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Submission to the

INDEPENDENT COMMUNICATIONS AUTHORITY OF SA (ICASA)

by the

FREE MARKET FOUNDATION (FMF)

on the

DRAFT MOBILE BROADBAND SERVICES REGULATIONS (DMBSR)

Pursuant to Section 67(4) of the

ELECTRONIC COMMUNICATIONS Act 36 of 2005 (ECA)

Friday 28 May 2021

INTRODUCTION

This Submission addresses.

1.1. The Free Market Foundation (FMF).

1.2. Consumer Interests.

1.3. South Africa's Greatest Accomplishment

1.4. Constitutional and Legal concerns.

1.5. Competition Law and Economics.

1.6. Critique of Draft Regulations.

1. FREE MARKET FOUNDATION (FMF)

1.1. Very briefly, for those not familiar with it, the FMF is one of the world's oldest and most internationally prestigious policy institutes (also called "thinktanks").

1.2. The Objectives and Principles listed under 1.4 and 1.5 are important because they determine everything that follows.

1.3. We are entirely independent, autonomous and politically unaligned. We have no association with nor preference for, and do not represent, any political party or formation, any business

or labour formation, any government, or any NGO or civil society organisation. All funding we received is conditional upon us never being expected to compromise our Objectives and Principles.

1.4. The FMF's redacted Constitutional Objectives include the promotion of:

1.4.1. Human rights and democracy.

1.4.2. Access to media and a free press.

1.4.3. The open society, rule of law and personal and economic freedom.

1.4.4. High economic growth and reduction of poverty and unemployment.

1.4.5. Development and fostering of free enterprise on a national and international basis.

1.4.6. Education of the government and the general public regarding sound economic principles.

1.5. The FMF's guiding Principles include:

1.5.1. All people have the right to life and to conduct it as they see fit, provided they do not impinge the similar rights of others.

1.5.2. All people have the right to own and control property, including the produce of their efforts, and to dispose of it as they see fit.

1.5.3. No person may initiate force or the threat of force against any other person.

1.5.4. The only economic system consistent with these fundamental rights is a market economy.

2. CONSUMER RIGHTS AND INTERESTS

2.1. What distinguishes this Submission, and all our Submissions, from virtually all other submissions is that we have no vested interest in the outcome.

2.2. In the introduction to the 26 and 27 October 2020 Hearings the Chair, on behalf of ICASA, thanked "stakeholders who participated".

2.3. Our sole concern is the rights and interests of consumers (ie all citizens), especially the poor.

2.4. The single most important stakeholders, consumers, were not represented at the October 2020 Hearings.

2.5. Accordingly, this Submission is consumer-centred. It promotes only the rights and interests of consumers, especially poor consumers.

2.6. Consumer interests are best advanced by what the eminent South African economist and anti-apartheid advocate, Prof William 'Bill' Hutt, called "Consumer Sovereignty".

2.7. What that means is that freely exercised consumer choices determine which goods and services are sold, and by whom. Consequently freely exercised consumer choices also determine "market structure".

2.8. Far from a free economy being "unregulated" it is ruthlessly controlled by consumers.

2.9. A pro-consumer government's role is to maximise Consumer Power by maximising the freedom of existing and prospective suppliers to offer and innovate goods and services.

2.10. A free or relatively free economy is a perpetual Consumer Democracy; consumers "vote" with every rand they spend, withhold, invest or save for what *they* want, not what others – vested interests, lobbies, regulators, ideologues etc – want to force on them.

2.11. Consumer Freedom has counter-intuitive implications:

2.11.1. If consumers freely "vote" for a single, a few, or many suppliers, the market structure that emerges is, for consumers, optimal.

2.11.2. It every consumer choses Nokia (as almost all once did), then they have the right to have a single supplier, and no one should force them to buy other products.

2.11.3. If all consumers choose IBM OS (as almost all once did), their right to do so must be respected.

2.11.4. If consumers choose many vehicle brands, they should not have their freedom limited.

(It is unclear how many local and imported brands we have, but AutoTrader lists over 150[1]. Since some brands offer many models, consumers might have 500 choices.)

2.11.5. The lowest end of the market is the closest thing to the hypothetical concept of "perfect competition". Consumers "vote" for literally millions of suppliers in the so-called "informal sector". This is in spite of the fact that the entire sector is technically unlawful.

2.12. The right thing for the government to do for consumers is ensure that existing and prospective suppliers are free to make offers to consumers.

2.13. ICASA says it wants Effective Competition. To achieve this goal it is necessary to liberate consumers from third party (government or supplier) regulation.

2.14. We explain this is greater detail below.

3. South Africa's Greatest Accomplishment

3.1. The relentless assault on large companies like Vodacom and MTN is extremely ill-informed.

3.2. The telecoms industry is arguably South Africa's greatest post-apartheid success story.

3.3. It was initially presumed that there would be little demand for cellphones, and it was planned that Telkom would supply most people with landline phones. These expectations were dashed when Vodacom and MTN turned out to supply more active units than the entire population, with a coverage of over 95%.

3.4. They achieved this alone because the government granted only two licences. Having done so it is now perverse for the government, especially ICASA, to complain of a so-called "duopoly" and their "market dominance".

3.5. What was expected? For them to remain small and supply few units? Instead of vilifying them, they should be applauded.

3.6. They remained vigorously competitive despite the government having created perfect conditions for "collusion". They built the first private infrastructure since the second World War, and innovated to the point where we are as well served as the world's richest countries.

3.7. The worst aspect of ICASA's proposed regulations is that it seeks to penalise success and service. It's based on a paradigm is that success is bad.

[1] https://www.autotrader.co.za/makes

3.8. The best provider of consumer satisfaction does and should grow its “market share”. No one knows better than consumers who should supply them, what with, and at what price.

3.9. The government has now allowed six Mobile Network Operators (MNOs). It should appreciate that they will all follow different strategies and perform differently. Some may become huge, and others fail. That is not a problem. On the contrary, it is one of the great benefits of competition.

3.10. Since ICASA says it wants “effective competition” it should celebrate the effects thereof. It should be thrilled if one or more operators are so good that consumers flock to them and they become sole suppliers in some “market segments”. It should be thrilled when bad suppliers fold.

