# The impact of competition law on pricing of telecommunication services

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In the Faculty of Law

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## Dedications

This paper is dedicated to two people in my life, firstly, my mom, Charlene Hall, to whom I will always be indebted to, for supporting me in my education journey, without your motivation and negotiating skills, I would not be where I am today.

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## Summary

The South African telecommunications industry is dominated by monopolies that were previously very under regulated in terms of incorporating competition law. The state-owned conglomerates known as Telkom, MTN and Vodacom were the dominant monopolies in the market. This was due to regulations that provided them with the ability to be the only companies in the telecommunications industry providing particular services such as fixed line telephone services, thereby, providing them with the market power and market share to control and determine the prices within the telecommunications industry. Competition law dictates that if a company is dominant it is not outright regarded as a problem. It becomes an issue when the dominance is abused to the detriment of the consumer. Excessive pricing is seen as detrimental to all consumers and is a prohibited action within any industry. South African telecommunications law has become regulated by two agents, first of them being the Competition Commission and the second The Independent Communications Authority of South Africa (ICASA). These two bodies share their jurisdiction in insuring competition remains within the telecommunications industry. However, abroad they follow different measures and regulations to ensure the competition remains within the telecommunications industry. This dissertation will look at the past and current competition law integration within the South African telecommunications market, as well as the international telecommunications industry. An overall look at by ensuring there is a specific knowledgeable agent to regulate the competition in the telecommunications market and less general judiciary bodies regulating this industry that it would be the only way that competition law will be its most powerful in ensuring pricing is never to the detriment of all consumers.

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# CHAPTER 1: BACKGROUND TO THE STUDIES

## 1.1 Introduction

South African competition policies and laws are comprehensive and multi-faceted. Accordingly, one has to acquire a complete understanding of the intricacies of this particular area of the law, to determine whether competition law is best suited to control the abusive dominant monopolists in our telecommunication services. I begin my research by analysing relevant parts of the competition law currently in place in South Africa. Thereafter, I examine telecommunication services, specifically the ownership and regulation thereof.

Neuhoff observes that one of the main reasons for government involvement in the market place is, because free markets do not always produce socially adequate quantities of goods at socially efficient prices.[1] Neuhoff specifically points out that free markets prices equate to the number of consumers demanding products and services, as well as, the amount of supply available of a particular product or service, with minimal interference from government.[2] Competition policies are the regulatory tool aimed at creating a desirable and appropriately competitive environment for dysfunctional markets or markets that have not yet begun to function.[3] As such, competition policies try to imitate the free market by providing equal opportunities for all businesses and further, to protect consumers (the so-called 'consumer welfare' objective of competition law).[4] It is regularly argued that the welfare of consumers should be the ultimate objective of

[1] Neuhoff *et al A Practical Guide to the South African Competition Act* (2017) 5.
[2] Neuhoff *et al* 6.
[3] *Ibid.*
[4] *Ibid.*

competition law. The aim of the Competition Act 89 of 1998 ('the Act') confirms this ultimate objective. Section 2 of the Act reads as follows:[5]

> The purpose of this Act is to promote and maintain competition in the Republic in order –
>
> (a) to promote efficiency, adaptability and development of the economy;
>
> (b) to provide consumers with competitive prices and product choices;
>
> (c) to promote employment and advance the social and economic welfare of South Africans;
>
> (d) to expand opportunities for South African participation in the world market and recognise the rate of foreign competition in the Republic;
>
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
>
> (f) to promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons.

However, some markets fail to deliver favourable results due to firms[6] negatively exercising dominance by monopolizing a specific industry or by colluding with other competitors to erect barriers in entering that particular market.[7] Competition law, therefore, aims to ensure that fair competition results through the output of goods and services at their lowest prices and at their best quality so that that small businesses also stand a chance to compete fairly and efficiently.[8] The Competition Act, *inter alia,* regulates two types of relationships and the practices conducted within these relationships. Firstly, a horizontal relationship, which is defined by section 1 of the Act as the interaction between competitors.[9] Section 4 of the Act, prohibits certain horizontal practices and interactions, such as "directly or indirectly fixing a purchase or selling price or any other trading condition."[10]. The second relationship which the Act regulates, is a

[5] The Competition Act 89 of 1998 s2.
[6] Section 1 of the Competition Act defines 'firms' to include a person, partnership or a trust.
[7] Neuhoff *et al* 7.
[8] *Ibid*.
[9] The Competition Act s1.
[10] The Competition Act s4.

vertical relationship. Section 1 of the Act defines a "vertical relationship" as a relationship between a firm and its suppliers.[11] The Act regulates and limits the behaviour of firms with market power (so-called dominant firms)[12] by prohibiting excessive pricing[13] and exclusionary acts.[14]

The prohibitions in the Act take the form of "*per se"* prohibitions in some instances and so-called "rule of reason"-prohibitions in others.[15] *Per se* prohibitions are more commonly known as "absolute" prohibitions.[16] They apply, for example, to individual horizontal relationships in relation to which certain interactions and practices are out rightly prohibited , namely price-fixing, dividing markets and collusive tendering.[17] The rule of reason prohibitions entail a more relaxed approach in that a particular agreement between competitors can be justified if the parties can prove that there are technological, efficiency or any other pro-competitive gains - even if the agreement otherwise has an anti-competitive effect.[18]

*Per se* is the legal term for 'outright illegal' meaning that any business conduct that falls within the parameters of the *per se* prohibitions, as contained in section 4(1)(b) in the Act, is absolutely prohibited.[19] The purpose behind *per se* rules is to alleviate the evidentiary burden on the competition authorities and to provide greater legal certainty to competitors regarding the type of conduct that is out rightly prohibited by the Act.[20] The "rule of reason"-approach, on the other hand, is described by Neuhoff as 'the legal term that provides for a justification or a reason for engaging in certain conduct' which has both pro-competitive and anti-competitive traits.[21]

[11] The Competition Act s1.
[12] The Competition Act s7.
[13] The Competition Act s8(a).
[14] The Competition Act s8(d).
[15] Neuhoff *et al* 10.
[16] *Ibid*.
[17] Neuhoff *et al* 11.
[18] *Ibid.*
[19] Neuhoff *et al*. 12.
[20] *Ibid.*
[21] *Ibid.*

## 1.2 Dominance in Competition Law

In order to conduct further research on the dominant monopolists in the South African telecommunication services, it is necessary to consider what the concept 'dominant monopolists' entails. In principle, a firm dominates if it has market power. In South African competition law, the term 'market power' is defined in the Act[22] as 'the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers and suppliers.'[23] *Nationwide Poles v Sasol (Oil) Pty Ltd*[24] was the first case in which the Competition Tribunal dealt with the concept of market power and as such, they decided that Sasol had market power, since it was able to set prices independently from its competitors and customers.[25] Not having any regard to its competitors or customers and not being influenced by their behaviour, to be able to act independently, was thus adequate evidence for the Tribunal to find that Sasol had market power in the particular instance concerned.[26]

As observed by Neuhoff, having market power is not a negative quality and generally only becomes a problem when such market power is abused.[27] The competition authorities are therefore not concerned with the mere possession of market power, but rather where a single firm has so much market power that, if abused, the effective functioning of the competitive process will be at risk.[28] In essence, competition law contraventions always occur within a specific relevant market. Therefore, to determine whether market power exists and whether the firm/monopolist under consideration is

[22] The Competition Act 89 of 1998 s1.
[23] *Ibid.*
[24] *Nationwide Poles v Sasol (Oil) Pty Ltd case* 72/CR/dec03 10.
[25] *Ibid.*
[26] *Ibid.*
[27] Neuhoff *et al* 29.
[28] *Ibid.*

abusing such power, one needs to first determine the 'relevant market' in which the market power is being used or abused.[29]

*The tribunal in the matter of Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd*[30] showed how complex it may be to determine what the 'relevant market' is for specific companies and whether they are, in fact, competitors in the same markets, abusing or using the same market share. In *Distillers,* the Competition Commission based its definition on international case precedents and allocated specific product classes in which the products should fall and, based on that, decided whether the Distillers had market power. However, the Tribunal did not accept this and found that the consumption behaviour of South African consumers should also be a consideration when defining market power.[31]The considerations above, of both product and consumer, shows that it was not just the product type that caused the companies to regard the product as being in the same market, but also taking into consideration how much of a specific class of product is consumed by the customer, thereby giving due attention, to the customer's preferences.[32]The relevant markets for competition law purposes, are often determined by using the 'small but significant non-transitory increase in price'- test ( the SSNIP test), 'which assesses whether a rise in price between 5% and 10% of one product causes a significant core group of consumers to shift to another product.'[33] If the consumers shift to another product, then the products are seen to be closely related and therefore, can substitute for one another and are declared to be in the same market .[34]

[29] Neuhoff *et al* 30.
[30] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 10.
[31] *Distillers Corporation* 10.
[32] *Distillers Corporation* 10.
[33] *Patensie Sitrus Beherend Bpk / Competition Commission and others 16/CAC/Apr02 14.*
[34] *Patensie* 14.

### 1.3 Dominance in the telecommunications industry in South Africa

In South Africa, our telecommunication services were initially operated exclusively by one State-owned conglomerate, namely Telkom.[35][36] The State conferred powers of exclusivity regarding several services, such as local telecommunication services and public payphones, to Telkom in terms of section 39(1) of the Telecommunications Act.[37] This exclusivity would last for five years and would end on the 7th of May 2002.[38] Telkom was able to secure their way into being part of other services, by providing services such as fixed-lines to enable ADSL internet services[39] offered by smaller private companies such as Afrihost (Pty) Ltd.[40]These days South Africa has several companies that are providing telecommunication services such as fibre[41]. However, a person still requires Telkom in order to install the fibre-line or a fixed ADSL line, which creates a limited market as the services rendered are still under the control of one monopolistic conglomerate.[42] Interconnection of competing networks is necessary for a competitive telecommunications market. However, it is a requirement of a competitive market that these telecom facilities are made available to a wide range of users.[43]

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[35]Telkom "company profile" https://www.telkom.co.za/about_us/companyprofile/company-profile.shtml (accessed 25-05-2020) - Telkom is a leading information and communications technology (ICT) services provider in South Africa. Telkom was established in 1991 when the state-owned telecommunications infrastructure was separated out of the Department of Posts and Telecommunications. In 1993, Telkom branched into cellular communication as part of the consortium that successfully bid for one of South Africa's first two mobile network licenses.

[36] Zlotnick "*Telecommunication Monopoly in South Africa – Some human Rights Aspects and options for future regulation*" 1999 *Journal of African law* 214.

[37] Telecommunications Act 103 of 1996 s39(1).

[38] Telecommunications Act s39(1) & (2).

[39] Searchnetworking "ADSL definition" https://searchnetworking.techtarget.com/definition/ADSL (Accessed 10-05-2020) - (Asymmetric Digital Subscriber Line) is a technology for transmitting digital information at a high bandwidth on existing phone lines to homes and businesses. Unlike regular dialup phone service, ADSL provides continuously-available, "always on" connection. ADSL is asymmetric in that it uses most of the channel to transmit downstream to the user and only a small part to receive information from the user. ADSL simultaneously accommodates analog (voice) information on the same line.

[40]Telecommunications Act s1 states, "Interconnect" means: "the physical or logical linking of telecommunications systems in order to enable any user of a system so linked to communicate with any users of, or utilise services provided by employing, another system so linked, and "**i**nterconnection" has a corresponding meaning.

[41]https://www.attinternetservice.com/resources/fiber-vs-dsl/ (accessed 10-05-2020) - Fibre optic Internet is an Internet connection that transfers data fully or partially via fibre optic cables. "Fibre" refers to the thin glass wires inside the larger protective cable. "Optic" refers to the way the type of data transferred – light signals

[42] Zlotnick *Journal of African law* 217.

[43] Burns "*The regulation of telecommunications in South Africa*" 1999 *CILSA* 315.

