



Swaziland
Competition Commission

GUIDANCE ON MARKET ENQUIRIES

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CHAPTER 1 - INTRODUCTION

1.1 The purpose of this guidance is to provide information to internal and external stakeholders on how the Swaziland Competition Commission (“the Commission”) conducts market enquiries. The mandate to conduct market enquiries stems from Section 11 (2) of the Competition Act, No.8 of 2007 (“the Act”) which provides inter alia:

Without limiting the generality of subsection (1), the Commission shall perform the following functions –

- (f) undertake studies and make available to the public reports regarding the operation of the Act;*
- (i) review this Act and any other legislation which inhibit fair competition and make proposals to the Minister for the amendment of such legislation; and*
- (k) enter into discussions on contentious issues with any regulatory authority in order to harmonise and ensure consistent application of the competition principles.*

1.2 The Act does not prescribe how market enquiries should be conducted; therefore this guidance sets out general principles and processes in order to make the Commission’s activities transparent to stakeholders. Transparency is a precondition for cooperation with stakeholders who include businesses operating in or affected by the markets we study, consumers, consumer bodies, government, and regulators. The guidance is not a statement of law, it explains the aim of market enquiries, selection criterion for markets to be studied, management of key processes, possible outcomes of market enquiries and assessment of impact. It achieves this by providing detailed information in the following 4 sections:

- (i) Chapter 2 – Purpose of market enquiries ;
- (ii) Chapter 3 – Selecting and managing market enquiries;
- (iii) Chapter 4 – Outcomes of market enquiries; and
- (iv) Chapter 5 – Impact assessment.

The Commission welcomes feedback on the guidance and ideas for market enquiries from stakeholders. Submissions can be directed to info@compco.co.sz

CHAPTER 2 - PURPOSE OF MARKET ENQUIRIES

2.1 The aim of market enquiries is twofold. It is to make markets work well for consumers, on one end. This is achieved by promoting and protecting consumer interest. On the other end, market enquiries ensure that the playing field for businesses is fair. This is attained by ensuring that businesses do not embark on anti-competitive practices in the market.

2.2 Market enquiries examine the causes as to why markets do not work well and in extreme instances why market failure occurs. They involve analysis of the structure of markets and the nature of competition in those markets without prior identification of conduct or practices of firms operating in those markets. They can be used to identify aspects of competition or consumer protection concerns that need to be addressed, thereby complementing merger control, enforcement directed to cartel, abuse of dominance and other anti-competitive practices as well as advocacy¹.

2.3 The term “market” in the context of competition law encompasses product market and geographic market. A product market refers to products (goods or services) that are interchangeable from the viewpoint of consumers. A geographic market is the area or boundary in which the competitive conditions are homogenous for all the firms trading in those interchangeable products. The geographic market for an enquiry can be any part or the whole of Swaziland. The Commission can also participate in regional market enquiries with other competition authorities with whom it shares similar interests.

2.4 When markets work well, firms compete to gain market share by increasing efficiencies or reducing costs, lowering prices, developing better goods and services or exploiting their strengths, skills, and other advantages to meet consumers’ needs more effectively than their rivals. The gains from fair competition impact the economy, businesses and consumers. .

2.5 Market enquiries can also examine restrictions on competition that may arise through government regulation or public policy. Public sector restrictions may include policies and laws that create barriers to entry into markets, distort market conditions and prevent markets from expanding. Therefore, findings from market enquiries can cause government to adopt pro-competitive policies and laws that will have positive effects on the economy.