3.11. We have our greatest success story, and this is not the time to turn it into our greatest failure. We should liberate the industry to boom and flourish in direct response to revealed consumer preference.

4. Constitutional and Legal Concerns

4.1. We are extremely concerned about multiple constitutional and legal issues presented by the Draft Mobile Broadband Services Regulations (DMBSR)

4.2. Some of our concerns almost certainly, and some possibly, render all or aspects of the DMBSR unlawful.

4.3. These are not ranked by our degree of concern:

4.3.1. **Rule of Law.**

4.3.1.1. The first section of the Constitution (§1) dictates that our country is “founded … on the … supremacy of … the rule of law”.

4.3.1.2. The rule of law has various imperatives, one of which is that all laws must be of “general application”, that is equally applicable to all.

4.3.1.3. This is re-emphasised in other contexts. It is a binding Constitutional “value” in for instance, the limitation clause (§36), which specifies that rights may be limited “only in terms of law of general application”.

4.3.1.4. A law of general application is a law that applies equally to all. No law or regulation may differentiate. The DMBSR differentiates between Vodacom and MTN, and others. It lumps those two together in accordance with the “duopoly” myth (see below) despite substantial differences.

4.3.1.5. There are multiple, in our view fatal, implications flowing from how operators are treated.

4.3.1.6. Vodacom and MTN’s supposed “Significant Market Power” (SMP) presumes that other suppliers have no SMP.

4.3.1.7. We could elaborate, but trust that this is sufficient to alert ICASA to the fact that the DMBSRs are probably unconstitutional. We will gladly elaborate if requested.

4.3.2. **Separation of powers**

4.3.2.1. Another component of the Rule of Law is the Separation of Powers.

4.3.2.2. It is not mentioned explicitly, but has been confirmed by the Constitutional Court to be an inherent Constitutional imperative.

4.3.2.3. In its simplest form it means that the government consists of three “branches”:

4.3.2.3.1. The **Legislature** legislates (makes or repeals legislation).

4.3.2.3.2. The **Executive** executes (that legislation).

4.3.2.3.3. The **Judiciary** adjudicates (disputes).

4.3.2.4. Organs of state, such as ICASA, fall under the Executive.

4.3.2.5. As such, they may create “subordinate legislation” to the extent permitted by legislation (§283).

4.3.2.6. Subordinate legislation is not just another kind of legislation. It is limited to what is “subordinate”, namely what is necessary to implement legislation.

4.3.2.7. The DMBSR envisage fully-fledged *substantive* legislation of a kind that, arguably, only the Legislature may adopt.

4.3.2.8. If challenged, the Constitutional Court might be expected to find that those aspects of the DMBSR that constitute substantive law are unconstitutional.

4.3.3. **Bill of Rights in context**

4.3.3.1. It is widely and mistakenly believed that the Bill of Rights is the most important part of the Constitution. This is true in many senses and for many purposes, but what tends to be overlooked is that it is subject to the “limitation clause” (§36).

4.3.3.2. Whilst the Bill of Rights may be limited in terms of the strict provisions of that section, the rest of the Constitution is absolute.

4.3.3.3. Accordingly, what we submit below regarding other sections, such as §1 above, must be regarded as unambiguous and inflexible.

4.3.3.4. We deal first with the Bill of Rights because it precedes what follows.

4.3.4. **Equality** - §7

4.3.4.1. §7 “enshrines” the right of equality, and adds that “the state must respect, protect, promote and fulfil” that and other rights.

4.3.4.2. Our respectful view is that the DMBSR clearly violates this provision.

4.3.5. **ICASA**

4.3.5.1. §8 subjects all “organs of state” to all Constitutional Provisions.

4.3.5.2. That, of course, includes ICASA,

4.3.6. **Companies enjoy Constitutional rights**

4.3.6.1. Another common myth is that the Constitutional rights do not extend to juristic persons, such as companies, trusts, clubs, co-ops, partnerships, NGOs, churches etc.

4.3.6.2. Under §8 “a juristic person is entitled to the rights in the Bill of Rights”.

4.3.6.3. In other words, the DMBSRs must treat MNOs as it would private individuals.

4.3.6.4. Only under laws of general application may people be treated differently at law.

4.3.6.5. For example only people with specified qualifications may practice medicine. This is a law of general application because it applies equally to all – all people may acquire the qualification and practice. Successful doctors with big practices may not be subjected to regulations that are not applicable to doctors with small practices, or *vice versa*.

4.3.6.6. All banks, for instance, must have the same reserve asset ratio. The SARB may not have differential regulations for some banks, and may not punish the most successful banks, as if success were reprehensible as ICASA and the Competition Commission propose when the best performers (as "voted" by consumers) are MNOs.

4.3.7. **Equality** - §9

4.3.7.1. §9 is known as the "equality clause".

4.3.7.2. It has various provisions such as "everyone is equal before the law and has the right to equal protection and benefit of the law".

4.3.7.3. Here too, the Constitution requires, not just companies, but their shareholders , employees and other stakeholder to equality at law.

4.3.8. **Enterprise freedom** - §22

4.3.8.1. Under §22 "the practice of a trade … may be regulated by law".

4.3.8.2. Such law must, of course, be a law of general application.

4.3.9. **Property rights** - §25

4.3.9.1. "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

4.3.9.2. Discrimination between some MNOs and others amounts to deprivation of property because it limits the right of some (but not others) to use their property.

4.3.9.3. This interpretation has not yet been tested. It would be anomalous for the Constitutional Court to rule otherwise for obvious reasons. Were ICASA to regulate that Telkom may not use or sell any of its property, for example its landlines, Telkom would obviously be "deprived" of its property.

Telkom's legal challenge is based on a related objection that it is expected to buy a spectrum asset it cannot use efficiently because (prior to Digital Migration, DM) it will be in "dirty" spectrum bands.

It is no defence against that to say that DM will happen within a year, when a decade of promises remain unfulfilled.

4.3.10. **Access to information** - §32

4.3.10.1. It seems clear from published submissions that ICASA has denied affected parties their Constitutional right to information "held by the state".

4.3.10.2. The information that must be supplied is all "information that is required for the exercise or protection of any rights".

