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**Does prioritisation contribute to effective regulatory governance in developing  
countries? Insights from the Competition Commission South Africa**

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**Abstract**

This paper examines whether strategy implementation through prioritisation contributes to the development of dynamic capabilities and whether this leads to effective regulatory governance based on a case study of the Competition Commission South Africa (CCSA). The CCSA adopted a prioritisation strategy in 2006 and this approach has become a key feature of its strategy implementation activities since then. The study found that the implementation of the prioritisation approach has contributed to the development of specific capabilities by which the organisation is able to identify opportunities for proactive competition regulation and take advantage of these opportunities. The research indicates that CCSA strengthened its internal regulatory capabilities through prioritisation, but this has not translated into effective enforcement of abuse of dominance and promotion of competitive rivalry. External factors and challenges such as the legislation that define and frame abuse of dominance provisions, the judicial process and the institutional design underpinning competition regulation in the country also influence the achievement of competition policy outcomes.

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## Introduction

This paper examines the relationship between strategy implementation and the development of internal capabilities of competition agencies on the one hand and regulatory effectiveness on the other. It explores whether strategy implementation through prioritisation contributes to the development of dynamic capabilities and whether this leads to effective regulatory governance. In order for strategy implementation in competition agencies to contribute to effective regulatory governance, it has to strengthen the internal capability of regulatory agencies to execute their mandates effectively. Furthermore, this capability has to be used to achieve the expected policy outcomes in a given jurisdiction. In answering the question of whether strategy implementation contributes to effective regulatory governance, it is necessary to determine if strategy implementation strengthens the capability of competition agencies and if, in the execution of their mandates, agencies are able to achieve the expected policy outcomes. The paper draws on insights from a case study of the Competition Commission South Africa (CCSA) conducted during September to December 2015.

The CCSA adopted a prioritisation strategy in 2006 and this approach has become a key feature of its strategy implementation activities since then. This study examined whether the implementation of the prioritisation strategy in the CCSA enabled the organisation to develop dynamic capabilities and whether these have resulted in effective regulatory governance of competition in South Africa. Strategy implementation and prioritisation in competition agencies is assumed to contribute to their effectiveness, and by extension, to effective regulatory governance. For this reason, there has been a significant focus by multi-lateral and international networks on the development of capacities in competition agencies to make and implement strategy (International Competition Network, 2009; UNCTAD, 2011). This is especially important in southern Africa where there are many young competition authorities in an environment where financial, technical and other resources are scarce.

Insights from this study are pertinent given the important role competition agencies in developing countries are expected to play as part of the system of regulatory governance. Competition agencies in developed countries tend to regulate competition in well-developed sectors and markets in which competitors have a track record of competition and in which efficiency as an outcome is the primary concern. Competition agencies in developing countries are concerned with redistribution in addition to efficiency concerns (Dubash & Morgen, 2012). Although there is great diversity in developing country economies some features do stand out. Many developing economies are characterised by high levels of concentration and high entry barriers in which it is necessary to generate competition in the first place and then to protect it by swiftly enforcing the rules on dominance (Gal, Bakhoun, Drexler, Fox & Gerber, 2015).

The paper briefly describes the research methodology and then locates the study in the context of the proliferation of competition regimes as part of the emergence of the regulatory mode of governance, the significance of strategic planning and the development of dynamic capabilities in the CCSA, and concludes by examining whether these capabilities contribute to effective regulatory governance.

## **Method and data analysis**

A qualitative and inductive research strategy is adopted with a case study research design focused on the CCSA as the site of study (Monette, Sullivan, & DeJong, 2002). A qualitative research strategy effectively supported the collection of “open-ended, emerging data with the primary intent of developing themes from the data” (Creswell, 2003: 18). Such an approach further facilitated an inductive enquiry that enabled the researcher to draw inferences out of observations (Bryman, 2004) and it works well with describing and exploring single cases (Wagner, Kawulich, & Garner, 2012). The case study design involves a detailed descriptive account of part of a particular situation, event or initiative with the goal of gaining understanding through depth and richness of the description of the case (Monette et al., 2002).

The research used both primary and secondary data to review, assess and analyse the development of dynamic capabilities associated with the implementation of the prioritisation strategy in the CCSA. Primary data collection consisted of semi-structured interviews in which an interview schedule that defined the lines of enquiry was used to guide the interview process (Wagner et al., 2012). Eleven interviews were conducted with nine senior managers, a middle manager and an administrator during September to December 2015. The secondary data consisted of literature on strategic planning, prioritisation and competition policy, and internal documents of the CCSA.

NVivo 10, a software programme for analysing unstructured qualitative data, was used to organise, structure, code and analyse the data and information. A three-phased approach was adopted in the data analysis. The first phase of analysis focused on analysing the internal documents of the CCSA, documents relevant to competition and the economy in South Africa, and a number of documents pertaining to prioritisation in competition agencies. The review of existing secondary data sources provided an opportunity to develop an initial set of themes and codes pertinent to prioritisation and dynamic capabilities. The second phase of analysis was focused on the interview data. Each interview was transcribed and the transcripts uploaded to NVivo for coding purposes. In this phase of the analysis, the focus was on identifying the capabilities that emerge from implementing prioritisation, particularly those capabilities that enable the CCSA to identify and take advantage of opportunities while reconfiguring its resource base. The third phase of analysis was focused on establishing the significance of dynamic capabilities identified in phase two.

## **Regulatory governance and the proliferation of competition regimes**

“Governance through regulation” constitutes a new division of labour between state and society in which there is an “increase in delegation, proliferation of new technologies of regulation, formalisation of inter-institutional and intra-institutional relations and the proliferation of mechanisms of self-regulation in the shadow of the state” (Levi-Faur, 2005: 13). It signals a move away from direct intervention by government through nationalisation and macro-economic planning towards more arm’s length control (Bach & Newman, 2007). Governance through regulation implies a greater reliance on institutions operating at arm’s length from government through the establishment of regulatory agencies that adopt technocratic and judicial approaches in the way they exercise their regulatory mandate.