Notably South Africa's telecommunication services sector constitutes an oligopoly. As pointed out by Neuhoff, this refers to a market structure that exists where relatively few firms control all or most of the production and sale of a product.[44] The characteristics of an oligopoly comprise a relatively small number of large sellers and a differentiated or homogenous product. The barriers to entry in respect of an oligopolistic market are often significant and this makes entry into such a market difficult. There is a mutual interdependence by each firm which is maintained by creating their own policies, while still watching the policies created by their competition.[45]

### 1.4 Factors relevant in determining the presence of anti-competitive behaviour in a particular market

"Market entry barriers" refer to obstacles at the edge of the market that permit incumbents to possess and abuse market power while keeping out potential competitors.[46] Ultimately, these barriers make it difficult for new firms to enter the industry or market. In the South African telecommunications sector, there are significantly high barriers to entry in order to become a new competitor.[47]These high barriers to entry are primarily due to the provisions in the Telecommunications Act, that confer exclusivity to specific monopolists in their respective services, such as Telkom, Vodacom and MTN. Two large cellphone companies operate in South Africa namely Vodacom and MTN as well as a third reasonably large company, Cell C. However, Cell C only came into existence in 2005 and therefore, had to compete in a relatively robust market which had time to establish itself and has therefore, created very high barriers.[48]

High barriers to entry are only perceived as a material problem when there is anti-competitive conduct or an anti-competitive effect that occurs due to various firms' conduct or behaviour in a specified market or industry, which would be as a result of a firm or group of firms abusing their market power. There are various ways in which such

[44] Neuhoff *et al* 48.
[45] *Ibid.*
[46] Neuhoff *et al* 51.
[47] *Ibid.*
[48] Burns 1999 *CILSA* 301.

abuse can take place, such as collusive (coordinated) behaviour where competitors agree on prices and also market allocations.[49] Anti-competitive conduct, in most cases, harms both competitors as well as consumers and the competitive process. As observed in *Competition Commission v South African Airways (Pty) Ltd,* competition law does not exist to protect the individual competitors, but rather the effectiveness of the competitive process to ensure that markets perform optimally.[50]

The anti-competitive effect, which occurs when there is a negative effect on the consumer, is seen when evidence, for example, shows that the conduct or behaviour of a particular firm has led to high prices (anti-competitive effect). This was the case in the matter of *Competition Commission v South African Airways (Pty) Ltd*[51] in which the Competition Tribunal noted that there was 'direct evidence of an adverse effect on the consumer welfare. In other words, there was direct evidence of exploitation '(higher prices or fewer choices) or evidence that the anti-competitive effect is substantial or significant in terms of its effect in foreclosing the market to rivals.'[52] This analysis by the Tribunal implies that the reduction of competition could be 'read back' from the conduct, which caused the effect.[53] In other words, if there is an anti-competitive effect, it is directly related to anti-competitive conduct by the firm concerned.[54] Neuhoff indicates that it is only possible to determine whether competition in markets have been reduced or prevented in a particular sector, once the nature and strength of competition relevant to that market has been made clear. She explains that the loss of one participant in an oligopoly market with four equally sized players would have a more profound effect on competition than losing one competitor in a market with a hundred equally sized players. Accordingly, Neuhoff points out that the evaluation of "lessening or prevention of

[49] Neuhoff *et al* 53.
[50] *Competition Commission v South African Airways (Pty) Ltd (SAA) Case* 18/CR/Mar01 29.
[51] *Competition Commission v SAA 34.*
[52] *Ibid 35.*
[53] *Ibid 35.*
[54] *Ibid 36.*

competition" in competition matters, requires a case-by-case analysis and focuses mainly on identifying the factors that constrain market power in a specific market.[55]

In the matter of the *Competition Commission v South African Airways (Pty) Ltd (SAA)*, the Tribunal held that whether the market conduct would lessen or prevent competition entails the following assessments:

1. Does the conduct lead and increase the exploitation of consumers (that is, will it limit conduct and increase output)?

2. Does or will the conduct lead to the unjustifiable exclusion of competitors (that is, will it interfere or degrade the market mechanism)?

3. Does or will the conduct affect the fairness of competition (that is, how will it impact small and medium-sized firms)?[56]

Conduct which lessens competition in a specific market, is prohibited by the Act (conduct such as for example price discrimination).[57] It is submitted that the conduct of providing exclusive power to a specific monopoly, such as Telkom, and after that, only allowing one other competitor , being Neotel who only came into the industry on the 31st of August 2006,[58] into the market, amounts to conduct which lessens competition.

In dealing with dominant monopolists within the telecommunications sector, it is essential that dominance is understood and analysed from a competition law point of view. Section 7 of the Act[59]contains the test for dominance and sets out the requirements for when a firm will qualify as dominant for purposes of the application of the abuse of dominance provisions in terms of sections 8 and 9.[60] In terms of section 7, a firm is dominant in a

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[55] Neuhoff *et al* 60.
[56] *Ibid*.
[57] The Competition Act s9(1)(a).
[58] Neotel website: https://www.neotel.co.za/wps/portal/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfIjo8ziTfydTTycgg28_UN83Qwcg808ncIsXQydw0z1w1EVGJj7GgAVGJsa-Lt5GRsYGupHEaPfAAdwNCBOPx4FUfiND9ePwmeFkZMZAQVeBugKsIQBIVcU5IaGRhhkeqY7KioCAIPf1Xo!/dz/d5/L2dJQSEvUUt3QS80TmxFL1o2XzZVRUI3RkgyMEdBODkwQVQ2RFFEOE8yMDg2/ (accessed 8 June 2020) Neotel started 31 August 2006.
[59] The Competition Act s7.
[60] *Ibid.*

specific relevant market if firstly, it has at least 45% of that market[61] - a market share of at least 45% is dominant *per se.*[62] Secondly, if the firm has at least 35% market power, but less than 45% of that market, unless it can show that it does not have the market power.[63] The firm under investigation bears the onus to prove that it does not have market power.[64] If it has less than 35% of the market but has market power,[65] the test requires an assessment of the specific firm's market share and market power, and the complainant, or where appropriate, the Competition Commission, bears the onus to prove that this firm has market power.[66] If a firm has less than 45% but at least 35% market share, but it cannot produce evidence to show that it does not enjoy market power, such firm is considered to be *per se* dominant.[67]

There are several types of conduct that amount to abuse of dominance which are prohibited by the Competition Act. My focus will be on the types of prohibitions which are relevant to this dissertation, being those contraventions likely to be perpetrated in the telecommunications industry. Section 8(1)(a) of the Act is particularly relevant and reads as follows: " it is prohibited for a firm to charge an excessive price to the detriment of the consumers or customers."[68] This abuse of dominance conduct is of a *per se* nature, in other words, if it is evident that the prices under consideration are excessive and they have been to the detriment of the customer, the conduct, once it is proven to have occurred, will constitute a contravention of section 8(1)(a) and no defence can be raised against it. The prohibited conduct will attract an administrative penalty in terms of section 59 of the Act.[69] If there is *prima facie* proof that the dominant firm abused its dominance by excessive pricing, the onus is on the firm facing investigation, to show that the price

[61] The Competition Act s7(a).
[62] *Ibid.*
[63] The Competition Act s7(b).
[64] Neuhoff *et al* 140.
[65] The Competition Act s7(c).
[66] Neuhoff *et al* 140.
[67] The Competition Act s7(b).
[68] The Competition Act s8(1)(a).
[69] Section 59 of the Competition Act reads as follows; Administrative penalties - (1) The Competition Tribunal may impose an administrative penalty only— (a) for a prohibited practice in terms of section 4 (1), 5 (1) and (2), 8 (1), 8 (4), 9 (1) or 9 (1A)

was reasonable in terms of the economic value of the good or service provided by that firm.[70] However, if there is no prima facie proof, then the onus is reversed unto the complainant to prove that the prices are excessive. The requirements to prove excessive pricing is found in section 8(3)(a) – (f) of the Act, and allow for the thorough investigation into the respondent's prices in comparison to prices in the market it operates in.[71]

## 1.5 Telecommunication Services in South Africa

“Telecommunication” is a concept that has been defined as ‘the emission, transmission or reception of a signal from one point to another by means of electricity, magnetism, radio or other electromagnetic waves, or any agency of a like nature, whether with or without the aid of tangible conductors.’[72] The concept of telecommunication can be broken up further into services and a system. A telecommunications service is provided for by employing the telecommunication system.[73] The telecommunications system encompasses the following:

> A system or series of telecommunication facilities or radio, optical or other electromagnetic apparatus or any similar technical system used for telecommunication,

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[70] The Competition Act s8(2).

[71] Section 8(3)(a)-(f). The Competition Act reads as follows: (3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—
(a) the respondent’s price cost margin, internal rate of return, return on capital invested or profit history;
(b) the respondent’s prices for the goods or services—
(i) in markets in which there are competing products; (ii) to customers in other geographic markets;
(iii) for similar products in other markets; and
(iv) historically;
(c) relevant comparator firm’s prices and level of profits for the goods or services in a competitive market for those goods or services;
(d) the length of time the prices have been charged at that level;
(e) the structural characteristics of the relevant market, including the extent of the respondent’s market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent’s own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and
(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.

[72] The Telecommunications Act s1.

[73] *Ibid.*

> whether or not such telecommunication is subject to rearrangement, composition or other processes by any means in the course of their transmission or emission or reception.[74]

The Electronic Communications Act ('ECA')[75] was enacted in 2006. It repealed the Telecommunications Act 103 of 1996, the Independent Broadcasting Authority Act 153 of 1993 ('the IBA') and most of the Broadcasting Act 4 of 1999, thereby making it the primary source of legislation governing the electronic communications industry in South Africa.[76] Section 2 of ECA[77] defines "electronic communications (previously known as telecommunications)" as:

> 'the emission, transmission or reception of information including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service.'[78]

As observed by Papadopoulos, the new definition of telecommunications, now known as electronic communications, allows for a more comprehensive and inclusive definition of a variety of possible communicative services.[79] The ECA as well as the Independent Communications Authority of South Africa Act 13 of 2000 (the ICASA Act)[80] work together primarily to regulate the electronic communications industry.[81]As indicated in Chapter One, the Constitution of the Republic of South Africa ('the Constitution') is the cornerstone of our democracy and all conduct inconsistent therewith may be declared

[74] *Ibid.*
[75] The Electronic Communications Act 36 of 2005 ('ECA').
[76] Papadopoulos '*Cyberlaw @ SA lll the Law of the Internet in South Africa' (*2012) 25.
[77] The ECA s2.
[78] *Ibid*.
[79] *Ibid.*
[80] The Independent Communications Authority of South Africa Act 13 of 2000 ('the ICASA Act').
[81] Papadopoulos 25.

invalid.[82] Accordingly, the regulation of the electronic communications industry must be in line with the objectives set out in the Constitution.[83]The ICASA Act *inter alia* provided for the establishment of the Independent Communications Authority of South Africa (ICASA) as regulatory body in the telecommunication sector in 2000.[84] The ECA sets out a regulatory framework to promote convergence in the broadcasting and telecommunications sector and to provide for new licenses and the granting of a new spectrum.[85][86] The ICASA Act makes the framework regulated by the ECA, operational.[87] There are three distinct types of licenses regulated by the ECA.[88]Firstly, service licensing which is regulated in Chapter 3 of the ECA, secondly frequency licensing which is regulated by Chapter 4 of the ECA and lastly, the approval of technical equipment and electronic communications facilities regulated under Chapter 6 of the ECA.

Burns points out that the telecommunications industry is dominated by monopolists, not just in one area, such as fixed-line services, but also in mobile network services.[89] There has been a considerable amount of discussion over liberalising the industry, ultimately allowing for the privatisation of the monopolized state-owned companies.[90] This would allow for the destruction of monopolists and the ability for greater competition.[91]

## 1.6 Nature and Scope of the Dissertation

In this dissertation, I will firstly investigate what South African competition law entails, and how the telecommunications sector is defined and regulated. I will, furthermore,

[82] The Constitution of the Republic of South Africa, 1996 s2.
[83] Papadopoulos 26.
[84] *Ibid.*
[85] The ECA Preamble.
[86] The ECA s1 Spectrum definition "means the portion of the electromagnetic spectrum used as a transmission medium for electronic communications"
[87] Papadopoulos 29.
[88] The ECA chapter 3 (Facilitating Electronic Transactions), 5 (Cryptography Providers) and 6 (Authentication Service Providers).
[89] Burns 1999 *CILSA* 313.
[90] *Ibid.*
[91] *Ibid.*

explore aspects of South African competition law pertaining to pricing with relevance to dominant monopolists and whether all conduct that such dominant firms engage in is necessarily anti-competitive. Furthermore, I will consider whether the telecommunications sector significantly abuses its dominance or whether there is sufficient competition within the industry to comply with the objectives of the Competition Act. The first assumption that I make in this context is that the telecommunications sector is too fragmented and overly regulated by non-competition law experts, which causes the sector to fail consumers in respect of the prices and qualities of goods and services.