4.3.10.3. Regulations, by their nature, limit rights, so all relevant information must be provided to affected parties.

4.3.10.4. Affected parties include all MNOs and other operators in the sector.

4.3.10.5. They are all entitles to know on what basis ICASA reached each conclusion that appears in the DMBSR.

4.3.11. **Administrative Justice** - §33

4.3.11.1. Two concerns flow from this section, (a) the right to just treatment and (b) the right to written reasons.

4.3.11.2. "Everyone has the has the right to administrative action that is lawful, reasonable and procedurally fair."

4.3.11.3. It seems clear from various submissions that some important arguments and evidence have not been taken into account in the formulation of the DMBSR. This is unreasonable and procedurally unfair.

4.3.11.4. Additionally, written reasons have not, as far as we can establish, been provided.

4.3.11.5. We do not know if they have been requested, but requests must be honoured.

4.3.11.6. We encourage ICASA to provide written reasons to all interested parties, the most interested being the general public. In other words, our respectful view is that ICASA should release its reasons as a public service.

4.3.12. **Public administration** - §195

4.3.12.1. §195 is, for ICASA, a very onerous Constitutional clause.

4.3.12.2. ICASA is "governed by the democratic values and principles enshrined in the Constitution". In other words, not merely the letter of the law, but spirit of the Constitution.

4.3.12.3. Compliance with §195 is frequently a cosmetic sham – merely a pretence of consultation. Proposed policies and laws proceed in their initital form without responding to or reflecting submissions. Proceeding thus, without significant improvements and changes, suggests bad faith.

4.3.12.4. This section adds some strict imperatives, including:

4.3.12.4.1. A "high standard of professional ethics". The DMBSR must, for instance, reflect the evidence received. They must comply with state of the art economic theory, rather than arbitrary conceptions of "competition", "market dominance". "market share", and the like.

4.3.12.4.2. As we show below, the DMBSR does not live up to this requirement.

4.3.12.4.3. They must promote "efficient, economic and effective use of resources."

4.3.12.4.4. The limitations envisaged for MNOs, especially MTN and Vodacom, are intended to serve other objectives at the expense of "efficient, economic and effective use of resources."

4.3.12.4.5. ICASA's services, including regulations, "must be provided impartially, fairly, equitably and without bias".

4.3.12.4.6. The DMBSR reflect bias and partiality. It is unfair to the two targeted MNOs, but much more seriously, to consumers, especially the poor.

4.3.12.4.7. "People's needs must be responded to", not the needs of ISPs, MNOs, broadcasters or others.

4.3.12.4.8. The sole consideration should be the implications for the broad public.

4.3.12.4.9. “The public must be encouraged to participate in policy-making.”

4.3.12.4.10. It is clear from all published evidence that only “stakeholders” were encourage to participate. We find no evidence that consumers were encouraged, nor do any seem to have done so.

4.3.12.4.11. If this is correct, ICASA may not proceed with this draft.

4.3.12.4.12. “Transparency must be fostered by providing the public with timely, accessible and accurate information.”

4.3.12.4.13. As far as we could establish, this has not been done. There are references to confidential information and processes. We, as members of the public, have been able to secure neither the evidence nor the theories on which ICASA based its findings (see more below).

4.3.13. **Void for vagueness**

4.3.13.1. Our Common Law is enshrined in the Constitution.

4.3.13.2. A crucial aspect of our law is that laws must “stand on their own feet”, so to speak. All of the law must be in the law explicitly, not by inference or implication.

4.3.13.3. Laws must also be clear and unambiguous. It must be clear directly from the law what everyone’s rights and obligations are, and no one may be subject to arbitrary discretion.

4.3.13.4. The DMBSR reads in parts as law, and in parts as ICASA narrative, which is of no legal significance. It is as if extracts from a discussion document were cut and pasted into it.

4.3.13.5. These narrative parts prescribe nothing with legal consequences – no one will know what is required of them to comply.

4.3.13.6. Parts are incoherent, and parts are void for vagueness.

4.3.13.7. It does not appear as if a professional legislative drafter worked on the DMBSR.

4.3.13.8. Here are examples by way of illustration. They do not cover every aspect that falls foul of these concerns.

4.3.13.8.1. According to Section 2 (§2), the first “purpose” is “to the define relevant wholesale and retail markets or market segments”. Regulations do not “define” terms; nothing is regulated by a definition. Laws and other documents, such as contracts, have definitions to provide clarity.

4.3.13.8.2. §3 has definitions with presuppose that readers are familiar with extraneous sources. Some do not make sense without those sources. (e), for instance reads as follows:
“Upstream market 3b: wholesale access point name (APN) services (including resellers).”

This is not coherent English. As it stands, it ranks below being void for vagueness, which refers to something coherent the meaning of which is vague. There is nothing coherent about these and other words. As they stand, on their own, they are meaningless.

We do not address every such concern.

As a whole, the regulations are void for vagueness in many respects, namely wherever it is unclear what is required for compliance. To be legitimate, it would be necessary for all who read it to know precisely what they must do – what exactly is obligatory.

4.3.13.8.3. §4 is not regulation as stated in §5, and does not purport to be. It is a vague summary of "methodology". Apart from not being regulation, it is incoherent with respect methodology

4.3.13.8.4. There is, for instance, nothing in it that enables the public (or anyone else) to "determining the effectiveness of competition".

4.3.13.8.5. It is unclear from the vague reference to the "Hypothetical Monopolist Test" of what relevance it might be. The standard definition of the HMT implies the ability to *impose* prices. Every vendor is free to ask whatever price they wish. In the absence of government-imposed monopoly power, as in the case of Eskom for instance, no price can be imposed.

4.3.13.8.6. Even Eskom cannot truly "impose" prices, because despite being the closest thing we have to a monopoly, everyone is free to go off grid. Likewise everyone is free to buy whatever network service they choose and thus to hire and fire MNOs at will.

4.3.13.8.7. As for "entry barriers" the only ones that exist are created and imposed by ICASA. No one in the market imposes, nor is able to impose any entry barrier. But for ICASA's over-regulation thousands of enterprises and individuals could enter and leave "relevant markets".

4.3.13.8.8. These issues are addressed at length and definitively in our Socio-Economic Impact Assessment (SEIA) which is in ICASA's possession. For convenience, it accompanies this submission, and relevant extracts appear below.

