Regulating for a competitive telecommunications sector

Helanya Fourie[1], Lara Granville[2] & Nicola Theron[3]

Keywords: telecommunications, regulation, antitrust, concurrent jurisdiction

JEL classification: L40, L51, L96

Convergence is giving rise to new product and service offerings in the telecommunications market. It encourages operators to invest in different types of infrastructure and services, often through the acquisition of existing service providers. The competitive effects of these transactions and the related impact that they have on economic growth and employment are influenced by the regulatory environment that governs the sector. In South Africa, ICASA is responsible for implementing and enforcing ex ante regulation, while the Competition Commission's role is to identify and remedy anti-competitive behaviour. This paper looks at international and South African precedent to investigate the application of ex ante regulation and ex post competition policy, and the implications thereof for evaluating transactions in South Africa's telecommunications sector.

[1] Lead author, Senior Economist, Econex.
[2] Director, Norton Rose Fullbright South Africa Inc.
[3] Managing Director, Econex, Extraordinary Professor, Department of Economics, University of Stellenbosch.

1. INTRODUCTION

Technological development in the communications sector has lead to overlap in the platforms over which services are provided and increases the variety of services that can be offered over a single device. This process is known as convergence. Consider, for example the Skype application: due to technological change, Skype services are offered with equal ease on smart phones as well as computers. These kind of developments in the telecommunications market call on service providers to adapt their service offerings to remain competitive. It is often more cost effective for service providers to acquire firms that are experienced in providing specific services, than to invest in new infrastructure or to grow these services organically.

These dynamics in South Africa's telecommunications sector are evidenced by the number of transactions that have recently come before the competition authorities. First, MTN acquired a controlling share in Afrihost, with the transaction approved by the Competition Tribunal in October 2014. The transaction allows MTN and Afrihost to leverage off each other's investment in broadband and other infrastructure.[4] Second, Telkom's acquisition of BCX – an company experienced in the provision of IT services – has recently received conditional approved by the Competition Tribunal.[5] Rather than growing Telkom Business organically, Telkom can now rely on BCX to enhance its IT services offering. Third, the Competition Commission ('the Commission') and the Independent Communications Authority of South Africa ('ICASA') have recently recommended the conditional approval of the acquisition of Neotel by Vodacom. It seems that one of the primary rationales for this acquisition is for Vodacom to gain access to Neotel's valuable spectrum allocation, which Vodacom argues would allow it to offer a greater range of LTE[6] data services. The outcome of this matter is still to be determined, since various parties, including ICASA, have indicated their intention to intervene in the merger proceedings at the Competition Tribunal ('the Tribunal'). Fourth, the Commission has recommended that the Tribunal prohibit the proposed large merger whereby MTN would acquire certain aspects of Telkom's Radio Access Network (RAN)[7]. It argues that the merger would limit Telkom Mobile's ability to grow and compete independently against MTN and other mobile operators.[8] This prohibition has caused the parties to abandon the transaction.

It is necessary to understand the regulatory environment that governs the telecommunications sector in order to understand the competitive effects of these transactions and the related impact that they have on economic growth and employment. South Africa's telecommunications sector is regulated by ICASA,[9] which shares responsibility with the Commission to facilitate competition. This is provided for by section

[4] http://www.techcentral.co.za/mtn-afrihost-deal-gets-regulatory-nod/52100/
[5] http://www.itweb.co.za/index.php?option=com_content&view=article&id=145219:Telkom-BCX-welcome-Competition-Tribunal-s-decision&catid=260
[6] Long Term Evolution is a standard of wireless high speed data communication, also known as 4G.
[7] The RAN network is the telecommunications network that connects subscribers to immediate service providers. It consists of base stations (RAN sites) on which network infrastructure (e.g. user equipment, antennae, etc.) is established.
[8] Mawson, N. (2015). Telkom, MTN call off deal. *Business Report.* 17 August. Available online: http://www.iol.co.za/business/companies/telkom-mtn-call-off-deal-1.1901069#.VdHxCBOqqkp
[9] ICASA was established by the ICASA Act in 2000 to regulate broadcasting and telecommunications in the public interest.

3(1A)(a) and 82 of the Competition Act (as amended), according to which concurrent jurisdiction over competition matters applies where a sector is subject to regulation by another regulatory authority.

