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Competing on whose merits? A new competition policy agenda to tackle inequality, concentration and participation?[1]

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ABSTRACT

Competition law, as developed in "the West" or developed nations can be broadly defined, as the framework for competitive activity, protecting the competitive process. The economics of this definition largely speak to Adam Smith's *"invisible hand"* that relies on the assumption that free market economies left to their own devices will self-correct and result in beneficial outcomes rather than government intervening to correct markets for the benefit of all society. This competitive framework, therefore, seeks to ensure that the *"invisible hand"* is protected, allowing rivalry amongst economic actors to compete on the merits.

This "traditional" competitive framework was developed without the developmental state in mind. Not only that, the economics of the *"invisible hand"* and self-correcting markets is devoid of the historical contexts faced by nations such as South Africa. Therefore, competition policy as an industrial policy tool and a means to an end in achieving inclusive economic growth as well as addressing historic and endemic economic imbalances and the three challenges of high levels of poverty, inequality and unemployment, needs to be specifically directed at addressing these economic issues. Regulatory alignment is therefore crucial especially with other sector regulators who are key to structural transformation and economic growth. Government's competition policy, therefore, needs to be deliberately directed towards tackling inequality, concentration and participation. Concentration and participation being potential drivers of small business development, innovation and job creation. The development of a practical framework for collaboration competition authorities and other regulators may be the only opportunity left for South Africa to address these social ills.

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A. INTRODUCTION

1. South Africa's segregated history is one that continues to have extreme and adverse effects in different aspects of its people's lives. The government of the day continues to deal with the difficult challenges of increasing inequality, high unemployment and poverty. The role of competition law and policy, as part of the basket of industrial policy tools geared towards economic development and addressing these challenges, has been recognised as one of these important tools in recent years. The 2016 ACF/World Bank Report[4] notes that *"Competition in the marketplace matters—for a country's economic growth, its international competitiveness, and the welfare of its citizens. It encourages companies and industries to become more productive, allowing local firms to invest more and grow and to compete successfully at home and abroad—generating profits, creating jobs, spurring economic growth, and benefiting society more broadly. Firms can then deliver the best deals for consumers, protecting poorer households from overpaying for consumer goods, and facilitating access to a broader set of goods."*

2. However, as the South African competition authorities come closer to celebrating their 20th year in existence, the true impact that they have had on the economy has come under scrutiny. Persisting levels of high concentration in key markets have meant that some of the competition authorities' interventions still leave a huge task to continue regulating for a growing and inclusive economy. This does not take away from the fact that barriers to entry and expansion remain high and participation by small and medium enterprises (**SMEs**) and firms owned by historically disadvantaged individuals (**HDIs**) has not increased substantially. Moreover, these very same concentrated markets are key to the structural transformation of the economy which is important to industrial development and job creation.

3. The developmental agenda of democratic South Africa is set out in various policy documents such as the National Development Plan (**NDP**). The principles in this policy are meant to guide all government activities and programmes. It is in this understanding that makes it imperative for coordination between government agencies and institutions to take place, not only as a matter of necessity but as an expectation to achieve these shared goals. Therefore, competition authorities cannot, by themselves and in isolation,

[4] Breaking Down Barriers: Unlocking Africa's Potential through Vigorous Competition Policy (2016) - http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf

address the challenges of high unemployment, poverty and inequality. In trying to understand the role that the competition authorities should play, one has to go back to an understanding of the role of competition policy in the economy.

4. The understanding of what constitutes competition policy in South Africa has developed over the years beyond simply that of the simpler conceptualisation limited only to the provisions of the Competition Act. Competition policy is described by Greco et al as *"a set of policies and instruments, including competition law, aimed at promoting competition in markets and protecting competitive processes in order to foster allocative, internal and dynamic efficiency."*[5]

5. The understanding that competition policy is more than competition law is critical in this regard. This aspect will be explored further in the sections that follow. A coherent competition policy will make it easier for competition authorities and all relevant government entities to engage on aspects of key markets in order to drive the developmental objectives of the country. This statement must be understood to mean that markets have to work for the economy and when they do not, notwithstanding the existence of competition law instruments, the government ought to intervene. The nature of the intervention has to be highly informed and with the clear goals that are sought to be achieved.

6. This paper will introduce a broad institutional framework based on the conceptual understanding of what competition policy is and should look like in South Africa. The framework proposed will also focus on the importance of strategic alliance and how such coordination can be achieved within the context of this competition policy framework. We make the case why such a framework is more desirable and examine some of the enabling and hindering factors that would affect the proper implementation of such a framework.

