

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

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South Africa

Background

1. The following note sets out the Competition Commission of South Africa's (the Commission) response to the call by the Organisation of Economic Cooperation and Development (OECD) for written submissions to inform the roundtable discussion on *Independent Sector Regulators* to be held on 2- 6 December 2019.
2. The purpose of the discussion is to exchange experiences on the role and mandate of sector regulators, the functions and policy objectives they pursue and the relationship with competition authorities.

1. Introduction

3. The Commission's mandate as an economy-wide regulator as established in terms of section 19 of the Competition Act 89 of 1998, as amended (Competition Act), is to investigate, control and evaluate restrictive practices, abuse of dominant positions and mergers, with the overall objective of promoting and maintaining competition. Section 21 of the Competition Act outlines the functions of the Commission, which include the responsibility to review legislation and public regulations and to identify any provision in such legislation or regulation that may enable anti-competitive behaviour. Moreover, section 21 (1) (h) of the Competition Act provides that the Commission is responsible to negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector. In addition, the Competition Act, as outlined by section 3 of the Act, applies to all economic activity within, or having an effect within the Republic.
4. The Commission has entered into Memorandums of Understanding (MOUs) with various independent sector regulators in South Africa in order to govern the exercise of their respective mandates. The MOUs are intended to outline the jurisdictions of the competition authorities and the sector-specific regulators and to ensure consistent application of competition law across the various sectors of the economy. They also strengthen enforcement through the exchange of information and the sharing of resources. The MOUs are then published on the national *government gazette*. To date the Commission has entered fourteen (14) MOUs with independent sector regulators in South Africa. The MOUs are normally entered for a fixed duration of five years.
5. This note provides insights into the experiences of the Commission in terms of its cooperation with independent sector regulators by illustrating the Commission's working relationship with independent sector regulators in following sectors: communications, broadcasting and postal services sector, finance, construction and energy.

2. The Communications, Broadcasting and Postal Services Sector

6. Since 2000, the Independent Communications Authority of South Africa (ICASA) is the regulatory authority of the South African communications, broadcasting and postal services sectors established in terms of the Independent Communications Authority of

South Africa Act 13 of 2000, as amended (the ICASA Act).. It develops regulations for these sectors, issues licences to telecommunications and broadcasting service providers, monitors compliance with licensing rules and regulations and manages the radio frequency spectrum licensing process. Its role and mandate are aimed at ensuring that South Africans have access to communication services at affordable prices.¹ It is also mandated to receive and resolve complaints from consumers in South Africa about poor services provided by telecommunications, broadcasting and postal services licensees.

7. ICASA's strategic objectives are to promote competition by implementing measures to facilitate effective, competitive markets in the sector and protect consumers from harmful practices. It aims to create an environment conducive to universal broadband provision and digital broadcasting services.

8. Section 67 of the Electronic Communications Act 36 of 2005, as amended (Electronic Communications Act) creates concurrent jurisdiction between ICASA and the Commission for the regulation of competition matters in the electronic communications, broadcasting and postal services. In terms of section 4(3A)(b) of the ICASA Act, ICASA may conclude a concurrent jurisdiction agreement with any relevant authority or institution.

2.1. Challenges between the regulators

9. The Commission and ICASA entered into an MOU in 2002.² The MOU was entered into in order to establish the manner in which the parties will interact with each other in respect of the investigation, evaluation and analysis of mergers and complaints involving electronic communications, postal and broadcasting matters. Even after the conclusion of the MOU there were challenges with the cooperation and coordination of some activities between the regulators.

Box 1. The Telkom Case

Competition Commission v Telkom (623/2008) [2009] ZASCA 155

The issue of concurrent jurisdiction was tested when Telkom SA Limited (a large telecommunications firm) used this aspect to challenge an abuse of dominance complaint brought in terms of the Competition Act.

In 2009 the Commission referred a complaint against Telkom SA Limited (Telkom) to the Competition Tribunal. The complaint related to Telkom's alleged refusal to lease telecommunication facilities to licensees, excessive pricing and price discrimination. It was alleged that Telkom charged its own value-added network services provider, lower prices than it charged licensees and their customers. It was alleged that Telkom, the sole supplier of backbone and access facilities, could determine and influence their conduct by threatening to withhold telecommunication facilities from licensees.

Telkom sought an order confirming that ICASA had exclusive jurisdiction in relation to allegations of anti-competitive conduct levelled against it. It argued that the conduct which

¹ For more information on ICASA's role and mandate refer to <https://www.icasa.org.za/pages/about-us-1> last accessed on 28 August 2019.

² The MOU is accessible at <http://www.compcom.co.za/wp-content/uploads/2014/09/ICASA.pdf> last accessed on 28 August 2019.

formed the subject of the complaint related to its licences and powers in terms of the Telecommunications Act and fell within the exclusive jurisdiction of ICASA and outside of the jurisdiction of the competition authorities. Since these matters were by their nature disputes between different kinds of licensees, they fell within the exclusive purview of ICASA, the sectoral regulator entrusted with the task of determining such disputes and interpreting the Telecommunications Act.

