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Regulatory ambiguity and policy uncertainty in South Africa's telecommunications sector

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Competition policy aims to encourage efficiency and promote choice by protecting consumers from anti-competitive behaviour by firms. The rationale is that by creating competitive markets, economic welfare will be maximised. Network industries, like telecommunications or electricity, however, are characterised by scale economies and sunk costs, which create barriers to entrants and prevent effective competition from being realised. In such industries, sector specific regulation plays an important role in preventing incumbents from abusing their market power, by imposing conditions to encourage entry and competition.

South Africa's telecommunications sector is regulated by the Independent Communications Authority of South Africa (ICASA)⁴, while the Competition Commission and Tribunal are responsible for implementing competition policy. ICASA also has a measure of responsibility to facilitate competition in the sector. This is provided for by sections 3(1A)(a) and 82 of the South African Competition Act 89 of 1998 as amended ('the Competition Act'), according to which concurrent jurisdiction over competition matters applies where a sector is subject to regulation by another regulatory authority.

Rapid technological development of the telecommunications sector in recent years has encouraged merger activity in the South African market as mobile operators strive to offer an ever increasing array of services. One example is the acquisition by MTN (an incumbent mobile network operator) of a controlling share in Afrihost (an internet service provider) in 2014 (Competition Commission, 2014), with the objective of leveraging off each other's investment in broadband networks. MTN has however subsequently sold its majority shareholding back to Afrihost. Another prominent merger was the acquisition of Business Connection (BCX), a company experienced in the provision of information technology (IT) services, by Telkom (the fixed line incumbent) during 2015 (Competition Commission, 2015). The most recent example is the (abandoned) merger between Vodacom (the largest mobile network operator in SA) and Neotel (the second fixed line operator), which was motivated by Vodacom wanting to gain access to Neotel's spectrum to improve its service offering. The competitive effects of these transactions and the related impact that they have on economic growth and employment, is a function of the regulatory environment that governs the telecommunications sector. It is imperative that South Africa's competition and regulatory authorities are able to provide the necessary policy framework to enable an efficient sector.

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⁴ ICASA was established by the ICASA Act in 2000 to regulate broadcasting and telecommunications in the public interest.

In this paper, we consider the respective roles of the South African competition authorities (the Commission and Tribunal) to facilitate competition in the telecommunications sector, and the regulator (ICASA) to correct market failure through implementing pro-competitive licencing conditions. We provide a theoretical comparison of the purpose of ex ante economic regulation and ex post competition policy in the telecommunications market. We then look at three examples of concurrent jurisdiction in South Africa's telecommunications sector: an abuse of dominance complaint against Telkom, the regulation of mobile termination rates, and the role that spectrum regulation played in the failed acquisition of Neotel by Vodacom.

The contribution of the paper lies in highlighting that both ex post competition policy and ex ante sector specific regulation is necessary for the effective functioning of the telecommunications sector. While their respective roles may be well established in theory, implementation can be hampered by regulatory uncertainty and the objectives of either authority compromised if their policies are not aligned. To avoid further unnecessary costs to the South African economy, ICASA and the competition authorities need to gain a better understanding of what it means to work together towards a competitive telecommunications sector.