

Telecommunication and the allocation of scarce resources and / or essential facilities in terms of the Competition Act 98 of 1998 of South Africa

By

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Declaration

I, **Cheryl Dinkelmann** do hereby declare that this dissertation is my own original work and that it has never been presented or submitted to any other educational institution for the award of a degree or any other qualification. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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Dedication

To my parents, who gave me the gift of education.

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List of abbreviations

1.	3G	Third generation mobile technology
2.	4G	Fourth generation mobile technology
3.	ADSL	Asymmetrical Digital Subscriber Line
4.	ANC	African National Congress
5.	CDMA	Code Division Multiple Access
6.	DoC	Department of Communications
7.	DTI	Department of Trade and Industry
8.	ECA	Electronic Communications Act
9.	ECNS	Electronic Communications Network Services
10.	ECS	Electronic Communications Services
11.	EU	European Union
12.	GEAR	Growth Employment and Redistribution
13.	GSM	General Standard for Mobile Technology
14.	HSDPA	High Speed Downlink Packet Access

15.	ICASA	Independent Communications Authority of South Africa
16.	ITU	International Telecommunications Union
17.	LTE	Long Term Evolution
18.	MOU	Memorandum of Understanding
19.	OECD	Organisation for Economic Co-operation and Development
20.	PSTS	Public Switched Telecommunication Services
21.	RDP	Reconstruction and Development Programme
22.	RSPG	Radio Spectrum Policy Group
23.	SATRA	South African Telecommunications Regulatory Authority
24.	SME	Small and Medium Enterprises
25.	SNO	Second Network Operator
26.	SMA	Spectrum Management Agency
27.	USA	United States of America
28.	VANS	Value Added Network Services

29.	WiMax	World Wide Interoperability for Microwave Access
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Figures and tables

1.	Figure 1	Radio frequency spectrum and its uses
2.	Table A	Table A - A comparison between an essential facility and a scarce resource

Table of contents

Chapter 1 - The Competition Act number 89 of 1998	10
1. Introduction.....	10
2. History and background of competition law in South Africa	10
3. Competition policy in South Africa	12
4. Scope and application of the Act	13
4.1. Purpose.....	13
5. Conduct regulated by the Act.....	13
6. The Competition Authorities of South Africa.....	14
6.1. The Competition Commission	14
6.2. The Competition Tribunal.....	15
6.3. The Competition Appeal Court.....	15
7. Concurrent jurisdiction	16
7.1. Concurrent jurisdiction with respect to the telecommunications industry	17
8. Radio frequency spectrum	19
9. Scope and purpose of this dissertation	21
Chapter 2 - Market definition: radio frequency spectrum	23
1. Introduction to the legal and regulatory framework for the allocation of radio frequency spectrum.....	23
2. Radio frequency spectrum allocation and usage in South Africa	24
3. The market players.....	25
3.1. Fixed-line Telecommunications.....	25
3.2. Mobile Telecommunications.....	26
3.3. Data communications.....	26
4. Discussion and conclusion of the market definition	27
Chapter 3 - Dominance, the essential facilities doctrine and scarce resources	28
1. Introduction.....	28
2. Abuse of dominance.....	28
2.1. Section 8 (b) - access to an essential facility.....	29
2.2. Section 8 (c) and 8 (d) (i) – exclusive dealing	29
2.3. Section 8 (d) (ii) – access to scarce resources.....	30
3. Relevant concepts and scope of the Competition Act.....	30
3.1. Introduction to an essential facility	30

3.2.	The doctrine of essential facilities a comparative perspective	32
4.	The difference between an essential facility and a scarce resource	38
Chapter 4 – Analysis of allocation of radio frequency spectrum in South Africa - is it in keeping with the spirit and purpose of the Competition Act?		40
1.	Introduction	40
2.	Competition issues and regulatory aspects of radio frequency spectrum management	41
3.	Allocation methods and remedies to prevent anti-competitive use of radio frequency spectrum	42
3.1.	Administrative approach	42
3.2.	Comparative approach	42
3.3.	Market based approach	42
3.4.	Spectrum auctions	42
3.5.	Spectrum trading	43
3.6.	Use-it-or-lose-it	43
4.	Industry’s reaction to the proposed policy directions	43
Chapter 5 – Conclusion		45
1.	The history and policy considerations of the Competition Act no 89 of 1998	45
2.	The relevant market	45
3.	The legal framework under the Competition Act	46
4.	The Department of Communications policy directions regarding the allocation of high demand frequency spectrum	47
5.	Introduction of a Spectrum Management Agency	48
Bibliography		50

Chapter 1 - The Competition Act number 89 of 1998

1. Introduction

Radio Frequency Spectrum is a vital input for the provision of mobile telecommunication services. The telecommunication industry in South Africa has developed rapidly over the past 20 years with the introduction of mobile telecommunication technology. The South African telecommunications industry has progressed from a highly-regulated industry, consisting of one state-owned monopoly, to a liberalised industry consisting of four mobile network operators and two fixed line operators. A 2012 study by the Sub-Saharan Africa Mobile Observatory, conducted by Deloitte and the GSMA¹ indicates that since the year 2000, the number of mobile connections in Sub-Saharan Africa have increased by 44%, with key countries such as Nigeria, South Africa, Tanzania, Kenya and Ghana, investing over 2.8 billion US dollars in 2011, mainly in infrastructure². Such growth has resulted in excess demand for radio frequency spectrum.

Following a brief introduction to the history and policy considerations of the Competition Act³, the structure and purpose of the Competition Authority, this dissertation examines radio frequency spectrum and its use in the mobile telecommunications industry. The concept of radio frequency spectrum is tested against the definition of an essential facility, in terms of the Competition Act⁴ and the concept of a scarce resource, whereafter the aim is to identify how the Competition Act⁵ can be used to address the allocation of radio frequency spectrum by the Independent Communication Authority of South Africa (“ICASA”). In conclusion it is established whether radio frequency spectrum can be classified as an essential facility or a scarce resource in terms of the Competition Act⁶ and what the relevant provisions of the Competition Act⁷ are in terms of which to ensure that radio frequency spectrum is allocated, in accordance with the spirit and object of the Competition Act⁸. Finally, it is sought to determine whether the recent policy directions from the Department of Communication (“DoC”) to ICASA, are in line with the spirit and object of the Competition Act⁹, thus ensuring that radio frequency spectrum is allocated efficiently in South Africa.

2. History and background of competition law in South Africa

Unlike most developing countries, South Africa’s history and development of economic policy is unique and born out of state ownership of resources, protection, import substitution and robust property rights and market institutions¹⁰. Industry in South Africa was subjected to very stringent

¹Sub-Saharan Africa Mobile Observatory, 13 November 2012. Conducted by Deloitte and the GSMA. Available at: http://www.gsma.com/publicpolicy/wp-content/uploads/2012/03/SSA_FullReport_v6.1_clean.pdf at 3. Accessed 12 April 2013. (hereinafter Sub-Saharan Africa Mobile Observatory).

² Sub-Saharan Africa Mobile Observatory at 3.

³ No 89 of 1998.

⁴ No 89 of 1998.

⁵ No 89 of 1998.

⁶ No 89 of 1998.

⁷ No 89 of 1998.

⁸ No 89 of 1998.

⁹ No 89 of 1998.

¹⁰ Competition Law and Policy in South Africa an OECD Peer Review (2003) 9 (hereafter OECD Peer Review).

regulation¹¹. Economic policy was discriminatory and focused on the protection of white land ownership and protection against competition from neighbouring African countries¹². Industry was highly concentrated and state monopolies developed in mining, agriculture, and telecommunications and even in consumer products such as beer¹³. This was a well-developed economy, which was forced to be self-reliant due to sanctions imposed on South Africa for its discriminatory practices under the Apartheid regime¹⁴.

In the 1950's competition law prescribed and defined the monopolistic economic policies of South Africa¹⁵. There were no *per se*¹⁶ prohibitions and the law simply provided for an administrative process which relied heavily on public interest analysis¹⁷. This administrative task was assigned to the Board of Trade and Industry ("the Board")¹⁸. The Board had no independent powers and was only tasked with investigation of complaints, the recommendation of remedies and compliance¹⁹. The Board took minimal action during this time and no landmark cases were ever heard, as the majority of the rulings made by the Board were negotiated settlements²⁰.

Subsequent enquiries into the Board of Trade and Industry in 1975, lead to a reform in competition law and in 1979, the Maintenance and Promotion of Competition Act²¹ was established²². The Act established a Competition Board, which possessed the power to investigate matters of non-compliance²³. Similar to the previous regime, the Competition Board was not an independent body and the government heavily influenced the Competition Boards' activities. As a result, the Competition Board did not use any initiative to investigate any matters and the act contained no prohibited practices²⁴. In 1984 regulations were issued under the act which prohibited certain practices as *per se* prohibitions, namely resale price maintenance; horizontal collusion about price, terms or market share; and bid rigging²⁵.

After the demise of the apartheid regime, the African National Congress ("ANC") came into power. The ANC's policy reform for a democratic South Africa in 1992 included competition policy reform; and the main objective of this policy reform was to eliminate and reform the market concentration which characterised the South African economy, creating centres of economic power, which would never be able to foster a balanced economic development and policy within South Africa²⁶. The key

¹¹ OECD Peer Review at 9, 10.

¹² OECD Peer Review at 9.

¹³ OECD Peer Review at 10.

¹⁴ OECD Peer Review at 9.

¹⁵ OECD Peer Review at 12.

¹⁶ A *per se* prohibition is on for which there is no defense. If the relevant conduct is proven then there is a presumption that the party engaged in the prohibited conduct. Neuhoff, M (ed.), Govender, M. Versfeld, M. and Dingley, D. (2006) *A Practical Guide to the South Africa Competition Act*. (Lexis Nexius Butterworths), Durban at 17 (hereafter Neuhoff).

¹⁷ OECD Peer Review at 12.

¹⁸ OECD Peer Review at 12.

¹⁹ OECD Peer Review at 12.

²⁰ OECD Peer Review at 12, 13.

²¹ Act 96 of 1979.

²² OECD Peer Review at 13.

²³ OECD Peer Review at 13.

²⁴ OECD Peer Review at 13.

²⁵ OECD Peer Review at 13.

²⁶ OECD Peer Review at 14.

objectives were set out in the Reconstruction and Development Program (“RDP”) in 1994, which set out the vision the ANC had in mind for South Africa²⁷. Part of this vision called for the development and implementation of strict competition laws in South Africa²⁸. The implementation of a new government policy in 1996, known as the Growth Employment Redistribution (“GEAR”), further reinforced the need for new antitrust legislation in South Africa²⁹. In 1995, the Department of Trade and Industry (“DTI”) set in motion a project to develop a competition policy and framework. In November 1997, the DTI put forward new guidelines for the South African Competition Act³⁰. The Act was a significant deviation from the Maintenance and Promotion of Competition Act³¹ and brought South African competition law policy in line with international standards and best practice³².

3. Competition policy in South Africa

One of the cornerstones of the current South African competition law regime is economic efficiency, and the foremost of the policy goals is to promote and maintain competition in South Africa. In summary, the act sets out the following policy goals in section 2 thereof:

- a) promote and maintain competition;
- b) competitive prices and freedom of choice for consumers;
- c) employment and social economic welfare;
- d) participation in world markets; and
- e) equitable opportunity for Small to Medium Enterprises (“SME’s”); and increasing the ownership for previously disadvantaged persons³³.

The preamble of the Act sets the scene and illustrates the wrongs of the Apartheid regime that it aims to address³⁴. The problem of excessive concentration of ownership is highlighted, as well as discriminatory practices, inadequate restraints of trade against anti-competitive practice, and unjust restrictions³⁵. The political and economic goals are reinforced and reflected in the Act, which sets out the main policy objectives such as ensuring *economic efficiency*, sustainability of the free market economy, the promotion of free and fair competition, the most efficient allocation of resources and the production of goods and services to the benefit of the consumer. Political rhetoric in the Act seeks to address the inequalities of the past and to ensure the equal distribution of wealth as well as the acknowledgement of previously disadvantaged persons³⁶. There is a focus on historically

²⁷ Sutherland, P and Kemp, K *Competition Law of South Africa* Service Issue 15 2012. (Lexis Nexis Butterworths) at 3-39 (hereafter Sutherland and Kemp).

²⁸ Sutherland and Kemp (2011) at 3-39.

²⁹ Sutherland and Kemp (2011) t p 3-40.

³⁰ Sutherland and Kemp (2011) p 3-40. The Competition Act 98 of 1998 was assented to by the president in October 1998. The most recent amendment to the Competition Act is the Competition Amentment Act 1 of 2009, which was assented to in august 2009. The recent amendment whas quite contentions as there are some constitutional issues relating to the crimilisation of certain offences under the Act.

³¹ Act 96 of 1979.

³² Sutherland and Kemp (2011) at 3-45.

³³ Competition Act no. 89 of 1998.

³⁴ Preamble of the Competition Act no. 89 of 1998.

³⁵ Preamble of the Competition Act no. 89 of 1998.

³⁶ OECD Peer Review at 18.

disadvantaged persons and public interest goals in order to ensure that such persons are given equal opportunity to participate in the economy³⁷.

4. Scope and application of the Act

4.1. Purpose

The Competition Act applies to all economic activity within, or having an effect within, the Republic of South Africa³⁸. The following matters are exempt from the application of the Act:

- a) collective bargaining in terms of the Constitution of the Republic of South Africa, 1996 and the Labour Relations Act³⁹;
- b) a collective agreement, as defined in section 213 of the Labour Relations Act⁴⁰; and
- c) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose⁴¹.

