

# The inter-relationships between regulation and competition enforcement in the South African liquid fuels industry

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## Abstract

*The competition authorities have devoted considerable time and energy to investigating anticompetitive conduct in the broad area of liquid fuel, gas and related products, where regulation sets rules for firm conduct. Competition cases have included the Sasol-Engen merger, collusive arrangements in gas distribution and the pricing of bitumen for road construction projects, and alleged coordination through information exchange in diesel. Drawing on a review of these matters we assess the inter-relationships between regulation and competition enforcement. We argue that regulation can be designed to enable greater competitive rivalry, while anti-competitive conduct can also be better remedied through recognition of the role of regulation.*

*Keywords: regulation, competition, liquid fuels*

## 1. Introduction

There has been much debate in South Africa as elsewhere about the relationships between competition authorities and regulators, and between competition and regulation.<sup>1</sup> There have also been court cases regarding the boundaries of the jurisdiction of regulators and the competition authorities, especially in telecommunications (Moodaliyar and Weeks, 2009). We focus on the inter-relationships between the two to better understand the nature of tensions and of complementarities between the two regimes.

At the outset we caution that it should not be assumed that there is a standard form of economic regulation nor of competition/antitrust. For example, some (Ginsberg, 2009) contrast antitrust and economic regulation in terms of objectives, observing that antitrust has consumer welfare as its objective while economic regulation typically has economic development and sector-specific goals. However, South Africa's competition law has a total welfare standard and has a range of objectives encompassing participation in the economy and addressing the legacy of concentration of control bequeathed by apartheid. International reviews also reveal a range of objectives, standards and frameworks (Fox, 2003; Singh, 2002).

We start by briefly characterising economic regulation and competition law and note some of the tensions that have been identified in the literature. In section 2, we then focus on the liquid fuels regime, describing its evolution and the proposed Sasol-Engen merger. Section 3 examines how previous regulation (and the role of the state) set up challenges for competition enforcement, drawing on a review of competition cases. In section 4 we then reflect back from the competition challenges to the ways in which regulation and competition can work better together, with clarity on roles and responsibilities.

The economic regulation which we have today in South Africa, as in many other countries, is in the main about regulating the natural monopoly parts of the economy that were state owned and have been privatised. Regulation is generally understood as *ex ante* because, in the absence of competitive discipline on market power, the regulators set rules

within which businesses make forward-looking investment and production decisions (Viscusi *et al.*, 2000). Regulators seek to ensure that a fair return is earned on investments made but not an exploitative one (Newbery, 1997). Three decades ago, it was widely believed that regulation would 'wither away' as competition developed. However, it has become evident that regulation is required to ensure the competitive space remains open and to govern aspects such as access to critical infrastructure. Indeed, regulation may seek to create what Ginsberg (2009) has termed 'synthetic competition' where the dynamic gains from rivalry, such as in terms of product and service development, are judged to merit several competitors where scale economies imply that only one firm would minimise costs.

Competition enforcement is most effective in dealing with firms' conduct in markets that would support competition absent the targeted behaviour. It is about evaluating conduct in *ex post* assessments of whether competition has been harmed (OECD, 1999; Buigues, 2006; de Strel, 2004). Contraventions are deterred through penalties on such conduct. Remedies in competition cases can, however, also involve changes to conduct (such as banning exclusive dealing or types of loyalty inducing rebates) and/or changes to structure.

Tensions between competition and regulation can arise in instances where regulation limits the scope of competition laws and instances where regulation makes it increasingly difficult to enforce the competition law. The former is not an issue in the South African context as the Competition Act was amended to give the competition authorities jurisdiction over all sectors including those that have sector regulators. The latter arises where regulation creates a structure which is not conducive to competition (ICN, 2004).

Economic regulation and competition law may be complementary even while their goals differ (de Strel, 2004). For example, regulation and competition law may work together to support entrants and smaller rivals in markets with an entrenched incumbent that have been recently opened to competition. Competition can be facilitated if the regulator has intervened to alleviate the potential competition problems (ICN, 2004).

