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**USING MARKET STUDIES TO TACKLE EMERGING COMPETITION ISSUES –Contribution
from South Africa**

- Session IV -

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More documentation related to this discussion can be found at: oe.cd/mstei.

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Using market studies to tackle emerging competition issues

- Contribution from South Africa –

1. Introduction

1. The Competition Act, as amended, empowers the Competition Commission South Africa (CCSA) to conduct market inquiries into the general state of competition in any industry or market. Market inquiries are different from investigations in that, while investigations target specified firms engaged in specified anti-competitive conduct, market inquiries look into any feature or combination of features in a market which may have the effect of distorting or restricting competition – without targeting any single firm.
2. The market inquiries are initiated with aim of uncovering competition concerns in those markets and coming up with appropriate recommendations for remedies, and policy reforms to restore competition. This allows the CCSA to make evidence-based recommendations which would remedy, mitigate or prevent adverse effect on competition.
3. This review provides the South African experience regarding the use of market studies to address emerging competition issues.

2. Legislative Framework – Market Inquiries

4. Following the election of the first democratic government of South Africa, the promulgation and amendments of legislative instruments were reflective of the desire by government to utilise the law to, amongst other things, redress imbalances created by past racial exclusions in South Africa. The Competition Act, passed for the first time in 1998, formed part of the pool of transformative legislation within the new democratic dispensation, with the enforcement institutions namely, the CCSA, Competition Tribunal (CT) and Competition Appeal Court (CAC) being established and opening their doors in 1999.
5. Prior to 2013, the Competition Act did not encompass specific market inquiry provisions. However, Section 21 of the Competition act, included a provision which includes the responsibility to “*implement measures to increase market transparency.*”¹ This provision, enabled the CCSA to undertake its first market inquiry in 2006 into the banking sector. At the time, there were various concerns regarding the oligopolistic structure of the sector, the payment system by would-be service providers and charges levied by banks for payment of transactions. These impacted on access to competitive banking services for South African consumers, particularly low-income consumers.
6. It is the amendments to the Competition Act in 2013 that first introduced specific provisions for market inquiries. Further amendments to the Competition Act in 2018 included amendments to the market inquiry provisions.

¹ Section 21(a) of the Competition Act.

3. Initiating Market Inquiries and Factors to Determine

7. A "**market inquiry**" means a formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm. The CCSA acting within its functions set out in section 21(1) Act and on its own initiative; or through the request from the Ministry of Trade, Industry and Competition, may initiate an inquiry, *if it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition within that market; or to achieve the purposes of this Competition Act.*

8. The CCSA is required to within 20 business days before the commencement of a market inquiry, publish a notice in the Gazette announcing the establishment of the market inquiry, setting out the **Terms of Reference**, which should include – statement of the scope of the inquiry, timeframes and an invitation to members of the public to provide information to the market inquiry.

9. The CCSA is required to determine several factors when conducting a market inquiry. These include whether any feature, including the structure and levels of concentration – of each relevant market for any goods or services impedes, restricts or distorts competition within that market.

10. The analysis must also have regard to the impact of the adverse effect on competition on small and medium businesses or firms controlled or owned by historically disadvantaged persons. An adverse effect on competition in any market is determined in reference to the following factors:

- The structure of that market,
- The level and trends of concentration and ownership in the market,
- Barriers to entry, regulation and instruments in place to foster transformation in that market, and
- Past or current advantage not due to the respondent firms' own commercial efforts or investment e.g. direct state support.

4. Outcomes of a Market Inquiry

11. At the conclusion of the inquiry, the CCSA must publish a report of the inquiry in the Gazette to inform all stakeholders of the outcomes and findings of the inquiry. The same report must also be submitted to the ministry of Trade, Industry and Competition with or without recommendations. Recommendations may include those for new or amended policy, legislation or regulations; and to other regulatory authorities in respect of competition matters.

12. On the basis of information obtained during a market inquiry, the CCSA may also, initiate a complaint and enter into a settlement through a consent order with any respondent firm, with or without conducting any further investigation, or may initiate a complaint against any firm for further investigation. The CCSA may also initiate and refer a complaint directly to the Competition Tribunal for prosecution without further investigation, provided that there is sufficient information to prosecute the case.