The dispute was argued before the Supreme Court of Appeal. It found that the Commission and ICASA share jurisdiction and that the competition authorities not only have the required jurisdiction but were also the appropriate authorities to deal with the complaint.

10. Following the decision in the Telkom case, the respective Departments to which the regulators report resolved to amend the Electronic Communications Act and the Competition Act which settled the status quo that the Commission is the primary authority to detect and investigate alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act. ICASA's jurisdiction is confined to procedural and licensing issues in the South African electronic communications sector.

11. Some of the issues which have arisen as a result of the lack of certainty as to concurrent jurisdiction include:

1. Confusion in relation to the deliberation of competition concerns in mergers and acquisitions - In *Telkom SA Soc Limited v Mncube No and Others*³, ICASA approved an application for the transfer of a spectrum license from Neotel to Vodacom and deferred the consideration of competition concerns to the Commission. The court found that ICASA had a statutory obligation to promote competition and its failure to take the competition concerns into consideration was materially influenced by an error of law.
2. Determining appropriate remedies to address the market dominance in the pay-tv market - Between 2012 and 2017, the Commission received various complaints of abuse of dominance against Multichoice and Supersport. Both operate in the pay-TV (subscription) broadcasters' market. The complaints alleged that Multichoice was abusing its dominant position and limiting consumer choice through excessive pricing, a refusal to grant access to an essential facility, inducing a supplier or customer not to deal with a competitor by concluding exclusive agreements with content rights holders and selling goods or services below their marginal or average variable cost. The complaints alleged that Multichoice's premium bouquet of pre-selected channels was excessively priced and that in order to watch premium live sport, consumers were forced to purchase programming that they are not interested in, which Multichoice offers as part of the DStv premium bouquet. In addition, the complaints alleged that broadcasters who compete with Multichoice were being excluded from broadcasting premium sports content acquired by SuperSport because Multichoice currently has exclusive rights to the content through contracts of long duration.⁴ In February 2019 the Commission decided not to refer

³ Case no. 55311/2015. The Judgment is accessible at <http://www.saflii.org/za/cases/ZAGPPHC/2016/93.html> last accessed on 15 October 2019.

⁴ Competition Commission comments on the Discussion Document for the Inquiry into Subscription Television Broadcasting Services, page 3 accessible at

complaints against pay-television operator MultiChoice South Africa (Pty) Ltd (the largest pay-TV broadcaster in South Africa) and its subsidiary SuperSport to the Competition Tribunal because it was of the view that a regulatory intervention by ICASA would be more effective. The Commission found that there is a potential market failure in subscription television in South Africa due to several factors, including a lack of credible competitors to SuperSport for premium sports rights. While the Commission was concerned about the likely market failure, it was of the view that there could be more targeted regulatory interventions to make the market more competitive. In this regard, the Commission took note of ICASA's inquiry into subscription television broadcasting services, which was launched on 26 June 2016 and covered a greater scope than the complaints it received. According to ICASA, the purpose of its inquiry is to, among others, define the relevant wholesale and retail markets or market segments in the subscription television broadcasting, taking into account the relationship and the impact from adjacent markets (i.e. free-to-air broadcasting services) and to determine whether there is effective competition in those relevant markets.

3. In April 2019, ICASA released its Draft Findings Document on "Inquiry into Subscription Television Broadcasting Services." Despite identifying Multichoice as a licensee with significant market power (due to its high market share and the nature of its vertical integration, which it considers to harm competition) it is yet to change its licence terms and conditions. Some of the Commission's recommendations made to remedy competition-related concerns in subscription television markets, have been incorporated in the Draft Findings Document. These remedies include shortening the period of broadcasting agreements that require exclusivity to between 3-5 years and unbundling of sports rights. The Commission continues to contribute to the Inquiry and support the work of ICASA in the pay-tv market.
4. Duplication of market review efforts - both ICASA and the Commission respectively announced in July and August 2017 that they would be conducting inquiries into data prices in South Africa. These inquiries illustrated that there was no coordination between the authorities which led to a duplication of efforts.

2.2. Nature of the relationship

12. The Commission has however continued to work closely with ICASA over the past few years and made inputs on Bills and policies in the South African electronic communications sector that aim to regulate spectrum licensing and the subscription broadcasting services market. The two regulators also share relevant information for case investigations.

13. On 29 August 2019 the Commission signed a revised MOU with ICASA to strengthen their relationship. The revision was due to changes in the respective enabling legislation of the institutions and changes in the operating environment. The MOU boosts bilateral relations on competition law and policy matters between the Commission and ICASA formalising an already existing relationship of mutual cooperation and support.