The Act also addresses specific industries that are subject to the jurisdiction of another regulatory authority, in respect of conduct relating to Chapter 2 of the Competition Act. This entails that the competition authority and the regulatory authority exercise concurrent jurisdiction regarding certain matters as set out in the Act⁴². The manner in which such concurrent jurisdiction is to be exercised will be examined in more detail below.

5. Conduct regulated by the Act

The Competition Act regulates various types of practices within the economy. The prohibited practices are set out in Chapter 2, which can be divided into restrictive practices, made up of two different types of restrictive practices, namely horizontal and vertical practices. Horizontal practices refer to the agreements and / or arrangements between competitors in a horizontal relationship⁴³. A vertical practice refers to the agreements and / or arrangements between firms in a vertical relationship; these are not likely to be competitors, but parties who are in a customer / supplier relationship⁴⁴. In addition, the Act regulates firms with significant market power, the abuse of dominance as well as pricing behaviours. The Competition Act also provides for the regulation of mergers and acquisitions amongst firms⁴⁵.

The Competition Act classifies the restrictive practices prohibited by the Act into *rule of reason* and *per se* contraventions. A *Rule of reason* prohibition allows for a defence to certain provisions of the

³⁷ Neuhoff, M (ed.), Govender, M. Versfeld, M. and Dingley, D. (2006) *A Practical Guide to the South Africa Competition Act*. (LexisNexius Butterworths), Durban at 13 (hereafter Neuhoff).

³⁸ Section 3.

³⁹ Act no 66 of 1995.

⁴⁰ Act no 66 of 1995.

⁴¹ Section 10.

⁴² Section 3(1A) (a) and (b).

⁴³ Neuhoff at 14 and 15.

⁴⁴ Neuhoff at 14 and 15.

⁴⁵ Neuhoff at 14 and 15.

Competition Act⁴⁶. The efficiency defence is available and defendants can use this to argue that various economic, technological or economies of scale exist, in order to justify the conduct⁴⁷. In other words, the conduct does not necessarily amount to a contravention; because once the rule of reason analysis is applied, the following is considered⁴⁸:

- a) Does the conduct complained about amount to a substantial lessening or prevention of competition?
- b) Will there be efficiency, pro-competitive or technological gains which outweigh the anti-competitive effects?
- c) Is the conduct necessary in order to attain the pro-competitive or technological gains⁴⁹?

A *Per se* prohibition defines conduct which is prohibited by its nature, and no defence exists if the conduct itself can be proven⁵⁰. An example of such conduct would be collusion which is specifically named in the Act and it is automatically deemed illegal. *Per se* provisions provide certainty, deter the prohibited conduct, and save the resources and time of the Commission and Tribunal as it does not usually result in a protracted investigation or trial⁵¹.

6. The Competition Authorities of South Africa

The OECD (2003) identified the three independent enforcement bodies created under the Competition Act as a principal innovation⁵². This removed the decision-making power from the Minister, which rendered the 1979 Act ineffective, due to the lack of independence⁵³. The Competition Authority consists of a three-tiered structure provided for in Chapter four of the Competition Act namely the Competition Commission (“the Commission”), Competition Tribunal (“the Tribunal”), and the Competition Appeal Court (“the Appeal Court”).

6.1. The Competition Commission

The main function of the Commission is to implement measures to increase market transparency and public awareness in South Africa⁵⁴. The Commission’s functions are of an investigative nature, as the primary investigative body⁵⁵, and entail the following:

- a) “To investigate and evaluate suspected contravention of the Act;
- b) to grant or refuse applications for exemptions;
- c) to negotiate and conclude consent orders;
- d) to investigate and evaluate proposed mergers;

⁴⁶ Neuhoff at 17.

⁴⁷ Neuhoff at 17.

⁴⁸ Neuhoff at 17.

⁴⁹ Neuhoff at 17.

⁵⁰ Neuhoff at 17.

⁵¹ Neuhoff at 16 and 17.

⁵² OECD Peer Review at 37.

⁵³ OECD Peer Review at 37.

⁵⁴ Section 21.

⁵⁵ OECD Peer Review at 37.

- e) to refer matters to and appear before the Tribunal;
- f) to review legislation;
- g) to negotiate agreements with any regulatory authority and coordinate and harmonize the exercise of jurisdiction over competition matters within an industry or sector; and
- h) to deal with any other matter referred to it by the Tribunal”⁵⁶.

The Commission is also empowered to issue guidelines with respect to matters within its jurisdiction, in order to indicate the Commission’s policy approach in terms of section 79 of the Act⁵⁷. The Commission is an independent body and may investigate any contravention, or suspected contravention, at its own instance, or upon a complaint being submitted by an interested party⁵⁸. The Commission has very wide search and seizure powers in terms of sections 46 to 49 of the Act. Upon concluding an investigation, the Commission must refer the matter to the Competition Tribunal⁵⁹. If not referred, a notice of non-referral is issued, or alternatively, the Commission may negotiate and enter into a settlement with the defendant / respondent⁶⁰.

6.2. The Competition Tribunal

The Tribunal was established as an independent authoritative body, and the court of first instance in relation to large mergers, complaints about restrictive practices, and the abuse of dominance⁶¹. Its function is also to adjudicate appeals arising out of decisions made by the Commission⁶².

The adjudicative arm’s functions can be summarised as follows:

- a) “adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act;
- b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act;
- c) hear appeals from, or review any decision of, the Competition Commission that may, in terms of this Act, be referred to it; and
- d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.”⁶³

6.3. The Competition Appeal Court

The Competition Appeal Court was established as the “court” of last instance in respect of matters arising out of the Competition Act, and shares the status of a high court, with high court judges at its bench⁶⁴, whose function it is to review the decisions of the Tribunal, and hear appeals against

⁵⁶ Section 21 and Visser, C An overview of the Competition Act Part 1 *Quarterly Law Review for People in Business (“QLRPB”)* Vol 12 at 54 (hereinafter Visser).

⁵⁷ Visser at 55.

⁵⁸ Visser at 55.

⁵⁹ Visser at 55.

⁶⁰ Visser at 55.

⁶¹ OECD Peer Review at 38.

⁶² Section 26. See also OECD Peer Review at 38.

⁶³ Section 27.

⁶⁴ OECD Peer Review at 38.

judgments of the Competition Tribunal⁶⁵. The Competition Appeal Court may grant leave to appeal to the Supreme Court of Appeal⁶⁶. These three independent bodies make up the enforcement agency for competition law in South Africa.

7. Concurrent jurisdiction

During the drafting of the Act, the drafters had to consider that within South Africa various industries are heavily regulated by other authorities. The objective was to demarcate these areas of regulation, in order to prevent regulatory arbitrage, and create more certainty within the framework of the Act⁶⁷. Therefore, when the Act was promulgated in 1998, an independent authority in relation to competition matters was created, namely the Competition Commission, whose functions as indicated above, are to enforce competition⁶⁸. The Competition Commission, and other regulatory authorities, however, has to function within the parameters of the Competition Act which has a very wide scope of application and applies to all economic activity within, or having an effect within the Republic of South Africa, with certain exclusions⁶⁹. Thus the concurrent jurisdiction between the Competition Commission and the other regulatory authorities gave rise to problems as discussed in more detail hereafter. The Act was recently amended to clarify the concept of concurrent jurisdiction, which has been the subject of much debate since the inception of the Act. Section 3(3)(a) of the Competition Act, as amended, provides⁷⁰:

“In so far as this Act applies to any conduct arising within an industry or sector of an industry that is subject to the jurisdiction of another regulatory authority in terms of any other legislation—

(a) this Act, and that other legislation, must be construed as establishing concurrent jurisdiction in respect of any such conduct that is regulated in terms of both this Act, and that other national legislation, subject to paragraph (b), such that—

(i) any other regulatory authority contemplated in this subsection will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that authority functions, and this Act; and

(ii) the Competition Commission will exercise primary authority to detect and investigate alleged prohibited practices within any industry or sector, and to review mergers within any industry or sector, in terms of this Act; and

(b) details of the administrative manner in which any concurrent jurisdiction contemplated in paragraph (a) is to be exercised, must be determined by an agreement between the Competition Commission and that other regulatory authority, as provided for in sections 21(1) (h) and 82(1)’’⁷¹.

⁶⁵ Section 37.

⁶⁶ Visser at 55.

⁶⁷ Sutherland and Kemp at 4-44.

⁶⁸ Irvine, H. and Granville, L. *Who to Call? - Concurrent Competition Jurisdiction in the South African Electronic Communications Sector* (draft paper). Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa and Celebration of 10 years of the Competition Act and Competition Authorities 1 – 3 September 2009 at 4 and 5 (hereinafter Irvine and Granville).

⁶⁹ Section 3.

⁷⁰ See Competition Amendment Act no 1 of 2009 published in Government Gazette no. 32522 notice no. 875 28 August 2009.

⁷¹ Section 3.

7.1. Concurrent jurisdiction with respect to the telecommunications industry

The problem of concurrent jurisdiction exists in various situations within South Africa⁷². This dissertation will focus on its appearance in the telecommunications industry. A brief history of the development of relevant legislation and the regulatory authority within the industry is described here in order to contextualise the issue of concurrent jurisdiction.

When the ANC came into power, part of the economic transformation involved the liberalisation of state-owned monopolies, as there was increased pressure to privatise⁷³. The convergence of new technologies also played a role in the transformation of the market place⁷⁴. Prior to the liberalisation of the industry, the state-owned telecommunications operator, Telkom, (as it is now known), was the exclusive telecommunications provider in South Africa. After the ANC came into power, all state-owned monopolies were decentralised and liberalised⁷⁵. The Telecommunications Act was promulgated in 1996⁷⁶, which established a sector regulator, then known as the South African Telecommunications Regulatory Authority (“SATRA”). Later the Telecommunications Act was amended, and ICASA was established under the ICASA Act⁷⁷ as the regulator of the telecommunications industry. Section 36(1)(d) of the Telecommunications Act gives ICASA certain powers with regard to competition matters.

Later, due to the convergence of technologies and the advent of the Convergence Bill,⁷⁸ the Electronic Communications Act (“ECA”)⁷⁹ was promulgated. In accordance with the ECA and the Competition Act, the competition authority and ICASA have concurrent jurisdiction over matters relating to the Competition Act and competition matters, as set out in the ECA, where these overlap⁸⁰. After the promulgation of the ECA the Competition Act was amended via the promulgation of the 2009 Competition Amendment Act⁸¹. The amendment was introduced in order to improve the interface between ICASA as the sector regulator, and the competition authorities⁸². The amendment stated that in cases where the Competition Act applies to a sector of an industry that is subject to regulation by another regulatory authority, this must be construed as establishing concurrent jurisdiction for the Competition Commission and the said regulatory authority over competition matters⁸³.

⁷² Sutherland and Kemp at 4-48.

⁷³ Irvine and Granville at 1 and 2.

⁷⁴ Irvine and Granville at 1 and 2.

⁷⁵ Irvine and Granville at 1 and 2.

⁷⁶ Act 103 of 1996.

⁷⁷ Act no. 13 of 2000.

⁷⁸ Convergence Bill, 2004 General Notice 3382 of 2003 Department of Communications. The object of the Convergence Bill was to promote convergence in the broadcasting, telecommunication and broadcasting sectors; to make new provision for the regulation of communication services; to provide for issuing of new licenses and new social obligations; to provide for the control of the radio frequency spectrum; and to clarify and augment the powers of the Independent Communications Authority of South Africa. This culminated in the Electronic Communications Act 36 of 2005 which saw broadcasting and Telecommunication fall under the ambit of a single regulatory authority (ICASA) under one Act.

⁷⁹ Act 36 of 2005.

⁸⁰ Competition Amendment Act no 1 of 2009 published in Government Gazette no. 32522 notice no. 875 28 August 2009.

⁸¹ Competition Amendment Act no 1 of 2009 published in Government Gazette no. 32522 notice no. 875 28 August 2009.

⁸² Moodliyar, K and Weeks, *A framework for promoting competition in electronic communications: clarifying the role of the Competition Authority and the sector regulator* (draft paper) Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa and Celebration of 10 years of the Competition Act and Competition Authorities 1 – 3 September 2009 at 1 (hereafter Moodliyar and Weeks).

⁸³ Section 3.

Therefore, in accordance with the amended Section 3 of the Competition Act, the Competition Commission is obliged to negotiate with the other sector regulator (ICASA), in order to clarify the exercise of jurisdiction in the relevant industry sector⁸⁴. The Act also requires the Commission to identify and establish procedures to manage concurrent jurisdiction; promote co-operation between parties; exchange information and publish the information in the Government Gazette⁸⁵. This took place and a document known as the Memorandum of Understanding (“MOU”) was published in the Government Gazette in 2002⁸⁶.

The introduction of the concept of concurrent jurisdiction was necessary in the telecommunications industry due to the complex nature of the industry, which is characterised by complex products and services, as well as rapid advancements in technology⁸⁷. This creates a need for detailed and specific regulations to govern all these complex components of the industry such as technical standards, numbering allocation, spectrum allocation, interconnection and competition concerns including concurrent jurisdiction in order to more effectively deal with transgressors in the industry⁸⁸. The industry is also influenced by the economic forces that affect the economy as a whole. Competition in the telecommunications industry is vigorous; and over the past few years, there has been a marked increase in competition⁸⁹.