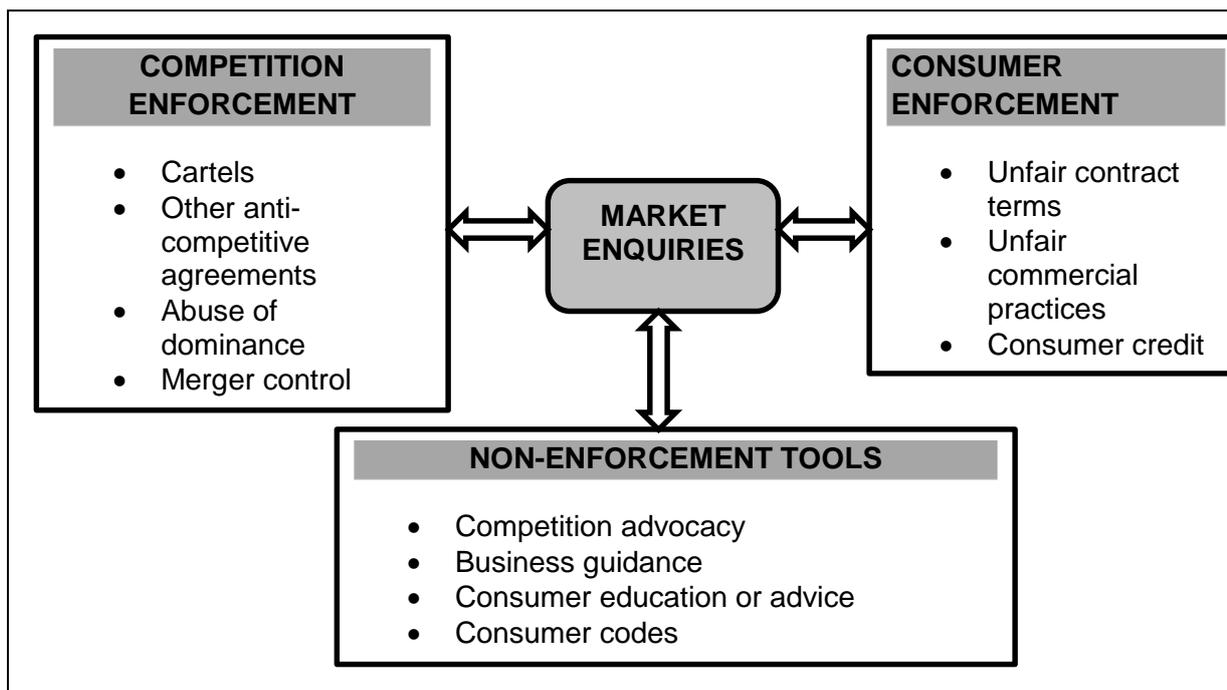
¹ Office of Fair Trading.

2.6 The role of market enquiries extends to intervention in markets where the public sector bodies or government operate as a customer and or a supplier. In this regard, the Commission can use market enquiry findings to lobby government to ensure that her role in the value chain does not result in the distortion of competition.

2.7 Market enquiries lead to formulation of comprehensive market remedies. Competition Authorities around the world have long realised that enforcement action may not successfully address all competition issues or concerns and that market enquiries are an effective competition tool in certain circumstances. This tool can serve competition policy well by facilitating value chain analysis which goes beyond matters of abuse of positions dominance, anti-competitive agreements that restrict competition or breaches of consumer protection legislation. This is to say, the tool provides a holistic approach to market investigations, knowledge creation and alternative remedial action beyond the scope of enforcement tools.

2.8 Market enquiries also link the Commission’s competition and consumer protection responsibilities. They consider the behaviour of all economic agents or participants in a market i.e. the relationship between consumer behaviour, the behaviour of firms and the structure of the market. This interface helps the Commission to determine actions that encourage changes in consumer behaviour or business behaviour, or both. Figure 1 demonstrates the central role of market enquiries.

Figure 1: Central Role of Market Enquiries



2.9 Participation of economic agents is imperative in competition law and policy. Therefore, market enquiries provide a platform where economic agents are encouraged to share information relating to the state, nature and form of competition in a market with the Commission. This is in the sense that the outcome of market enquiries is oriented towards making markets work well in order to impact on economic agents who are the ultimate beneficiaries. As a result, informed consumers gain confidence to engage more proactively in markets and firms get encouraged to use legally acceptable strategies to gain market shares.