Thereafter, I discuss the challenges experienced in relation to applying competition law in the South African telecommunications industry. I further explore how the monopolists that are dominant in the telecommunication industries internationally, are regulated in terms of foreign law. I comment specifically on the position in Canada, the European Union, and New Zealand. The dissertation will reveal that the above three countries and their competition law, is far more developed and had sufficient time to be applied within the telecommunications sector, for the industry to be regarded as sufficiently competitive and to be providing affordable goods and services of good quality.

## 1.7 Chapter Layout

Chapter One contains an analysis of the broad features of competition law in South Africa and what competition law aims to achieve and regulate. In particular I consider as abuse of dominance in the form of excessive pricing. Thereafter, I consider what telecommunications entail and determine how the telecommunications sector is regulated.

In Chapter Two the focus is on the establishment of the communications sector in South Africa and on the different authorities that are empowered to regulate competition in the telecommunications sector as well as the challenges posed by these conferred powers from a South African perspective. Thereafter, I comment on the limitations of competition law and its ability to regulate the telecommunications industry effectively for purposes of achieving a more competitive telecommunications market.

Chapter Three entails an investigation into how dominant monopolists in international telecommunications sectors are regulated by foreign competition law and whether foreign competition authorities have succeeded in appropriately regulating abusive monopolistic dominant firms. I specifically focus on Canadian law, the competition laws of New Zealand and the European Union.

Chapter Four contains the conclusions drawn from the aforesaid study as well as suitable recommendations.

# CHAPTER 2: CHALLENGES FACING COMPETITION LAW IN THE TELECOMMUNICATIONS INDUSTRY IN SOUTH AFRICA

## 2.1 The Regulatory Authorities in the Telecommunications Sector

The Telecommunications Act[92] regulates the telecommunications framework policy and also addresses aspects pertaining to competition in the telecommunications sector. Section 53 of the Telecommunications Act[93] provides the Authority[94] with the power to inform a telecommunications licensee holder, if they find that the licensee holder is causing any undue discrimination to any person or if they are giving any undue preference to any person in terms of any uncompetitive actions, which the licensee holder must refrain from taking such action.[95] The Authority is provided with the power to issue any regulations to ensure effective and efficient monitoring of uncompetitive effects and to provide protection for consumer's interests and speedy complaint

[92] Telecommunications Act 103 of 1996 As amended by the Telecommunications Amended Act 64 of 2001.
[93] Telecommunications Act 103 of 1996 ("Hereinafter the Telecommunications Act").
[94] The telecommunications Act s1 - "Authority" means the Independent Communications Authority of South Africa established by section 3 of the Independent Communications Authority of South Africa Act, 2000.
[95] The Telecommunications Act s53(1).

resolution.[96] As pointed out in Chapter One, the ECA and ICASA Act regulate electronic communications within South Africa. The ECA, like the Telecommunications Act, provides ICASA with the authority to regulate competition issues within the telecommunications sector, and ICASA must outline what the uncompetitive behaviour entails, to allow for the licensee holders to ensure they do not conduct any uncompetitive behaviour.[97] The Competition Amendment Act 39 of 2000 conferred concurrent jurisdiction over the communications sector to the ICASA and the Competition Commission to regulate competition within the communications sector.[98]

### 2.1.1 ICASA's authority to regulate competition in telecommunications

In South Africa, ICASA is the sector regulator responsible for implementing and enforcing ex-ante regulation in the telecommunications sector,[99] while the Competition Commission's ("the Commission") role is to identify and remedy anti-competitive behaviour.[100] The Commission and ICASA agreed to govern the exercise of their concurrent jurisdiction by signing a Memorandum of Agreement ("MOA") which was concluded and signed by both respective representatives of the regulating bodies on the 29th of August 2019 and was Gazetted on the 6th of September 2019 (hereinafter "the agreement").[101] The agreement reached between the Commission and ICASA stipulates the functions of each authority. ICASA's primary functions are to facilitate market entry

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[96] The Telecommunications Act s53(1)(a).

[97]The Electronic Communications Act s67(2) provides that ICASA must "The Authority must prescribe regulations— (a) setting out what actions in terms of subsection (1) would be considered by the Authority as giving undue preference to or causing undue discrimination against another licensee or person providing a service pursuant to a licence exemption; (b) detailing procedures for complaints and the monitoring and investigation of such actions that ensure the protection of the interests of consumers; (c) indicating the penalties that may be imposed for failure to comply with a written notice to cease or refrain from taking such actions as prescribed in terms of subsection (2)(a).

[98] Competition Second Amendment Act 39 of 2000 s3(1A)(a) ("Competition Amendment Act").

[99]https://community.jisc.ac.uk/blogs/janet-broadband-policy-watch/article/new-european-commission-recommendation-ex-ante-regulation (accessed on 14 May 2020) - Ex Ante Regulation is defined as "before the event" market intervention by a regulatory body, and includes measures such as pricing regulation and placing obligations on a provider or providers to offer wholesale broadband products.

[100] Fourie et al, "Regulatory ambiguity and policy uncertainty in South Africa's telecommunications sector" (2018) 1

[101] Memorandum of Agreement - https://www.ellipsis.co.za/wp-content/uploads/2019/09/MOU-Competition-Commission-ICASA-September-2019.pdf (accessed on 14 May 2020)

into the communications sector, by issuing licenses and allocating frequency-spectrums, and furthermore, to provide a regulatory framework that promotes competition.[102] Section 2(c) of the ICASA Act provides for underlying statutes[103] and states that the objectives of these underlying statutes must be contemplated,[104] in other words the objectives of for example the Telecommunications Act, must be adhered to and achieved, as the Telecommunications Act is the legislation that formed the basis for the development of the ICASA Act. The Telecommunications Act confers all power on ICASA to regulate competition within the telecommunications sector. A few examples of the regulatory powers that have been conferred onto ICASA in relation to competition in the telecommunications sector, include section 36(1)(d) of the Telecommunications Act which allows for ICASA to keep track of Telkom's behaviour in producing fair competition within the sector; section 52[105]which allows for ICASA to place limitations regarding control on the telecommunications services with regards to the holding of financial or voting interests; and section 53[106] –which states that if any telecommunication license holder intends on taking action which is likely to have an effect of undue preference or undue discrimination against any other person, then ICASA can withdraw their license ceases or require that the said licence holder refrain from acting in that manner However, section 52 and 53 state that any actions taken by ICASA may not be inconsistent with the general provisions of the Competition Act.[107]

### 2.1.2. The Competition Commissions authority to regulate competition in the telecommunications industry

Section 21(1)(h) of the Competition Act provides that the duties of the Commission are to negotiate any agreements with (other) regulatory agents so that the exercise of their

[102]Markovitz "Concurrent Jurisdiction, the relationship between the independent communications Authority of South Africa and the Competition Commission' paper presented at the Competition Law update conference, Rosebank" 2001 8 – 9.
[103]ICASA Act s1 - "underlying statutes" means the Broadcasting Act, the IBA Act and Telecommunications Act.
[104] ICASA Act s2(c).
[105] The Telecommunications Act s52.
[106] The Telecommunications Act s53.
[107] Ngwepe 2003 *South African law journal* 246.

jurisdiction works in a harmonised manner.[108] As indicated inChapter one of this dissertation, the Commission's functions are to ensure that no monopolistic actions, anti-competitive agreements, acts, or abuse of dominance from partnerships grouped as vertical or horizontal relationships take place.[109] While fulfilling these functions, the Competition Commission must ensure that the public interest and policies in a specific sector are still taken into consideration and promoted, as contemplated in section 2 of the Competition Amendment Act.[110] In particular Ngwepe points out that the Commission is not involved in the determination of any technical policy frameworks that apply to any specific industry – thus insofar as the telecommunications sector is concerned this function is left to ICASA.[111]

### 2.1.3 The two regulatory authorities and their concurrent jurisdiction

In principle, therefore, the functions conferred on each authority should allow them to work concurrently and effectively with one another as their functions do not overlap but instead are supportive of one another.

Notably, the agreement that was concluded between the two regulators as referred to above, which stated that if transactions such as mergers, which require approval by both regulators, then the companies concluding the mergers, should submit individual applications to both regulators separately. Before ICASA may make a decision concerning any sort of complaint or transaction, section 4B(8)(a) of the ICASA Act provides that ICASA must consider in terms of the agreement, whether or not it should refer the complaint or transaction to the Commission. Section 4B(8)(a) of the ICASA Act in conjunction with section 67 of the ECA states that it must be kept in mind that the Commission has primary authority to detect and investigate past or concurrent commission of alleged prohibited practices as defined in the Competition Act.[112] Where

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[108] Ngwepe "Serving two masters: concurrent jurisdiction between the competition commission and the Independent communications authority of South Africa" 2003 *South African law journal* 244.
[109] The Competition Act s21.
[110] The Competition Act s2.
[111] Ngwepe 2003 *South African law journal* 245
[112] The Competition Act S1.

a complaint is lodged regarding an issue where both regulatory bodies have concurrent jurisdiction they will adhere to the following process as set out in the agreement[113]:

1. The regulator that receives the complaint ("the recipient regulator") must notify the other regulator in terms of the agreement;
2. The Commission and ICASA may consult with each other in respect of the complaint;
3. When consulting each other the, the parties must have regard with the principle that the Commission is the primary authority to detect and investigate the alleged prohibited practices, and ICASA must promote competition in the electronic communications sector.
4. If it is decided in the consultation process in item 3 above, that ICASA will deal with the matter, the Commission may issue a notice of non-referral in terms of section 50(2)(b).[114]

Ngwepe, points out, with reference to the 2002 agreement between ICASA and the Commission, that the problematic issue with the aspect of concurrent jurisdiction lies in the decision criteria used when evaluating the anti-competitive effects of transactions. ICASA promotes the public interest objectives stated in section 2 of the Telecommunications Act, which inter alia are to "promote the universal and affordable provision of telecommunication services; promote the provision of a wide range of telecommunication services in the interest of the economic growth and development of the Republic; ….promote and facilitate convergence of telecommunications, broadcasting and information technology".[115] However, these objectives are not what the Competition Commission uses when evaluating the particular behaviour.[116] ICASA uses a public interest test,[117] meaning they must regulate the telecommunications sector,

[113] Memorandum of Agreement - https://www.ellipsis.co.za/wp-content/uploads/2019/09/MOU-Competition-Commission-ICASA-September-2019.pdf (accessed on 14 May 2020) pg10.
[114] Memorandum of Agreement - https://www.ellipsis.co.za/wp-content/uploads/2019/09/MOU-Competition-Commission-ICASA-September-2019.pdf (accessed on 14 May 2020) pg10.
[115] The Competition Act s2.
[116] Ngwepe 2003 *South African law journal* 248.
[117] ICASA Act s2(a) – "regulate broadcasting in the public interest and to ensure fairness and a diversity of views

broadcasting sector and postal sector in the interest of public[118], which serves to ensure that public interest is considered with regard to competition policies in the communications sector.[119] The public interest test used by ICASA is a flexible test, as it provides for public interest to be taken into consideration as well as the competition principles and considerations founded in the Act[120], such as efficiency, adaptability and the development of the economy, competitive prices and better quality product choices for consumers.[121] The Competition Commission however relies on the competition principles as set out in the Competition Act, which in summation is aimed at determining whether competition is being hindered in a sector or not. The Competition Commission consequently has narrow powers when it comes to its ability to regulate the telecommunications sector, but broad powers when competition regulation is needed, and vice versa for ICASA. However, the public interest test as well as the objectives set out in the telecommunications Act, allows for ICASA to look at issues beyond what the Commission would, thereby almost creating stricter criterions to implement.

An example of the application of their concurrent jurisdiction as stated in their agreement, was when New Africa Investment Ltd ("New Africa") were bidding to acquire the assets of Kagiso Media Ltd ("Kagiso"). If the bidding were to be approved, New Africa would gain control of three FM Broadcasting licenses.[122] New Africa made an application to the Commission and ICASA for merger approval. As observed by Ngwepe, this application presented a test for the concurrent jurisdiction of both authorities.[123] The Commission approved the merger, contending that the acquisition of the assets would not be substantial enough to lessen or restrict competition within the market, and they were of the view that the merger did not raise any public interest concerns.[124] Contrastingly,

broadly representing South African society, as required by section 192 of the Constitution" (b) "the authority must regulate telecommunications in the public interest".

