangements for each payment stream within the NPS fell outside the remit of regulation, and it was believed that in the past these had been negotiated between participants on a multilateral basis. While some smaller players were concerned that bilateral negotiations might place them at a disadvantage as they wielded so little market power, it seemed possible that bilateral negotiations might benefit the consumer. Further inquiry regarding the pricing arrangements in each payment stream seemed to be warranted. There might well be aspects of the NPS where uniform pricing could give way to competitive pricing without compromising the soundness or efficiency of the system.
- The banks operated a switching arrangement between themselves called Bankserv. Although Bankserv costs made up only a fraction of the price of a payment transaction, the current profitability of Bankserv and the control and ownership of this essential infrastructure by the banks raises the question of broader representation on the board of Bankserv. There was international precedent for this.
- There was an absence of market conduct regulation throughout the banking industry and the NPS in particular. There was also an absence of transparency. Disclosed pricing is often difficult to evaluate because of bundled offerings. In a country where there was an obvious need to improve the access of under-served consumers to financial services, the absence of a market conduct regulator was likely to be particularly keenly felt.
- Legislation and regulation have focused on banks. This had left a regulatory gap in terms of the rules of participation for non-banks and highlighted the need for an overall strategy. To the extent that collaborative infrastructure and uniform pricing is necessary for sustaining a sound and efficient NPS for the benefit of consumers, there might also be a need for regulatory oversight.

1.3.3 The Competition Commission's response

For the Commission, the FEASibility Report raised a number of concerns, the main ones being the concerns around access to the payment system by would-be service providers

⁹ See Glossary for explanation of the SAMOS system.

(banks and non-banks) and charges levied by banks for payment transactions. Both of these impacted on access to competitive banking services for South African consumers (be they businesses or individuals).¹⁰

The Commission was furthermore of the opinion that while the FEASibility study provided a detailed understanding of how the system works in general, it did not extend to indicating whether or not actual contraventions of the Competition Act were entailed in the current structure and operation of the national payment system.

Having regard to its responsibilities and powers, the Commission decided to conduct a public Enquiry in order to obtain further information and input about the competition concerns highlighted in the FEASibility report.

In its announcement, the Commission stated that such an Enquiry was to be held in terms of Section 21(1)(a) of the Competition Act which gives the Competition Commission the responsibility to implement measures to increase market transparency. Section 21(2)(b) empowers the Commission to enquire into and report to the Minister of Trade and Industry on any matter concerning the promotion and maintenance of competition in the Republic.

The Commission invited all interested persons and stakeholders, including the banks, to respond to the FEASibility report and voluntarily to provide detailed information and answers on relevant questions to the Enquiry.

The Commission pointed out that the Enquiry would be on the record, which would be made public subject only to the protection of genuinely confidential information as provided for in the Competition Act. The Commission envisaged that public hearings would be held and that the views of Regulators and other overseeing authorities would also be sought and considered during the course of the Enquiry. The outcome of the process would be a report with recommendations being submitted to the Commissioner.

After this announcement the Commission began to take steps to have the Enquiry established. As it was the first time that the Commission had undertaken an Enquiry of this nature, the Commission looked to other jurisdictions for guidance and assistance.

¹⁰ See Press Statement released by the Commission on the 20th April 2006.

1.4 Visit to the United Kingdom

In March 2006 a delegation of the Commission visited the offices of the UK Competition Commission and Office of Fair Trading (OFT). The meetings took place over three days from the 21st March 2006 to the 23rd March 2006. Two half days were spent at the OFT and one day at the UK Competition Commission.

The main purpose of the visit by the delegation was to learn more about the approach to similar inquiries that had taken place in the UK and to obtain information as to what was involved in the planning and organisation of such enquiries. The Commission delegation also sought to learn more about what the UK regulatory bodies considered to be the important competition issues in the banking sector which would need to be examined during the Enquiry.

The OFT provided useful information regarding the Payments System Task Team, which had been established following the competition issues that had been identified in the Cruickshank Report.¹¹ The Task Team consisted of dedicated OFT officials who interacted regularly with officials from the central bank, HM Treasury, and industry through working groups. There are valuable lessons to be learned here on how to establish a representative forum to bring about voluntary compliance with certain recommendations. This approach may prove useful in implementing some of the recommendations arising from the Enquiry Panel's report.