This paper considers the role of the competition authorities (the Commission and Tribunal) to facilitate competition in the telecommunications sector, and the telecommunications regulator (ICASA) to correct market failure through implementing pro-competitive licencing conditions. We compare ex ante economic regulation and ex post competition policy, and consider the application thereof with a focus on telecommunications transactions. We further evaluate South Africa's experience in implementing concurrent jurisdiction in the telecommunications sector by looking at three examples: a complaint against Telkom for alleged anti-competitive behaviour, mobile termination rate regulation, and spectrum regulation.

2. EX ANTE ECONOMIC REGULATION VERSUS EX POST COMPETITION POLICY

"Ex ante" regulation refers to explicit market intervention by the regulator "before the fact", in other words regulation in order to establish conditions within the industry so as to ensure that the relevant market functions optimally. "Ex post" regulation refers to the opposite situation, where no explicit market intervention is performed, but the regulator will detect and investigate alleged prohibited practices within any industry or sector and, if necessary, punish or remedy any identified unlawful conduct. Competition authorities enable competitive markets *ex post* by investigating alleged anti-competitive behaviour and evaluating merger activity. In contrast, sector regulators are obligated to implement *ex ante* regulation to correct market failure. The table below provides an overview of the differences between ex ante regulation and ex post competition policy.

Table 1: Comparison of ex ante regulation and ex post competition policy in South Africa[10]

	EX ANTE REGULATION	**EX POST COMPETITION POLICY**
General approach	Forward looking: prescriptive business conduct	Backward looking: harm based
Nature of policy intervention	Sector specific intervention by an independent regulator	Overarching legislation based on general competition principles
Defining the relevant markets	The market is defined in broad terms to avoid over regulation and having adapt regulations to subtle shifts in technology/ innovation	Likely to adopt a relatively narrow view of product markets

[10] Alexiadis, P. (2012) Balancing the Application of Ex Post and Ex Ante Disciplines under Community Law in Electronic Communications Markets: Square Pegs in Round Holes?" *Rights and Remedies in a Liberalised and Competitive Internal Market.* University of Malta; Buigues, P. 2006. "Competition Policy versus Sector-Specific Regulation in Network Industries – The EU Experience." UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, November 2006.

Information requirements	General as well as detailed information on market structures	Fact-specific information regarding specific market conduct
Remedies imposed	Very specific in the prescription of remedies; requires extensive monitoring (e.g. adhering to specific licencing conditions)	Structural or behavioural remedies to address a specific abuse

Source: Compiled from Buigues (2006) and Alexiadis (2012)

Each of these indicators are explored in more detail below.

2.1. General approach

To avoid over-regulating a sector, ex ante regulation should only be applied if ex post competition policy alone cannot address observed market failure. Ex post competition policy addresses competition concerns by identifying harm and implementing necessary penalties or remedies. Potential competition concerns in the telecommunications sector include denying access to infrastructure for downstream service providers (i.e. a refusal to deal), or implementing non-price strategies (such as bundling and tying, delaying tactics, quality issues, etc.) or price strategies (such as price discrimination, predatory pricing, margin squeeze and cross subsidisation) with the aim of excluding other market participants.[11]

Forward looking ex ante regulation can however prescribe business conduct in markets where structural problems give rise to market failure. The European Commission lists three criteria, all of which need to be satisfied, to identify markets in which ex ante regulation is required. If a market does not satisfy these criteria, ex post regulation through competition policy should be sufficient to address competition concerns.

"National regulatory authorities should ensure that the following three criteria are cumulatively met: [12]

(a) the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;

(b) a market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry;

(c) the insufficiency of competition law alone to adequately address the market failure(s) concerned."

[11] Theron, N. & L Binge. (2014). The interface between competition and sector-specific regulation in the telecommunications industry: the case of Mobile Termination Rates.

[12] Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC)

High and non-transitory barriers to entry are common in the telecommunications sector. Fixed line networks are expensive to duplicate and can create a structural barrier to entry, giving incumbent operators access to a large share of the network infrastructure necessary for providing downstream services. It may be more effective to impose ex ante regulation than ex post competition policy on such 'high risk' markets, but in the absence of ex ante regulation, it remains the competition authority's responsibility to ensure competitive wholesale markets.

Barriers of a regulatory nature, such as access to radio frequency spectrum, can also limit the ability of new operators to enter the market. In South Africa, spectrum allocation is regulated by ICASA. However, merger assessments by the Commission may require them to evaluate the competitive effects of changes in the control of spectrum.

