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Effective promotion of competition in regulated markets: South African piped-gas industry

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Abstract

Like the Competition Act of 1998, the Gas Act of 2001 outlines the linkages between black economic empowerment and competition policy. Section 2 of the Gas Act makes it clear that promoting the participation of companies owned or controlled by historically disadvantaged South Africans ("HDSAs") by way of licence conditions so as to enable them to become competitive is one of the objectives to be upheld in developing the South African gas industry. This Gas Act provision complements the preamble to the Competition Act which recognizes that competition law has to specifically address the excessive concentration of ownership and control of the entire South African economy and the unjust restrictions on the full participation of black people in the economy which resulted from various apartheid laws.

Despite the abovementioned provisions in both the Gas Act and the Competition Act, only one vertically integrated player still retains substantial ownership and control of the gas economy in South Africa. It is briefly against this background that this paper aims to look at ways to effectively and practically promote competition within the South African gas industry, particularly the competitiveness of HDSAs, using the competition law and policy as a yardstick to address some identified policy issues.

In this report, I find that the promotion of the competitiveness of HDSAs is implemented ineffectively most probably as a result of the interpretational challenges yielded by the wording of section 2*(d)* when read together with section 21(1)*(b)* of the Gas Act. To this end, the report proposes solutions that could be considered to help remedy these challenges and thereby potentially aid the promotion of the competitiveness of HDSAs in the piped-gas industry both from the regulatory and legislative reform perspectives.

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1. INTRODUCTION

The state of competition of all economic activities in South Africa, at the time when the South African economy was dominated by oligopolies,[1] was historically governed by the Regulation of Monopolistic Conditions Act, 1955.[2] In the 1970s, a legislative review was conducted to assess if this Act had succeeded to prevent a dramatic increase in oligopolies; and it was found that it had not.[3] Consequently, the Maintenance and Promotion of Competition Act, 1979[4] was enacted and the Competition Board was established to administer this Act. In 1986, the Act was amended with a view to empowering the Competition Board further with an improved ability to act against new concentrations of economic power as well as existing oligopolies and monopolies.[5] However, it later became apparent that the Act had significant technical flaws in it which prevented the effective application of competition law.[6],[7] As a result, an extensive public consultation process looking at the development of a new competition policy for South Africa was embarked on from 1994 when the matter was put on the policy agenda until 1998 when negotiations on a new law were undertaken in earnest.[8] This resulted in a release of A Framework for Competition, Competitiveness and Development by government in November 1997, which entailed the proposed guidelines for new competition policy for South Africa.[9] This then led to the National Economic Development and Labour Council ("NEDLAC") consultation process aimed at reaching an agreement between government, business, and labour on the principles of this policy, which would

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[1] Oligopoly means competition amongst few sellers. See HJO Van Heerden & J Neethling *Unlawful Competition* (1994) 19.

[2] Act No. 24 of 1955.

[3] 'About | The Competition Commission of South Africa' available at http://www.compcom.co.za/about/ accessed on 15 March 2017.

[4] Act No. 96 of 1979.

[5] The term monopoly denotes a market situation whereby a single seller controls the entire supply of a commodity without any substitute to an extent that this makes him free, in the absence of regulatory intervention, to determine the output and price at his will. See Van Heerden & Neethling, supra at 19.

[6] Trudi Hartzenberg 'Competition Policy in SADC' *Trade and Industrial Policy Strategies Annual Forum* (2002) 5. Available at https://www.mylexisnexis.co.za/Index.aspx, accessed on 21 July 2017.

[7] See also Neil Mackenzie 'Rethinking Exclusionary Abuse in South Africa' 4-5. Available at http://www.compcom.co.za/wp-content/uploads/2014/09/Rethinking-Exclusionary-Abuse-in-SA.pdf, accessed on 21 August 2017.

[8] Simon Roberts 'The role for competition policy in economic development? The effects of competition policy in South Africa, and selected international comparisons' 3-4. Available at https://www.mylexisnexis.co.za/Index.aspx, accessed on 21 July 2017.

[9] 'About | The Competition Commission of South Africa', supra.

later inform a whole new competition legislation for South Africa.[10] A NEDLAC agreement on competition policy was reached in May 1998, and this finally saw the enactment of the Competition Act, 1998 ("Competition Act")[11] in October 1998 and its coming into effect in September 1999.[12],[13] To date, this primary legislation constitutes the main pillar against which the competitiveness of all economic activity occurring within, or having an effect within, South Africa is measured.

The history on the origins of the Competition Act and the essence of what it aims to address are nicely summed in the *Competition Commission of South Africa v Senwes Ltd*, as follows –

> 'Under the apartheid order, discriminatory laws were used to exclude the black majority from participating in the economy of the country. The Preamble to the Act records that the people of South Africa recognize, among other things, that discriminatory laws of the past imposed unjust restrictions on free and full participation in the economy by all South Africans. It calls for the opening up of the economy to enable all South Africans to have access to the control and ownership of the national economy. It declares that a credible competition law and effective structures to administer that law must be established in order to create an efficient functioning economy.'[14]

Against this background, the principles that underpin the ability and performance of South Africa (or any of its industries, sectors or sub-sectors, or firms) to competitively sell and supply goods and services in any economic market are found in section 2 of the Competition Act, which spells out the purpose of this Act as follows –

> '2. The purpose of *this Act* is promote and maintain competition in the Republic in order –
>
> (a) to promote the efficiency, adaptability and development of the economy;
>
> (b) to provide consumers with competitive prices and product choices;
>
> (c) to promote employment and advance the social and economic welfare of South Africans;

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[10] *Ibid*.
[11] Act No. 89 of 1998 (as amended).
[12] Fox, EM 'Equality, discrimination, and competition law: Lessons from and for South Africa and Indonesia' *Harvard International Law Journal*, 2000.
[13] Simon Roberts 'The role for competition policy in economic development? The effects of competition policy in South Africa, and selected international comparisons', supra, 1.
[14] (CCT 61/11) [2012] ZACC 6, paragraph 2.

(d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.'

Recognizing that some problems existing in the economy can be more effectively dealt with through direct sector regulation or industrial policy measures, the Competition Act goes on to provide that in so far as this Act applies to an industry or a sector of an industry that falls under the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of the Competition Act, then the Competition Act must be construed as establishing concurrent jurisdiction in respect of that conduct.[15] Hence, South Africa has its piped-gas industry primarily regulated in terms of the Gas Act[16] by the National Energy Regulator ("NERSA").[17]

The Gas Act was enacted to attain, among others, the following energy sector policy objectives outlined in the South African Energy Policy – [18]

i. increase access to affordable energy services;[19]

ii. stimulate economic development;[20]

iii. managing energy-related environmental impacts;[21] and

iv. securing supply through diversity.[22]

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[15] Section 3(1A)*(a)*.

[16] Act No. 48 of 2001.

[17] Section 3 of the current Gas Act was repealed by section 15 of the National Energy Regulator Act 40 of 2004 ('National Energy Regulator Act'). In terms of this repeal, the Gas Act is no longer administered by the Gas Regulator that is still being referred to throughout the text of the current Gas Act; but is now administered and enforced by NERSA which is an independent energy sector economic regulator established by section 3 of the National Energy Regulator Act.

[18] The *White Paper on the Energy Policy of the Republic of South Africa* (GN 3007 in *GG* 19606 of 17 December 1998). Available at http://www.energy.gov.za/files/policies/whitepaper_energypolicy_1998.pdf, accessed on 1 March 2017.

[19] *Ibid* para. 5.2.1 at 23.

