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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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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

**UNITED NATIONS CONFERENCE ON TRADE AND
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competition commission
south africa

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Institutions for competition regulation

- The Competition Act (as amended) was introduced in 1998 and became operational on 1 September 1999
- The Competition Act created three independent juristic persons to form the regulatory institutions: Competition Commission of South Africa (CCSA), Competition Tribunal and the Competition Appeal Court
 - **Competition Commission (CCSA)** – investigative and prosecutorial arm
 - **Competition Tribunal (Tribunal)** – adjudicative arm which reviews decisions of the CCSA and is the decision-maker in large mergers
 - **Competition Appeal Court (CAC)** – a high court which hears appeals and reviews decisions of the Tribunal and is the last court of instance in competition-related matters with the Constitutional Court remaining the highest court in South Africa in relation to constitutional matters
- Before the Competition Act of 1998, competition regulation was an in-house Government function (sactioned market controls and cartels), thereby weak and ineffective

Institutions for competition regulation

Constitutional Court

Appeal of Tribunal decisions

**Competition
Appeal Court**

Appeal of exemptions,
intermediate mergers or non-
referral decisions, defence of
referral decisions

Competition Tribunal

Exemption applications,
complaints and merger
notifications

Competition Commission

Competition Policy in SA

- Prior to democracy government played an extensive role both as economic actor and regulator
- Post democracy in 1994 government undertook various processes including market liberalisation and strengthening institutions
- South African government had state monopolies in sectors such as telecommunications, transportation, utilities and steel manufacturing
- Competition law and policy became instruments of industrial policy to achieve growth and inclusiveness
- The Competition Act:
 - applies to all economic activity, including state monopolies and regulates pricing conduct such as excessive pricing, margin squeeze, predation and price discrimination by all dominant firms and monopolies and refusal to grant access to essential facilities
 - empowers the CCSA to review legislation and public regulations and report to the Minister where any provision engenders anti-competitive behaviour