The emphasis on the role of institutions in social and economic development processes has been given a boost by the resurgence in research on 'institutionalism' across the disciplines of economics, political science and sociology, motivated by a "common conviction that institutional arrangements and social processes matter" (Powell & DiMaggio, 1991: 3). North (1998) argues that institutions form the incentive structure of society and that political and economic institutions determine economic performance. Institutions are the rules of the game that are "humanly devised constraints that structure human interaction" and "are made up of formal constraints, informal constraints, and their enforcement characteristics" (North, 1998: 248).

The proliferation of competition laws and authorities set up to implement and enforce these laws as a demonstration of the spread of regulatory governance as a mode of governing economic activity has been nothing short of remarkable. Nine jurisdictions had a competition law in place and only six had established a competition agency in 1990. By October 2013, there were 127 jurisdictions with a competition law and 120 with an operational competition agency (OECD, 2014).

Competition policies can be defined as "the set of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare" (Motta, 2004: 30). These policies are intended to promote rivalry among firms through regulating activities such as mergers and acquisitions, abuse of dominance, cartels, conspiracies in restraint of trade and other economic offences deemed to be anti-competitive (Doern & Wilks, 1996). Accordingly, the overall purpose of competition policies, laws and institutions is to protect competition as a means of allocating scarce resources in order to produce allocative efficiency that leads to broader economic and social welfare gains. In theory and in practice, "competitive pressures on individual firms must be strong enough not only to dissipate monopolistic rents but, more importantly, to induce firms to adopt active competitive strategies instead of profiting from incentives provided by industrial and technology policies" (Possas & Borges, 2009: 450).

Competition law is a specific instrument of competition regulation. It involves the adoption of legislation to regulate anti-competitive conduct. The firm conduct and structural conditions that competition law aims to regulate include (Doern & Wilks, 1996: 15) cartels, trusts, or horizontal arrangements among competitors to fix prices or allocate markets; abuse of dominant position or monopoly or market power; mergers that significantly reduce competition; vertical arrangements between producers and various sellers, such as resale price maintenance, exclusive dealing, exclusive territories, and tying arrangements; and arrangements and practices that mislead consumers.

The goals of competition laws can be categorised into economic and equity goals. Economic goals include efficiency, such as static and dynamic, allocative, productive and dynamic efficiency; consumer welfare sometimes including consumer choice; total welfare; or protecting the competition process from the creation of private artificial barriers. Equity goals concern protecting small and middle sized businesses from abuses; safeguarding economic opportunity for all, in some cases especially for historically excluded segments of society (Fox & Gal, 2014).

Competition agencies are an integral part of the institutional arrangements set out to operationalise competition policy and law. As Kovacic (2013, 5) states, “To be adapted successfully to practice, theory cannot be suspended in air. Unless grounded in engineering of effective institutions, theory will not work in practice. The engineering of policy making involves basic questions of policy implementation.” Competition agencies are economy-wide in their scope of coverage and administer the laws aimed at protecting consumer interests by prohibiting firms from reducing competition through colluding or merging with their rivals, or seeking to eliminate competitors by means other than offering superior products to consumers (OECD, 1998).

### **Competition agency effectiveness, strategic planning and prioritisation**

There is widespread recognition that the quality of a nation's competition policy depends on the effectiveness of the institutions responsible for the formulation and implementation of that policy and law (Kovacic & Hyman, 2012). Effectiveness refers to the ability of an agency to achieve its objectives by the appropriate use of its resources. The effectiveness of competition agencies is influenced by a number of factors in its design, including elements related to its legal status, its standing within the broader governmental machinery and the business and consumer stakeholders, and the design of its internal processes to maintain high-quality work output (UNCTAD, 2011). According to the International Competition Network (2009), there are a number of pre-requisites to achieving effectiveness including: good planning and prioritisation (both strategic and operational); efficiency in use of resources and project management; evaluation of activity in order to assess its impact; and good communication as a large part of the impact of a competition agency comes via perceptions and awareness of the value of competition by various economic actors.

A large focus of the work of international organisations has been on prioritisation within competition agencies in the face of constraints related to scarce resources relative to the requirements for effectively achieving the mandates of these agencies. The assumption is that it is necessary to decide what must be achieved over a period of time, establish a plan to achieve this and provide a framework for prioritisation. Setting strategy and developing a plan to implement it must enable an agency's limited resources to be focused on high-impact cases and markets with great significance in terms of direct economic impact on the market in question or by virtue of deterrence value or value in setting precedent or policy (International Competition Network, 2009). The focus on strategy and prioritisation is in direct response to the recognition that competition agencies all over the world, but especially in developing countries, simply do not have the resources to deal with every complaint brought before them.

### **Strategy implementation and prioritisation in the Competition Commission South Africa**

The CCSA was established in 1999 following the enactment of the Competition Act of 1998. The purpose of the Competition Act is to promote and maintain competition in the South Africa by promoting the efficiency, adaptability and development of the economy; providing consumers with competitive prices and product choices; promoting employment and advancing the social and economic welfare of South Africans; ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

promoting a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The Act further aims to open the economy to greater participation by more South Africans by addressing high levels of concentrated ownership and control in the South African economy. The objectives of the Act are explicit about promoting the participation of previously excluded groups (small and medium enterprises and historically disadvantaged persons) in the economy and addressing the legacy of concentrated ownership and control (Makhaya, Mkwanaenzi & Roberts, 2012).