4.3.13.8.9. §5 is also not regulation. It is a vague narrative of what ICASA set out to do. There is nothing that governs anything. Whatever ICASA "determined", and what its relevance is, is unclear.

4.3.13.8.10. §6 has bald assertions. They might be justified by something in ICASA's possession but are of no significance here.

4.3.13.8.11. §7 finally has compliance provisions. We respectfully submit, that the information demanded is unfair and unreasonable. Unless demanded of all MNOs and other operators, the requirement is probably unconstitutional as explained at length in this submission.

4.3.13.8.12. It is also unclear why ICASA wants the information in 7. To the extent that sense can be made of ICASA's conceptions of competition and "market power", the information sought will, for the most part, be superfluous and irrelevant.

4.3.13.8.13. The penalties envisaged in §9 are out of all proportion with reality. A tiny administrative error or oversight could occasion a 10% of turnover fine. That could be billions of Rands.

4.3.13.8.14. That this is arbitrarily imposed on only two MNOs is, we submit, plainly unfair, unreasonable, discriminatory, vindictive, oppressive and/or unconstitutional.

4.3.14. **SEIA?**

4.3.14.1. Our final legal concern is that all laws, regulations and policies *must* be preceded by a Socio-Economic Impact Assessment (SEIA).

4.3.14.2. Every SEIA must:

4.3.14.2.1. Be to the satisfaction of the unit in the Planning Department.

4.3.14.2.2. Be fully compliant with the prescribed Guidelines.

4.3.14.2.3. Be published for scrutiny and criticism.

4.3.14.2.4. Be adjusted in response to informed feedback.

4.3.14.2.5. Be the basis on which policy and law are finalised.

5. COMPETITION LAW AND ECONOMICS.

In this section we depart from the bullet point format. Since it is descriptive, we comment instead in text or narrative form.

Before proceeding, some fundamental insights are necessary and basic myths must be debunked.

Common rhetoric speaks of controls as if they apply to non-human phenomena. There is supposedly "tobacco" control, "exchange" control or broadcasting" control. By depersonalising what is controlled, controls seem benign; who is against "controlling" supposedly bad things?

The truth, however, is that things are never controlled. Businesses, markets, products and services cannot be "regulated". No official has been seen chasing a delinquent mobile phone down the road, arresting a telecommunications tower, or subjugating an air wave.

All controls are *people* controls. All regulations should be called "people control". Regulating a company, for instance, is like firing a shotgun into a dark room; there is no way of know who will be hit. Are the victims of company "regulation" investors, financiers, shareholders, managers, labourers, consultants or, most importantly, consumers?

According to economic theory, there is no way of knowing, and there is no methodology whereby relative impacts can be determined. The best estimates in the world might be close in a very narrow context, such as expected effects on a specific category of labourer. But no meaningful prediction can be made regarding generalised short- and long-term impacts, or market structure effects, or, most importantly, consumer behaviour.

ICASA knows this from something very close to home. To mention just one example, during the 1990s landline telephones were presumed to be the be the means by which the general public, especially the poor, would communicate. Official policy was that the government protected monopoly, Telkom, would roll-out landline services to millions of homes countrywide, particularly rural and sparsely populated areas.

Allowing only two MNOs, Vodacom and MTN, was justified by the prediction that only very few high-income people would ever use mobile telephones.

Those predictions and expectations were hopeless disproven by what happened. Landlines declined rather than grew, and "cell phones" tool over. Along the way multiple expectations about what mobile communication technology would develop and which services would be supplied were far removed from what happened. Precisely the same will continue happening.

As before the talk will be about regulating "the market" and operators, but that will never happen. What will happen is that *people* will be regulated, and the worst effected will be consumer, especially the poor. They will be denied their natural "market dominance" rights, and their right to regulate providers by their "market conduct" as opposed to the subordinate conduct of providers.

What ICASA should do, in our respectful opinion, is appreciate that what is in the Draft is mostly non-regulatory text. To the extent that the Draft contains real regulation, it transfers the power to regulate from consumers to officials who, unlike consumers and providers, pay no price for being as wrong as have been hitherto.

According to introductory textbooks, a market is considered efficient when there is "perfect competition." Competition is perfect when no single buyer and no single seller has any market power, for example the power to charge a higher price or to introduce a new product. In this world, knowledge would be universal and any hypothetical step away from the equilibrium price a futile exercise. It is important to understand that in equilibrium there is no entrepreneurship, no innovation, and no real progress because no profits are made that would allow investing in new technologies and markets. It's Groundhog Day forever.

Real markets are not like that. Contemporary Neoclassical scholars have noted that some companies indeed set prices and have significant market shares because consumers prefer their products. In some instances, only one company serves the bulk of consumers, which means that consumers like their products very much. In the latter case, according to early neoclassical textbooks, a market structure of natural monopoly might result in some sectors if firms are able to fend off entry of potential competitors by decreasing prices below average cost implying that past investment is sunk and thus irrelevant for price determination. Further, assuming universal knowledge of technologies (there are only efficient technologies) and perfect information about consumers' preferences (and their indifference curves), a challenger will not be able to enter the market at prices less than average cost because it would imply that shareholders earn returns below equilibrium market returns.

The interesting part is that this early neoclassical theory cannot explain how a market would arrive at equilibrium. For example, at some time before equilibrium something must have induced entrepreneurs to assume equity risk, build something new and take risks for which they expected above-equilibrium rates of return. Also, before equilibrium, consumers must have been willing to pay entrepreneurs for launching new products and services. In other words, somehow all the capital assets of modern economies we see around us must have been financed based on the expectation of higher consumer prosperity and above-average profit returns. As all market activity is necessarily forward-looking and happens under uncertainty, investments will be amortized over time when entrepreneurial expectations about consumer value turn out to be correct. An example of a single consumer-driven supplier is that half the world's zippers, and 100% in many countries, are supplied by YKK. If the CompCom forces YKK's nearly 100% market share in South Africa down, it will not be acting so much against YKK as against the revealed preferences of consumers.

A free or nearly free market is a permanent consumer democracy in which consumers vote with their own money for or against the world's "most powerful" and supposedly "dominant" suppliers. If a sole supplier of anything to emerge in a contestable market, it should be praised being better than all others at satisfying consumer. Interference with consumer-driven "market structure" is mistakenly considered action against suppliers, whereas in truth, it is interference with consumers; it imposes suppliers and market structures on consumers against which consumers clearly demonstrate their opposition.

