Regulation and Competition Enforcement:

The South African experience in Health, Banking, Communication and Ports Markets

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Roundtable on the "Competition Enforcement and Regulatory Alternatives"

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Introduction

1. This is the submission of the Competition Commission of South Africa (**CCSA**) to the Organisation for Economic Co-operation and Development Organisation (**OECD**)'s Working Party 2 of the Competition Committee for a roundtable discussion on the "Competition Enforcement and Regulatory Alternatives".

2. There has been much debate in South Africa as elsewhere about the relationships between competition authorities and regulators, and between competition and regulation. There have also been court cases regarding the boundaries of the jurisdiction of regulators and the competition authorities, especially in telecommunications in South Africa. Tensions between competition and regulation can arise in instances where regulation limits the scope of competition laws and instances where regulation makes it increasingly difficult to enforce the competition law. The former has mainly been addressed in the South Africa as the Competition Act no.89 of 1998 (as amended) (**the Competition Act**) was amended early on to give the competition authorities jurisdiction over all sectors including those that have sector regulators.

3. South Africa's very complex economic history led to extensive government regulation in one respect and government also actively participated in economic activity through state monopolies. At the advent of democracy in 1994, it became imperative for the state to

ensure that the economy is transformed, by ensuring that previous state monopolies including in the various sectors, become competitive through not only the process of market liberalization but also through strengthening and amending regulations which governed the conduct of the state as an economic actor. These interventions were necessitated by the need for sustainable inclusive growth and development. Competition law and policy became one of the instruments envisioned to achieve growth and inclusiveness.

4. The South African economy exhibits high levels of concentration, in large part a result of our history whereby apartheid denied the majority of the population the opportunity to participate in the economy. However, many developing country markets are similarly concentrated given limited domestic markets on the demand side and limited capital and skilled labour on the supply side. The economy is also still amongst the most unequal in the world with high levels of unemployment and poverty, 27 years into democracy. Again, this is a product of our history. It is also something that other developing countries are battling as they undergo the path of development.

5. It is against this backdrop that we reflect the South African experience regarding the competition and regulation enforcement in health, data, banking and ports markets to address emerging competition issues.

Legislative framework and interplay with sector regulators

6. The CCSA is one of three independent competition authorities established in terms of the Competition Act. The CCSA has the mandate to regulate competition of all economic activity within South Africa through, *inter alia*, merger control and the investigation of prohibited practices such as cartel conduct and the abuse of market dominance. The role of the CCSA is both investigative and prosecutorial.

7. The other two independent competition authorities of South Africa are the Competition Tribunal and the Competition Appeal Court. The Competition Tribunal is the adjudicative body and the "court of first instance" in relation to the review and/or appeals of decisions of the CCSA. The Competition Appeal Court, a high court, is the appellate body and the court of last instance in relation to competition litigation. The highest court in the land remains the Constitutional Court.

8. The Competition Act establishes concurrent jurisdiction between the CCSA and other sector regulators. To give effect to concurrent jurisdiction, the CCSA has signed various memoranda of understanding with sector regulators. There are inherent tensions on priority setting, as striking the balance on what the competition regulator can do without interfering with the jurisdiction of the sector regulator is complex. In the telecommunication market, for example, the CCSA has intervened to address access to the network infrastructure of the erstwhile monopoly provider, where the sector regulator had limitations.

9. Section 3(1A) of the Competition Act sets out the scope and application of the Act which encompasses concurrent jurisdiction between the CCSA and sector regulators. In particular it sets out that, *"In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated…this Act must be construed as establishing concurrent jurisdiction in respect of that conduct. The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2)."*

10. Section 21(1)(h) sets out the functions of the CCSA which include negotiating *"agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act."*

11. Section 82(1) and (2) sets out that, *"A regulatory authority which…has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 or on matters set out in Chapter 4A within a particular sector…must negotiate agreements with the Competition CCSA, as anticipated in section 21(1)(h) and…must identify and establish procedures for the management of areas of concurrent jurisdiction; promote co-operation between the regulatory authority and the Competition CCSA; and provide for the exchange of information and the protection of confidential information."*

12. The import of the above legislative provisions is the recognition that competition regulation forms part of the toolbox of regulation within the economy. Therefore, in order for the CCSA to be effective, there needs to be overall buy-in by all stakeholders in the CCSA's enforcement actions. To this end, the CCSA has concluded memoranda of

understanding with at least 13 sector regulators in South Africa.[1] These agreements set out the substantive and institutional relationships between the CCSA and the relevant sector regulator including notifications of proceedings relating to concurrent jurisdiction and how each institution will deal with these matters where applicable.