The first five to eight years of the CCSA's work was dominated by merger regulation (Competition Commission South Africa & Competition Tribunal South Africa, 2009; Makhaya, Mkwanaenzi & Roberts, 2012; Makhaya & Roberts, 2013). The CCSA has since 2006 stepped up its enforcement activity. The Competition Act empowers the CCSA to investigate three classes of anti-competitive conduct, namely, restrictive horizontal practices, restrictive vertical practices, and abuse of a dominant position. The CCSA signaled its intent to improve its enforcement capacity in its 2006/07 annual report, with a specific focus on detecting and prosecuting cartels (Competition Commission, 2007).

### ***Strategic planning in the Competition Commission South Africa***

The CCSA embarked on its journey of strategic planning and implementation in 2006 when it sought to consolidate its experience into a strategic plan and respond appropriately to developments and changes in its environment (Competition Commission, 2007). The plan's main strategic thrusts were to increase staff morale and motivation; align organisational structure and work processes to the CCSA's strategic priorities; define and clarify the Commission's approach and methodology; establish the CCSA as a centre of information, knowledge and expertise; and ensure effective advocacy and communication (Competition Commission, 2006a).

The implementation of the second generation strategy commenced in 2010 and focused on achieving demonstrable competitive outcomes in the economy through prioritisation; enhancing the competitive environment for economic activity through partnership, engagement, dialogue and advocacy; and realising a high-performance regulatory agency (Competition Commission, 2009). This strategy was implemented through to 2013/14 financial year before a third generation strategy was developed. This strategy remained in force until the commencement of the third generation strategy for the period 2015 – 2020. The focus of the current strategic priorities is effective competition enforcement and merger regulation; strategic collaboration and advocacy; and developing a high-performing agency. The strategic priorities for the first, second and third generation strategies are set out below in Table 1.

<b>2006 – 2009 (1<sup>st</sup> Generation Strategy)</b>	<b>2009 – 2014 (2<sup>nd</sup> Generation Strategy)</b>	<b>2015 – 2020 (3<sup>rd</sup> Generation Strategy)</b>
<b>External Environment</b>	<b>External Environment</b>	<b>External Environment</b>
<ul style="list-style-type: none"> <li>Expanding economic activity</li> <li>Competition policy review</li> <li>Increasing sophistication</li> <li>Impact assessment</li> <li>Increasing profile</li> </ul>	<ul style="list-style-type: none"> <li>Global economic crisis</li> <li>Implementation of changes to the Competition Act</li> <li>Strategic engagement opportunities</li> <li>Increasing expectations</li> </ul>	<ul style="list-style-type: none"> <li>Re-alignment of regulatory institutions to promote efficiency</li> <li>Growing importance of BRICS nations</li> <li>Infrastructure-led growth</li> <li>Implementation of changes to the Competition Act</li> </ul>
<b>Internal Environment</b>	<b>Internal Environment</b>	<b>Internal Environment</b>
<ul style="list-style-type: none"> <li>Sound governance arrangements</li> <li>Structure</li> <li>Human resource</li> <li>Culture and climate</li> <li>Information and knowledge management</li> </ul>	<ul style="list-style-type: none"> <li>Continued organisational growth and expansion</li> <li>Empowering middle management</li> <li>Leading and managing change</li> <li>Information and knowledge management</li> </ul>	<ul style="list-style-type: none"> <li>Streamlining business processes</li> <li>Human capital development and management</li> <li>Effective leadership and management</li> <li>Improving resource management</li> </ul>
<b>Strategic Priorities</b>	<b>Strategic Priorities</b>	<b>Strategic Priorities</b>
<ul style="list-style-type: none"> <li>Increase staff morale and motivation</li> <li>Align organisational structure and work processes to the Strategy</li> <li>Defining and clarifying the Commission's approach and methodology</li> <li>Establish the Commission as a centre of information, knowledge and expertise</li> <li>Ensure effective advocacy and communication</li> </ul>	<ul style="list-style-type: none"> <li>Achieve demonstrable competitive outcomes in the economy</li> <li>Improve competitive environment for economic activity</li> <li>Realise a high-performance competition regulatory agency</li> </ul>	<ul style="list-style-type: none"> <li>Effective competition enforcement and merger regulation</li> <li>Strategic collaboration and advocacy</li> <li>A high-performance agency</li> </ul>

**Table 1.1:** Strategy cycles and strategic priorities

Source: Compiled from Competition Commission Strategic Plans 2006 – 2009; 2009 – 2012; 2012 – 2015; and 2015 – 2020.

### ***Implementing prioritisation as strategy***

A consistent feature of the strategic plans of the CCSA over the past decade has been the adoption and implementation of a strategy to prioritise its work. According to Commissioner, “[t]he challenges are so enormous and the resources so limited that you have to constantly prioritise. In the past ten years or so, we have really institutionalised strategic planning, prioritisation of sectors, and so on” (Krisztian, 2015: 1).



### *Defining prioritisation*

Prioritisation refers to “a process of deciding what type of activities, enforcement actions, advocacy initiatives, or in general competition policy measures a competition agency might pursue in a given period of time” (UNCTAD, 2013: 4). Prioritisation is predicated on competition agencies being able to make choices about what they regard as strategically important or not. The ability to make these choices assumes that competition agencies have discretion to make such choices. This was a concern shared by CCSA staff at the time when discussions on prioritisation ensued following the strategic planning process in 2006 as noted by a senior manager:

There was some debate around...prosecutorial discretion. Can we do this, you know? Can we say we will focus on this and not do other things you know? We did get to a point where we realised that yes; ... there is no conflict between prioritisation and prosecutorial discretion. Then we reconciled there is no internal conflict between prioritisation and prosecutorial discretion. (Senior manager interview).

According to Wils (2011: 353), competition agencies have discretion “whenever the law leaves the authority a certain freedom to choose among different possible courses of action according to the authority's own judgment.” Competition agencies have discretion over organisational, procedural and institutional matters (Petit, 2010).

