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### **Agenda Item 3a. Challenges faced by developing countries in competition and regulation in the maritime transport sector**

Contribution by  
Competition Commission  
South Africa

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## 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 17<sup>th</sup> Session of Inter-Governmental Group of Experts on Competition Law and Policy (**UNCTAD-IGE**) (11 – 13 July 2018). In particular, these are submissions for the Roundtable Discussion on “*Challenges faced by developing countries in competition and regulation in the maritime transport sector*”.

## Background

### *Competition Commission of South Africa*

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 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. 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, in 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 become competitive through not only the process of market liberalisation but also through strengthening and amending regulations which governed the conduct of the state as an economic actor. These interventions were necessitated by the need for sustainable growth and development and inclusiveness. Competition law and policy became one of the instruments envisioned to achieve growth and inclusiveness.

5. Post 1994 and at the advent of democracy in South Africa, the government of the day undertook a liberalisation programme in sectors such as telecommunications. However, sectors such as rail, electricity and in particular ports have remained as natural monopolies. 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 port facilities.
6. Notwithstanding, 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 anticompetitive 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.<sup>1</sup>

### **Regulatory framework: Maritime transport sector**

7. The following are key stakeholders in the South African ports sector; the Department of Transport (**DOT**), the Department of Public Enterprises (**DPE**)<sup>2</sup>, Transnet SOC Limited (**Transnet**)<sup>3</sup>, the Ports Regulator of South Africa (**Ports Regulator**), the South African Maritime Safety Authority (**SAMSA**)<sup>4</sup>, Port Consultative Committees (**PCCs**)<sup>5</sup>, and National Port Consultative Committee (**NPCC**)<sup>6</sup>.

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<sup>1</sup> 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

<sup>2</sup> DPE is the shareholder representative of government responsible for Transnet and other SOEs. DPE monitors performance of SOEs including Transnet with regard to infrastructure investment and delivery; operational and industry efficiency; financial and commercial viability; and governance and regulatory compliance.

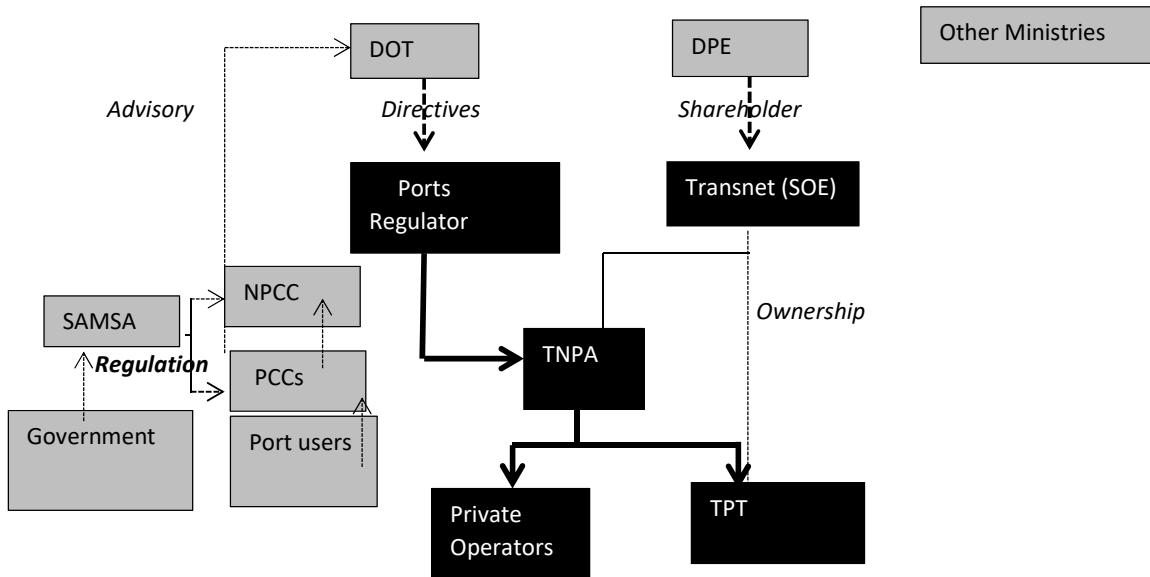
<sup>3</sup> Transnet is a state-owned logistics company which is responsible for the transportation and handling of goods in and out of South Africa through its five operating divisions, which include (i) TFR, (ii) TRE, (iii) TNPA, (iv) TPT; and (v) TP.