[118] *Ibid*.

[119] Ngwepe 2003 *South African law journal* 248.

[120] The Competition Act s2.

[121] The Competition Act s2.

[122] Business Report https://www.iol.co.za/business-report/companies/kagiso-shareholders-to-get-r28m-776981 (accessed 15 May 2020).

[123] Ngwepe 2003 *South African law journal* 248.

[124] *Ibid at 49.*

ICASA however denied the merger. ICASA based its decision on the fact that broadcasting licenses were granted to New Africa and Kagiso previously after a competitive bidding process took place. ICASA further, considered the merger in light of the objectives of the Broadcasting Act[125], which are set out inter alia to;

(a) contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society;

(b) encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;

(c) ensure fair competition in the broadcasting sector.

ICASA's view was that the merger was not desirable for various reasons, inter alia that the merger did not promote black economic empowerment, nor did it promote competition and the parties failed to provide evidence that the merger would encourage investment in the industry and stimulate growth of the licensees.in the industry.[126] The above example illustrates the disadvantages to concurrent jurisdiction, in that it is not easy to make a decision incorporating competition considerations and principles that are of relevance in a technical industry. The different approaches of the two regulators involved causes many delays for the applicant to receive a decision as both regulators have to complete their due diligence in accordance with their investigative processes set out in their respective governing Acts. Thereafter they then have to come together to determine whether they have reached consensus regarding whether the merger should be approved or whether they differ on that point.[127] It also shows that the two authorities would have to relax their own respective rules in order to accommodate the other.

[125] The Broadcasting Act 4 of 1999 s2 (hereinafter "the Broadcasting Act").
[126] Ngwepe 2003 *South African law journal* 248.
[127] Ngwepe 2003 *South African law journal* 248.

## 2.2 Other challenges facing the telecommunications industry within South Africa

Fourie observes that an ever-developing telecommunications industry has led to many firms converging their services with other already-established firms in order to stay relevant, competitive and to keep costs as low as possible while offering the latest in technological advancements.[128] An example in point is the following: MTN (Pty) Ltd (a mobile network operator) acquires controlling shares in Afrihost (Pty) Ltd (internet service provider) which allows both companies to leverage off each other's investments in broadband and other infrastructure.[129] The convergence further allows MTN to offer internet services that they have never been able to offer and for Afrihost to broaden their clientele without having to first develop the infrastructure which enables such services to be offered by each service provider.[130] So both entities benefit from this convergence. Convergence has therefore played quite an essential role in the telecommunications industry, allowing for "mergers" to take place which allow telecommunications service providers to ensure that their services develop sufficiently without incurring high costs. Convergence is accordingly a crucial aspect in the telecommunications industry, and it is up to ICASA to keep track of the dominant firms in the industry to ensure that they do not use the economies of scale[131]of their network to exclude competitors from entering the market.[132] Without ICASA, Ngwepe remarks that new entrants would be held at ransom by dominant firms in the industry.[133]

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128 Fourie et al, "Regulatory ambiguity and policy uncertainty in South Africa's telecommunications sector" 2018 *Asian Journal of Public Administration 205*.
129 *Ibid.*
130 *Ibid.*
131 https://www.investopedia.com/insights/what-are-economies-of-scale/ (Accessed 16 May 2020) – Economies of scale means "that as a company grows and production units increase, a company will have a better chance to decrease its costs. According to this theory, economic growth may be achieved when economies of scale are realized." See also https://corporatefinanceinstitute.com/resources/knowledge/economics/economies-of-scale/ (accessed 16 May 2020) "the cost advantages that enterprises obtain due to their scale of operation."
132 Ngwepe 2003 *South African Law Journal* 251.
133 Ngwepe 2003 *South African Law Journal* 251.

In the telecommunications industry, several barriers make entry into the industry challenging. In particular, a significant barrier of entry is posed by monopolistic state owned conglomerates who prevent new competitive entrants into the sector by charging excessive prices.[134] One of the first issues I will address in this regard pertains to the South African broadcasting sector as the broadcasting sector is regulated by the ECA and therefore forms part of the telecommunications sector.[135]

In the broadcasting sector broadcasting services are produced off of an analogue frequency, which is the transmission of the television picture and sound information to the viewer in its entirety. There is no conversion of the picture and sound, and none of the picture and sound information is removed.[136] However most of the developed western world functions off of a digital spectrum.[137] Digital spectrum entails the conversion of the television picture and sound into discrete digital information which is then compressed by removing unnecessary information, and it is then transmitted to the end-user (the consumer) as a digital sound.[138] Analogue frequency only allows a specific amount of frequency within the spectrum to be used up within a specified area, whereas digital frequency uses a lot less frequency within the spectrum and would require a lot less bandwidth to cater for the same amount of usage, which allows the reception to also be a lot clearer.[139] If the broadcasting sector were to migrate from analogue to digital it would allow other service providers in the telecommunications sector to have larger spectrum and thus to offer better quality services at a far more affordable rate, thereby allowing more competition in the different sectors, including the mobile telecommunications sector, as well as the radio broadcasting sector.[140]

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[134] *Ibid.*
[135] The ECA s2(e) "ensure that broadcasting services are effectively controlled by South Africans"
**[136]** E.tv (Pty) Ltd v Minister of Communications and Others (26166/2015) [2015] ZAGPPHC 1148 pg 6
[137] *Ibid at 5*
[138] E.tv (Pty) Ltd v Minister of Communications and Others (26166/2015) [2015] ZAGPPHC 1148 pg 6
[139] *Ibid.*
[140] My Broadband official website "South Africa will switch to digital TV by 2021"https://mybroadband.co.za/news/broadcasting/337640-south-africa-will-switch-to-digital-tv-by-2021-here-is-the-plan.html (accessed on 15 April 2020).

However, in South Africa there has been a major delay in ensuring that this migration occurs, which is due to several challenges. Firstly, one of the challenges we face is the debate on encryption[141], specifically whether the set boxes (these are similar to decoders) should be encrypted for end-to-end use or whether they should remain open and unencrypted.[142] The first deadline to complete the aforesaid migration was due in 2011. However, two broadcasting networks, E-tv and Multichoice approached the court to debate whether the set boxes should be encrypted or not.[143] E-tv argued that the lack of encryption would allow "non-compliant Set boxes" to receive digital broadcasts and that E.tv would not likely be able to provide high definition broadcasts."[144] E-tv lost the first case brought in the High Court in Pretoria, but were granted leave to appeal and thereafter, won in the Supreme Court of Appeal.[145] The issue, however, is that the second deadline to complete the migration was due in June 2019 and has again been missed.[146] The transition from analogue to digital would result in the creation of affordable and accessible telecommunication services in South Africa, and thereby result in service providers in the broadcasting sector complying with South African competition laws, by not providing services at excessive prices and creating accessibility for all, thus not unduly discriminating against any person.[147]

The second challenge that the migration faces, is the affordability to distribute the set-boxes required to implement the migration to all corners of South Africa. South Africa has a high unemployment rate; it is one of the highest rates in the world currently sitting at 29.1% at the end of quarter three in 2019,[148] Television is a luxury that many cannot afford, therefore, distributing about 5 million of the set boxes to these poor and informal, rural types of homes is one of E-tv's goals. However, if the encryption of these models

[141] The Broadcasting Act s1 defines encryption as – "a method for changing a broadcasting signal in a systematic way so that the signal would be unintelligible without a suitable receiving equipment.
[142] *Ibid.*
[143] E.tv (Pty) Ltd v Minister of Communications and Others (26166/2015) [2015] ZAGPPHC 1148.
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] http://www.statssa.gov.za (accessed on 15 May 2020).

does not happen, it would cost E-tv around R3 billion to achieve this goal, which is their revenue for two years and would, therefore, be unachievable.[149] If these homes do not receive the set boxes, the migration from analogue to digital will be further delayed, and therefore, the spectrum and bandwidth required for mobile and internet services would still be limited and unaffordable. Mish Molakeng, a spokesperson for the Minister of Communications, stated in this regard that "Digital terrestrial television (DTT) has the potential to radically transform the value chain of the broadcasting and telecommunications systems, thereby creating a new industry trajectory that will assist in addressing the triple challenge of poverty, unemployment and inequality."[150]

Access to accessible data and good quality mobile networks is a fundamental goal of the ECA especially in underserviced areas[151]; however, a solution to the enormity of this issue has not yet materialised.[152] A multi-method study which took place in 2013 was used to investigate the expenditure on mobile data in a traditional rural community, Nyandeni Local Municipality in Eastern Cape (one of the more disadvantaged areas of the country) and a comparison was done with the national data taken in 2016 for people in similar socio-economic situations.[153] The results of the study found that there were high levels of access to digital communications – (87% of people using mobile phone services weekly). However, this comes with very high costs as on average, 22% of the disadvantaged individuals disposable income is dedicated to a limited basket of services.[154] Moreover, 40% of the time, their SIM cards do not have airtime making it impossible to use all the available services, mainly due to the cost of the communication.[155] The study shows that only 22.2% of the persons surveyed accessed internet services monthly but with very constrained use of only 25 – 30 MB a month being

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[149] Fin24 official website "e-tv wins key digital broadcast court battle" https://www.fin24.com/Tech/News/etv-wins-key-digital-broadcast-court-battle-20160531 (accessed on 15 April 2020).
[150] *Ibid.*
[151] The ECA s2 (c) "promote the universal provision of electronic communications networks and electronic communications services and connectivity for all"
[152] Rey-Moreno 'Alternatives for Affordable communications in Rural South Africa: Social Purpose GSM Licenses' 2017 2.
[153] *Ibid at* 3.
[154] *Ibid.*
[155] *Ibid.*

available.[156] The government is aiming for a 5%[157] use and expenditure of a community's disposable income which is considerably lower than the current 22%.[158] The central multimedia study as mentioned above was conducted in 2013 by Stats SA,[159] which formed the basis for the statistics gathered. A follow-up survey is to be conducted once annually.[160] The survey's which were concluded annually specifically those completed in 2014 through to 2018 showed very little progress from the statistics mentioned above, which shows that the reduction in rates is not reaching rural areas and that the communities are reluctant to change service providers for cheaper services, due to the issue of the network coverage by the cheaper service providers. This is because the cheaper service providers have no ability to cover the area for signal, since the spectrum is so limited and monopolised by the current telecommunications monopolies.[161] At a national level, MTN and Vodacom have more than 85% of the market share, with consumers with an individual income of R3000 or less a month and more than 95% of the market share of those living in traditional huts.[162] The results provide us with the understanding that having access to services within the rural areas does not mean that the service is affordable.[163]

This type of market share shows a market dominance, but whether the Mobile networks in South Africa are abusing power[59] above, would have to be analysed with reference to specific facts. It is quite clear that the affordability of these services is not within the range of these poverty-stricken people. However, no other affordable firm can provide the reliability of service as MTN and Vodacom can, due to lack of spectrum and coverage

[156] *Ibid at* 4.
[157] http://www.statssa.gov.za/publications/P0310/P03102014.pdf (accessed 16 May 2020) Living Conditions of Households in South Africa, an analysis of household expenditure and income data using the LCS 2014/2015.
[158] Rey-Moreno 'Alternatives for Affordable communications in Rural South Africa: Social Purpose GSM Licenses' 2017 4.
[159] http://www.statssa.gov.za/publications/P0310/P03102014.pdf (accessed 16 May 2020) Living Conditions of Households in South Africa, an analysis of household expenditure and income data using the LCS 2014/2015
[160] Rey-Moreno 'Alternatives for Affordable communications in Rural South Africa: Social Purpose GSM Licenses' 2017 4.
[161] *Ibid.*
[162] Data from the 2015 "All Media and Products Survey" (AMPS) from the South African Audience Research Foundation (SAARF). Also see Rey-Moreno 'Alternatives for Affordable communications in Rural South Africa: Social Purpose GSM Licenses' 2017 5.
[163] *Ibid.*

and lack of access to essential facilities.[164] The above entry barrier, being affordability, to new entrants would therefore show that MTN and Vodacom are abusing their power within a market by not providing more cost-effective communication to the areas that cannot afford it. As pointed out, section 7 of the Competition Act[165] states that a firm is dominant if they have at least 45% of the market. As mentioned above, MTN and Vodacom hold 85% of the market who earn above the minimum wage criteria and 95% of the market living in traditional huts. [158] above Section 8 of the Competition Act state that a firm is prohibited from exercising its dominance by charging excessive prices to the detriment of the customers.[166] The above section is a *per se* prohibited rule[19] above which automatically alleviates the evidentiary burden for the competition commission.[20] above Section 8 of the Competition Act[167] shows us that MTN and Vodacom are dominant in the Mobile telecommunication services market and they are charging excessive prices that are detrimental to the consumer, which proves for abuse of dominance and this is therefore instantly, a prohibited action.[168] Abuse of such dominance, but a lack of availability of spectrum and reception leave the average South African with little to know choice when choosing a mobile telephone network.