13. Memoranda of understanding also recognise the independence of the CCSA and sector regulators and therefore the decision to intervene in any market by the CCSA is informed by it recognising competition concerns, which is some instances can be due to legislation warranting amendment due to engender anticompetitive behaviour or market outcomes. The recommendations made in terms of the data services market inquiry undertaken by the CCSA are illustrative of the interaction between the CCSA and a sector regulator. In this instance the sector regulator was undertaking its own inquiry into the same market. The CCSA made recommendations/remedies which had a direct impact on the sector regulator including calling for legislative amendment to the legislative instrument which mandates the sector regulator.

14. The coordination and cooperation between the CCSA and sector regulators is imperative not just for overall policy coordination but to ensure that no conflicts arise in terms of market intervention by either institution. The submission focuses on selected interventions of the CCSA in regulated markets, namely, healthcare, banking and communication.

Intervention in healthcare markets

15. The Republic of South Africa has a two-tiered healthcare system, comprising a public and private sector. The private healthcare sector caters for an estimated 16% of the population (7 million people) that have access to medical insurance via Medical Aid Schemes[2] and access to high-quality private healthcare.[3] The private healthcare sector accounts for R33.2 billion (approximately USD2.3 billion) of pharmaceutical expenditure which equates to 84% of total pharmaceutical spend in the country.[4]

[1] http://www.compcom.co.za/mou-with-sector-regulators-in-south-africa/
[2] Some Medical Aid Scheme contributions are financed by employees and others joint contributions from employees and employers.
[3] IMS Health Company presentation (November 2016): A review of the South African Pharmaceutical landscape.
[4] ibid

16. The public healthcare sector on the other hand serves the healthcare needs of 84% of the population (42 million people)[5] but only accounts for 16% (or R6.1 billion approximately USD400 million)[6] of the total pharmaceuticals expenditure in the country and has access to 2 400 product lines.[7] Public sector medicines are procured through a tender system which is administered by the National Department of Health.[8] Public healthcare is financed by the government, primarily through taxes.

17. Prior to the advent of democracy in 1994, the pricing of medicine in South Africa was largely subject to market forces, with the result that multinational pharmaceutical companies were free to determine the price at which they sold their products in the country. Innovator brands dominated the market while generics held limited market share. Pharmaceutical companies promoted their products directly to doctors and pharmacists, and would offer samples, bonuses, discounts, rebates and other incentives to encourage the prescription or dispensing of a particular product. In 1994, the new democratic government undertook to reform the healthcare system. The drafting of the National Drug Policy (1996)[9] sought to increase access to safe, affordable and quality medicines for all South Africans and laid the foundation for subsequent revisions to legislation and regulations to reduce prices and improve access to pharmaceutical products.[10]

18. Amendments to legislation in 1997 saw significant changes to the manner in which pharmaceutical products were supplied and marketed in South Africa. In particular, the amendments made provision for the importation of medicines by companies other than the patent holder, prohibited sampling medicines, bonuses, rebates and any other incentive schemes, and made the generic substitution of products mandatory. The amended legislation further called for the establishment of a Pricing Committee, which was tasked with correcting the pricing distortions in the market by developing a transparent pricing system for all medicines and scheduled substances[11] sold in South

[5] IMS Health Company presentation (November 2016): A review of the South African Pharmaceutical landscape.
[6] ibid
[7] Ngozwana, S. (2016). Policies to Control Prices of Medicines: Does the South African Experience Have Lessons for Other African Countries in Making Medicines in Africa edited Maureen Mackintosh, Geoffrey Banda, Paula Tibandebage, Watu Wamae. Palgrave MacMillan
[8] ibid
[9] National Drug Policy for South Africa (1996)
[10] Ngozwana, S. (2016). Policies to Control Prices of Medicines: Does the South African Experience Have Lessons for Other African Countries in Making Medicines in Africa edited Maureen Mackintosh, Geoffrey Banda, Paula Tibandebage, Watu Wamae. Palgrave MacMillan
[11] Including generic and originator products across Schedules 1 to 7

Africa.[12] This led to the introduction of a Single Exit Price (**SEP**) regulatory framework in 2004. Under the SEP regime, the price at which manufacturers sell to pharmacies is regulated and cannot be varied according to volumes sold. Manufacturers are obliged to supply medicines to wholesalers at the SEP plus logistic fees, and pharmacists have to dispense all products to patients at SEP plus dispensing fees.[13] The objective of SEP is to ensure price transparency and that manufacturers sell medicine at one price to all customers in the price sector regardless of order size, consumption levels or customer profile. Only scheduled medicines are subject to SEP (Schedule 1 –7).

19. The private healthcare system in South Africa is relatively well resourced, with substantially higher per capita spending than the public sector. Private healthcare inflation has been consistently higher than the consumer price index, making cover increasingly unaffordable. In the light of these increases, which only a minority of South Africans can afford, the CCSA initiated the Health Market Inquiry (HMI) in 2013 to investigate and provide explanations for these increases in price and expenditure.