Selecting and managing market enquiries

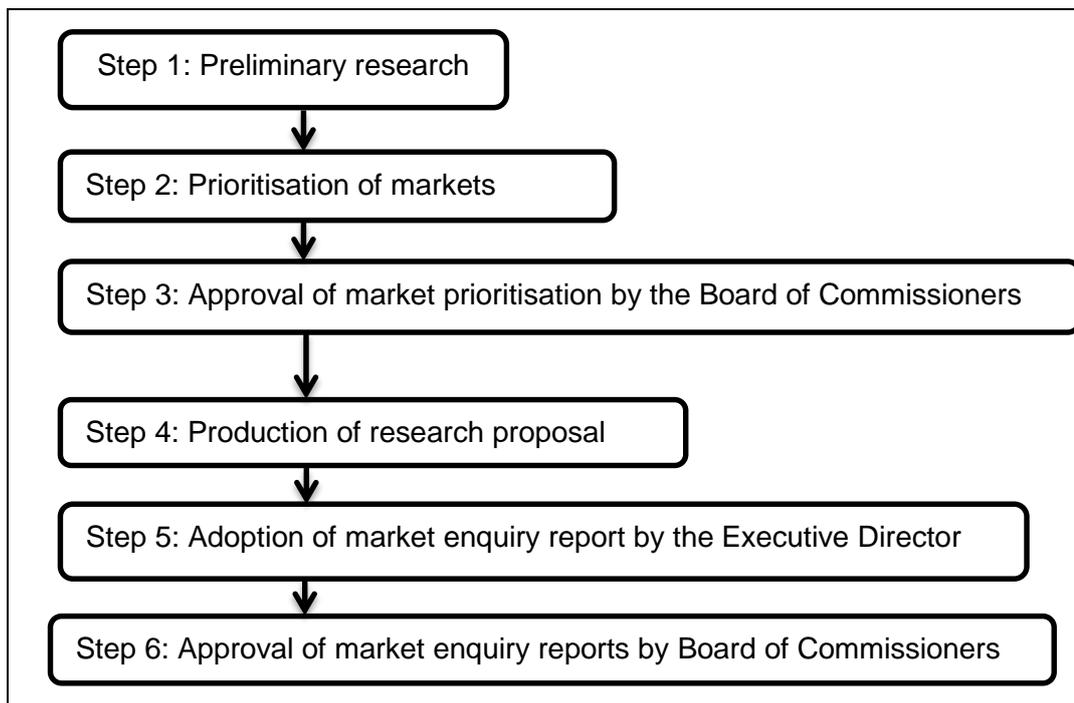
3.1 The Commission employs a wide array of sources to identify possible markets in which to conduct a market enquiry. These include:

- a) Complaints from businesses and trade associations;
- b) Suggestions made by Government and regulatory bodies;
- c) Concerns that arise from merger analysis, enforcement matters and advocacy work;
- d) Complaints from consumer protection agencies and consumer association/forum;
- e) Information gathered from publicly available sources; and
- f) Suggestions from Board of Commissioners.

The information is cross-checked with other sources of information before initiation of an enquiry.

3.2 Managing the entire market enquiry process involves the six steps illustrated in Figure 2.

Figure 2: Market Enquiries Management Steps



Step 1: Preliminary research

The information gathered through by any of the sources in 3.1 will be the basis of preliminary research which involves the use of secondary data and minimum consultations with stakeholders.

Step 2: Prioritisation of markets

Following the preliminary research, the identified markets are then given order of priority. Markets that are likely to be at the top of the priority list include those involving products that are either essential for human survival or have a significant impact on economic growth and key economic sectors or have potential for cross-border trade or are produced in markets that are inherently prone to anti-competitive conduct,

Step 3: Approval of market enquiry prioritisation by the Board of Commissioners

Reports on prioritised markets will be submitted to the Board of Commissioners for approval. This stage will enable the Board of Commissioners to provide input and facilitate any support that may be required in subsequent stages of the process.

Step 4: Production of research proposal

The market enquiry proposal will be prepared by the research team. The proposal should clearly spell out the scope of an enquiry and a tentative cost-benefit analysis. This is imperative in identifying the likely cost of a market enquiry in advance as well as informing the Commission about any external resources that may be required. The paramount principle in the cost-benefit analysis is considering whether the net effect of the enquiry is likely to be positive on consumer welfare. . Factors to be considered in this analysis include the following:

- i) Impact
 - ❖ What is the likely direct or indirect impact on consumers?
 - ❖ What are the wider economic benefits?

- ii) Strategic
 - ❖ Is the Commission best placed to act?
 - ❖ How will the enquiry contribute to the Commission's strategy and objectives?

- iii) Risks
 - ❖ What is the likelihood of a successful outcome?

- iv) Resources

❖ What are the resource implications of conducting the enquiry?

At this stage, the Commission may consider new information from stakeholders and/or other factors that might impact on an enquiry. This may result in reassessment of the prioritisation report taking into account the fact that markets structures and competitive forces therein are not static but always evolving. One of the necessities for effective market enquiries is allocation of the required resource to such activities hence the research proposal will aid those processes.