B. WHAT IS COMPETITION POLICY

7. Based on Greco et. al.'s definition of competition policy above, one can argue that South Africa does not have a comprehensive competition policy. The contents of the Competition Act 89 of 1998, as amended (**the Competition Act**) which are often mistaken to contain the country's comprehensive competition policy only address one component, that is competition law enforcement. The Competition Act even with its wide

[5] Greco, E., Petrecolla, D., Romero, C. A. & Martinez, J. V., 2016. Chapter 4: Competition Policy and Growth: Evidence from Latin America. *Kluwer Competition Law*. pp 51 -66

application across the economy and across all economic activity in the country does not constitute a comprehensive competition policy and perhaps rightly so. The language contained in this Competition Act is also consistent with the general national policy as contained in the NDP.

8. In looking at the Botswana National Competition Policy (2005)[6] (**Policy**), one sees the elements of competition policy as described above. In the introductory part of the Policy it recognises that, *"The formulation of this Competition Policy was preceded by an Economic Mapping Survey that took into consideration factors such as: the policy's likely impact on unemployment; the increasing dominance of foreign companies in the Botswana economy; the need to safeguard and promote the growth and development of- citizen-owned small and medium enterprises; and other Government policy initiatives such as the diversification of the economy."* This encapsulates the holistic approach to the formulation of a competition policy which, again by way of example, culminated in the recognition that the structural transformation of public monopolies, as a policy imperative of the privatisation project in Botswana, needs to be considered in the regulation of competition in the economy. To this end, the Policy notes that *"Government remains fully committed to restructuring public enterprises within the broader framework for increasing the role of the private sector in the economy. Government will, therefore, continue to look into ways of structurally reforming public monopolies operating in sectors such as telecommunications, water, electricity and meat export with a view to opening up some of the services they provide to competition. Government will, however, retain monopoly powers, where necessary, to provide major infrastructure facilities whilst at the same time opening up activities like connection and distribution services to competition. In keeping with the objectives of the Privatisation Policy and this Policy, Government will, prior to introducing competition in a market traditionally supplied by public enterprise or monopoly, undertake a review of the entity or entities concerned. Such a review will take into consideration the commercial objectives of the business as well as the merits and de-merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly*".

9. Although the broad objectives of competition in South Africa are recognised such as deconcentration of market to engender more inclusivity, job creation and the promotion of SMEs and HDIs, this is not set out clearly and deliberately in strategic industrial policies. For example, it is arguable that although market liberalisation of former state

[6] http://www.competitionauthority.co.bw/sites/default/files/National%20Competition%20Policy%20Botswana%202005.pdf

monopolies such as Telkom were considered key in order to engender competition within the ICT sector, the practical separation of the infrastructure and distribution business of Telkom came about as a decision of the competition authorities and not necessarily following a deliberate and considered exercise by government and other relevant sector regulators following the taking, "…*into consideration the commercial objectives of the business as well as the merits and de-merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly*".[7]

10. In terms of the Competition Act, the mandate of the Competition Commission (**Commission**) of promoting and maintaining fair competition in markets is carried out through investigating and prosecuting restrictive practices, abuse of dominance and cartel conduct, considering exemption applications, conducting market inquiries, merger regulation, advocacy as well as engaging with other public policy to ensure competitive outcomes. These are prescribed activities that have a great role to play in regulating competition in markets but also have their limitations. There are other aspects of competition policy that cannot be prescribed within the provisions of the Competition Act. Arguably, the Competition Amendment Bill (2017) attempts to fill some of these gaps but from a competition policy perspective, other industrial policy tools and instruments, alongside competition law are necessary in order to promote competition and the competitive process within the South African context.

11. The provisions of the Competition Act are silent on other, arguably more important, policy issues such as the role of government in markets, coordination in regulated sectors, the role of state monopolies and regional integration to name a few, which are key to structural transformation and development.

12. The above would suggest that competition policy would find itself even outside the confines of the Competition Act. This could include sectoral policy, trade policy and regional integration and regulatory policies which will inform the interventions of the competition regulators consistent within the broad developmental agenda.[8]

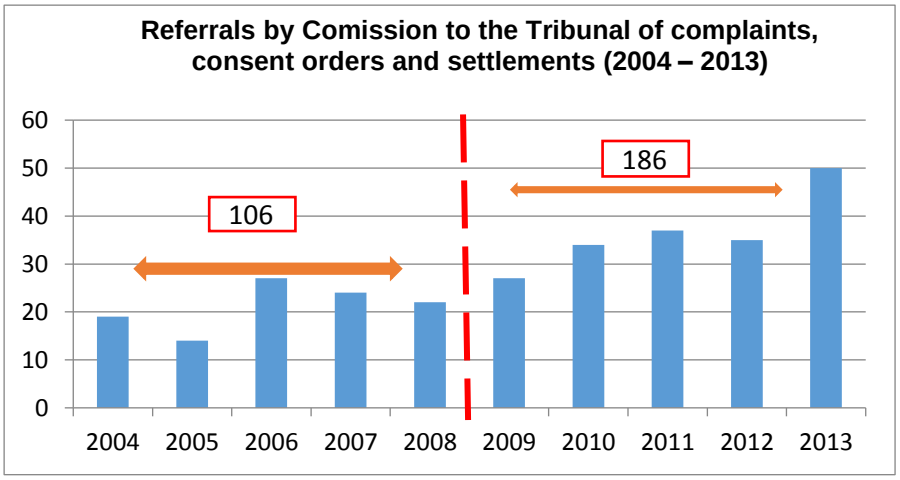
C. COMPETITION POLICY AND ENFORCEMENT AND ECONOMIC DEVELOPMENT

13. The theoretical starting point is that competitive markets yield positive results for economic growth. In a country like South Africa which for a long time did not have competitive markets and many sectors were subsidised, the idea of competition is fairly