[20] *Ibid* para. 5.2.3 at 25.

[21] *Ibid* para 5.2.4 at 26.

[22] *Ibid* para 5.2.5 at 27.

In summary, the South African Energy Policy aims to ensure that sufficient investment is diversely made in energy generation and associated infrastructure as a boost in the development of the country's economy and also to keep the lights on, as well as ensure the continual supply of the country's energy sources at reasonable costs.

Like the Competition Act, albeit the slight difference in wording, the Gas Act advocates for, among others, the promotion of competition,[23] which is further complemented by advocating for the promotion of access to gas in an affordable manner.[24] This is well aligned with section 2*(b)* of the Competition Act quoted in one of the preceding paragraphs which requires that competition in economic activities occurring within or having an effect within South Africa must be promoted and maintained in order that consumers may have a variety of products to choose from and in order that they may also enjoy reasonable prices for such products, and it also accords with an old widespread recognition that the incentives offered by a competitive market include production of better, cheaper commodities.[25],[26] As with section 2*(f)* of the Competition Act, the advocacy for promoting competition in the gas industry is further extended by section 2*(d)* of the Gas Act which calls for promotion of companies owned or controlled by HDSAs by means of licence conditions so as to enable them to become competitive.

NERSA started regulating the piped-gas industry and the petroleum pipelines industries on 1 November 2005[27] and took over the regulation of the electricity supply industry from the former National Electricity Regulator on 17 July 2006,[28] after its establishment on 1 October 2005 following the enactment of the National Energy Regulator Act which commenced on 15 September 2005. The piped-gas industry, an

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[23] Section 2*(h)* and 4*(j)*.

[24] Section 2*(j)*.

[25] 'Competition policy in South Africa' available at http://www.iassa.co.za/competition-policy-in-south-africa/ accessed on 5 May 2017.

[26] See also Monamodi Owen Thothela 'The influence of regulatory approach on competition in the South African pay-TV market' 45. Available at http://wiredspace.wits.ac.za/bitstream/handle/10539/13634/MMICTPR_RESEARCH_REPORT_FINAL.pdf?sequence=1, accessed on 26 May 2017.

[27] Parliamentary Monitoring Group (11 November 2014) 'NERSA on Regulation of Electricity, Piped-Gas & Petroleum Pipelines Industries'. Available at https://pmg.org.za/committee-meeting/17856/ accessed on 31 July 2017.

[28] Impumelelo Top Empowerment Companies | NERSA. Available at https://www.impumelelo.net/company/nersa/ accessed on 31 July 2017.

industry in which I have developed a considerable interest from my involvement in its regulation and which I know best, is dominated by one vertically integrated player,[29] who still retains substantial ownership and control of the economy despite the policy measure put in place by section 2*(d)* of the Gas Act to promote the competitiveness of companies owned or controlled by HDSAs. In my view, this status quo presents a challenge that I believe could be suitably addressed through legislative changes or policy reform.

It is, therefore, against the abovementioned background that **section 2** of this paper first explores the extent to which the Gas Act advocates for promoting the competitiveness of HDSAs in the piped-gas market. In this regard, I particularly argue that although the Gas Act provisions do, at a glance, satisfy the overarching objects set out in section 2 of the Competition Act for promoting competition and the competitiveness of HDSAs, the practical implementation of these provisions has done too little in that regard.

Then in **section 3**, I use competition law and policy sources to argue how I understand section 2*(d)* of the Gas Act should be interpreted and practically implemented; and conclude this part of my research by recommending regulatory intervention measures to be considered by NERSA and appropriate legislative measures to be considered by policy makers for future incorporation into the Gas Act and its Regulations.

Lastly, I use **section 4** to explore if economic regulation could potentially have a future role in correcting the anti-competitiveness of regulated markets, specifically from the piped-gas industry regulation perspective. I do this by briefly analyzing the role of economic regulation in effectively promoting competition or competitiveness in regulated industries, so as to assess if the legislative measures that I recommend would potentially aid the promotion of the HDSAs' competitiveness and the consequent diverse competition in the piped-gas industry. **Section 5** concludes.

[29] See Figure 1 under section 2.2 below.

2. AN OVERVIEW OF THE SOUTH AFRICAN PIPED-GAS INDUSTRY

2.1 The governing legislation and extent of regulation

The South African piped-gas industry is primarily regulated in terms of the Gas Act through the licensing of licensable activities, regulation of prices and tariffs associated with the licensed activities, and registration of activities that are exempt from licensing.

In so far as the licensing process is concerned, the Gas Act regulates the construction and operation of gas transmission,[30] storage,[31] distribution,[32] liquefaction[33] and re-gasification[34] facilities as well as the conversion of any infrastructure into any of these listed facilities; plus the trading in gas.[35] This particular aspect of regulation stems from section 15(1), which provides the following –

> '15. (1) No person may without a licence issued by the Gas Regulator [sic]' –
>
> (a) construct gas transmission, storage, distribution, liquefaction and re-gasification facilities or convert infrastructure into such facilities;
>
> (b) operate gas transmission, storage, distribution, liquefaction and re-gasification facilities; or
>
> (c) trade in gas.'

On this score, the piped-gas industry would ordinarily have licensees licensed in one or more of the categories of gas transmission pipeline operator, gas storage facility operator, gas distribution pipeline operator, gas liquefaction plant operator, re-gasification

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[30] '**"transmission"** means the bulk transportation of gas by pipeline supplied between a source of supply and a distributor, reticulator, storage company or eligible customer, or any other activity incidental thereto, and "transmit" and "transmitting" have corresponding meanings' – section 1 of the Gas Act.

[31] *Ibid* '**"storage"** means the holding of gas as a service and any other activity incidental thereto, but excludes storage of gas in pipelines which are used primarily for the transmission and distribution of gas'.

[32] *Ibid* '**"distribution"** means the distribution of bulk gas supplies and the transportation thereof by pipelines with a general operating pressure of more than 2 bar gauge and less than 15 bar gauge, or by pipelines with any such other operating pressure as the Gas Operator may permit according to criteria prescribed by regulation to points of ultimate consumption or to reticulation systems, or to both points of ultimate consumption and reticulation systems, and any other activity incidental thereto...'

[33] *Ibid* '**"liquefaction"** means converting natural gas from a gaseous state to a liquid state'.

[34] *Ibid* '***"re-gasification"*** means converting liquefied natural gas to a gaseous state at a re-gasification plant'.

[35] *Ibid* '**"trading"** means the purchase and sale of gas as a commodity by any person and any services associated therewith, excluding the construction and operation of transmission, storage and distribution systems...'

facility operator, and gas trader; and these therefore represent the six different levels at which competition might present itself in this industry. In this regard, it is also worth noting that the Gas Act allows one entity to hold licences to engage in one or more or all of these licensable activities, and therefore be vertically integrated as defined in the Competition Act.[36]

One of the key tools of a regulator that is charged with regulating a powerful incumbent is the power to regulate prices and/or tariffs whereby the key objective is to mimic results of efficient competition.[37] History shows that this has been the case even in some developed jurisdictions like England and Wales.[38] This is because it is widely accepted that a dominant firm in a market can restrict output and/or raise prices, and thereby exclude its potential competitors from meaningfully co-existing with it in the same market.[39] Therefore, linked to the licensing regulatory aspect discussed above, the Gas Act requires NERSA to, in the event that there is inadequate competition in the piped-gas industry, mimic competition by setting and controlling the maximum, but not the actual, prices which the licensees may not exceed when charging their customers for the gas commodity traded in.[40] Similarly, NERSA is required to monitor, approve and regulate tariffs associated with the gas transmission mode of transportation or gas storage service provided by a licensee to all its classes of customers so as to ensure that the customers are not unduly discriminated against but that they all receive a fairly reasonable treatment from their licensee.[41]

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[36] Section 1(1)*(xxviii)*.