Chapter 10 of the Electronic Communications Act⁹⁰ sets out the operational framework for ICASA to deal with competition matters. The Commission has the principal role in terms of assessing merger control and Chapter two contraventions, whilst ICASA’s role is with respect to the conditions prescribed in the relevant legislation⁹¹, such as regulatory intervention with respect to undue discrimination, giving undue preference and defining the market⁹².

Despite the amendments regarding concurrent jurisdiction, the telecommunications industry has been characterised by disputes relating to the exercise of jurisdiction between the Commission and ICASA. Moodaliyar and Weeks draw a distinction between economic regulation and competition policy, in that economic regulation refers to the regulatory response to a natural monopoly (such as the telecommunication industry), and competition policy refers to the regulation where the structure and conditions of the market are similar to that of a normal functioning market - a more general approach⁹³. Thus intervention by a sector regulator, such as ICASA, should be applied *ex ante*, meaning before the event or based on anticipated changes in the economy⁹⁴. The competition

⁸⁴ Section 21 (1) (h).

⁸⁵ Sutherland and Kemp at at 4-46.

⁸⁶ See MOU between ICASA and the Competition Commission Government Gazette no. 23857, Government Notice no. 1747 of 2002 available at: <http://www.compcom.co.za/assets/Uploads/home/ICASA.pdf>.

⁸⁷ Irvine and Granville at 1 and 2.

⁸⁸ Irvine and Granville at 1 and 2.

⁸⁹ Irvine and Granville at 1 and 2.

⁹⁰ Act 36 of 2005.

⁹¹ Moodaliyar and Weeks at 8.

⁹² ECA sections 67 (1) and (4).

⁹³ Moodaliyar and Weeks at 4.

⁹⁴ Legal Theory Lexicon “All the concepts that fit” Available at:

http://lsolum.typepad.com/legal_theory_lexicon/2003/09/legal_theory_le_2.html
Accessed 7 February 2013.

authority's interventions are applied *ex post*, meaning backward looking after the event⁹⁵, after identifying unlawful conduct⁹⁶. Moodaliyar and Weeks go on to suggest that: "Competition policy and economic regulation should properly be understood as complimentary tools used to address the problem of high levels of concentration."⁹⁷

8. Radio frequency spectrum

Central to the discussions in this dissertation as being an issue which is problematic within the context of the concurrent jurisdiction that is to be enforced by the Competition Commission and ICASA is the concept of "radio frequency spectrum". Radio frequency is a resource or facility that is a necessary requirement in order to compete in the telecommunication market. Radio frequency spectrum is a resource or facility which is used for a multitude of purposes in our everyday lives⁹⁸. Some examples are: radio communication, radio broadcasting (such as your local radio station), television broadcasting, military and government communication, radio astronomy and mobile broadband⁹⁹. With the evolution of mobile telecommunication, the demand for radio frequency spectrum has increased dramatically over the past two decades¹⁰⁰. A technical description of radio frequency spectrum would be "the portion of the electromagnetic spectrum that is able to transmit radio waves"¹⁰¹. The different frequencies within the spectrum define the boundaries of the spectrum and can be described as a band of resources, likened to a race track¹⁰². The track consists of eight lanes of equal length and width, *the space is finite and there is no scope for expansion* [my emphasis]¹⁰³. The spectrum ranges from about 9 kHz to 300 GHz¹⁰⁴. These signals can carry information and transmit such information. The higher the frequency, the shorter the distance reached, however higher frequencies can transmit a larger volume of information¹⁰⁵. The physical attributes of radio frequency spectrum defines which frequency band can be used for which type of technology or application that is available¹⁰⁶. The figure below demonstrates radio frequency spectrum and its various uses. The "sweet spot" indicated in the figure, represents the frequency bands most commonly used for television and mobile telecommunications¹⁰⁷, and is also commonly referred to as "high demand"

⁹⁵ Legal Theory Lexicon "All the concepts that fit." Available at:

http://solum.typepad.com/legal_theory_lexicon/2003/09/legal_theory_le_2.html

Accessed 7 February 2013.

⁹⁶ Moodaliyar and Weeks at 2 and 3.

⁹⁷ Moodaliyar and Weeks at 4.

⁹⁸ Blackman, C. and Srivastava, L. (Ed.) (2011) *Telecommunications Regulation Handbook. 10th anniversary edition*. Washington, DC: The World Bank. Available at <http://www.infodev.org/en/Document.1057.pdf>. Accessed April 2012 at 93 to 94 (hereafter Blackman and Srivastava).

⁹⁹ Blackman and Srivastava Blackman and Srivastava at 94.

¹⁰⁰ Blackman and Srivastava Blackman and Srivastava at 94.

¹⁰¹ Blackman and Srivastava at 94.

¹⁰² Blackman and Srivastava at 93 and 94 and Akoh, B. (2008) *Spectrum management Report Year: 2008*. - Access to Infrastructure Open Society Initiative for West Africa (OSIWA). Available at <http://www.osiwa.org> link <http://www.giswatch.org/fr/node/236> Accessed October 2012 at 24 (hereafter Akoh).

¹⁰³ Akoh at 24.

¹⁰⁴ Blackman and Srivastava at 94.

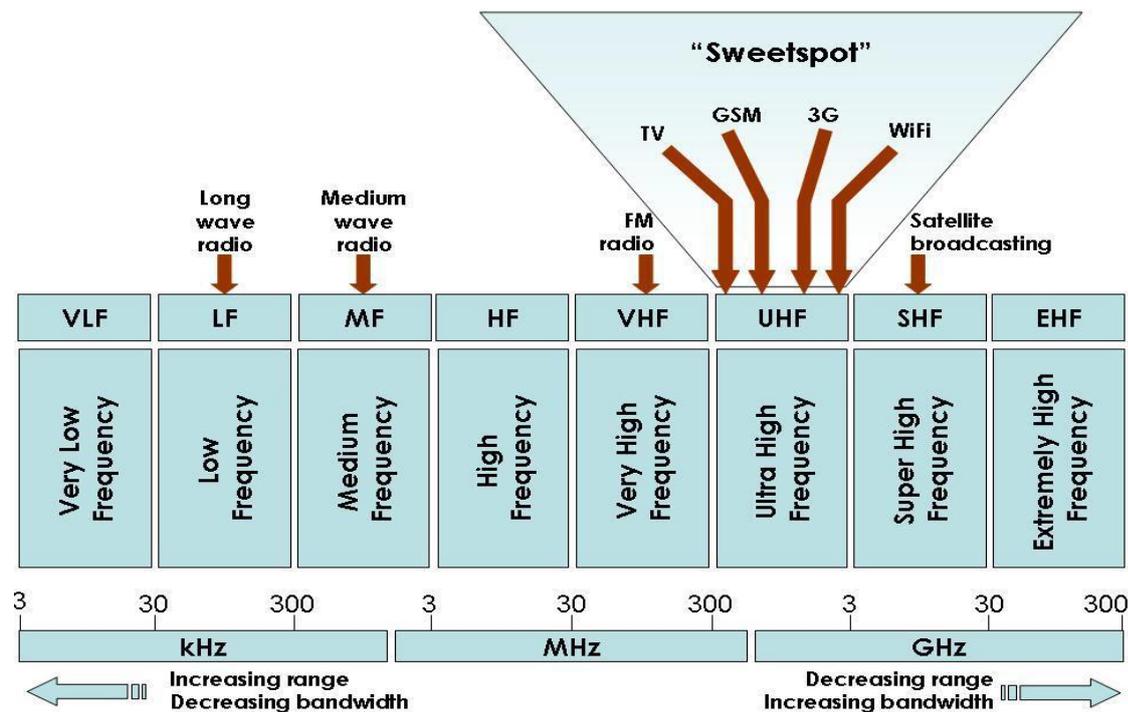
¹⁰⁵ Blackman and Srivastava at 94.

¹⁰⁶ Blackman and Srivastava at 94.

¹⁰⁷ Blackman and Srivastava at 94.

frequency spectrum. Naturally, the higher frequencies are sought after by the mobile network operators, as this is where ultra-fast broadband services are provided.

Figure 1 Radio frequency spectrum and its use



Source: Telecommunications regulation handbook 10th anniversary Edition¹⁰⁸

The above figure illustrates the nature of radio frequency spectrum, an essential element required for the transmission of data and voice from a transmitter to a receiver¹⁰⁹. A telecommunications operator who provides this service, via the various technologies and applications available, must do so within the confines of the frequency ‘bands’ allocated to it¹¹⁰. As more operators provide telecommunication services, specifically broadband services, the number of users increases, using up more and more of this finite band of resources or facilities¹¹¹. This economic resource or facility cannot be stored, however it is also infinite in supply within the confines of the frequency bands¹¹². This points toward a classification as a scarce resource, due to the fact that it cannot be reproduced or stored; it merely exists (as a natural resource) within the confines of the radio frequency spectrum band and cannot be recreated. At the same time, the supply is unlimited within those bands, i.e. it will never deplete over time and will always be available, but as it is used more and more there will be less and less capacity for other users to share it¹¹³. Thus it can be illustrated why authorities and regulators have to take great care in allocating such a resource or facility, in order to ensure efficiency, competition and non-discrimination, and to ensure healthy competition within the market place. ICASA is responsible for the allocation of radio frequency spectrum in South Africa. It is empowered under the Electronic

¹⁰⁸ Blackman and Srivastava at 94.

¹⁰⁹ Akoh at 24.

¹¹⁰ Akoh at 24.

¹¹¹ Akoh at 24.

¹¹² Blackman and Srivastava at 94.

¹¹³ Blackman and Srivastava at 94.

Communications Act (“ECA”) to do such allocation whereby a radio frequency spectrum license is required for the purposes of utilising a portion of the spectrum.

9. Scope and purpose of this dissertation

The question is whether radio frequency spectrum is an essential facility or a scarce resource? There is no precedent in South Africa, dealing specifically with this issue. However in a 2002 judgment of *Altech Autopage Cellular (Pty) Ltd v ICASA and Others*¹¹⁴, Altech brought a matter before the high court arguing that its subsidiary, the holder of a VANS (value-added-network-services) license, should be able to self-provide its own network infrastructure. In other words, instead of relying on access to an essential facility from the incumbent (Telkom), the subsidiary should be allowed to provide its own network infrastructure. Here it is important to note, that in terms of Section 40 (2) of the Telecommunications Act¹¹⁵ Telkom was afforded exclusivity for the provision of public switched telecommunication services (“PSTS”) for five years¹¹⁶. The purpose of this was to implement a process of “Managed Liberalisation”, in order to progress to an open market system, and to stimulate competition¹¹⁷. Upon the completion of the process, it was envisaged that other players in the market could also begin to self-provide in the PSTS market, and would no longer be reliant on the incumbent for access¹¹⁸. The court found in Altech’s favour, which changed the landscape in South Africa’s telecommunication market¹¹⁹. This ruling has meant that all VANS license holders are able to convert to ECNS (Electronic Communications Network Services) licenses, a space previously explained, reserved for Telkom and the then Mobile Network Operators. Such an ECNS licence would enable the subsidiary to apply for the 2.6GHz or 3.5GHz spectrum¹²⁰. In the aforesaid judgment, Davis, JA stated that radio frequency spectrum is a scarce resource¹²¹. In his evaluation of the prayers requested by the Respondent (Altech Autopage), Davis, JA states that:

“...the only resource which is scarce is radio frequency spectrum¹²².”

The significance of this judgment is that the market was opened to other market players to self-provide. This basically means the physical infrastructure, (for example the “local loop” or the “copper mile”) consisting of copper wire, which acts as the circuit connecting the electronic communication network to the subscribers premises (known as the “termination point”)¹²³. Telkom’s “local loop” is regarded as an essential facility¹²⁴, as all players need to gain access to this infrastructure in order to

¹¹⁴ *Altech Autopage Cellular (Pty) Ltd v ICASA and Others TPD 2002/08* (Unreported) (hereafter *Altech*).

¹¹⁵ No 103 of 1996. The Telecommunication Act was repealed on 19 July 2006.

¹¹⁶ This is referred to as a statutory monopoly

¹¹⁷ *Altech* at 10.

¹¹⁸ Wieland, K (2009) “*South Africa fights over spectrum*” <http://www.telecoms.com/?s=south+africa+fights+over+spectrum> accessed: 4 December 2012 at 2 (hereafter Wieland).

¹¹⁹ Wieland at 2.

¹²⁰ Wieland at 2.

¹²¹ Da Costa, V. (2009) *Radio frequency spectrum: A scarce resource* Eversheds. Available at: <http://www.legalcity.net/Index.cfm?fuseaction=magazine.article&ArticleID=6936588> Accessed April 2012 at 1. See also *Altech* at 49.

¹²² *Altech* at 49.

¹²³ ICASA framework for introducing local loop unbundling – discussion paper for public comment. Government Gazette No 34382 22 June 2011 at 11.

¹²⁴ See section 43 (8) of the ECA which states the following:

“The Authority must prescribe a list of essential facilities including but not limited to—

provide services¹²⁵. This position has now changed, allowing self-provision if economically feasible, which would allow all market players to apply for radio frequency spectrum licences through which to provide services.

The scope and purpose of this dissertation is to examine whether ICASA and the Department of Communications are managing the allocation of essential facilities and or scarce resources in terms of the relevant empowering legislation, efficiently and in accordance with the principles of the Competition Act. It will examine the nature of the concurrent jurisdiction to be exercised by the Competition Commission and ICASA and consider the nature of radio frequency spectrum and how it should be dealt with under the Competition Act.

