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**Towards a Coherent Services Regulation and
Trade Policy for Structural Transformation:
New Research and Capacity Building Agenda**

Competition Commission of South Africa

by

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**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
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COMPETITION COMMISSION OF SOUTH AFRICA

PREFACE

1. This submission is made on behalf of the Competition Commission of South Africa (CCSA) as part of the United Nations Conference on Trade and Development (UNCTAD) Multi-Year Expert Meeting on Trade, Services and Development (18-20 July 2017). In particular, the CCSA makes these submissions for Session 5 relating to *“Towards a coherent services regulation and trade policy for structural transformation: new research and capacity building agenda”*.

INTRODUCTION

2. The CCSA is one of three independent competition authorities established in terms of the Competition Act 89 of 1998 (the Competition Act) of South Africa. 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.
3. 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.
4. Chapter VII of the UNCTAD Model Law on Competition (2017)¹ (UNCTAD Model Law), notes that the aim of competition law and policy is to minimise economic inefficiencies created by anti-competitive behaviour. Therefore competition law and policy forms an important pillar of industrial policy.
5. 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, for example, telecommunications, transportation, utilities and steel manufacturing. 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 services sectors, 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

¹ United Nations Conference on Trade and Development, Trade and Development Board, Trade and Development Commission, Intergovernmental Group of Experts on competition Law and Policy, Sixteenth Session, Geneva 5-7 July 2017, Item 3 of the provisional agenda, “Work programme, including capacity-building and technical assistance on competition law and policy

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.

6. The UNCTAD Model Law also recognises that services sectors such as telecommunications, transportation and utilities, “*are fundamental to the performance of a country’s economy, since they provide inputs for all other sectors of activity*”. Therefore the efficiency of these sectors is intrinsically linked to the success of a state’s economy. For example, the growth of South Africa’s global trade in goods (manufactured and agricultural) is intrinsically linked to the efficiency and competitiveness of South Africa’s transportation system including ports and land (see Box 5). Although South Africa has liberalised some sectors such as telecommunications through the issuance of licences to new operators (See Box 2), some sectors such as ports and electricity are only subject to sector regulation. Various policy decisions have informed the process of liberalisation including ensuring affordable universal access and difficulties of replicating and investing in some infrastructure such as rail facilities.
7. However, natural state monopolies are not inherently immunised from competition regulation in South Africa. The Competition Act applies to all economic activity, including state monopolies. In particular, the ambit of the Competition Act encompasses the regulation of state monopolies in relation to conduct such as excessive pricing, price discrimination and access to essential facilities, along with other anti-competitive activity that is exclusionary in nature. Moreover, the Competition Act empowers the CCSA to review legislation and public regulations and report to the Minister where any provision engenders anti-competitive behaviour.²

BROAD INSTITUTIONAL ARRANGEMENTS

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. Another example is in the ports market, where there is a regulator of ports, but prices, albeit declining, appear still high relative to comparable markets. The CCSA in this case has invoked its investigative powers to look into pricing for ports services in South Africa. Challenges of concurrent jurisdiction are common, as also noted in the UNCTAD Model Law.

TRADE IN SERVICES

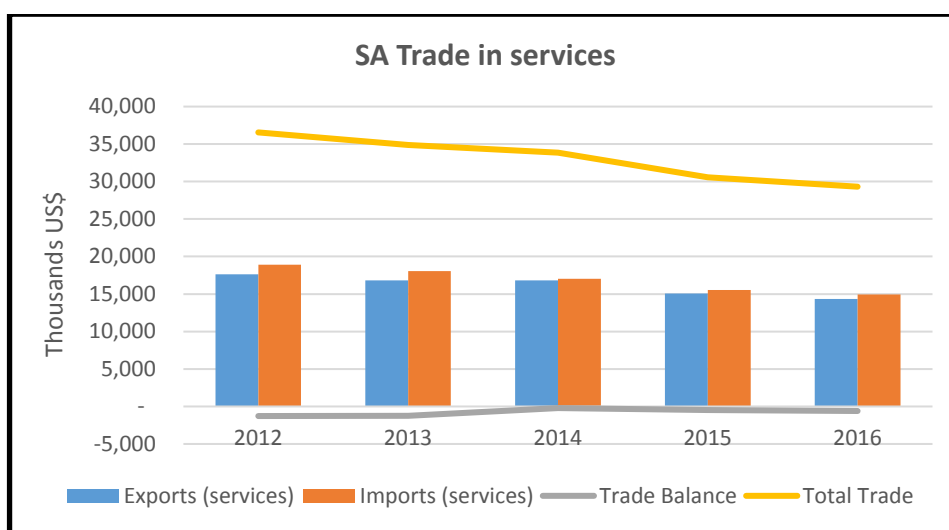
Overview

9. Trade in services encompasses trade in business and professional services such as engineering and legal services; communication, construction and related services, distribution, energy, financial and transport services. Trade in services has become an important developmental and growth topic in all economies.