[37] Michael Markovitz, 'Concurrent jurisdiction: The relationship between the independent communications authority and the competition commission' (2001) 6. Available at https://www.mylexisnexis.co.za/Index.aspx, accessed on 21 July 2017.

[38] Colin Robinson *Utility Regulation and Competition Policy* (2002) 47.

[39] Trudi Hartzenberg, supra at 5. See also UNCTAD 'The benefit of competition policy for consumers' 4. Available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf, accessed on 26 May 2017.

[40] Section 4*(g)* read with section 21(1)*(p)* of the Gas Act.

[41] Section 4*(h)* read with section 22(1).

Acknowledging that price regulation alone does not necessarily yield competitive outcomes,[42] the focus of this paper is not on alleged anti-competitive practices by the incumbent but it is on the regulatory framework that is believed can still be enhanced to facilitate the attainment of the Gas Act object to make HDSAs also become competitive.

In so far as the registration process is concerned, the Gas Act stipulates that the owner of an operation that involves a gas production or a gas importation activity,[43] or the owner of an operation that involves gas transmission for that particular person's exclusive use, or the owner of an operation that involves small biogas projects in rural communities not connected to the national gas pipeline grid does not require to be licensed but only has to register the non-licensable operation concerned with NERSA by providing the latter with prescribed information concerning the activities of such operation.[44]

2.2 The current state of competition in the piped-gas industry

The South African piped-gas industry currently has one major licensee that does business across all three streams of the currently prevalent piped-gas value chain, namely, transmission and distribution of gas at midstream level and trading in gas at downstream level, as illustrated in Figure 1 below.[45]

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[42] Philip G. Gayle and & Dennis L. Weisman 'Efficiency Trade-Offs in the Design of Competition Policy for the Telecommunications Industry' (2007) 5. Available at *http://www.personal.ksu.edu/~gaylep/Gayle-Weisman_RNE_Final.pdf*, accessed on 21 August 2017

[43] These constitute part of upstream activities regulated in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).

[44] Section 15(2) read with section 28 of the Gas Act.

[45] Genesis 'An assessment of the adequacy of competition in the South African piped-gas industry', 8 October 2015. Available at *http://www.nersa.org.za/Admin/Document/Editor/file/Piped%20Gas/Consultations/Document/An%20assessment%20of%20the%20adequacy%20of%competition%20in%20the20%20South%20Afican%20piped-gas%20industry.pdf*, accessed on 12/07/2017.

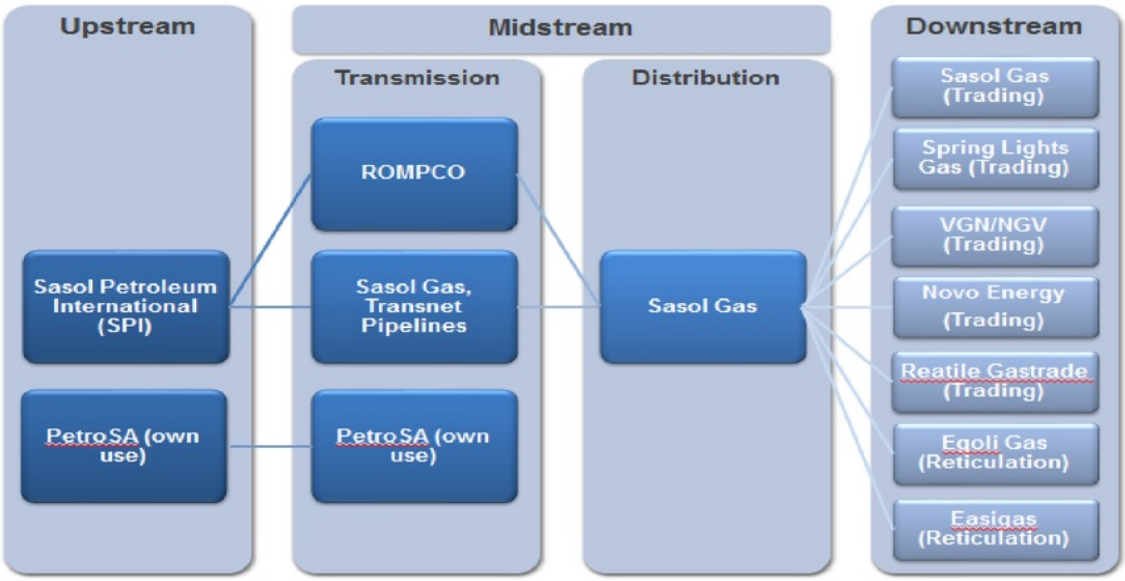


Figure 1: South African piped-gas market structure

Nine other licensees exist in the trading space where they still compete with the aforesaid major licensee over and above having procured their gas from such major supplier, as per the illustration in Figure 1 above. The presence of these other players in the market does not necessarily mean there is competition yet. As Littlechild says, 'adding a few firms or taking away a few would not fundamentally affect the competitive outcome in an industry: it is not the number of firms that really counts, but the conditions of entry and exit.'[46]

Not every one of these licensed entities in the piped-gas industry is owned or controlled by HDSAs. It is worth mentioning, however, that most of them do employ HDSAs in senior management or leadership roles, as per the information that periodically comes to the attention of NERSA post licensing phase in compliance with a licence condition that NERSA imposes in terms of section 21(1)*(b)* of the Gas Act read with

[46] Stephen Littlechild 'Michael Beesley's contribution to privatization, competition and regulation' in Colin Robinson (ed) *Utility Regulation and Competition Policy* (2002) xxvii.

regulation 5(1) of the Piped Gas Regulations.[47],[48] I discuss these two provisions in detail in **section 2.4** below to critique their imposition as a licence condition vis-à-vis the object of the Gas Act to promote the competitiveness of companies owned or controlled by HDSAs as outlined in **section 2.3** below.

2.3 Gas Act on promoting competition and the competitiveness of HDSAs in the piped-gas industry

Regarding the promotion of competition and competitiveness of HDSAs, the Gas Act contains a whole host of provisions including the following –

'2. The objects of this Act are to –

(a) promote the efficient, effective, sustainable and orderly development and operation of gas transmission, storage, distribution, liquefaction and re-gasification facilities and the provision of efficient, effective and sustainable gas transmission, storage, distribution, liquefaction, re-gasification and trading services;

(b) ...

(c)

(d) promote companies in the gas industry that are owned or controlled by historically disadvantaged South Africans by means of licence conditions so as to enable them to become competitive;

(e) …

(f) …

(g) …

(h) promote the development of competitive markets for gas and gas services;

(i) …; and

(j) promote access to gas in an affordable and safe manner.'

'4. The Gas Regulator [sic] must, as appropriate, in accordance with this Act –

(g) regulate prices in terms of section 21(1)(p) in the prescribed manner;

---

[47] Regulations issued by GN R321 GG 29792 of 20 April 2007, under section 34(1) of Gas Act No. 48 of 2001.

[48] Licence conditions for all piped-gas licences issued are published on the NERSA website at http://www.nersa.org.za/RegulatorDecisions>Piped-Gas.