<https://www.icasa.org.za/uploads/files/Competition-Commission-Submission-on-Discussion-Documents-Inquiry-into-Subscription-TV-Broadcasting-Services.pdf> last accessed on 15 October 2019.

14. It also encompasses cooperation in the exchange of confidential information, the sharing of resources, the establishment of a joint working committees, the manner of consultation, as well as the participation by one regulator in the proceedings of another. The MOU may go some way towards improving coordination, leveraging the complementary functions between the two authorities (i.e. the specialist knowledge of the sector regulator on the one hand and the competition expertise of the competition authority on the other) and ensuring optimal regulatory outcomes.

3. The Financial Sector

15. The primary regulator of the financial sector is the South African Reserve Bank (SARB) which was established by Section 9 of the Currency and Banking Act, 1920 (Act No 31 of 1920) and is governed by the South African Reserve Bank Act, 1989 (Act No 90 of 1989), as amended.

16. The mandate of the SARB is to achieve and maintain price stability in the interest of balanced and sustainable economic growth in South Africa. Price stability is achieved through the setting of an inflation target that serves as a benchmark against which price stability is measured. The achievement of price stability is underpinned by the stability of the financial system and financial markets. For this reason, the SARB is obliged to actively promote financial stability as one of the important determinants of financial system stability.

17. Further, in terms of section 10(1)(c) of the South African Reserve Bank Act, 1989 (Act No 90 of 1989), as amended, the SARB is required to perform such functions, implement such rules and procedures and, in general, take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems. Furthermore, the National Payment System Act 78 of 1998 (NPS Act) provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa.

18. The Commission has not yet established a formal relationship with the SARB in terms of a MOU. However, there is coordination between the regulatory frameworks in which these two institutions' functions are established, and this will be illustrated below.

3.1. The Banking Inquiry

19. In May 2003, a Task Group which comprised of the National Treasury⁵ and the SARB was established to undertake a study on the competitiveness of the South African banking industry.⁶ A report by this Task Group was published in April 2004 and part of its recommendations required the Commission to investigate the possibility of a complex monopoly in the governance and operation of the payments system.

⁵ Important to note is that the National Treasury is not a sector regulator, it is one of the departments in the South African government that is responsible for, among other things, the management of national economic policy, government finances and the preparation of South Africa's annual budget.

⁶ The primary objective of the study was to examine the extent to which competition in the South African banking sector differs from that of industrialized countries. This was done by following the approach of similar studies conducted on industrial countries (for example, The Cruickshank Report in the UK and the Wallis Report in Australia).

20. In response to the Task Group's recommendation, the Commission launched a market inquiry on the 4th of August 2006 into the South African banking industry with a particular focus on the payment system. On the 9th of June 2008, the Commission published its findings and recommendations.

21. One of the key findings of the Banking Inquiry were that the market for the processing of domestic transactions is dominated by three processors, namely: Visa, MasterCard and Bankserv (who is the only local operator). Further, the Banking Inquiry found that shareholders of Bankserv are banks who are competitors largely operating in a concentrated market. In this regard, the Banking Inquiry was concerned that there might be an incentive for the current shareholders to negatively affect the functionality and operation of the banks. Further, the Banking Inquiry was concerned with the exclusion of non-bank participants from full participation in the national payments systems where banks, largely through Bankserv and the Payments Association of South Africa (PASA), are essentially gatekeepers.

22. In addressing the above-mentioned concerns, the Banking Inquiry made the following recommendations:

- The SARB to provide an access regime that includes non-bank providers of payment services so as to allow for their participation in both clearing and settlement activities in appropriate low-value or retail payment streams.
- The membership and governance of PASA should be revised so as to include non-bank participants and governance revision should also allow for the objective application of entry criteria.
- A Payment System Ombudsman should be established that would assess whether or not applications have been fairly dealt with and whether or not participants have been fairly treated in terms of access and the pricing of such access.

23. The above recommendations from the Banking Inquiry sought to improve the competition inherent in the structure, ownership and decision-making of Bankserv. Consequently, this would achieve real benefits to customers through greater access and lower costs.

24. The SARB is largely responsible for the implementation of the above-mentioned recommendations. In this regard, on the 28th of November 2018, the SARB submitted a consultation paper to the Commission in which it required the Commission's input regarding its proposed approach in addressing competition issues raised by the Banking Inquiry in the domestic market for the processing of payments. The Commission has welcomed the SARB's efforts and responded to its consultation paper. However, it is quite concerning that the SARB took more than a decade to consider implementing some of the Banking Inquiry's recommendations.