If the new information on the market leads to an adjustment of the order of priority of a particular market enquiry, the Commission may decide to curtail or halt the enquiry. In addition, a market enquiry may also need to be stopped or delayed if the Commission's resources need to be diverted urgently to other higher priority work. The Commission would be expected to publish a statement of its reasons for not continuing a market enquiry.

Step 5: Adoption of market enquiry report by the Executive Director

The market enquiry report will be submitted to the Executive Director for adoption before any subsequent action.

Step 6: Approval of market enquiry reports by Board of Commissioners

The Board of Commissioners will approve the final report on a market enquiry. Once approved, the follow-up action recommended in the report will commence.

Managing stakeholder participation

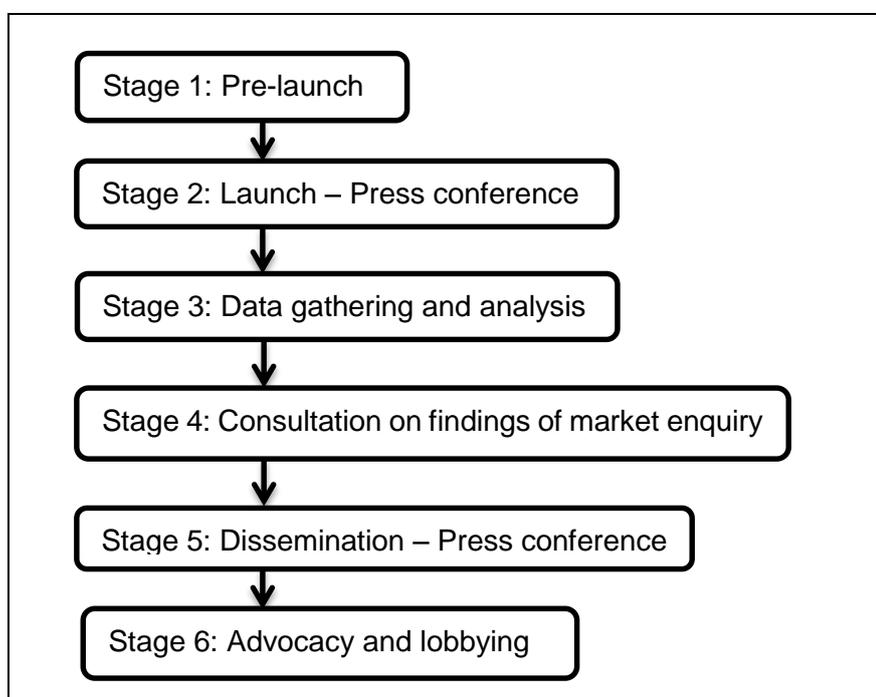
3.3 Transparency is important in market enquiries and the Commission is committed to this principle. In the context of market enquiries, transparency means providing timely and useful information to stakeholders.² This will be achieved by explaining the rationale for a market enquiry, the approach to be used in conducting the enquiry as well as providing findings and recommendations to stakeholders and the public.

3.4 Stakeholder engagement includes actively consulting and taking into consideration views of economic participants with vested interest and others that have expertise and/or knowledge about the market. This is done informally in most instances to aid the research team with holistic information about the market and pave the way for future stakeholder engagement

² Office of Fair Trading

relating to the findings and/or recommendations. Figure 3 illustrates the necessary stages of managing market enquiries to ensure transparency and stakeholder participation.

Figure 3: Stages for managing market enquiries



Stage 1: Pre-launch

Internal stakeholders of the Commission will be informed about the market enquiry. This stage involves:

- i) Describing goods and services that constitute a market and developing theories of harm;
- ii) Explaining assumptions concerning the potential impact of the enquiry on consumer welfare;
- iii) Presenting a market enquiry plan;
- iv) Presenting stakeholder communication strategy; and
- v) Identifying and assessing risks that might affect the enquiry and actions to mitigate same.

Information and advice from internal stakeholders will be received and reviewed throughout the period of an enquiry.

Stage 2: Launch – Press conference

The Executive Director will convene a press conference and inform the media and public about the proposed market enquiry. Contents of the press statement will include a description of:

- i) The scope and intentions of the enquiry;
- ii) An invitation to stakeholders to make submissions;
- iii) Contact details for the research team; and
- iv) Time line for the enquiry.