[7] https://www.comptrib.co.za/assets/Uploads/LM065Aug14.pdf
[8] Greco, et al (2016)

new when compared to other matured jurisdictions such as the European Union and the United States of America.

14. Pre-democracy, South Africa's economy was characterised by extensive government regulation alongside the active participation of government in the economy. In particular, the state participated in markets through state monopolies in telecommunications, transportation, utilities and steel manufacturing and encouraged coordination amongst competitors. This is demonstrated by continued coordinated conduct for instance in agricultural markets which were historically synonymous with cooperatives and coordination between competitors. This is also reflected in the cartel enforcement of the competition authorities across all sectors of the economy since the introduction of the Competition Act. The table below indicates the rise of cartel enforcement up until 2013 which is still not an exception in 2017/18.[9]



15. Given the historical context of the economy of South Africa, a reliance on Adam Smith's *"invisible hand"* may not necessarily yield the self-correction within the context of continued high levels of cartel activity and persistent and stubborn concentration in key sectors.

16. This is suggestive that South Africa needs to think about competition policy in a nuanced manner than more developed countries which do not necessarily have entrenched dominance and pervasive cartel conduct. As stated above, post-democracy, the state took a policy position that for the economy to transform by, amongst other things,

[9] https://www.comptrib.co.za/assets/Uploads/Reports/Annual-Reports/Competition-Tribunal-AR16.pdf
http://www.compcom.co.za/wp-content/uploads/2014/09/Annual-Report-2016-17.pdf

ensuring that previous state monopolies become competitive through not only the process of market liberalisation but also through strengthening and amending regulations which governed the conduct of the state as an economic actor. However, nothing stops the government from collecting data in order to analyse whether or not industrial goals are being achieved and what more needs to be done as a means of directing economic policy to deal with developmental goals and address the challenges of poverty, unemployment and inequality.[10]

17. Challenges faced by developing countries in establishing effective competition policies include:[11]
    17.1. The role of government – its participation and extent of government control;
    17.2. Political influence;
    17.3. Institutional structures;
    17.4. Awareness of competition; and
    17.5. The balance between competition and other policies.

18. Based on the above it is clear that there are various aspects that will affect the proper use of competition policy to achieve developmental goals. Many of these require action outside of the control of the competition authorities. In fact, other government entities and bodies are directly relevant to the effectiveness of competition policy. This echoes the idea that a comprehensive competition policy on its own is also not enough to generate sustainable economic growth but that strong institutional arrangements are necessary as well along with deliberate coordination across sector regulators.

19. The consideration of economic development in the country cannot go without considering the social aspects that have plagued the country's history. The social ills that persist in the country are the very problem that economic development agenda is trying to resolve and thus the role of competition policy should be understood in this context.[12] For instance, the role of competition policy in addressing inequality has been examined in developed economies such as the United States of America and the following findings were made:[13]

[10] This includes data collected through enforcement action by regulators including the competition authorities as well as data collected by Statistics South Africa
[11] Dabbah, M. M., 2010. Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime. *World Competition Law and Economics Review,* 33(3), pp 457 – 475
[12] Lamadrid de Pablo, A., 2017. Competition Law as Fairness. *Journal of European Competition Law & Practice*, 8(3), pp. 147 – 148
Fox, E. M., 2017. Competition and Democracy. In: sl: Organisation for Economic Co-operation and Development.
[13] Baker, J. B. & Salop, S. C., 2015. Antitrust, Competition Policy, and Inequality. *The Georgetown Law Journal Online*, 104(1), pp. 1-28

19.1. The positive effects of competition such as innovation do not automatically benefit everyone;

19.2. The returns achieved from possessing market power are often received by those already wealthy at the cost of the poorer;

19.3. *"Capitalism does not self-correct toward greater equality";*

19.4. Governments have an active role to play if they wish to achieve equality;

19.5. The design of remedies in competition enforcement with other regulatory agencies is useful to address concerns; and

19.6. Competition policy outside of competition law enforcement could be strengthened.

20. Competition policy must, therefore, be seen as a complement to other policies such as industrial policy. In this regard, it should be remembered that all government interventions are likely to have an effect and maybe distort competitive dynamics in a market.[14] The direct intersection between competition policy and other government policy can be found in relation to sector regulators. The dynamics that exist between competition law and sector regulation are well documented in the literature. The complementary of competition policy as a tool for industrial development is evidenced by the intersection between competition regulation and sector regulation where in most instances, firms are state monopolies.