### *Motivations and criteria in priority-setting*

Wils (2011) sets out six motivations for prioritisation. Firstly, rules that set out anti-competitive conduct may be over-inclusive so that it is necessary for competition agencies to have discretion as to which cases they pursue. Secondly, the costs of pursuing a case may exceed the benefits of doing so. Thirdly, the limited resources available to a competition agency may not allow it to investigate and pursue all infringements. Fourthly, it may be prudent not to pursue cases if complaints received only concern a specific type of infringement and pursuing these complaints result in insufficient resources being available to pursue other infringements that may be as important or have greater import. Fifthly, it may be possible to achieve the same level of deterrence by pursuing fewer contraventions rather than all, and punishing these more harshly. Finally, other enforcers of the law may be better placed to deal with a particular case.

The International Competition Network regards prioritisation as important because it provides competition agencies with the mechanism to allocate resources to the most relevant projects in a resource constrained environment (International Competition Network, 2010). The concern for focusing limited resources on areas in which the CCSA would be able to make the greatest impact as a key motivation for adopting prioritisation was widely shared among the respondents. According to respondents, the logic of prioritisation is one in which setting priorities enables the organisation to focus and concentrate its limited resources on sectors and cases in which its address anti-competitive conduct would make a difference in the economy and to consumers.

Ja, prioritisation is once again; it's a product of trying to balance you know, the limited resources that you have and still make an impact in the market in terms of what you do, because prioritisation says, identify the sectors that are important, not just important for the sake of being important, but important for the economy at large... (Senior manager interview).

The manner in which competition agencies set priorities differs from one jurisdiction to another and may involve criteria set out in the law, the experience of the agency, specific sectors, or public interest (International Competition Network, 2008). That complaints and cases should be economically significant with the potential to yield substantial precedent is a criterion used by a large number of competition agencies (UNCTAD, 2013). Jenny (2013) summarises the criteria used as the gravity of the infringement (such as cartels), high impact, importance of the sector to consumers, high profile (food), low resources required or ease of proof (such as leniency applications), precedent setting, type of practice, availability of remedies, social relevance of the cases, and whether the competition agency is best placed to act.

### ***The Competition Commission South Africa's approach to prioritisation***

Prioritisation in the CCSA must be viewed in the context of South Africa's quest to transform its economy. The economy inherited by the democratic government following the demise of Apartheid in 1994 was protected, concentrated and dominated by capital-intensive sectors with strong links to the mining and resource base. State intervention through state-owned enterprises (SOEs) privileged the development of the minerals-energy complex (Fine & Rustonjee, 1996). Prior to the democratic transition, strategic concerns of the Apartheid government related to defense and liquid fuels, together with the needs of the resource extraction and processing industry, were prioritised and left a deep imprint on the economy through state intervention (Aron, Khan & Kingdon, 2009). The present growth path remains dependent on the minerals value chain, is underpinned by bottlenecks and backlogs in infrastructure, particularly energy, and is characterised by continued economic concentration in key sectors, combined with monopoly pricing at the expense of industrial development (Ashman, Fine, Padayachee & Sender, 2014).

The country's economic development strategy, *The New Growth Path* adopted in 2010, aims to shift South Africa's growth path away from an industrial development trajectory that is locked into a developed minerals-energy complex with weak linkages to other industries domestically. It seeks to shift it towards an economy that is labour-absorbing along the agricultural value-chain, light manufacturing and services in the medium term and in the long term, to knowledge and advanced industries (Department of Economic Development, 2010). Competition policy is regarded as an important policy remedy for addressing excessive levels of concentration in the economy. Without competitive discipline, firms are able to use their market power and achieve abnormal returns by means of collusion and rent extraction and by so doing hurt consumers and the economy (Competition Commission, 2008). The strategy to prioritise was adopted to by the CCSA in order to concentrate and leverage minimal resources towards those sectors and markets in which the abuse of market power adversely affects consumers and the South African economy.

By 2006, the organisation recognised that it was on the verge of a new phase of development influenced by changes such as the adoption of the Accelerated and Shared Growth Initiative for South Africa (Asgi-SA), a competition policy review and the appointment of new leadership and it responded to these changes by formulating and implementing a strategic plan (Competition Commission South Africa, 2007a). A key outcome of the planning process was an acknowledgement that the CCSA “should take a more proactive stance in dealing with sectors that have high levels of concentration and anti-competitive market structures and practices” (Competition Commission, 2006: 3). As such, the organisation set itself the goal of defining and clarifying the CCSA approach and methodology. This was to be achieved by developing a methodology that would enable the organisation to prioritise sectors and cases and become more pro-active in addressing market concentration and anti-competitive conduct. The CCSA regarded prioritisation as a means to become more pro-active, “that is, making appropriate decisions about which sectors and cases the Commission focuses on in pursuit of its mandate” (Competition Commission, 2007a: 1 - 2).

The evolution of the CCSA approach to prioritisation is characterised by an increasing level of sophistication in the approaches adopted, criteria used and the recommended instruments for intervention. Three periods of development and implementation are discernible, that is 2006 to 2009, 2010 to 2014, and 2015 onward.

For the period 2006 to 2009 the processes for developing the prioritisation framework involved undertaking an assessment of the relationship between competition policy and government’s broader national policy objectives; explaining how prioritising of certain sectors or complaints will improve the effectiveness of the organisation; reviewing experience of other jurisdictions regarding prioritisation; and recommending sectors based on identified prioritisation criteria. The approach set out in the discussion document was formalised in adopted by the CCSA as a *Framework for Prioritising Sectors and Cases* (Competition Commission South Africa, 2007a). The priority sectors were financial services, infrastructure and construction, food, agro-processing and forestry, telecommunications, and intermediate industrial products.