-
- (a) electronic communications facilities, including without limitation *local loops, sub-loops and associated electronic communications facilities for accessing subscribers and provisioning services*;
- (b) electronic communications facilities connected to international electronic communications facilities such as submarine cables and satellite earth stations; and
- (c) any other such facilities, required to be leased by an electronic communications network service licensee in terms of subsection (1).”

¹²⁵ The local loop is currently being unbundled by ICASA. The unbundling is the process whereby the licensee (Telkom) in this case is obliged to provide access as a wholesale level to other licensees in order for them to also access the end users. See ICASA framework for introducing local loop unbundling – discussion paper for public comment. Government Gazette No 34382 22 June 2011.

Chapter 2 - Market definition: radio frequency spectrum

1. Introduction to the legal and regulatory framework for the allocation of radio frequency spectrum

In accordance with the Electronic Communications Act¹²⁶ (“ECA”), in carrying out its functions, ICASA controls, plans, administers and manages the use and licensing of radio frequency spectrum¹²⁷. Section 34 of the ECA provides that the Minister of Communications is responsible for international allotment and coordination, as well as approval of the national frequency plan¹²⁸. In carrying out its responsibilities, ICASA must:

- a) take into account modes of transmission and *efficient utilisation* of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced;
- b) give high priority to applications for radio frequency spectrum where the applicant proposes to utilise digital electronic communications facilities for the provision of broadcasting services, electronic communications services, electronic communications network services, and other services¹²⁹.

Subject to certain exclusions¹³⁰ the ECA prohibits any person from transmitting any signal by radio, or to use a radio apparatus to receive any signal by radio, except under, and in accordance with, a radio frequency spectrum license granted by ICASA in terms of the ECA¹³¹. Therefore radio frequency spectrum is not freely available in an open access market. Where the provision of services entails the use of radio frequency spectrum, a radio frequency spectrum license, as well as a service license is required¹³². ICASA is responsible for assigning the radio frequency spectrum to license holders in accordance with the National Radio Frequency Spectrum Plan. Such plan should:

- a) designate the radio frequency bands to be used for particular types of services;
- b) ensure that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner;
- c) aim at reducing congestion in the use of the radio frequency spectrum;
- d) aim at protecting radio frequency spectrum licensees from harmful interference;
- e) provide for flexibility and the rapid and efficient introduction of new technologies; and
- f) aim at providing opportunities for the introduction of the widest range of services and the maximum number of users thereof as is practically feasible¹³³.

¹²⁶ Act 36 of 2005.

¹²⁷ Section 30 (1).

¹²⁸ Section 34.

¹²⁹ Section 30 (2).

¹³⁰S 31 (6) of the ECA states that: “the Authority may prescribe -
(a) types of radio apparatus the use or possession of which; or
(b) the circumstances in which the use or possession of radio apparatus, does not require a radio frequency spectrum licence, including, but not limited to radio frequency spectrum allocated for use in respect of radio astronomy and other scientific uses of radio frequency spectrum that have been coordinated and agreed to by the Authority.”

¹³¹ Section 30 (1).

¹³² Section 30 (2).

¹³³ Section 35 (6).

2. Radio frequency spectrum allocation and usage in South Africa

Radio frequency spectrum is utilised across a very wide range of services and is allocated in terms of the National Radio Frequency Plan (currently version 2010)¹³⁴. The frequency allocation is conducted, based on the international frequency allocation by the International Telecommunications Union (“ITU”). The South African Table of Frequency Allocations allocates the frequency from 9 kHz to 3000 GHz, as well as defining the types of radio communication which is permitted to make use of each frequency band used in South Africa, including possible future use of specific frequency bands¹³⁵. The allocations change as new technologies are introduced into the market and will respect agreements and allocations made at an international level between members of the ITU¹³⁶. The ITU divides the frequency bands into two categories, namely primary and secondary services¹³⁷. Secondary services are allocated on a non-interference basis, in other words, they may not interfere with primary services or claim protection from interference with primary services¹³⁸.

Radio frequency spectrum is used for, amongst other services, the following types of services:

- a) radio communication;
- b) satellite communication;
- c) broadcasting;
- d) amateur radio;
- e) Government communication, such as military and emergency communication¹³⁹.

It is not possible to explore the full range of services due to the vastness thereof. This dissertation will focus on the radio frequency spectrum for the purposes of telecommunication services in the *sweet spot* as indicated in figure 1 of Chapter 1 above. Within the telecommunications industry, radio frequency spectrum is allocated for and used to provide some of the following technologies¹⁴⁰:

- a) GSM Mobile (general standard for mobile technology) - this is known as first generation mobile technology and was the first technology used to launch mobile communications in South Africa in 1993 when Vodacom and MTN started up operations. The frequencies allocated here are mainly the 900MHz and the 1800MHz frequency bands¹⁴¹.
- b) 3G (third generation mobile network / standard)¹⁴² MTN and Vodacom were granted spectrum in the 2100MHz frequency band for 3G technology¹⁴³.
- c) CDMA (Code Division Multiple Access) – licenses for this frequency band were granted under the 800MHz spectrum and awarded to Neotel¹⁴⁴.

¹³⁴ Government Gazette no: 33409 Notice 727 of 2012.

¹³⁵ Section 2.3 of Government Gazette no: 33409 Notice 727 of 2012.

¹³⁶ *Altech* at 49.

¹³⁷ Section 2.3.1 of Government Gazette no: 33409 Notice 727 of 2012.

¹³⁸ Section 34.

¹³⁹ Section 4 of Government Gazette no: 33409 Notice 727 of 2012.

¹⁴⁰ Note: this list is not inclusive of all technologies.

¹⁴¹ Song, S (October 2012) “*Open Spectrum for Development: South Africa case Study*” Shuttleworth Foundation available at: <http://www.apc.org> Accessed April 2012 at 5 (hereafter Song).

¹⁴² The predecessor to 3G was EDGE or 2G.

¹⁴³ Song at 5.

¹⁴⁴ Song at 5.

- d) WIMAX (WorldWide Interoperability for Microwave Access) – this is a wireless technology for whom iBurst, Sentech, Telkom and Neotel have allocations in the 2.6GHz and 3.6GHz frequency band¹⁴⁵.
- e) Microwave – this is used for back-hauling transmission services, and a range of licenses have been issued within the 1.4GHz range to 6 to 8 GHz, 15GHz and 3.5GHz¹⁴⁶.
- f) HSDPA (High Speed Downlink Packet Access), high speed broadband services¹⁴⁷
- g) Finally, LTE (Long Term Evolution), the new buzzword in the telecommunication industry is the latest fourth generation network technology (referred to as 4G), which enables high speed data¹⁴⁸.

The high demand for broadband Internet services, as well as the increasing pressure to increase broadband penetration in South Africa highlights the allocation of high demand frequency spectrum, which is important to stimulating competition in the South African market and has been the subject of vigorous debate in the industry.

3. The market players

The participants in the national telecommunication market in South Africa can be divided into three categories: mobile telecommunication, fixed line telecommunication and data communication¹⁴⁹. Radio frequency spectrum is relevant in a much larger market than just telecommunications, such as broadcasting, for example. The scope of this market definition for the purposes of this dissertation will focus only on the telecommunications industry and a very broad national market definition will be explored, as many different technologies within the mobile and fixed line markets are utilised in these frequency bands on a national level¹⁵⁰.

3.1. Fixed-line Telecommunications

Fixed-line telecommunications in South Africa is a R41 billion per annum industry dominated by Telkom Ltd, the original fixed line monopoly created during the apartheid era, which is still dominant in the market despite the licensing and entry of the second network operator, known as Neotel¹⁵¹. Neotel has not been able to generate any form of formidable competition against Telkom. However the mobile telecommunication industry has placed increasing competitive pressures on Telkom in recent years¹⁵². Telkom has approximately four million fixed lines, and the majority of the South

¹⁴⁵ Song at 5.

¹⁴⁶ Song at 5.

¹⁴⁷ GSMA <http://www.gsma.com/aboutus/gsm-technology/hspa> 12 January 2013.

¹⁴⁸ GSMA <http://www.gsma.com/aboutus/gsm-technology/lte> 12 January 2013.

¹⁴⁹ See generally: Creamer Media (2011) *Telecommunications 2011: A review of South Africa's telecoms industry* Creamer Media's Research Channel Africa available at: <http://ius-cdn.creamermedia.co.za>. Accessed August 2012 (hereafter Creamer Media report).

¹⁵⁰ Another interesting debate currently going on in South Africa is that of the so-called “digital dividend”, which are the frequencies that will be made available to broadcasters following the conversion from analogue to digital in television broadcasting. This provides Great opportunity for television broadcasting and the possible introduction of new Technologies. This places a further strain on the availability of high demand frequency Spectrum. Government Gazette no. 24996, Government Notice no. 80 of 1 February 2012 at 6.

¹⁵¹ Creamer Media Report at 3.

¹⁵² Creamer Media Report at 3.

African corporate market, while Neotel has a mere 50 thousand fixed lines and services only an estimated one hundred corporate customers¹⁵³.

3.2. Mobile Telecommunications

Mobile telecommunication services were launched in South Africa in 1994, achieving phenomenal market growth since its launch¹⁵⁴. Creamer Media (2011) reports that the industry was expected to reach 104% penetration in South Africa in 2011¹⁵⁵. The two dominant players in the South African market are Vodacom and MTN, which were granted licenses in 1993 and 1994 respectively¹⁵⁶. South Africa's third mobile operator, Cell C was launched in 2001; and subsequently, Telkom launched the fourth mobile network operator known as 8ta in 2010¹⁵⁷. Market share is estimated at approximately 50% for Vodacom, 36% for MTN and 14% for Cell C, with 8ta not having achieved significant market share as yet¹⁵⁸. 8ta is aiming at achieving 12% to 15% market share within its first 5 years of operation¹⁵⁹.

3.3. Data communications

Both fixed line and mobile operators in South Africa are increasing their reliability in data services, in order to maintain and grow profitability¹⁶⁰. Telkom made use of its existing copper loop (legacy infrastructure) to be the first operator to provide broadband services (ADSL). Neotel offers basic services but not broadband services, rendering competition to Telkom in the fixed-line arena non-existent¹⁶¹. Despite Telkom's *de facto* monopoly in the fixed-line broadband market, limited ADSL availability has led to the evolution of wireless technology, which is the primary method used to connect to the Internet¹⁶². The major players in the mobile broadband space providing 3G (third generation) and HSDPA (high-speed downlink packet access) are Vodacom and MTN, with Cell C entering the market with new data offerings in 2010 and 2011, as well as 8ta, who have competitively priced packages on the market¹⁶³.

In terms of state participation, the state-owned provider for wireless data services is Sentech via satellite and fixed wire facilities¹⁶⁴. The South African Government also established Broadband Infraco in order to facilitate the availability and affordability of broadband services and increase market penetration¹⁶⁵.

¹⁵³ Creamer Media Report at 3.

¹⁵⁴ Creamer Media Report at 7.

¹⁵⁵ Creamer Media Report at 7.

¹⁵⁶ Creamer Media Report at 7.

¹⁵⁷ Creamer Media Report at 7.

¹⁵⁸ Creamer Media Report at 7.

¹⁵⁹ Creamer Media Report at 8.

¹⁶⁰ Creamer Media Report at . 11.

¹⁶¹ Creamer Media Report at . 11.

¹⁶² Creamer Media Report at . 11.

¹⁶³ Creamer Media Report at . 11.

¹⁶⁴ Creamer Media Report at . 12.

¹⁶⁵ Creamer Media Report at . 12.

4. Discussion and conclusion of the market definition

The common denominator between the product markets set out above, is that in all cases they require radio frequency spectrum in order to operate the relevant technologies. In terms of the ECA:

“No person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person in terms of this Act.”¹⁶⁶

The ECA also states that:

“...a radio frequency spectrum licence is required in addition to any service licence... where the provision of such service entails the use of radio frequency spectrum.”¹⁶⁷

There are certain exemptions set out in the ECA where a radio frequency spectrum licence is not required¹⁶⁸. Thus the very broadly defined national market consists of the various Electronic Communications Services Providers, who provide various services via different technologies in South Africa. As can be seen from the aforementioned sections of the ECA, access to radio frequency spectrum is controlled by ICASA and is not available on the open market. Thus in the context of competition law in South Africa, this dissertation examines the allocation of radio frequency spectrum by ICASA (hypothetically the dominant firm). There is a need to examine the methodology applied by the so-called dominant firm in frequency allocation and determine if it is allocated within the spirit of the Competition Act and not in an anti-competitive manner.

¹⁶⁶ Section 31 (1).

¹⁶⁷ Section 31 (2)

¹⁶⁸ Section 31 (5) and (6) set out instances where a licence is not required:

“Subsection (1) does not apply to a person who utilises radio frequency spectrum—

(a) in the course of making due and proper use, as a subscriber, of an electronic communications service or electronic communications network service, the provision of which is licensed in terms of Chapter 3 or as a recipient of a service subject to a licence exemption;

(b) in the course of making due and proper use of an electronic communications service, the provision of which is licensed in terms of Chapter 3 as part of His or her duties in the service of the State or a local authority, including any military force, police service or traffic authority, in instances of force majeure;

or

(c) in accordance with the regulations contemplated in subsection (6).

