

## **4<sup>th</sup> Annual Competition and Economic Development (ACER) Conference**

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### **THE LIQUEFIED PETROLEUM GAS MARKET INQUIRY (2014) – IS THE RECOMMENDATIONS REALISTIC OR OVERLOADED EXPECTATIONS?**

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#### **1 Abstract**

The Competition Commission South Africa ('the Commission') concluded a Market Inquiry into the Liquefied Petroleum Gas sector in South Africa ('SA') in terms of the Competition Act, 1998 with the publication of its Final LPG Market Inquiry Report ('the Report') in April 2017.

The Commission's non-binding recommendations have to be implemented by several industry role-players, Government departments and regulatory authorities. The Commission's expectation was that *"the identified stakeholders will implement all the recommendations and will periodically review the progress of the implementation of the remedies proposed"* (Commission, 2017:vi).

Despite the positive outcome in terms of a better understanding of the structural and market issues involved, the challenges arising from the concurrent regulatory mandates, policy and legislative changes needed, it may prove problematic to implement the majority of these recommendations. This was no different for other market inquiries concluded in SA to date. The question arises if market inquiries are realistic or just overloaded expectations.

In terms of media statements, all the stakeholders have positively received the Report, its findings and recommendations. However, at face value, the practical implementation of the Report's recommendations shows little progress. This suggests that some of these and/or the implementation timelines thereof, were too optimistic. On the other hand, the supply agreements recommendation may still be achievable.

Overall, given the limited progress and the implementation challenges highlighted, presently it can only be concluded that despite the valuable findings, the recommendations and implementation timelines are not realistic, but rather overloaded expectations.

**JEL:** K21, L41, L43, L71, Q48

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## 2 Introduction

The Competition Commission South Africa ('the Commission') has in terms of its powers done several market inquiries in the past few years. Based on a review of media reports, commentators and role-players have 'mixed feelings' on the benefits of market inquiries as a competition enforcement tool. The market inquiry into the Liquefied Petroleum Gas (LPG) sector in South Africa in terms of the Competition Act, Act No. 89 of 1998 is one of the recent market inquiries completed, following the publication of the Final LPG Market Inquiry Report ('the Report') on 28 April 2017. The aim of this paper is to look at the use and benefits of market inquiries in general, but with specific reference to the LPG Market Inquiry.

LPG is used as thermal fuel for industrial, commercial and residential use. It is especially used by households that do not have access to electricity and the affordability and availability of LPG to poorer households is therefore a concern. The SA Government also has certain policy objectives for the LPG market sector in terms of growth and transformation. The Commission states that it initiated the inquiry because "*it has reason to believe that there are features of the sector that may prevent, distort or restrict competition*", to investigate complaints received within the LPG sector, and to assist "*in understanding how it may promote competition in the LPG sector*" (Commission, 2017:1).

The Commission's recommendations have to be implemented by several role-players, Government departments and regulatory authorities. The Commission was "*hopeful that the identified stakeholders will implement all the recommendations and will periodically review the progress of the implementation of the remedies proposed*" (Commission, 2017:vii).

Despite the positive outcome in terms of gathering information and a better understanding of the structural and market issues, the challenges arising from the concurrent regulatory mandates involved, it seems at face value that it may prove to be problematic to implement these recommendations. Therefore, the question arises if the recommendations are realistic and achievable or just overloaded expectations.

## 3 SA Competition Authority functions and market Inquiries

### 3.1 Commission's Functions

The Commission is a statutory body constituted in terms of the Competition Act, No. 89 of 1998 ('the Act') to investigate and enforce compliance with the Act. The Commission is functionally independent, but is administratively accountable to the Department of Economic Development.

Chapter 4A of the Competition Amendment Act 1 of 2009 ('Competition Amendment Act') became effective on 1 April 2013 and provides the Commission with formal powers to conduct market inquiries. To achieve its purpose, the Commission's core functions, set out in Section 21 of the Act, include conducting formal inquiries in respect of the general state of competition in a particular market, and develop and communicate advocacy positions on specific competition issues.

The Commission can negotiate agreements with any regulatory authority to coordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and ensure the consistent application of the principles of the Act. The Commission can also participate in the proceedings of any regulatory authority and advise (or receive advice) therefrom (Commission, c2018a).

According to Munyai (2017) the principal way the Commission meets its mandate, is through investigating and prosecuting cases of suspected anti-competitive conduct following complaints or initiated by itself. Alternatively, other way it can fight anti-competitive behavior, is by launching a market inquiry. In contrast to other methods of competition law enforcement, market enquiries are seen to represent a more proactive approach. However, Munyai (2017) also raises a concern that these market enquiries may also place a burden on the Commission, which he believe can distract the Commission from its core function.

### **3.2 Market Inquiries**

*“A market inquiry is a formal inquiry regarding the general state of competition in a market for particular goods and services, without necessarily referring to the conduct or activities of any particular named firm”* (Commission, 2017:vi).

The Commission is empowered to initiate a market inquiry if *“it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market.”* (Commission, 2017:vi). To date, the Commission has conducted the Banking Enquiry, Data Market, Health Care, LPG Market, Public Passenger Transport Market and Retail Market.

The detailed process followed in conducting the Inquiry is described in the Competition Act, but in summary comprises of three phases: “Evidence gathering/investigation”; “Competition assessment”; and “Reporting” (Commission, 2017:15).

## **4 Case study: LPG Market Inquiry and the Report**

### **4.1 Market Inquiry process**

The Commission initiated the market inquiry into the supply and distribution of LPG in South Africa in terms of Chapter 4A of the Act, because *“it has reason to believe that there are features of the sector that prevent, distort or restrict competition”* (Commission, 2017). The LPG market inquiry is the first market inquiry to be finalised under the new provisions outlined in the Competition Amendment Act.

The Commission gave notice in the Government Gazette on 15 August 2014 in terms of Section 43B(2) of the Act. The Commission set out its Terms of Reference (‘ToR’) and timeframes for the inquiry in the Government Gazette. The LPG Market inquiry officially commenced on 15 September 2014 and it was expected to be completed by 31 March 2016. During the investigation process, the need arose to amend the ToR; the Amended ToR was published on 28 September 2016 (Commission, c2018b).