This complementarity also stems from the tools that are at the disposal of the two authorities. In circumstances where the intervention required is extensive and/or frequent, or where the remedies that are available to competition authorities are insufficient to address such conduct, then it may be better to use *ex-ante* regulation (Buigues, 2006; Geradin & O'Donoghue, 2005). By comparison, competition law typically has stronger powers of investigation and sanction to uncover anticompetitive practices which may be undermining the objec-

tives of regulation, including where a firm is using benefits from regulation in one market to engage in anti-competitive conduct in another (ICN, 2004; Buigues, 2006). Without overlapping jurisdiction of regulators and competition authorities, the risk is that there may be gaps where neither competition law nor regulation applies. This could occur as an unintended consequence of regulation creating a position of market power in a related market that the firm claims is not covered by the competition law.<sup>2</sup>

It is against this backdrop that we reflect on the South African energy value chains, and argue for regulation *for* competition, to complement competition law and to facilitate better market outcomes.

## **2. The legacy of liquid fuels policy and objectives under apartheid<sup>3</sup>**

The history of regulation in the refining and marketing of petrochemical products entrenched a long-standing culture of coordinated behaviour between oil companies. Government intervened extensively in petrochemical markets to develop a synthetic fuels industry to reduce dependency on imported crude oil and vulnerability to sanctions in the apartheid period. Low grade coal supply in the inland region allowed the formation by the state of a synthetic fuels producer, South African Coal, Oil and Gas Corporation Limited, later Sasol Limited, in the 1950s.

In 1954, government brokered the Main Supply Agreement (MSA) between Sasol and other crude oil refining companies, obliging the other oil companies (OOCs) to purchase Sasol's production to meet their inland fuel demand. The OOCs were committed to purchase all of Sasol's production volumes pro-rata to their market shares. The regulation here effectively represented a bargain between the multinational refiners present in the country (including Shell, BP, Total and Chevron) and Sasol together with the South African state (Rustomjee *et al.*, 2007). This favoured Sasol's growth and dominance in the inland region.

Sasol sold to the OOCs at import parity prices, where hypothetical transport costs were added to a free-on-board international price to arrive at a local South African price as though the refined product was imported. This pricing structure was initially known as the In Bond Landed Cost (IBLC) and later evolved into the 'basic fuel price' (BFP) and was the foundation for the wholesale list selling price for petroleum products (Corbett *et al.*, 2010). In certain instances, key policy issues were not legislated, rather, a system of 'gentlemen's agreements' was put in place by the oil companies to regulate the industry (Rustomjee *et al.*, 2007).

Support was given to compensate the crude oil refiners for having to mothball a substantial portion of their refining capacity. The arrangements meant

the crude oil refiners agreed to purchase all Sasol's output in exchange for a guaranteed margin<sup>4</sup> at the marketing level, which Sasol agreed not to enter. Competition between fuel producers was essentially removed in the interests of supporting the profitability of Sasol (Rustomjee, 2012).

Sasol was also supported by a dispensation<sup>5</sup> where synthetic fuel producers (which included Mossgas) received tariff protection when crude oil prices fell below a defined floor price and had to put additional revenue into an Equalisation Fund when crude oil prices rose above a ceiling price (Rustomjee *et al.*, 2007).

Extensive regulation of the liquid fuels industry continued despite the government's liberalisation policy as articulated in the Energy White Paper of 1998. When the Competition Act came into effect in 1999 it was intended to be part of an evolution to less regulation, and the oil companies applied for and were granted an exemption from the Competition Act for certain arrangements to ease the transition from a heavily protected environment to a more liberalised one. In 2002, Sasol applied for and was granted another exemption from the collusion provisions of the Competition Act for a number of market allocation agreements with the OOCs. The exemption was granted until 31 December 2003. At the end of 1998, Sasol gave the required 5 year notice to end the Main Supply Agreement in December 2003. In 1998 the Government also released Sasol from the obligation to repay any outstanding subsidies it had received during the 'Pim Goldby' era provided it continued to develop the petrochemicals sector (National Treasury, 2007). From the end of 2003 Sasol has been free to enter and expand into the marketing and retailing of fuel, and the OOCs have not been required to buy Sasol products.