A summary of the scope and objectives of the market enquiry will also be uploaded to the Commission's website.

Stage 3: Data gathering and analysis

Data gathering

- i) The project team will collect detailed information about the market from stakeholders including economic participants in order to test the theories of harm
- ii) Data collection tools will include questionnaires, surveys and mystery shopping which will be selected according to need and appropriateness. In addition, communication with targeted stakeholders may occur by using telephones or emails or meetings.
- iii) The project team will review literature about the target markets to obtain additional information. Information about similar markets from other jurisdictions may also be used but the team will exercise caution because the competitiveness of firms in separate economies might not be identical.

Data Analysis

- i) The nature of data to be collected is both quantitative and qualitative as the two complement each other. Quantitative data provides measurement of phenomenon while qualitative data leads to better analysis.
- ii) The research team will use a range of techniques to analyse the economic data and provide empirical evidence to support the theories of harm. Where necessary the empirical evidence will be the basis for the design of remedies that are most appropriate to address competition and consumer issues in the market.
- iii) The research team will normally comprise staff of the Commission. Consultants may also be engaged if an assessment of financial resource requirements, the level of complexity of the market and expertise available within the Commission shows that that would be the best approach.

Information from external stakeholders will be received and reviewed throughout the period of the market enquiry.

Stage 4: Consultation on findings of market enquiry

The research team will discuss findings and proposed outcome with stakeholders who will be affected. This process provides a platform for verifying results and receiving just in time feedback from stakeholders.

Stage 5: Dissemination – Press conference

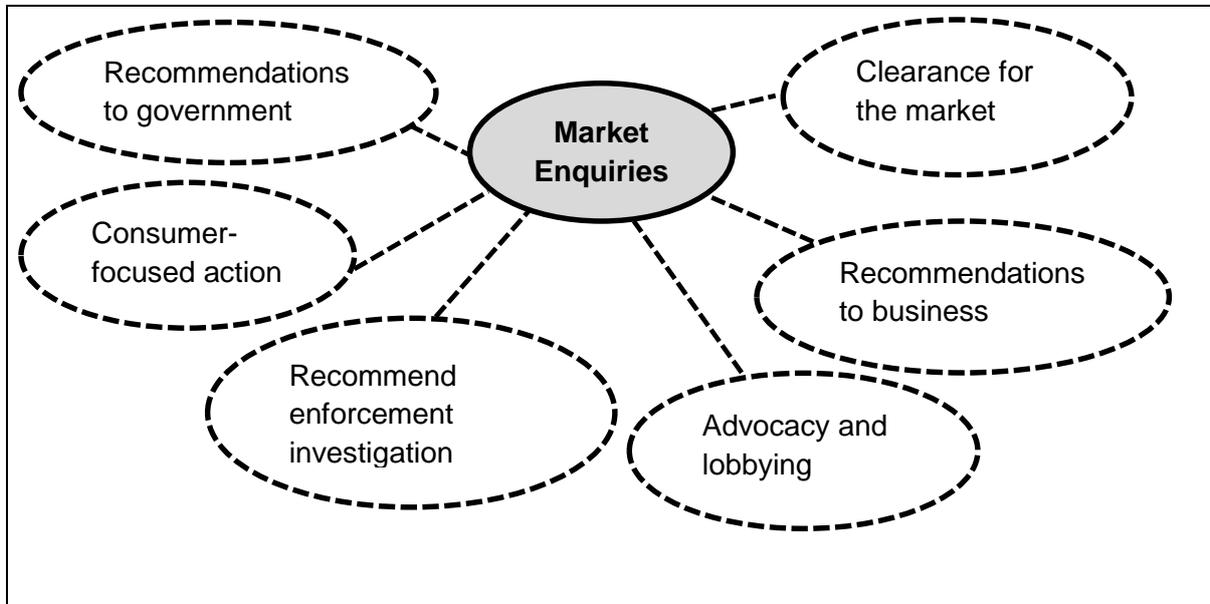
The Executive Director will convene another press conference to inform the media and public about findings and subsequent action. In addition, non-confidential versions of the report of market enquiries will be disseminated to stakeholders and uploaded to the Commission's website. The report will give a description of the market, rationale for conducting market enquiry, methodologies used to collect and analyse data, results and/or recommendations to address identified problems. It may also be possible to organise interviews or workshops in order to provide detailed explanation to stakeholders.