The investigation was finalised on 31 March 2017 and the handover of the Report to the Minister of Economic Development took place on 24 April 2017. The Report was subsequently published formally in the Government Gazette on 28 April 2017 (Commission, 2017). On completion of the market inquiry, the Commission must “*submit the report to the relevant Minister, with or without recommendations*”. The report “*may include recommendations for new or amended policies, legislation or regulations; and recommendations to other regulatory authorities on competition matters.*” (Commission, 2017).

## **4.2 Commission’s Findings & Recommendations**

### **4.2.1 Executive Summary of recommendations**

The recommendations from the LPG Market Inquiry “*seek to introduce or encourage changes in the domestic LPG sector that will promote efficiency, improve security of supply, encourage investment and provide customers with competitive prices and product choices.*” (Commission, 2017:181).

The key findings and recommendations are provided in Chapter 14 of the Report (Commission, 2017:181-186). For the purposes of the analysis, the recommendations have been briefly summarised below using verbatim extracts from the different sections in the Report, but the key findings and recommendations for each of the relevant sections should be referred to directly for more detail.

### **4.2.2 Regulatory issues identified**

In terms of price regulation, the Commission recommended (Commission, 2017:181):

- *NERSA must undertake pricing and the monitoring of MRGP and MRP;*
- *the DoE must undertake a study on how price deregulation in the LPG industry can be achieved;*
- *the deregulation of prices in the sector must be regarded as a long-term solution and should only be considered after the existing supply bottlenecks have been resolved.*

In terms of non-price regulation, the Commission recommended the following (Commission, 2017:182):

- *NERSA must be the regulator responsible for issuing wholesale licences and the monitoring thereof. NERSA is also involved in licensing import, loading and storage facilities for market participants including wholesalers;*
- *NERSA and the TNPA’s adjudication processes should be aligned to avoid delays in the construction of import and storage facilities and resolve the issues identified. As an MOU has been signed between the two entities, ... that it be used as a mechanism to give effect to this recommendation. In addition, there should also be a sequencing of legal processes.*

### **4.2.3 The limited domestic supply**

The Commission recommends the following (Commission, 2017:182):

- *“A review of the regulatory frameworks applicable to the construction of LPG import and storage facilities at ports, as outlined in the applicable legislation including the National Ports Act and the Petroleum Pipelines Act.”*

#### **4.2.4 The long-term LPG supply agreements**

The Commission recommends the following (Commission, 2017:183):

- *Existing evergreen agreements or agreements with more than a ten-year duration must be capped to a maximum of ten years;*
- *All automatic renewal clauses must be removed from all supply agreements;*
- *Refineries must allocate a minimum of ten percent of LPG production (excluding internal consumption) to small wholesalers on at least two year supply agreements;*
- *These recommendations are a short-term solution to the supply constraints in the LPG sector, as it is envisaged that within five years South Africa’s LPG import infrastructure and the storage facilities at its ports will support increased LPG imports, averting the domestic supply shortage.”*

#### **4.2.5 The sale of LPG through cylinders**

The Commission recommends the following (Commission, 2017:183):

- *“The definition of a small wholesaler proposed by the Commission is any wholesaler that requires between 2 500 and 10 000 tonnes of LPG per annum;*
- *NERSA must be responsible for the determination of the cylinder deposit fees and must review same on an annual basis, so that they are aligned with changes in market conditions;*
- *The deposit fee for each cylinder size must be linked to the cost of the cylinder;*
- *The Commission will continue with its ongoing cartel investigations separate from the market inquiry process;*
- *the cylinder exchange practice must be more inclusive ...*
- *The current hybrid cylinder ownership model must continue to enhance customer choice; and*
- *Cross-filling of LPG cylinders should occur within the confines of the law”.*

#### **4.2.6 Recommendations on the high switching costs**

The Commission recommends that the following measures be implemented to facilitate switching (Commission, 2017:185-186):

- *“Separating the LPG supply agreement from the LPG equipment agreement;*
- *By default, contracts between customers and wholesalers must contain provisions for transferring tanks, with a clear methodology for valuing the equipment;*
- *Incoming suppliers must have a right, subject to a commercially agreeable arrangement, to buy the existing tank and piping equipment from the outgoing supplier;*
- *Customers must be provided with information on how to switch in their contracts;*
- *Guidelines for the valuation methodology of LPG equipment ... NERSA must develop and publish guidelines setting out the appropriate valuation methodology;*

- *The mandate of NERSA must be expanded to include the resolution of disputes relating to the interpretation and application of the valuation methodology of LPG equipment.*

## **5 Market Inquiries as competition tool**

There are different views on the use, 'success' and benefits derived from market inquiries as competition enforcement tool. Some of the factors highlighted by other authors to consider are briefly discussed below from a general (local and international) as well as the LPG case.

### **5.1 The use of market Inquiries**

Currie (2016) states that market inquiries *"have proved to be useful tools in numerous jurisdictions, particularly in Europe, and is becoming a common and increasingly popular tool amongst an number of African agencies as well"*. Furthermore, states that most African countries with competition laws have included provisions in their respective legislations that allow their competition authorities to conduct market inquiries. Other African countries using it is Swaziland, Zambia, Botswana and Comesa.

Currie (2016) further states that *although the number of inquiries are limited*, he is of the view that *"as competition agencies gain more expertise and confidence in their mandates"*, he thinks it's likely that could be *"a significant increase in the number of market inquiries instituted ... in Africa, particularly within 'priority' sectors."* Applying this to the SA context, he states that *"there is a further trend is that the Commission has over the last few years identified certain priority sectors and several Market Inquiries resulted"*.

### **5.2 Characteristics and benefits resulting from an Market Inquiry**

*"Market inquiries are generally broad in nature and may, to the extent that there is evidence of cartel conduct, uncover such conduct due to the extensive powers afforded to the authorities conducting a market inquiry"* (Global Competition Review, 2016).

In line with the concept of 'priority sectors', Currie (2017b) reports that the focus tend to be on markets which have identified *"as having a large impact on consumers"*, listing the food, healthcare and banking (at customer level) sectors. Therefore, he concludes that the *"socio-economic considerations appear to be a significant factor during the screening process"* in deciding on instituting a market inquiry.