(h) monitor and approve, and if necessary regulate, transmission and storage tariffs and take appropriate action when necessary to ensure that they are applied in a non-discriminatory manner as contemplated in section 22;

(j) promote competition in the gas industry;'

'21. (1) The Gas Regulator [sic] may impose licence conditions within the following framework of requirements and limitations:

(p) maximum prices for distributors, reticulators and all classes of consumers must be approved by the Gas Regulator [sic] where there is inadequate competition as contemplated in Chapters 2 and 3 of the Competition Act, 1998 (Act No. 89 of 1998);'

'22. (1) Licensees may not discriminate between customers or classes of customers regarding access, tariffs, prices, conditions or service except for objectively justifiable and identifiable differences regarding such matters as quantity, transmission distance, length of contract, load profile, interruptible supply or other distinguishing feature approved by the Gas Regulator [sic].'

From these provisions of the Gas Act, I deduce that the function in section 4*(j)* of the Gas Act particularly requires and empowers NERSA to promote competition in the piped-gas industry by taking guidance from the relevant objects and other functions enumerated in sections 2 and 4 of the same Act as its available regulatory tools to practically fulfill this function. In this regard, these Gas Act provisions envisage the attainment of competition either through the elimination of market dominance by one player or same groups/categories of players in the first place (i.e. promotion of diverse competition); or through the prohibition of abusive behavior by a firm dominating the market or prohibition of anti-competitive practices that tend to lead to the abuse of dominant position. This is not at odds with the observation that in industries that are not monopolistically state-owned, the design of a competitive market will always vary from industry to industry, according to the kinds of market failure identified.[49]

That said, section 2*(a)*, *(d)*, *(h)*, *(j)* as well as section 4*(g)* read with section 21(1)*(p)* and section 4*(h)* read with section 22(1) are all indications that, within the Gas Act context,

[49] Dieter Helm & Tim Jenkinson (ed) *Competition in Regulated Industries* (1998) 10.

the function in section 4*(j)* would have been properly fulfilled if the following outcomes ensue from its performance –

i. the promotion of *inter alia* effective development and operation of gas facilities which paves the way to a variety of gas products for gas consumers to choose from and thereby translates to effective provision of gas services in the country;
ii. the issuing of licences that have the potential to enable the HDSA-owned or controlled entities to also become competitive in the industry, in which case the imposed conditions attaching to such licences must directly correspond with such goal;
iii. the development of a competitive market for gas and/or gas services;
iv. the approval of prices by NERSA only up to reasonable maximum levels that would mimic competition in case there is still an inadequacy thereof;
v. the ability to procure gas at affordable prices; and
vi. the general levying of same tariffs to all customers for gas transmission and storage services received from the same licensee under the regulated privilege to only charge different tariffs in respect of objectively justifiable and identifiable flexibilities such as different quantities of gas to be transmitted or stored for different customers, different distances over which the gas molecule to different customers must be transmitted, the different lengths of time over which the gas transmission or storage service will be provided to different customers etc.

To contain the research scope, this paper focuses mainly on enabling the HDSAs to become competitive in the piped-gas market through licence conditions imposed upon licensees that are not necessarily HDSA-owned or controlled, and therefore concentrates mostly on the object in section 2*(d)* of the Gas Act read with associated regulatory provisions.

By virtue of sections 3(1) and 3(1A)*(a)* of the Competition Act, the competition that is required to be promoted by NERSA during the execution of its powers and performance of its functions under the Gas Act is the same competition as would be perceived within the context of the Competition Act. Hence, the referencing to competition law and policy as a yardstick mostly under **section 3** of this paper.

2.4 *Application of relevant Gas Act provisions towards promoting the competitiveness of HDSAs*

In assessing the extent, if any, to which the competitiveness of HDSA-owned or controlled companies is effectively promoted in the piped-gas industry, it is important to first note that NERSA has continually set out to fulfill the object in section 2*(d)* of the Gas Act by applying the powers conferred to it by section 21(1)*(b)*. Section 21(1)*(b)* of the Gas Act provides that –

> '21. (1) The Gas Regulator [sic] may impose licence conditions within the following framework of requirements and limitations:
>
> (b) licensees must provide information to the Gas Regulator [sic] of the commercial arrangements regarding the participation of historically disadvantaged South Africans in the licensees' activities as prescribed by regulation and other relevant legislation'.

Essentially, section 21(1)*(b)* of the Gas Act gives NERSA the discretion to, at the time of issuing any licence in terms of the Gas Act, impose amongst many other conditions of such licence a requirement that the licensee concerned must, only after the licensing phase has been finalized, provide NERSA with information in the manner prescribed by regulation and other relevant legislation about commercial arrangements that such licensee has made regarding the participation of HDSAs in its licensed activities. In line with this provision, NERSA normally requires licensees to, within thirty days of their every financial year end, submit the information contemplated in regulation 5 of the Piped Gas Regulations regarding the HDSAs.

> In turn, regulation 5(1) of the Piped Gas Regulations provides the following –
>
> '5. (1) Information regarding historically disadvantaged South Africans provided by a licensee must include-
>
> (a) the number of shareholders from historically disadvantaged background and their respective shareholding in the licensee;
>
> (b) the number and positions of historically disadvantaged South Africans who are members of the Board of Directors of the licensee;

(c) the number of historically disadvantaged South Africans who hold senior management positions in the licensee;
(d) the quantity and percentage of sub-contracted work to companies with more than 50% ownership by historically disadvantaged South Africans;
(e) proof of compliance with the Employment Equity Act, 1998 (Act No. 55 of 1998); and
(f) plans for and actions taken to develop historical [sic] disadvantaged South Africans in the gas sector through training, procurement and enterprise development.'

My understanding of this regulation is that only after obtaining a licence from NERSA, must the licensee provide NERSA with information that shows if it has any shareholders, board members, or senior managers from HDSA background; and if it sub-contracts any of its work, which may definitely not be piped-gas related,[50] to companies that are more than a half-owned by people from such background; and if it has measures in place to develop the HDSAs, albeit not in a piped-gas related manner;[51] and if it complies with the Employment Equity Act. Now this is where my earlier assertion under **section 2.2** above, about most licensed entities in the piped-gas industry employing the HDSAs in senior management or leadership roles although not all of them are themselves owned or controlled by HDSAs, comes from; and I argue that this cannot conceivably be what the object in section 2*(d)* was set to achieve. Like Stelzer, I believe regulators should concentrate on getting the incentives right.[52]

Lest the preceding paragraph comes across as insinuating that NERSA is not interpreting section 2*(d)* correctly, it should be noted that I am inclined to believe that regulation 5(1) was crafted the way that it is because it clearly flows directly from section 21(1)*(b)* instead of section 2*(d)*. In that case, I argue that the careful reading of section 21(1)*(b)* ought to rather tell us that the purpose sought to be achieved by this section is distinct from the one sought to be achieved by section 2*(d)*.

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[50] Section 23(4) of the Gas Act provides that 'A licensee may not assign its licence to another party' while section 15(1) proscribes the performance of any licensable activity by anyone unless they are duly licensed.
[51] *Ibid*.
[52] Irwin M. Stelzer 'A review of privatization and regulation experience in the UK' in Colin Robinson (ed) *Utility Regulation and Competition Policy* (2002) 92.

In this regard, I argue that section 2*(d)* is directly concerned with promoting the participation of companies owned or controlled by HDSAs so that they may also become competitive in the gas industry space as licensees in their own right. Therefore, section 2*(d)* requires NERSA to seriously engage in an *ex-ante* determination prior to deciding if it may licence any aspirant industry player, having due regard to the likelihood or otherwise of such aspirant player to help make any HDSA-owned or controlled company also become competitive in the piped-gas industry in a manner that addresses the section 15(1) and 23(4) constraints[53] upfront. Section 21(1)*(b)*, on the other hand, merely concerns itself mostly with the creation of directorship, shareholding or senior management employment opportunities for HDSA individuals within the licensed companies who, themselves, might not necessarily be owned or controlled by HDSAs.