² Section 21(1)(k) – The Competition Commission is responsible to over time, review legislation and public regulations, and report to the Minister concerning any provision that permits uncompetitive behavior
Section 21(3) – The Minister must table in the National Assembly any report submitted in terms of subsection (1)(k)...if that report deals with a substantial matter relating to the purposes of this Act

10. According to the World Economic Forum's Africa Competitiveness Report 2015, "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)."³
11. South Africa's trade in services with the rest of the world amounted to over USD36 billion in 2012 and saw a gradual decline year-on-year to USD29 billion in 2016 (Diagram 1). South Africa imports more services in comparison with its exports of services to the rest of the world, leading to a trade balance deficit of USD594 million in 2016.

Diagram 1



Source: Author's construction based on data from ITC

12. Given the significance of trade in services, it is important that South Africa deals with any impediments to enhancing growth in services as part of the developmental agenda and increase its trade in services both regionally and globally. As evidenced in Diagram 1, South Africa's export in services has been declining over time and this suggests that there is great scope to develop policies that seek to enhance the growth of the services sector. One such policy would be to entrench competition in the services market and improve productivity and innovation which will ultimately improve the export competitiveness of South Africa's products, albeit noting that competition may not be feasible in some services markets thus requiring regulation.
13. One of the impediments in South Africa, as recognised by the World Economic Forum is the penetration of competition in key service sectors such as telecommunications, transportation, financial services and construction and infrastructure. In South Africa, these markets are characterised by high levels of concentration, natural monopolies and high barriers to entry. The 2016 ACF/World Bank Report (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

³ http://www3.weforum.org/docs/WEF_ACR_2015/ACR_Chapter2.2_2015.pdf

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>

*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.*⁵

14. Therefore, the promotion of competition and effective regulation of the services sectors becomes a key industrial tool in the path to development. In a bid to contribute to the developmental path, the CCSA, has adopted prioritisation in sectors that are significant to the economy and which complement South Africa's growth and developmental agenda. The sectors prioritised include, construction and infrastructure, healthcare, telecommunication, financial services, energy and agro-processing and foods.
15. The CCSA's intervention into the services sectors has markedly contributed in opening up concentrated markets, dealing with cartel behaviour and clearing mergers that are likely to result in efficiencies in the broader economy.
16. Some of the key interventions in the services sectors over time are illustrated below in text box 1 (Box 1), with further specific case examples set out in text boxes numbered 2 to 5.

Box 1 – Key interventions in mergers, cartels and abuse of dominance by CCSA in services sector over time

2012

- Construction – eradicating bid rigging, fast track settlement programme, civil damages claims
- Transport – airlines exemptions

2013

- Telecommunications – abuse of dominance finding against former state monopoly Telkom
- Transportation – exemption to South African Airways a state-owned airline in relation to a code sharing agreement

2014

- Telecommunication – merger activity see text box 2
- Energy – market inquiry into liquefied petroleum gas

2015

- Telecommunication – investigation into abuse of dominance by Vodacom and MTN
- Transportation – investigation against SAA by Comair in relation to incentive schemes

2016

- Energy – mergers in Liquefied Petroleum Gas
- Liquefied Petroleum Gas Market Inquiry

Ongoing cases

- Private Health Market Inquiry
- Public Passenger Transport Market Inquiry
- Shipping cartels (cargo)
- Forex Banking Cartel
- Broadband Data Cost Market Inquiry

⁵<http://documents.worldbank.org/curated/en/917591468185330593/pdf/103057-WP-P148373-Box394849B-PUBLIC-SAEU8-for-web-0129e.pdf>

17. The CCSA's intervention in the services sectors is indicative of underlying concerns permeating these sectors. In relation to telecommunications (see Box 2) the CCSA also gave cognisance to the fact that direct policy intervention, alongside competition regulation, is important in seeking to achieve structural transformation and development. This is so again, as noted in the World Bank Report that, *"...mobile technologies are best placed to provide connectivity and deliver Internet access to the poorest populations. Given its potential transformational effects on key sectors of the economy, estimations indicate that if Internet access achieved an impact of the same scale as mobile telephony in Africa, it could account for 10 percent of the region's total GDP in 2025 compared to 1 percent in 2013."*

Box 2 – Telecommunication

Between 2013 and 2016, the Competition Commission of South Africa (CCSA) assessed 3 significant merger transactions and settled an abuse of dominance case in the telecommunications sector.

Prior to 1994, South Africa had one telecommunications provider, Telkom, a state monopoly. Following 1994, the new government embarked on a path of liberalisation of the economy, including the telecommunications sector.