D. SECTOR REGULATION AND COMPETITION POLICY

21. Sectors such as energy, information and communication technology (**ICT**), port infrastructure and even healthcare financing are regulated by sector-specific regulators. The National Energy Regulator of South Africa (**NERSA**), the Independent Communications Authority of South Africa (**ICASA**), the National Ports Authority (**TNPA**) and the Council of Medical Schemes (**CMS**) are a few examples of sector regulators that have each been mandated with the economic regulation of their respective sectors. It is notable that an aspect of economic regulation would generally affect market dynamics including those that would affect competition. In certain circumstances, the enabling legislation contains aspects of competition law for which the sector regulator will be responsible which may, in some instances, create concurrent jurisdiction with the competition authorities.

22. For purposes of this paper, we will focus only on ICASA and NERSA.

[14] Licetti, M. M. & Nyman, S., 2016. Competition Policy in Africa: five proposals READY for action. CPI's Africa Column, November

ICASA

23. ICASA is a regulatory authority established in terms of the Independent Communications Authority of South Africa Act 13 of 2000, as amended (**the ICASA Act**) to regulate electronic communications, broadcasting and postal services; issue licences to providers of the aforesaid services; monitor the environment and enforce compliance with licence conditions and regulations; investigate and decide on disputes and complaints brought by industry or members of the public against licensees; plan, control and manage the frequency spectrum and protect consumers.

24. Section 67 of the Electronic Communications Act 36 of 2005, as amended (**EC Act**) creates concurrent jurisdiction between the ICASA and the Commission for the regulation of competition matters in the electronic communications, broadcasting and postal services (broadly referred herein as the ICT sector).

25. In terms of section 4(3A)(b) of the ICASA Act, ICASA may conclude a concurrent jurisdiction agreement with any relevant authority or institution. Section 21(1)(h) read with sections 3(1A)(b) and 82(1) and (2) of the Competition Act recognises concurrent jurisdiction as well and therefore the need for sector coordination through the negotiation of agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act. To this end, the Commission and ICASA signed a memorandum of agreement in September 2002, which established the manner in which the parties would interact with each other in respect of competition matters in the ICT, postal and broadcasting sectors.

NERSA

26. NERSA is the regulatory authority established as a juristic person in terms of Section 3 of the National Energy Regulator Act, 2004. NERSA's mandate is to regulate the electricity, piped-gas and petroleum pipelines industries in terms of the Electricity Regulation Act, 2006 (**Electricity Act**), Gas Act, 2001 (**Gas Act**) and Petroleum Pipelines Act, 2003 (**Petroleum Pipelines Act**).[15]

27. In terms of the interaction of sector regulation and competition regulation, section 21(1)(p) of the Gas Act sets out, that in considering the conditions of licences and in particular pricing, NERSA may impose various conditions including maximum prices for

[15] http://www.nersa.org.za/#

distributors, reticulators and all classes of consumers where there is inadequate competition as contemplated in Chapters 2 and 3 of the Competition Act, 1998.

28. Section 2 of the Petroleum Pipelines Act sets out that the objectives of this Act include the promotion of competition in the construction and operation of petroleum pipelines, loading facilities and storage facilities and the promotion of the development of competitive markets for petroleum products. Section 4 empowers the regulator to promote competition in the petroleum pipeline industry.

29. Section 2 of the Electricity Act sets out that the objects of this Act are to promote competitiveness and customer and end-user choice. Section 46(a)(e) sets out that new generation capacity must be established through a tendering process that is fair, transparent and competitive.

30. The Commission and NERSA signed a memorandum of agreement in 2012 which establishes the manner in which the two regulators will interact with each other in matters of competition involving the licensees i.e. market participants, in the electricity, piped-gas and petroleum pipelines markets.

E. CHALLENGES WITH THE CURRENT FRAMEWORK OF COLLABORATION

ICASA

31. After the amendment of the Competition Act, and the establishment of concurrency between the Commission and ICASA in the regulation of competition in the ICT sector a lot of engagement had to occur between the regulators which led to the conclusion of the memorandum of agreement. The operation of this memorandum of agreement was tested in the *Telkom Case*[16].

32. Though the regulators have appeared to be cooperating and contributing to each other's work in many aspects over the years, it would seem that the coordination of some activities remains a challenge. For instance, the recent announcements of the inquiries into data prices in South Africa by both ICASA and the Commission in July and August 2017 respectively. This we believe, presented an opportunity for coordination and collaboration between the two institutions, notwithstanding their different mandates and more so to ameliorate for potential duplication of activities such as information requests for what are likely to be the same stakeholders.