The delegation also held discussions with OFT officials regarding their investigations into interchange fees of four-party payment card schemes.

The meeting with the UK Competition Commission proved to be most beneficial insofar as it informed the conception, planning and organisation of the Banking Enquiry. The UK Competition Commission officials explained the regulatory framework within which the Northern Ireland Banking Inquiry came to be established and what was involved in the establishment of an expert Panel, the secretariat responsible for the administration of the inquiry, and the technical staff from the UK Competition Commission supporting the Panel and inquiry. Although the South African Banking Enquiry was established in terms of a different regulatory framework there were nevertheless many aspects of the UK inquiry that were adopted for purposes of this Enquiry, in particular, the role played by the secretariat in administering the Enquiry and the process of Technical Team engagements with industry participants and other stakeholders.

¹¹ Cruickshank, D. 2000. Competition in UK Banking: A report to the Chancellor of the Exchequer, UK.

1.5 Infrastructure and personnel

Armed with the information gleaned from the UK visit, the Commission began with the initial steps of establishing the Enquiry. A detailed project plan was drafted setting out the personnel and logistic resources for the Enquiry as well as timeframe targets and the financial resources necessary for the completion of the Enquiry.

Financial constraints dictated that the Enquiry had to be housed in the current Commission offices, but dedicated office space and separate infrastructure were provided for Enquiry personnel.

Although certain Commission staff were seconded to the Enquiry, the Enquiry operated independently and impartially from the Commission.

1.6 Launch of the Enquiry

On the 4th August 2006, the Commissioner officially announced the establishment of the Enquiry and released the document titled *Composition of the Enquiry and Terms of Reference*.¹² This document sets out the Enquiry's Terms of Reference and who the Panel members are. It also deals with submissions and when the Report might be expected. Details of the Enquiry's secretariat and contact details were also provided.

1.6.1 Terms of reference

The Commissioner's statement, *Composition of the Enquiry and Terms of Reference*, is contained in an appendix to this report.

The terms of reference of the Enquiry¹³ were as follows:

5. The subject matter of the Enquiry will be:
 - (a) the level and structure of charges made by banks, as well as by other providers of payment services, including:
 - (i) the relation between the costs of providing retail banking and/or payment services and the charges for such services;
 - (ii) the process by which charges are set; and
 - (iii) the level and scope of existing and potential competition in this regard;
 - (b) the feasibility of improving access by non-banks and would-be banks to the national payment system infrastructure, so that they can compete more effectively in providing payment services to consumers;
 - (c) any other aspect relating to the payment system or the above-mentioned charges which could be regarded as anti-competitive.

¹² For the purposes of convenience this document will be referred to in this report as "The Terms of Reference".

¹³ Paragraphs 5 and 6 of the *Composition of the Enquiry and Terms of Reference*.

6. The objects of this Enquiry are, in connection with the subject matter stated above:

- (a) to increase transparency and competition in the relevant markets;
- (b) to ascertain whether there are grounds upon which the Competition Commissioner should initiate, and the Commission consequently use its powers to investigate, any specific complaints of contraventions of the Competition Act;
- (c) to engage with the banks, other providers of payment services, the appropriate regulatory authorities and other stakeholders in order to ascertain the extent to which, consistent with the soundness of the banking and payments system, there could realistically be improvements in the conditions affecting competition in the relevant markets, including increased access to the national payments infrastructure;
- (d) to enable the Commission to report to the Minister and make recommendations on any matter needing legislative or regulatory attention.

1.7 Enquiry personnel

The Enquiry was conducted by the following Panel appointed by the Competition Commissioner:

- Mr Thabani Jali (Chairperson)
- Mrs Hixonia Nyasulu
- Mr Oupa Bodibe, and
- Adv Rob Petersen SC

The Technical staff that rendered support to the Panel during the course of the Enquiry were:

- Mr Keith Weeks – Head of the Technical Team
- Dr Penelope Hawkins – Expert Consultant
- Miss Jana Louw – Head of Technical and Data Analysis
- Mr Stephen Chisadza – Research Assistant
- Miss Vania Cardoso – Research Assistant
- Mr Vincent Motshwane – Graduate Trainee
- Prof. Chris Torr – Editorial Consultant

The Administrative staff were:

- Mr Charles Frank – Enquiry Manager
- Miss Kamogelo Seleka – Personal Assistant to the Manager

The Enquiry also received assistance from amongst others, the following consultants:

- Mr Keith Smith
- Mr Henry Shaw.