According to the Competition Tribunal (2006), the MSA had amounted in effect to a cartel:

In our view and, we note again, this view is essentially uncontroverted – the South African fuel market, from the refinery level through to the level of the retail service station, was cartelised for many years. The MSA was in effect the market sharing agreement entered into by the participants in the cartel with the price of refined product based on import parity or BFP which was then used to build up to the wholesale price and the retail pump price. (Para 122 p 46)

It appears as if the new government's change in the basis of calculating the wholesale price in the price build-up from the IBLC to the 'Basic Fuel Price' and intention to de-regulate the market stimulated Sasol's termination of the MSA as Sasol anticipated competitive pressure (Competition Tribunal, 2006, para 123). Sasol wanted to be able

to enter and expand in the downstream retail markets (para 125). At the same time, it sought to entrench its dominant position inland and extend its retail presence nationally through the proposed merger of its fuel business with Engen in a merger to create a new entity to be termed uHambo.

The uHambo merger sought to secure a downstream retail and distribution footprint as well as to control refining capacity at one of the large crude oil refineries on the coast. The importance of these objectives can be appreciated by understanding the competitive threat to Sasol that was expressed in the bargaining games that occurred at the end of the MSA as the OOCs were no longer obliged to uplift all of Sasol's synfuels production (Corbett *et al.*, 2011; Competition Tribunal, 2006). At the time, the OOCs had excess capacity at the coast and were exporting products which they could have sold locally had they not been required to buy all of Sasol's production. After 2003, in purchasing inland volumes from Sasol, they therefore sought discounts off the inland BFP (set as the import parity price), as Sasol had a surplus of product, did not have its own distribution network, and also had very low production costs. Sasol on the other hand only wanted to offer product at the BFP to protect it as the benchmark price, and thus had to credibly threaten to reduce supply, either by reducing production (which it did at the Natref refinery) or by exporting product (Competition Tribunal, 2006).

The uHambo transaction would simultaneously provide Sasol with a route to market for its own product (through the Engen network, the largest in the country) without having to rely on the OOCs, and refinery capacity at the coast (the Engen refinery). The Tribunal prohibited the merger due largely to the effect of the former, judging that Sasol could credibly threaten to 'foreclose' (not supply) OOCs as customers for bulk supply of fuels, the impact of which was exacerbated by capacity constraints on the Durban-Johannesburg Pipeline which limited OOCs from bringing in the product from the coast, and as competitors in retail and commercial markets. The merger was contested by all the OOCs in Tribunal hearings involving detailed scrutiny of Sasol's operations and intentions. The Competition Commission at first supported the merger, and then altered its position (Competition Tribunal, 2006). The Competition Tribunal ultimately prohibited the merger and Sasol has had to expand in the downstream market through incrementally adding forecourts and obtaining commercial customers.

The other major threat to Sasol has been a possible change in the taxation and/or regulatory regime. This was most obviously in the form of the mooted windfall tax on excessive profits. National Treasury established a task team to evaluate the arguments which recommended such a tax should

be pursued. National Treasury rejected the recommendations of the Task Team on grounds which included the fact that Sasol had committed to 'significantly expand its synthetic fuel production capacity' in the interests of 'fuel security' and development of petrochemicals (National Treasury, 2007:4).<sup>6</sup> Having headed off the possible windfall tax, it appears that certain projects will not be pursued without very substantial participation and support from the state.