These sectors were identified following the application of criteria set out in the framework. The first criterion focuses on competition concerns and considers the degree of concentration (including barriers to entry; price unrelated to cost of demand factors, irregular price differences; low rate of price switching), and the most harmful anti-competitive practices including, hard-core cartels and abuse of dominance. The second criterion focuses on alignment of the sector to government economic policy and sector priorities by considering its importance to economic policy; importance to South Africa’s competitiveness and the effective working of the economy; extent to which sectors provide essential inputs to other economic sectors; and the extent to which the sector is able to contribute to empowerment, new entry and growth of small, medium and micro enterprises (SMEs) (Competition Commission South Africa, 2007a).

An internal task team reviewed the prioritisation of sectors and cases in 2010 (Ratshisusu & Bonakele, 2010), following the adoption of the strategy for the period 2010 – 2013 (Competition Commission South Africa, 2009) and the adoption of the strategic goal of achieving demonstrable outcomes in the economy through prioritisation of sectors and

cases. The review took account of changing external conditions particularly with regard to government's emphasis on labour-absorbing economic growth aimed at addressing unemployment and poverty. The approach to the prioritisation of sectors and cases recommended by the task team refined the organisation's approach in two material ways.

Firstly, the CCSA sought to bring the full range of available instruments to bear on priority sectors, including investigations, advocacy and market enquiries. In the prioritisation of sectors, it was proposed that different interventions are targeted at specific sectors. Thus, the priority sectors for investigation were identified as infrastructure inputs into construction; mineral resources and intermediate industrial products; food and agro-processing; and telecommunications. Banking, construction services and public transport were earmarked as priority sectors for advocacy while the health care sector was targeted for a market enquiry (Ratshisusu & Bonakele, 2010).

Secondly, the criteria for selecting priority investigations were further refined and described in more detail. For an investigation to be prioritised investigators must consider whether the complaint is in a priority sector, the competition issues involved, the type of infringement, the potential for precedent-setting, extent of harm caused, enforcement capability of the CCSA, and the likely net result considering the nature of the complaint relative to the extent of harm and the enforcement capability of the organisation. The task team integrated the different criteria into principles referred to as SCREEN (**S**ector, **C**ompetition Issue, **R**esources, **E**xtent of Harm, **E**nforcement Capability, **N**et Result).

The CCSA initiated consultations with stakeholders including Business Unity South Africa, Grain SA, National Consumer Forum, Federation of Unions of South Africa (FEDUSA), Congress of South African Trade Unions (COSATU), National Treasury and others between 2011 and 2012 as part of a comprehensive review of prioritisation. The review included taking into account additional factors from the Income and Expenditure Survey (IES), sector and industry contribution to GDP, and government's Medium Term Expenditure Framework (MTEF) in order to broaden the scope of prioritisation. Furthermore, the review undertook a comprehensive assessment of previous priority sectors highlighting investigations, outcomes and outstanding work that culminated in the development of a Prioritisation Advisory Note (Competition Commission South Africa, 2015a). The advisory note recommends priority sectors that form the focus of various interventions by the organisation, including investigation and enforcement, impact assessment, scoping study, advocacy, monitoring and market inquiry interventions. The sectors in which these interventions are to be implemented are food and agro-processing; intermediate industrial products; financial services; media; energy; and private healthcare. A summary of the evolution of prioritisation within the CCSA is presented in Annexure 1.

The adoption of the prioritisation strategy in 2006 was a catalyst for the CCSA to strengthen its enforcement activities in sectors and markets with high levels of concentration and competition concerns in a pro-active manner. Prioritisation was aimed at increasing enforcement in priority sectors. While the record on anti-cartel enforcement has been robust with the pro-active approach contributing to uncovering wide-spread collusive conduct, the record on abuse of dominance has been less so (Makhaya & Roberts, 2013).

Analysis by Tapia and Roberts (2015) show that the CCSA receive between 100 and 200 complaints annually, but only conducts about twenty in-depth investigations as the overwhelming majority of complaints do not raise substantive competition issues. Their analysis indicates that the CCSA only referred nine-teen abuse cases to the Competition Tribunal between 1999 to December 2012 at an average of 1.5 cases per year. The Competition Tribunal determined that abuse of dominance occurred in only eight of the cases, with two decisions later set aside by higher courts. There are several challenges that account for the poor record of success in abuse of dominance cases, including different interpretations of law between the Competition Tribunal and the Competition Appeal Court, the time it takes conclude cases, and procedural challenges by well-resourced parties (Makhaya, Mkwanzani & Roberts, 2012).

### **Prioritisation and the development of dynamic capabilities**

Strategy implies change. The dynamic capabilities perspective regards the “capacity of an organisation to purposefully create, extend or modify its resource base” as a key resource for channeling organisational change (Helfat et al., 2007: 4). It is the ability of an organisation to integrate, build and reconfigure internal and external competences to address rapidly changing environments (Teece, Pisano & Shuen, 1997). Dynamic capabilities are the organisational and strategic routines by which managers change the resource base of the organisation to achieve their strategic goals (Eisenhardt & Martin, 2000). Sensing and shaping opportunities and threats, seizing opportunities and transforming organisational resources to enhance performance are regarded as dynamic capabilities (Katkalo, Pitelis & Teece, 2010; Teece, 2007).

Study participants in the CCSA were asked to consider the development of specific capabilities that resulted from strategy implementation and prioritisation in the organisation. They were asked to consider especially those capabilities that enabled the CCSA to identify and exploit opportunities by re-configuring its resource base. The research identified sector and priority setting expertise, and emerging project management capabilities as the main capabilities associated with the implementation of the prioritisation strategy.

### ***Sector expertise***

A common theme from the interviews is that prioritisation has contributed in a significant way to the development of sector expertise in the organisation. Staff have developed specific sector expertise by collecting information and researching specific sectors over time, thus developing knowledge and understanding of the dynamics of specific markets, competitors and competition issues. This is a learning process that is facilitated by scoping studies, impact assessment, case investigations and other formal and non-formal means of research and information gathering by teams. A senior manager noted that:

... people that are very much experts or know quite a lot when it comes to certain sectors of the economy, you know. I mean, an example is, if you get a steel case, you know that this case has to be given to a certain person because the person knows the industry very well or you get a polymers matter, or whatever, you know. So, from that point of view, I think, it has

helped in terms of, you know, having that benefit of having people who are in a way, experts in certain sectors.