(6) The Authority may prescribe—

(a) types of radio apparatus the use or possession of which; or

(b) the circumstances in which the use or possession of radio apparatus, does not require a radio frequency spectrum licence, including, but not limited to radio frequency spectrum allocated for use in respect of radio astronomy and other scientific uses of radio frequency spectrum that have been coordinated and agreed to by the Authority”.

Chapter 3 - Dominance, the essential facilities doctrine and scarce resources

1. Introduction

This dissertation aims to address questions as to how the issue of the allocation of radio frequency spectrum by ICASA can be addressed in terms of the Competition Act. It is submitted that ICASA is hypothetically, the dominant firm in the current scenario¹⁶⁹, hence ICASA would have no defence in terms of the Competition Act in the event that ICASA does not allocate radio frequency spectrum in accordance with the provisions of the Competition Act. It is also submitted that even though not a competitor (in the strict sense), ICASA is obliged to allocate radio frequency spectrum in a pro-competitive manner within the spirit and purpose of the Competition Act. The question which needs to be explored and answered, is whether ICASA is acting in accordance with the provisions of the Competition Act or not, and if not, to determine where the shortfall in its policy objectives lie and how this can be addressed. It is submitted that ICASA's allocation of radio frequency spectrum should be addressed under Part B of the Competition Act – abuse of dominance, as an abstract concept.

2. Abuse of dominance

Abuse of dominance is regulated under Section 8 and 9 of the Competition Act. The purpose of these provisions in the Act is to regulate and prevent the following conduct by dominant firms.¹⁷⁰ Section 8 of the Competition Act sets out the following prohibited practices:

“It is prohibited for a dominant firm to:

- (a) charge an excessive price to the detriment of consumers;
- (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency other pro-competitive, gain; or
- (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:
 - (i) requiring or inducing a supplier or customer to not deal with a competitor;
 - (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

¹⁶⁹ Section 7 of the Competition Act sets out that a firm is dominant in a market if –

- (a) “it has at least 45% of the market;
- (b) It has at least 35%, but less than 45%, of the market, unless it can show that it does not have market power, or
- (c) It has less than 30% of the market, but has market power.”

¹⁷⁰ Section 8.

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services below their marginal or average variable cost; or

(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.¹⁷¹

2.1. Section 8 (b) - access to an essential facility

The Act prohibits a dominant firm to refuse to give a competitor access to an essential facility when it is economically feasible to do so in terms of Section 8(b)¹⁷²: this is a *per se* prohibition¹⁷³. Thus the evidentiary burden for 8(b) is the onus of the complainant to prove that the conduct has occurred¹⁷⁴. The rationale of the essential facility prohibition is that firms are often vertically integrated, in other words they supply the resources required as inputs in the production of goods and services in the upstream market, and supply the goods and services in the downstream market¹⁷⁵. If the firm has control over the supply of inputs into the market, they are able to influence the upstream or downstream markets by controlling the supply of inputs or the goods and services.¹⁷⁶ Once such conduct is proven, the respondent could be fined up to 10% of the firms' annual turnover in South Africa¹⁷⁷.

2.2. Section 8 (c) and 8 (d) (i) – exclusive dealing

Section 8(d)(i) refers to a named exclusionary act, which is assumed to be exclusionary; therefore the conduct needs to be proven, but it need not be proven that such conduct is exclusionary¹⁷⁸. The burden of proof is on the complainant to prove that the named conduct has occurred. If such specific act is proven, it is presumed exclusionary. However this is still a *rule of reason* provision where the defendant can argue pro-competitive gain, technological or efficiency defence exists to justify the conduct¹⁷⁹. The onus falls on the dominant firm to provide efficiency, pro-competitive or technological gains which outweigh the anti-competitive effect¹⁸⁰. Section 8(c), on the other hand, refers to exclusionary acts other than the conduct named in section 8(d), therefore the fact that the conduct has an exclusionary effect needs to be established by the complainant before the court can look at the anti-competitive effect thereof¹⁸¹. Section 8(c) is also a *rule of reason* provision and can

¹⁷¹ Section 8 (a), (b), (c) and (d).

¹⁷² Section 8 (b).

¹⁷³ Nuehoff at 112.

¹⁷⁴ Nuehoff at 125.

¹⁷⁵ Sutherland and Kemp at 7-49.

¹⁷⁶ Sutherland and Kemp at 7-49.

¹⁷⁷ Nuehoff at 127 and section 59 of the Competition Act 89 of 1998.

¹⁷⁸ Nuehoff at 125.

¹⁷⁹ Nuehoff at 125.

¹⁸⁰ Nuehoff at 126.

¹⁸¹ Nuehoff at 125.

be justified by the dominant firm, who bears the onus to prove that a pro-competitive gain, technological or efficiency defence exists to justify the conduct¹⁸².

2.3. Section 8 (d) (ii) – access to scarce resources

Section 8 (d) (ii) prohibits a dominant firm to refuse to supply a scarce resource to a competitor, if the supply of that resource is economically feasible. This is a *rule of reason* provision, which can be defended on the basis that the firm refusing to supply the scarce goods, can prove a technological, efficiency or other pro-competitive gain, which outweighs the anti-competitive effect of the refusal to supply¹⁸³. The onus is on the complainant to prove that the named conduct has occurred and that the supply of the resource was refused despite such supply being economically feasible for the dominant firm¹⁸⁴. In terms of the good being scarce it needs to be proven that the resource is a scarce resource, that it is not reasonably practical, or economically feasible for the firm requesting access, to obtain the scarce good or a substitute, if possible and available¹⁸⁵. As this dissertation discusses the telecommunications industry as an example, the scarce good in question is radio frequency spectrum, which is not possible to obtain or reproduce, neither is there an alternative good available. In this case, the dominant firm would be the regulator, which is in control of allocating such resources fairly and efficiently within the industry in terms of its obligations under the ECA¹⁸⁶.

3. Relevant concepts and scope of the Competition Act

The provisions set out in paragraphs 2.1, 2.2, and 2.3 above can be used to establish if ICASA's allocation methods are anti-competitive or not. In order to determine which provision is most suitable, an evaluation of the case law in terms of essential facilities and scarce resources, would be helpful as ultimately, it is necessary to determine if radio frequency is a scarce resource or an essential facility, as this will influence the manner it should be dealt with under the Competition Act.

3.1. Introduction to an essential facility

The Competition Act defines an essential facility as follows:

“means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;”¹⁸⁷

Sutherland and Kemp¹⁸⁸ suggest that the definition must be interpreted with regard to the constitutional property rights, in order to balance the definition with the importance of competition¹⁸⁹. In order to get a full understanding of the definition it is helpful to break it down into sections.

¹⁸² Nuehoff at 125.

¹⁸³ Section 8 (d) (ii).

¹⁸⁴ Section 8 (d) (i)

¹⁸⁵ Sutherland and Kemp at 7-86.

¹⁸⁶ Act 36 of 2005.

¹⁸⁷ Section 1 (8).

¹⁸⁸ Sutherland and Kemp at 7-53

¹⁸⁹ Sutherland and Kemp at 7-53

Firstly we look at the word “infrastructure” and what it means. Sutherland and Kemp state that infrastructure is traditionally viewed as ports, airports, telecommunication facilities and even computer networks¹⁹⁰. For example, in *South African Fruit Terminals (Pty) Limited v Portnet and others*¹⁹¹ South African fruit Terminals brought an interim application against Capespan¹⁹² for access to quayside storage facilities (infrastructure along the harbor side, which it deemed to be an essential facility). South African fruit Terminals argued that it was not able to compete in the steri-fruit market without access to the quayside storage facilities¹⁹³.

Secondly, the meaning of “resources” is defined in the Oxford Dictionary¹⁹⁴ as: “a supply ... that a country, an organization or a person has and can use, especially to increase their wealth. Something that can be used to achieve and aim...” Therefore it makes sense that in *Glaxo Wellcome (Pty) Ltd. V National Association of Pharmaceutical Wholesalers*¹⁹⁵, the court held that an essential facility cannot include goods and services¹⁹⁶. Therefore it is submitted that an essential facility could be classified as a natural resource if it does not include goods and services.

Thirdly, the infrastructure or resource is not reasonably capable of being duplicated and without access to such a competitor, is not able to provide goods and services and compete in the market¹⁹⁷. In the *Telkom* matter (discussed below)¹⁹⁸, Telkom admitted that the fixed line telecommunication facilities such as the local loop, were essential facilities¹⁹⁹, therefore for the purposes of this dissertation, it is submitted that such are indeed essential facilities²⁰⁰.

¹⁹⁰ Sutherland and Kemp at 7-53

¹⁹¹ *South African Fruit Terminals (Pty) Limited and Portnet Capespan (Pty) Ltd / International Harbour Services (Pty) Ltd / Fresh Produce Terminals (Pty) Ltd* (52/IR/Sep01) [2001] ZACT 18 (29 April 2001).

¹⁹² Capespan is an export agent and logistic service provider in the fruit export market, and South African Fruit Terminals is its only competitor in the market.

¹⁹³ Unfortunately the claim for access to essential facilities was abandoned before the conclusion of the matter, therefore the court did not deal with the issue. See Econex research paper by Dr. Nicola Theron, Dr. Rache Jafta, Wimpie Boshoff, Prof. Philip Sutherland & Anita Moolman: *Impact assessment and study of competition policy and law – the food sector in South Africa*. Final report January 2006. www.econex.co.za accessed 9 July 2013.

¹⁹⁴ Oxford Advanced Learners Dictionary 8th edition (Mobile Application for iPad).

¹⁹⁵ (2002) ZA CAC at 28, 29 and 30.

¹⁹⁶ Sutherland and Kemp at 7-53

¹⁹⁷ Sutherland and Kemp at 7-54

¹⁹⁸ Telkom received a significant fine for refusing access to essential facilities (local loop and PSTS) to independent VANS providers, in favour of its own customers. This case is discussed in more detail below.

¹⁹⁹ *The Competition Commission v Telkom SA Ltd* Case no: 11/CR/Feb04 at 21 and 22.

²⁰⁰ This is also supported by the Regulations prescribing a list of Essential Facilities and matters related thereto, pursuant to section 43(8) of the Electronic Communications Act no. 36 of in Government Gazette no. 30612 notice number 1800 of 2007. The Regulations list items such as those referred to in Section 43(8) (a) of the ECA including:

- (a) Co-location space,
- (b) Land based fibre optic cables,
- (c) Main distribution frame, and

Those referred to in Section 43(8) (b) of the ECA and, but not limited to the following:

- (a) Backhaul circuit;
- (b) Cable landing station;
- (c) Co-location space;
- (d) Earth station;
- (e) International gateway;
- (f) Land based fibre optic cables;
- (g) Main distribution frame, and
- (h) Undersea-based fibre optic cables.

The definition of an essential facility itself outlines why the allocation and management of an essential facility is so critical in terms of the Competition Act. New entrants into the market are unlikely to have the funds or resources available to duplicate an essential facility, and thus making the barriers to entry too high for most entrants, and creating a monopolistic environment for the incumbent, such as a state-owned telecommunications facility, with all the funds and resources at its disposal to thrive in. Without regulating such access, it will not be possible for a competitive industry to thrive and, more importantly, choices for the consumer will be limited, resulting in the consumer having to pay high prices, and most likely, no access to good quality services. Some essential facilities are not only prohibitively costly, such as fibre optic cables or the copper loop, (also known as the last mile), but are also classified as a limited or scarce resource, such as radio frequency spectrum, for example.

3.2. The doctrine of essential facilities: a comparative perspective

In order to ascertain how to determine when a facility qualifies as an essential facility and what an essential facility is it is necessary to examine the case law in order to understand how the doctrine of an essential facility was introduced into South African Competition Law, and to examine the approach developed by the courts.

As indicated, in South Africa the Competition Act prohibits dominant firms from refusing to provide access to an essential facility to a competitor when it is economically feasible to do so²⁰¹. Such refusal amounts to a *per se* contravention which does not allow for the dominant firm to raise an efficiency defence²⁰². This must be contrasted to the situation contemplated by Section 8(d)(ii) where a dominant firm refuses to supply a scarce resource when economically feasible to do so. The aforementioned situation is a *rule of reason* contravention as Section (d) allows for the dominant firm to raise a technological, efficiency or pro-competitive gain which outweighs the anti-competitive effect of the conduct²⁰³. The significance of this provision means that the dominant firm will have the opportunity to show an efficiency or pro-competitive gain, which outweighs the anti-competitive effect, in order to justify the refusal to deal. In this way the dominant firm can escape contravention of the Competition Act. For example, by refusing to supply an essential facility, the firm can allege that it is able offer competitive prices and sufficient capacity to its customers; whereas if the dominant firm was forced to provide access, there would not be enough capacity for either party to utilise efficiently, pushing up prices for the consumers.

A landmark case regarding refusal to deal and the doctrine of essential facility is *Glaxo Wellcome (Pty) Ltd. v National Association of Pharmaceutical Wholesalers* wherein the complainant's interpretation of the definition of essential facilities included pharmaceutical products. In the matter it was argued that such pharmaceutical products should be regarded as resources under the definition of essential facilities²⁰⁴. The Competition Appeal Court rejected the argument raised by the complainants²⁰⁵.

²⁰¹ Section 8 (d).

²⁰² Neuhoff at 112.

²⁰³ Section 8.

²⁰⁴ Richards, L; Kruger, K (2012) "Essential matters: a comparative assessment of different approaches to the essential facilities doctrine" ISSN 1606-9986 Siber Ink www.siberink.co.za Accessed: August 2012 (hereafter Richard's and Kruger).

²⁰⁵ Richard's and Kruger at 3.