<sup>4</sup> SAMSA was established on the 1st April 1998 under the South Africa Marine Safety Authority Act No 5 of 1998 (“SAMSA Act”). SAMSA’s mandate is to ensure safety of life and property at sea; to prevent and combat pollution from ships in the marine environment; and to promote the Republic’s maritime interests.

<sup>5</sup> In terms of Section 81 of the National Ports Act, Minister of Transport must appoint PCC for each port. The mandate of the PCCs is to provide a forum for exchange of views between the TNPA and other interested parties. There are no terms of reference for the PCCs beyond the generic function of advising TNPA on stakeholder views.

<sup>6</sup> In terms of Section 82 of the National Ports Act, the Minister of Transport must appoint NPCC. The mandate of NPCC is to advise the Minister of Transport on national commercial ports policy matters; to advise the Minister of Transport on measures that need to be taken to improve the regulatory framework governing management and operations of ports; to consider any proposed substantial alteration to TNPA’s tariffs; and to consider any other matter that the Minister of Transport or the shareholding Minister of Transport may require the Committee to consider.

Figure 1: Stakeholders in the ports sector



Source: *Review of regulation in the Ports Sector, 2014 (CCRED)*

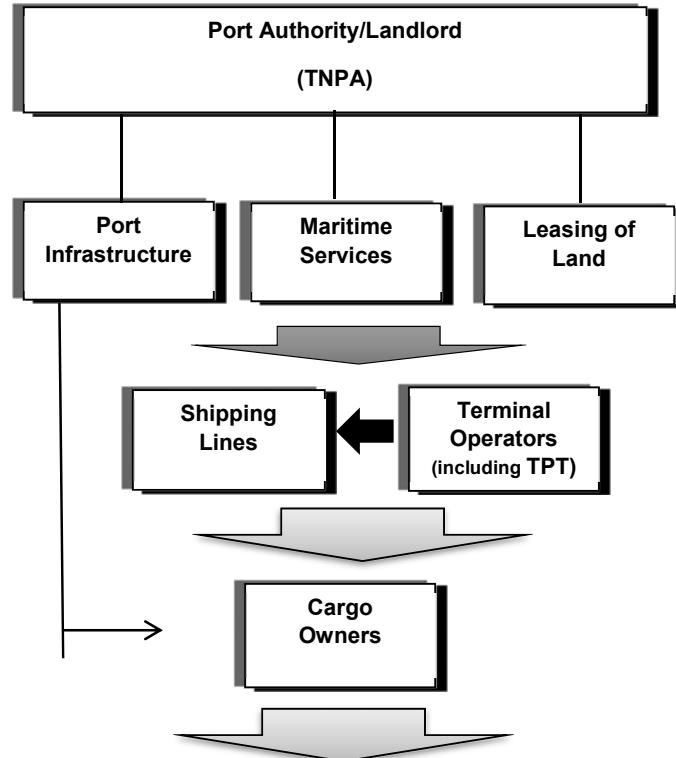
8. The DOT is the custodian of the National Ports Act No. 12 of 2005 (**National Ports Act**) established the Ports Regulator to provide for the administration of ports in South Africa.
9. The Ports Regulator was established in 2009 and consists of a chairperson and a minimum of six and a maximum of 12 other members appointed by Minister of Transport for a period of up to five years at a time.<sup>7</sup> This body is mandated with regulating the port systems of South Africa to achieve the following<sup>8</sup>:
  - 9.1. The exercise of economic regulation of the port systems in line with the strategic objectives of the South African government;
  - 9.2. Promoting fair access to ports and port facilities;
  - 9.3. Regulating the provision of adequate, affordable and efficient port services and facilities;
  - 9.4. Monitoring Transnet National Ports Authority (**TNPA**), the ports landlord, to ensure it effectively performs the functions delegated to it in terms of the National Ports Act; and
  - 9.5. Hearing complaints and appeals that are lodged as well as regulating prices in the national ports system.