[16] Telkom SA Limited v The Competition Commission of South Africa and the Competition Tribunal of South Africa (Case: 11239/04)

33. Nevertheless, it is clear from the Electronic Communications Amendment Bill published on 17 November 2017 that coordination between ICASA and the Commission remains a concern. The overall objective of this amendment is said to be to ensure that the EC Act is aligned with the National Integrated ICT Policy White Paper which outlines the overarching policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society. Amongst various amendments, the Bill proposes the insertion of section 67A to formalise the requirement for a concurrent jurisdiction agreement between the authority (ICASA) and the Commission. It also requires that such agreement must include consultative mechanisms between the two authorities on market definition, market review and mergers. It is understood that the purpose of these additions is to strengthen the already existing framework.

34. The insertion of section 67B goes further to require that the regulators must coordinate with each other when considering mergers and licencing matters respectively and to "align their decisions, approvals or recommendations to the extent possible". The coordination on decision-making is a new concept as the previous position (as contained in the persisting memorandum of agreement) is that each regulator would make its own independent decision.

35. It is however noted that the legislator may have felt the need for heightened and formalised coordination between ICASA and the Commission because this Bill goes further than the 2005 amendments to increase ICASA's power to engage in competition regulation. By way of example, the Bill introduces requirements for ICASA to define relevant markets and market segments relevant to the ICT sector within 12 months of the coming into operation of the Bill, provisions to conduct market reviews and even those that state that ICASA can impose appropriate pro-competitive license conditions on licensees having significant market power to remedy market failure. The Bill also states that when conducting market reviews the authority must prescribe regulations that must provide for monitoring and investigation of anti-competitive behaviour in the market or market segment.

36. Based on this it is clear that the scope of ICASA's involvement in competition regulation is likely to shift from only *ex-ante* regulation to include *ex-post* regulation as well. Whereas, this divide and the roles between the Commission and ICASA was, at least theoretically, clear these amendments will undoubtedly lead to more coordination and collaboration between ICASA and the competition authorities.

37. The Electronic Communications Amendment Bill attempt to ensure greater cooperation between the Commission and ICASA and raises the challenge of both regulators to think about the practical mechanisms of effecting this cooperation such as the alignment of processes and timelines on investigations and/or mergers.

38. All of this is also to be considered in the light of the Competition Amendment Bill which also aims to introduce new powers for the competition authorities. It is clear that the 2002 memorandum of agreement between the Commission and the ICASA will have to be revisited. However, even if it is updated and the terms thereof take into account the new provisions of the enabling legislation, it is not clear that the regulators will be capacitated enough to engage with their respective mandates which would now overlap more than ever.

NERSA

39. The most recent and best example of the intersection of competition and sector regulation in the energy sector is illustrated in the Commission's liquefied petroleum gas inquiry (**LPG Inquiry**) concluded by the Commission 2017. The LPG Inquiry was conducted in a priority sector of Government as well as the Commission. Energy and utilities are instrumental to economic development. The World Economic Forum's Africa Competitiveness Report 2015 sets out that, *"Productivity in services plays a critical role as a strategic driver of economic competitiveness. The competitiveness of most exported goods in global markets depends not only on access to raw material inputs, but also on critical services inputs. These include efficient, competitively priced utilities (e.g., ICTs and transport), financial services (e.g., banking and insurance), and other commercial services (e.g., accounting, engineering, consulting, legal services, and marketing)."*[17]

40. Government's integrated resources plan (**IRP**) sets out its policy towards energy to include, *"…affordable electricity, carbon mitigation, reduced water consumption, localisation and regional development, producing a balanced strategy towards diversified electricity generation sources and gradual decarbonisation of electricity sector in South Africa."*[18]

[17] http://www3.weforum.org/docs/WEF_ACR_2015/ACR_Chapter2.2_2015.pdf
[18] http://www.ee.co.za/wp-content/uploads/2017/12/Eskom-IRP-2017-study-report-for-DoE-November-2017.pdf

41. The affordability of energy by households is important as it impacts productivity and development. Having hot water and electricity quite simply determines how early persons have to rise in order to begin their day and whether are not they are able to stay productive even at home. Therefore, having broad and affordable energy sources are essential to productivity and development not just to individual citizens but also to industry. The competitive processes of the supply of energy are therefore essential in making energy accessible and affordable. From the perspective of the LPG Inquiry, *"It is within this policy context that the LPG market inquiry investigated those features of the market with the potential to lessen, prevent or distort competition. These features included the limited domestic production and supply of LPG, the incentives provided by the regulatory environment, and the existence of barriers to entry and expansion."*[19]

42. Eskom still remains the dominant supplier of energy, particularly of electricity, in South Africa and is a significant supplier of electricity on the continent.[20] Eskom generates, transmits and distributes electricity and is therefore vertically integrated across this supply chain. The relevance of Eskom as an energy supplier is in the context of it operating as a state entity and therefore has implications for South Africa's fiscus and consequently the developmental programme. According to Statistics South Africa, in 2016, Eskom accounted for the largest infrastructure-related capital expenditure by the government in the public sector. Out of the total expenditure of R284 billion, Eskom accounted for R73 billion of that expenditure[21].