On the doctrine, Hussain, JA did not agree with the court *a quo*'s finding that refusal to deal and the denial of access to an essential facility are “*conceptually similar*”²⁰⁶. Hussain, JA first analysed comparative law and looked at the US Sherman Act²⁰⁷ as well, and article 82 of the European Commission Treaty²⁰⁸. He found that neither act makes an express reference to an essential facility, but rather contains a provision against the abuse of dominance²⁰⁹. Thus, he held that the doctrine of essential facilities in the USA and Europe:

“is the result of widely-framed norms directed at conduct amounting to the abuse of a dominant position”²¹⁰.

An investigation by the court into the history of the essential facilities doctrine indicates that the concept was first coined in the USA in 1912 in the case of *United States v Terminal Railroad Association of St Louis*²¹¹. The Supreme Court heard a matter regarding a refusal by the Terminal Railroad Association of St. Louis to give access to the only railway terminal in St Louis²¹². This case dealt with infrastructure as an essential facility. The court cited various American judgments, where the term of an essential facility was referred to, including a reference in a case regarding interconnection to telecommunications facilities²¹³. In the aforementioned case, it was held that specific allegations need to be alleged, namely:

- a) “Control of the essential facility by a monopolist;
- b) A competitors inability practically or reasonably to duplicate the essential facility;
- c) The denial of the use of the facility to a competitor; and
- d) The feasibility of providing the facility²¹⁴”.

The essential facilities doctrine has been applied in the EU for the last 30 years²¹⁵. The European Court of Justice endorsed the doctrine and set out its application and limitations²¹⁶. The doctrine is applied in most jurisdictions outside of the European Union²¹⁷.

Outside of the United States, the court indicated that the EU was the first to apply the doctrine, by requiring that incumbents provide access to infrastructure that cannot be easily duplicated

²⁰⁶ *Glaxo* at 21.

²⁰⁷ Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

²⁰⁸ Article 82 now appears as Article 102 of the Treaty on European Union and the Treaty on the Functioning of the European Union (consolidated) (2008/c 115/01).

²⁰⁹ *Glaxo* at 22

²¹⁰ *Glaxo* at 22.

²¹¹ (1912) 244 US at 383 (hereafter Terminal Railroad).

²¹² *Glaxo* at 22.

²¹³ *MCI Communications Corporation and MCI Telecommunications v American Telephone and Telegraph Company* 708 F.2d at 1081 (1983), see also *Glaxo* at 23 for a discussion on the salient points of the case.

²¹⁴ *MCI Communications Corporation and MCI Telecommunications v American Telephone and Telegraph Company* 708 F.2d at 1132 to 1133, see also *Galxo* at 23.

²¹⁵ Waller, S. and Tasch, W. (2009) *Harmonizing Essential Facilities and Refusals to Deal*. Available at: <http://www.papers.ssrn.com>. Accessed September 2012 at 1 (hereafter Waller and Tasch).

²¹⁶ Waller, S. and Tasch, at 1.

²¹⁷ Waller, S. and Tasch at 1.

downstream²¹⁸. With respect to the European competition law, it is to be noted that there is also no specific reference prohibiting refusal of access to an essential facility. However the doctrine developed out of numerous abuses of dominance cases.²¹⁹ In the EU case of *Sea Containers v Stena Sealink*²²⁰, the European Commission found that the refusal of *Stena Sealink* to provide access to a port to *Sea Containers* amounted to the abuse of dominance in the refusal to allow access to an essential facility²²¹. This is yet another example of the essential facility in question consisting of legacy infrastructure, which was a product of state-owned monopolies in the past²²². A number of judgments from the European Commission enforced the doctrine on owners of facilities such as ports and harbours, who refused access to such facilities, stifling downstream competition²²³. In the well-known Microsoft cases, the European Commission ruled that Microsoft should provide access to information necessary for interconnection to networks²²⁴. The European Court of Justice did not, however, order open access in the event that it was possible for the downstream competitor to duplicate the facility²²⁵. In the case of *Oscar Bronner GmbH & Co v Mediaprint Zeitungs*²²⁶, a dominant media player who owned a home delivery network refused access to a rival publisher. The court found that this case did not meet the conditions for an abuse of dominance as the delivery scheme could be duplicated and / or other methods of delivery could be used, hence this was not a significant barrier to entry, and the delivery network was thus not an essential facility²²⁷. The *IMS Health GmbH & Co OHG v NDC Health GmbH & Co case*²²⁸ wherein there was a refusal to provide access to a “brick structure” used to supply regional sales data, which was protected by intellectual property rights, sets out a three-fold test in order to determine if the doctrine of essential facilities is applicable²²⁹. The court determined that the following factors were pertinent to the enquiry once it has been proven that the facility in question is an essential facility:

- a) “the refusal is preventing the emergence of new products for which there is a potential customer demand;
- b) the refusal is not justified by an objective consideration; and
- c) the refusal will exclude any or all competition or will eliminate any or all competition in a secondary market.”²³⁰

²¹⁸ Waller, S. and Tasch at 5.

²¹⁹ *Glaxo* at 24.

²²⁰ *Sea Containers v Stena Sealink* Case IV/34 at 689.

²²¹ *Glaxo* at 24.

²²² *Glaxo* at 24.

²²³ See *B & I Line PLC v Sealink Harbours Ltd. & Sealink Stena Ltd.* 5 C.M.L.R at 255 (1992). See also Waller and Tasch at 6.

²²⁴ Commission Decision (EC) 53/2007, 24 March 2004, case COMP/C-3.37.792 OJ. (L32) at 23. See also Case T-201/04 R, *Microsoft Corporation v Comm'n*, 2007 O.J. (C269) at 80; see also Waller and Tasch for a discussion on the aforementioned cases.

²²⁵ Waller and Tasch at 6.

²²⁶ Case C-7/97, *Oscar Bronner GmbH & Co v Mediaprint Zeitungs*, 1998 E.C.R. I-7791, 4 C.M.L.R. at 112 (1999), see also *Glaxo* at 25.

²²⁷ *Glaxo* at 25.

²²⁸ *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] E.C.R. I5039 (hereafter *IMS case*).

²²⁹ The *IMS* built a database for the purpose of formatting reports and sales of medicine to pharmaceutical companies. *IMS* owned the intellectual property with respect to the data base and refused to grant licenses to its competitors. The court held that the licensing framework was an essential component for competition. See Richards and Kruger at 14.

²³⁰ *IMS case* at 38 and 52. See also Richards and Kruger at 14.

The *IMS* case also emphasises the importance of establishing and clearly defining the downstream and upstream markets in order to successfully apply the doctrine of essential facilities²³¹.

After an analysis of comparative law in the *Glaxo* case, the court stated that a distinctive doctrine is established with regard to the abuse of dominance via refusing access to an essential facility²³². The court further held that there are clear requirements which need to be established, and that there is no general refusal to deal as indicated by the court *a quo*²³³.

The *Glaxo* judgment confines the definition of an essential facility in Section 8(b) of the Competition Act to traditional infrastructure, making it very onerous to prove.²³⁴ Thus South Africa has adopted a two-pronged approach to refusals to deal²³⁵. The first of the two pronged approach is 8(b) which prohibits dominant firms from refusing access to an essential facility when it is economically feasible to do so²³⁶. As indicated this is a *per se* prohibition, which means that once the conduct is proven, the respondent has no defence²³⁷. In the *Glaxo* judgment²³⁸, the court concluded that the words “infrastructure” and “resource” in the context of an essential facility in section 8(b) of the Competition Act, exclude any “goods,” “products” or “services” and established the following five elements to be proven, in order to activate the “*per se*” provision, which are:

- a) A dominant firm refuses to give a downstream competitor access to infrastructure or a resource;
- b) The firms in question are in fact competitors;
- c) The infrastructure or resource cannot reasonably be duplicated;
- d) The complainant competitor cannot provide goods or services to customers without access to the said infrastructure or resources; and
- e) It is economically feasible for the dominant firm to provide access to downstream competitors to the infrastructure or resource²³⁹.

The *Glaxo* judgment limits section 8(b) of the Competition act to “traditional infrastructure” thus²⁴⁰ limiting the application of section 8 (b)²⁴¹.

The second part of the two pronged approach is Section 8(d)(ii) of the Competition Act which is less onerous to prove as it only prohibits the refusal to supply scarce goods to a competitor when economically feasible to do so²⁴². The threshold is reduced from an essential facility to a scarce good,

²³¹ Richards and Kruger at 15. Richards and Kruger state that the definition of the upstream market, for example will influence the definition of the downstream market, hence the importance of accurate market definitions. Without this, it will be difficult to determine the impact of the refusal to deal.

²³² *Glaxo* at 26.

²³³ *Glaxo* at 26.

²³⁴ Waller and Tasch at 17.

²³⁵ Waller and Tasch at 16.

²³⁶ Waller and Tasch at 17.

²³⁷ Waller and Tasch at 16 and 17.

²³⁸ *Glaxo* at 30.

²³⁹ Waller and Tasch at 17. See also *Glaxo* at 29.

²⁴⁰ Waller and Tasch at 17.

²⁴¹ Waller and Tasch at 17.

²⁴² Waller and Tasch at 17.

a rebuttable presumption as opposed to a *per se* prohibition.²⁴³ The court cautioned that courts should be circumspect in the application of the doctrine of essential facilities as judicial application does not favour a wide interpretation and general application of the doctrine²⁴⁴.

In the large merger between *DCD Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd*²⁴⁵, the Competition Tribunal conditionally approved the merger. The parties provided ship repair services in Cape Town harbour²⁴⁶. A joint venture between the firms was proposed to lease the area where the services were conducted in the harbour known as A-berth²⁴⁷. This berth was equipped and suitable for oil and gas repairs in the shipping industry, which deemed it to be an essential facility²⁴⁸. The merger would have resulted in the granting of exclusive use of A-berth to the merging parties to the detriment of other competitors, as there were no other areas suitable or equipped for oil and gas repairs²⁴⁹. The Competition tribunal approved the merger conditionally so that the merged entity may only lease 50% of A-berth to the joint venture, so as to allow access to competitors²⁵⁰. The Tribunal commented that the matter was not one of an abuse of dominance, however the facility in question could not easily be duplicated without access to the relevant berth²⁵¹. This indicates that the doctrine of essential facilities is wider than a mere abuse of dominance.

A recent example of a case involving a section 8(b) contravention is the landmark judgment in *Competition Commission v Telkom SA Ltd*²⁵². Telkom was fined R449 000 000.00 (four hundred and forty nine million rand). The Tribunal found that Telkom had contravened section 8(b) (refused access to an essential facility) and 8(d)(i) (requiring or inducing a supplier or customer not to deal with a competitor). The initial complaint was brought against Telkom by 21 complainants, including the South African VANS Association (“SAVA”)²⁵³. The case was brought by the Value Added Network Services (“VANS”) providers who alleged that Telkom refused to supply essential facilities to the independent VANS providers²⁵⁴. It was alleged that this conduct resulted in the substantial lessening and prevention of competition, in that Telkom had leveraged its upstream monopoly in the facilities market to the advantage of its own subsidiary VANS provider²⁵⁵. The essential facility in question was the provision of internet and virtual private network services via Public Switched Telecommunication Service. In this case, Telkom was the dominant player, and had sole control of the relevant essential facility, due to their exclusivity over Public Switched Telecommunication

²⁴³ Waller and Tasch at 18.

²⁴⁴ ²⁴⁴ *Glaxo* at 30 and 31.

²⁴⁵ Case No: 108/LM/Oct08 (hereafter *DCD Dorbyl*) , see also Richards and Kruger at 6 for further discussion of the case.

²⁴⁶ *DCD Dorbyl* at 2.

²⁴⁷ *DCD Dorbyl* at 4.

²⁴⁸ *DCD Dorbyl* at 2 and 3.

²⁴⁹ *DCD Dorbyl* at 35

²⁵⁰ *DCD Dorbyl* at 35.

²⁵¹ *DCD Dorbyl* at 35, Richards and Kruger at 6 and 7.

¹⁶⁷ *The Competition Commission v Telkom SA Ltd* Case no: 11/CR/feb04 (hereafter *Telkom*). (This only represents less than 2% of Telkom’s annual turnover for the 2012/11 period.)

²⁵³ *Telkom* at 2.

²⁵⁴ *Telkom* at 2.

²⁵⁵ *Telkom* at 2.

Services (“PSTS”). However Telkom did not enjoy exclusivity over VANS, which is provided via PSTS²⁵⁶.

In all the cases discussed above the respondents are seen to be dominant in the relevant market, thus it has relevance in the context of an essential facility, as the dominant firm is in control of the said facility, as a result of its dominance. For example, as in *Glaxo*, pharmaceutical products, *Dorbyl*, control of A-berth and *Telkom* has control of public switched telecommunication services. There is some analogy to the example to be discussed in this dissertation, namely radio frequency spectrum, it being the sole prerogative of ICASA to allocate such radio frequency spectrum to the relevant operators, in terms of the provisions of the ECA. ICASA is not a competitor of the licensees (mobile network operators and service providers) however, due to its exclusive control over radio frequency spectrum, it is submitted that, as an abstract concept, ICASA is the dominant firm and is still required to allocate radio frequency spectrum in accordance with the provision of the Competition Act.

Essentially, the question with regard to essential facilities, hinges on the economic feasibility of the facility in question and therefore it may be asked whether it should not be subject to a wider application? Case precedent indicates that access to an essential facility is not as a result of a general refusal to deal – it is more specific, in that it amounts to a refusal to deal, by denying access to an essential facility. Considering the two-pronged approach set out in *Glaxo* above, it is helpful to look at differences between an essential facility and a scarce resource.