Sasol's continued hold over supply of fuels in the inland market in particular has been reinforced by their position as joint owner in the exploitation of Mozambican gas and in the pipeline delivering it to Secunda. The pricing of the gas has been subject to maximum regulation for the first ten years from 2004 to 2014, with the volume weighted price not to exceed an average price of selected European countries, while individual customers can be charged up to a maximum determined as the price of their alternative energy source (including the cost of physically switching to gas). This latter provision is effectively the monopoly price in any case as it is the maximum price that Sasol could offer in order to attract the individual buyer to switch to natural gas.

The legacy of the apartheid liquid fuels policies has resulted in the concentrated markets that are found throughout these value chains and has further placed Sasol in a particular position of influence in terms of fuel supply. The barriers to entry are substantial, as is witnessed by the slow rate of entry, particularly of historically disadvantaged South Africans (Mokoena and Lloyd, 2005). Over the last decade, the Competition Commission has uncovered cartels in related products, such as bitumen and piped gas; referred a case of coordinated conduct in diesel to the Competition Tribunal and has pursued a number of enforcement cases as explained below.

### **3. Regulation in the petroleum industry and competition enforcement**

As of 2013, the prices of certain products, such as petrol at the retail/pump level, loose illuminating paraffin at the retail level and liquid petroleum gas at the refinery gate and retail level, are still regulated by the Department of Energy (DoE). These prices are posted on the department website and published monthly in the Government Gazette.

Diesel is referred to as a 'controlled' product. Government measures the return being made on the marketing of controlled products and sets the prices of regulated products (for example, of retail petrol) in order to yield a rate of return for the industry on marketing assets of between 10% and 20% (Rustomjee *et al.*, 2007). Although not regulated by legislation, the wholesale list selling price (WLSP) of diesel is published on DoE's website.

The industry has used this posted WLSP as the list price for wholesale diesel sales. Competition between the oil companies is therefore largely through discounts off this wholesale list price and through quality of service.

Certain information has been required from the oil companies for the calculations relating to the regulatory framework. However, the oil companies also exchanged such information between each other. The exchange of information between the oil companies began as early as the 1960s with a single company tasked to gather and disseminate information. The National Energy Council in 1989 requested that this data be submitted to government on a more disaggregated level for research purposes and to inform policy (Corbett *et al.*, 2010). There was, however, no requirement and no justification from a regulatory perspective to exchange this information, particularly company specific information, between the oil companies themselves.

In 1994, the South African Petroleum Industry Association (SAPIA) was created. SAPIA, an industry organisation to which all the oil companies still belong, was originally created for the oil industry to engage with the new African National Congress (ANC) government and other stakeholders. It also undertook the handling of information between oil companies, and between oil companies and government.

The history of regulation in the petroleum industry has created well understood, focal pricing points that could allow for coordinated behaviour to continue in markets which are no longer regulated and in which exemptions from competition law no longer apply (Corbett *et al.*, 2010). This transparency was further enhanced through the highly disaggregated information exchanged via the SAPIA platform. For unregulated products like commercial diesel, these published prices could act as focal points of which competition would occur only through discounting. If secret discounting is discouraged through the exchange of disaggregated information (such as detailed information on sales volumes) which increased the ability to monitor market shares, then competition is stifled, particularly in an oligopolistic industry such as the oil industry.

A player has no incentive to secretly discount to gain market share if it knows that this action is immediately visible to its competitors through the information exchange (Corbett *et al.*, 2010). The Competition Commission referred a case against the main oil companies, alleging that such information exchange amounted to a contravention of the cartel provisions of the Act.<sup>7</sup>

Information exchange was also part of the conduct in the bitumen arrangements. The Commission referred to the Competition Tribunal a

cartel case against the oil companies on price fixing in the bitumen market, a petroleum product used to make tar to pave roads. This was in contravention of Section 4(1)(b)(i) of the Act. Sasol, the leniency applicant in this case admitted to continued coordination in the post-exemption period based on import parity pricing formulae established in the exemption period and suitable escalations.<sup>8</sup> Masana/BP, Shell and Engen all subsequently settled with the Commission and admitted that the arrangements contravened section 4(1)(b)(i) which addresses direct and indirect price fixing.