### ***Priority setting expertise***

Respondents identified the ability to prioritise as a significant capability that the organisation has developed as a consequence of having adopted the strategic approach of prioritisation. Priority setting is a continuous process that has been refined over time through experimentation and learning. Prioritisation happens at various levels in the organisation, including in teams, in divisions and organisation-wide. Prioritisation is undertaken for different purposes and in relation to how the range of interventions is prioritised to address specific competition issues as observed by a senior manager:

... prioritising for different purposes, you know, ... you prioritise for marketing enquiry, you prioritise for enforcement, you prioritise for advocacy, you know there are all these things now that we are able to prioritise for when at the beginning really, it was prioritisation on limited things so, you know ... (Senior manager interview)

Prioritisation involves making choices about competing demands within the organisation's prioritisation framework. It involves a continuous process of strategising at different levels within the organisation about the best possible areas of focus and means with which to achieve the desired outcomes.

### ***Project management capability***

Cases and other initiatives such as market enquiries are regarded as projects and as such, planning and organisation of these interventions are done on a project basis. Skills such as planning, budgeting, organising, and reporting are developed in teams. The project organisation of case investigations, market enquiries, and special projects means that "demands for project management are ever growing" (Senior Manager Interview). According to respondents, this capability is not yet fully developed across the organisation and requires further support to enable it to develop into an organisation-wide capability. A senior manager describes this in the following way: "... we are becoming a lot more sophisticated in terms of project management. Our investigation plan, our litigation plan is forcing us to become better at project management: budgeting, risk and so on."

Large organisation-wide initiatives such as the Fast Track Construction Settlement Project and the Health Enquiry are cited as examples of large projects that required a project management discipline to implement. In this regard, a senior manager noted: "So we said look, this is something that's never been taken on before. And then we said okay, it's a huge task, it's huge budgets, we've actually gotta split this up and take a project management approach."

### ***Significance of dynamic capabilities***

This section discusses the ways in which these capabilities enable the organisation to sense and seize opportunities and to change the resource base accordingly.

### ***Sensing opportunities***

The CCSA's focus on a limited number of sectors that have an impact on low-income consumers, have competition concerns and are aligned to government policy and sector priorities has enabled the organisation to build up a knowledge base and expertise in priority sectors. The organisation is able to learn about these sectors through the complaints received from the public, the investigations it initiates, the scoping studies it undertakes and the impact assessments it conducts. The continuous process of learning and knowledge building in regard to dynamics of the prioritised sectors enables the organisation to sense opportunities insofar as addressing competition concerns. Sensing opportunities involves recognising emerging patterns in the environment through interpreting signals, symbols and information (Helfat & Peteraf, 2015). Synthesis of this information yields new knowledge (Desouza & Hensgen, 2005).

The Fast Track Construction Settlement Project initiated by the CCSA in 2011 is a useful illustration of how the organisation's work in the construction sector enabled it to identify patterns of anti-competitive behaviour over time by interpreting and synthesising information obtained. Signs of collusion in the sector were apparent as early as 2007 following a corporate leniency application (CLP) by Rocla, a subsidiary of Murray & Roberts - one of the largest construction firms in the country (Hekima Advisory, 2014). This exposed a hugely profitable cartel that operated from 1973 to 2007 in three provinces in South Africa.

The sector was prioritised following uncovered collusion by top-tier construction firms. It was also influenced by the infrastructure programme that Government was due to embark upon. The CCSA subsequently undertook an in-depth study of the entire value-chain of the construction sector and during this time, more CLPs applications were received. With this information, the CCSA initiated investigations into bid-rigging and collusion that led to the organisation inviting firms involved in these anti-competitive practices to settle their contraventions provided they fully disclose the extent of their involvement and, where applicable, pay an administrative penalty. In 2013, the CCSA concluded settlements for these contraventions between 2006 and 2009 with the majority of firms with administrative penalties from the settlement process totalling R1.46 billion (Hekima Advisory, 2014). The work done in the sector enabled the CCSA progressively to establish patterns of information that were synthesised to build up sector knowledge and expertise. In turn, this contributed to the organisation identifying the opportunity for intervening in the sector to address wide-spread anti-competitive practices by firms.

### ***Seizing opportunities***

Seizing an opportunity refers to the mobilisation of resources and organisational infrastructure necessary to take advantage of an opportunity (Katlako, Pitelis & Teece, 2010). It may involve making large investments in funds, and management commitment to developing capabilities under conditions of uncertainty and complexity (Helfat & Peteraf, 2015). The capabilities of priority setting, sector expertise and project management developed over time contributes to the CCSA's ability seize opportunities.

Not only was the CCSA able to sense an opportunity in the construction sector, but it was also able to take advantage thereof through the establishment of the Fast Track

Construction Settlement Project. The fast track settlement procedure constituted a new approach to dealing with large volumes of uncovered contraventions of the Competition Act. The CCSA made commitments towards developing the requisite fast track settlement procedures and developed the organisational infrastructure to deal with the process in the form of an inter-divisional team (Competition Commission, undated). Settlements were reached with 15 of the 21 firms under the settlement procedure covering more than 300 instances of bid-rigging (Competition Commission South Africa, 2013).

The Health Enquiry was cited as another example of how the CCSA was able to draw on its priority setting and project management capabilities, and thereby take advantage of conditions in the external environment to initiate this enquiry. The healthcare system is described by Government as “neither efficient nor fair” with concerns raised about the inequitable nature of the existing system in which “the privileged few hav[e] access to a relative lion's share of general health resources” (Department of Health, 2014: 2). Further, complaints about competition issues have been received in the health care sector over a period of time so that a market inquiry into determine whether or not there are anti-competitive features in the private health care market and what their effects are, was appropriate (Competition Commission South Africa, 2015).