3.2. The Twin Peaks Model

25. The SARB, responding to a series of events⁷ which included the recommendations made by the Banking Inquiry, established the Twin Peaks model for financial sector regulation. The model was a means to strengthen financial sector stability and regulate the

⁷ These include, among others, the 2008 global financial crisis, African Bank curatorship, household over-indebtedness.

conduct of financial institutions (including banks) in the interest of customers. In June 2011, the Cabinet approved the move towards the model which resulted in the drafting of the Financial Sector Regulation (FSR) Act. On 21 August 2017 the FSR Act was signed into law.

26. The FSR Act gave effect to three important changes to the regulation of our financial sector. First, it gave the SARB an explicit mandate to maintain and enhance financial stability. Second, it created a prudential regulator, the Prudential Authority (PA). The PA is located within the SARB and is responsible for regulating banks, insurers, cooperative financial institutions, financial conglomerates and certain market infrastructures. Third, the FSR Act established a market conduct regulator, the Financial Sector Conduct Authority (FSCA), which is located outside of the SARB.⁸ The FSCA is responsible for market conduct regulation and supervision. FSCA aims to enhance and support the efficiency and integrity of financial markets and to protect financial customers by promoting their fair treatment by financial institutions, as well as providing financial customers with financial education.⁹

Box 2. The Forex Case

The Competition Commission v Bank Of America Merrill Lynch International Limited; BNP Paribas; JP Morgan Chase & Co; JP Morgan Chase Bank N.A; Australia and New Zealand Banking Group Limited; Standard New York Securities Inc; Investec Ltd; Standard Bank of South Africa Limited; Nomura International Plc; Standard Chartered Bank; Credit Suisse Group; Commerzbank Ag; Macquarie Bank Limited; HSBC Bank Plc; Citibank N.A Absa Bank Limited; and Barclays Capital Inc. (Case no. CR212Feb17)

On 01 April 2015, the Commissioner initiated a complaint against the above-mentioned respondents, for directly or indirectly fixing prices in relation to bids, offers and bid-offer spreads in respect of spot trades, forward trades and futures trading in foreign exchange market for the USD/ZAR pair in offshore financial centres.

The Commission's investigation found that, at least between the period 2007 and 2013, the representatives of the respondents engaged in several collusive practices such as manipulating bid and offer prices posted on trading platforms, coordinating trading at a FIX, reserving trade for each other as well as pulling and holding of trade that resulted in fixing prices for bids, offers and bid offer spreads and dividing markets by allocating customers and suppliers in contravention of section 4(1)(b)(i) & (ii) of Competition Act. No 89 of 1998, as amended ("the Act").

These practices were carried out through Bloomberg instant messaging systems as well as telephonic conversations in the form of bilateral and multilateral arrangements. Based on the above, the Commission concluded that the respondents have engaged in conducts that contravenes section 4(1)(b)(i) and (ii) of the Act. Consequently, in April 2015, the Commission referred to the Competition Tribunal ("Tribunal") for prosecution a case of price fixing and market allocation in the trading of foreign currency pairs involving the South African Rand (ZAR). This case has since been under the Tribunal's consideration.

⁸ See <https://www.resbank.co.za/PrudentialAuthority/Pages/default.aspx>

⁹ See <https://www.fsca.co.za/Pages/Vision-and-Mission.aspx>

3.3. The Forex Case

27. At the time of the launch of the Commission's investigation, a joint SARB and Financial Services Board (FSB)¹⁰ process was already underway to review foreign exchange operations of authorized foreign exchange dealers in the domestic market. This review was not informed by any allegations or whistleblowing but represented a proactive step on the part of the authorities in response to various other investigations that were being undertaken by international regulators.

28. The objective of the review was to establish whether there was any misconduct in the South African foreign exchange market, and to put forward recommendations on how foreign exchange trading practices could be strengthened to enhance the efficiency, integrity and credibility of the local foreign exchange market.

29. Contradictory to the findings of the Commission, the review found no evidence of serious and widespread misconduct in the South African foreign exchange market but saw scope for the improvement in overall market conduct. However, the review stated that should any irregularities be revealed as part of the Commission's investigation, which link violations in other international financial centres to operations of local authorised dealers, the matters would be followed up and appropriate action would be taken by regulators.

30. *The Financial System Council of Regulators (FSCR)*

31. The Commission is part of the FSCR where it is given a mandate to contribute and provide guidance on matters related to competition in financial markets. The FSCR is basically a forum in which senior officials of the financial sector regulators can address industry-wide concerns and ensure that there is consistency in action between the financial sector regulators.

32. *Nature of the relationships*

33. The Commission enjoys a relatively good relationship with most of the regulators in the financial sector and continues to engage with them on a number of matters including policy changes and developments and providing training in relation to aspects of competition. It also notable that many of the regulators have in the past years been engaging with the findings and recommendations of the Commission based on various interventions.