In defining markets for ex ante regulation, note that a lack of competition in the retail market does not necessarily imply a need for ex ante regulation at this level. Ex ante regulation at the *retail* level should only be implemented if regulation at the *wholesale* level has failed to affect competition. The rationale is that "[by] *intervening at the wholesale level, NRAs can ensure that as much of the value chain is subject to the competition process as possible, thereby delivering the best outcomes for end-users*".[13]

Recommendation 2007/879/EC of the European Commission notes that "*[t]he objective of any ex ante regulatory intervention is ultimately to produce benefits for end-users by making retail markets competitive on a sustainable basis*". In line with the criteria presented above, ex ante regulation should not be imposed to the extent that it stifles investment and innovation. At the same time, authorities should heed against too little regulation at the cost of consumer choice and competitive dynamics. Ex ante regulation should be progressively reduced as competition develops, so that the telecommunications sector is ultimately governed by competition law only.[14]

2.2. Nature of policy intervention

Ex ante regulation is typically implemented by a sector regulator, such as ICASA, which imposes licence conditions or regulations to govern the activities of licensees. In contrast, ex post competition policy relies on general competition principles captured in competition legislation that spans across all sectors. It occurs by way of market enquiries (such as the Commission's ongoing private healthcare enquiry and retail market enquiry), and the enforcement of penalties and remedies for anti-competitive behaviour.

[13] European Commission (2014). Commission Staff Working Document Explanatory Note to *Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.* SWD(2014)298. p. 19.

[14] European Commission (2014). Commission Staff Working Document Explanatory Note to *Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.* SWD(2014)298.

As per the Competition Act of 89 of 1998, the Commission is responsible for the "*investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers*".[15] In contrast, ICASA's ex ante policy mandate is to licence and regulate broadcasting and telecommunication services in South Africa, as set out in the Electronic Communications Act (ECA).

The ECA came into effect in 2005 and repealed the Telecommunications Act of 1996 and the Independent Broadcasting Authority Act of 1993. It was introduced as a result of the increasing overlap between telecommunications and broadcasting services (as a consequence of convergence), and gives ICASA the power to advance competition in these sectors. The ECA allows ICASA to issue licences for Electronic Communication (EC) services, Electronic Communication Network (ECN) services, and broadcasting services. Specifically, Chapter 10 Section 67 of the ECA gives ICASA the power to deal with competition matters in the telecommunications sector.

The relationship between ICASA and the Commission is captured in a Memorandum of Agreement, 2002 (MoA), which sets out the "*manner in which the parties will interact with each other in respect of the investigation, evaluation and analysis of mergers and acquisitions transactions and complaints involving telecommunications and broadcasting matters".*[16] The MoA states that in terms of merger applications, the parties "*shall submit separate and concurrent applications to the Commission (in accordance with Competition Act) and to the Authority (in accordance with the Independent Broadcasting Authority Act, the Broadcasting Act and the Telecommunications Act) for their respective consideration*".[17] The Commission must deal with complaints about restrictive horizontal and vertical practices and abuse of dominance, while ICASA must deal with contraventions of telecommunications and broadcasting licence conditions and legislation. This process was followed in the proposed Vodacom/ Neotel transaction, which had to be approved by both the Commission and ICASA, due to the implications of the proposed merger on, inter alia, the change in control of spectrum.

Despite the provisions of the MoA, it has not always been clear where ICASA's responsibility ends and the Commission's responsibility begins. Various amendments to legislation over the past decade have attempted to refine the details of how concurrent jurisdiction between the Commission and ICASA should be achieved. Prominent examples include the Competition Amendment Act of 2009, the ECA Amendment Act of 2014, and the ICASA Amendment Act of 2014. One of the provisions in the legislation which continues to complicate questions of concurrent jurisdiction, is section 67(9) of the ECA, which reads: "*Subject to the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry*" (own emphasis). This section of the ECA implies that ICASA has the final say in the conduct of telecommunications licensees, and in effect excludes the application of the Competition

[15] Competition Act 89 of 1998.
[16] Government Gazette No. 23857. 20 September 2002. Memorandum of Agreement entered into between the Competition Commission and ICASA (para. 1.1)
[17] Government Gazette No. 23857. 20 September 2002. Memorandum of Agreement entered into between the Competition Commission and ICASA (para. 2.1)

Act from all competition matters addressed by the ECA.[18] The Competition Amendment Act is intended to make an important change to this section by replacing the phrase "*Subject to*" with "*Despite*", to clarify that the Competition Act applies despite the existence of provisions in the ECA dealing with competition matters. However, the Competition Amendment Act has not been brought into effect as a whole. Only one section of the Amendment Act has been promulgated,[19] while the rest of the Amendment Act (which was signed into law in 2009) has been waiting to be brought into effect.