Coetzee (2017) states that *"As a general rule it can be expected that a proposed merger of parties conducting business in any of these sectors could anticipate a higher degree of scrutiny by the Commission."*

Several authors, including Currie (2017a) are of the view that there *"are mixed feelings"* about the benefits of market inquiries in SA. He further remarks that they are *"extremely resource intensive"* (for both the Commission and the key participants in the inquiry) and in his view, the outcomes of the inquiries which have been concluded to date *"are lukewarm at best."* He suggests that there is little evidence available to confirm that the resources needed in conducting market inquiries in SA *"are proportional to the perceived or intended pro-competitive outcomes."*

Market inquiries take a long time to complete (The Conversation (2017); Currie (2017b)). The LPG inquiry took more than 2 and a half years to conclude, whilst the private healthcare inquiry and the grocery retail inquiry commenced in 2014 and 2015 respectively, and has yet to be concluded.

However, Currie (2017b) highlights that the length of time taken to conclude a market inquiry is, is not the only (primary) shortcoming from a timeline perspective. The process post the publication of the market inquiry, needs further consideration. Once published, the Commission's recommendations must be presented to Parliament. Currie states that these recommendations *"may include legislative reforms or other remedies to address identified concerns with the structure of the market."* This is governed by the Parliamentary processes. Parliament may or may not adopt these recommendations.

This raises several questions: what then is the role of market inquiries? Is it primarily information gathering and identification of structural issues? If so, are there no efficient ways of doing so? Given that other Government institutions, agencies and industry role-players have to implement the voluntary recommendations, can there be realistic expectations on the outcomes?

According to The Conversation (2017), the Commission is *"being distracted by market inquiries"* and *"may also prove to be a burden to it"*. The view is that market inquiries are meant to complement the Commission's key functions, which is to investigate and prosecute instances of anti-competitive conduct. He proposes that market inquiries *"should be done by state departments or regulatory authorities in affected industries"* based on precedent that exists for this citing the Banking Enquiry commissioned by the South African National Treasury and Reserve Bank in 2004.

### **5.3 Advantages of a market inquiry**

Some advantages of market inquiries raised in the literature review (not exhaustive list):

- resulting from the inquiry itself, this may uncover further areas for investigations;
- is a *"proactive weapon in the Commission's arsenal against industry-wide anti-competitive practice"*;
- inquiries provide the Commission *"with information and insights into the dynamics and workings of particular industries"*;
- the Commission *"can use information gleaned through an inquiry to determine appropriate enforcement action and policy intervention"*;
- can also *"shake up industries and force incumbents to stop anti-competitive behavior."* (The Conversation, 2017); and
- market enquiries *"are seen to represent a more proactive approach in competition law enforcement"*.

### **5.4 Disadvantages of market inquiries**

The literature also highlighted some on the 'weaknesses' of market inquiries (again not an exhaustive list):

- The Commission *“is unable during market inquiries to use its powers to enter and search premises and take possession of things and information it can use as evidence against implicated firms”*;
- market inquiries *“rely on the goodwill of respondents who must answer questions fully and honestly”*, which in reality doesn’t always happen;
- based on experience, *“the offence of perjury hasn’t been enough of a deterrent to stop people from lying, or telling half-truths”*;
- *“the fear of personal criminal liability as a result of the cartel offence”* is a disincentive for directors of companies to tell the truth;
- market inquiries *“depend largely on the cooperation of affected firms and industries”*, which is not always feasible;
- *“any firm implicated by a market inquiry doesn’t face any immediate consequences” (the Commission must initiate a fresh and specific investigation or complaint against it)”* (The Conversation, 2017);
- It is necessary *“to appreciate and have due regard to the costs associated with such inquiries”*;
- Market inquiries *“are very time consuming and onerous for market participants”* (Currie, 2017);
- There is *“also little evidence that market inquiries do improve competitiveness” or that penalties/fines being imposed anti-competitive behavior hasn’t stopped in many sectors”*;
- The market inquiry process has *“the potential of weakening subsequent competition investigations or complaints against particular firms”*;
- causes *“a drain on the resources of the Commission”* (The Conversation, 2017);
- the United Kingdom’s competition authority in 2017 proposed *“streamlining its procedure for investigating markets for competition concerns”* (Lalli, 2017); and
- *“due to its voluntary nature, the involvement of the industry participants plays a critical role in the success of any market inquiry”*.

## 6 The LPG Market Inquiry case

Based on some of the comments and criticisms of the use and benefits of market inquiries, and the inherent advantages and disadvantages highlighted in the preceding sections, an analysis of the LPG Market Inquiry recommendations as well as the developments post the publication of the Report, is provided in the sections to follow.

### 6.1 The Market Inquiry process

The process involved three phases as outlined previously. The Gazetting of the ToR was on 15 August 2014, while the publication of Final Report in Government Gazette, took place on 28 April 2017; almost 2 years and 8 months later.

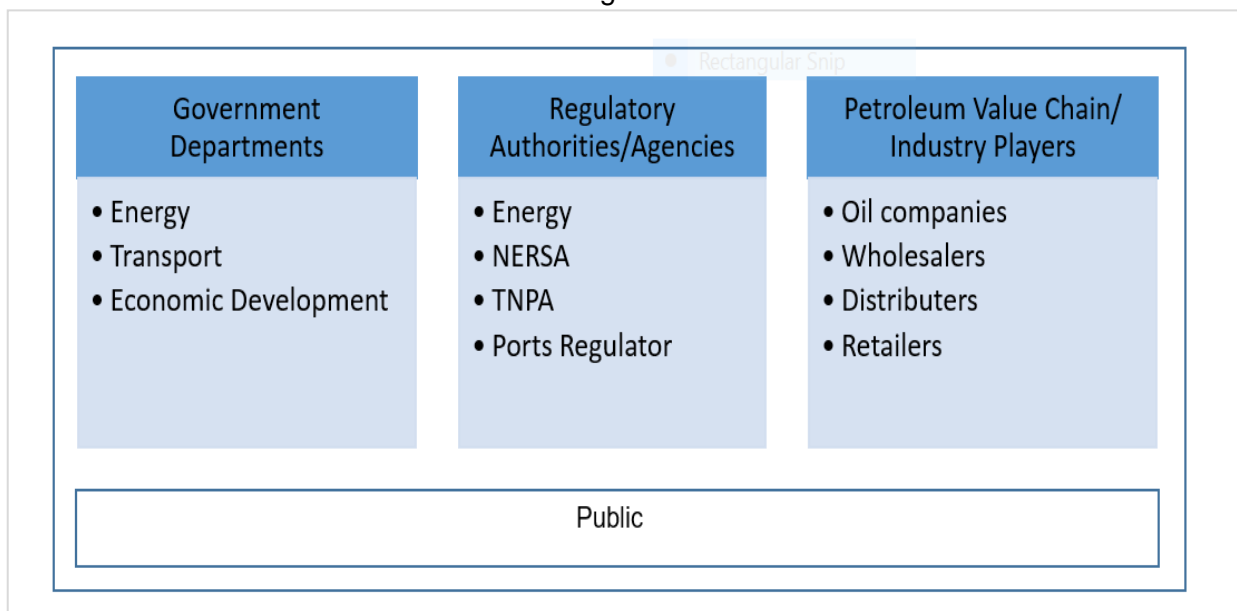
Although it is a fairly long period, the process involved 30 stakeholder meetings and 11 teleconferences, 9 site visits conducted across the country, in my view there is general consensus amongst role-players that the inquiry did uncover new facts and provided new insights into the LPG sector. The duration was to be expected, given the need the resource constraints, the complexities and need to involve the entire sector. The re-publication of the