During the exemption period, the petrochemical companies jointly calculated the prices for bitumen with reference to an industry-wide retail price list, the Wholesale List Selling Price (WLSP). After the exemption lapsed in the latter part of 2000, there was no longer a standard method by which list prices for bitumen could be changed according to the changes in crude oil prices. The primary producers agreed to set the WLSP each month by setting a 'starting' price for February 2002 and escalating this by a factor determined through a formula, the Bitumen Price Index (BPI) which later became the Bitumen Price Adjustment Factor (BPAF). This was deemed an appropriate price escalation factor for long-term road construction contracts.

The development and implementation of the BPAF was done through another industry association, South African Bitumen Industry Association (SABITA). Information was exchanged through regular e-mail communications where BPAF percentages and/or Rand per ton escalation figures were circulated to the oil companies. The BPAF then would be added to the present month's WLSP to arrive at the following month's WLSP. It was therefore clearly forward-looking and gave an indication of what the market was likely to do in terms of magnitude of list price increases the next month and amounted to collusive conduct (Boshoff, 2013). In addition to such information exchange via emails, there were bilateral communications between oil companies. While the agreement did not fix the transaction prices of bitumen, it had the effect of dampening competition, undermining discounting below list prices and, as a result, underpinning higher prices.

The Competition Commission has also assessed coordinated conduct in the piped gas market. Pricing of piped gas is regulated by NERSA through provisions in the Gas Act 2001 (Act No. 48 of 2001) and Schedule One of the Agreement Concerning the Mozambican Gas Pipeline between the Government of the RSA and Sasol Limited. Possible contraventions of Section 4 of the Competition Act, particularly involving market allocation, were brought to the Commission's attention through a leniency application by Sasol Gas Ltd in 2009.<sup>9</sup>

Sasol is the main producer of natural gas sourced from Mozambique as well as methane rich gas produced in its Secunda plant. These gases are transported via pipeline to industry and household users. Sasol applied for leniency for participating in a series of agreements entered into with Spring Lights Gas in KwaZulu-Natal and Egoli Gas in Johannesburg, both competitors to Sasol Gas. These agreements contained non-compete clauses that amounted to market allocation by region (which therefore implied allocation of regional customers too), a contravention of Section 4(1)(b)(ii) of the Competition Act.

Spring Lights Gas further applied for an exemption from the Competition Act seeking to maintain the non-compete clauses in the agreement on grounds that it needed the exemption to survive and grow its business, particularly in light of the fact that its sole supplier is Sasol, with whom it also competes. The Commission found that the non-compete clauses were not necessary for Spring Lights to effectively compete with Sasol, given protection offered through the regulatory framework,<sup>10</sup> and rejected the exemption application.

In these circumstances, the Commission viewed the Competition Act as a secondary defence and that the regulatory framework was sufficient to ensure existing and new gas traders were protected from any potential abuses of dominance by Sasol.

There have thus been a number of cases of anti-competitive conduct which are closely related to past and current regulatory framework for liquid fuels. In addition, there have been competition cases in by-products of liquid fuels production and their derivatives in fertilizer and polymer chemicals (Makhaya and Roberts, 2013).

#### **4. What are the appropriate roles of competition law and regulation?**

Traditionally competition law is presented as being about addressing structural changes (mergers) and conduct in the absence of which there would be competition, while economic regulation controls market power in instances where competition is either not possible or is not desirable (de Streel, 2004; Lang, 2009). This fits neatly with the distinction drawn between the *ex-ante* nature of regulation and *ex-post* nature of competition law intervention in markets. However, it does not accord with the reality of how markets work and firms' strategies to create and protect rents from the exercise of market power.

Leaving aside mergers, cartel enforcement would appear to be the most straightforward area where, in the absence of cartel agreements, there would be competition. However, in tight oligopolies of 'insiders', who have well established norms for maintaining the status quo, collusive outcomes may exist without the need for explicit arrangements.