The idea that free or nearly free markets might result in sole suppliers is a purely hypothetical myth. It never happens in reality. Only if the government issues an exclusive licence, could a real world exclusive supplier exist.

In the unlikely event of a single supplier, say of hardware in a small village, consumers are free to boycott the supplier, get supplies from nearby villages and cities, use substitutes or improvise.

In short, flawed competition policy targets consumers, not suppliers. Legitimate competition policy respect consumers and their chosen suppliers..

Another standard misconception is that "competition" exists only between suppliers of similar products and services. In the real world, every supplier of anything competes with every other supplier. Since consumers have finite wealth, all competition is "Rand competition", namely competition against everything consumers buy.

For consumers to achieve increasing prosperity, they must compensate entrepreneurs for investment uncertainty and risking their wealth (savings and capital). The function of capital markets is to intermediate between savings and investments.[57] The key point is that debt financing greatly constrains firms to decrease prices below average cost. In companies that own and invest in long-term infrastructure, a significant portion of their operating cash flow goes to meeting debt obligations. Cutting down on employee cost, reducing investment or paying out lower dividends are not sustainable strategies to defend a firm's market position.

The *Theory of Contestable Markets*, mostly associated with British economist William J. Baumol, was first presented in 1982.[58] The novelty of this theory was that it did not look at competition as is but at potential competition of new entrants. As we are still in the perfectly competitive market with perfect knowledge, absence of uncertainty and no transaction cost, the threat of entry disciplines the market incumbent because any movement away from the equilibrium price would conjure up the threat of (a hit-and-run) entry. The theoretical setup is as remote from reality as the usual model of perfect competition with the exception that Baumol allowed for the possibility of a dynamic element.

Leaving the nirvana world of early neoclassical economics, as Chicago-economist Harold Demsetz (1969) termed it, an exploration needs to be undertaken of what contestability means in the competitive context of real markets. Firstly, the new theory (re)introduced the distinction between *competition in the market* and *competition for the market*, which is to say that a disturbance of equilibrium can be endogenously motivated. Yet, this does not change the fact that the theory is still fundamentally incommensurable with anything that would resemble real markets. A particularly noteworthy aspect of the theory concerns the implicit assumption that competition in Baumol's model means competition for consumer markets. The supply-side is defined away through the assumption of perfect knowledge and perfect capital markets (i.e., no return spreads). These assumptions immediately beg the question on which basis an entrant could threaten the incumbent (apart from the fact that neoclassical consumers already live in a happiness end-state which makes ambitions for inventing new technology superfluous).

While the *theory of contestable markets* as presented above is inapplicable to real world scenarios, the *idea* of contestability can be fruitfully applied to real markets, for example to the supply-side of mobile telecommunication markets. Accepting that the (weighted average) return on capital for most sectors and firms ranges between 5 percent and 10 percent, implies that 90 percent and more of a firm's net revenues earned are needed to pay employees, suppliers and debt providers. Of this cost base, the bulk is needed to pay the cost of long-term infrastructure investments. While there are only a few MNOs serving end-customers, there are hundreds of firms scrambling to produce the various elements of the MNOs' supply side—or value chain. The value chain of mobile telecommunication networks might well be the most contestable—and contested— production structure in the history of capitalism. The decision of regulators to issue two or more licenses turned out to be a game-changer. The decision was partly informed by the lacklustre performance of fixed-telecommunication carriers across the world. The fall of the Iron Curtain and the market-friendly supply-side politics of the Reagan- and

Thatcher-administration facilitated privatization. Selling SOEs also gave governments the opportunity to realize short-term revenues.

The bottom line, however, is that nobody had mobile prepaid technology on the bill and that a relatively simple commercial idea would first make voice telecommunications universally available and, a few years later, turn MNOs into the most important providers of Internet access (and now into retail banking providers). This was understood only a few years after mobile networks were introduced in most countries and entrepreneurs seized the opportunity. The telecommunication market, which used to be divided into national fixed-line monopolies serving roughly half a billion people in high-income countries and a slim strata of the urban (political) elite in other countries, suddenly was able to address the needs of everybody. It further helped that the market for mobile handsets and content was beyond national jurisdiction, as was the sales and distribution chain (remember that in most countries we had to source rotary phones from the post office). All of these conditions have contributed to stimulating an unprecedented wave of innovation in all areas of the mobile value chain. Below, figure 2 attempts to give an idea of the nature of the current mobile telecommunication value chain:

To the extent that the above-described conditions helped investors to raise capital to profitably roll out networks even in countries with very low incomes (whose population technically speaking had no access to telecommunication before) and turned MNOs into valuable companies literally overnight, they could only achieve this in cooperation with national and international value-chain partners. On a closer look, it becomes clear that mobile operators are pure aggregators of equipment and content that is produced outside their firm boundaries. Their task is to plan networks in such a way that consumers are willing to buy services at prices that allow them to pay suppliers, service debt and generate cash flows to expand their network and improve services. Of course, it is possible to do a better or worse job in managing an MNO. But it does not seem as if management is the make-or-break element in the value chain. To my knowledge, there have been very few cases of illiquidity of MNOs with a significant market share (with the notable exception of India). As it is rather unlikely that the world of MNOs is inhabited by particularly outstanding management teams and as it is also not the case that MNOs are so profitable that bankruptcy is a remote possibility, something else must explain the extraordinarily stable nature of MNO operations across the world.[59]

The explanation appears to be that the supply-chain ecosystem exerts a disciplining effect on what MNOs can and cannot do. This disciplining effect can only play out to the advantage of consumers when the elements of the mobile value chain are contestable. By way of example, if we assume that MTN had taken the decision in the early 2010s to roll out LTE in South Africa's metros and we also assume that Vodacom's shareholders had decided to cash in dividends for five years and keep on going with 3G data, then the market would have forced Vodacom shareholders to correct their decision very quickly. This logic essentially applies to the whole value-chain ecosystem. It is inconceivable that within two decades six or seven new technological standards would have been implemented in the SOE-world of fixed-line incumbents. The reason is not that there is anything intrinsic to managers of MNOs that would justify the conjecture that they are particularly keen to overhaul the production structure of their company every three years; they just have to. Administrators of public monopolies, in turn, are not subjected to market discipline because there is no threat that a rival will leap ahead by implementing a new technology. This demonstrates that the competitive advantage firms can reach is first and foremost a consequence of innovation efforts on the supply-side of the value chain. Note that the ontological nature of one megabit of data is such that it is hard to differentiate. But the same megabit can be fast; you can get it fast or slow; you can get it reliably at peak times in Sandton; you can get it in rural areas; and you can get it for more or less money. Until the 1990s, you got a fixed-line minute, or you did not; you paid what you had to pay; you had to take the phone you were given; and in most low-income and lower-middle income countries you had to wait for years until you got connected even where there was a network (unless you paid some incentive to speed up the process).