<sup>7</sup> Section 31(1) of the National Ports Act

<sup>8</sup> PRSA (2015). Overview.

10. The National Ports Act makes provision for the Ports Regulator to regulate TNPA only, to the exclusion of any other firms that provide port services. However, the majority of port terminal services are provided by Transnet Port Terminals (**TPT**), especially in terms of container and RoRo handling, with some private terminals being operated on TNPA land, including significant private operators such as the Richards Bay Coal Terminal, the single largest export coal terminal in the world.
  
11. TPT is responsible for managing terminal operations and handling cargo at the eight commercial ports in South Africa. TPT is an operating division of Transnet and is contracted to TNPA. TPT currently operates all of the dedicated container terminals as well as RoRo terminals in the system with significant bulk and multipurpose terminals.
  
12. Transnet is a state-owned logistics company which is responsible for the transportation and handling of goods in and out of South Africa through its five operating divisions, which include TNPA and TPT.
  
13. Below is a simple depiction of the value chain of the relevant role players in the provision of ports services in South Africa:

*Figure 2: Role players in the provision of port services*



**Import or Export Market**

Source: CCSA

14. The main role player in the value chain is TNPA. TNPA is the division within Transnet responsible for the planning, authorisation, coordination and control of services within South African ports. It also owns land on which the ports are constructed. TNPA's services and major revenue streams can be summarised as the provision of ports infrastructure, maritime services and leasing of land.
  
15. TNPA recovers revenue in the form of, rentals from terminal operators and other lessees (real estate revenue), maritime service charges from the shipping lines and cargo dues from cargo owners.<sup>9</sup> These are regulated by the Ports Regulator as illustrated below.

*Table 1: Tariffs regulated by the Ports Regulator*

CATEGORY	MAIN COST ITEMS	TARIFFS USED TO RECOVER COSTS
Port land and terminals	Lease port land to terminal operators and other port service and port facility providers in the port.	Lease income (rentals).
Wet infrastructure	Lighthouse services infrastructure (lighthouses, buoys, beacons and electric/radio navigation equipment), port control and safety, entrance channels, breakwaters, turning basins, aids to navigation within port limits, vessel traffic services, and maintenance dredging within ports.	Light dues, port dues, vessel traffic services fees.
Dry infrastructure	Quay walls, roads, rail lines, buildings, fencing, port security, lighting (outside terminals), bulk services and in certain cases terminal infrastructure.	Cargo dues, berth dues.
Ship repair services	Provide and maintain ship facilities as well as the cranes utilized in such facilities.	Preparation fee, docking and undocking fees (vessels at repair facilities) berth dues (vessels at repair quays).
Marine services	Pilotage, tug assistance, berthing, running of lines, floating cranes.	Pilotage dues, tug assistance fees, berthing fees, running of line fees, floating crane hire fees.

Source: TNPA's Tariff Application 2014/2015

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<sup>9</sup> Cargo owners are customers of shipping lines and terminal operators and are not direct recipients of services provided by the TNPA. They therefore use TNPA's infrastructure through shipping lines and terminal operators. TNPA's argument is that cargo owners should pay cargo dues since they benefit from the port infrastructure and the significant investment made by the port authority.

16. The Ports Regulator was established with the short term objective of ensuring that TNPA does not operate with the intention of achieving the goals of Transnet, but rather the broader legislative goals as set out by the South African government. The Ports Regulator regulates TNPA to ensure that Transnet would not derive any unfair advantage over other port users, and that revenue generated by TNPA would be used to the benefit of TNPA and its stakeholders as well as the South African economy. To this end, the Ports Regulator would typically approve tariff increases significantly below TNPA's requested tariff adjustments as illustrated below.