13. Lastly, the CCSA may take any other action within its powers in terms of the Competition Act, that is recommended in the report of the market inquiry or take no further action. These recommendations are binding unless otherwise contested through judicial processes.

5. Market Inquiries conducted by the CCSA

14. To date, the CCSA has initiated and conducted **six (6)** market inquiries into the following sectors, **five (5)** of which have been completed.

- **Banking Inquiry** (2006 – 2008) which was initiated in terms of Section 21 general provisions. The study assessed the level and structure of charges made by banks, as well as by other providers of payment services, including the relation between the costs of providing retail banking and/or payment services and the charges for such services, and the process by which charges are set and the level and scope of existing and potential competition in this regard.

Box 1. Key lessons from the Banking Inquiry

1. The Inquiry was the first conducted within the general provisions of the Act.
2. The process was largely voluntary, and a lot of cooperation was received from industry players throughout the process.
3. The interaction with regulators and relevant departments during the period of determining findings and recommendations is essential for buy-in. Several recommendations were not taken through by the sector regulators, thus delaying the envisaged reforms recommended by the inquiry.
4. Recommendations which were adopted, enabled increased competition in relation to the banking solutions offered, in terms of products and services to low-income markets (previously unbanked) but also overall reduction in the cost of transactions.

- **Private Healthcare Market Inquiry** (2013 – 2019) which was initiated in terms of the 2013 amendments, assessed the costs of private healthcare, which were increasing substantially overtime. The study found that the healthcare market is characterised by high costs, due to a highly concentrated funders and facilities (hospital) markets, disempowered and uninformed consumers, a general absence of value-based purchasing, practitioners who are subject to little regulation and failures of accountability at many levels. The report recommended several regulatory reforms, to enable a more competitive private healthcare market which should translate into lower costs and prices, more value-for-money for consumers and should promote innovation in the delivery and funding of healthcare. These recommendations came in at an opportune time as the country was transitioning to implement a National Health Insurance, to achieve universal health coverage.

Box 2. Key lessons from the Healthcare Market Inquiry

1. The duration of the market inquiry was long which was reflected in the budget of approximately ZAR 200 million (approximately EUR 9 614 551 million).
2. The inquiry engaged an external panel, led by former Chief Justice, for technical and decision-making purposes which led to significant delays and cost. The expertise and independence of engaging an external inquiry was important as the process gained credibility and corporation from the industry stakeholders.
3. The evidence produced from the market inquiry was the first comprehensive in the private health sector, but also provided critical evidence to support the envisaged health sector reform, towards universal health coverage.
4. Interactions with other regulators is necessary in order to get the right buy-in where regulators have to implement remedies/recommendations stemming from an inquiry.

- **Liquefied Petroleum Gas (LPG) Market Inquiry** (2014 – 2017) which was initiated in terms of the 2013 amendments. The study found structural features of the market and high switching costs, and a regulatory environment which impacted on competition. The limited usage of LPG at the household level (energy mix), was found to be a significant constraint given the current energy crises that the country faces.

Box 3. Key lessons from the LPG Inquiry

1. The inquiry encompassed internal staff members, it was undertaken in a short period of time and the budget was relatively low.
2. The key stakeholders in the inquiry were the sector regulator NERSA and the Department of Energy to whom most of the remedies were directed. There were ministerial changes with the department made finalising recommendations difficult along with getting buy-in from the sector regulator.
3. The limited participation by the Department of Energy and some market participants impacted the workability of remedies.

- **Grocery Retail Market Inquiry** (2015 – 2019) which was initiated in terms of the 2013 amendments. The Inquiry found that the formalised grocery retail market was concentrated and that this was perpetuated through exclusive leases with shopping malls and superior rebates resulting from buyer power of the four large national chains. The Inquiry recommended that exclusive leases be phased out, with an immediate cessation in the enforcement of such leases as against Small and Medium Enterprises (SMEs) and speciality stores nationally, as well as all grocery retailers in non-urban areas. The Inquiry also recommended that no exclusivity be included in future leases or renews of existing leases. For the remaining urban shopping malls, the inquiry recommended that provisions against other grocery retailers be phased out over 5 years. In respect of supplier rebates, the Inquiry recommended that large suppliers sign up to a Code of Conduct which ensures that

all rebates have an objective justification and that they are available to all retailers, including smaller retailers and the buying groups that support them.