The high degree of contestability for the elements of the mobile value chain is not only exemplified by the quick succession of radio standards. Since the mobile market emerged in the 1990s, external suppliers have captured—or are in the process of capturing—most of the value-chain elements that were owned and controlled by MNOs until ten years ago. Fibre backhauls to offload traffic is in the firm hands of suppliers; most carriers source their data centre capacity from independent providers; more than 70 percent of the world's mobile towers were sold to towercos by 2020; radio modules have begun to be shared in many markets. [60] Most importantly, MNOs do not sell a bespoke product anymore. While GSM voice and SMS in the 1990s could only be produced and transmitted by MNOs, in the world of IP it is content that consumers look at. The role of MNOs is to facilitate the delivery of content produced by other firms. There are thus two forces of contestability. The first force disciplines MNOs to adopt the best technology, often by giving up control over parts of the value chain where external producers can deliver the service at lower cost.[61] The second force is consumer demand for evermore data-heavy content. In terms of dynamic economic theory, the introduction of new technologies (first force) serves to satisfy consumer demand (second force). In other words, all economic activity is necessarily a result of consumers looking for better and cheaper services.

In contrast, the only "market" that per se is not contestable is a public monopoly, most typically in the form of utilities and the prohibition of market entry.[62] It is also the only legitimate theoretical definition of "monopoly" because no competitive market can exist in such constitutional settings: consumers do not have the choice of alternative offerings, entrepreneurs cannot enter the market even when the penetration levels of services hover around 0.1 percent for decades (as was the case for fixed-telecommunication in low-income countries), because competition would lead to market failure. This is no joke; it is what we read in the textbooks used to teach economics in undergraduate courses. For the sake of younger readers born in the 1980s or later and only have a faint childhood memory of rotary phones, it was a criminal offense in Germany to connect a French rotary phone to the German copper loop because of the potentially destabilizing effect it could have on the overall network (apart from the fact that you could not buy a French rotary phone without living in France and having a subscriber line with the French monopolist and that there was nothing to be gained by connecting a French rotary phone to the German network).

As to the quality of both economic reasoning and empirical evidence that could corroborate the claim of ineffective competition and SMP, the authors of the Market Inquiry document do not succeed in submitting any argument that goes beyond commonplace and assertions. I will provide four examples to illustrate the depth of reasoning. The first one concerns roaming ("Upstream Market 3"):

> The Authority considers a market for roaming services that has a geographic dimension at least as narrow as local and metropolitan municipal areas. This is based on, among other factors, the nature of roaming agreements in South Africa which have geographic limitations. These markets are ineffectively competitive as only MTN and Vodacom have substantial coverage in many municipalities. From a network capacity perspective, measured by number of network sites, MTN is dominant (has a market share of 45% or more) in 34 local and metropolitan municipalities, Vodacom is dominant in 86 and MTN and Vodacom both have a market share exceeding 45% in 15 municipalities.

The causality is that markets are ineffectively competitive because MTN and Vodacom have done their job, namely, to provide coverage to all municipalities. The first question to ask the authors is why Telkom and Cell C are not offering their services in these municipalities. There must be some inherent economic reason that two network operators are sufficient. The verdict "ineffective competition" is derived from section 7 of the Competition Act, which the authors quote: "In terms of section 7 of the Competition Act a dorminat [*sic*] firm has market share of 45% …" In other words, the fact that it is somewhere defined that 45 percent is constitutive of dominance (irrespective of the specific nature of the market), firms in all markets that meet this criterion are dominant implying

consumers are harmed and regulatory intervention is warranted. So, what about the towns with one bank branch only, one gas station or one butcher? It is not worthwhile to elaborate any further on this.

The second question to ask is whether MTN and Vodacom exploit their so-called "duopoly" by charging different prices for voice and data in Johannesburg or Cape Town. If MTN and Vodacom were to charge cost-based prices for the services they render to subscribers in small municipalities, they had to charge tenfold the price. They do not do this, not because they are Good Samaritans, but because of two very tangible market-related reasons. Firstly, a cost-based price differentiation along geographical and demographical boundaries is almost unsolvable from an accounting perspective.[63] How do you price a piece of the backbone that branches off to provide fibre to the little municipality? What does the MNO finance professional make of the fact that a radio module in Sandton possibly amortizes in three years or less while the one in Pofadder only in fifteen years or never? Secondly, consumers perceive price differentiation along geographical factors as unfair.

The *Market Inquiry* states that "access to spectrum" faces very "high barriers to entry" because of the "nature of spectrum assignments." It is important to note that filling the supermarket shelves in Kuruman costs the supplier more than in Johannesburg. Even so, the prices are usually very similar. There seems to be a market consensus that prices for basic groceries and essential services such as mobile telecommunication should not put people in Kuruman at a disadvantage.

However, if people in remote places want goods and services that are cheaper to offer in built-up places, they might have to pay more. The same is true of people who want to whop ate the corner store instead of travelling to a cheaper supermarket.