43. The relevance of Eskom as an energy supplier also falls within the context of government in markets and how its conduct ought to be regulated by competition regulation or sector regulation or a combination of both. Therefore, the competitiveness of other market suppliers of energy in the market is imperative, alongside government as a market participant too. Therefore, the LPG Inquiry, within the context of the IRP and government's overall strategy on energy diversification has to be seen together as threads towards achieving these strategic goals.

44. The findings and recommendations of the LPG Inquiry were plenty including pricing and non-pricing/regulatory recommendations. Of relevance to this paper are the recommendations in relation to the non-pricing/regulatory environment in the supply of LPG in South Africa. The recommendations noted that there is overlapping mandates

[19] http://www.compcom.co.za/wp-content/uploads/2017/04/LPG-FINAL-NON-CONFIDENTIAL-VERSION.pdf
[20] http://www.eskom.co.za/OurCompany/CompanyInformation/Pages/Company_Information.aspx
[21] http://www.statssa.gov.za/wp-content/uploads/2017/07/img2.jpg

and misalignment of the regulatory activities of NERSA and the Transnet National Ports Authority (**TNPA**) in particular, which create barriers to entry by potentially delaying approvals for infrastructure-related licencing as well as, in some instances, conflicting policy outcomes from both regulators. This alignment is also essential from a competition regulation perspective given government's IRP and understanding how competition intervention may impact on the energy policy of government as well as the national commercial ports policy of the government.

45. In particular, the Commission's LPG Inquiry report notes that *"For example, the Commission found it can take almost four years for a refinery to obtain regulatory clearance and over three years for a wholesaler to commence operations, due to the heavy administrative requirements and regulatory review process. This entails processes which include obtaining a wholesale licence, environmental authorisation, construction licence and an operation licence, amongst others…significant bottlenecks are caused by overlapping and complementary jurisdictions of the National Energy Regulator of South Africa ("NERSA") and Transnet National Ports Authority ("TNPA") regarding approvals for the construction of import and storage facilities at the ports. The Commission found that, in terms of the National Ports Act, the TNPA is permitted to grant concessions to infrastructure developers within port boundaries. At the same time, such infrastructure requires licensing under the Petroleum Pipelines Act, administered by NERSA, leading to an overlap in jurisdictions as well as inconsistent policy outcomes. The Commission also found a mismatch between the TNPA's 20-year concession agreements and the Petroleum Pipelines Act regulations. The former incentivises recoupment in 20 years, whereas the Petroleum Pipelines Act regulations allow depreciation over the useful life of the asset. In most cases, the assets concerned ensure useful life of longer than 20 years. NERSA licences are valid for 25 years in terms of the Petroleum Pipelines Act as opposed to TNPA concessions. This misalignment can then become an issue in relation to the appropriate tariff to be charged since the period over which to recover the investment differs. This might lead to projects being stalled if the investor is not satisfied with the NERSA-approved tariff…Policy harmonisation and regulatory clarity across the various bodies are required to allow for better decision-making, taking cognisance of any outstanding processes required by other regulators."*[22]

46. Given the strategic significance of the energy sector and how it is linked to the development of, for example, maritime competition and undoubtedly other industries

[22] http://www.compcom.co.za/wp-content/uploads/2017/04/LPG-FINAL-NON-CONFIDENTIAL-VERSION.pdf

such as the automotive industry as another example, the strategic alignment of regulators such as NERSA, TNPA and the Commission are of necessity. Notwithstanding the memoranda of understanding between NERSA and the Commission, the Ports Regulator and the Commission and NERSA and the TNPA, further and deliberate interaction needs to occur across these regulators including how and when competition regulation is appropriate alongside or apart from sectorial regulation.

47. It should be further noted that the work of the Commission in regulated sectors is still ongoing and includes the Public Passenger Transport Market Inquiry, the Data Inquiry as well as the cartel investigation into LPG cylinder exchanges by wholesale suppliers of LPG, to name only a few.

F. PROPOSED FRAMEWORK FOR COLLABORATION

48. Though it is agreed amongst many that increased and improved collaboration between the competition authorities and sector regulators is necessary, the practical implementation of such programmes has proven challenging. This, however, is not to say that it has not been practically implemented elsewhere. We introduce here what we believe is a pragmatic and model framework that can be built upon to develop an institutional structure that will be conducive for the implementation of a coherent competition policy in South Africa geared towards strategic alignment in seeking to implement government's developmental goals.