1.8 Enquiry programme

In accordance with the undertaking given at the launch on the 4th August 2006, the Enquiry's Programme of Action and its Guidelines on Submissions were made public on the 22nd August 2006 through a media release and by posting both documents on the Enquiry website.

The Programme of Action informed stakeholders and the South African public in general how the Enquiry process would unfold. The Programme set out the main activities that the Enquiry was likely to be engaged in during its various stages. Timeframes for the completion of the various stages were also included.

The initial Programme provided for five stages and set out the main activities that would take place during each stage.

After amendments, the five stages of the Enquiry programme were:

- a) Stage one: August to October 2006
Submissions, analysis and research
- b) Stage two: November 2006
First public hearings
- c) Stage three: December 2006 to March 2007
Further analysis, engagement and research
- d) Stage four: April 2007 to July 2007
Second public hearings
- e) Stage five: August 2007 onwards
Analysis and report writing

1.9 Stakeholders and submissions

During Stage one, the Enquiry focused on the following activities:

- Identifying and contacting stakeholders
- Releasing the programme of action and guidelines on submissions
- Introductory meetings with stakeholders
- Receiving submissions.

Each of these areas is briefly discussed below.

1.9.1 Identifying and contacting stakeholders

Once the operating structure had been established, the Enquiry set about compiling a comprehensive stakeholder data base. Stakeholders were divided into the following categories:

- (a) banks
- (b) card associations
- (c) regulators & supervisory authorities
- (d) consumer and civil society organisations
- (e) retailers
- (f) additional stakeholders

After verifying the office bearers of each of such stakeholders, introductory letters were addressed to the following organisations in each of the categories:

(a) Banks

- Absa Bank
- FirstRand Bank¹⁴
- Nedbank
- Standard Bank
- Investec Bank
- Capitec Bank
- Mercantile Bank
- Teba Bank
- Rennie's Bank
- Deutsche Bank
- HSBC Bank
- Standard Chartered Bank
- MEEG Bank
- Ithala Limited¹⁵

¹⁴ First Rand Bank includes other bank brands – such as Rand Merchant Bank, Wesbank and First National Bank. This report focuses on the latter, as one of the big four commercial banks.

¹⁵ Even though Ithala Limited is not a registered bank in terms of the Banks Act, it has been included under the list of banks as it is conducting the deposit taking functions of a bank in terms of an exemption from the provisions of the Banks Act granted to it by the Minister of Finance.

- South African Bank of Athens
- Postbank
- Bank of Baroda
- Citibank NA
- Bank of Taiwan
- Sasfin Bank
- Societe Generale
- Imperial Bank
- Albaraka Bank
- Habib Overseas Bank
- State Bank of India
- HBZ Bank
- Commerzbank Aktiengesellschaft
- China Construction Bank
- Bank of China
- ABN AMRO Bank NV
- Marriot Corporate Bank
- Calyon Corporate & Investment Bank
- GBS Mutual Bank
- VBS Mutual Bank

(b) Card associations

- MasterCard International
- Visa International
- Diners Club South Africa
- American Express

(c) Regulators and overseeing authorities

- Ombudsman for Banking Services
- Payment Association of South Africa (PASA)
- Bankserv
- The Bank Supervision Department of the South African Reserve Bank