Formal powers to conduct a market inquiry were granted to the CCSA by virtue of section 6 of the Competition Amendment Act 1 of 2009. The provisions pertaining to market inquiries came into force on 01 April 2013 following intervention by the CCSA. The CCSA recognised that conducting the market inquiry would be costly and additional resources would need to be mobilised. This was achieved partly as a result of alignment between the regulatory framework on competition and the interest of key stakeholders to better understand the competition dynamics, including market power and distortions of competition at various levels, barriers to entry, and factors limiting access by consumers to private healthcare (Competition Commission South Africa, 2015). The Health Enquiry thus represented a significant investment of funds and management commitment.

### ***Reconfiguring the organisational resource base***

The ability to renew and recreate the organisation's resources is essential for making adjustments and adaptations in order to take advantage of opportunities sensed and seized. The emerging project management capability within the CCSA was identified by respondents as a key ability that enables the organisation to reconfigure its resource base. The project management capability in the organisation has several important features that facilitate the process of renewing and reconfiguring the resources at its disposal.

Firstly, by structuring an initiative as a project, resources from across the organisation can be coordinated in a way that is focused on the needs of the project. For instance, a person with sector expertise that may be required for a specific project can be enlisted as part of the project team irrespective of the division in which that person is employed. In so doing, the CCSA is able to address departmentalism that results from functional organisational structures (Cushway & Lodge, 1999).

Secondly, projects are inherently temporary in nature so that the resources built up in regard to a specific project can be re-deployed elsewhere in the organisation or moved to the next



project. For instance, many of the staff recruited to work on the Fast Track Construction Settlement Project were recruited into the Cartels Division subsequent to their project roles coming to an end. Both the ability to coordinate resources across the organisation and the temporal nature of projects provide the CCSA with a level of flexibility it otherwise may not have developed.

Thirdly, projects serve as a useful means to experiment, learn, adapt organisational routines and replicate where required (Teece, Pisano & Shuen, 1997). The Fast Track Construction Settlement Project illustrates this point. The fast track settlement procedure applied in the construction cases has proven its usefulness for dealing with large volumes of cases and the approach and lessons learnt from this project were replicated to deal with cartel investigations in the furniture removal industry involving more than 5 000 tenders (Competition Commission South Africa, 2014).

### **The significance of strategy and prioritisation to competition agencies**

Competition agencies in developing countries face a broad range of challenges in the execution of their mandates to regulate competition in ways that produce competitive and efficient economies while at the same time ensuring public interest outcomes such as participation in the economy by previously marginalised groups. Agencies in many developing countries must execute their mandates in economic environments characterised by high levels of concentration and market power and thus must contend with distributive politics in addition to efficiency concern (Dubash & Morgan, 2012). Navigating, balancing and integrating efficiency and public interest concerns in the execution of their mandates shape the context and inform the content of the competition agency strategies. Moreover, competition agencies must do this with meagre resources compared to those agencies in developed countries with a much longer tradition and institutional track record of regulating competition

If a fundamental focus of strategy is allocating resources between competing claims on scarce resources (Daniell, 2004), then prioritisation is an inherent concern of strategy implementation. The ability to determine priorities and to action those priorities in practice is, therefore, an integral part of strategy-making and implementation. In this sense, prioritisation enables strategy implementation. In developing country environments characterised by limited resources, the ability to make choices about how those priorities will be allocated and then ensure delivery to those priorities assumes even greater significance. What effective prioritisation enables competition agencies to do is to focus on competition issues that matter most and then to align organisational resource behind that focus. It is the alignment of organisational resources towards a specific focus that enables competition agencies to have a greater impact than would be possible without it.

### **The relationship between strategy implementation and regulatory governance**

Support for strategic planning and implementation in competition agencies is premised on the conviction and assumption that it contributes to effective regulatory governance. In essence, effective regulatory governance in competition policy concerns how the rules of the game are set up, how compliance with the rules are enforced and whether the consequences are such that it deters others from not complying.

Competition policy and law establish the framework and the rules in which institutions set up to enforce the rules must operate. Such rules comprise the formal and informal constraints that shape the set of choices economic actors make and specify the limits of legitimate action in the same way that rules of the game specify the structure within which players are free to pursue their strategies (Nee, 1998). Regulators, such as competition agencies, are part of the institutional framework by which economic activity is regulated. However, regulatory governance consists of more than the formally designated agencies. It consists of the combination of institutions, laws and processes by which the conduct of economic actors is governed.

This study indicates that prioritisation, as a strategic approach to competition regulation in the CCSA, has become widely institutionalised, deeply embedded, and permeates the way things are done in the organisation. Moreover, the implementation of the prioritisation approach has contributed to the development of specific capabilities by which the organisation is able to identify opportunities for proactive competition regulation. The CCSA has been able to develop sector expertise over time by focusing on prioritised sectors. This has led to the development of a knowledge base that enables it to sense opportunities for competition enforcement. The organisation's project management capability has provided the organisation with the flexibility and responsiveness to re-configure the organisational resource base to take advantage of identified opportunities for expanding and deepening competition regulation and enforcement. The development of the CCSA's sector expertise and capabilities in priority setting and project management flowed from the strategic decision to prioritise. The ability to prioritise developed over time with processes and practices gradually emerging to implement this approach. The implementation of the prioritisation strategy has strengthened the internal capability of the CCSA to execute its mandate by developing the dynamic capabilities discussed. Has this internal capability contributed to effective regulatory governance with reference to the policy outcomes the CCSA seeks to achieve?