The second example is about "Barriers to entry" under section 4.2, "Effectiveness of competition:"

> In respect of facilities-based entry, access to spectrum, sites and supplementary roaming are very high barriers to entry. This is because of the nature of spectrum assignments, the expense of rolling out new sites, the relatively limited extent of site sharing in South Africa, and the high costs of national roaming (discussed in sections 6 and 7 below). These barriers to entry contribute to the ineffective levels of competition in markets for mobile services in South Africa. (para 37; emphasis added)

As to facilities-based entry, Cell C and Telkom are free to erect towers in all South African municipalities. They, however, prefer to roam on MTN and Vodacom infrastructure for very good commercial reasons. Because only MTN and Vodacom own sites in many rural municipalities, according to Government, site access is ineffectively competitive. Since roaming is "supplementary" to sites, roaming is also ineffectively competitive. Again, Telkom and Cell C are free to convince Rain or American Towers to erect a tower or put radio modules on existing towers in Pofadder or Aggeneys. For good economic reasons, they instead chose to have towers in Upington only and benefit from MTN's and Vodacom's countrywide network. This is infrastructure sharing on commercial terms. Vodacom CEO, Shameel Josub, stated that of the 11,000 sites it has in South Africa, over 7,000 are shared.[64]

It is instructive to have a look at the formal response MTN gave to the Market Inquiry to compare CompCom's definition of "markets" based on contrived market-share parameters and an exceedingly simplistic understanding of "sites" with the complex realities of real markets:

MTN notes that in respect of the determination of market shares, ICASA has simplistically and incorrectly relied on the "number of sites" as the metric to calculate market shares. This suggests that ICASA has mistakenly equated all types of sites as intrinsically equal in value. This is incorrect as, for example, tower deployments vary significantly in value and operational functionality, dependent on the various deployment criteria, including, *inter alia*:

Tower type: towers differ considerably dependent on deployment architectures, e.g. macro tower, roof top tower, small cell, distributed antennae system (DAS) etc.;

Tower height: which differs according to the terrain and environmental typology in order to ensure that the appropriate coverage footprint is achieved;

Technology deployed at a tower or other facility (2G/3G/LTE/5G), which is spectrum dependent; and

Tower functionality: cellular towers perform different functions, for example, microwave hub-towers are key towers that connect several other towers, unlike point-to-point (PTP) microwave links which uses a single hub-tower to create a sector of coverage that can backhaul multiple towers.

Accordingly, the equal weighting of sites with a "number of sites" metric provides a skewed and inaccurate assessment of market share.

The above documents the danger of regulators contriving mental constructs of markets that ignore real value. The authors of the Market Inquiry, however, do have a point that barriers to entry are very high in respect of spectrum because there is no free market for trading spectrum. To the extent that publicly assigned spectrum can be considered a market at all, the "market" is suffering from an artificial shortage of spectrum that Government failed to make available for which there is only one logical justification: regulatory failure. It is the reduction of this artificial scarcity that deserves the full attention of Government, not any perceived ineffective competition in Pofadder.

Generally, the fact that ICASA uses municipalities as a geographic market to investigate significant market power (SMP) misconstrues the complexity of mobile networks and the fact that carriers are not free to set prices as they please. ICASA derives its conclusion that MNOs have SMP exclusively on their assessment of market shares. If a carrier's market share is found to be 45 percent (or more), then the carrier is presumed "dominant", which to the authors implies that the market is ineffectively competitive. Part of the problem is that the Market Inquiry does not define what "ineffective" competition is or could be. Might it be a doubling of data prices in Pofadder overnight, or the clandestine throttling of a roaming partner's traffic speed? Since economic science deals with human actions, the verdict "ineffective" must necessarily refer to some people's concrete actions. If an action is regarded as "unfair", an unfair or "anti-competitive" action must be proven (not to be confused with breach of contract or fraud). The Market Inquiry does not provide any example for such behaviour.[65]

The third example deals with the concrete findings in respect of high data prices. The following sections are from the Market Inquiry report in order of their appearance:

> The ITU data suggests that South Africa's prices are not disastrously high but neither are they as low as they could be, particularly in comparison to South Africa's peers in the BRICS group. (para 49)
>
> … while South Africa's prices are not the lowest, the download speeds experienced by South African customers are much faster than anywhere else in the continent, including large comparator countries like Egypt, Morocco, Ghana, Nigeria and Kenya. (p 56)
>
> Figure 13 illustrates that while mobile data speeds in South Africa are *extremely* high by African standards (see figure 12), they are no better than average in the more advanced grouping. Interestingly, while South African prices are higher than India and Russia's, the speeds provided in South Africa are much higher. Put in an appropriate context, therefore, South Africa's speed and quality performance looks neither excellent nor terrible. However, the examples of China and Turkey demonstrate that there is plenty of room for improvement. (para 58/59)

> … while South Africa's prices are not the lowest, the proportion of the population with access to LTE (approaching 80%) is much higher than most other countries. (para 60)
>
> A barrier to lower mobile data prices in South Africa which has frequently been cited is the lack of spectrum assigned to the mobile operators. This is since having access to spectrum lowers the cost to operators of rolling out both improved coverage and capacity, since it requires them to build fewer base stations. In addition, large amounts of spectrum are necessary to provide high speed mobile broadband, especially as the demand for data increases rapidly. *If operators with inadequate spectrum assignments are struggling to meet data capacity requirements from their existing customers, this lowers their incentive to reduce prices as lower prices will lead to higher volumes which could result in declining network quality.* There are therefore a number of reasons why spectrum assignment is critical to achieving cheap, high quality mobile broadband.
>
> South Africa is well behind the leading countries when it comes to assigning spectrum for mobile broadband, having assigned about half the spectrum compared to the UK for example, and with an extremely low assignment per operator.

The causal relationship between the extremely low provision of spectrum to the two leading mobile network operators and the resulting relatively higher costs for the provision of network services largely invalidates the subject of the Market Inquiry from the outset. The quoted paragraphs suggest that it is mistaken to assume that the operators' incentives to reduce prices are *lowered*. What is *lowered* is the MNOs' profitability as a consequence of the relatively higher network costs resulting from low spectrum assignment. Accordingly, it is network cost that makes it impossible to reduce prices. Incentives have nothing to do with this; operators would cut prices in half overnight if they found a way to achieve this at given profitability levels.

Regarding what ineffective competition is, it is sobering to consider the financial statements of PRASA or Eskom. These entities survive only because of the absence of competition and the fact that public money is misappropriated to plug financial holes. The astonishing number of "turnarounds" have not produced tangible results. [66] In contrast to South Africa's aimlessly drifting SOEs, MNOs do not need turnarounds and bailouts. With the help of equipment manufacturers, consumers make sure through their purchase decisions that MNOs turn in the direction they want MNOs to go. There must be something to the disciplining effect of free consumer choice provided it means something that no large (privately owned) MNO has ever gone bankrupt since the emergence of the first cellular voice offerings thirty years ago.