*Table 2: TNPA proposed tariffs and Ports Regulator approved tariffs*

	2010/11	2011/12	2012/13	2013/14	2014/15
<b>Tariffs proposed and allowed</b>					
<b>Tariff proposed</b>	10.62%	11.91%	18.06%	14.2%	14.39%
<b>Tariff allowed</b>	4.42%	4.49%	2.76%	5.4%	6.6%

Source: CCSA

17. In determining the tariffs to be charged to port users, the TNPA first calculates the total amount of revenue that it requires to fulfil its functions, which includes the provision of infrastructure. The Ports Regulator then determines how the total revenue should be apportioned across individual tariffs for specific services and facilities. Importantly, the distinction must be made between the *tariff methodology* based on which the total revenue is calculated, and the *tariff structure* through which the individual tariffs are determined.
18. Currently, the TNPA makes use of the Required Revenue method when applying to the Ports Regulator for tariff adjustments as defined through a number of tariff methodologies developed and subjected to extensive consultation by the Ports Regulator. This entails TNPA generating revenue by charging tariffs to port users<sup>10</sup>. In addition to this, TNPA as a landlord, derives real estate revenue from third party tenants (terminal operators) for the use of some leased fixed assets (i.e. real estate) under its control.
19. The **tariff methodology** applicable to the 2018/19 - 2020/21 financial years is based on the Revenue Requirement formula as follows:<sup>11</sup>

*Figure 3*

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<sup>10</sup> Tariffs are charged to cargo owners (or their agents i.e. freight forwarders), shipping lines or their agents.

<sup>11</sup> <https://www.portsregulator.org/images/documents/Final-Tariff-Methodology-1819-2021.pdf>

*Revenue Requirement = Regulatory Asset Base (RAB) × Weighted Average Cost of Capital (WACC) + Operating Costs + Depreciation + Taxation Expense ± Clawback ± Excessive Tariff Increase Margin Credit (ETIMC) ± Weighted Efficiency Gains from Operations (WEGO)*

20. There are many factors to consider in tariff determination. In looking at the allocation of assets amongst port users, it is noted that for wet infrastructure, the TNPA does not receive government funding for the provision of these facilities, these costs must be incorporated into its Required Revenue. TNPA guards against allocating all wet infrastructure assets to shipping lines (despite them being the more prevalent users of the infrastructure) as this would make these tariffs expensive in comparison to international ports. As such, the TNPA has proposed shifting the allocation of most wet infrastructure to cargo owners; it is explained that as this infrastructure is typically paid for by taxpayers through government funds at international ports, taxpayers should incur these costs through cargo dues at TNPA operated ports.
21. TNPA has proposed allocating the largest proportion of dry infrastructure to the terminal operators (i.e. tenants), which it maintains derive the greatest economic benefit from these facilities. Finally, assets used in the provision of marine services (such as tugs) are allocated to shipping lines.
22. The table below captures the current asset allocation as compared to the allocation proposed by TNPA and the Ports Regulator.

*Table 3: Asset allocation amongst port users, as proposed by the TNPA and approved by the Ports Regulator*

Asset classification	Current structure	Proposed structure	
		TNPA	Ports Regulator
<b>Dry infrastructure/landward side</b>			
Buildings & structures	Shipping lines Cargo owners	Terminal operators	Cargo owners Terminal operators
Electrical & rail		Terminal operators	
Land		Terminal operators	
Movable assets		Shipping lines Cargo owners Terminal operators	Shipping lines Cargo owners Terminal operators
Quay walls & jetties		Terminal operators	Shipping lines Terminal operators
<b>Wet infrastructure</b>			
Vessels	Shipping lines	Shipping lines	Shipping lines
Repair infrastructure		Cargo owners	Shipping lines Cargo owners Terminal operators
Breakwater & seawalls		Cargo owners	Shipping lines Cargo owners Terminal operators
Channels, fairways & basins		Cargo owners	Shipping lines Cargo owners
<b>Other</b>			
Construction work in progress	Shipping lines	Cargo owners	-

Source: CCSA

23. The differences in the proposed allocation of assets translate into variances in the suggested contribution to Required Revenue by each port user group. In particular, the Ports Regulator has proposed a significantly sharper increase in the proportion of tariffs to be paid by shipping lines whilst similarly recommending a sharper decrease in cargo owners' contribution to required revenue. The differences between the TNPA and the Ports Regulator's contribution by terminal operators/tenants is less severe. However, while the changes proposed by the TNPA and the Ports Regulator for each of the port users' tariffs may differ in magnitude, they are similar in direction (i.e. increase or decrease).