But be that as it may, it is also important to note that there is nothing further in the Act or the Regulations which says what should happen if the licensee could furnish NERSA with information that suggests no prevalence of any factor listed in regulation 5(1). In my view, this on its own would suggest a legislative void in the application of the section 2*(d)* object if one were to attempt arguing that the licence conditions imposed under section 21(1)*(b)* read with regulation 5(1) are designed to fulfill the section 2*(d)* object. Hence, I believe the issues canvassed in this paper could suitably be addressed through legislative changes or policy reform than by mere change of interpretation from the regulator's side.

Therefore, my assessment of the extent to which the competitiveness of HDSA-owned or controlled companies is effectively promoted in the piped-gas industry can be summed up as follows:

i. The manner in which sections 2*(a)*, 4*(h)* and 22(1) of the Gas Act have been crafted do support the principle of competition law advanced in section 2*(a)* of the Competition Act in that, just like the latter provision does in respect of the broader South African economy, the said three provisions of the Gas Act also provide in favour of stimulating the growth, efficacies and flexibility of the South

[53] See note 50 above.

African economy specifically within the piped-gas industry. However, the practical implementation of section 2*(d)* by NERSA in the way that has already been articulated in the preceding paragraphs of this particular section negates the actual attainment of the Gas Act objects and/or NERSA's function to effectively promote competition. Consequently, the support by these Gas Act provisions of the competition law principle advanced in section 2*(a)* of the Competition Act is nullified.

ii. The manner in which sections 2*(h)*, 2*(j)*, 4*(g)* and 21(1)*(p)* of the Gas Act have been crafted do support the principle of competition law advanced in section 2*(b)* of the Competition Act in that, just like the latter provision does in respect of the broader South African economy, the said four provisions of the Gas Act also provide in favour of regulating towards the state of economy whereby consumers will ultimately have a variety of gas products to choose from as well as enjoy reasonable prices for such.

iii. It is understood that the manner in which regulation 5(1)*(b)*, *(c)*, and *(d)* of the Piped Gas Regulations were crafted was an attempt to support the principles of competition law advanced in section 2*(c)* and *(e)* of the Competition Act to increase employment opportunities in so far as HDSAs are concerned and thereby improve their socio-economic welfare, as well as to afford this category of persons a fair opportunity to partake in the gas industry even if their businesses are small or medium sized and thereby ensure that the industry is not only dominated by large-sized businesses. As already alluded to above, however, I assert that, in my view, regulation 5(1) would have moved more closely towards promoting the competitiveness of HDSAs if it was crafted slightly different in a manner that clearly makes the advancement of these persons an obligation on the part of any person licensed under the Gas Act. Alternatively, the same regulation 5 or the Gas Act itself could also go further as to propose measures to sanction licensees who have nothing put or prepared to be put in place to promote the competitiveness of HDSAs.

iv. The manner in which section 2*(d)* of the Gas Act has been crafted does support the principle of competition law advanced in section 2*(f)* of the Competition Act

in that, just like the latter provision does in respect of participation of historically disadvantaged persons in the broader South African economy, the former also provides in favour of increased ownership stakes by these persons particularly in the gas industry. The only challenge that remains with section 2*(d)* of the Gas Act as it currently stands is its practical implementation as noted in sub-paragraph (i) herein above. In other words, it is not necessarily the manner in which section 2*(d)* is crafted in the Gas Act, but rather the manner in which it is practically implemented, that hinders the increased ownership stakes of historically disadvantaged persons in the gas industry and thereby negatively affect one of the stipulated methods to promote competition in this particular industry. While it is noted that the challenge may not necessarily be with the manner in which section 2*(d)* is crafted in the Gas Act, there could still also be room for improvement in the articulation of section 2*(d)* itself in the Act to eliminate any possible continual future confusions. One need also not lose hindsight of the fact that the cluster of confusion in the practical implementation of this section could most likely be ensuing from the words 'by means of licence conditions' used in such section when the framework of licence conditions provided by the Gas Act under section 21(1) only has paragraph *(b)* closest to the wording of section 2*(d)* at first glance. Furthermore, this seeming cluster of confusion in the practical implementation of section 2*(d)* could be viewed as attestation to Price's observation that the gas regulators have faced inevitable contradiction between constraining the incumbents where there is monopoly power and encouraging the development of competition through increased diverse participation.[54]

In summary, my in-depth examination of regulation 5 against the wording of section 2*(d)* of the Gas Act[55] read with section 2*(f)* of the Competition Act[56] reveals that, for purposes of appropriately interpreting and practically applying the Gas Act object in section 2*(d)* towards mostly attaining the goal of promoting the competitiveness of HDSAs

[54] Catherine Waddams Price, supra at 122
[55] Namely, to promote the participation of companies that are owned or controlled by HDSAs in the gas industry by means of licence conditions so as to enable them to become competitive.
[56] Namely, to increase the ownership stakes of HDSAs in the South African economy.

in the piped-gas industry, the imposition of a licence condition in terms of section 21(1)*(b)* which calls only for a mere provision of information to NERSA that the licensee has leadership or strategic positions occupied by HDSAs cannot conceivably be sufficient. Contrary to what is envisaged in the Preamble to the Competition Act, this does nothing really adequate towards opening up the piped-gas economy to greater ownership by a diverse greater number of willing and capable South Africans. This cannot be good for regulating for competition as some scholars observe that the slow rate of entry by HDSAs presents a case for substantial barriers of entry,[57] as can also do regulation if things remain unfixed.[58]

In this regard, some scholars similarly observe that competition can be facilitated if the regulator intervenes to alleviate the potential competition problems,[59] because '[R]egulatory measures can provide certainty in advance that can facilitate entry into markets, and…[T]he facilitation of entry and promotion of effective rivalry creates a landscape for competition to work more effectively.'[60] Hence, Shuttleworth asserts that the economics of energy networks mean that regulators have to take some deliberate measures to promote competition in energy markets.[61] This assertion is in line with Sharpe's view that 'by far the most important function of a regulator is to act as a positive stimulant to introduce competition.'[62] Furthermore, in his Wincott lecture on *'Privatisation, Competition and Regulation'*, Professor Littlechild is quoted as having described his statutory power to promote and maintain effective competition to mean seeking new opportunities to provide effectively structural remedies to enable competitors to enter.[63]

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[57] R Das Nair, P Mondliwa & S Roberts, 'The inter-relationship between regulation and competition enforcement in the South African liquid fuels industry', *Journal of Energy in Southern Africa vol.26* (2015) 4. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-447X2015000100002, accessed on 12 July 2017.

[58] James Hodge 'Promoting Competitive Outcomes in the Fixed Line Telecommunications Sector in South Africa' (2001) 3. Available at https://www.mylexisnexis.co.za/Index.aspx, accessed on 21 July 2017.

[59] R Das Nair *et al*, supra at 2.

[60] *Ibid*, 7.

[61] Graham Shuttleworth 'Opening European electricity and gas markets' in Colin Robinson (ed) *Utility Regulation and Competition Policy* (2002) 140-46.

[62] Tom Sharpe QC 'Concurrency or convergence? Competition and regulation under the Competition Act 1998' in Colin Robinson (ed) *Utility Regulation and Competition Policy* (2002) 167.

[63] *Ibid*, 168.