A third challenge that South Africa faces in its telecommunications industry is accessibility and reliability of internet services, specifically within rural areas.[169] The internet is a critical enabler of human rights; from freedom of expression, to access of information, privacy and freedom of assembly.[170] It is becoming evident that internet access is a critical and essential service that everyone should have the right to access. In an increasingly interconnected world, it is easy to forget that many people, especially women and minorities living in rural areas, lack this basic service. Some main reasons for lack of access to these services show that it is due to the affordability of such

164 *Ibid.*
165 Competition Act s7
166 Competition Act s8(a)
167 *Ibid.*
168 *Ibid.*
169 ICASA report "Comments in respect of the provisioning Broadband Wireless Open Access Services for urban and rural areas using the complementary bands" 2020 2.
170 *Ibid.*

services.[171] Rural South Africans who currently use a 1GB prepaid data bundle are paying, on average, 60% of their disposable income for it.[172] The Competition Commission has stated that the lack of data transparency amongst mobile network operators is undermining competition and that this is reflected in this contravention of Section 8(a) anti-poor excessive pricing.[173] There have been demands made in the past ten years for international mobile telecommunications (IMT) spectrum network operators which would allow for universal service[174] and access to affordable and secure broadband services. However, observing competition law and telecommunication systems from abroad have shown that merely increasing spectrum does not guarantee competition nor universal service or access.[175] The IMT spectrum will create a Wholesale Open Access Network (WOAN), which will allow for everyone living in rural areas or urban areas, to have access to the network. However, the infrastructure needed to operate and maintain such a network would be economically infeasible for South Africa as the population that this network would be provided for, are unable to afford the service and therefore South African tax payers would be ultimately paying for the infrastructure needed for the WOAN.[176]

Affordability and accessibility go hand in hand with one another, as the issue with rural areas lies in the fact that they are unable to access the networks and use internet services due to the costs of the services provided.[177] The affordability of the service is high due to the limited access to the spectrum available within the open rural areas -

[171] *Ibid at* 3.
[172] "Using R149 for 1GB bundle from main providers in rural areas (MTN and Vodacom) and income levels and household size for Nyandeni local municipality": https://wazimap.co.za/profiles/municipality-EC155-nyandeni/. Also see ICASA report "Comments in respect of the provisioning Broadband Wireless Open Access Services for urban and rural areas using the complementary bands" 2020 3.
[173] Competition Commission official website http://www.compcom.co.za/wp-content/uploads/2017/09/Data-Services-Inquiry-Report.pdf. (accessed on 15 April 2020). Also see ICASA report "Comments in respect of the provisioning Broadband Wireless Open Access Services for urban and rural areas using the complementary bands" 2020 4.
[174] Telecommunications Act s1 - "universal service" means the universal provision of telecommunication services as determined from time to time in terms of section 59(2)(a)(ii).
[175] ICASA report "Comments in respect of the provisioning Broadband Wireless Open Access Services for urban and rural areas using the complementary bands" 2020 4.
[176] *Ibid at* 5.
[177] *Ibid.*

even though there is seemingly a "universal coverage" within South Africa, the access to this coverage is hindered by affordability.[178] However, the spectrum allocated for the WOAN is designed to reduce the cost of communication and will increase competition by encouraging small and medium-sized operators to purchase wholesale capacity from the WOAN at the regional level.[179] WOAN can provide wholesale capacity at low costs due to the spectrum being available on a reduced or no-fee basis for five years.[180] It is submitted that lowering data costs in South Africa cannot be challenging for MTN and Vodacom as they have been charging significantly high rates without any sort of consequence or reason. However, after being investigated by the Competition Commission, which Data Services Market investigation (the "Inquiry") was initiated by the Competition Commission in terms of Section 43B(2) of the Competition Act No. 89 of 1998 (as amended) ("the Act") in August 2017[181], it has been proven that they are overcharging in terms of data prices and that they have to decrease this considerably or would be found to be engaging in anti-competitive practices and face administrative penalties.[182] Universal access[183] to a network seems like an unachievable feat for South Africa; however, if it will provide for affordable communication and access to the internet, then one must attempt to achieve this at least.[184]

## 2.3. Competition law limitations in South Africa's telecommunication sector

South Africa is one of the more developed countries on the African continent. However, the South African telecommunications industry is not nearly as developed as the rest of

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[178] *Ibid at* 6.
[179] *Ibid at* 5.
[180] *Ibid.*
[181] http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf - (accessed 16 May 2020) Competition Commissions Data services Market enquiry - Final Report 13.
[182]http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf - (accessed 16 May 2020) Competition Commissions Data services Market enquiry - Final Report
[183] The Telecommunications Act s1 states - "universal access" means "universal access to telecommunication services as determined from time to time in terms of section 59(2)(a)(i)". also see s59(2)(a)(i) & (ii) "the universal provision for all persons in the Republic of telecommunication services, including any elements or attributes thereof.
[184] *Ibid.*

the western world.[185] One cannot but wonder how this is possible? South Africa has a sophisticated system and infrastructure and all the technology as well as the human resources to understand and implement the technology - so why does South Africa have one of the most inaccessible and unaffordable telecommunication industries in the world?[186]

Alleman remarks that "[T]elecommunications can increase the efficiency of economic, commercial, and administrative activities, improve the effectiveness of social and emergency services and distribute the social, cultural and economic benefits of the process of development more equitably throughout the country."[187] In a country where poverty is growing exponentially, growing the telecommunications sector is not a priority; however, this should perhaps become the central focus for developing countries like South Africa.[188] Our telecommunications sector, specifically our mobile telephone sector, is monopolised by MTN and Vodacom, who, as pointed out, hold 85% of the market power. However, the prices of data and voice communication, as stated above, are not competitive.[189] The Commission has indicated in the Provisional Report[190] that it undertook pricing analysis and the evidence provided to the Commission since confirmed that these two operators are to a large extent able to price independently of the challenger networks, regardless of then recent adjustments in price by Vodacom[191]

As stated earlier, section 7(a) of the Competition Act[192] provides that a firm is dominant in a market if it has at least 45% of that market. However, having dominance does not create an immediate problem for competition amongst firms, only the abuse of such

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[185] http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf - (accessed 16 May 2020) Competition Commissions Data services Market enquiry - Final Report pg15

[186] *Ibid.*

[187] Alleman et al "Telecommunications and economic development empirical evidence from Southern Africa" 1994 International Telecommunications Society Sydney 5.

[188] *Ibid.*

[189] *Ibid.*

[190] http://www.compcom.co.za/wp-content/uploads/2019/08/Data-Services-Inquiry-Report-..2.pdf (accessed 16 May 2020) Competition Commission of South Africa "Data services market Preliminary inquiry report" 2019 10.

[191] http://www.compcom.co.za/wp-content/uploads/2019/12/DSMI-Non-Confidential-Report-002.pdf Competition Commission of South Africa "Data services market inquiry Final report" 2019 9.

[192] The Competition Act s7.

dominance would be considered problematic as also pointed out above. Competition law in South Africa strives to regulate such abuse through applying section 8 of the Competition Act which prohibits abuse by a dominant firm that engages in of excessive pricing. Excessive pricing was defined in the Competition Act as a price "that bears no reasonable relation to the economic value of that good or service."[193] However, this definition has now been deleted by the Competition Amendment Act 18 of 2018. Before it was deleted, the competition authorities had to consider firstly the economic value of a certain good or service, secondly, whether the price charged for such good or service was considered reasonable in relation to the economic value as determined and thirdly, whether the price of the good or service is higher than the reasonable economic value of the good or service.[194] These considerations were confirmed in the *Mittal Steel/Harmony Gold/Durban Roodepoort Deep* case.[195] In addition to these aforementioned considerations, the court considered a fourth factor: whether the excessive pricing was to the detriment of the consumers. These factors were considered when evaluating the mobile data prices set by the mobile telephone monopolists MTN and Vodacom, and it is found that excessive pricing was, in fact, the issue.[196]

The resilience of the dominant positions of these two monopolists is due to the lack of appropriate regulation in the past, such as the inability of the Telecommunications Act to regulate their prices properly, and the Monopolists influence of pricing in the telecommunications sector, as well as their profitability which allows them considerable advantage to roll out new technologies and services which their "competitors" cannot do due to lack of size and market power.[197] The gap experienced in the regulatory abilities of the Commission insofar as pricing in the telecommunications sector is concerned, must be closed, or at least lessened to ensure that the consumer is getting the best

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[193] The Competition Act s1.
[194] Neuhoff *et al* 147.
[195] Mittal Steel/Harmony Gold/Durban Roodepoort Deep Case 70/CAC/Apr07.
[196] Competition Commission of South Africa "Data services market inquiry Final report" 2019 8.
[197] Competition Commission of South Africa "Data services market inquiry Final report" 2019 9.

quality service at the best prices and therefore, fulfil the aim of the Competition Act as well as the Telecommunications Act.

The fixed-line industry too has a monopolist, namely, Telkom. It remains a state-owned company (hereinafter referred to as SOC) that provides citizens with the necessary service of local and long distances telecommunications, payphone services as well as international telecommunication including internet connectivity services and cellular devices.[198] Telkom is categorised as a semi-privatised company with 39% state ownership. This SOC has been trading on the Johannesburg Stock Exchange since 2003.[199] This conglomerate has also had several encounters with the Commission. In one of the first cases, namely *Competition Commission v Telkom*,[200] the Tribunal found Telkom guilty of contravening section 8(b) and section 8(d)(i) which lead to Telkom receiving administrative penalties of R 449 000 000.00 (Four hundred and forty-nine million Rands).[201] Telkom is constantly monitored by the Commission to ensure compliance and adherence with the aims and goals thereof.[202]

The Competition Commission is not unwilling to regulate state-owned entities in relation to competition law compliance. However one has to consider whether the Commission only regulates the entities who engage in severe anti-competitive behaviour and whether they rely on the notion that state-owned enterprises act in the public's interest, rather than creating or levelling an environment for more competition.[203] Maybe the possibility of privatisation of mobile telephone connectivity would cause a fairer and more competitive environment for new entrants, as was seen internationally, where liberalisation and less regulatory statutes were needed to allow competition laws to deliver its genuine desired effects, as discussed in more detail in Chapter Three.

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[198] Fourie (2003) at 207.
[199] Telkom SA Limited Prospectus dated 4 March 2003.
[200] Competition Commission v Telkom 11/CR/Feb04.
[201] *Ibid.*
[202] Competition Commission v Telkom 11/CR/Feb04.
[203] Aproskie J et al, "State-owned Enterprises and Competition: Exception to the rule? (2014) at 12. See also Fourie DJ, (2003) at 205-206.

One of the significant limitations facing competition law could be the interference of the State in state-owned enterprises or the legislation regulating them, as these enterprises are seemingly the only successful businesses within the telecommunications sector. The concept of "state-owned" entities are defined in two pieces of legislation, namely the Public Finance Management Act[204] and the Companies Act[205] which the Public Finance Management Act section 1 defines "state-owned entities" as follows:

> "...the equivalent of a state-owned-enterprise, which it refers to as "national government business enterprise" to be "an entity which: (a) is a juristic person under the ownership control of the national executive; (b) has been assigned financial and operational authority to carry on business activity; (c) as its principal business, provides goods or services as per ordinary business principles; (d) is financed fully or substantially from sources other than – (i) the National Revenue Fund; or (ii) by way of a tax, levy or other statutory money."

The limitations facing competition law within the telecommunications sector is not so inhibiting that our telecommunications sector is ill-fated. Further development of the Competition Act, to be inclusive of state-owned enterprises and specifically conferring powers and limitations on state-owned monopolies, could possibly be the solution to the lack of competition in the telecommunications industry that South Africa seeks to address.[206]

[204] The Public Finance Management Act 1 of 1999 s1.
[205] The Companies Act 71 of 2008 s1.
[206] *Ibid at* 47.