amended terms of reference, also added to the envisaged timelines, but benefits were derived in the form of a much more in depth investigation.

The key findings, and recommendations, who has to implement, the envisaged timelines and the latest progress known is summarised in Table 1 (p.10-11).

The different role players involved in the market study are provided in the Report (Annexure A), but these can be summarised are shown in Figure 1 below.



**Figure 1: Role-players**

## **6.2 Developments post the publication of the Final Report:**

Therefore, the developments, media statements and expectations by the relevant role players on the findings and recommendations emanating from the LPG Market Inquiry in the past 14 months post the publication of the Report on 28 April 2017, are briefly discussed.

### **6.2.1 The Parliamentary Portfolio Committee on Energy**

On 2 May 2017, the Portfolio Committee on Energy noted the report *“calling for price and regulatory changes in the LPG industry”*. The Committee Chairperson, Mr Majola, said this *“is an important survey and should benefit poor communities that rely on gas as a source of energy. Gas should be affordable and priced fairly...”* (Parliament Services, 2017a).

### **6.2.2 Parliament Portfolio Committee on Economic Development**

On 30 May 2017, the Commission briefed the Portfolio Committee on Economic Development about its findings and recommendations following an inquiry into the LPG sector. Commissioner Bonakele reported to Parliament that *“there are a number of regulatory shortcomings in the LPG sector”*. According to the communication issued by the Parliamentary

Communication Services on behalf of the Chairperson, *“the Portfolio Committee will consider the Report and determine a way forward.”* (Parliament Services, 2017b).

### 6.2.3 Department of Economic Development

On 30 May 2017, Economic Development Minister Patel announced during his budget speech *“that the Competition Act will undergo far-reaching changes to address the barriers to entry for smaller players, and the skewed ownership structure in the economy”* (Fin24, 2017). On 1 September 2017, he was quoted saying *“the government will give priority to the proposals contained in the Report that would have the best impact ... in the sector”*. Furthermore, that *“we are now working through it with the Department of Energy... on one of the core decisions we have to reach on the recommendations set out”*. [own emphasis] (Webber Wentzel, 2017).

**Table 1: Summary of Market Inquiry Implementation Plan**

Section	Findings	Recommendations	Who will implement	Timeline
Sec. 7: Non-Pricing Regulation	Overlap in mandates and misaligned regulatory processes	NERSA and TNPA's process	DoE in consultation with NERSA and TNPA	20/06/2018
	Lack of monitoring wholesale licensees	NERSA to undertake wholesale licensing activities	DoE	20/03/2019
Sec. 8: Pricing Regulation	MRGP and MRP Methodology had not been periodically reviewed and lack of monitoring of adherence	NERSA to undertake pricing methodology and the monitoring of MRGP and MRP	DoE	20/03/2019
	Import efficiency and optimisation	Undertake a market study on how price deregulation can be achieved.	DoE	20/03/2019
	MRGP in its current form is not creating an sufficient supplies of LPG in implemented incentive for refineries to expand	Price deregulation once sufficient supplies of LPG established in the domestic market	DoE	To be implemented following the recommendations of the Market Study
Sec. 9: Addressing Limited domestic supply of LPG	Significant Bottlenecks caused by overlapping jurisdictions of NERSA and TNPA	Review of the applicable regulatory framework relating to LPG construction at ports	DoE in consultation with Department of Transport	20/06/2018
Sec 10: LPG Supply agreements with refineries	Wholesalers with long-term contractual agreements have a competitive advantage over those that rely on short-term contracts or the spot market.	Existing evergreen agreements or agreements with over ten year duration should be capped to a maximum of ten years.	Refineries and wholesalers	30/09/2017
	There is evidence of contracts with some large wholesalers that included unlimited renewal clauses. These clauses have the effect of making them "evergreen contracts".	The automatic renewal clauses should be removed from all supply agreements.	Refineries and wholesalers	30/09/2017
	Smaller wholesalers are unable to attain economies of scale due to the existence of the long-term contractual agreements in place.	10% allocation should be made available through a supply agreement with at least two year duration.	Refineries and wholesalers	30/09/2017
Sec 11: Possible co-ordinated behaviour	DoE had not reviewed the deposit fees since 2010 in terms of the MRP Working Rules (2010).	DoE to amend the MRP Working Rules to enable NERSA to undertake the determination of deposit fees. NERSA to undertake the determination of deposit fees and the subsequent annual reviews.	DoE and NERSA	20/03/2019

Market inquiries – realistic or overloaded expectations?