20. The HMI assessed the costs of private healthcare cost were increasing substantially overtime. The study found that the healthcare market is characterised by high costs, due to a highly concentrated funders and facilities (hospital) markets, disempowered and uninformed consumers, a general absence of value-based purchasing, practitioners who are subject to little regulation and failures of accountability at many levels. The report recommended several regulatory reforms, to enable a more competitive private healthcare market which should translate into lower costs and prices, more value-for-money for consumers and should promote innovation in the delivery and funding of healthcare. These recommendations came in at an opportune time as the country was transitioning to implement a National Health Insurance, to achieve universal health coverage.

Intervention in banking/financial markets

21. The banking sector is characterised by dense rules and standards as well as a lack of information for consumers to make informed choices . Much of competition regulation in

[12] Ngozwana, S. (2016). Policies to Control Prices of Medicines: Does the South African Experience Have Lessons for Other African Countries in Making Medicines in Africa edited Maureen Mackintosh, Geoffrey Banda, Paula Tibandebage, Watu Wamae. Palgrave MacMillan

[13] Medicines and Related Substances Act, 1965 (Act no. 101 of 1965): Regulations Relating to a Transparent Pricing System for Medicines and Scheduled Substances (Draft Dispensing Fee for Pharmacists**)**. *Government Notice 895 in Government Gazette 40188 dated 5 August 2016.*

banking focusses largely on consumer banking. However, banking and financial services are imperative to the growth of small and medium-sized firms who, in the developing world are the biggest employers. Therefore, access to financing and banking facilities to all economic players of all sizes is key to encouraging entrepreneurship, entry, investment and dynamism in all sectors of the economy.

22. In 2006 the CCSA initiated an inquiry into the banking sector to assess the level and structure of charges made by banks, as well as by other providers of payment services, including, the relation between the costs of providing retail banking and/or payment services and the charges for such services, and the process by which charges are set, and the level and scope of existing and potential competition in this regard. At the time of the enquiry the banking industry's revenue accounted for around 6% of GDP or R106.9billion and transactional fee income amounted to R34.5 billion.

23. The decision to launch the enquiry was prompted by widespread consumer concerns about the level of bank charges, a 2004 report into competition in banking commissioned by the National Treasury and a 2006 *FEASability (Pty) Ltd* report commissioned by the CCSA on competition in banking and the national payments system. On the basis of these reports, the CCSA decided to conduct a comprehensive comparative study into competition in retail banking, access to the national payments system, and financial inclusion. The enquiry was established in terms of Section 21 of the Competition Act, 89 of 1998 (as amended) which states that the Commission may enquire into any matter that concerns the purposes of the Competition Act.

24. The four major banks together had over 90% of the market. Around 1 billion ATM transactions were made which generated gross revenues in excess of R4 billion for the banks. This led the inquiry to conclude that pricing arrangements between banks for use of shared networks have served to shelter the provision of ATM services from effective price competition. Pricing arrangements in relation to "on-us" / "off-us" charged customers a substantially higher fee for off-us transactions which restricts the ability of consumers to exercise choice in terms of cash dispensing services. Therefore, the abolition of ATM transaction fees may force banks to charge the consumer directly for the cash dispensing service, increasing transparency.

25. After the conclusion of the enquiry, the CCSA engaged with National Treasury and the South African Reserve Bank (**SARB**) to discuss the findings and coordinate

implementation of the recommendations. Many of the banking inquiry recommendations were implemented by the National Treasury, SARB, individual banks, the Payments Association of South Africa (**PASA**) and the Banking Association of South Africa (**BASA**) over several years, with the SARB for example issuing a policy position paper on non-bank access to the payments system in 2011, BASA issuing a new code of conduct in 2011, and PASA making changes to various rules, including its constitution, over time.

26. Financial inclusion has subsequently grown significantly in South Africa: 51% of adults in South Africa had a bank account in 2006 while 75% had one in 2013. The banking sector has seen significant growth in transaction fee and related income, among all banks, and mostly above the rate of growth of bank revenues.

27. There are some gaps in South Africa's banking policymaking and regulatory environment that mean that mobile and online payments enjoyed in other countries (some significantly less developed than South Africa) are missing in South Africa. Most of the key banking enquiry recommendations fell to the policymaker and regulator to implement, the lack of incorporation of these two entities in the banking enquiry process has resulted in substantial delays in implementation and in some cases a resistance to reforms altogether.