These arrangements may well have been developed under past regulatory arrangements or in an environment where coordination was tolerated or even encouraged, such as where the policy and regulatory framework had been 'captured' by the industry. This accords with the coordinated arrangements uncovered by the Competition Commission in several markets such as cement, bitumen and fertilizer. In each of these markets, after the ending of such formal arrangements for coordination as existed, firms established their own mechanisms. While the Commission has tackled such mechanisms, it may require entry to destabilise the collective understanding in place. Even in industries with apparently low barriers to entry, collusive outcomes can persist for some time (Khumalo *et al.*, 2014).

Entry barriers due to scale economies may be further reinforced by vertical integration on the part of incumbents implying that an entrant at one level needs to source inputs from firms associated with its rivals. As Geroski and Jacquemin (1984: 22) caution: 'when, however, small asymmetries can be solidified into dominant positions that persist, the inequities they create become institutionalized, creating long-term problems in the performance of the economic system which cry out for policy attention'.

In relatively small industrial economies, such as South Africa, there is also a greater prevalence of markets dominated by a single firm (Chabane *et al.*, 2006; Roberts, 2012). The large open markets of the USA and the EU are outliers when viewed against the conditions characterising most economies in the world.

Imperfect competition is thus commonplace, rather than an aberration resulting from readily identifiable anti-competitive arrangements. As such, it is important to understand the way in which competition works in practice and to guard against oversimplifying it, for example, by simplistically seeking to separate out natural monopoly elements for regulation, and assuming there will be 'free' competition elsewhere (Helm and Jenkinson, 1998: 2). Against the reality of competitive rivalry, choices about both competition law and regulation are about setting the 'rules of the game' or deciding on the 'economic constitution' of a country (Gerber, 2010). These are part of a set of rules and institutions which influence who has access to economic opportunities and on what terms, and whether the economy tends towards being inclusive or extractive (Acemoglu and Robinson, 2012).

We now consider these issues in terms of the objectives, analytical framework and tools of regulatory bodies and competition authorities, drawing on the cases discussed above.

The *objectives* of regulators may appear wider than those of competition authorities, in including the development of the economy, and more partic-

ular, in addressing the development of a selected sector. However, competition law can have a wide mandate as part of economic welfare. For example, the objectives of the South Korean Fair Trade Commission (KFTC) are to encourage free and fair competition, prevent the concentration of economic power and thereby promote 'balanced development' (Wise, 2000). This is given that the early stages of rapid industrialisation were viewed as 'unbalanced', requiring an active competition policy addressed at dominant firms in that country (Fox, 2002; Fox, 2003). The mandate of the KFTC therefore includes evaluating 'unreasonable' practices and 'unjustifiable' restrictions on competition (Fox, 2003; KFTC, 2011). The South African Competition Act has a range of objectives that reflect the importance of addressing the apartheid legacy of the concentration of control, although arguably these objectives only find expression in the provisions for merger evaluation which include a public interest test.

Relevant to the cases examined here, regulation of liquid fuels had originally been part of the apartheid state's objective to ensure local production, by Sasol in particular. Security of supply remains a natural government concern. However, this is not necessarily in conflict with competitive outcomes over time. Supply of refined product means ensuring logistics and transport capacity to get product to market, consistent with vigorous competition between suppliers to meet demand. Regulation and competition law seeking to ensure dynamic rivalry, increased access and competitive pricing could thus take quite a different stance to the past regulation which sought to guarantee margins of oil companies, as the 'insiders'. In addition, the unintended consequences of regulatory provisions that entrench market power in related products should be taken into account by regulatory bodies and competition authorities.