Section	Findings	Recommendations	Who will implement	Timeline
Section 12: The sale of LPG through cylinders	The cylinder exchange practice acts as a potential barrier to entry into the cylinder market as it is governed through bilateral agreements and participation by new entrants has been difficult.	The cylinder exchange practice should be more inclusive, any unjustifiable restrictions in place should be removed. No wholesaler should unreasonably be denied the opportunity by another party to enter a bilateral agreement to facilitate the exchange of cylinders	Wholesalers and distributors	30/09/2017
Section 13: The high cost of switching	Bulk LPG supply agreements are structured in a vague manner regarding equipment ownership during and after the expiration of the initial supply agreement. There is limited disclosure of when the costs of the installed LPG equipment will be fully amortised and whether the end-user will ever own the installed equipment. The majority of cases, equipment ownership lies with the wholesale supplier and that equipment ownership is not transferred to the bulk end-user at the end of the term.	Recommends separating the LPG supply agreement from the LPG equipment agreement. The agreement pertaining to the cost and usage of LPG equipment should provide for the end-user to own the installed equipment after the costs have been fully amortised; or, alternatively, it should be clear that the equipment is subject to a rental agreement	Wholesalers and end-users	30/09/2017
	Limited disclosure of the salient features of supply agreements creates an environment wherein end-users are unable to switch seamlessly at the end of a contractual period.	The mandate of NERSA must be expanded to include developing and publishing a bulk LPG equipment installation valuation methodology. NERSA to adjudicate on disputes in the valuation of bulk equipment and installations leading to switching impediments.	NERSA	30/06/2018

Adapted from LPG Market Inquiry (2017:187), *Table 25 Implementation Plan for LPG market inquiry recommendations*

#### **6.2.4 National Energy Regulator of South Africa (NERSA or 'Energy Regulator')**

On 28 June 2017, the Energy Regulator considered the Report (NERSA, 2017). This follows NERSA's participation in the LPG Market Inquiry. NERSA representatives attended the aforementioned Portfolio Committee sessions. Subsequently, NERSA also communicated its comments on the Report to the Commission and the DoE.

#### **6.2.5 Department of Energy**

On 5 September 2017, the Deputy Minister of Energy and Senior DoE officials provided response on the Market Inquiry Report. The media report stated that *"the DoE supports the Competition Commission's view that it [DoE] should start considering de-regulation of LPG pricing"*. The DoE also expressed its support, in particular *"to align the regulatory processes"*. Further stated that the *"DoE was also in the process of developing a clear pricing framework to review the maximum refinery gate price and the maximum retail price during the current financial year. Amendments to the Petroleum Products Act are also in the pipeline to address a number of issues including penalties for non-compliance. The department will also develop a policy position on cylinder deposit fees"* [own emphasis] (PMG, 2017).

On 13 November 2017, the Acting Director General (DG) commented that *"the inquiry had been conducted with the full co-operation of DOE into an industry beset with supply and distribution problems"*. According to the media report, the DG stated that *"whilst many of the Commission recommendations were valid, nobody should put the cart before the horse by implementing major changes in the LPG industry before current storage and supply projects were completed."* However, he did indicated that *"the current cylinder exchange practice must now be studied by DOE and answers found"*. (ParlyReportSA, 2017).

#### **6.2.6 The Competition Act Amendment Bill**

In December 2017, Economic Development Minister Patel released the Competition Amendment Bill for public comment. He envisaged that the proposed legislation should be placed before 'lawmakers' during the first half of 2018. The draft amendments seek to strengthen the Competition Act to address the high levels of economic concentration, as well as to address South Africa's racially skewed corporate ownership profile. Another important proposed change relates *"to the functioning and powers of the market inquiry instrument"* (Creamer, 2018).

#### **6.2.7 Development in terms of Supplier Agreements**

In terms of the Commission's recommendation on the supply agreements between suppliers and wholesalers/distributors, in the most recent development, Puregas (a supplier of propellants) was able to secure a supply agreement from Easigas (Pty) Ltd ('Easigas'), a wholesaler sourcing its supply from Shell SA Downstream ('Shell'), a manufacturer and supplier of LPG, on favourable terms (Commission, 2018).

The Commission confirmed that Puregas, who lodged a complaint with the Commission against Shell in February 2018 relating to unfair (“*exclusionary*”) business practices, has since secured a supply agreement with Easigas on favourable terms and therefore, Puregas withdrew its complaint. The Commission accepted the withdrawal on 12 April 2018, and considered the matter as finalised. (UJUH, 2018).

### 6.3 Analysis of the Implementation of the LPG Market Inquiry Recommendations

#### 6.3.1 Achievements in terms of the envisaged timelines:

In terms of the process post the publication, section 6.2 above summarises what has transpired post the publication of the Report. Based on the information in public domain, the implementation status and achievements of the Commission’s recommendations is summarised in Table 2 below.

**Table 2: Progress made on Implementation Plan**

Section	Recommendations	Who will implement	Timeline
Sec. 7: Non-Pricing Regulation	NERSA and TNPA’s licensing processes to be aligned (MoU)	DoE in consultation with NERSA & TNPA	20/06/2018
	NERSA to undertake wholesale wholesale licensing activities	DoE	20/03/2019
Sec. 8: Pricing Regulation	NERSA to undertake pricing methodology had and the monitoring of MRGP and MRP	DoE	20/03/2019
	Undertake a market study on how price deregulation can be achieved.	DoE	20/03/2019
	Price deregulation once sufficient supplies of LPG established in the domestic market	DoE	Post recommendations of Market Study
Sec. 9: Limited domestic supply of LPG	Review of the applicable regulatory framework relating to LPG construction at ports	DoE in consultation with Dept. of Transport	20/06/2018
Sec. 10: LPG Supply agreements with refineries	Existing evergreen agreements or agreements with over ten year duration should be capped to a maximum of ten years.	Refineries and wholesalers	30/09/2017
	The automatic renewal clauses should be removed from all supply agreements.	Refineries and wholesalers	30/09/2017
	10% allocation should be made available through a supply agreement with at least a two year duration.	Refineries and wholesalers	30/09/2017
Sec. 11: Possible co-ordinated behaviour	DoE to amend the MRP Working Rules to enable NERSA to undertake the determination of	DoE and NERSA	20/03/2019

	deposit fees and the subsequent annual reviews.		
Sec. 12: The sale of LPG through cylinders	The cylinder exchange practice should be more inclusive, any unjustifiable restrictions in place should be removed.	Wholesalers and distributors	30/09/2017
Sec. 13: The high cost of switching	Recommends separating the LPG supply agreement from the LPG equipment agreement.	Wholesalers and end-users	30/09/2017
	The mandate of NERSA must be expanded to include the development of <i>valuation methodology of LPG equipment and</i> resolution of disputes	NERSA	30/06/2018