ICASA competition theory advisors seems to rely on simplistic and flawed concepts. The Govt created the very "duopoly" it now condems. Despite all the errors in setting up the "duopoly" it has grown into SA's greatest success What would the govt have preferred?

The word "monopoly" was orignally perceived as an exclusive legal right of sale covered by Government and usually ensured by patent or licence. In the seventeenth century "monopoly" was defined by Sir Edward Coke as an "allowance by the King to any person or corporate for the sole buying, selling, making, working or using anything, whereby any person or corporate are sought to be restrained of any freedom or liberty that they had before.[2] " In the eighteen century another definition was developed by Samuel Johnson: the "exclusive privilege of selling anything.[3]" In the course of time "monopoly" been reinterpreted to mean the private accumulation of so-called "economic power" or an entity that has total or near-total "control" of a market.[4]

But being large does not confer "control". Regardless of size, suppliers must behave competitively to keep attracting consumers.

Definitions of the kind used in the Draft Regulations give the appearance of sophistication, but conceal the real world. Terms like "market power" and "dominance" imply some kind of supplier control,

whereas if there is relative freedom of entry, only consumers have market power. They wield it ruthlessly over the world's largest enterprises. They hire and fire them by the minute.

There are countless examples of consumer market power being mightier than firms with so-called market dominance, for instance:

1. Consumer fired the once mighty IBA and employed Microsoft and Apple instead.
2. There was a succession of "monopolistic" search engines, like HotBot, Excite, WebCrawler, Ask Jeeves, Ask.com, Yahoo, Dogpile, AltaVista, Lycos, MSN Search, Bing, AOL Search, Infoseek, Go.com, Netscape, MetaCrawler, All The Web, and Bing. Then along came Google. Consumers loved Google so much – which is their right – that it now "dominates". But in reality it is the consumers who dominate, not Google which could be overthrown by a popular competitor at any time. When markets are contestable "market power" is exclusively "consumer power".
3. For a timeline see *https://www.wordstream.com/articles/internet-search-engines-history.*
4. The once mighty Encyclopedia Britanica became an old person's memory, because consumers "voted" against it with their Rands.
5. Movie houses and drive-ins have largely been replaced by multiple alternatives.
6. Juke boxes made way for records, which were defeated by cassettes, until CDs disposed of them, and now we have YouTube and Spotify.
7. Former regulated monopoly Telcom now begs for protection and subsidies.
8. Former SAA regulated monopoly has all but vanished.
9. Law reports have been pulped or retained for display purposes.
10. Outspan oranges have been replaced by multiple citrus fruits.
11. Rainbow chickens, once a near sole supplier, has been driven out by multiple new entrants.
12. Former regulated monopolist SABC now begs for subsidies.
13. Agricultural co-ops virtual monopolies have virtually been driven into oblivion by hundreds of commercial alternatives.

The FMF submits that in the quest to create the best conditions for consumers to reap value through better and cheaper services, the regulator must principally be agnostic regarding the distribution of market share (however defined) to individual MNOs as a result of consumer choice and competitive rivalry. It should also be agnostic with respect to how many MNOs play in the market, provided that markets are competitive, which is to say that markets are contestable. South Africa's mobile market is and has always been highly competitive by any standards, which is why the notion of "market failure" is unwarranted.

The Coase invariance thesis (better known as the Coase theorem), which goes back to the works of Nobel laureate Ronald Coase, states that the initial distribution of ownership rights is irrelevant because the market outcome will always reach the same optimal result from the consumer point of view. It is noteworthy that Coase used the example of regulation of spectrum assignment in the US broadcasting industry in his famous paper "The Federal Commission of Communications" published in 1959[2] in which he developed the basis for the Coase theorem which in its ultimate version was published in the even more famous paper "The Problem of Social Cost" published in 1960.[3]

[2] RH Coase (1959): "The Federal Communications Commission." The Journal of Law & Economics. 3: 1-40.
[3] RH Coase (1960): "The Problem of Social Cost". *Journal of Law and Economics*. **3** (1): 1-44.

In the 1959-paper, Coase proposed that as long as property rights in these frequencies were well defined, it ultimately did not matter if adjacent radio stations interfered with each other by broadcasting in the same frequency band. Furthermore, it did not matter to whom the property rights were granted. His reasoning was that the station able to reap the higher economic gain from broadcasting would have an incentive to pay the other station not to interfere. In the absence of or given reasonably low transaction costs, both stations would strike a mutually advantageous deal. It would not matter which station had the initial right to broadcast; eventually, the right to broadcast would end up with the party that was able to put it to the most highly valued use. Of course, the parties themselves would care who was granted the rights initially because this allocation would impact their wealth, but the end result of who broadcasts would not change because the parties would trade to the outcome that was overall most efficient from the perspective of the consumer.

And it is the perspective of the consumer that must guide regulatory decisions. At the same time, regulatory decisions must be bound by existing property rights even in the case in which the regulator or any other party comes to the (reasonably informed) view that a reallocation of ownership titles would improve consumer prosperity. As long as markets are competitive and open to entry, consumers will eventually force upon market participants a distribution of ownership titles that is in their own best interest.

All of this might be too theoretical for most ICASA members, but if they do not fully appreciate competition theory, they should not try to implement competition policy. Having addressed the matter in some detail, it might be summed up as follows.

The crude and prevailing notion of competition is that (a) there must be more than one supplier, preferably many, and (b) that they supply identical goods and services.

But that is untrue on many levels. There are never two identical products. Consumers know that, which is why they make choices. They choose brands, deals, ease, style, convenience and much else where regulators see no variation.

Even in a large “informal market” where many sellers supply identical packets of, say, tomatoes at the same price, all sitting in a row at a large terminus, there are differences that get consumers to buy from A instead of B.

The accurate way to understand competition is that all competition is ultimately “Rand Competition”. All suppliers compete with all other suppliers for all consumer Rands. Even a sole supplier such as the Soccer League, is up against everyone else trying to attract consumers, from shoe sellers to travel agents.

Vodacom and MTN, and the other four or more, compete more with grocery and clothing stores than with each other. They watch each other and make small adjustments, but their real problem is that consumers can buy a coke instead of making a call.

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