South African competition policy reflects the realities of the country and seeks to promote economic efficiency, adaptability and development while advancing the social and economic welfare of South Africans. The objectives of the Competition Act explicitly focus on the participation of previously excluded groups such as historically disadvantaged persons and small and medium enterprises. Broadening participation is dependent on addressing the high levels of concentrated ownership and control in the South African economy. Former state ownership and support have contributed to the entrenched position of dominance by incumbents through licences, regulatory provisions and privileged energy and transport infrastructure provision (Roberts, 2012). Incumbents are able to protect their dominance by raising barriers to new entrants which are exacerbated by the difficulties of achieving scale economies relative to market size in South Africa.

The CCSA has a solid track record in merger regulation and anti-cartel enforcement. However, the record on abuse of dominance has been less than expected considering the high levels of concentration and market power in the South African economy. The CCSA has strengthened its internal regulatory capabilities through prioritisation, but this has not translated into effective enforcement of abuse of dominance and promotion of competitive rivalry. Thus, institutional performance alone cannot account for the outcomes of regulatory

governance. Internal capability may be a necessary condition for effectively regulating competition, but is not a sufficient condition for achieving the expected policy outcomes. External factors and challenges such as the legislation that define and frame abuse of dominance provisions, the judicial process and the institutional design underpinning competition regulation in the country should also be taken into account.

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## Annexure 1: Evolution of prioritisation in the Competition Commission South Africa

2006 - 2009		2010 - 2014		2015 Onward	
Process					
<ul style="list-style-type: none"><li>• Undertook an analysis of the CCSA's experience and observations in dealing with complaints since 1999</li><li>• Undertook an assessment of economic policy developments</li><li>• Review of global trends relative to prioritisation</li><li>• Produced framework to guide selection of priority sectors and cases</li></ul>		<ul style="list-style-type: none"><li>• Internal prioritisation review on progress in priority sector in line with new organisational strategy introduced in 2010</li></ul>		<ul style="list-style-type: none"><li>• Views of stakeholders consulted between March 2011 and April 2012</li><li>• Internal studies and impact assessments into CCSA's interventions</li><li>• Comprehensive review of previous priority sectors highlighting investigations, outcomes and outstanding work</li><li>• Annual reviews from 2015</li></ul>	
Criteria					
<p>Selection of sectors involved two-step process to determine competition concerns and alignment to government policy and priority sectors:</p> <ul style="list-style-type: none"><li>• Competition concerns included degree of concentration, barriers to entry, price unrelated to cost and demand factors, most harmful anti-competitive prices such as hardcore cartels and abuse of dominance</li><li>• Alignment to government policy and priority sectors took into account the sector's importance to growth and development objectives; importance to competitiveness and working of the economy; extent to which sector provides essential inputs to other economic sectors; extent to which sector is able to contribute to empowerment, and entry and growth of SMMEs</li><li>• Prioritising cases involved and assessment of competition issues, priority sector, and additional criteria if complaint is outside of priority sector (including extent of harm; nature, gravity and harm of conduct; deterrent effect; resource requirements, etc.)</li></ul>		<p>Selection of sectors based on:</p> <ul style="list-style-type: none"><li>• Impact on low-income consumers</li><li>• Competition concerns</li><li>• Alignment to government's economic policy and sector priorities</li></ul> <p>Criteria for prioritising investigations include (SCREEN):</p> <ul style="list-style-type: none"><li>• <u>S</u>ector,</li><li>• <u>C</u>ompetition issue,</li><li>• <u>R</u>esources,</li><li>• <u>E</u>xtent of harm,</li><li>• <u>E</u>nforcement capability</li><li>• <u>N</u>et result</li></ul>		<p>Selection of sectors based on:</p> <ul style="list-style-type: none"><li>• Impact on low-income consumers</li><li>• Competition concerns</li><li>• Alignment to government's economic policy and sector priorities</li></ul> <p>In order to broaden scope of prioritisation the CCSA took into account</p> <ul style="list-style-type: none"><li>• Income and Expenditure Survey (IES)</li><li>• Sector and Industry contribution to GDP</li><li>• Government's Medium Term Expenditure Framework (MTEF)</li></ul>	
Sectors					



<ul style="list-style-type: none"> <li>• Financial services</li> <li>• Infrastructure and construction</li> <li>• Food, agro-processing and forestry</li> <li>• Telecommunications</li> <li>• Intermediate industrial products</li> </ul>	<p>Priority for investigation:</p> <ul style="list-style-type: none"> <li>• Infrastructure inputs into construction</li> <li>• Mineral resources and intermediate industrial products</li> <li>• Food and agro-processing</li> <li>• Telecommunications</li> </ul> <p>Priority for advocacy</p> <ul style="list-style-type: none"> <li>• Banking</li> <li>• Construction services</li> <li>• Public transport</li> </ul> <p>Priority for market enquiries</p> <ul style="list-style-type: none"> <li>• Healthcare</li> </ul>	<ul style="list-style-type: none"> <li>• Food and agro-processing for <u>investigation</u> include: poultry, red meat, dairy, fats and oils; for <u>impact assessment</u>: eggs, white maize milling, poultry; for <u>scoping</u>: fresh produce; and or <u>advocacy</u>: fisheries</li> <li>• Intermediate industrial products for <u>enforcement</u>: forestry, steel, polymers, glass; for <u>impact assessments</u>: fertiliser, scrap metals; for monitoring: fuel; for <u>advocacy</u>: pulp and paper</li> <li>• Financial services for <u>investigation and enforcement</u>: Forex Trading Banking Cartel; for <u>scoping</u>: impact of mobile money on the economy, insurance industry; continued <u>monitoring</u>: banking enquiry</li> <li>• Media for <u>enforcement</u>: broadcasting; for <u>monitoring</u>: print media and publishing</li> <li>• Energy (Renewable Energy and Industrial Gases) for <u>scoping/research brief</u>: renewable energy; for <u>monitoring and impact assessment</u>: natural gas</li> <li>• Prioritised for <u>market inquiry</u>: private healthcare, liquefied petroleum gas, and supermarkets</li> </ul>
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