A change to the ECA itself partially addressed this problem: the ECA Amendment Act of 2014 removed Section 67(1) to (3) of the ECA. These sections previously granted ICASA the authority to act against a licensee (or a person providing a service pursuant to a licence exemption) who engages in acts that may "*substantially prevent or lessen competition by, among other things (a) giving undue preferences to; or (b) causing undue discrimination against*" any other licensee.[20] The deletion of these sections absolved ICASA from enforcing ex post competition regulation, and helped to clarify that the Commission has the primary responsibility to deal with ex post competition contraventions in the telecommunications sector.

However, ICASA maintains its ex ante competition jurisdiction and has the power to promulgate regulation or impose licence conditions aimed to address the conduct of licensees that have significant market power (SMP). Sections 67(4) to (7) in the ECA set out the conditions that allow ICASA to impose ex ante pro-competitive regulation. Is considers how ICASA should define the relevant markets, prescribes the methodology for identifying SMP, and how ICASA should go about imposing pro-competitive terms and conditions. ICASA's mobile termination rate regulation flows from this mandate. Section 67(8) of the ECA stipulates the process that ICASA must follow to determine whether a lack of competition in a market justifies imposing pro-competitive licencing conditions for licensees who are found to have SMP.[21] The removal of sections 67(1) and (2) from the scope of ICASA's mandate therefore followed the logic that in markets where structural market failure inhibits competition, ICASA's power to impose ex ante regulation (as per the rest of section 67 of the ECA) should invalidate the need for ex post jurisdictional responsibility.[22]

A further change in the ICASA Amendment Act of 2014 also goes some way in clearing up some of the remaining uncertainty of implementing concurrent jurisdiction, by adding, as section 4B(8)(b) the following provision: "*subject to section 67 of the Electronic Communications Act and the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Competition Commission, bear in mind that the Competition Commission has primary authority to detect and investigate past or*

[18] Irvine, H. & L Granville. 2009. Who to Call? Concurrent Competition Jurisdiction in the South African Electronic Communications Sector. The Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa. *Working Draft.*
[19] The market inquiry provision was brought into effect in March 2013 by Proclamation 5 of 2013, GG36221.
[20] Government Gazette No. 28743. 18 April 2006,
[21] http://www.ellipsis.co.za/wp-content/uploads/2014/04/Overview-of-the-Electronic-Communications-Amendment-Act-1-of-2014.pdf
[22] Irvine, H. & L Granville. 2009. Who to Call? Concurrent Competition Jurisdiction in the South African Electronic Communications Sector. The Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa. *Working Draft.*

current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act".[23] Despite the caveat which remains in section 67(9) of the ECA, this amendment clarifies ICASA's power to implement ex ante regulation and the Commission's mandate to enforce ex post competition policy. The remaining loopholes will be tied up when the Competition Amendment Act comes into force.

2.3. Defining the relevant markets

Market definition lies at the core of ex post competition policy and is an important step in determining anti-competitive behaviour. It also plays an important role in ex ante competition regulation, as section 67 of the ECA mandates ICASA to identify and define markets with SMP.

Market definition for the purpose of identifying a need for ex ante regulation is common practice in the European telecommunications regime. Article 16(6) of Directive 2002/21/EC ("the Framework Directive") stipulates that national regulators need to carry out a round of market analyses every three years to ensure that the markets defined as requiring ex ante regulation still satisfy the criteria. Recommendation 2007/879/EC identified seven markets (one at retail level and six at wholesale level) that required ex ante regulation, and reduced these to five markets in 2014.

Table 2 lists the markets identified in the EU in the 2007 and 2014 Recommendations. The boundaries of markets 4, 5 and 6 were redefined in 2014, and are listed next to the corresponding market as defined in 2007. No retail market requiring ex ante regulation was defined in the 2014 Recommendation, and fewer markets in need of regulation were identified than in 2007. This attests to the effectiveness with which market liberalisation has given rise to more effective competition and has reduced the need for ex ante regulation.