²⁵⁶ *Telkom* at 9.

4. The difference between an essential facility and a scarce resource

The Oxford Dictionary²⁵⁷ defines a facility as:

“a place, amenity, or piece of equipment provided for a particular purpose”.

The definition of a resource is:

“a supply ... that a country, an organization or a person has and can use, especially to increase their wealth. Something that can be used to achieve and aim...”

As indicated in the Act an Essential Facility is defined as:

“... an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers”²⁵⁸

A scarce resource is however not defined in the Competition Act²⁵⁹. A scarce resource appears to be something that can be obtained, however it is scarce, and perhaps there is only a finite amount of the resource available, i.e. radio frequency spectrum. This also implies that this is more likely to be a natural resource, such as radio frequency spectrum, water or minerals. An essential facility, on the other hand, cannot easily be obtained or duplicated, as the cost of doing so is prohibitive, for example, an airport. An airport can indeed be built, but the cost and expertise required means that only a highly resourced organisation, such as the government, is capable of constructing such a facility. There are also regulatory barriers that make essential facilities unobtainable, and the likelihood of being granted consent to build more than one airport is unlikely, as the already existing facility could be shared and this would be more economically feasible.

South African law differs from the USA and EU with respect to the doctrine of essential facilities and refusal to supply scarce goods. We examined how in the *Glaxo Wellcome*²⁶⁰ case, the Competition Appeal Court held that the essential facilities provisions in Section 8(b) and the refusal to supply scarce goods in Section 8(d)(ii) are distinctly separate prohibitions in the Act, and cannot be lumped together in one offence²⁶¹. Sutherland and Kemp highlight that despite the decision in *Glaxo*,²⁶² the two prohibitions relating to essential facilities and scarce resources are based on the same rationale²⁶³.

In determining the difference between an essential facility and a scarce resource, the following differences are noted:

²⁵⁷ Oxford Advanced Learners Dictionary 8th edition (Mobile Application for iPad).

²⁵⁸ Section 1 (1) (vi).

²⁵⁹ Act 89 of 1998.

²⁶⁰ *Glaxo* at 50-52 and 56.

²⁶¹ Sutherland and Kemp at 7-83.

²⁶² *Glaxo* at 50-52 and 56.

²⁶³ Sutherland and Kemp at 7-83.

Table A - A comparison between an essential facility and a scarce resource

Essential Facility	Scarce resource
Man made	Natural resource occurring naturally in nature
Can be reproduced by man	Cannot be reproduced by man
Can be controlled by the Government or an private entity	Usually controlled by the government
Access is regulated to an extent	Access regulated and controlled by government
e.g. Communications network, harbour, airport, railway network	e.g. minerals, water, fossil fuels

Considering the differences pointed out in Table A above, it is submitted that radio frequency spectrum does not meet the requirements of an essential facility as it cannot be duplicated. It is like a country's gold reserves. There is no way to make more gold than a country has as a natural resource²⁶⁴. Therefore it is submitted that the best way to deal with radio frequency spectrum in terms of the Competition Act is under Section 8(d)(ii) as opposed to the general abuse of dominance provisions or under an essential facility. This would certainly benefit licensees and enable ICASA to allocate on a fair and transparent basis. Allocation should be based on the availability of radio frequency spectrum and due regard must be given to the efficient utilisation of radio frequency spectrum, taking care not to reward spectrum hoarders. It is submitted that the principles of Section 8(d)(ii) will ensure efficient allocation. It is accepted that ICASA is not a competitor of the licensees under the ECA; however, based on ICASA's dominance as the regulator in control of allocation radio frequency spectrum it is submitted that it should be hypothetically considered as a dominant firm. Chapter 4 specifically examines the policy directions of the Department of Communications to ICASA, in order to establish if ICASA is well placed to allocate such resources efficiently and in line with the principles of the Competition Act.

²⁶⁴ Also, the RSPG report, for example states that radio frequency spectrum is an essential input for telecommunication services and it is a limited resource. ERG-RSPG Report on Radio Frequency Spectrum "*ESP-RSPG report on the management of radio spectrum in order to avoid anticompetitive hoarding*" June 2009 ERG Radio Spectrum Policy Group - Independent Regulators Group available at: www.irg.eu accessed 29 October 2012.(hereafter "RSPG") at 11.

Chapter 4 – Analysis of allocation of radio frequency spectrum in South Africa - is it in keeping with the spirit and purpose of the Competition Act?

1. Introduction

In terms of section 3(2) of the Electronic Communications Act (“ECA”), the Department of Communications (“DoC”) may issue policy directions to ICASA²⁶⁵. In December 2011, the DoC issued such policy directions for electronic communications services in high demand spectrum²⁶⁶. The relevant national policy objectives of the said policy directions sought to achieve, are as follows:

- a) “Facilitate introduction of new national and rural providers of electronic communication including broadband.
- b) Ensure that the participating licensees contribute broad based black economic empowerment.
- c) Impose universal access and service obligations to promote uptake and usage of electronic communications in rural and urban poor settlements.”²⁶⁷

The Department of Communication suggests a *combinational licensing approach*²⁶⁸, in order to achieve “the objectives of delivering an *efficient, competitive* and responsive infrastructure network”²⁶⁹. ICASA is directed to facilitate licensing methods and determine a methodology, in order to achieve various objectives, such as²⁷⁰:

- a) universal access to broadband;
- b) introduction of new entrants; and
- c) economic growth and empowerment²⁷¹.

There is an emphasis on high demand frequency spectrum, and as discussed in Chapter 2 above, these frequency bands are predominantly used for high speed broadband coverage and other new technologies such as LTE (Long Term Evolution or 4G). The directions deal specifically with the 800MHz and 2.6GHz bands. The DoC directs that 800MHz should be available on a wholesale open access market, whilst 2.6GHz should be licensed to the operators according to availability²⁷². Auctions should be considered as a last resort only where the demand exceeds available bandwidth²⁷³.

²⁶⁵ Section 3 (2) of Act no 36 of 2005 sets out the following:

“(2) The Minister may, subject to subsections (3) and (5), issue to the Authority policy directions consistent with the objects of this Act and of the related legislation in relation to—

(a) the undertaking of an inquiry in terms of section 4B of the ICASA Act on any matter within the Authority’s jurisdiction and the submission of reports to the Minister in respect of such matter;

(b) the determination of priorities for the development of electronic communications networks and electronic communications services or any other service contemplated in Chapter 3;

(c) the consideration of any matter within the Authority’s jurisdiction reasonably”

These policy directions are still draft and have not yet been finalised.

²⁶⁶ Government Gazette no. 34848 Government Notice no. 898 of 2011.

²⁶⁷ Government Gazette no. 34848 Government Notice no. 898 of 2011 at 6.

²⁶⁸ Meaning a combination of 800MHz and 2.6GHz for wireless broadband access applications. See Government Gazette no. 34848 Government Notice no. 898 of 2011 at 7.

²⁶⁹ Government Gazette no. 34848 Government Notice no. 898 of 2011 at 6.

²⁷⁰ Government Gazette no. 34848 Government Notice no. 898 of 2011 at 7.

²⁷¹ Government Gazette no. 34848 Government Notice no. 898 of 2011 at 7.

²⁷² Government Gazette no. 34848 Government Notice no. 898 of 2011 at 7.

²⁷³ Government Gazette no. 34848 Government Notice no. 898 of 2011 at 7.

Broadband must be widely available in sparsely populated, rural and remote areas, and finally to ensure efficient spectrum utilisation and to allow for the introduction of new entrants in the market²⁷⁴. At a glance, the objectives seem to be well in line with the relevant provisions of the Competition Act.

2. Competition issues and regulatory aspects of radio frequency spectrum management

In general, various anti-competitive issues have been identified within the framework of radio frequency allocation. As previously discussed, the global framework for allocation is contained in the International Telecoms Union (“ITU”) Regulations²⁷⁵, South Africa is a member of the ITU. Radio frequency spectrum is allocated at a global level by the ITU to its members, which must then be cascaded down to a national level²⁷⁶. The Radio Spectrum Policy Group (2009) states that the spectrum uses must be maximised and used *fully and efficiently*, in order to prevent spectrum hoarding²⁷⁷ or the abuse of market power by way of foreclosing the market²⁷⁸.

The main anti-competitive use of radio frequency spectrum is “spectrum hoarding”²⁷⁹. Anti-competitive spectrum hoarding occurs when an incumbent is guilty of acquiring spectrum in quantities greater than the actual, or future needs, e.g. if the incumbents hold the relevant frequency bands, there will be an anti-competitive effect in the downstream market blocking new entrants from entering into the market (abuse of dominance)²⁸⁰. On the other hand, this may not always have an anti-competitive effect as a substitute frequency band can be utilised, or in the event of “speculative hoarding”. In other words, the incumbent is saving the radio frequency spectrum for later use for a new technology²⁸¹.

Other anti-competitive effects could also be identified as a result of the allocation methods of radio frequency spectrum. For example, the regulator could continuously reward a spectrum hoarder with further allocations²⁸². For example, Sentech is a state-owned entity, therefore any allocation of radio frequency spectrum to a state-owned entity could lead to a potential conflict of interest. Further, if radio frequency spectrum is awarded to too many licensees, it could potentially limit competition in the market due to oversupply²⁸³.

²⁷⁴ Government Gazette no. 34848 Government Notice no. 898 of 2011 at 7.

²⁷⁵ RSPG at 6.

²⁷⁶ RSPG at 6.

²⁷⁷ Anti-competitive hoarding refers to the acquisition of spectrum to use at a later date (speculative hoarding) and the intent or effect of hoarding is anti-competitive. RSPG at 11.

²⁷⁸ RSPG at 11.

²⁷⁹ RSPG at 14.

²⁸⁰ RSPG at 11.

²⁸¹ RSPG at 11.

²⁸² MTN’s response to the Department of Communications Policy Directions as published in Government Gazette no 34848 dated 14 December 2011. Available at www.icasa.org.za accessed April 2012 at p 2 (hereinafter MTN submission).

²⁸³ MTN submission at 3.

3. Allocation methods and remedies to prevent anti-competitive use of radio frequency spectrum

It is submitted that if the basis upon which the regulatory authority allocates radio frequency spectrum is flawed, this would lead to anti-competitive and inefficient allocation / use of radio frequency spectrum, which could result in regulatory or market failure. The RSPG states that the structure of an industry is largely determined by the spectrum regulator²⁸⁴.

3.1. Administrative approach

This specific method of allocation, used by the regulator, who is in control of radio frequency spectrum (for example South Africa), is commonly referred to as the “beauty contest” approach and is criticised as a mere administrative process which is not transparent²⁸⁵. This is primarily used where there is no excess demand for spectrum²⁸⁶. The applicants are evaluated based on specific qualifications and criteria, and spectrum is assigned on this basis²⁸⁷.

3.2. Comparative approach

Where there is excess demand, a comparative process is utilised where criteria are set out, whether it be technical, financial or geographical range and applicants meeting the criteria are selected²⁸⁸.

3.3. Market based approach

The market-based approach was introduced in the European Union this allows for easier access to spectrum and lowers the barriers to entry for new providers²⁸⁹. Conversely, this could also encourage collusion and spectrum hoarding amongst participants in order to limit new entrants²⁹⁰.

3.4. Spectrum auctions

Auctions by way of sealed bids are based on the perceived economic value of the radio frequency spectrum²⁹¹. This could result in an efficient method of allocation, assuming the bidders behave rationally²⁹². This is a far more transparent process²⁹³.

²⁸⁴ RSPG at 16.

²⁸⁵ RSPG at 18.

²⁸⁶ Blackman and Srivastava at 103.

²⁸⁷ Blackman and Srivastava at 103.

²⁸⁸ Blackman and Srivastava at 103.

²⁸⁹ RSPG at 17.

²⁹⁰ RSPG at 17.

²⁹¹ RSPG at 17.

²⁹² RSPG at 17.

²⁹³ RSPG at 18.

3.5. Spectrum trading

Spectrum trading allows spectrum to be assigned on a first-come-first-served basis, allowing for secondary trading of excess spectrum; this would only achieve its full potential in a totally liberalised market²⁹⁴.

3.6. Use-it-or-lose-it

This is a remedial approach which attracts some kind of penalty if spectrum is not fully and efficiently utilised²⁹⁵.

4. Industry's reaction to the proposed policy directions²⁹⁶

The DoC's policy directions propose a blend of a comparative approach and administrative approach, and only allow for auctions as a last resort. This leaves little scope for licensees to trade off excess spectrum on the open market, encouraging spectrum hoarding. The combinational approach also provides little transparency as it is left up to ICASA within the scope of its policy directions to determine allocation via administrative and comparative methods. This has been criticised by members of the industry as "fundamentally out of line with international best practise"²⁹⁷. It has been further criticised for allowing for more entrants to enter the market, resulting in the fragmentation of the market²⁹⁸. This could potentially double the number of participants from four (currently MTN, Vodacom, Cell C and 8ta) to eight mobile operators²⁹⁹. This would not necessarily increase competition, but will fragment the market leading to an initial increase in competition but eventually will lead to an increase in prices as economies of scale could be lost due to the market fragmentation³⁰⁰. Concerns were noted that the interpretation of the Department of Communication policy directions by ICASA has lead to ICASA awarding spectrum to spectrum hoarders and that the incumbents could be excluded from participating, by awarding licences to new entrants³⁰¹ only. MTN voiced concerns that the initial Electronic Communication Network Services licensees ("ECNS"), who are responsible for the initial creation of the mobile broadband revolution, should be utilised to further develop mobile broadband in South Africa³⁰². The wholesale open access network was

²⁹⁴ RSPG at 23 and 24.