49. This model framework is the one adopted by the Competition and Markets Authority (**CMA**) in the United Kingdom (**UK**) in the form of the UK Competition Network (**UKCN**); an institutional framework aimed at enhancing cooperation between competition authorities and sector regulators by creating a structural platform that will allow for collaboration and cooperation where there is concurrent jurisdiction.

50. Following the establishment of the CMA in 2014, the enabling legislation, the Enterprise and Regulatory Reform Act 2013 also established the collaborative framework between the CMA and listed sector regulators[23] through the UKCN. The genesis of the operation of this collaboration was set out in the UK government's issuance of a 'strategic steer'

[23] The CAA (Civil Aviation Authority), in respect of air traffic services and airport operation services, Ofcom (Office of Communications), in respect of communications (telecommunications, broadcasting and postal services), Ofgem (Gas and Electricity Markets Authority), in respect of electricity and gas in Great Britain, the FCA (Financial Conduct Authority), in respect of financial services – which is also establishing the Payment Systems Regulator in respect of inter-bank payment transfer systems with effect from April 2014, the ORR (Office of Rail Regulation), in respect of railway services, Ofwat (Water Services Regulation Authority) in respect of water and sewerage services in England and Wales and the NIAUR (Northern Ireland Authority for Utility Regulation), in respect of electricity, gas, and water and sewerage services in Northern Ireland

in October 2013. The 'strategic steer' laid out, amongst other things, the role of competition regulation within the UK economy. Given this broader outlook, the CMA had to extend its mandate to working with regulators to ensure fuller use of competition law and policy in sectoral markets. The nature of the collaboration between the CMA and sector regulation is set out in the Concurrency Regulations[24] which include:

50.1. The exchange of information between the CMA and the sector regulators;

50.2. Determining who should exercise jurisdictional functions in relation to specific cases;

50.3. The transfer of a case from one authority to another;

50.4. Putting into place mechanisms for information sharing for purposes of enhancing transparency and coordination in relation to the concurrent application of competition law provisions; and

50.5. Use of staff of the CMA or a regulator(s) by either including through secondment.

51. From a principle point-of-view, the above framework is intuitively sound in that guidance on competition policy is derived from the strategic input of the state. In other words, the role of competition policy is driven first by government policy and then duly implemented through enforcement by the CMA alongside other sector regulators where concurrent competition jurisdiction exists. Moreover, the need for collaboration in these specific regulated industries is set out within the legislative frameworks of the Competition Act[25] and the Enterprise and Regulatory Reform Act of 2013[26] making it a necessity rather than discretionary that the competition authority collaborates and coordinates with relevant sector regulators.

52. The UKCN has been in existence for approximately 4 years and of course, has faced some challenges. Collaboration and coordination require buy-in which may take time when each regulator has its own mandate, legislative framework and reporting lines. However, in line with the 'strategic steer' of the UK government, it is important that such activity is encouraged from heads of departments and government itself, in order to guide the technical agencies about the implementation of policy programmes through sector regulation. A recent report by the National Audit Office of the UK[27] (previously conducted in 2010) noted that following shortcomings in relation to the collaborative efforts of the CMA with sector regulators:

[24] http://www.legislation.gov.uk/uksi/2014/536/pdfs/uksi_20140536_en.pdf
[25] See section 54 of the Competition Act 1998
[26] See section 51 of the Enterprise and Regulatory Reform Act of 2013
[27] https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf

52.1. Recruitment and remuneration of competition experts reflect the varied funding and governance arrangements of competition bodies and market conditions in different sectors, rather than an overall assessment of competition priorities. Figure 8 overleaf illustrates salary differences across the regime. This may impact retention across the different sectors.

52.2. There have been relatively few secondments, with only nine occurring between competition bodies in the last three years.

52.3. Regulators may still find it easier and more effective, at least in the short term, to use their regulatory powers instead of their competition powers, and some regulators are required to consider the use of other methods before promoting competition.

52.4. While the UK Competition Network is considered to be valuable, there is further to go to develop the network as a genuinely collaborative enterprise as, at present, the CMA typically leads on most issues.

53. Arguably the above challenges are in no way fatal to the commencement and further refining of the programme of collaboration and cooperation. Compulsory reporting to Parliament may also be useful input for all regulators including the Commission, again with the policy programme being directed from the top and filtering down to the technical regulatory agencies. Reporting to Parliament also allows an opportunity for annual review about the likely impact of competition in the relevant regulated sectors.

G. IMPLEMENTATION IN THE SOUTH AFRICAN CONTEXT

54. One may ask how such a framework can be developed in the country, and how it would address concerns of collaboration between competition authorities and sector regulators which memoranda of agreements have not been able to address. Unlike the existing framework, the proposed framework relies on the formalisation of the collaborative efforts. Taking away some of the discretion of the regulators may ensure that they do in fact make use of the potential benefits of collaboration.