Table 2: Markets susceptible to ex ante regulation in accordance with Directive 2002/21/EC

	2007 Recommendation	**2014 Recommendation**
Retail markets	Market 1: Access to the public telephone network at a fixed location for residential and non-residential customers	
Wholesale markets	Market 2: Call origination on the public telephone network provided at a fixed location	
	Market 3: Call termination on individual public telephone networks provided at a fixed location	Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location
	Market 4: Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location	Market 3a: Wholesale local access provided at a fixed location
	Market 5: Wholesale broadband access	Market 3b: Wholesale central access

[23] Government Gazette No. 37537. 7 April 2014.

		provided at a fixed location for mass-market products
	Market 6: Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity	Market 4: Wholesale high-quality access provided at a fixed location
	Market 7: Voice call termination on individual mobile networks	Market 2: Wholesale voice call termination on individual mobile networks

Source: Recommendation 2007/879/EC; Commission Recommendation of 9.10.2014

Following European precedent, in 2007 ICASA gave notice of its "*intention to prescribe regulations in terms of section 67(4)(a)* [of the ECA] *to define and identify the retail or wholesale markets or market segments in which the Authority intends to impose pro-competitive measures in cases where such markets are found to have ineffective competition*".[24] ICASA accordingly listed in excess of 30 potential retail and wholesale markets to investigate for signs of SMP or ineffective competition, with the aim of imposing pro-competitive conditions in markets where anti-competitive conduct is detected.

Since announcing its intention to do so, however, ICASA has only defined one market in which to impose ex ante pro-competitive measures: the market for "*wholesale call termination on a service provider's network, where each market is national in scope*".[25] It defined the relevant market through:

(a) Following the principles of the Hypothetical Monopolist Test, taking into account non-transitory entry barriers and the dynamic character of the relevant markets;
(b) An assessment of market shares in the relevant markets; and
(c) A forward-looking assessment of competition and market power in the relevant markets.

Subsequent to defining the market for wholesale call termination, ICASA published Call Termination Regulations in 2010 ('the 2010 MTR regulations') and introduced a three year glide path from March 2011 to March 2014 for mobile (and fixed) termination rates (MTRs), as well as associated levels of asymmetry.[26] These regulations were implemented to correct for four types of observed market failures identified by ICASA: (1) a lack of the provision of access; (2) a potential for discrimination between licensees offering similar services; (3) a lack of transparency; and (4) inefficient pricing.[27]

After the expiry of the 2010 MTR regulations in March 2014, new MTRs with a higher level of asymmetry were introduced, but were reviewed by Vodacom and MTN and were declared by the High Court as unlawful and invalid.[28] The declaration of invalidity was suspended for six months while the regulations were reviewed, and new MTRs with a lower level of asymmetry were published[29] by ICASA in September

[24] Government Gazette No. 30622. 21 December 2007. Notice 1809 of 2007.
[25] Government Gazette No. 30449. 9 November 2007. Notice 1627 of 2007.
[26] Government Gazette No. 33698. 29 October 2010. Notice 1015 of 2010.
[27] Government Gazette No. 33698. 29 October 2010. Notice 1015 of 2010.
[28] High Court Judgement, 31 March 2014. Case Number: 2014/04699 (para 124.iii)
[29] Government Gazette No. 38042. 30 September 2014. Notice 844 of 2014.

2014 ('the September 2014 regulations'). Shortly after publication, however, Cell C announced that it would challenge the new rates based on the premise that the new regulations would be ineffective in promoting competition and would further entrench the dominance of incumbent players.[30] The review of the September 2014 regulations is still ongoing. ICASA's attempt at fostering competition in the telecommunications sector through ex ante regulation of termination markets has been slow and difficult, which may be the reason why no further markets for ex ante regulation have been defined.

2.4. Information requirements

The Commission and ICASA rely on largely similar sources of information to inform their decisions, but follow slightly different approaches in the way they analyse that information. The Commission primarily investigates behaviour at the firm level to evaluate market conduct. It evaluates anti-competitive behaviour or proposed transactions by looking at the activities of e.g. an dominant mobile operator within the context of the broader telecommunications market.

ICASA casts the net wider than the Commission by focusing on general market structures. It evaluates the industry as a whole to identify potential instances of market failure, but also relies on detailed firm level information to gain an understanding of market conditions. An example of this approach is ICASA's Cost to Communicate Programme (announced in 2013), which has the overall goal of "[achieving] *fair and reasonable prices for products and services offered by licensees*".[31] In addition to the regulatory review of call termination markets, the Programme planned to include a broadband value chain analysis, recommendations to guide local loop unbundling, the finalisation of the review of the market for wholesale transmission services for Digital Terrestrial Television, and the monitoring and evaluation of ICT indicator data.