4. The Construction Sector

34. The Construction Industry Development Board (CIDB) was established in terms of the Construction Industry Development Board Act of 2000 (CIDB Act), in order implement an integrated strategy for the reconstruction, growth and development of the construction industry. The CIDB Act, also recognises the Government's vision of a construction industry development strategy that promotes stability, fosters economic growth and international competitiveness, creates sustainable employment and addresses historical imbalances as it generates new construction industry capacity. The CIDB is required to keep a national register of contactors to facilitate public sector procurement and promote

10 The FSB is the former Financial Sector Conduct Authority (FSCA). It was responsible for the supervision and regulation of non-bank financial services in the interest of the public. It was dissolved in 2018 subsequent to the implementation of the twin peaks model which gave rise to the establishment of the FSCA and the prudential regulator, Prudential Authority (PA).

contractor development, through measures provided by the CIDB Act; support risk management in the tendering process; reduce the administration burden associated with the award of contracts; reduce tendering costs to both clients and contractors; enable effective access by the emerging sector to work and development opportunity; assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors; regulate the behaviour and promote minimum standards and best practice of contractors; store and provide data on the size and distribution of contractors operating within the industry and the volume, nature, performance and development of contractors and target groups; and enable access by the private sector and thus also facilitate private sector procurement.

35. The Commission has established relationship with the CIDB. In June 2016, the Commission entered into a MOU with the CIDB in order to i) establish a formal basis for co-operative governance in the exercise of jurisdiction over competition matters within the construction industry; ii) manage areas of concurrent jurisdiction over prohibited practices; and iii) provide for the exchange of information and the protection of confidential information.¹¹

36. There are also various CIDB standards and regulations to give effect to the CIDB Act including the Standard of Developing Skills through Infrastructure Contracts (2013), Standard for Indirect Targeting for Enterprise Development through Construction Works Contracts (2013), Standard for Uniformity in Construction Procurement (2010), Code of Conduct for all parties involved in construction procurement (2003) and Construction Industry Development Regulations 2004 (as amended) (CIDB Regulations).

4.1. CIDB Grading System

37. The Commission conducted a study into the competitive impact of the grading and rating system of the CIDB which uncovered that indeed there were various competition issues as a result of the CIDB grading system.¹² The study found that the CIDB aided and abated the collusive conduct in the construction sector. It appeared that all the construction firms that were found to have cartelised the sector were Grade 9 listed in terms of the CIDB rating system, but most black-owned firms did not qualify for this rating. Another issue uncovered by the Commission was that the CIDB board that was mandated to monitor the conduct of players in the sector and issue fines where appropriate.

38. Consequently, the Commission considered its options to increase the level of competition in the sector. It decided to conduct two programmes simultaneously, through enforcement and prosecutions of cartelists and advocacy. As part of its advocacy programme, the Commission engaged with the Department of Public Works (the CIDB's executive authority) to change the composition of the CIDB board and its rating system. The Commission was also instrumental in the development of the Certificate of Independent Determination, which is now a prerequisite document for all firms filing bids across all spheres of government. The implication is that if the certificate is not completed it renders the bid invalid. The objective of the certificate is for bidders to declare upfront that they have not communicated with each other on price and the tender requirements prior to submitting a bid. If bidders refuse to sign the certificate it may alert the Commission to

11 MOU between the Commission and CIDB accessible here: <http://www.compcom.co.za/wp-content/uploads/2016/05/MOU-CC-CIDB-Signed.pdf>

12 A CIDB grade is determined by the contractor's financial capability and work capability.

investigate the implicated firms. It also introduces a means to prosecute firms. Bidders who file the certificate could be liable for perjury if found to have been involved in collusive conduct. Bidders now have a responsibility of bidding competitively and not to engage in bid rigging.

39. The purpose of the certificate was therefore a deterrence tool or preventative measure to use before the conduct had transpired. In advancing its advocacy role, the Commission lobbied National Treasury to make use of the certificate. Following the advocacy, National Treasury issued a proclamation to codify the certificate as a binding legal document in July 2010.

4.2. Voluntary Rebuild Programme

40. Another notable collaboration was when the Commission together with the South African government signed a Voluntary Rebuild Programme (VRP) with six of the fifteen construction firms that were involved in the collusion uncovered by the Commission in the construction industry. This came as a result of an investigation initiated by the Commission in 2009, which uncovered a large number of instances of collusive tendering that was prevalent in the construction sector. In response to this conduct, in 2011 the Commission developed the Construction Fast Track Settlement Process (“Fast Track Settlement”) and invited firms to settle matters for the contraventions of the Act in accordance with the Commission’s Corporate Leniency Policy (CLP). Consequently, in 2013 the Commission settled with 13 of the 21 construction firms that were found liable under the Fast Track Settlement.

41. A second phase of investigation was conducted by the Commission. This investigation was against firms that did not participate in the Fast Track Settlement but were implicated by other firms that participated, firms that participated in the Fast Track Settlement for certain projects but declined regarding other projects wherein they were implicated, and firms that participated in the Fast Track Settlement but refused to settle for projects they themselves disclosed in their Fast Track Settlement applications. This resulted in a second phase of the settlement programme, in which the Commission settled with nine firms.