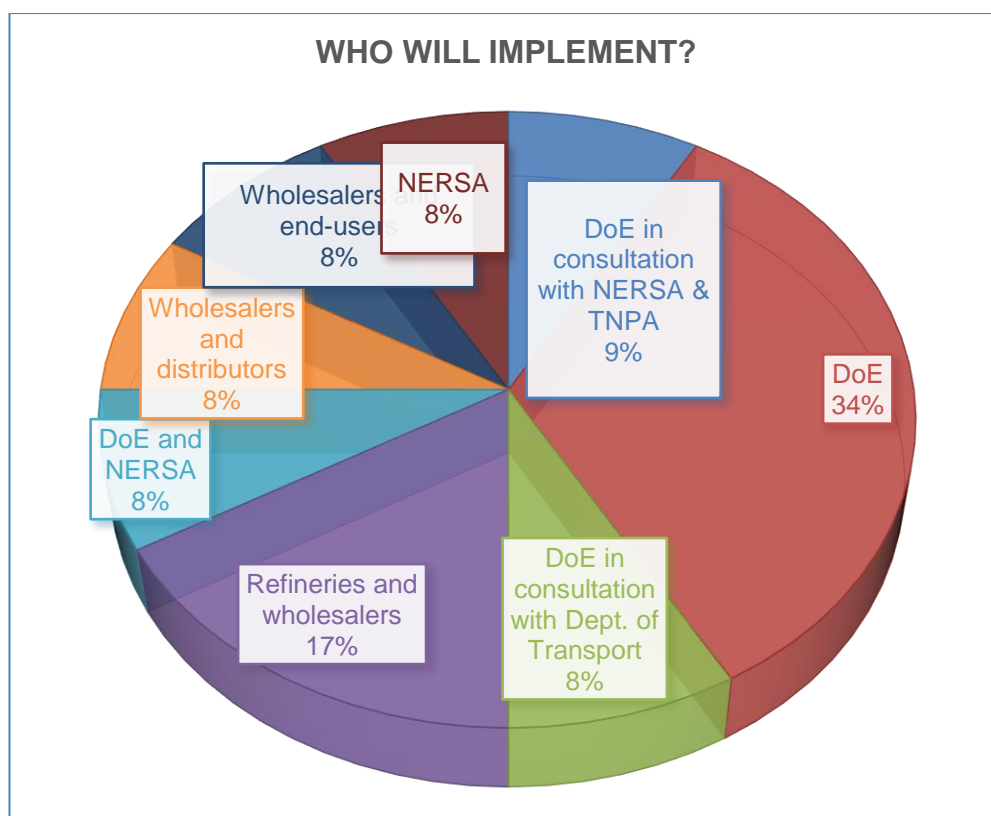
Adapted from LPG Market Inquiry (2017:187), *Table 25 Implementation Plan for LPG market inquiry recommendations*

Table 2 shows that as at 20 June 2018, eight of the thirteen recommendation timelines (nearly two thirds) were not achieved approximately 14 months post the publication of the Report. The reasons for not achieving may vary, but with the information in the public domain, at face value, this suggests that the recommendations (or a large number of them) may not have been realistic to start off.

All five the recommendation milestones not yet due, were assigned to the DoE to implement and in one instance in conjunction with NERSA. The date set for four of them is 20 March 2019, whilst the remaining one (Price deregulation of LPG) is a long-term objective linked to first ensuring sufficient supplies and infrastructure.

### 6.3.2 Feasibility of some of the recommendations

Accepting the fact that policy reviews and legislative changes do take long, and therefore setting timelines aside, the next consideration is the feasibility of some of the recommendations and which role-player had to implement them. The Commission assigned the implementation of recommendations to a number of role players as presented in Figure 2.



**Figure 2: Implementation Role players**

Figure 2 highlights the following challenges involved:

- The complexity of the LPG sector and the various role players involved;
- The different sets of applicable legislation (including, but not limited to the Petroleum Products Act, the Petroleum Pipelines Act, 2003 and the National Ports Act, 2000);
- The fragmented regulation of the sector, that includes concurrent and overlapping mandates, but also 'gaps';
- The Section 13 recommendation, is technically not feasible, since NERSA does not have the powers to make any policy decisions or legislative changes; effectively this recommendation is the responsibility of the DoE, or the DoE in consultation with NERSA;
- Overall the responsibility for implementation of the recommendations lies with:
  - the DoE - two thirds (8/12):
    - 33% (4) of the recommendations on its own; and
    - 33% (4) in consultation with other authorities/Government departments; and
  - the Market players (Refiners, wholesalers, distributors and end-users) jointly - the remaining third (4/12);

Many of the recommendations will require legislative changes, which have its own parliamentary processes. This is exacerbated where there are more than one set of legislation involved and coordination between the different Government departments/Ministries will be needed. It is worth noting that both the Department of Economic Development and the DoE did indicate that there may be a need to prioritise the recommendations to focus on those that will have the biggest impact.



In terms of the Section 9 recommendation, the review of the applicable regulatory framework relating to LPG construction at ports, this has to be done by the DoE in consultation with the Department of Transport ('DoT'). On 22 June 2018, the DoT published the Draft National Ports Amendment Bill, 2018 for comments (DoT, 2018). It is currently not clear if and how the proposed amendments will impact on the Commission's recommendation.

It is not within NERSA's powers to implement the Section 13 recommendation as allocated by the Commission. DoE as the policy maker, can do it in consultation with NERSA, but the DoE will need to amend the enabling legislation which determines NERSA's mandate first. However, the DoE's current Annual Performance Plan (APP) does not include amendment of the Petroleum Pipelines Act, 2003. Therefore, it is highly unlikely that the necessary legislative changes will take place until the DoE APP has been reviewed.

In terms of the recommendations to be done by the industry players themselves (Sections 10, 12 & 13) the only information in the public domain presently is the positive development that resulted from efforts from Shell to comply with the Commission's recommendation, by renegotiating its supply contract with Easigas. In terms of the new contract signed, effective from February 2018, Shell will exclusively supply 90% of its LPG total production to Easigas, but then allocate the remaining 10% to small wholesalers in line with the Commission's recommendations in the LPG Market Inquiry (Commission, 2018).

However, more similar outcomes are needed to have a significant impact on the sector, but based on the above case, it seems like the Commission's recommendation was realistic and achievable, albeit dependent on the voluntary cooperation of the suppliers and wholesalers to renegotiate their existing contracts.