The *analytical framework* for regulators and competition authorities is substantially the same (Piergiovanni *et al.*, 2009). It is essentially about evaluating firm conduct and outcomes in static and dynamic terms. This includes the effect of arrangements that undermine competition as well as the impact of arrangements on efficiency and investment. The main difference is that competition authorities make findings in specific instances, while regulators make determinations about the necessary arrangements to achieve efficient outcomes (or approximate effective competition) looking forwards. Even this is an over-generalisation. Competition authorities in some jurisdictions (including in South Africa) have market enquiry powers, that is, powers to investigate widely to address competition problems in a market and make far-reaching findings on necessary remedies. Conversely, regulators in some regimes, including in

South Africa, have to make findings of 'inadequate competition' in order to trigger regulatory powers.<sup>11</sup> Even where this is not explicit, the analysis of regulators of what is necessary going forwards will likely take into account what has happened in the past.

The more important distinction is the in-depth industry knowledge and the on-going monitoring that a specialist regulator embodies as compared with the generalist that is a competition authority. Seen in these terms, the relative scope of regulation and of competition enforcement is just a matter of choice for a given country. This also applies to particular responsibilities within a sector, such as where the regulator has powers to determine conditions of access and/or issue licences along with, for example maximum price caps, while the competition authority investigates anti-competitive conduct. In this world, the interplay of competition and regulation is not so-much about drawing lines as it is about understanding the complementarities in the work of the institutions. In several countries, such as the Netherlands and Australia, the common analytical base has led to important regulatory bodies being combined with the competition authority. The separate application of different laws, competition and regulatory, does not prevent the development of knowledge and expertise. In South Africa, the separate regulators and competition bodies have not established effective mechanisms to build on the complementarities while maintaining distinct roles. Instead, the impression is of the emphasis of their independence as an obstacle, rather than as a starting premise from which to build constructive engagement.

The third area is the *tools*, by which we mean the powers to change or set boundaries on behaviour. In competition law, remedies are available to competition authorities include those that are behavioural and structural, as well as sanctions in the form of administrative fines (de Streef, 2004). Administrative penalties perform a deterrence role, assuming that it is simply about deterring the conduct in the absence of which there will be adequate competition (and the efficient outcomes therefrom). Remedies seek to stop the anti-competitive conduct of the respondent and to restore competition (Marsden, 2008).

Structural remedies will, at least on the surface, require less monitoring than behavioural undertakings and tend to be preferred for competition authorities (OECD, 2004; de Streef 2004). At one extreme is divestiture, which seeks to create more competition through structural change. At the other is a behavioural remedy on pricing, such as to address a margin squeeze which results from the upstream and downstream prices of a vertically integrated firm. Pricing remedies are viewed as the tools more associated with regulators. However, there are many other types of conduct that are less

easily categorised in terms of the structural/behavioural separation. For example, loyalty rebates are prices that seek to achieve *de facto* exclusivity and can be seen as substitutable with pricing offered for exclusive contracts.

In South African case law, administrative fines and remedies are primarily used as deterrent and corrective tools. There has however only been one instance where a structural remedy was adopted for an abuse of dominance under section 8 of the Act of 1998. This was in the complaint of abuse of dominance in the market for ammonia derivative products against Sasol Chemical Industries.<sup>12</sup> The remedy involved a combination of commitments regarding pricing (not to discriminate by location of customer) with divestiture of all but one downstream blending operation. The pricing remedy does not therefore stipulate maximum prices nor require ongoing monitoring on a month by month basis. In other cases such as *SAA* and *Patensie* the remedies have simply been the ending of the conduct being the form of rebates in *SAA* and the exclusivity in *Patensie* (Roberts, 2012).

The cases discussed above illustrate that the competition authorities have been pursuing alleged anti-competitive conduct, while the firms are subject to regulation in important areas of their business, which relate to their market power in associated products. The worlds of regulators and competition enforcers have not been talking to each other. One consequence is the long and drawn out competition investigations and prosecutions where, if proven, the remedies would be of a quasi-regulatory nature, even if implemented by the competition authorities. These cases could be strengthened by appropriate regulatory measures, if the competition concerns have merit. Rather than drawing what may be unhelpful distinctions between structural and behavioural measures, it is therefore more appropriate to recognise the skills and capabilities of regulators and competition authorities assessed against the nature of the problem. For example, whether the position of the dominant firm is linked to licencing arrangements, and/or there is regulation of some of the products, should be taken into account.