42. This enforcement work by the Commission culminated in the above-mentioned VRP which seeks to create opportunities for emerging black contractors. The six companies included Aveng (Africa) Pty Limited, Raubex Pty Limited, Steffanutti Stocks Holdings Limited, WBHO Construction Pty Limited, Basil Read Holdings Pty Limited and Group Five Limited. In order to ensure compliance to the VRP agreement, the CIDB and the Presidential Infrastructure Coordinating Commission play a monitoring role by ensuring that the companies comply with their obligations under the agreement. Moreover, the companies have an obligation to report progress to the CIDB.

43. However, due to differences in the regulatory framework, the VRP prevented CIDB from prosecuting the firms in terms of their regulations. As a result, CIDB reached a separate independent agreement with the firms in terms of which the CIDB withdrew its disciplinary proceedings against them. The agreement between the CIDB and the construction companies obliges the companies to comply with their obligations as assumed under the VRP Agreement, to additionally withdraw their high court applications for review of the CIDB legislative framework, and to contribute the costs incurred by the CIDB and the Minister of Public Works for the court proceedings.

44. *CBE Exemption Application*

45. Further on the collaboration challenges between the Commission and the independent regulators in the construction sector, it has come to light that there are further regulations in the sector that promote anti-competitive behaviour in nature. This is evident in the exemption applications by the Council for Built Environment (CBE).¹³ The Commission received six (6) exemption applications from the as well as the CBE on behalf of its six (6) member councils, namely, the South African Council for the Architectural Profession (SACAP); the Engineering Council of South Africa (ECSA); the South African Council for the Quantity Surveying Profession (SACQSP); South African Council for Property Valuers Profession (SACPVP); the South African Council for the Landscape Architectural Profession (SACLAP); and the South African Council for the Project and Construction Management Professions (SACPCMS).

46. The exemption applications sought the Commission to exempt the rules of the professional councils relating to what is referred to in the built environment as the 'Identification of Work' (the IDOW rules) from the provisions of the Competition Act. The IDOW rules provide for the reservation of work for registered professionals with a certain level of competency, skills and academic qualification in their respective professions. According to the CBE the IDOW rules are necessary to maintain professional standards and to protect consumers from health, safety and financial risks associated with work performed by professionals.

47. In 2016, the Commission published a government gazette notice (Notice: 39630, 32 of 2016) of its decision to reject the exemption applications of the IDOW rules filed. The purposes of the IDOW rules as presented by the respective councils in the exemption application was to regulate work which persons can undertake based on their academic qualifications, skills and competencies. The Commission's rejection sited the following key concerns regarding the IDOW rules:

- IDOW rules had created different categories of registration and allocates work to those categories. For example, the IDOW rules make provision for different categories of registrations such as Professional Engineers or Architects, Technologist and Draughtspersons and allocates work which can be done by each category. This means that Technologists and Draughtspersons could not undertake work outside their area of registration, even when they are competent to do such work.
- IDOW is an exclusionary practice and contravenes the Competition Act. IDOW places restrictions by differentiating between registered and unregistered architectural and engineering professionals.
- The Commission's research at the time showed that even though even though the National Engineering Skills Survey registered 120,000 professionals, only 40,000 were registered with ECSA. Hence, an estimated 60% of the engineering professionals would not be able to practice under IDOW.
- In respect of SACAP, approximately 9,634 architects were registered with 3,976 being unregistered and representing about 29% of the professional architects' market. Given the general consensus in the market, that the demand for architects

¹³ The Council for Built Environment is a statutory body established under the Council for the Built Environment Act 43 of 2000. It is an overarching body that coordinates six councils for the built environment professions – Architecture, Engineering, Landscape Architects, Project and Construction Management, Property Valuation, and Quantity Surveying.

far exceeds the supply, the planned IDOW would put further pressure on consumers and pricing for services rendered.

48. The Commission found that the restrictions imposed by the IDOW rules have some element of market allocation i.e. by creating different categories of registrations, the IDOW rules would divide the market by allocating suppliers of different services within the built environment industry.

49. Of significance was the highlight by the Commission that, market allocation as a result of the IDOW rules not only impacts the professionals, but also consumers of those services, given that the number of service providers would be limited, resulting in high demand and less supply, therefore higher prices as well as a limited choice to consumers. Moreover, the exclusion of Technologists and Draughtspersons was not based on their level of competency or skills, but rather because they were not registered as Professional Engineers or Architects.

50. The Commission continues to engage with the CBE and its member councils in relation to the IDOW rules and their use application in the various professions. Part of the issue that the regulators are trying to resolve relates to the conflict in the empowering legislations of both regulators. The Commission has received varying levels of acceptance and compliance from the councils and has thus not been able to resolve these issues fully. The Commission also continues to receive complaints from consumers and participants in the sector related the effects of these rules. This remains an area of great importance which the Commission hopes to resolve through its advocacy with the CBE.