Box 4. Key lessons from the Grocery Retail Market Inquiry

1. This has been the most impactful in that it enabled the establishment of an intergovernmental committee to enable policy reforms that restore competition in the grocery retail sector, and a government response in relation to implementation of the inquiry recommendations to enable a coordinated policy response.
2. The CCSA was able to secure settlement agreements with the major retail stores to do away with exclusivity provisions in the lease agreement with property development companies, as well as buy-in with regard to broader reforms, for a code of conduct to transform the anticompetitive discriminatory trading practices that favour larger firms to the exclusion of SMMEs.
3. These reforms were not achievable with the previous individual case investigations against the retail industry firms.

- **Data Services Market Inquiry** (mobile telecommunications) (2017 – 2019) which was initiated in terms of the 2013 amendments. The inquiry assessed mobile data prices in South Africa, which were found to be both high and structurally anti-poor insofar as smaller volume bundles were priced inexplicably higher on a per MB basis compared to larger bundles. The Mobile Network Operators recently undertook to implement the following: reductions of data costs by up to 50%, provide lifeline data and zero rating of data for public interest organizations, such as education, healthcare. These undertakings are important at a time where economies are transitioning to operate digitally, due to COVID19. The commitments by mobile data service providers to reduce data costs in South Africa will save consumers over ZAR 3 billion annually.

Box 5. Key lessons from the data services market Inquiry

1. Stakeholder engagements at public hearing through presentations by the CEOs of the mobile network operators were critical in setting the tone of discourse in the inquiry.
2. Undertaking a situational analysis and public consultation prior to initiating the inquiry proved useful considering the amendments to the Competition Act, in terms of timelines and the binding nature of the recommended remedies.
3. Interactions with other regulators is necessary in order to get the right buy-in where regulators have to implement remedies/recommendations stemming from an inquiry.
4. Given the amendments to the Competition Act and the binding nature of remedies, it was expected that the inquiry will be subject to litigation, requiring legal expertise from initiation to conclusion. However, to date, there has been cooperation from the industry, which resulted in several settlement agreements.

- **Land-Based Public Transportation Market Inquiry** (2017 and on-going) which was initiated in terms of the 2013 amendments. The terms of reference for this study covered broadly price setting mechanisms, route allocation, licensing and entry regulations, allocation of operational subsidies and planning; and various issues of transformation in the land-based public passenger transport industry. The CCSA issued provisional reports with preliminary findings and recommendations for public comments and stakeholder comments, to test these with the stakeholders. The final report which incorporates these comments is due to be published at the end of 2020.

6. How effective is this tool against traditional Antitrust tools?

15. Under the Competition Act, the CCSA undertakes its functions through 4 main pillars:

- **Enforcement** – cartel, abuse of dominance, restrictive vertical practices investigations and applications for exemptions;
- **Mergers and acquisitions;**
- **Market inquiries;**
- **Advocacy** – case or sector specific advocacy, public awareness, stakeholder engagements and policy/legislative reviews.

16. Market inquiries therefore form part of the enforcement tools available to the CCSA in carrying out its mandate. The determination of which enforcement tool is appropriate for the CCSA to use in intervening in markets depends upon multiple factors.

17. As part of focusing on impact and the efficient allocation of its resources the CCSA developed a prioritisation framework in January 2008. The CCSA's criteria for prioritisation includes: *impact on consumers, especially the poor and marginalised, alignment with government's economic growth and development objectives, and prevalence of anti-competitive conduct in the economy*. Thus, in refining its prioritisation framework within the context of the criteria above, the CCSA identified priority sectors in which it focuses its enforcement activities, namely:

- Food and agro-processing;
- Construction and infrastructure;
- Intermediate industrial products;
- Healthcare;
- Telecommunications;
- Energy;
- Financial services.