- The National Payment System Department of the South African Reserve Bank
- The National Treasury
- Ombudsman for Financial Services
- The National Credit Regulator
-
- (d) Consumer and Civil society organisations**
- Financial Sector Campaign Coalition (FSCC)
- South African National Consumer Union (SANCU)
- National Consumer Forum
- Consumer Goods Council of South Africa
- Benchmark Foundation
- Congress of South African Trade Unions (COSATU)
- National Economic Development and Labour Council (NEDLAC)
- Federation of Unions of South Africa (FEDUSA)
- South African Council of Churches (SACC)
- South African Communist Party
- Black Sash
- South African National NGO Coalition (SANGOCO)
- (e) Retailers**
- South African Retailers Payment Issues Forum (SARPIF)
- Pick 'n Pay
- Shoprite Checkers
- (f) Other stakeholders**
- Micro Finance South Africa (MFSA)
- NET 1
- Capital Software
- ATM Solutions
- Direct Transact
- Intecon
- Savings and Credit Co-Operative League of South Africa (SACCOL)

- Protea Finance
- Fundamo
- Rural Housing Loan Fund
- Credit Bureaux
- Freedom of Expression Institute
- Capital Software
- STRATE Limited
- Xpertek Group
- SA Financial Sector Forum
- Micro Enterprise Alliance (MEA)
- Eskom

In letters to each stakeholder, the Panel welcomed the opportunity of an initial meeting with them and encouraged organisations to contact the Enquiry Manager if they were desirous of such a meeting. (See Section 1.9.3). The introductory letter also explained that the main purpose of such meetings was to afford the Panel members the opportunity to introduce themselves and to explain the ambit of the Enquiry and the relevant information that the Enquiry sought from stakeholders.

1.9.2 Guidelines on submissions

Guidelines were issued to assist stakeholders in the preparation of submissions. The guidelines provided directives on length, language, claims of confidentiality, number of copies and deadlines. All first submissions made by stakeholders were to be received by the Enquiry by no later than the 27th October 2006. In the record of the Enquiry, all such submissions are referred to as First submissions, and are referenced accordingly in the report.

After the first set of hearings, the Technical Team requested additional information in the form of questionnaires. These enabled stakeholders to clarify or amplify any portion of submissions previously received (see section 1.9.4). These are referred to as the Second submissions received by the Enquiry (see section 1.11).

1.9.3 Introductory meetings with stakeholders

As soon as the responses were received from the interested stakeholders, the Enquiry commenced with the process of arranging and holding meetings between the Panel and Technical Team and those stakeholders that had requested meetings. The Enquiry also

initiated meetings with those stakeholders that had been identified by the Enquiry as being important in providing information relating to the matters relevant to the terms of reference.

During the course of the Enquiry, a total of 101 engagements and consultations were held by the Enquiry's Technical Team either at the offices of the Banking Enquiry or at the offices of the stakeholders. A complete list of such meetings is attached in the Appendix entitled *Technical Team Engagements*.

As the success of the Enquiry was largely dependent on the voluntary participation of the banks, the main aim of these initial introductory meetings was to gain the co-operation and confidence of banks and to address any concerns or perceptions that may have existed after the announcement of the Enquiry.

At these meetings, the background to the Enquiry was explained as well as the Enquiry's terms of reference. The Enquiry's intended programme of action and its preliminary proposals on the guidelines on submissions were also discussed and the likely areas of focus during the course of the Enquiry highlighted.

The initial stakeholders that the Panel visited were banks, regulators and overseeing authorities. In this regard, Panel members held introductory meetings with:

- Absa Bank
- Nedbank
- FirstRand Bank
- Standard Bank
- The Bank Supervision Department of South African Reserve Bank
- The National Payment System Department of the South African Reserve Bank
- The Banking Association of South Africa
- The Ombudsman for Banking Services
- Bankserv
- The Payments Association of South Africa (PASA)
- Capitec Bank
- Mercantile Bank
- Ithala Limited
- The Bank of Athens
- Standard Chartered Bank
- HSBC

- The Bank of Baroda.

The Enquiry was, however, unsuccessful in arranging meetings with Investec Bank and the Postbank.

Panel members also held meetings with the following card associations and retail organisations:

- MasterCard
- Visa International
- American Express
- South African Retailers Payment Issues Forum (SARPIF)
- Shoprite Checkers
- Pick 'n Pay.

The Enquiry also attempted to increase awareness of the work of the Enquiry amongst organisations belonging to civil society and consumer groups and held briefing meetings and/or discussions with:

- Nedlac
- Financial Sector Charter Coalition
- South African National Consumer Union
- Benchmark Foundation
- Ethekewini Civic Forum.