*Table 4: Contributions by port users to assets payments, as proposed by the TNPA and the Ports Regulator*

Port user	Current % contribution to RR by port users <sup>12</sup>		Proposed contribution to Required Revenue	
	TNPA	Ports Regulator	TNPA	Ports Regulator
Shipping lines	20%	18%	21%	36%
Cargo owners	61%	60%	46%	35%
Terminal operators/tenants	19%	22%	33%	29%

Source: Ports Regulator tariff strategy

- 24. The increase in port charges will see **shipping lines'** tariffs become high in comparison to international ports, although they will still be relatively well aligned. However, there is a possibility that shipping lines may pass the increased cost onto cargo owners through increased shipping charges. These effects are likely to be more pronounced should the Ports Regulator's proposed Revenue Requirement contribution by shipping lines be implemented.
- 25. In terms of cargo owners, the reduction in **cargo dues** will strengthen the competitiveness of certain industries, particularly in the export sector. The effect of these decreased cargo dues is expected to be larger should the Ports Regulator's proposed tariff decrease be implemented. However, there is a risk that the expected effect of this tariff decrease will be eliminated should shipping lines pass their increase tariff rates onto cargo owners.
- 26. Currently there is differentiation of tariffs for commodities within the same cargo handling classification. In seeking to address this inconsistency, the Ports Regulator has proposed the application of one base tariff for each different cargo handling type which will be determined based on the user pay principle. The share of total cargo dues to be paid by each cargo handling type will be determined through the count of vessel arrivals. Similarly, the Ports Regulator has proposed a process of tariff line simplification based on the type of cargo handled (e.g. containers, roll-on/roll-off, etc.). The proposed changes to the revenue contribution of each cargo handling type, as proposed by TNPA and the Ports Regulator are set out below.

Table 5: Contributions by port users to cargo dues as proposed by the TNPA and Ports Regulator

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<sup>12</sup> Based on 2012 figures.

Cargo Type	Current % contribution to RR by port users <sup>13</sup>		Proposed contribution to Required Revenue	
	TNPA	Ports Regulator	TNPA	Ports Regulator
Containers	64%	60%	39%	46%
Dry Bulk	12%	18%	32%	30%
Liquid Bulk	11%	9.1%	9%	9%
Break Bulk	8%	3.9%	15%	8%
RoRo	5%	9%	6%	7%

Source: Ports Regulator tariff strategy

### Maritime transport sector and competition

27. There are eight commercial ports located in South Africa and are situated in:
  - 27.1. Richards Bay
  - 27.2. Durban
  - 27.3. Saldanha
  - 27.4. Cape Town
  - 27.5. Port Elizabeth
  - 27.6. East London
  - 27.7. Mossel Bay
  - 27.8. Ngqura (Coega)
  
28. Ports, and more specifically port terminals can be categorised according to the type of cargo handled. Broadly, the commercial ports in South Africa handle the following types of cargo:<sup>14</sup>
  - 28.1. Containers – these are used to transport a variety of cargo types ranging from electronics to food and everyday household goods. Reefer containers are used to transport goods that require cold storage in order to preserve the quality of the goods.
  - 28.2. Dry bulk – this cargo is transported in large quantities and in unpackaged form and includes products such as coal, cement, iron ore, grain, and chemicals in solid form.
  - 28.3. Liquid bulks – this cargo is transferred in large unpackaged volumes and via pipes to and from vessels and includes petroleum oil, Liquefied Natural Gas (“LNG”), chemicals such as liquid fertilizer.

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<sup>13</sup> Based on 2012 figures.