Hodge, on the other hand, submits that the obvious solution to address regulatory barriers or deficiencies is to resource the regulator better although some of the steps involved in doing so require a political will and may only be put in place if the responsible Ministry does not deliberately want to cripple competition by crippling the regulatory body.[64]

It is consequently against this backdrop that, in **section 3** below, I first recommend different ways of implementing sections 2*(d)* and 21(1)*(b)* read with regulation 5(1) that could be considered as pure regulatory intervention measures not requiring political will; and secondly recommend how they may be improved through legislative amendment processes to facilitate optimal execution of NERSA's duty to promote the competitiveness of HDSAs in the gas industry.

The paper also explores some other regulatory activities that could be looked at or revisited in an effort to make the most of the provisions of section 2*(h)* read with section 4*(j)* of the Gas Act.

3. IMPROVING PROMOTION OF THE COMPETITIVENESS OF HDSAs UNDER THE GAS ACT

3.1 Different practical implementation as a regulatory intervention measure

This paper uses competition law and policy principles as a yardstick in recommending different practical implementation approaches. This is mainly because such principles are about setting the rules for the market economy, which rules can be changed at any stage in order to shift the balance in favour of different outcomes such as constructively opening up markets.[65]

Moreover, other scholars submit that in the age of regulatory concurrency brought about by the deletion of the erstwhile section 3(1)*(d)* and the insertion of the current

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[64] James Hodge, supra at 6.

[65] Simon Roberts 'Assessing the record on competition enforcement against anti-competitive practices and implications for inclusive growth', *REDI3x3 Working Paper 27* (February 2017), 8. Available at https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/58b90923d482e90722bf0483/1488521512374/Roberts+2017+REDI3x3+Working+Paper+27+Competition+policy+and+inclusive+growth.pdf, accessed on11 August 2017.

section 3(1A)*(a)* of the Competition Act, the role of sector-specific regulators should be to facilitate market entry into the sectors concerned not only just through the issuing of licences but also through the creation of regulatory frameworks that promote competition,[66] because sometimes the simple licensing of competitors will not be effective enough, especially where the existing incumbents are strong and seemingly impregnable. Just like the anti-competitive conduct can be better remedied through recognition of the role of regulation, so too regulation can be designed such that it enables greater competitive rivalry,[67] or 'effective competition'.[68] Hence, the view that the issuing of new licences needs to be accompanied by regulatory mechanisms that facilitate new entry.[69] This is consistent with Roberts' statement that '[F]ostering competitive rivalry means not just preventing exclusion but also addressing strategies that undermine effective competitive discipline.'[70] In fact in other regulated markets, like the telecommunications, where the sector-specific legislation generally requires the sector-specific regulator to promote competition, such statutory provision has been used by the sector-specific regulator concerned to exercise its discretion not to grant licences when this would not be pro-competitive.[71]

While it is acknowledged that in this age of regulatory concurrency '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',[72] it is also submitted that there can be no harmony if the regulator has the statutory ability to intervene and impose provisions based

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[66] Michael Markovitz, 'Concurrent jurisdiction: The relationship between the independent communications authority and the competition commission' (2001), 2. Available at https://www.mylexisnexis.co.za/Index.aspx, accessed on 21 July 2017. See also R Das Nair *et al*, supra at 5.

[67] R Das Nair, P Mondliwa & S Roberts, 'The inter-relationship between regulation and competition enforcement in the South African liquid fuels industry', *Journal of Energy in Southern Africa vol.26* (2015) 1. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-447X2015000100002, accessed on 12 July 2017.

[68] Term used by competition economics literature to describe competitive rivalry even where there may be relatively few firms. See Simon Roberts 'Competition policy, competitive rivalry and a development state in South Africa', 224. Available at www.hsrcpress.ac.za, accessed on 14 March 2016.

[69] Michael Markovitz, supra at 3.

[70] Simon Roberts 'Competition policy, competitive rivalry and a development state in South Africa', supra at 228.

[71] Michael Markovitz, supra at 4.

[72] R Das Nair *et al*, supra at 6.

upon very loose and unspecified criteria detached from competition.[73] Hence, the regulator's course of action must be aligned with prevailing competition principles.

Against the foregoing background, one recommended criteria which NERSA could consider specifying in its regulatory frameworks so as to bring about a different practical implementation of the object in section 2*(d)* of the Gas Act is to expand on the notion of public interest found in section 10(1)*(b)* of the National Energy Regulator Act requiring all NERSA decisions to be in the public interest. In competition laws and policies, public interest considerations are expressed through merger control provisions wherein competition authorities are empowered to correct the anti-competitive effects of mergers through structural and behavioural remedies. In this regard, public interest considerations include, amongst others, taking into account the effect that the merger will have on the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive.[74]

To mention just a few examples, in *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*, the Competition Tribunal approved the acquisition of Tepco by Shell SA without conditions on the grounds that the transaction would not lead to a black investor, Thebe (a B-BBEE holding company of which Tepco was a subsidiary), exiting the petroleum industry in that Thebe was promised to acquire between 17.5% and 25% stake in the newly formed Shell SA Marketing in return for selling its subsidiary; and that this would also enable Shell SA to comply with the provisions of the Charter for the South African Petroleum and Liquid Fuels Industry on Empowering HDSAs in the Petroleum and Liquid Fuels Industry where participating companies and stakeholders had committed to bring ownership and control of the industry by HDSAs to approximately 25% by 2010. Regarding the Commission's recommendation that the merger should be approved subject to Tepco continuing to exist in the market under the joint control of Thebe and Shell SA, the Tribunal interestingly remarked that empowerment is not furthered by obliging firms controlled by HDSAs to continue to exist under a life support system kind

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[73] Tom Sharpe QC 'Concurrency or convergence? Competition and regulation under the Competition Act 1998' in Colin Robinson (ed) *Utility Regulation and Competition Policy* (2002), 175.

[74] Trudi Hartzenberg, supra at 6. See also Simon Roberts 'The role for competition policy in economic development? The effects of competition policy in South Africa, and selected international comparisons', supra at 5.

of arrangement.[75] Applying a similar principle in a piped-gas licensing scenario, this would mean that an application for a licence by a prominent industry player could be granted if the applicant successfully demonstrates to the regulator that this would lead to a black investor entering the piped-gas industry even though not predominantly under its unknown brand name.

In *Coleus Packaging (Pty) Ltd and Rheem Crown Plant (a division of Highveld Steel and Vanadium Corporation Limited)*, the Tribunal approved the acquisition of Rheem by South African Breweries through its subsidiary, Coleus subject to a few conditions one of which was to require SAB to dispose at least 40% of its issued share capital to a BEE partner within two years provided that the crown plant had been rehabilitated to its reasonable satisfaction.[76] Similarly, in a foreign jurisdiction of Mexico, a merger proposal by which Nestlé S.A. wanted to purchase the infant formula and nutrient division of Pfizer Inc. was reportedly notified in 2012. Holding the view that the proposed merger presented more potential anti-competitive effects than pro-competitive ones, the authority blocked the transaction; and this led to the parties subsequently submitting a proposal of remedies to eliminate the identified anti-competitive effects. Accordingly, the final settlement reached was that Nestlé S.A. had to divest to a third party all assets necessary to maintain the presence of the infant formula and nutrient division of Pfizer in the Mexican market.[77] Applying a similar principle to a piped-gas licensing scenario, this would mean that an application for a licence by a prominent industry player could be granted subject to a condition that such licensee would need to meaningfully divest a specified percentage of its share capital to a BEE partner within a specified period.