## CHAPTER 3: HOW ARE DOMINANT MONOPOLISTS WITHIN INTERNATIONAL TELECOMMUNICATIONS SECTORS REGULATED?

### 3.1 How foreign law and international law are applicable in relation to South African's domestic law

The South African Constitution[207] is the cornerstone of our democracy. All South African law, whether common law, legislation or case law, must align with the Constitution.[208] Section 2 of the Constitution states that "this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[209] This Chapter considers foreign law and how it differs from international law. Thereafter, the success of foreign countries in regulating dominant conglomerates within the telecommunication services sector using their regulations with competition laws, is interrogated, and further, whether their solutions can be applied in the South African context.

#### 3.1.1 International law versus foreign law

Notably section 39 of the Constitution provides the following with regards to international law and foreign law:

> When interpreting the Bill of Rights, a court, tribunal or forum *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; *(b)* <u>must</u> consider international law, and *(c)* <u>may</u> consider foreign law.[210]

This section not only promotes the use of foreign and international law but insists that international law *must* be considered in every analysis when interpreting and developing our domestic laws, and provides that foreign law *may* be considered. It is, therefore,

[207] The Constitution of the Republic of South Africa,1996 s2 (hereinafter "The Constitution").
[208] The Constitution s2 states - "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
[209] *Ibid*.
[210] *Ibid* s39.

crucial to understand the differences between foreign law and international law and how they are applicable in South Africa. In particular, foreign law can be thought of as follows: "one nation's domestic law is another nation's foreign law".[211] An example of foreign law, in the context of South Africa, are Canadian laws. International law, on the other hand, is the "legal system governing the relationships between international organisations and participants in international relations."[212] In this dissertation, I specifically analyse foreign laws.

## 3.2 Canadian competition laws and regulations in respect of their telecommunications sector

Canada's telecommunications services are subject to two bodies exercising jurisdiction over the telecommunications industry namely, the Canadian Radio-television and Telecommunications Commission (the "CRTC") and the Competition Bureau (the "Bureau").[213] These two bodies are regulated and governed by two federal statutes[214] namely, the Canadian Radio-television and Telecommunications Commission Act[215] ("the CRTC Act") – which established the CRTC - and the Telecommunications Act,[216] which sets out the substantive regulatory framework, which regulates the telecommunications sector.[217] The Competition Bureau is responsible for the administration and enforcement of the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act.[218]

[211] University of Michigan Law Library "Foreign vs Comparative vs International" https://libguides.law.umich.edu/fcil (accessed 8 April 2020).

[212] *Ibid*.

[213] Bertrand "Competition in Canadian Telecommunications: Building on Success and Moving Forward" 2001 *Media Law and Policy* 1.

[214] Campbell & Opashinev "Untangling the web of the Canadian Telecommunications and competition regimes" 2002 *International business lawyer* 305.

[215] Canadian Radio-television and Telecommunications Commission Act RSC 1985, c22 ("CRTC Act").

[216] The Telecommunications Act SC 1995, c 38 ("Telecommunications Act").

[217] Campbell & Opashinev 2002 *International business lawyer* 305.

[218] The Competition Act (R.S.C., 1985, c. C-34) s7(1) - 7 (1) The Governor in Council may appoint an officer to be known as the Commissioner of Competition, who shall be responsible for: (a) the administration and enforcement of this Act; and (b) the administration and enforcement of the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*.

The CRTC allows for full-time commissioners to be appointed and to implement the powers conferred onto them by the CRTC Act[219], thereby respecting particular telecommunications carriers.[220] The Telecommunications Act gives the CRTC broad powers to regulate the players in the industry, in conformity with several objectives stated within the Telecommunications Act.[221]

There are many differing objectives within the Telecommunications Act which raise some potential conflicting issues.[222] One of the most prevalent issues is the competition sections versus the regulation sections of the Telecommunications Act, furthermore, there are two issues regarding equal access to telecommunications in urban and in rural areas, accessibility and affordability.[223] Canada faces the issue, that if they are to provide telecommunication services of high quality to both urban and rural areas, the telecommunications service would not be affordable, due to the lack of infrastructure available in the rural areas currently.[224] The accessible, yet unaffordable, telecommunication services lies in contradiction with the objectives stated in section 7 of the Telecommunications Act.[225]

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219 CRTC Act s12(2) states "The full-time members of the Commission and the Chairperson shall exercise the powers and perform the duties vested in the Commission and the Chairperson, respectively, by the Telecommunications Act or any special Act, as defined in subsection 2(1) of that Act, or by An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act."

220 Telecommunications Act s1 - Canadian carriers are defined as "means a telecommunications common carrier that is subject to the legislative authority of Parliament; (*entreprise canadienne*). Also see s1, Telecommunications common carrier which is defined as; "means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation; (*entreprise de télécommunication*)

221 Campbell & Opashinev 2002 *International business lawyer* 305.

222 Campbell & Opashinev 2002 *International business lawyer* 306.

223 The Telecommunications Act s7(b).

224 Campbell & Opashinev 2002 *International business lawyer* 306.

225 The Telecommunications Act s7 objectives are: "it is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions; (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; (d) to promote the ownership and control of Canadian

Canada's Competition Act[226] has four main objectives, namely, to maintain and encourage competition which will promote the efficiency and adaptability of their economy; to increase opportunities for their participation in world markets, while recognising foreign competition in Canada; ensuring that the small and medium-sized enterprises will have equal opportunity to participate in the Canadian economy and to provide consumers with competitive prices and product choices.[227] These objectives mirror those in the South African Competition Act.[228]The similarity in objectives between Canada's Act[229] and South Africa's Competition Act,[230] enables us to analyse their strategies closely as it would be easy to integrate them into our legislation, where applicable.

The CRTC has not entirely incorporated the competition laws into the telecommunications sector and is rather exercising a gradual amalgamation process to balance its competition law objectives with other regulatory considerations.[231] The CRTC has far-reaching powers[232] to regulate the telecommunications sector as was conferred on it by the CRTC Act, which includes but are not limited to, powers of forbearance from regulatory activity.[233] Forbearance is defined as "the action of refraining from exercising

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carriers by Canadians; (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada; (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services; (h) to respond to the economic and social requirements of users of telecommunications services; and (i) to contribute to the protection of the privacy of persons.

[226] The Competition Act RSC 1985 cC 31 ("Competition Act").

[227] The Competition Act s1.1.

[228] Competition Act s2 "specifically, section 2(a) which states "to promote the efficiency, adaptability and development of the economy", section 2(b) "to provide consumers with competitive prices and product choices", section 2(d) stating "to expand opportunities for South African participation in world markets and recognize the foreign competition in the republic, section 2(e) "to ensure that the small and medium-sized enterprises have an equitable opportunity to participate in the economy."

[229] Competition Act RSC 1985 cC 31

[230] The Competition Act 1998 s2

[231] Campbell & Opashinev 2002 *International business lawyer* 305 – 309 306.

[232] The Telecommunications Act s47 states: "the Commission shall exercise its powers and perform its duties under this Act and any special Act (**a)** with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27.

[233] Ibid.

a legal right."[234] Forbearance is therefore seen as the ability of the regulator to abstain from acting, from using and implementing their powers. The Telecommunications Act section 34.2 reads as follows:

> "Where the Commission finds as a question of the fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall determine to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 concerning the service or class of services."[235]

The above demonstrates that the Canadian Telecommunications Act has integrated processes for competition law to facilitate telecommunication carriers.[236] It provides a mechanism for the CRTC to exclude itself from exercising its' powers of forbearance, if competition law is best suited to regulate the complaint in the telecommunications sector, if it is for the interests of the consumers.[237] The forbearance power and ability conferred onto the commissioner of the CRTC, provides a solution in the sense that if Canadian carrier's offer telecommunication services which are or will be subject to sufficient competition to protect the interests of users, the commissioner of the CRTC may refrain from exercising its powers.[238] The CRTC can then take a step back from implementing regulations and allow for competition law to create more amenable solutions for all involved by exercising forbearance as stated in section 34.2 of the Telecommunications Act.[239]

The CRTC has extensive powers[240] to regulate players in the industry in conformity with the objectives listed above in comparison to the Bureau, which has very narrow

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234 The law dictionary https://dictionary.law.com/Default.aspx?selected=760 (accessed 8 April 2020)
235 The Telecommunications Act s34.2
236 *Ibid.*
237 Campbell & Opashinev 2002 *International business lawyer* 306.
238 Janisch "From monopoly towards competition in Telecommunications: what role for competition law" 1994 *Canadian Business Law Journal* remember to add start and end page first 241.
239 Campbell & Opashinev 2002 *International business lawyer* 306.
240 Telecommunications Act s8 – "The Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives." Also see s47 – "The Commission shall exercise its powers and perform its duties under this Act and any special Act **(a)** with a view to implementing the Canadian telecommunications policy objectives and ensuring that

regulating powers.[241] The Bureau's jurisdiction insofar as their regulatory powers are concerned, overlap with the CRTC, insofar with their broad powers, over the telecommunications sector in general and ensuring competition in this sector is maintained, and the narrow powers for the Competition Bureau, in ensuring the Competition Act is adhered to and that competition is maintained in the sector. Thereby creating a complex scenario for the telecommunication industry participants during this evolution of deregulation.[242] Deregulation entails heading away from the general regulations created by the state, in telecommunication services and heading towards a liberalized private telecommunications sector run by independent agents and competition law.[243]

The two regulatory bodies have decided to consolidate their jurisdictional powers and exclusivity of jurisdiction in certain circumstances. In a joint statement ("the interface agreement"), each agent outlined specifically what their exclusive jurisdiction entailed.[244] The CRTC stated that "they would forbear from regulating a market which is workably competitive."[245] The Bureau stated that to determine whether a market possesses this quality of "workable competition", they would need to look at traditional indicators such as market power, market share, barriers to entry and the implementation of switching prices either higher or lower and analysing the effect thereof on the customer.[246] These indicators above are very applicable to South African law since we use the same indicators to determine competition in a market.[33] and would, therefore, be able to

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Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and **(b)** in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.

[241] Competition Act s7(1) – "The Governor in Council may appoint an officer to be known as the Commissioner of Competition, who shall be responsible for **(a)** the administration and enforcement of this Act; and **(b)** the administration and enforcement of the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*."

[242] *Ibid.*

[243] Campbell & Opashinev 2002 *International business lawyer* 306.

[244] *http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01544e.html*. The Interface Agreement sets out a protocol for dividing regulatory responsibility between the Bureau and the CRTC in four situations: (i) where the CRTC has forborne from regulation; (ii) where the CRTC and the Bureau exercise concurrent authority; (iii) where the CRTC is exercising exclusive authority; and (iv) where the Bureau is exercising exclusive authority.

[245] *http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01544e.html*.

[246] *Ibid.*

implement the traditional Canadian indicators to determine workable competition within our industries and we can thus make use of them to determine dominance or unfavourable competitive behaviour within the telecommunications sector. The joint statement also states that where the CRTC abstains from using their powers, the Bureau will substitute to fill the gap.[247] In terms of the interface agreement, the CRTC is able to reassess whether they will continue with their option to forbear with their particular jurisdiction they may exercise, or they may elect to take back their ability to regulate that specific market, at any time during the process of regulation.[248] However, the Commission's powers of jurisdiction in regulating into certain areas of the telecommunications sector, are shared between themselves and the Bureau, specifically with regards to price-fixing as the Bureau has exclusive jurisdiction in this regard. [249] The Bureau's exclusive jurisdiction in for example price-fixing, allows for more significant expertise and concentration in those specified areas, creating agents with exclusive specified jurisdiction with the ability to make definitive decisions, leaving less room for error.[250]

The most significant solution that Canadian law has implemented in relation to addressing issues relating to competition in its telecommunications industry, is the progressive deregulation of the telecommunications sector by the implementation of the forbearance provision in their Telecommunications Act. This deregulation is specifically found in the CRTC Act's enforcement provisions relating to penalty procedures and the allowance for the forbearance of the CRTC's conferred regulatory powers.[251] Campbell and Opashinev observe that the ability by the Commission, to refrain from exercising regulatory powers has changed the Canadian telecommunications landscape from a highly-regulated collection of monopoly utilities to a dynamic telecommunications marketplace, which seems to be achieving many of the policy objectives stated within

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[247] http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct01544e.html.
[248] *Ibid.*
[249] Janisch "From monopoly towards competition in Telecommunications: what role for competition law" 1994 *Canadian Business Law Journal* 252.
[250] Campbell & Opashinev 2002 *International business lawyer* 308.
[251] *Ibid.*

their Telecommunications Act as well as their Competition Act.[252] It is submitted that this type of progressive deregulation of state intervention in the state-owned monopolies and the liberalisation of the telecommunications sector is a strategy which we could to consider to determine its potential effectiveness in South Africa's telecom sector.