<sup>14</sup> Cargo types may also differ depending on from where they emanate, i.e. imports; exports, coastwise (cargo emanating from within the borders of South Africa shipped between the ports), and; transhipments (cargo emanating from an international source destined for another international destination – usually referred to as ‘transhipment cargo’).

- 28.4. Roll-On-Roll-Off (“Ro-Ro”) – this cargo makes use of wheels to move on or off of a vessel and include automotive vehicles, earth moving machinery, semi-trailers, trucks and motorcycles.
  - 28.5. Break-bulk – this cargo comprises general cargo which requires individual loading and is shipped in bags, crates, boxes, drums, barrels, bales or pallets, rather than in containers. Cargo includes steel girders and pipes, wind energy components such as wind turbine blades, paper reels, etc.
29. Ports play a pivotal role in the trade of international and domestic goods. This is particularly true for South Africa where 28% of gross domestic product is derived from exports.<sup>15</sup> An estimated 90% of South African trade which includes over 170 million tonnes of freight and 3 million containers annually is handled through the ports.<sup>16</sup> Further, South Africa’s ports serve as a conduit for trade between South Africa and its trading partners in the Southern Africa region.<sup>17</sup> Given this, factors such as ports reliability, speed of cargo handling and price competitiveness are important for South Africa’s global competitiveness and the efficiency of the region’s international trade flows.
30. The CCSA is much too cognisant of the “multiplier effect” of anticompetitive conduct especially within services industries. To this end, the CCSA has undertaken a number of investigations within the maritime sector. Box 1 below sets out cartel investigations that the CCSA has uncovered over time.
31. Equally, the CCSA is cognisant of the fact that there may be strong justification in favour of economic regulation in terms of backbone infrastructure sectors such as energy, telecommunications, transport, and water. Economic regulation in these sectors is widely regarded as necessary in order to prevent market failures in the absence of effective market forces, to ensure that essential infrastructure services are provided and to ultimately achieve optimal social welfare.

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<sup>15</sup> Department of Performance Monitoring Evaluation. 2010. Delivery Agreement for Outcome 6: An Efficient, Competitive and Responsive Economic Infrastructure Network.

<sup>16</sup> Ibid.

<sup>17</sup> South African Maritime Safety Authority, [n.d.]. *Port Services – Industry Profile*.

#### **Box 1 – CCSA cartel investigations**

##### ***Competition Commissioner vs various shipping lines (“2009 Shipping Complaint”)***

This complaint was initiated in 2009 against various shipping liners and their association named the Association of Shipping Liners relating to allegations that being competitors in the liner shipping market entered into agreement on heavy weight surcharge for export cargo.

Further, on 14 June 2010, the CCSA received a complaint against some shipping liners alleging that the same Respondents also entered into agreement relating to the congestion recovery surcharge.

##### ***Competition Commissioner vs car carriers shipping line companies (“2012 Shipping Complaint”)***

This complaint was initiated in 2012 against car carriers shipping liner firms for the alleged collusion relating to price fixing, market division and collusive tendering in the transportation of motor vehicles, machinery and/or equipment (including new and used vehicle and new used rolling construction and agricultural machinery) by sea, to and from South Africa). To date, the CCSA has concluded settlements with some Respondent-shipping liners and continues its prosecution of the remainder Respondent-shipping liners.

##### ***Competition Commissioner vs various shipping lines (2016 Shipping Complaint”)***

This complaint was initiated in 2016 against various shipping lines for alleged price fixing and / or fixing of trading conditions. The Respondents are active in the market for shipping of cargo for import and export purposes. It is alleged that the Respondents may be fixing the price of shipping cargo from Asia to South Africa in that they all announced a general rate increase of the same magnitude to be effective on the same date from 1 August 2016. Effectively the Respondents are distorting competition by coordinating the prices charged to their customers. The investigation is still ongoing.

#### ***Exemption application***

The CCSA also has the mandate to consider exemption applications from firms who seek exemption from the provisions of the Competition Act. Exemptions are granted to firms if they meet certain objectives of the Competition Act such as promotion of exports and achieving industry stability.