55. We note that a form collaborative framework was attempted in the country in 2002 through the establishment of the now defunct South African Utility Regulators Association and the South African Regulatory Forum. We note further that these were voluntary and not backed up by any regulatory framework, which is likely to have contributed to their failure.

56. It is noted that the implementation of the proposed framework will require amendments across different legislation and regulations to ensure that collaboration is made easier and effective. This, however, should be predicated by a comprehensive competition policy document that recognises the different aspects of competition policy as discussed above.

57. A key introduction based on a learning from UKCN is that even though the CMA is the driving force of the network, all the sector regulators that are part of this network also engage with each other and can exchange learning and information as necessary. This ensures that the collaboration takes place not just with the competition authorities but also across other linked sectors. Based on the example above, this would allow for effective engagement between TNPA and NERSA (and the Commission) on factors affecting competition.

58. Knowledge sharing, in particular, the idea of secondments, is also essential in relation to the interaction between the regulators so as to build institutional capacity and create expert knowledge within particular sectors across institutions. In particular, given the use of market inquiries in South Africa, especially as contained in the Competition Amendment Bill, knowledge sharing in the form of staff exchanges, for example, will enable competition staff a deeper understanding of particular sectors making that knowledge invaluable within the context of a market inquiry investigation. Collaboration and coordination also mean that there is little room for duplication of efforts thereby saving resources and enhancing policy consistency outcomes across sectors in the economy.

59. The implementation of this framework would require a change in mindset from all relevant stakeholders. Policy direction and consistency are the most essential starting points. The role of government in this regard cannot be understated. Implementing such a framework would require political buy-in from the highest structures to drive the policy agenda. The way that we think about executive authority and its operation would also need to change to some extent. Having regulators that are currently operating off the basis of different empowering legislation and reporting requirements, does need a reimagining of how they all operate toward the same objective. The idea of reporting directly to Parliament may address this concern.

60. A question can be raised as to whether such a framework would not undermine the independence of regulators, thus affecting their governance and reputations. It is our

view that this should not be a big stumbling block if there is clear policy direction. Each regulator can maintain their respective mandate with the understanding that where their respective mandates overlap there is clarity on how this will be addressed. In fact, this framework can provide an opportunity for improved governance structures and processes. For instance, it introduces a different level of accountability and may lead to better results, where joint or collaborative decision making ensures that there are no unintended consequences on business or other parts of the market that the sector regulator or the competition authorities may be more aware of.

61. Another starting point would be to get a clear understanding of all legislative instruments where competition concurrency exists in order to establish which sector regulators would be impacted by such a programme. Some of these sector regulators already have memoranda of agreement with the competition authorities. As the saying goes, "*one eats an elephant one piece at a time*" and perhaps the most obvious start of this project would be with the existing sector regulators who the Commission has memoranda of agreement with.[28]

62. In order to set such a framework in motion, the regulators will have to engage with the practicalities that currently hinder and assist collaboration. The terms of reference and a regulatory framework can be developed based on these engagements. Regular meetings by the heads of the relevant sector regulators alongside the legislated requirement for such a network to report on an annual basis to Parliament is essential especially as an advocacy tool as well as engendering the necessary buy-in.

63. The extent of collaboration can be determined through consultation with the relevant stakeholders and can be staggered in its implementation. It is however notable that the possibilities for cooperation need not be limited only to the investigations of anti-competitive conduct, but also to the development of other policies that affect competition, institutional arrangements including alignment of common functions (for instance making use of one Competition Tribunal to hear all competition-related matters from all regulators) and jointly introducing remedies that will address market failures including divestitures.

[28] http://www.compcom.co.za/mou-sa-regulators/ (including NERSA)

H. CONCLUSION

64. Given the growth and prevalence of competition not just in South Africa but the region and the world, effective regulation will require some form of coordination and collaboration not just from political players but also all regulators across the economy.

65. The premise of this practical approach to competition policy is one which speaks and contributes to the developmental agenda of South Africa and alive to the challenges of inequality, unemployment and poverty. To this end, it is important that *"…the potential complementarities across competition and industrial policies requires us to build on coordinating mechanisms, such as the prioritisation process undertaken by the Commission, by drawing on government's broad policy agenda and engagement with other public institutions and stakeholders."*[29]

66. The difficulties of collaboration that have persisted until now are noted, and the development of a practical framework for collaboration may be the only opportunity left for South Africa to address the social ills that continue to plague it. A different way of thinking about how competition policy is used in this regard is necessary and the role of the competition authorities and other regulators should be understood in the context of the shared objectives. In order to make this a workable solution it is noted that more work will have to be done to address various aspects of the current regulatory and legal environment.

[29] *"Constructing a democratic developmental state in South Africa: potentials and challenges",* edited by Omano Edigheji, pages 233 – 234, *"Competition policy, competitive rivalry and a development state in South Africa"* Simon Roberts