2.5. Remedies imposed

Regulatory authorities enforce remedies through imposing fines when licence conditions are not met. Ex post competition policy can similarly remedy anti-competitive behaviour through fines. In evaluating whether to approve or prohibit a merger, the Commission needs to establish if a merger will lead to an increase in overall welfare. In doing so, the Commission compares the efficiencies associated with a merger with the anti-competitive effects thereof. Anti-competitive effects can often be remedied by the conditional approval of mergers, with structural or behavioural (non-structural) remedies prescribed to govern the behaviour of merging firms. Structural remedies prescribe structural change on the part of the merging parties, and although it is easier to monitor, structural remedies are irreversible. While behavioural remedies require close monitoring, it holds the potential to be adjusted as the market develops.

[30] http://businesstech.co.za/news/mobile/69817/cell-c-to-challenge-termination-rates/
[31] Government Gazette No. 36532. 4 June 2013. Notice 574 of 2013.

The Commission's recommended conditions for the proposed Vodacom/ Neotel merger are an example of behavioural remedies. The proposed conditions include preventing Vodacom from using Neotel's spectrum to offer wholesale or retail services for two years following the transaction, and requiring Vodacom to commit to R10 billion investment in fixed line infrastructure. These behavioural remedies have been designed to mitigate any unfair advantage that Vodacom may attain by gaining access to Neotel's spectrum, and to ensure that the merger does not reduce Vodacom's incentive to invest in fixed infrastructure.

A similar approach was followed in evaluating the Telkom/ BCX merger, which received conditional approval from the Competition Tribunal earlier in 2015. Although generally more benign in terms of competition effects, vertical mergers in telecommunications markets may give rise to anti-competitive effects through strategies that raise rivals' costs. Dimension Data intervened in the Tribunal's decision, arguing that the proposed remedies would not be sufficient to prevent Telkom from engaging in anti-competitive conduct. The parties subsequently proposed additional conditions, which were approved by the Tribunal.

3. REGULATORY AMBIGUITY AND THE IMPORTANCE OF A COORDINATED APPROACH

Prior to the ICASA Amendment Act of 2014, the regulatory framework did not provide a clear delineation of the respective roles of ICASA and the Commission. The implications of an ambiguous regulatory framework and the importance of concurrent jurisdiction in enforcing competition in the telecommunications sector are illustrated with three examples below: the Telkom case; the regulation of mobile termination rates; and the role of spectrum regulation to ensure a competitive telecommunications environment.

3.1. Telkom case

Ambiguity in the different jurisdictional responsibilities of the Commission and ICASA emerged in May 2002, when the South African VANS[32] Association (SAVA), the Internet Service Providers Associations (ISPA), as well as 18 VANS providers lodged a complaint ("the SAVA complaint") with the Commission against Telkom for alleged anticompetitive behaviour. A further complaint by Internet Solutions and Omnilink in August of the same year was combined with the SAVA complaint.

In 2004, the Commission referred the complaint to the Tribunal for adjudication, arguing that Telkom's behaviour "*constituted an exclusionary act in terms of section 8(c) of the Act, and/or a refusal to provide access to an essential facility in terms of section 8(b) of the Act, and/ or price discrimination in terms of*

[32] Value added network services

section 9 of the Act".[33] Telkom applied for a review of the referral on the grounds that – among other constraints – the Commission did not have the power to refer the matter to the Tribunal, and that the Tribunal did not have the power to make a judgement on its conduct in this regard, as the disputes involved matters dealt with in the telecommunication licenses and consequently was the responsibility of ICASA and not the competition authorities.[34] The Commission in turn opposed the review, reasoning that Telkom's alleged contraventions of the Competition Act were not authorised by the Telecommunications Act (which was the legislation in force at the time of the referral by the Commission), ICASA, or its licence conditions.[35]

The High Court ruled that the Commission's complaint referral was invalid (although its decision was not based on the question of the respective authorities' jurisdiction). Both the Commission and Telkom appealed the decision. The Commission appealed on the grounds that the High Court erred in its judgement, while Telkom appealed for a further judgement that the competition authorities were not entitled to investigate and make a ruling regarding Telkom's conduct.[36]

This raised the matter to the Supreme Court of Appeal to test whether the Telecommunications Act limited the application of the Competition Act. The Supreme Court of Appeal set aside the earlier High Court ruling,[37] thereby allowing the Commission to examine Telkom's conduct and clarifying that there is concurrent jurisdiction between the competition authorities and ICASA in investigating competition issues in South Africa's telecommunications sector.