5. The Energy Sector

51. NERSA is a regulatory authority established as a juristic person in terms of section 3 of the National Energy Regulator Act (2004), its mandate it to regulate the electricity, piped-gas, and petroleum pipeline industries in terms of the Electricity Regulation Act, No.4 of 2006, the Gas Act, No.48 of 2001, and the Petroleum Pipelines Act, No.60 of 2003.

52. NERSA's mission is to regulate the energy industry in accordance with government laws and policies, standards and international best practices in support of sustainable and orderly development. Moreover, NERSA is required, in terms of section 4(j) of the Gas Act and section 4(i) of the Petroleum Pipelines Act, to promote competition in the gas and petroleum pipelines industries.

53. The relationship between the Commission and NERSA dates back to the early 2000s when the Commission entered into the MOU with the then National Electricity Regulator (NER) (subsequently NERSA) in October 2002. This came due the expected impact, at the time, by the changes that were being implemented in the electricity supply industry. These changes were for the introduction of competition in the electricity generation sector, the establishment of a separate power exchange to facilitate competition, amongst others.

54. *LPG Inquiry*

55. In the recent years the Commission conducted a market inquiry into the supply and distribution of liquefied petroleum gas (LPG) in South Africa. The inquiry was completed on 28 April 2017. Amongst others, the LPG Market Inquiry found several features of the market that prevent, restrict and distort competition in the LPG market. And so, the inquiry recommended a number of measures to address these findings and some of the

recommendations were directed to NERSA. This therefore required the use of the established relationship between the Commission and NERSA.

56. The key findings of the inquiry include high concentration whereby only five refineries operate, (price and non-price) regulatory framework issues, limited domestic supply, long-term supply agreements, distortions to competition in the sale of LPG through cylinders, and the high cost of switching within the bulk LPG segment.

57. The recommendations from the LPG inquiry are the subject matter of further advocacy in order to drive to their implementation. The advocacy is carried out through engagements with all the identified relevant stakeholders, including the large refineries and wholesalers, the regulatory bodies such as the Transnet National Ports Authority (TNPA), Department of Energy (DoE), and the National Energy Regulator (NERSA).

58. The inquiry recommendations that pertain to NERSA governance brought to light the need for active and functioning relations between the Commission and NERSA. To date NERSA has not implemented the recommendations of the inquiry. Part of the reason this could be the case is that there has not been meaningful engagement between the regulators to date. In this regard, this pointed to the need to revisit the terms of the relationship and engagement of between the Commission and NERSA. As part of trying to resolve this gap the regulators are in the process of reviewing their existing MOU in order to redetermine the terms of engagement. The engagement between the regulators at this stage is largely informal and on a case by case basis.

59. However, there has been issues of concurrent jurisdiction where the Commission receives complaint cases that include matters that need to be resolved by NERSA but instead are grouped with the competition issues that fall under the jurisdiction of the Commission. An example of such a scenario is a case involving an LPG import facility operator, Sunrise Energy (Sunrise) and an LPG importer and distributor, Southern Energy Trading (SET). In this case, SET accused Sunrise of granting its competitor exclusivity over approximately two-thirds of the storage capacity of the terminal for an indefinite period (exclusivity allegation) as well as affording them better pricing and more favourable terms and condition for the use of the LPG import facility. There was concurrent jurisdiction with NERSA on both of these allegations. However, NERSA chose not to investigate the case.

60. Moreover, there still exist an issue of anticompetitive regulations on the part of NERSA, particularly in regard to the creation of barriers to entry and long-term contracts pertaining to the LPG sector.

61. The Commission continues to engage with the regulator in an attempt to resolve these and other aspects based on the recommendations from the inquiry as well as cases that the Commission continues to receive in the LPG sector.

Box 3. The LPG Case

Avedia v Sunrise (Case No: 2019Jul0048)

In 2010, the Transnet National Ports Authority (TNPA) issued an invitation to interested parties to submit an expression of interest (“EOI”) for the funding, construction, installation, maintenance and operation of an LPG import facility at Saldanha Bay. Avedia and Sunrise each submitted an EOI. Thereafter, in December 2010, the TNPA issued a request for proposals (“RFP”), which was subsequently amended and re-issued in February

2011. In June 2011, Sunrise re-submitted its proposal to the TNPA for constructing the loading facility, comprising a central buoy mooring located offshore, which was to be connected to an undersea pipeline and LPG storage facility. This was done after Sunrise obtained a licence from NERSA on 23 February 2011. Avedia did not submit a proposal, and it was only granted the two licences by NERSA on 1 July 2014.