To facilitate the interaction and exchange of views, the Enquiry invited consumer and civil society organisations to a briefing workshop which dealt with how the work of the Enquiry impacted on such organisations and their members.

1.9.4 Receiving submissions

During this early period of the Enquiry the Panel and the Technical Team focused their efforts on encouraging stakeholders to participate in the process and to furnish submissions and information to the Enquiry.

During the course of the Enquiry, submissions from the following stakeholders were received by the Enquiry Manager.

(a) Banks

- Absa

- Capitec Bank
- FirstRand Bank
- Ithala Limited
- Mercantile Bank
- Nedbank
- Standard Bank

(b) Card associations

- American Express
- MasterCard
- Visa
-

(c) Retail sector

- Pick 'n Pay
- Shoprite Checkers
- South African Retailers Payment Issues Forum (SARPIF)

(d) Consumer & civil society groups

- Benchmark Foundation
- Black Sash
- Ethekwini Civic Forum
- Financial Sector Charter Coalition
- Savings and Credit Co-Operatives (SACCO)
- South African National Consumer Union
- 1860 Pioneers' Foundation

(e) Overseeing bodies

- Banking Association
- Ombudsman for Banking Services
- The National Credit Regulator

(f) Other submissions

- ATM Solutions

- CIBA (Commercial Independent Bureaux Association)
 - Eskom
 - Fundamo
 - Intecon
 - Micro Finance South Africa (MFSA)
 - Net1
 - Rural Housing Fund
 - Wizzit
 -
- (g) General public**

The Enquiry has received 267 submissions or letters from members of the public. Where these raised matters that fall within the jurisdiction of the Ombudsman for Banking Services they should be referred by the Commission to that office.

Many of the submissions from business entities were made under claims of confidentiality in terms of Sections 44, 45 and 45A of the Competition Act. We did not deem it necessary to challenge the confidentiality claims, as they did not impede the Enquiry in its work. The Commission will need to ensure that no confidential information is placed in the public domain.

The submissions are not deal with in any detail in this chapter as they are discussed under the relevant subject headings in subsequent chapters.

The Commission and the Panel have from the outset maintained that the Enquiry would be public and that all submissions (unless covered by claims of confidentiality) would be made available to the public. As many of the submissions had been made under claims of confidentiality, public disclosure of the submissions presented a challenge to the Enquiry. The Enquiry was greatly assisted in surmounting this by many of the banks and card associations who provided the Enquiry with non-confidential versions of their submissions which the Enquiry was able to make available to the public on the Enquiry's website.

On receipt all submissions were briefly analysed by the Enquiry's Technical Team and where necessary the stakeholders making such submissions were asked to verify, clarify and amplify the submissions. Thereafter, in consultation with the Panel selected organisations were then invited to appear before the Panel at the first public hearings.

1.10 First public hearings

During the course of the Enquiry, the Panel held two sets of public hearings, the first being during November 2006 and the second in the period April to July 2007. In total, 21 days of public hearings were held by the Panel during the existence of the Enquiry.

The first public hearings (November 2006) afforded selected stakeholders an opportunity to make public presentations regarding their submissions and organisation. Only parties who had furnished the Enquiry with written submissions by the closing date of the 27th October 2006 (and who had been specifically requested by the Enquiry to appear) were entitled to appear to make oral presentations at these first public hearings. The Panel reserved the right to invite other persons to appear if it considered that their appearance would assist the Enquiry.

In an attempt to increase public awareness and greater participation by the stakeholders in the process, the Enquiry held these first set of public hearings in several cities and as far as was reasonably possible, the Enquiry attempted to arrange venues that were most convenient to stakeholders wishing to make presentations. The Enquiry also reserved the right to expand the hearings to other cities if the number of submission received justified such a decision.

The first hearings were held on the dates and in the cities set out hereafter:

- 1st to 3rd November 2006 - Pretoria
- 9th November 2006 - Pretoria
- 13th November 2006 - Cape Town
- 29th November 2006 - Durban
- 30th November 2006 - Pretoria

To ensure that stakeholders understood the Enquiry's adopted procedure for its first public hearings and to assist stakeholders in presenting their submissions at such hearings, the Enquiry released a further set of guidelines dealing with the first public hearings.