The matter was referred back to the Commission, where the Commission found that Telkom had contravened the Competition Act by engaging in exclusionary practices and refusals to provide access to essential facilities. More than a decade after the initial complaint was brought before the Commission, Telkom was ordered to pay a fine of R449 million.[38] A further complaint, relating to a later time period, was settled between the Commission and Telkom in 2013.[39]

One anomaly remains – the Supreme Court of Appeal's decision was based on the Telecommunications Act, which was the legislation governing the telecommunications sector at the time that the Commission

[33] Irvine, H. & L Granville. 2009. Who to Call? Concurrent Competition Jurisdiction in the South African Electronic Communications Sector. The Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa. *Working Draft.*
[34] Irvine, H. & L Granville. 2009. Who to Call? Concurrent Competition Jurisdiction in the South African Electronic Communications Sector. The Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa. *Working Draft.*
[35] Irvine, H. & L Granville. 2009. Who to Call? Concurrent Competition Jurisdiction in the South African Electronic Communications Sector. The Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa. *Working Draft.*
[36] Irvine, H. & L Granville. 2009. Who to Call? Concurrent Competition Jurisdiction in the South African Electronic Communications Sector. The Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa. *Working Draft.*
[37] http://ispa.org.za/press-release/ispa-welcomes-the-supreme-courts-decision-on-telkom/
[38] http://www.comptrib.co.za/cases/complaint/retrieve_case/1448
[39] Competition Commission. 2013. Media Release 14 June 2013. Available online: http://www.compcom.co.za/wp-content/uploads/2014/09/Commission-reaches-settlement-agreement-with-Telkom.pdf

investigated Telkom's conduct and at the time that the referral was made to the Tribunal. The remaining contradictions between the ECA, the ICASA Act and the Competition Act (given that section 67(9) has not yet been amended) could mean that if the Supreme Court of Appeal were to decide in favour of Telkom in respect of a referral that took place after July 2006, the outcome could have been different.

3.2. Mobile termination rates

Another example of the importance of a coordinated approach to ensure competition in the telecommunication sector is illustrated by the regulation of mobile termination rates (MTRs). As mentioned above, ICASA introduced asymmetric MTRs in 2010 with the purpose of acknowledging the disadvantaged position of the smaller operators (such as Cell C and Telkom Mobile) as compared to the larger operators (Vodacom and MTN).

However, asymmetry had the unintended consequence of exacerbating on-net/ off-net price discrimination, leading to the intended impact of asymmetric MTRs to allegedly become muted. Operators can adjust their on net/off-net price differentials to promote on-net offers; the rationale being that if a smaller operator imposes a higher termination rate as a result of asymmetric MTR regulations, a larger operator can increase its off-net price by the difference between its own MTR and that of the smaller operator.[40] In October 2013, Cell C lodged a complaint with the Commission against Vodacom and MTN, alleging anti-competitive conduct through price discrimination by the operators. The complaint is still under investigation and is running in parallel with the review of mobile termination rates that Cell C has lodged with ICASA.

The above example illustrates the importance of ICASA and the Commission coordinating policy: while ICASA imposed ex ante regulation to correct market failure in the wholesale termination markets, the Commission has to rely on ex post competition policy to address the anti-competitive conduct that arises as a result of the incentives created by the regulations.

3.3. Spectrum regulation

While applications for mergers and acquisitions are lodged with the Commission, ICASA needs to provide regulatory approval for service and spectrum licence transfers in terms of section 13(1) of the ECA (as amended). The ECA states that "*An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority".*

With demand for mobile data expected to continue increasing in the coming years, access to high quality spectrum will be pivotal in allowing mobile operators to provide their services. The growing demand for

[40] Theron, N. & L Binge. (2014). The interface between competition and sector-specific regulation in the telecommunications industry: the case of Mobile Termination Rates.

broadband has led ICASA to formulate policy proposals for the assignment of high demand spectrum, specifically in the 800MHz and 2.6GHz bands.[41] However, the policy directive published in 2011 has not yet been finalised, and has delayed ICASA's spectrum assignment plan. ICASA's delays in allocating spectrum is forcing operators to think strategically about transactions which provide access to spectrum. More spectrum allows operators to expand their networks without having to invest as extensively in fixed infrastructure such as RAN sites.