## **6.4 Outcomes/success/benefits of Market Inquiries?**

### **6.4.1 In general**

According to Currie (2017a), there is not any convincing evidence supporting the beneficial outcomes of market inquiries in SA as a competition enforcement tool. He therefore proposes that the Commission "*conclude the current inquiries as expeditiously as possible*" and then conduct a Regulatory Impact Assessment to assess the benefits that can be derived, "*with particular emphasis on the manner in which they [market inquiries] are presently being conducted*" [own emphasis].

Currie (2017a) concludes that it is clear that the involvement of regulatory agencies in the process and the need for a transparent post-implementation framework, are key elements to consider. Therefore, he warns against what he refers to as the "*tendency to use market inquiries for industry re-engineering purposes*". He concludes that "*the Commission is not best placed in a parliamentary democracy to take such crucial policy decisions on the future of a given sector.*"

Currently, the Commission is only empowered to make recommendations to regulatory stakeholders (Currie, 2017b; Gumbie & Griffiths (2014)). However, the proposed draft amendments in the Competition Amendment Bill proposes certain additional powers including

that the Commission's market inquiry remedies (recommendations) should be binding (Creamer, 2018). This will however not completely resolve the constraint that the Commission and the competition law operates within a bigger policy framework and several sector role-players.

The participation of all the Government departments and regulatory authorities involved in a particular sector remains essential. If the proposed remedies requires legislative changes, then the implementation timelines for such recommendations have to take this into consideration to prevent creating over optimistic ('overloaded') expectations.

#### 6.4.2 The LPG Market Inquiry case

Overall, the LPG Market Inquiry was welcomed by the sector role-players and policy makers and did create high expectations that its findings and recommendations will result in addressing LPG market/competition issues. According to the Law Reviews (n.d.) to date, the Commission's efforts to promote competition to *eradicate "hard-core cartels"*, particularly in industries which has been identified as 'priority sectors'. He further states that the *"LPG Market Inquiry should be commended for the unearthing and documenting of the structural problems in the sector."*

Several recommendations (e.g. the NERSA and Transnet National Ports Authority (TNPA) Memorandum of Understanding to address misalignment in processes), will assist in the short-term, but again, the long-term, sustainable solution is to address these issues by amending the applicable legislation.

The majority of the Commission's recommendations have some linkage to the legislative frameworks involved and requires amendments to current legislation associated with the sector. The Commission's observation regarding the fragmented approach to the regulation of LPG, is thus correct. Such a fragmented framework is not ideal, as it could result in the inconsistent implementation of government policies resulting in regulatory uncertainty that could ultimately discourage investment. In terms of NERSA's mandate, it is the implementer of the policy and can provide input on challenges encountered relating to the legislative framework, but the DoE as the policy maker will need to address the comments.

Some of the Commission's findings and recommendations are not entirely new. In 2011, when the DoE adopted a strategy to convert 1.5 million households to LGP by 2018, the DoE identified a number of challenges, which include many of the current Commission findings (Min. Peters, 2011). In terms of allocation, the DoE is the key role-player to implement the recommendations. The Commission's Report show that many of challenges identified by the DoE itself in 2011, have not been resolved and this suggests that a new more radical approach might be warranted to ensure that this Report does not remain just overloaded expectations.

In terms of the Petroleum Products Act which the DoE administers, the legislative framework could be revised to provide for an enforcement mechanism that includes significant punitive penalties that would act as a deterrent and discourage non-compliance, as alternative to active policing (which requires more inspectors).

The recommendation to move price regulation to NERSA, is most likely intended to revamp the entire regulatory value chain, and such measures would need a review of all the enabling legislation and policy first, if they are to materialise. However, it is also important that the solutions/remedies be proportionate to the problems encountered. From the Report, it seems that what is required is a review of the pricing framework to ensure that it reflects the current realities of the sector. It is therefore imperative that the focus remains on reviewing and correcting the aforementioned pricing framework, rather than shifting regulation.

The Minister of Energy's 2017/18 Budget Vote Speech included specific reference to the intention to revamp the regulatory model for LPG in consideration of the findings and recommendations from the LPG Market Inquiry Report (PMG, 2017). Subsequently, the newly appointed Minister Radebe, in his Budget Speech for 2018/19, again confirmed that the DoE was in the process to review the LPG Pricing Regulatory Model, and envisaged that this new pricing framework will be implemented during the 2018/19 financial year (DoE, 2017).

On the other hand, any market inquiry also relies on voluntary initiatives by industry players themselves. Such positive outcomes were evident in the Banking Inquiry and the example of PureGas in the LPG Market Inquiry again confirms that some of the recommendations are realistic expectations.

## 7 Conclusions

Are market inquiries yield realistic and/or achievable outcomes or are they just ambitious or 'overloaded' attempts by competition authorities to achieve a more competitive market environment?

The success of any future market inquiry will also depend on lessons learnt from other market inquiries. The market inquiry definitely raised further awareness of the state of competition in the LPG sector, stimulated debate on how to address the challenges identified, and reinforced the case for effective regulatory mechanisms to be in place to allow for an inclusive energy sector.

As highlighted by Curie (2017a), it seems that the lack of certainty with industry stakeholders as to *"the institutional framework for the implementation of the [Market inquiry] Recommendations and, in particular, which regulatory body or government department would take the lead and overall accountability"*, are critical factors to consider for a successful outcome. The proposed amendments to the Competition Act may assist with future market inquiries.

In terms of the LPG Market Inquiry under consideration here, no concrete evidence could be found that the envisaged timelines that were due by June 2018, were indeed achieved. The remaining four short-term milestones are all still achievable, but in general the timelines were definitely optimistic. Since the implementation of many of these recommendations involves concurrent regulatory mandates and the need for policy, regulatory framework and legislative changes, achieving the remaining timelines, also remains questionable.

The DoE is the key role-player and whilst the pricing related matters falls within the DoE's powers in terms of the Petroleum Products Act, the recommendations involving NERSA also requires amendments to the Petroleum Pipelines Act. However, the Budget Vote and the DoE 2018/19

Annual Performance Plan does not include this currently. Therefore, the feasibility of some of the remaining milestones involving NERSA's mandate, materialising by March 2019, are doubtful. However, based on DoE comments, it seems that the strategy is to prioritise the recommendations that would have the largest impact and based on statements, the pricing regulatory framework will still be implemented in the 2018/19 financial year.