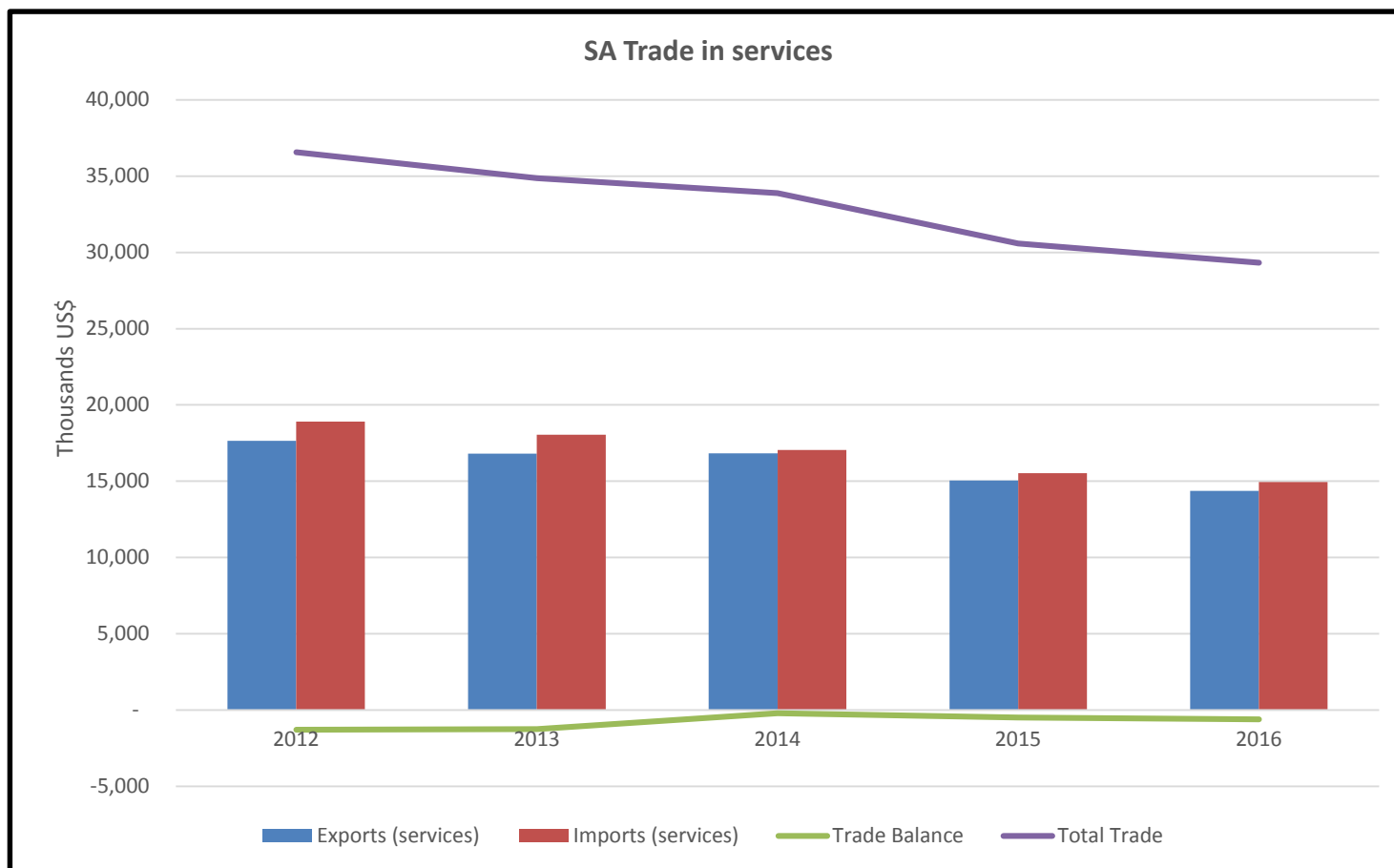
Competition Policy in SA

- Trade in the services sectors such as telecommunications, transportation and utilities are intrinsically linked to the success of an economy
- Even post liberalisation some sectors remain natural monopolies such as rail, ports and electricity and are state-owned
- The Competition Act:
 - applies to all economic activity, including state monopolies and regulates pricing conduct such as excessive pricing, margin squeeze, predation and price discrimination by all dominant firms and monopolies and refusal to grant access to essential facilities
 - empowers the CCSA to review legislation and public regulations and report to the Minister where any provision engenders anti-competitive behaviour

Broad institutional arrangements

- 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 not easy
- In the telecoms 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 Chapter VII of the UNCTAD Model Law on Competition (2017)

Services trade in SA (2012-2106)



Some features of the services markets in SA

- Impediments to growth in trade in services include 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 and high barriers to entry
- Promotion of competition and effective regulation of the services sectors is a key industrial tool in ensuring development and growth
- Since its inception, the CCSA has intervened in key services sectors such as telecommunications, financial services, construction and transportation

Interventions in mergers, cartels and abuse of dominance in the services sector over time

2012

Construction – fast track settlement programme

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 textbox 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

Ongoing cases

Private Health Market Inquiry

Public Passenger Transport Market Inquiry

Shipping cartels (cargo)

Forex Banking Cartel

Interventions in services sectors

Telecommunication	Construction	Financial Services	Transport
<ul style="list-style-type: none">•Hunger for spectrum•Consolidation through mergers•Dismantling fixed-line monopoly	<ul style="list-style-type: none">•Construction cartel (Over Eur200m in fines and damages)•Cartels in construction inputs like cement	<ul style="list-style-type: none">•Key sector for growth and market access•Banking Inquiry•Global forex cartel	<ul style="list-style-type: none">•Global shipping liners cartels•Trade of cargo impeded•Key for market access

Interventions in services sectors

- Competition regulation has proved an important instrument within South Africa's industrial policy toolkit to contribute to structural transformation
- Competition Authorities have been able to intervene in markets that are of strategic importance to South Africa's development
- Moreover 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
- CCSA has undertaken enforcement 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 gas and banking.

Way ahead

- 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.
- The CSSA Competition Commission 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
- Intervention into the services sectors has markedly contributed in opening up concentrated markets
- 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

Thank you

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