In *Walmart Stores Inc and Massmart Holding Ltd*, the Tribunal was unable to quantify the impact that would be had on small businesses by the merged entity's likely diversion from buying its products from the local markets to importing them.

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[75] Case No: 66/LM/Oct01.
[76] Case No: 75/LM/Oct02.
[77] UNCTAD 'The benefit of competition policy for consumers' *Intergovernmental Group of Experts on Competition Law and Policy*, Fourteenth session, Geneva, 8-10 July 2014, 6. Available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf, accessed on 26 May 2017.

Nevertheless, the merger was approved on the basis of *inter alia* the merging parties proposing an investment remedy aimed at developing local suppliers to the tune of R100 million which the Tribunal felt it sought to make the local industry more competitive.[78] Again, applying a similar principle to a piped-gas licensing scenario, this would mean that a licence application could still be considered in favour of an applicant who has no specific BEE partner in mind to help also become competitive but commits to some sort of measurable investment remedy aimed at empowering any HDSAs.

It is therefore my submission that, provided that the existing legislative framework is expanded on to permit it, I see nothing in law that could prevent the similar application of public interest principles in the piped-gas licensing process to say who is going to be an industry player through imposition of clearly articulated licence conditions that aim to correct any anti-competitive effects that may potentially ensue. In other words, this particular section of this research paper is advocating for an improved regulatory intervention measure where an application that meets all the licensing requirements could nevertheless fall to be rejected because of the applicant's failure to demonstrate how it would enable the HDSAs to become competitive. It is my respectful view that this is just one of the ways in which the piped-gas industry might gradually transform into a state that ensures that the HDSAs also become competitive.

Another way to bring about this regulatory reform could be through unbundling provisions. For instance, when the European Union ("EU") decided to move from a monopolistic to a competitive market framework for the provision of electricity and gas, it did so by introducing third party access regime and some unbundling provisions to discourage vertical foreclosure.[79] At first, consideration was given to a full independent system operator ("full ISO") unbundling option '(where the vertically integrated company remains owner of the network assets and receives a regulated return on them, but is not responsible for their operation, maintenance and development)' and a full ownership

[78] Case No: 73/LM/Nov10.
[79] Philip Lowe, Ingrida Pucinskaite, William Webster and Patrick Lindberg 'Effective unbundling of energy transmission networks: lessons from the Energy Sector Inquiry', *Competition Policy Newsletter*, 23. Available at http://ec.europa.eu/competition/publications/cpn/2007_1_23.pdf, accessed on 21 August 2017.

unbundling option '(where network companies are wholly separate from the supply and generation companies)'.[80]

The unbundling regime that was ultimately opted for, with full support from the European Group of Regulators for Electricity and Gas ("ERGEG"), as the most efficient cure for EU was ownership unbundling, and it commanded a clearer separation between the company that would manage gas and electricity networks and the company or companies that would manage the activities relating to production and sale of these two commodities.[81] Part of the reported reasons why the ownership unbundling regime was opted for is that it conceivably avoids overly detailed and complex regulation while the full ISO option requires a more detailed, prescriptive and costly regulation although it had the potential to improve the status quo.

Therefore, since the topic of this research paper ensues from what I would term a complex articulation of applicable regulatory framework, I also think the full ownership unbundling regime would be more optimal for the piped-gas industry. I have deliberately chosen not to delve into the third party access regime issues, as the South African Gas Act already entails this regime which has proven to have its own flaws the details of which are unrelated to the topic being discussed in this paper.

If NERSA would rather avoid the regulatory intervention measure option, it is my view that the promotion of the competitiveness of HDSAs under the Gas Act to an extent that is more in line with the principles advanced in section 2 of the Competition Act can still possibly be attained subject to a few adjustments that may have to be effected either in the Gas Act or the Piped Gas regulations. In this regard, it should be noted that the

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[80] See clause 3.1.1 of the Communication from the Commission to the European Council and the European Parliament of 10 January 2007, "An energy policy for Europe" [COM(2007) 1 final – {Sec(2007) 12}], 7. Available at *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0001&from=EN*, accessed on 21 August 2017.

[81] *Ibid*, 28-29. See also Communication from the Commission to the European Council and the European Parliament of 10 January 2007, "An energy policy for Europe" [COM(2007) 1 final – Not published in the Official Journal], 1. Available at *http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:127067&from=EN*, accessed on 24 August 2017. And also ERGEG's response to the European Commission's Communication "An Energy Policy for Europe", 6 February 2007, 9. Available at *https://www.ceer.eu/documents/104400/-/-/bd56d8e1-6e2d-dc89-8e9d-86ba4ec577a4*, accessed on 21/08/2017.

proposal to have the law amended so as to make it clearer in certain respects to avoid different interpretations and therefore lengthy legal processes which do not ultimately serve the country well in terms of what the Act was intended to achieve is not something new and has been done even in the Competition Act space.[82]

3.2 Adjustments that may be effected in the Gas Act

To eliminate the cluster of confusion already identified in the preceding sections of this report, I consider that it may be beneficial to slightly amend the provisions of sections 2*(d)* and 21(1)*(b)* of the Gas Act as follows, where the underlined words indicate insertion while the words in bold square brackets indicate deletion –

'2. *(d)* promote the participation of companies **[in the gas industry]** that are owned or controlled by historically disadvantaged South Africans **[by means of licence conditions]** so as to also enable them to become competitive in the gas industry'

'21. (1) *(b)* licensees must always have the historically disadvantaged South Africans and companies owned or controlled by such persons participating in their licensed activities and must provide **[information to]** the **[Gas]** Energy Regulator with information of their commercial arrangements regarding the participation of **[historically disadvantaged South Africans]** these persons and companies in their [licensees'] activities as prescribed by regulation and other relevant legislation;

'21. (1) *(bA)* licensees who have been issued with licenses on the basis of them being owned or controlled by historically disadvantaged South Africans or committing to enable the participation of companies owned or controlled by these persons in their licensed activities in accordance with the object in section 2(d) must remain owned or controlled or committed as such throughout their licence duration and must provide the Energy Regulator with necessary proof to this effect as may be prescribed by regulation'

I also take the view that there would be more weight from the enforcement perspective if a new supplementary provision is added in the Gas Act to render the failure to comply with any of the licence conditions imposed in terms of the abovementioned

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[82] I Lesofe & N Ntombana, 'A Review of abuse of dominance provisions of the Competition Act – is it necessary?' 14. Available at http://www.compcom.co.za/wp-content/uploads/2016/07/1-Review-of-Abuse-of-Dominance-Provisions-of-the-Competition-Act-%E2%80%93-Is-it-Necessary.pdf, accessed on 18 July 2017.

provisions a ground for revoking the non-compliant licensee's licence in addition to the grounds already provided for in section 25(1) and 27(1) of the Gas Act.

3.3 Adjustments that may be effected in the Piped Gas Regulations

I consider that it may be beneficial to slightly amend the relevant paragraphs of regulation 5(1) as follows, where the underlined words indicate insertion while the words in bold square brackets indicate deletion –

'5. (1) Information regarding historically disadvantaged South Africans provided by all licensees annually within three months of the licensee's financial year end must include-

(e) proof of compliance with the Employment Equity Act, 1998 (Act No. 55 of 1998); **[and]**

(f) plans for and actions taken to develop historically disadvantaged South Africans in the gas sector through training, procurement and enterprise development;

(g) where the response to any of paragraphs (a) to (f) above is naught, a detailed plan clearly depicting the licensee's commitments to remedy the situation within 12 calendar months of it having arose or presented itself;

(h) in respect of licensees who have been issued with licenses on the basis of them being owned or controlled by historically disadvantaged South Africans in accordance with the object in section 2*(d)* as contemplated in section 21(1)*(bA)*, an additional document outlining the extent to which it still remains owned or controlled by historically disadvantaged South Africans even though it may no longer be the same persons as the time when the licence was first issued; and

(i) in respect of licensees who have been issued with licenses on the basis of them committing to enable the participation of companies owned or controlled by historically disadvantaged South Africans in their activities for the duration of their licence in accordance with the object in section 2*(d)* as contemplated in section 21(1)*(bA)*, an additional document outlining the extent to which it still remains so committed including a detailed account on the nature and scope of such participation.'