²⁹⁵ RSPG at 30.

²⁹⁶ For the sake of brevity the views of each and every industry player were not considered. In order to get a general view of industry's reaction, the submissions of MTN, one of the largest mobile network operators in South Africa and GSMA, a global body representing the interests of mobile network operators worldwide were considered. The majority of the issues raised by both parties overlap.

²⁷⁶ GSMA response to ICASA framework for licensing high demand frequency spectrum. Undated. Accessed 6 April 2012 available at: www.GSMA.com. At 1.(hereinafter "GSMA")

²⁹⁸ GSMA at 1; MTN Submission at 3.

²⁹⁹ MTN Submission 3; GSMA at 1.

³⁰⁰ MTN Submission at 3.

³⁰¹ MTN Submission at 2; GSMA at 1.

³⁰² MTN's response to the Department of Communications Policy Directions as published in Government Gazette no 34848 dated 14 December 2011. Available at www.icasa.org.za accessed April 2012 at p 174. MTN references the National Development Plan at p 174 or chapter 4 "Economic Infrastructure" which states that spectrum policy should favour competition, limit spectrum hoarding and the incumbents should not be excluded from gaining access to frequency bands in order to deploy new technologies in line with global trends.

criticised as wholesale deployment is costly and requires intensive capital investment, not something new entrants will necessarily have access to³⁰³, resulting in limited innovation and opportunities³⁰⁴.

³⁰³ MTN Submission at 4.

³⁰⁴ GSMA at 1.

Chapter 5 – Conclusion

1. The history and policy considerations of the Competition Act no 89 of 1998

Chapter 1 sets the scene in explaining the history of competition law in South Africa and the introduction of the Competition Act no 89 of 1998. The crux of the history, policy considerations and subsequent development of the Competition Act³⁰⁵ (for the purposes of this dissertation) lies in the liberalisation of the telecommunications industry. The process of managed liberalisation was implemented by the Department of Communications (“DoC”) and the Independent Communications Authority of South Africa (“ICASA”). This lowered the barriers to entry and resulted in the introduction of the Second Network Operator (“SNO”), currently known as Neotel, as well as the mobile network operators: Vodacom, MTN, Cell C, and most recently, 8Ta (Telkom). This resulted in increased competition, a wider variety of products and services, and lower prices for consumers. Finally Chapter 1 explores radio frequency spectrum and briefly explains what radio frequency spectrum is, how it works and the different technologies it is utilised for.

2. The relevant market

Chapter 2 sets out a broad national market, in which the aforementioned fixed line and mobile network operators operate. The market definition demonstrates that Telkom, the incumbent, is still a dominant player and holds significant market power in the Value Added Network Services (“VANS”) market, and the local loop for example, which are essential inputs for the provision of telecommunication services. Vodacom comes out on top being the dominant mobile network operator, with MTN a close second.

The telecommunications industry is dynamic and ever evolving. The latest technologies, such as mobile broadband and Long term Evolution (“LTE”) also known as 4G, are being implemented by the mobile network operators in order to provide better coverage, capacity and faster broadband speeds. One of South Africa’s key objectives in the National Broadband Policy³⁰⁶ is to ensure greater mobile broadband penetration in South Africa, especially in rural areas, to bring the Internet into every home³⁰⁷. To quote directly from the policy document:

“Broadband will contribute in enhancing government policy objectives in the provision of education, health services, job creation, reducing the levels of crime and corruption and building sustainable rural communities. This will ultimately facilitate the sharing of information and knowledge and ensure greater connection amongst the people of South Africa and the rest of the World.”³⁰⁸

³⁰⁵ No 89 of 1998.

³⁰⁶ National Broadband Policy for South Africa. Government Gazette No. 36332 Government notice no. 350 of 3 APRIL 2013. (hereinafter NBP).

³⁰⁷ See NBP in general.

³⁰⁸ NDB at paragraph 1.1.5 at 8.

These policy objectives are designed to ensure that South African become an e-literate society by 2030³⁰⁹, and in order to achieve this, government aims to increase broadband capacity and bring down the prices of mobile broadband in the future³¹⁰. It is submitted that it has been demonstrated in Chapter 2, that the aforementioned can only be achieved with the efficient allocation of radio frequency spectrum, which is an essential input to the provision of such services. It is also submitted that the relevant radio frequency spectrum is in high demand, thus supply exceeds demand in some instances. Radio frequency spectrum is utilised according to its comparability with the relevant technology, for current purposes, high speed radio frequency spectrum in the so-called “sweet spot”, is in demand.

3. The legal framework under the Competition Act

Chapter 3 sets out the legal framework under the Competition Act³¹¹ and introduces the doctrine of essential facilities and the concept of scarce resources. An analysis of the abuse of dominance provisions under the Competition Act³¹², reveals the various types of abuse of dominance provisions and the evidentiary requirements thereof. An in depth analysis of the case law and the history of the essential facilities doctrine sets out how and where the concept was developed and introduced into South Africa competition law. In summary, the concept was developed in the USA and introduced into the European Union about 30 years ago. A discussion of the South African case law, more specifically the landmark judgment of *Glaxo Wellcome (Pty) Ltd. V National Association of Pharmaceutical Wholesalers*³¹³ reveals a two-pronged approach by the South African courts, which distinguishes between an outright refusal to provide access to an essential facility³¹⁴; the second prong being the less onerous of the two as it prohibits only the refusal to supply scarce goods to a competitor when economically feasible in terms of Section 8(d)(ii) of the Competition Act³¹⁵. Finally, in conclusion to Chapter 3 it is submitted that radio frequency spectrum is a scarce resource and does not meet the requirements of an essential facility. Therefore it is submitted that Section 8(d)(ii) of the Competition Act³¹⁶ is the appropriate approach to address radio frequency spectrum allocation.

It is submitted that the abuse of dominance provisions should be given a wider interpretation. Currently the abuse of dominance provisions set out in section 8 applies strictly to competitors. If one considers the telecommunication example discussed in this dissertation, the allocation of essential facilities and scarce resources within the concept of a competitive market exceed the boundaries of abuse of dominance. This is due to the fact that the regulator (in this case ICASA) often obtains a *de facto* dominant position where it allocates the use of an essential facility or a scarce resource such as radio frequency spectrum. Thus the regulator is in a position of dominance which allows it to use

³⁰⁹ National development plan: vision for 2030, 11 November 2011, National Planning Commission. Available at: <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> Accessed 12 April 2013. (hereinafter NDP)

³¹⁰ NDP at 44 and NBP at 6, 7 and 8.

³¹¹ No 89 of 1998.

³¹² No 89 of 1998.

³¹³ (2002) ZA CAC.

³¹⁴ Section 8 (b) of the Competition act no 89 of 1998.

³¹⁵ Act no 89 of 1998.

³¹⁶ Act no 89 of 1998.

regulation as a tool to act anti-competitively. For instance in allocating radio frequency spectrum to a licensee who is not utilising the scarce resource efficiently, or by allocating radio frequency to too many licensees thus fragmenting the market and preventing already established competitors from providing cheaper services through economies of scale.

4. The Department of Communications policy directions regarding the allocation of high demand frequency spectrum

Chapter 4 examines the Department of Communication's ("DoC") recent policy directions under the Electronic Communications Act³¹⁷ to ICASA, with respect to the allocation of high demand frequency spectrum. Chapter 4 critically discusses various methods of allocation and very briefly indicates some of the industry player's reactions to the policy directions. The main purpose of this dissertation is to establish whether radio frequency spectrum is allocated in accordance with the object and spirit of the Competition Act³¹⁸ with specific reference to Section 8(d)(ii).

In Chapter 3 it is submitted that, essentially the question with regard to essential facilities, hinges on the economic feasibility of the facility in question. The same applies to the allocation of scarce resources. Section 8 (d) (ii) states:

“ ...engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act... refusing to supply scarce goods to a competitor when supplying those goods is economically feasible”

In conclusion, the objectives of the policy directions are sound. The objectives aim to ensure universal access to broadband, the introduction of new entrants into the market, economic growth and empowerment, which align with the objectives of the Competition Act³¹⁹. These objectives will stimulate competition and provide more choices to consumers. However it is submitted that ICASA must be cautious in its approach to allocating radio frequency spectrum, so as to avoid the appearance of abuse of its *de facto* dominant position. For example the introduction of new entrants into the market could result in the fragmentation of the market and result in the inefficient allocation and use of radio frequency spectrum. The new entrants will not necessarily have access to capital and economies of scale required, in order to successfully provide services, especially in the rural areas, which require large capital investment and economies of scale. If the incumbent mobile network operators are excluded from such allocations in order to accommodate new entrants, they will be unable to make use of such infrastructure, and economies of scale required in order to provide an affordable service. This could result in market failure.

In terms of any technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect, it is submitted that there could be such arguments in favour of introducing new entrants. If a new entrant has access to a specific or new type of technology which the incumbents do not have access to, it would make sense to introduce such new entrants into the market.

³¹⁷ Act no. 36 of 2005.

³¹⁸ Act no 89 of 1998.

³¹⁹ Act no 89 of 1998.

Industry representatives have criticised the allocation methods set out in the policy. For instance, making 800MHz available on the open access market, will mean the new entrants have to make significant capital investments in order to ultimately provide the services without the advantages of economies of scale. The combinational approach is criticised and it is submitted that auctions (which are specifically directed to be used only as a last resort), are a more competitive and transparent approach to spectrum licensing and allows for competitors to trade excess spectrum on the open market, facilitating efficient utilisation thereof³²⁰. This is also an incentive not to hoard radio frequency spectrum as it would be financially more beneficial to trade with it than to hoard it.

Finally, it is submitted that although the underlying policy objectives of the policy directions purport to stimulate competition and growth in the industry, and certainly do align with the spirit and object of the Competition Act³²¹ more attention must be paid to the actual methods of allocation of radio frequency spectrum. A fine balance is required, so as not to exclude new entrants from entering the market, but also to ensure that spectrum allocation is transparent and responsible to ensure that the recipients are capable of utilising such radio frequency spectrum to its full extent.

5. Introduction of a Spectrum Management Agency

On the 18th of July 2012 the Department of Communication published the Electronic Communications Amendment Bill (“ECA Bill”)³²². The ECA Bill introduces the Spectrum Management Agency (the “SMA”)³²³ in order to fulfil the responsibility of allocating radio frequency spectrum³²⁴, whilst the actual assignment responsibilities are to be shared between ICASA and the SMA³²⁵. ICASA will be responsible for assignment to non-governmental organisations whilst SMA will be responsible for assignment to governmental organisations³²⁶. Roetter and Parle commended the Department of Communications for this change as it requires the co-operation and co-ordination between the SMA and ICASA with regard to allocation of radio frequency spectrum³²⁷. Radio Frequency Spectrum is described by Roetter and Parle as a *scarce national resource*³²⁸. Roetter and Parle conclude that the establishment of the SMA creates a clear line of demarcation between policy (the SMA) and implementation (ICASA)³²⁹. The ECA Bill is not finalised yet and in the absence of the relevant legislation with respect to the SMA, it is difficult to comment on the pros and cons of such an agency. The SMA is to a degree based on international precedent and best practice³³⁰ hence it may be a significant step in the right direction. The demarcation between government and non-governmental assignment may be problematic in the sense that it may create another potentially dominant regulatory

³²⁰ GSMA at 1 and MTN Submission at 3.

³²¹ Act no 89 of 1998.

³²² Government Gazette No. 35525 18 July 2012.

³²³ The ECA Bill defines the Spectrum Management Agency as an Agency established in terms of legislation prepared for this purpose.

³²⁴ Also including: long term spectrum planning, the development of the national radio frequency plan, and allocation of radio frequency spectrum for both government and non-government use and assignment of the radio frequency spectrum for government. See ³²⁴ Roetter, M and Parle, T. *A Spectrum Management Agency for South Africa* BMI-TechKnoweldge. Available at: <http://www.bmi-t.co.za/content/spectrum-management-agency-south-africa> accessed 10 July 2013 (hereafter BMI-TeKnowledge).

³²⁵ MI-TeKnowledge.

³²⁶ BMI-TeKnowledge.

³²⁷ BMI-TeKnowledge.

³²⁸ BMI-TeKnowledge.

³²⁹ BMI-TeKnowledge.

³³⁰ BMI-TeKnowledge.

entity with the potential to allocate radio frequency spectrum in an anti-competitive manner, further strengthening the argument put forward in this dissertation that the abuse of dominance provisions be widened to include such entities.

In July 2013, a second draft of the ECA Bill was published for public comment³³¹. The second version of the draft ECA Bill removed all reference to the establishment of the SMA and referred the subject matter for discussion during the upcoming ICT Policy Review Process³³². It would be interesting to see how long the ICT Review Process will take, what kind of public participation will be allowed and whether the final outcome will result in an independent and impartial SMA free from state intervention.

-end-

Total word count 15 747 (excluding footnotes)

³³¹ Electronic Communications Amendment Bill Government Gazette No. 36550 07 July 2013. Hereinafter ECA Amendment Bill 2013.

³³² ECA Amendment Bill 2013, Explanatory Note paragraph 1.5 at p. 23.

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