In January 2012, the TNPA announced that Sunrise was the preferred bidder. Avedia did not submit a proposal since its business model did not cater for such a process; rather, it operated based on the “build, own, operate, transfer” (“BOOT”) model. Avedia did not intend to construct a berthing facility. It had intended building an LPG storage facility near the port.

On 3 June 2013, TNPA awarded an exclusive tender (concession agreement) to Sunrise based on the process outlined in Section 56 of the Ports Act. At the same time, Sunrise sold the land on which it intended to construct the storage facility to the TNPA, and NERSA amended Sunrise’s construction licence.

In opposition to the awarding of the concession agreement, Avedia complained that the exclusivity agreement signed by Sunrise and TNPA constrained any other market players that wanted to establish operations at Saldanha’s port terminal. In effect, it maintained that this import facility was destined to operate as a regulated import terminal monopoly. Avedia appealed to have Sunrise’s terminal operating licence set aside by the Port Regulator, based on Sections 20(1)(e), (j), (k), (l) and (n) of the Petroleum Pipelines Act, under which common user access was allowed to the loading facility and pipeline in addition to uncommitted capacity for storage facilities, interconnection with the facilities of other licensees based on technical feasibility and costs paid by the user. Considering this, the Port Regulator found that the Section 56 concession TPNA had granted to Sunrise contravened the National Ports Act and the Petroleum Pipelines Act and declared their agreement null and void. Consequently, Sunrise had to delay its construction process at Saldanha.

In August 2015, Sunrise and the TNPA separately applied for the Port Regulator’s decision to be reviewed by the High Court of South Africa (“the Court”). The Court found that the Port Regulator had failed to apply the principles of interpretation to interpret the meaning of ‘port user’ in the National Ports Act. The Court noted that the Port Regulator was not supposed to have considered Avedia’s licences in its ruling, as NERSA only granted Avedia the licences after the ruling had been delivered. The issue of where the inter-connection was to take place was to be dealt with by NERSA in the exercise of its mediation and/or arbitration powers. Avedia was unaffected by the concession agreement concluded as it had not competed in the relevant tender process and NERSA had not granted any licences at the time. In light of the above, the Court dismissed the ruling of the Port Regulator and ruled in favour of Sunrise and the TNPA on 20 September 2016.

The Saldanha Bay import facility developments illustrate the impact of the regulatory barriers and the lack of synchronisation of the TNPA and NERSA processes which led to protracted legal challenges. Due to legal challenges, it has taken almost seven years for the Sunrise port terminal development in Saldanha Bay to be completed. This indicates that the bidding process can be lengthy and can lead to delays in constructing port terminals. In addition, it appears that the regulatory hurdles create an environment not conducive to the effective and efficient construction of an import terminal and/or loading facilities. The necessary processes are not synchronised amongst the regulators in terms of jurisdictions

and this creates uncertainty in the market. This matter requires immediate intervention to resolve the challenges highlighted above.

6. Conclusion

62. The Commission's experience demonstrates the complementarity of competition policy and industrial policy in the regulation of South African markets, highlighting the need for both *competition policy* and sector regulation in South African markets. This paper exposes the challenges and lessons revealed from the case studies. Even after the conclusion of the MOUs there were challenges with the cooperation and coordination of some activities between the regulators.

63. The case study of the Commission's relationship with ICASA reveals issues that have arisen as a result of the lack of certainty as to the roles of each regulator in the situation of concurrent jurisdiction. These include confusion in relation to the deliberation of competition concerns in mergers and acquisitions, determining appropriate remedies to address market dominance in the pay-tv market and a duplication of market review efforts. In the case of the Commission's relationship with financial sector regulators (SARB), there is room for improvement in their coordination and efficient implementation of the Banking Market Inquiry outcomes and contradictory findings of forex transgressors to address competition concerns. However, there is a notably good relationship in this sector as the regulators have taken a better stance of engage the Commission and competition issues in their recent policy amendments.

64. A notable collaboration is in the case of the CIDB, which resulted in new measures being introduced in its bidding system (i.e. certificate) and the VRP initiative that settled disputes relating to cartel conduct in the construction industry. However, due to differences in approach to prosecute the signatories of the VRP for their involvement in the cartel, competition and disciplinary proceedings were withdrawn against them. Further engagements between the Commission and IDOW are necessary. In the energy sector, the paper reveals that despite the Commission's engagements with NERSA on its LPG market inquiry findings, NERSA is yet to implement the recommendations. There are also challenges of concurrent jurisdiction arising in complaint matters received by the Commission that include issues that need to be resolved by NERSA. In some cases, NERSA has chosen not to investigate.

65. These case studies reveal a lack of clarity on the exercise of concurrent jurisdiction between the Commission and independent sector regulators, opposing legislative mandates and in some cases, a lack of will to cooperate and interact with each other. More competitive outcomes through continued co-operation and improved relations between the Commission and independent sector regulators is expected.