Intervention in the communication markets (mobile data)

28. The data services market inquiry (mobile telecommunications) which was initiated in terms of the 2013 amendments assessed mobile data prices in South Africa, which were found to be both high and structurally anti-poor insofar as smaller volume bundles were priced inexplicably higher on a per MB basis compared to larger bundles. This sector is regulated by the Independent Communications Authority of South Africa (ICASA) which is a creature of statute formed in terms of the Independent Communications Authority of South Africa Act, 13 of 2000, as amended. ICASA is responsible for regulating telecommunications, broadcasting and postal industries. ICASA also issues licenses to telecommunications and broadcasting service providers, and enforces compliance with rules and regulations, as determined by the Electronic Communications Act, 26 of 2005 as amended.

29. The Inquiry was initiated by the Commission in August 2017 following concerns expressed by government about the high level of data prices and the importance of data

affordability for the South African economy and consumers. On 2 December 2019, the Commission released the final report of the Inquiry containing the final recommendations. Two broad sets of recommendations were proposed in the report. The first set sought to provide immediate relief to high data prices, especially for low-income consumers. This set of recommendations proposed a number of steps to be taken soon after the release of the final report in order to have an immediate impact on data costs. The second broad set of recommendations proposed initiatives to improve mobile price competition and greater infrastructure alternatives to consumers over the medium term. This set of recommendations would have a mid to long-term effects on data prices. Overall, these recommendations were envisaged to lower data prices for all consumers, particularly the poor, and to also promote greater economic inclusion as the country moves into the digital age.

30. The Mobile Network Operators undertook to implement the following: reductions of data costs by up to 50%, provide lifeline data and zero rating of data for public interest organizations, such as education, healthcare. These undertakings are important at time where economies are transitioning to operate digitally, due to COVID19. The commitments by mobile data service providers to reduce data costs in South Africa will save consumers over R3 billion annually.

Intervention in ports

31. On 7 July 2016 the Commission initiated a complaint in terms of section 49B(1) of the Competition Act against Transnet SOC Ltd (“Transnet”) and its two divisions, namely, Transnet National Ports Authority ("TNPA") and Transnet Port Terminals ("TPT"), for alleged contravention of certain sections of the Competition Act. Of relevance to the issue under consideration is the investigation against TNPA, which TNPA is responsible for issuing licences to terminal operators to provide terminal operating services within a port. In this regard, TNPA has issued licences to TPT (another division of Transnet) and private terminal operators. TPT and private terminal operators are responsible for managing terminal operations and handling cargo at commercial ports in South Africa. The commercial activities of TNPA fall within the purview of the regulatory mandate of the Ports Regulator of South Africa (**the Ports Regulator**), established in terms of the National Ports Act number 12 of 2005.

32. The initiation was based on the information obtained by the Commission that gave rise to a reasonable suspicion that the Respondents may have engaged in excessive pricing

in the provision of port services and exclusionary practices in the prioritisation of cargo and berthing at port terminals, respectively, in contravention of sections 8(a) and 8(c) of the Competition Act. The pricing aspects of the compliant include prices that were determined by the Ports Regulator.

33. The investigation revealed that TNPA has refused to issue terminal licences and/or enter into terminal operator agreements in contravention of section 8(c) of the Competition Act and the Commission will refer the alleged conduct to the Tribunal for prosecution. In respect of TNPA, the investigation revealed that TNPA's revenue is below its total economic costs. The evidence before the Commission indicates that the alleged excessive pricing conduct cannot be sustained. As a result, the excessive pricing allegation against TNPA has not been pursue further.

Conclusion

34. The four case studies of the interventions of the CCSA in healthcare, banking, communication and ports markets have demonstrated the importance of competition regulation in South Africa, particularly also in those sectors subject to sector regulation. The broad architecture of the Competition Act provides for mechanisms for effective competition regulation in all sectors of the economy, particularly with the increasing use of market inquiry powers that allow for the CCSA to identify and propose policy recommendation as well as market correcting measures to address competition concerns in markets.

35. Competition regulation has proved an important instrument within South Africa's policy framework to contribute to structural transformation. The competition authorities have been able to intervene in markets that are of strategic importance to South Africa's development. Moreover, the competition authorities have also sought to intervene in a meaningful way by using innovative remedies beyond the imposition of administrative penalties to effectively address the identified competition harm as well as improve the competitive dynamics of markets. This the CCSA has undertaken in individual enforcement cases and advocacy initiatives, with the latter illustrated in the recommendations on policy and legislative changes.

36. The CCSA's intervention into the various sectors has markedly contributed to opening up concentrated markets, dealing with cartel behaviour and clearing mergers that are

likely to result in efficiencies in the broader economy (and blocking anti-competitive mergers too). South Africa is still not competitive in many other sectors thus requiring ongoing pro-competitive regulatory intervention by both the competition authorities and sector-specific regulators.

37. Competition regulation in South Africa has extended to those areas regulated by sector-specific regulators as illustrated by the four case studies. Concurrent jurisdiction between competition regulators and sector-specific regulators has ensured sufficient checks and balances to ensure markets are regulated with due regard to the impact of regulatory interventions on competition.