Canada implemented the aforementioned deregulation and the liberalisation because they found that regulators would prefer to mimic the government rather than to mimic the markets influencing these highly-regulated industries.[253] The liberalisation and structural rationalisation are accomplished in part, by private institutions' initiative and in part, by significant legal developments, which took place in the courts, in the regulatory agencies and the legislation.[254]

There are three main characteristics of competition in Canada's telecommunications sector which resemble a similar nature to South Africa's telecommunications sector.[255] Firstly, interconnection and the need to interconnect with existing local networks. Secondly, equity concerns that are as a result of the monopolies and which have now transposed into entitlement of access to universal service at affordable rates.[256] Lastly, the concern for the abuse of dominance has led to the asymmetrical regulation designed to prevent those seen as dominant carriers from continuing as such.[257] The biggest concern, as it currently stands for the Canadian telecommunications sector, relating to long-distance phone calls, is the distributional concerns from urban to rural without high costs and, therefore, unaffordable service.[258] This concern is aggravated by the CRTC's unwillingness to rebalance rates, thereby allowing local calls to rise to near cost, and long-distance calls will be brought down to near cost.[259] Janisch remarks that rebalancing rates would be essential if the benefits of competition are the primary goal.

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[252] *Ibid.*
[253] Janisch 1994 *Canadian business law journal* remember start and end page for your first ref 253.
[254] Janisch 1994 *Canadian business law journal* 244.
[255] *Ibid.*
[256] Janisch 1994 *Canadian business law journal* 245.
[257] *Ibid.*
[258] *Ibid.*
[259] *Ibid.*

Canada created the need for subsidies, known as the "contribution", to be paid out by the private individual, rather than from the government.[260] The new entrants into the telecommunications sector must "pick up the share" of the burden with the steadily increasing subsidy, and make the required contribution.[261] The payment from private individuals allows competition to grow amongst the private sector without the influence of the state.[262] According to Campbell and Opashinev the solution to Canadian telecommunications would be to include "rate rebalancing", allowing the public to receive excellent quality service at affordable rates by implementing subsidies that the private sector contribute to and allowing for an active role for the competition authorities in the event of forbearance.[263]

### 3.3 New-Zealand's laws and the regulation of their Telecommunications Sector

New Zealand took a much more aggressive approach in regulating its telecommunications industry. It is the only country that moved right from a government focused monopoly to private focused competition, without employing an industry-specific regulatory agent[264] - as Canada did with allowing the Bureau and the Commissioner powers to regulate competition in the telecommunications sector. New-Zealand allowed for their telecommunications sector to be controlled by the private sector and did not allow the state to interfere. There have been four issues pertaining to the New-Zealand telecommunications sector prior to its reform that require emphasis. Firstly, there was no immediate change in the system from a monopoly dominated industry to an industry with competition law regulating the dominant firms.[265] Secondly, there is no evidence that New-Zealand has achieved a perfect state of genuine competition within the telecommunications industry.[266] Thirdly, there does not appear to be any effective

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[260] Janisch 1994 *Canadian business law journal* 249.
[261] Janisch 1994 *Canadian business law journal* 249.
[262] Janisch 1994 *Canadian business law journal* 249.
[263] Campbell & Opashinev 2002 *International business lawyer 9*
[264] Janisch 1994 *Canadian business law journal* 266.
[265] *Ibid.*
[266] *Ibid.*

measures in place that prevent previously dominant monopolies from abusing their position within the market.[267] Lastly, they have placed the general courts in charge of regulating the telecommunications market, while being poorly equipped with the knowledge and the understanding of the market, to effectively do so.[268]

The one concern that New-Zealand faced with implementing competition law in relation to their monopolies in the telecommunications sector was the fact that this specific sector required interconnection between its competitors with a former monopolist in the industry.[269] Interconnection "is the physical and logical linking of two or more electronic communication networks, electronic communication services, broadcasting service, or any combination thereof."[270] The problem in this regard, as is faced in South Africa[35], is where one monopolist controls the facilities to the electronic communication services, thereby forcing the smaller companies to link their services with this one monopolists' facilities in order to provide their specific service. New-Zealand adopted a reliance on the commitment by monopolists to charge a "fair and reasonable" interconnection tariff. This tariff was charged continuously and was therefore, monitored closely and consistently.[271] The Minister of Commerce indicated that since the government was not placing a specific governmental body or agency with conferred powers to monitor these tariffs, they had to place reliance on the negotiations between the Telecom Corporation of New-Zealand Ltd[272] and the smaller firms seeking to supply telecommunication goods and services.[273] Hawthorne and Gryzbowski however remark that the form of reliance would be contested quite heavily in South Africa, due to allegations of corruption, making

[267] *Ibid.*
[268] *Ibid.*
[269] Janisch 1994 *Canadian business law journal* 267
[270] The ECA s1.
[271] The Telecommunications (disclosure) regulations 1990 2000-au350 no58.
[272] https://www.referenceforbusiness.com/history2/85/Telecom-Corporation-of-New-Zealand-Limited.html#ixzz6NTKYdmx8 (accessed 25 May 2020) Telecom PTY Ltd "is that country's dominant telecommunications company, providing fixed line and mobile telephony, Internet, data network, and wireless network services. The company also publishes telephone directories and operates extra, the country's leading Internet access provider. Telecom New Zealand is also that country's largest company, with sales of more than NZ$5.53 billion, and the country's dominant publicly listed company, worth approximately one-third of the entire share value of the New Zealand stock exchange."
[273] Ministry of commerce, 'Telecommunications Information Leaflet' No. 1 (1992) 4.

fair and reasonable tariffs an impossible objective to achieve, without proper regulation and intervention.[274]

New-Zealand places strict requirements of transparency and accountability[275] on Telecom Ltd whereby they sanction the publication of separate audited financial statements for each of its regional offices, as well as the publication of the prices, terms and conditions for the supply of certain telecommunication goods and services.[276] It is submitted that the telecommunications sector in South Africa would be able to use these strict measures to the consumers benefit, as it would allow the consumers and competitors to see where the consumer's money is being spent and if the service being paid for is the actual service being provided. However, an even more extensive system would need to be put in place to ensure that no corruption takes place within South Africa. The Ministry of Commerce stated that these requirements are put in place to ensure and facilitate effective competition in the telecommunication services.[277] The Ministry of Commerce further went on to state that, "competitive markets generate information which ultimately enables the public to choose suppliers and therefore, create the possibility of new entrants."[278] In markets where competition is limited, or even non-existent, there are fewer checks on the conduct of the dominant firms, customers, competitors and new entrants have less information to plan their businesses properly.[279] The Ministry of Commerce finds that information disclosure requirements can correct this deficiency and therefore be an integral component for the government's competition policy.[280] These disclosure measures allow for price checks to be conducted to monitor the monopolist Telecom Ltd and ensure they are not unreasonably profiting or engaging in predatory or unfair price discrimination.[281] However, in the Commerce Commission's

[274] Hawthrone, & Gryzbowski, "*Benefits of regulation vs. Competition where inequality is High: the case of Mobile Telephony in South Africa"* (2019) Cesifo Working Paper no. 7703 1 – 39 4
[275] The Telecommunications (disclosure) regulations 1990 2000-au350 no58.
[276] Campbell & Opashinev 2002 *International business lawyer* 268.
[277] *Ibid.*
[278] Campbell & Opashinev 2002 *International business lawyer* 268.
[279] Campbell & Opashinev 2002 *International business lawyer* 268
[280] Voon & Mitchell "Achieving a Common Market for Telecommunication Services in Australia and New Zealand" *Australian Yearbook of International law* 153.
[281] *Ibid.*

Telecommunications Industry Inquiry Report in 1993,[282] the Ministry of Commerce stated that this sector is unregulated, did not assist in removing obstacles in achieving competition, and therefore, is still creating limited, if not zero competition, which in the Commission's view, leaves a gap that is filled instead with self-regulation.[283] The unregulated sector allows for the monopolists to make the rules which the new entrants are regulated by, which clearly leaves room for much abuse. Even with these observations made above, New-Zealand is reluctant to move to an industry-specific regulator, such as in the case of Canada, or even South Africa, which begs the question: how does New-Zealand have fair and genuine competition policies in their telecommunications sector that are effective? The simple answer is based on the pure observation that they possess no such competition.

A further concern is that the general courts have been placed in charge of monitoring and making decisions regarding complaints of for example, excessive pricing and abuse of dominance, in the telecommunications sector, a highly technical industry, which they do not have the skills for, as the general court judges are not specialists in this highly technical industry. The judges merely have a brief understanding of the competition law and the telecommunication regulations but competition law and telecommunications are very intricate fields of law which require a dedicated independent tribunal to regulate it.[284] In the case *Telecom Corporation of New-Zealand v Commerce Commission*[285] one can appreciate that a bench of technical experts was needed. The facts were that Telecom (Pty) Ltd applied for additional frequency, in an industry which Telecom were already the monopolists. The additional frequency would give them the market at their disposal, allowing them to control the competition and thus, preventing any competitors without a connection with Telecom, from entering the sector.[286] Due to the lack of expertise of judges in this technical field, it allowed for second-guessing higher up the judicial

[282] Telecommunications Industry Inquiry Report (1993) 7.
[283] *Ibid.*
[284] Telecommunications Industry Inquiry Report (1993) 7
[285] Telecom Corporation of New-Zealand v Commerce Commission [1992] 3 N.Z. L.R. 429.
[286] Commerce Commission, Decision (1990) 254.

hierarchy hence diluting the decision-making process.[287] New-Zealand is very much against governmental regulatory assistance within this sector meaning that they do not want any government department to assist in regulating the telecommunications sector and they appeared unwilling to change.[288]

New-Zealand's regulatory agent of competition law in the telecommunications sector is referred to as the Commerce Commission and it has two functions: firstly "to regulate certain fixed-line and mobile services by setting the price and access terms for that service; secondly to monitor and report on competition in telecommunication markets. Both of these functions are focused on promoting competition and transparency in telecommunication markets for the benefit of consumers."[289] The Commission came into effect in 2001 in terms of section 9(1) when the new Telecommunications Act[290] allowed for regulations and prices to be set by an agent outside of the market, which created and allowed new entrants into the market of telecommunications. By observation, the regulatory body put in place reformed regulations for the telecommunications sector, allowing for competition in this sector, which will bring about better prices and quality of service for the customer, all due to the that fact that dominant monopolist now has less market power to abuse the market by allowing the Commission to regulate it actions.

The approach to regulation of competition in the New-Zealand Telecommunications sector however changed once the Telecommunications Act was amended in 2018 to confer industry-specific regulatory powers on the Commission.[291] These powers were

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[287] Commerce Commission, Decision (1990) 255.
[288] Commerce Commission, Decision (1990) 274.
[289] Commerce Commission, Decision (1990) 274.
[290] The telecommunications Act s9(1) states "9Appointment of Telecommunications Commissioner
(1) There must be a Telecommunications Commissioner.
(2) The Telecommunications Commissioner is a member of the Commission as provided in section 9(3) of the Commerce Act 1986.
[291]Telecommunications Act 2001 s9A states: "(1) In addition to the other functions conferred on the Commission by this Act, the Commission—(a)must monitor competition in telecommunications markets and the performance and development of telecommunications markets; and (b)may conduct inquiries, reviews, and studies (including international benchmarking) into any matter relating to the telecommunications industry or the long-term benefit of end-users of telecommunications services within New Zealand; and (c)must monitor compliance with the Commission 111 contact code; and (d) must make available reports, summaries, and information about the things

reflected in section 9A of the Telecommunications Act[292] which has since, been replaced by section 25 of the Telecommunications (New Regulatory Framework) Amendment Act 2018. Nonetheless, it still provides that "in addition to the other functions conferred on the Commission by this Act, the Commission (a) must monitor competition in telecommunications markets and the performance and development of telecommunications markets." The amendment in the Telecommunications Act shows a complete change in direction for competition in the New-Zealand telecommunications industry which now allows for regulation by a specified agent, rather than allowing for the monopolist conglomerate to decide the rules.