In terms of the recommendations to be implemented by the industry players amongst themselves, one positive development has been reported publicly, which does suggest that despite being voluntary, is achievable and hopefully more such may follow in due course.

Overall, given the limited implementation progress made to date, the challenges highlighted, and the need for significant legislative changes to enable the recommendations to materialise, at this stage it can only be concluded that despite the valuable findings of the LPG Market Inquiry, the recommendations and the timelines within which to achieve, were not realistic, but rather overloaded expectations.

## 8 References

- Anon., 2016. *Global Competition Review*. Available from: <https://globalcompetitionreview.com/insight/the-african-and-middle-eastern-antitrust-review-2016/1066980/south-africa-cartels> [Accessed May 2018].
- Creamer, T., (2018). *Polity.org.za*. Concerns raised over lack of policy framework for competition law changes. Available from: <http://www.polity.org.za/article/concerns-raised-over-lack-of-policy-framework-for-competition-law-changes-2018-01-19> [Accessed 18 June 2018].
- Currie, M., (2016). Market Inquiries in Africa – An Overview. Available from: <https://africanantitrust.com/2016/02/16/the-big-picture-market-sector-inquiries-in-africa/> [Accessed June 2018].
- Currie, M., (2017a). South African Market Inquiries: What Lies Ahead and is it Justified? by jacarandaglobal. Available from: <https://africanantitrust.com/tag/market-inquiries/> [Accessed May 2018].
- Currie, M., (2017b). The New South African Competition Amendment Bill - What it means for business. Available from: <https://africanantitrust.com/2017/12/04/the-new-south-african-competition-amendment-bill-what-this-means-for-business/> [Accessed May 2018].
- Fin24. (2017). *Financial Mail 24*. LPG sector needs better price regulation - competition watchdog. Available from: <https://www.fin24.com/Companies/Industrial/lpg-sector-needs-better-price-regulation-competition-watchdog-20170530> [Accessed April 2018].
- Gumbie, W, Griffiths, M., (2014). Probing the value of market inquiries from the perspective of the Banking Enquiry. Available from: <http://www.compcom.co.za/wp-content/uploads/2014/09/Banking-Enquiry-Griffiths-Gumbie.pdf>
- Lalli, S., (2017). CMA considers revamping market inquiries. [Accessed: May 2018].

Law Reviews. (n.d.) Available at: <https://thelawreviews.co.uk/chapter/1141248/south-africa> [Accessed May 2018].

Min. Peters, D.P. (MP). (2011). Key note address by the Minister of Energy: Honorable Dipuo Peters, MP Annual LPGAS Conference, Riverside Hotel, Available at [www.energy.org.za](http://www.energy.org.za). Vanderbijlpark, Department Of Energy. 6-7 November 2011.

Munyai, P. S., (11 October 2017). South Africa's competition body is being distracted by market inquiries. Available from: <https://theconversation.com/profiles/dr-phumudzo-s-munyai-406779> [Accessed May 2018].

National Energy Regulator [NERSA]. (2017). Notices > Meetings. Notice - Energy Regulator Meeting of 28 June 2017. Available from: [www.nersa.org.za](http://www.nersa.org.za) [Accessed 2017].

Parliamentary Monitoring Group [PMG]. (2017). LPG market inquiry by Competition Commission, with Deputy Minister & Department responses. Available from: <https://pmg.org.za/committee-meeting/24937/>

ParlyReportSA. (2017). Available from: <http://parlyreportsa.co.za/energy/competition-commission-gets-know-lpg-market/> 13 November 2017 [Accessed 2018].

SA. Commission, (c2018). Competition Commission: Home. Available from: <http://www.compcom.co.za/> [Accessed: April 2018].

SA. Competition Commission, 2017. The LPG Market Inquiry Final Report, Pretoria: Competition Commission. Available from: <http://www.compcom.co.za/wp-content/uploads/2017/04/LPG-FINAL-NON-CONFIDENTIAL-VERSION.pdf>

SA. Competition Commission. 2018. Commission's LPG Market Inquiry Recommendation Yields Positive Outcomes. Available from: <http://www.compcom.co.za/wp-content/uploads/2018/01/Commissions-LPG-Market-Inquiry-recommendation-yields-positive-outcomes.pdf> [Accessed: June 2018].

SA. Department of Energy [DoE]. (15 September 2017). DOE Provides Feedback on Competition Commission Report on LPG. Available from: <https://pmg.org.za/committee-meeting/24937/> [Accessed May 2018].

SA. Department of Energy [DoE]. (2017). Performance Plan. Available from: <http://www.energy.gov.za/files/aboutus/DoE-Annual-Performance-Plan-2018-19.pdf> [Accessed May 2018].

SA. Department of Transport [DoT]. (2018). Publication for Comments: Draft National Ports Amendment Bill, 2018. Government Gazette, 22 June 2018, GN 355 of 2018. Available from: [www.gpwonline.co.za](http://www.gpwonline.co.za) [Accessed: 22 June 2018].

SA. Parliament Services. (2017a). Available from: <https://www.parliament.gov.za/press-releases/committee-notes-competition-commission-market-inquiry-report-lpg-industry>. 2 May 2017. [Accessed May 2018].

SA. Parliament Services. (2017b). Competition Commission briefing Economic Development. 30 May 2017. Available from: Liquefied Petroleum Gas (LPG) Market Inquiry outcomes: Chairperson [Accessed May 2018].

South Africa. Competition Commission. 2017b. Available from: <http://www.compcom.co.za/wp-content/uploads/2017/04/Chapter-2-Market-Inquiry-process.pdf>. [Accessed May 2018].

The Conversation. (October 11, 2017). South Africa's competition body is being distracted by market inquiries. Available from: <http://theconversation.com/south-africas-competition-body-is-being-distracted-by-market-inquiries-84099> [Accessed April 2018].

UJUH, (2018). Available from: <https://www.ujuh.co.za/shell-and-eaigsgas-relent-to-puregas-in-remarkable-lpg-competition-case/> [Accessed: June 2018].

Webber Wentzel. (2017). Oil and Gas: Update on Implementation of LPG Recommendations. Available from: <http://www.webberwentzel.com/wwb/content/en/ww-in-the-news?oid=59604&sn=Detail-2011&pid=32583> Catch Up With Competition Law [Accessed: May 2018].