In 2014 the CCSA considered Telkom/BCX¹ merger. At the time of this merger, Telkom was a dominant provider of fixed leased line services used by downstream competitors of Telkom and BCX. This merger came at the backdrop of Telkom's historic dominance at the infrastructure level and its presence in downstream markets as well as a previous attempt to acquire BCX in 2007 which was prohibited.

Moreover, at that time, Telkom was the subject of numerous abuse of dominance allegations emanating from its position in the upstream infrastructure market. In relation to the abuse of dominance claims, the CCSA investigated and found Telkom in contravention of the Competition Act and subsequently entered into settlement in 2013 which encompassed:

- An administrative penalty in the amount of R450 million (approximately €29 million)
- Structural/functional separation of Telkom's business into wholesale and retail
- Implementation of a Transfer Pricing Programme

In the 2014 merger, the CCSA recommended the extension of the remedies agreed to in the 2013 settlement to extend to 2020 and included Telkom's provision of fibre.

In 2014 and 2015 the CCSA assessed two mergers between Vodacom/Neotel (abandoned) and MTN/Telkom¹ (prohibited) both relating to mobile telecommunications. Both mergers raised similar competition issues in that they were likely to substantially lessen or prevent competition in the mobile services market. Vodacom and MTN, market leaders in the mobile services markets were to acquire additional spectrum which would have resulted in spectrum concentration effects that will likely consolidate both Vodacom's and MTN's strong market positions. These transactions would have conferred first mover advantage that would have likely lead to reduced choice and higher prices to end customers in the absence of effective constraints on Vodacom and MTN.

18. The South African government is currently reviewing its national Information Communication Technology (ICT) policy and published an *Integrated ICT White Paper*⁶ which seeks to address providing cross-government leadership and facilitating multi-stakeholder participation in the drive for inclusive digital transformation, interventions to reinforce fair competition and facilitate innovation in the converged environment including approaches to addressing horizontal and vertical integration across the value chain and interventions to facilitate digital transformation of society such as bridging the digital divide and ensuring affordable

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https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf

access by all. This is a significant step in promoting the competitiveness of the ICT sector and access to communication services particularly in the rural areas of South Africa.

Construction and related sectors

19. Much like other jurisdictions, the CCSA intervened in the construction and infrastructure market and most known, in the construction bid-rigging cartel investigations (see Box 3).

Box 3 – Construction

In 2009, the CCSA initiated investigations into alleged prohibited practices of bid-rigging and general collusion in the construction sector. In 2011, following further investigation, the CCSA received more information signalling to widespread cartel conduct in the construction sector. This led to the introduction of the fast-track programme for settlements of cartel conduct by self-confessing firms. The fast-track programme yielded the uncovering of more than 300 private and public sector rigged construction projects. These projects included major infrastructure development in South Africa, such as the 2010 FIFA Soccer World Cup stadia, dams, business/residential buildings and national roads. The firms who settled with the CCSA included the top six largest construction firms in South Africa. The total combined administrative penalties imposed on firms implicated in the conduct amounted to R1.6 billion (over €110 million).

In 2016, the CCSA entered into settlement with the large steel manufacturer ArcelorMittal South Africa (AMSA) in terms of which AMSA admitted to involvement in the long steel and scrap metal cartels. AMSA, amongst other remedies, agreed to pay an administrative penalty of R1.5 billion (approximately €100 million)

20. The CCSA also investigated the cement sector which is a key input into construction and infrastructure services. Competition regulation is important in this sector in removing barriers to entry in order to reduce costs for governments, businesses, and households and also to encourage investment in the cement sector. Based on a study conducted by the CCSA, competition regulation intervention in this sector has led to new cement manufacturers entering markets previously subject to cartel conduct such as market allocation. Moreover, the CCSA's intervention led to estimated consumer savings of between R4.5 billion and R5.8 billion (approximately €380 million) after uncovering the cartel in 2010 and 2013.
21. The work of the CCSA in relation to the construction sector related primarily to collusive conduct brought about largely by historic relationships which were not sufficiently discouraged or deterred from engaging in anti-competitive conduct prior to 1994 due to ineffective competition law and policy. In seeking to address and breakdown historic relationships, following from the CCSA's intervention in the construction sector, various government departments and the large construction firms entered into a settlement agreement. This agreement seeks to, amongst other things, foster entry and the sustainability of non-incumbent and smaller firms within the construction sector through financial contributions amount to R1,5 billion (over €100 million) over and above the amount referred to in Box 3. The settlement also commits the promotion of transformation and wider economic participation in the sector, through either equity transactions or by partnering with and developing smaller construction companies that will result in these smaller firms attaining the market value of roughly R5 billion (over €320 million) by 2024.