The Guidelines provided for the orderly conduct of the hearings to be held in public. Exceptions to this would only occur if the Panel decided to conduct any portion thereof in private – involving a subject matter in respect of which a claim of confidentiality had been made – or if the Panel considered that such a decision was necessary for the effective conduct of the Enquiry.

The nature of these presentations was such that the invited parties were to provide the Panel with an introduction to the organisation itself and then enlighten the Panel on how they had dealt with or were dealing with the issues that are the subject matter of the Enquiry.

These presentations were to be one hour of duration with parties being expected to summarise and highlight the main thrust of their submissions.

The general rule at the public hearings was that only the Panel members would be entitled to put questions directly to anyone making a submission or presentation and any deviation from this rule would only be allowed if the Panel was of the opinion that compelling reasons existed for doing so.

All proceedings at the hearings were recorded and transcribed and, subject again to the preservation of confidentiality provided for in the Terms of Reference, all transcripts of the hearings were made available on the Enquiry's website as soon as was reasonably possible by the Enquiry Manager.

At the time of these hearings the Panel had not had an opportunity to read the detailed submissions made by the banks and thus the presentations made were not probed in great detail by the Panel at these first hearings. The Panel's interaction with those appearing was mainly intended to clarify and test at a general level the significance and reliability of the presentations made. The Panel made every effort to deal with the substantial merits of the issues with a minimum of legal formalities and thus all proceedings were conducted in an informal manner.

All those appearing before the Panel were, however, entitled to assistance when they presented their submissions and although all the hearings were conducted in English, interpretation services were made available to any party desiring such service.

The first to be given the opportunity to make presentations were the banks and card associations followed by consumer groups and members of the public. As was the case with the banks, only those consumer groups and members of the public who furnished the Enquiry with written submissions were afforded the opportunity to make presentations.

Full details of all the parties that appeared and made presentations at these first public hearings are reflected in the Appendix entitled *November 2006 Hearings Schedule*.

1.11 Further analysis and engagement

After the completion of the first public hearings the focus of the Enquiry shifted from the procedural to the analytical with the Panel and the Technical Team commencing with the task of analysing the submissions made by all parties in greater detail and attempting to identify the main issues of concern from a competition law and policy perspective. A detailed schedule of technical meetings between the Technical Team and the banks, card associations and other identified stakeholders with the aim of obtaining a better understanding of the submissions received was drawn up and followed.

Where the Technical Team was of the opinion that additional information was required, questionnaires were prepared and forwarded to stakeholders to enable them to clarify or amplify any portion of submissions received or any other matter that the Technical Team considered to be in need of such clarification or amplification. Supplementary submissions were also requested.

Stakeholders were also, in one-on-one meetings, requested to clarify any aspect of their presentations and submissions. Stakeholders were also encouraged to make supplementary submissions in response to any issue raised during the course of the Enquiry.

1.12 Second public hearings

Unlike the first public hearings held in November 2006, the second set of public hearings focused mainly on specific subject matters that had been identified by the Enquiry as requiring further airing in public.

The subject matters that the Enquiry had initially identified were:

- ATM charging and related issues
- Payment cards and interchange fees
- Access to the National Payment System
- Market power and the level and structure of bank charges.

The Enquiry extended invitations to specific parties to appear before the Panel and to make brief presentations and answer questions on the specific subject matter being dealt with at the time. Only parties who had been specifically requested by the Enquiry appeared at these second and final hearings. Such parties were given the opportunity to make supplementary submissions on any relevant issue and/or in response to any allegation made by any party whether in a submission or at the first public hearings.

The hearings into each of the subject matters commenced with the Enquiry's Technical Team making a presentation that provided an overview on the subject matter. The Technical Team presentations attempted to identify the main areas of concern in respect of each of the topics and such areas of concern were cross-referenced with submissions, regulations and even academic material on the subject matter.

For the Panel, the greatest challenge surrounding these second hearings was how to deal in a public forum with all the confidential information contained in the original and supplementary submissions. The questionnaires sent out by the Technical Team had requested detailed disclosure of further data and all the major banks had indicated that they would be claiming confidentiality over a large proportion of their responses. The smooth running of the Enquiry would clearly be affected if a disruptive situation arose where the hearing room was being constantly cleared to deal with confidential information and then reconvened and perhaps only to be cleared again.