18. Therefore, in terms of the Competition Act, the CCSA may receive complaints alleging cartel conduct, abuse of dominance and/or restrictive vertical practices which it must investigate. It may receive a merger transaction which it must investigate. Concerns of anticompetitive conduct in specific sectors may be indicative of broader issues within the sector that may warrant wider inquisitorial processes under the market inquiry provisions, contrasted with looking at firm-specific conduct.

19. All these factors therefore determine which tools become appropriate for intervention. Further, where a market inquiry is informed by multiple complaints within a specific sector, this process can run in conjunction with other enforcement actions against named firms. This has in fact occurred in relation to firms affected by the CCSA's market inquiry into land-based public transportation where a separate investigation into alleged abuse of dominance was conducted in parallel to the market inquiry and subsequently referred to the Competition Tribunal.²

7. Stakeholder advocacy and Interplay with Sectoral Regulations

20. Given the voluntary nature of market inquiries (although the CCSA can issue summons to stakeholders) it is important that industry participants, firms government and sector regulators alike, buy into the market inquiry processes for them to be effective. This invariably includes the implementation of recommendations and/or remedies from market inquiries. Further, given the dynamic nature of markets, it is important that recommendations/remedies issued under market inquiries are not overtaken by market and regulatory developments due to the duration of a market inquiry.

21. The CCSA's processes further allow for comment and input from stakeholders in its provisional reports which sets out preliminary findings and recommendations stemming from the market inquiry. It is in these processes that recommendations/remedies are tested and refined where necessary. These also enables obtaining buy-in before the final recommendations are crafted.

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

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

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

² <http://www.compcom.co.za/wp-content/uploads/2020/02/THE-COMPETITION-COMMISSION-PROSECUTES-PRASA-FOR-ABUSE-OF-DOMINANCE-10-Feb.pdf>.

25. The import of the above legislative provisions is the recognition that competition regulation forms part of the toolbox of regulation within the economy. Therefore, in order for the CCSA to be effective, there needs to be overall buy-in by all stakeholders in the CCSA's enforcement actions. To this end, the CCSA has concluded memoranda of understanding with 13 sector regulators.³ These agreements sets out the substantive and institutional relationships between the CCSA and the relevant sector regulator including notifications of proceedings relating to concurrent jurisdiction and how each institution will deal with these matters where applicable. Specific to market inquiries, section 81 of the Competition Act recognises that concurrent jurisdiction may be of relevance especially where recommendations/remedies are directed at sector regulators. The 2018 amendments to market inquiry provisions compels the CCSA to “notify and consult with the relevant regulatory authority if the intended market inquiry will investigate a sector over which the regulatory authority has jurisdiction in terms of any public regulation.”⁴

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

27. The coordination and cooperation between the CCSA and sector regulators are imperative not just for overall policy coordination but to ensure that no conflicts arise in terms of market intervention by either institution. Therefore consultation, referred to in the 2018 amendments, between the CCSA and sector regulators in market inquiry proceedings is imperative especially where the sector regulator is required to implement recommendations/remedies stemming from a market inquiry.

8. Conclusion

28. In conclusion, the CCSA's approach to market inquiries has had a fair share of success. The market inquires have enabled recommendations that introduce market reforms that promote competition. Several stakeholders implemented the recommendations arising from the market inquiries including the data services and grocery retail sectors.

29. It is also important to recognise that emerging markets, such as digital, online and big data markets, have introduced a unique set of competition issues, and there are still debates whether traditional tools of enforcement are adequate and effective for these markets. Market studies therefore provide an opportunity to tackle these issues holistically, which may in turn also inform appropriate competition strategies to use to address competition concerns in these emerging markets.

³ <http://www.compcom.co.za/mou-with-sector-regulators-in-south-africa/>.

⁴ Section 4B(2A) of the Competition Act.

30. Remedies for competition reforms have also been enabled when extensive advocacy and stakeholder engagements have been achieved on identified competition issues particularly in complex markets. These engagements also provide extensive evidence to aid policy reforms. This was mainly achieved in the healthcare industry.

31. However, continuous coordination with sector regulators is important to ensure buy-in and cooperation, but also to ensure overall policy coordination in introducing market reforms.

32. The CCSA's successes, and lessons learnt from the inquiries conducted thus far, will make the use of this enforcement tool more useful going forward, particularly emerging competition issues.