On 5 March 2014, the CCSA received an exemption application from members of the Association of Shipping Liners who stated that they are engaged in the provision of liner shipping services, which involves the transportation of goods on scheduled ships or vessels between ports via established sea routes in the Southern African region.

The exemption application related to the category of agreements and/or practices to be concluded by the Association of Shipping Liners including, a slot charter agreement; slot exchange agreement; vessel sharing agreement and multi-carrier contract. The basis of the exemption application was premised on the assumption that the application was necessary. Following investigation, the CCSA decided not to grant the exemption on the basis that the conduct forming part of the exemption application did not constitute a prohibited practice as contemplated in the Competition Act.

32. Regulation of certain sectors in the economy is necessary when that particular sector is governed by a firm that enjoys market power. Certain sectors necessitate government intervention during the developmental stage of an economy, especially since the capital requirements necessary to set up and operate in such sectors may be vast and not easily attainable through private sector investors. Alternatively, governments may want to restrict private sector development and participation in such industries so as to rather use these state-run sectors to accomplish developmental goals.

33. In South Africa, port services are carried out by TPT with a limited number of private firms offering port services.<sup>18</sup> This invariably gives TPT market power in the provision of ports services. Where market power exists, it is likely that competition concerns may arise and harm consumers. Given the scale of South Africa's port activities in relation to its trade flows, any abuse of market power has an inimical domino effect on the economy as a whole. Box 2 below sets out the current investigations by the CCSA against both TNPA and TPT in relation to allegations of abuse of dominance. This, notwithstanding the fact that this is a regulated sector.
34. In 2001/2002 the South African government adopted the National Commercial Ports Policy (**NCPP**) with the aim of, *inter alia*, reducing the extent of cross-subsidisation and cost-price irregularities across marine and cargo functions at port terminals.<sup>19</sup> The adoption of the NCPP led to many outcomes including the introduction of cargo dues for all commodities, containers and goods handled at the ports. This has consequently led to complaints that the change in tariff determination has exceeded South Africa's inflation rate. This led to the establishment of the Ports Regulator in 2009 in requiring TNPA to apply for approval of tariff adjustments on an annual basis to the Ports Regulator.
35. From 2012, the Ports Regulator conducted Global Port Pricing Comparator Studies<sup>20</sup> and examined tariffs charged by ports worldwide for specific commodities and port services in comparison to South Africa. The earlier studies (the latest published in March 2018) found that South African ports were amongst the most expensive in the sample in some areas, whilst in comparing to the sample used, relatively cheap in other areas.
36. For example, based on the earlier studies in 2012/13, cargo dues paid by cargo owners were 874% above the global average while total container handling costs, including terminal handling charges, were an estimated 360% above the global average. Conversely, vessel owners incurred costs which were consistently below the global average (-25% in 2012/13).

**Box 2 – CCSA ongoing investigation against TPT and TNPA**

<sup>18</sup> Companies such as Kangra Coal, Exxaro Coal, ARM Coal and Glencore Operations South Africa offer port services through the Richard's Bay Coal Terminal – the single largest coal export facility in the world.

<sup>19</sup> Gumede, S. & Chasomeris, M. 2013. Assessing Stakeholders' Perspective on Maritime Port Policy in South Africa.

<sup>20</sup> <https://www.portsregulator.org/economic/benchmarking>

***Competition Commissioner vs. Transnet National Ports Authority and Transnet Port Terminals***

This complaint was initiated in 2016 and alleges that TNPA and TPT may be engaged in excessive pricing in the provision of port services in South Africa. The excessive pricing allegations relate to port tariffs over the alleged period which indicate that South African port tariffs are significantly high when compared to global averages of port charges.

The investigation also alleges that TNPA and TPT may have engaged in exclusionary conduct in the provision of port services through granting preferential berthing windows, capped export capacity, minimum export tonnage requirements or preferential lease agreements. This conduct may exclude certain parties from participating in markets and increase costs to those that do not receive similar treatment.