Stage 6: Advocacy and lobbying

It is conceivable that conduct by businesses, consumers, practices of government agencies and regulatory bodies may change in the course of a market enquiry. However, in some instances where change has not occurred by the time the enquiry is concluded, it will be necessary to influence stakeholders to adopt and implement the results of market enquiries.

4.1 A market enquiry should lead to one or more of the outcomes shown in Figure 4.

Figure 4: Outcomes of market enquiries



Clearance for the market

4.2 A market will be cleared if some or all of the potential consumer harm identified during the project proposal stage is not substantiated by the information gathered or that intervention would be disproportionate to the harm. This clearance will not prevent the Commission from revisiting the market at a later stage when new concerns on the functioning of the market arise. At that time, it will still be important to conduct an enquiry provided the prioritisation conditions are satisfied.

4.3 In the absence of a clearance, the results of market enquiries will require follow-up work from the project team and other relevant officials of the Commission. It might be necessary to implement recommended actions that are directed to the Commission or monitor the implementation of recommendations directed to stakeholders.

Consumer-focused action

4.4 Consumer-focused action may take various forms determined on the basis of both the nature of harm and its key drivers. In most instances, action will take the form of campaigns aimed at raising consumer awareness, for instance about their rights and responsibilities when

purchasing goods and services. This may also require the Commission to work in partnership with consumer associations and government bodies.

Recommendations to business

4.5 The Commission will make recommendations to the relevant businesses if the identified problems can be addressed through behavioural change. In instances where the behaviour is encouraged by an association of businesses, recommendations will be made to that association.

Recommendations to the government

4.6 When the market enquiry includes an examination of the effect of regulations in a market or where a public sector agency is a supplier or major customer in a market, recommendation on government policy and or regulatory practice will be directed to government department and or public agencies or regulators. Such outcomes will require the Commission to organise meetings with the relevant agencies and departments to present the findings and recommendations. The project team will monitor the implementation of such recommendations.

Recommend enforcement investigation

4.7 When the results of a market enquiry indicate potential breaches of competition law and/or consumer protection law, enforcement action will be recommended provided it is concluded that is necessary to address the issues identified. The evidence or understanding obtained through conducting the market enquiry will provide baseline information for enforcement action.

Advocacy and lobbying

4.8 The outcome of market enquiries may prompt the Commission to elicit a response from public officials and effect real change, and where possible through multi-stakeholder dialogue. Advocacy and lobbying will assist stakeholders to better appreciate ways in which competition leads to healthy markets and protect consumers. It will also explain why certain types of conduct raise competition concerns. In addition, efforts of advocacy and lobbying will focus efforts on strengthening markets and preserving economic freedom and fairness. These activities may involve direct interaction and negotiation with concerned stakeholders using various means of communication. Some advocacy activities may cause businesses to stop engaging in certain conduct without enforcement investigation by the Commission.

5.1 The question that needs an answer at the end of a market enquiry, during and/or after implementation of results is whether the enquiry has caused an improvement in competition in specific markets and ultimately on consumer welfare? The causality between market enquiries and the degree of competition and consumer welfare may be direct or indirect. This is an important task for the project team because impact assessments will provide the Commission and stakeholders with the answers to five (5) main questions:

- (i) Do market enquiries contribute to the promotion of competition and protection of consumer welfare as per the objective of the Act?
- (ii) Is there need for further or additional intervention in markets in which market enquiries have been conducted?
- (iii) Do market enquiries increase transparency of the Commission's activities and raise stakeholder awareness on how markets work and the role of the Commission?
- (iv) Is the prioritisation of a specific sector effective in optimising use of the Commission's resources?
- (v) What are the lessons that can contribute towards continuous learning and improvement of the Commission's investigatory research techniques?

5.2 The five questions above provide a general scope of the impact assessment methods that will be applied. The time and resource requirements for each market assessment will be estimated during the proposal stage of a market enquiry. However, the requirements might also be influenced at the end by results of a market enquiry. As transparency is a general principle of the guidance, impact assessment reports will be externally published in order to further raise stakeholder awareness and participation.