## 3.4 The European Union's Regulation of their Telecommunications Sector

Telecommunications markets in the European Union, traditionally characterised by a chain of national public monopolies, were opened up in accordance with several legislative packages, starting in 1988 and concluding in 1998 with full liberalisation.[293] The current regulatory framework namely, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)(5), was assented to in 2002 and amended in 2009, and since then additions have subsequently been made.[294]

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referred to in paragraphs (a) to (c); and (e) must monitor retail service quality in relation to telecommunications services; and (f) must make available reports, summaries, and information about retail service quality in a way that informs consumer choice."

[292] Telecommunications Act 2001 s9A.

[293] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed 8 April 2020).

[294] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html(accessed 8 April 2020).

In initiating this current regulatory framework, the Commission presented the regulations[295] for electronic communication services to the European Parliament, the Council of the European Union, and the Economic and Social Committee.[296] They reviewed the telecommunications regulations that were in place at the time to determine what needed to change within the ever-evolving sector of telecommunications. They also presented several new policy proposals for a new regulatory framework for the electronic communications infrastructure.[297] The biggest realisation during this presentation was "the convergence of the telecommunications, media and information technology sectors meant that a single regulatory framework should cover all transmission networks and services."[298]

The Framework Directive[299] mentioned above set out considerations for use when analysing competition in a market. The Commission stated that the analysis must include a study into whether the market is prospectively competitive, in other words, does it have the ability to become competitive, and then whether any lack in competition in that market is feasible.[300] The Commission further stated that competition policies and regulatory bodies would bring about five positive outcomes: Firstly, low prices for all. It indicated that the easiest way for a company to achieve a high market share is to propose a better price.[301] In a competitive market, prices are pushed down, allowing the consumer to have

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[295] Directive 2002/21/EC of the European parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

[296] European Union website https://europa.eu/european-union/about-eu/institutions-bodies/european-economic-socialcommittee_en#:~:text=The%20European%20Economic%20and%20Social,organisations%20and%20other%20interest%20groups. (accessed 9 June 2020) Economic and Social Committee "The European Economic and Social Committee (EESC) is an European Union (EU) advisory body comprising representatives of workers' and employers' organisation's and other interest groups. It issues opinions on EU issues to the European Commission, the Council of the EU and the European Parliament, thus acting as a bridge between the EU's decision-making institutions and EU citizens.

[297] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 (O.J. L 108, 24.4.2002, p. 33).

[298] Telecommunications Act s5.

[299] Directive 2002/21/EC of the European parliament and of the council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)

[300] Telecommunications Act s27.

[301] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed on 8 April 2020).

more choice, which allows for the telecommunications service to be affordable.[302] Secondly, if prices are lower, then businesses are encouraged to improve the quality of their services to distinguish them from the competition, and this boosts the economy in general.[303] Thirdly, with lower prices and better quality the Commission indicated that businesses will try and provide a product which can be differentiated from others and will, therefore, allow for more choices for the consumer, and thus, providing for a choice in respect of quality and affordability.[304]The fourth reason is that the more the products differ, the more businesses would have to become innovative and therefore allowing for businesses to stretch their product concepts, creating an economy with innovative new products continually flooding the market.[305] Lastly, the European companies become more significant international competitors who are more influential outside the European Union and can draw in more business for their companies and the economies concerned as a whole.[306] The above five positive outcomes for competition policies and regulatory bodies are globally accepted and in some way, adapted nation-wide to ensure competition implements the strategies within the market sectors.[307]

European Competition law incorporates very similar factors, as South Africa, which they use in determining whether a specific market is being dominated by a monopolist and whether this dominance is abusive, similar to South Africa. Firstly, they too define the relevant market; thereafter, they assess whether the company has market shares, and if the Commission finds that the company has more than 40% of the market shares they are considered to be dominant.[308] The Commission also evaluates the ease of entry into

[302] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed on 8 April 2020).
[303] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed on 8 April 2020).
[304] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed on 9 April 2020).
[305] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed on 9 April 2020).
[306] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed on 25 May 2020).
[307] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed on 25 May 2020).
[308] Commission Regulation (EC) No 773/2004 of 7 April 2004.

the market by new entrants. The Commission looks at what sort of barriers there are, the existence of buyer power as well as the size of the company, its resources and the several levels of the supply chain, within the vertical relationship.[309] Once dominance is established, the Commission looks at a few other factors to determine whether abuse exists. They assess whether there is predatory pricing, collusive tendering, and refusal to allow competition to use a specific essential facility to provide their product.[310]

The regulatory body that is appointed has the level of expertise required to assess competition law within the highly technical field of telecommunications. However, one would have to assess each country within the European Union to determine whether this regulatory body is sufficient or whether agents should be created within each country to facilitate a smoother-running system. However, for this paper I simply analyse the general application of competition law in the telecommunication sector on the entire Continent. This analysis benefits us in assessing the regulations controlling the dominant monopolist conglomerates as a whole within the telecommunication service industry.

[309] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed 8 April 2020).
[310] European Commission "Telecommunications" https://ec.europa.eu/competition/sectors/telecommunications/overview_en.html (accessed 8 April 2020).

# CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

## 4.1 Introduction

It is clear from the above analysis that having a regulatory body with the necessary expertise of the technical field of telecommunication services and competition law, is critical to the success of applying and/or regulating the competition aspects in the telecommunications sector. If competition law is not applied correctly, or not at all, the monopolists abuse their dominance in the sector, notably if the sector is not liberalised at first. A rebalancing of rates, allowing for new entrants by regulating the already positioned conglomerates, liberalising the companies, privatisation of the New-Zealand Telecommunications company Telecom Pty Ltd[272], as well as forbearance from the general regulatory bodies and deregulating, and allowing competition law to "regulate", provides a country with many competitors, lower prices and a booming economy.

The implementation of competition law for purposes of regulating the competition aspects of the telecommunications industry is a crucial process to ensure that the dominant monopolists in the telecommunications industry do not abuse their position within this very technical and high entry barrier industry. The Competition Act determines which firms are dominant.[311] Once a firm is established as being dominant it is analysed to determine whether its dominance is being abused.[312] Competition law has been given very narrow provisions to regulate competition in the telecommunications sector, as is confirmed in section 53 of the Telecommunications Act. The Competition Commission must share its regulatory powers with ICASA which is the authority[97] within the telecommunications sector. Nonetheless, the Competition Commission ultimately has the overall authority to make final decisions regarding competition in the telecommunications sector.

[311] Competition Act s7
[312] Competition Act s8

In comparing foreign law pertaining to competition in the telecommunications industry with the position in South Africa, one cannot help but notice a few distinct similarities between Canadian law and South African telecommunications law. South Africa has two regulators that regulate aspects of the telecommunications sector as stated above. These two regulators share jurisdiction and an agreement[101] above had to be entered into to determine who has jurisdiction over what issue or area within the telecommunications industry. In Canada, the same scenario is experienced, as they have the CRTC and the Competition Bureau exercising concurrent jurisdiction over the telecommunications sector. They too, developed the interface agreement to determine the extent of their jurisdiction, so as to not interfere with one another's jurisdiction.[244] above One major difference however between the two countries is the forbearance provision in the Canadian CRTC Act and Telecommunications Act. This provision allows for the Commissioner to take a step back and prevents the Commissioner from over regulating a matter, wherein the Commissioner can see the matter is ensuring competition remains within the telecommunications sector and that it is in the best interests of the public. One of the most significant solutions which Canada has implemented was the deregulation of their telecommunications sector by implementing the forbearance law.

If South Africa were to begin deregulating the telecommunications industry, thus causing ICASA to have the ability to forbear from exercising their powers of regulation, it may allow for the competition commission to exercise ex-ante regulation[100] above and ensure that the anti-competitive behavior does not take place before it is too late. Another key solution suggested by Janisch was the rebalancing of rates in the mobile network sector to allow for the implementation of subsidies, which the private sector would contribute to pay, however, this ultimately will allow the privately owned business competitors to have a stronger influence on the prices set and the new entrants in the telecommunications market.[264] above If we allow for South Africa's telephony network sector, whether mobile or fixed-line, to become controlled by the private sector and deregulated, the prohibited anti-competitive behavior of excessive prices that are currently exploiting consumers, would be avoided as the monopolists controlling the pricing, being state-owned entities, would have to lower their prices to become competitive.

It is therefore submitted that a possible combination of solutions from abroad should be implemented in the South African telecommunications industry to ensure that excessive prices are a thing of the past. The Canadian competition and telecommunications law and solutions, seems all too similar to South Africa's, however, successful it maybe. South Africa may want to consider implementing the strategies of Canadian law, that are not already part of the telecommunications sector, together with the reformed and drastic strategy as per the one New-Zealand took, as this will be the best solutions.

New-Zealand conferred industry-specific regulatory powers on a commissioner, to regulate the competition in the telecommunications sector.[290] above They steered away from allowing the private sector to control the telecommunications sector and placed an agent to ensure that the telecommunications sector remains competitive. By doing this they were able to do away with monopolists abusing dominance who were enforcing excessive prices and creating impossible barriers of entry for smaller companies. New Zealand, therefore, adopted the opposite strategy to that of Canada in the sense that it steers away from the principle that deregulation and forbearance is the correct approach and aims at employing more regulations within the telecommunications sector. What is different to the approach taken in Canada, is that there is now only one agent in New-Zealand, ensuring that competition within the telecommunications sector, is adhered to.[290] above This could possibly be the solution to implement within South Africa, namely to provide the Competition Commission only with the power to regulate competition and allow ICASA and the ECA to regulate the technical areas of the telecommunications sector.

South Africa has a problem with excessive prices being charged within its telecommunications industry due to dominant monopolists abusing their market and economic power. The monopolists in this specific industry are predominantly state-owned entities, specifically Telkom, who were provided with exclusivity tenders[37], allowing for the monopolist to be established and amass market power. If the tenders were now given to the smaller private individuals, and shares of the monopolists broken down to allow for the private sector to control ownership, competition would be more easily established as no high price barriers, no interconnection would be needed with the monopolist companies. Ultimately, the competition that it would invite, would allow for excessive pricing to be a thing of the past.

## 4.2 Final Remarks

Competition in South Africa is an essential factor for most industries and as such, all industries have incorporated the regulation thereof into their regulations. The Canadian experience and South African experience illustrates that having two different agencies regulating the same industry is neither an unusual, nor an essentially bad thing.[313]The current South African legislative provisions on concurrent jurisdiction are augmented by the agreement between the Competition Commission and ICASA to provide for a more formalised co-operative telecommunications regime.[314] If we were to combine the methods of New-Zealand and Canada, their approaches than allows the affected parties within South Africa, which are the companies within the telecommunications sector, to be entitled to challenge a decision by ICASA at the Competition Appeal court.[315] According to Ngwepe this will ensure consolidated decision making and promote consistency, avoid regulatory double jeopardy and will allow ICASA to defer to the Commission on the competition issues within matters.[316]Two regulations and two regulatory bodies seems to be an aid for any mistakes that will ensue, and it is clear that one main sector specific-industry regulator is clearly needed since the economy-wide communications rules are too wide to regulate the competition disputes within the

[313] Ngwepe 2003 *South African law journal* 257.
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*

communications sector.[317] Ngwepe however cautions that the introduction of concurrent jurisdiction comes with its own set of challenges.[318]Each regulator has its own mandate in terms of its specific constitutive Act: ICASA's mandate is derived from the ICASA Act, IBA Act and Telecommunications Act, whilst the Commission's Mandate is derived from the Competition Act.[319] The objectives of the constitutive Acts are to an extent, irreconcilable and their enforcement mechanisms are completely different.[320] As observed by Ngwepe the differences in the constitutive Acts leaves the regulatory framework open to inconsistencies, uncertainties and general confusion regarding the general development within the sector.[321] Competition law is the answer to the dominant monopolists who are enforcing excessive prices within the telecommunications sector, however, it needs ICASA to remain within its expertise of technical issues and not interfere with the decisions of the Competition Commission, especially when it relates to the competitiveness of pricing within the sector.

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