Through either one or both these proposed legislative reforms, I believe that the Gas Act would be adequately strengthened to influence legislative efficiencies directed at improving the industry participation of HDSAs. After all, some authors have argued that strong legislation and credible institutions are critically needed if competition policy is to be an effective instrument.[83] I am therefore arguing that the kind of legislative reform proposed in this paper could be just one of the envisaged complementary measures required for competitive outcomes to be realized.[84]

My final submission is that, in the long run, this transformation would not only benefit the HDSAs but will also enhance consumer welfare owing to the belief that competitive markets provide incentives for firms to offer quality products and services at the best prices. Moreover, it could perhaps also change the perception that developing countries commonly have inappropriate government policies that yield up competition barriers.[85]

4. ROLE OF ECONOMIC REGULATION IN EFFECTIVELY PROMOTING COMPETITION OR COMPETITIVENESS

The widespread recognition out there is that where the market forces do not operate and where regulation is ineffective, consumers become more vulnerable to receiving expensive and inefficient services.[86] Similarly, in instances where the sector is opened up to competition, either through the licensing regulatory approach or 'free entry' the erstwhile monopoly usually still succeeds at excluding or limiting new entrants, and thus retaining its dominant position.[87] This is particularly more common in vertically integrated markets and it could be done by way of refusal to supply or of manipulating prices, amongst many other ways. This way, vertical integration could be a barrier to entry and

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[83] Kasturi Moodaliyar and Simon Roberts 'Introduction: Reflecting on the maturing South African competition law regime' in Kasturi Moodaliyar and Simon Roberts (eds) *The development of competition law in South Africa* (2013) *ix*. Available at http://www.hsrcpress.ac.za/product.php?productid=2302&cat=28&page=1, accessed on 14 March 2016.

[84] Kasturi Moodaliyar and Simon Roberts, supra, *xvi*.

[85] Nick Godfrey 'Why is Competition Important for Growth and Poverty Reduction?' *OECD Global Forum on International Investment* (2008) 4. Available at www.oecd.org/investment/gfi-7, accessed on 21 July 2017.

[86] 'Competition policy in South Africa', supra note 25.

[87] *Ibid*.

lead to foreclosure problems.[88] The manipulation of prices, in particular, is at odds with the principle that 'pure or perfect competition exists in an industry where no seller or buyer of a particular commodity is individually able to exert any influence on its price'.[89]

This therefore leads to a conclusion that if regulation is designed and carried out such that it responds well to the changes in relevant market conditions, this renders the regulation effective and therefore results in the provisioning of improved products and efficient services to consumers and at affordable costs. As a result, the anti-competitiveness of the industry concerned is conquered and its pro-competitiveness achieved. However, if regulation fails to respond to changes in relevant market conditions, then it would be rendered ineffective and thereby most likely yield up to or contribute towards the anti-competitiveness of the industry concerned.

5. CONCLUSION

This report provides a detailed account of how the Gas Act object to promote the competitiveness of HDSAs is seemingly implemented ineffectively most probably as a result of the interpretation of the wording in section 2*(d)* to potentially mean or lead NERSA to a reason to believe that imposing a licence condition in terms of section 21(1)*(b)* is the closest means provided by the Act to facilitate the attainment of this particular object. Consequent to this, the entire **section 3** of this report proposes solutions, both from the regulatory and legislative reform perspectives, to remedy these challenges and thereby potentially aid the promotion of the competitiveness of HDSAs in the piped-gas industry. This way, many ideologies enumerated in the Preamble to the Competition Act in so far as they relate to the piped-gas industry would move more closely towards being the attainable goals than just being the documented intended goals for which no effective plans exist.

I have found no evidence to suggest what has been done by the competition authorities to promote the competitiveness of the HDSAs in the piped-gas industry since the inception of its regulation in November 2005. However, the inclination to use competition law and policy principles as a benchmark for this paper comes from its

[88] Helm & Jenkinson (ed), supra at 11.
[89] Van Heerden & Neethling, supra at 19.

recognition by competition law experts as a potential means to make markets work better by promoting effective competition albeit through the prohibition of anticompetitive practices and merger control provisions, which contain the public interest considerations and consequently the pursuit to advance the HDSAs. [90]

In essence, it is important to always bear in mind that economic regulation is a policy response to any market failure. It plays a key role by presenting opportunities to introduce or promote competition in economies where there was previously none, resulting in the delivery of a variety of choices and lower prices for consumers as well as improved product and service innovation. This is especially more so when the relevant regulatory regime is correctly designed and operated in such a way as to avoid – or at least minimize – the risk of having regulation itself delay the establishment of a normal competitive market.[91] This accords with one main view widely held in respect of industry regulation, namely, 'that regulation is instituted primarily for the protection and benefit of the public at large or some subclass of the public'.[92]

That said, one may conclude that whether economic regulation could potentially positively correct the current anti-competitiveness of the piped-gas market in future will depend on the extent to which the policy makers are willing to re-articulate the regulatory functions in a manner that optimally favours the attainment of the industry competitiveness along the lines of the observations and recommendations made in **sections 2** and **3** above.

While still on this point, it is important never to disregard the fact that competition and regulation can only deliver certain objectives, and thereby potentially leave government with an even significantly major role of delivering a wider social policy agenda

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[90] Kasturi Moodaliyar and Simon Roberts, supra, *ix*.

[91] The Competition Authority 'Economic Regulation' – Competition Authority response to the Draft Consultation on the Government Statement on Economic Regulation May 2013 available at http://ccpc.ie/sites/default/files/S-13-002%20Economic%20Regulation.pdf, accessed on 5 May 2017. See also Stephen Dale 'Case Study: South Africa – Equal opportunity to compete' available at https://www.idrc.ca/en/article/case-study-south-africa-equal-opportunity-compete, accessed on 27 March 2017.

[92] George J. Stigler 'The theory of economic regulation' in Paul L. Joskow (ed) *Economic Regulation* (2000) 3.

probably using other policy instruments or intervention measures that may address the problems more aptly and directly.

In this regard, this report observes that the vertically integrated monopolies are often adept at limiting new entrants or driving out competition and thus retaining their dominant position even in instances where the sector is already opened up to competition. This, in itself, indicates that the situation could even be worse in cases of nascent and not yet competitive industries like the South African piped-gas industry. Therefore, doing away with vertical integration could also serve as a cure that ensures that once competition is attained in the industry, new entrants are adequately protected from anti-competitive tricks of a competitor that previously used to be a monopoly. And this could actually make the most of the provisions of section 2*(h)* read with section 4*(j)* of the Gas Act.

I conclude by emphasizing that all recommendations and, to a greater extent, some arguments advanced in this report are made with an appreciation that economic regulation is indeed a process which requires the change in regulatory approach as and when market conditions also evolve.[93] Consequently, an ideal proposed solution for the problem identified today may no longer be an appropriate solution for the same or similar problem in the future.

[93] *Ibid*.

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