Financial services

22. Although not largely subject to explicit conduct uncovered by the CCSA, the financial services sector in South Africa characterised by concentration and a lack of vigorous competition between the four big banks. This sector is characterised by

opaque rules and standards as well as a lack of information for consumers to make informed choices (see Box 4). Much of competition regulation in banking focusses largely on consumer banking⁷. 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.

Box 4 – Financial services

In 2006, the CCSA established a banking enquiry in order to examine certain aspects of competition in retail banking in South Africa. At the time of the enquiry the banking industry's revenue accounted for around 6% of GDP or R106.9billion (approximately €7 billion) and transactional fee income amounted to R34.5 billion (approximately €2 billion). Moreover, 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 (approximately €200 billion) for the banks. This led the enquiry 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.

The CCSA is currently prosecuting cartel conduct in relation to forex trading before the Competition Tribunal. It is alleged that Bank of America Merrill Lynch International Limited, BNP Paribas, JP Morgan Chase & Co, JP Morgan Chase Bank N.A, Investec Ltd, Standard New York Securities Inc., HSBC Bank Plc, Standard Chartered Bank, Credit Suisse Group; Standard Bank of South Africa Ltd, Commerzbank AG; Australia and New Zealand Banking Group Limited, Nomura International Plc., Macquarie Bank Limited, ABSA Bank Limited (ABSA), Barclays Capital Inc, Barclays Bank plc colluded in relation to the trading of foreign currency pairs involving the Rand. To date, the CCSA has settled with Citibank NA in relation to the bank's involvement in a forex trading cartel and has paid an administrative penalty of almost R70 million (approximately €5 million). This is part of a global cartel, also investigated in the US, the EU and elsewhere.

Transportation

23. According to the World Bank Report, *"High road freight rates in Africa and limited quality in terms of timeliness might be explained in part by competition problems in transport and logistics. Given that various actors intervene in the supply chain for end-to-end cargo transportation, sector prices, service quality, and performance depend on the functioning of various interlinked markets, including trucking, freight-forwarding, brokerage, warehousing, cargo consolidation, and others."* This speaks to important policy interventions necessary in order to ensure the efficiency of transportation given its linkages into all sectors.
24. The CCSA intervened in many subsectors of transportation (see Box 5) and is currently undertaking a market inquiry into land transportation and investigating ports and rail. South Africa is a strategic hub for the trade of goods in and out of the Southern African region. Therefore, uncovering cartels into cargo shipping, as illustrated in Box 5 is important as they increase the cost of trading in the region and render the region uncompetitive in the world markets.

⁷ <https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf>

Box 5 – Transportation

As part of an ongoing investigation, last year the CCSA conducted a search and seizure operation at the premises of six cargo shipping companies. The CCSA conducted the search and seizure operation on the basis that it had reasonable grounds to suspect that Hamburg Sud South Africa (Pty) Ltd, Maersk South Africa (Pty) Ltd, Safmarine (Pty) Ltd, Mediterranean Shipping Company (Pty) Ltd, Pacific International Line South Africa (Pty) Ltd and CMA CGM Shipping Agencies South Africa (Pty) Ltd have engaged in collusive practices to, inter alia, fix the incremental rates for the shipment of cargo from Asia to South Africa in contravention of the Competition Act. The companies under investigation are involved in the transportation of cargo for import and export purposes across the globe, including South Africa.

Prior to this investigation, in 2007, the CCSA investigated a complaint into freight forward against various respondents for cartel conduct in relation to freight forwarding fees. The CCSA settled with Schenker SA and Kuene Nagel for a contravention of price fixing in relation to fixing freight fees for international cargo.

In 2012 the CCSA investigated collusive conduct against shipping liners, namely: Mitsui O.S.K Lines; Kawasaki Kisen Kaisha Ltd; Compania Sud Americana de Vapores; Hoegh Autoliners Holdings AS; Wallenius Wilhelmsen Logistics; Eukor Car Carriers; and NYK for allegedly fixed prices, divided markets and tendered collusively in respect of the provision of deep sea transportation services. To date, the CCSA has settled with NYK and Wallenius Wilhelmsen Logistics for a combined R200 million (approximately €14 million) and is still pursuing the remainder of the respondents.

CONCLUSION

25. Competition regulation has proved an important instrument within South Africa's industrial policy toolkit 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 as an outcome of its market inquiries into liquefied petroleum gas⁸ and banking.
26. Services markets are crucial in spurring growth in an economy. Equally, if these markets are not competitive, they could significantly impede the growth and development of an economy. To this end, the CCSA has prioritised enforcement and advocacy in key services markets such as telecommunications, energy and transport, primarily to tackle constraints to competition (where entry is feasible) and competitiveness.
27. The CCSA's intervention into the services sectors has markedly contributed in 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 services sectors thus requiring ongoing pro-competitive regulatory intervention by both the competition authorities and sector-specific regulators.

⁸ <http://www.compcor.co.za/lpg-inquiry/>