## 5. Regulating for competition?

The institutional make-up of regulators and competition authorities mean they have a natural tendency to certain types of arrangements which might blinker them to the benefits of competition and regulation when combined. Regulators by their nature engage with a small number of large firms on which they develop detailed information and with which they have extensive interactions. The relationships that develop will naturally lead to an appreciation of the firms' capabilities, the importance of the incumbents in ensuring security of supply, and a tenden-

cy to under-estimate the value of opening up to new rivals. However, there are likely to be substantial dynamic benefits from regulating for competition in terms of incentivising new ideas, service, quality and product offerings. While it will intrinsically be less stable in the short term, greater access and rivalry generates information for the regulator, and tests assumptions in the established system which can make it more robust in the longer-term.

On the side of the competition authorities, the tendency is to have very discrete interventions and to deter anticompetitive conduct (rather than to regulate it). However, in industries by their nature characterised by entrenched firms seeking to protect their positions, this simply means repeated extensive investigations and drawn-out legal processes. This could therefore mean as much detailed enquiry into a firm by the competition authority as is undertaken by the regulator. And, in terms of addressing the conduct, powers that can be portrayed as 'regulatory', whether in the hands of a regulator or the competition authorities, are necessary and appropriate to address the anti-competitive conduct in a way that is credible and ensures more competitive outcomes in practice. In addition, regulatory measures tailored to enable entrants and smaller rivals will ensure less need for such invasive remedies in the future. Regulatory measures can provide certainty in advance that can facilitate entry into markets, critical in markets where dominant firms have engaged in reputational strategies to discourage entry or have entrenched dominance (Lang, 2009: 30). The facilitation of entry and promotion of effective rivalry creates a landscape for competition to work more effectively.

## Notes

1. See, for example, papers at the Annual Conference on Competition Law, Economics and Policy, available at [www.compcom.co.za](http://www.compcom.co.za)
2. This was contended by Telkom in the case brought by Value Added Network Service providers to the Competition Commission. After the Commission's referral on 24 February 2004 there were over five years of litigation over jurisdictional points brought by Telkom including over the proper application of regulation and competition, until the Supreme Court of Appeal decision on 27 November 2009.
3. This draws substantially on Rustomjee *et al.* (2007); Competition Tribunal (2006); Rustomjee (2012).
4. Until 1989, refining margins were guaranteed along with returns on marketing assets. From 1989 only the returns on marketing assets were regulated through setting retail prices to allow this return. Bulk supply prices (wholesale prices) for refined products were regulated at import parity.
5. Following an investigation by Pim Goldby consult-

ants.

6. In particular, Sasol had undertaken to pursue the Mafutha project, of a large new coal to liquids plant in the Waterberg.
7. See Competition Commission media release, 'Commission refers a case of collusion against oil companies' 24 October 2012, [www.compcom.co.za](http://www.compcom.co.za) accessed 20 November 2012.
8. Competition Commission media release, 'The Commission refers its price fixing findings against major oil companies' 4 March 2010, [www.compcom.co.za](http://www.compcom.co.za) accessed 10 June 2012.
9. [www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/March-09-Newsletter-31.pdf](http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/March-09-Newsletter-31.pdf), accessed on 29 August 2012
10. For instance, through non-discrimination requirements, access on commercially reasonable terms to facilities as well as powers by the regulator to investigate complaints relating to issues of supply and excessive prices or tariffs, amongst others.
11. As under the Gas Act, section 21(1)(p), for NERSA to regulate maximum prices for piped gas.
12. The consent and settlement agreement was confirmed by the Tribunal on 20 July 2010. See [www.comptrib.co.za](http://www.comptrib.co.za)

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