Access to spectrum appears to be an important rationale in the Vodacom/ Neotel transaction. The Vodacom/ Neotel transaction illustrates the importance of concurrent jurisdiction between ICASA and the Commission: Whereas ICASA had to evaluate the legality of the change in control of spectrum amongst other things, the competition authorities have the primary authority to review the merger and the competitive effect that it may have on the telecommunications industry. If ICASA rejects an application for a transfer of control of spectrum and service licences, the competition authority's approval would not have been sufficient for the merger to go through. Similarly, if ICASA were to approve the transaction, the competition authority could theoretically prohibit a merger from going ahead on the grounds of it having an anti-competitive effect on the industry.

In the case of the Vodacom/Neotel transaction, hearings at ICASA for the acquisition of Neotel by Vodacom saw the *transfer or control* of Neotel's spectrum licence as a key point of contention. Neotel has access to high quality spectrum in the 800MHz, 1.8GHz and 3.5GHz bands, which Vodacom could repurpose to roll out its 4G/LTE broadband network.[42] At the ICASA hearings, MTN specifically objected to the transfer of Neotel's spectrum to Vodacom, arguing that in order for the deal to proceed, Neotel's spectrum should be handed back to ICASA and reassigned to operators on an equitable basis. Nevertheless, ICASA approved the transaction. On the competition side of the transaction, as noted above, the Commission has recommended conditional approval, but the matter is still to be determined by the Tribunal. In this regard, various parties have notified the Commission of their intention to intervene, some of whom argue that the transaction should be prohibited.[43]

Interestingly, one of the interveners is ICASA itself. It is not clear what ICASA's stance in the intervention is. On the one hand, ICASA may be able to provide valuable information to the Tribunal, such as whether it will be able to regulate the spectrum issues in the two year period in which the Commission asserts that it can. On the other hand, the intervention may illustrate the ineffectiveness of the concurrency regime created by the legislation if the two regulators have failed to reach agreement on the best way to regulate the issue in line with both regulators' objectives. It is however comforting to know that there is a forum in which differences can be adjudicated and different objectives balanced against each other.

[41] Abrahams, L, Y Kedama, E Naidu and K Pillay (2014). Regulating radio-frequency spectrum to advance the digital economy: issues of economic regulation for the electronic communications sector. *CCRED.*

[42] http://www.bdlive.co.za/businesstimes/2015/01/18/the-pros-and-cons-of-a-vodacom-neotel-deal

[43] http://www.techcentral.co.za/the-inversion-layer-choking-sa-telecoms/59234/

4. CONCLUSIONS

ICASA and the Commission share the responsibility of preventing and penalising anti-competitive conduct in order to enable effective competition in South Africa's telecommunications sector. Regulatory and competition legislation have created a framework whereby ICASA has the mandate to impose ex ante regulation to foster competition in the telecommunications sector through implementing pro-competitive licencing conditions, while the Commission has the power to address competition complaints in the telecommunications sector through the Competition Act. The ICASA Amendment Act of 2014 gives the Commission the primary responsibility to review mergers and identify and address alleged competition concerns in the sector.

In clarifying the role of the regulator, the European Commission defines specific markets where the market structure implies a need for ex ante regulation by an independent regulator. ICASA's attempts to follow a similar route has achieved limited success to date, with only the wholesale call termination market being identified as in need of ex ante regulation. Complaints about resulting anti-competitive behaviour by operators have subsequently been handled by the Commission.

The importance of concurrent jurisdiction is observed in the Vodacom/ Neotel transaction, where the Commission has had to evaluate the anti-competitive effects of the merger prior to ICASA having finalised its regulatory processes in regards to the allocation of spectrum. The Commission has tried to accommodate this policy lacuna by proposing behavioural remedies (conditions) which prevents Vodacom from using Neotel's spectrum for two years after the approval of the transaction. However, the effectiveness thereof will depend on ICASA's allocation of high demand spectrum within this timeframe. Even though the ICASA Amendment Act grants the Commission the primary authority to review mergers in the sector, the competition and regulatory authorities need to work together toward enabling a competitive telecommunications sector.