37. From a historical perspective, bulk commodities are charged much lower total port costs than the global sample average. For instance, in 2014/15, total port costs incurred by coal and iron ore owners were 57% and 52% below the global sample average respectively. On the other hand vehicles, which are identified as an important export commodity in the country's industrial policy, face significant premiums compared to the global average.<sup>21</sup>
38. Part of the investigation referred to in Box 2 above refers to TPT's preferential access to terminals, resources and berths to certain customers, under certain conditions, at some of its terminals. Preferential treatment in berthing vessels and handling cargo is not an uncommon phenomenon and is not restricted to South Africa. Therefore, in some instances, preferential treatment can be justified in, for example, the handling of certain cargo. It is common cause that the commercial ports engage in some form of product exclusivity as the type of cargo handled at each port is unique to that port. For example, the port of Richard's Bay specialises as a bulk coal terminal whilst the port of Ngqura focuses on container cargo at the moment.<sup>22</sup> These 'specialisations' may be reflective of how the port was originally built and thus indicates the particular capacity each port has for a certain type of cargo.
39. Further examples can be found in the case of reefer containers which have to be handled efficiently during the loading and unloading process since they require an electrical connection at the terminal in order for the refrigeration unit to work. Vessels carrying crude oil may receive preferential berthing rights due to the hazardous nature of the

<sup>21</sup> There are a number of variables which could impact the sampling exercise e.g. exchange rate, unitary vessel sizes, parcel mix and size of ports included in the sample and date used.

<sup>22</sup> Ngqura was originally intended to service smelters/bulk but due electricity shortages across the country this has resulted in the need to shift to containers from smelters/bulk.

cargo that they carry as is the case at the port of Saldanha Bay. Certain ports have draft restrictions during low tide that affect the berthing priority of larger vessels, whereas other ports have specific acts that give priority to vessels carrying a certain cargo. It must however be acknowledged that the South African ports system operates within a system of complimentary ports, rather than competing ports.

40. In some instances, however, preferential treatment may not be conducive to effective competition as it may raise the costs of those that do not receive the same treatment. For instance, limited export capacity for coal exporters may result in small players incurring higher costs in exporting product. The preferential berthing of vessels may cause shipping liners to divert their vessels to different ports since operations may become unprofitable as a result of increased costs that arise when vessels are delayed. Furthermore, cargo owners may lose market share to competitors if cargo does not arrive on time or their sustainability may be threatened where fixed costs continue to be incurred despite their inability to supply products to markets.

#### **Initiatives by the CCSA and the Ports Regulator to address competition and regulation challenges in the maritime transport sector**

41. As discussed above, the CCSA is investigating some of the complaints received in this sector. The ultimate goal is to establish if there is any contravention of the Competition Act by the incumbents and to come up with remedies that will make this sector competitive.
42. In addition to the on-going investigations by the CCSA in this sector, the Ports Regulator is also constantly reviewing its regulation instruments and methodologies especially around issues of taxation, asset values, debt and efficiencies. The measures are aimed at incentivising TPT and TNPA to be efficient in their operations and to provide consumers with competitive prices. For example, the Ports Regulator has a 10-year plan which will ensure that TNPA is able to operate and undertake investments whilst offering competitive tariffs to port users by reducing TNPA's tariffs eliminating the current differentials that exist between import and export cargos.

#### **Conclusion**

43. Regulated markets present a challenge for competition regulation and intuitively, deference is granted to the sector regulator to deal with issues such as pricing and access. This however is not to say that competition and sector regulation have opposing goals. On the contrary they both seek to prevent the illegitimate acquisition and exercise of market power and to facilitate the efficient allocation of resources. Where free and unrestricted competition is unlikely to produce this result, it is generally recognised that some sort of regulation is appropriate, either:
  - 43.1. A full substitute for competition (regulated monopoly); or
  - 43.2. A means for establishing a sustainable framework within which effective competition can take place, or a means of 'holding the fort' until the anticipated arrival of competition.
44. There is a need to manage the interface between competition policy and sector regulatory policy in a way that recognises their mutually reinforcing nature and optimises economic welfare through constant engagements and advocacy amongst sector regulators and competition authorities.