In addressing this issue, the Panel adopted the approach that the Enquiry was a public process and any stakeholder requesting a deviation from this position had to specifically request that the Panel hear them in a closed session. The Enquiry acknowledges the co-operation received from the parties appearing at these second hearings who in general agreed to the hearings being conducted in public. During the entire hearings process, the public was excluded on one occasion only.¹⁶

The details of the second hearings were posted on the Enquiry's website and a press statement was released. All the regulatory authorities, including the National Treasury were informed of the hearings and invited to attend. All such hearing were held at the Commission offices in Pretoria on the following days:

- 3rd April 2007 – ATMs and direct charging
- 4th April 2007 – ATMs and direct charging
- 11th April 2007 – ATMs and direct charging
- 17th April 2007 – Payment cards and interchange fees
- 18th April 2007 – Payment cards and interchange fees
- 19th April 2007 – Payment cards and interchange fees
- 25th May 2007 – The National Payment System – Access and regulation
- 28th May 2007 – The National Payment System – Access and regulation
- 29th May 2007 – The National Payment System – Access and regulation
- 5th June 2007 – Payment cards and interchange fees

¹⁶ This occurred during the Visa International presentation held on the 18th June 2007.

- 18th June 2007 – Market power and the level and structure of charges
 - Payment cards and interchange fees
- 19th June 2007 – Payment cards and interchange fees
 - The National Payment System – Access and regulation
- 9th July 2007 – Market power and the level and structure of charges
- 17th July 2007 – Market power and the level and structure of charges

Full details of the parties that appeared and made presentations at these second public hearings are reflected in the Appendix entitled *April to July 2007 Hearings Schedule*.

1.13 Exploratory process

One of the objects of the Competition Commission's Banking Enquiry, stated in paragraph 6(c) of its terms of reference, was:

to engage with the banks, other providers of payment services, the appropriate regulatory authorities and other stakeholders in order to ascertain the extent to which, consistent with the soundness of the banking and payments system, there could realistically be improvements in the conditions affecting competition in the relevant markets, including increased access to the national payments infrastructure.

With this in mind, the Enquiry Panel requested the Technical Team to arrange meetings with banks and other relevant stakeholders in order to explore the feasibility and practical implications of certain possible recommendations and/or changes which were mooted in public hearings and which could come to form part of the eventual recommendations of the Panel.

These exploratory meetings focused on three distinct topics:

- A proposed change to direct charging for ATM transactions, and greater access for additional (including non-bank) ATM service providers
- The introduction of an independent, objective and transparent process for determining interchange in all payment streams in which interchange is necessary
- A combination of measures to improve the ability of bank customers not only to compare product offerings and prices, but also to switch providers with the minimum of cost and difficulty. The possible measures to be considered here included the availability of one or more basic banking product bundles.

Participation in the process did not commit any participant to support or endorse any particular change or measure which was mooted for exploration, nor was the process or its topics taken to imply definite findings or recommendations by the Enquiry Panel. It was emphasised that nothing said at those meetings would be considered as being on the record

of the Enquiry, unless specifically advanced and recorded as an on-the-record statement at the instance of, or by agreement with, the participant concerned.

A series of exploratory meetings were arranged on the 15th August, 3rd and 4th September and 30th October 2007. These were attended by representatives of banks, system operators, card schemes, consumer groups and retailers. The process contributed to further understanding of the topics, through both oral debates and working documents for discussion (that remained off the record). The understanding so gained has been drawn upon to varying degrees in this report.

The completion of the exploratory meetings generally marked the end of engagements and interactions by the Panel and Technical Team with stakeholders. The Enquiry team then focussed its attention on the writing of this report.

Having provided an overview of the Enquiry process we deal with the subject of market power in the subsequent chapter. In the Panel's opinion, banks' market power has a bearing on every facet of their operations.

In the following chapters, we make recommendations designed to address issues of market power and consumer protection in retail banking. These recommendations are gathered together in the concluding chapter.