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17 June 2022

ATTENTION:
Chairperson: End User Subscriber Service Committee
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SUBMISSION

to

ICASA

by the

FREE MARKET FOUNDATION

Written representations on the

Draft End-user Subscriber Service Charter Regulations ("Draft")

Proposed Amendments

17 June 2022

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with

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Disclaimer:
Whilst being consistent with the FMF's values and principles, the views expressed in this Submission are, as with all FMF work, those of the writers and not necessarily those of members, funders, clients, consultants or staff.

CONTENTS

1. PRELIMINARY

We thank ICASA for this valuable opportunity make a Submission and the extension which we struggled to meet because our key specialist was hospitalised after a vicious dog attack from which she is far from recovered. We wish ICASA well as it grapples with the complexities of the proposals, and declare ourselves ready to elaborate and/or assist in any other way.

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This Submission has what might be considered two “introductions”. The first is brief and sets the context. The second, despite being “introductory”, is significantly longer and forms the bulk of this Submission.

This is necessitated by the enormous implications of the proposed regulations for our beloved country and all who live in it, especially the poor, those with ageing technology, and those in remote poorly serviced areas. Unlike almost every other policy consideration, this will impact every compatriot.

ICASA is tasked with addressing an extremely serious matter as we struggle to keep-up with the global technology revolution, economic growth rates far exceeding ours, socially and politically dangerous unemployed levels (world’s highest sustained rate), improving efficiency, innovation, investment, and reduced consumer prices with increases choices.

The longer second Introduction provides the pivotal theoretical and philosophical principles and theories that inform the findings and conclusions that follow it.

It is appreciated that not everyone might have the to read all of this Submission. Those constrained by workload can skip to where the new regulatory proposals are addressed directly. For elaboration, where needed, they can refer back to the relevant parts skipped.

We stress, however, that the analysis provides essential information for the adoption by ICASA of optimal policies generally, not just for present purposes. We suggest that the introductory analysis should be read and absorbed as far as possible with a view to forming the cornerstone of on-going ICASA analysis and policy.

NOTE that, to keep this Submission within reasonable limits, most footnotes, references, charts and related exhibits are omitted. They are all available in the accompanying SEIA on *Radio Spectrum Policy* and will be provided on request.

2. BRIEF INTRODUCTION

On 31 March ICASA gazetted an invitation to submit written comments on Draft End-user Subscriber Service Charter Regulations ("Draft") together with an Explanatory Memorandum "Memorandum").

The invitation stated that comments had to be submitted not later than 4pm 30 working days after the date of publication of the invitation. Allowing for public holidays, the deadline was 4pm Wednesday 18 May 2022. That date was extended to the same time today, 17 June 2022.

For ease of reference, and due to its length, most of this Submission is in bullet rather than continuous text format.

Summary and Synopsis

2.1. **Scope**. This Submission does not address every proposal contained in the Draft and every consideration in the Memorandum. It is confined to those considered most in need of ICASA reconsideration.

2.2. **TANSTAAFL**. This is the acronym for what might be the only true "law" of economics, that "*there ain't no such thing as a free lunch*".

2.2.1. It is close to impossible to bear in mind when proposing policies and "solutions" that *all* benefits have negative impacts ("costs"), and that policy-induced costs usually exceed benefits.

2.2.2. Cost-benefit impacts vary widely for everyone: consumers, suppliers, financiers, workers, policy-makers etc. No single "one-size-fits-all" formula can serve all legitimate interests. Everyone has unique circumstances needs and preferences. The best way to accommodate that reality tends to be increased rather than decreased (as proposed) diversity of products and services with maximal consumer freedom of choice.

2.2.3. Every benefit envisaged in the Draft and Memorandum would impose substantial costs, especially on low-income consumers ("the poor"). It follows that before proceeding all expected benefits and costs should be reliably and independently quantified, and should differentiate between hugely diverse providers and consumers.

2.2.4. "Costs" in economic analysis include all and long-term negatives, disadvantages and impacts far beyond monetary considerations.

2.3. **Complaints**. "Complaints" are cited in the Memorandum as the main reason for the Draft.

2.3.1. Whilst concerns and complaints could be legitimate, they could just as easily – perhaps more probably – be simplistic, misguided, misinformed or irrelevant.

2.3.2. That consumers "complain" about:

2.3.2.1. broadcasting ad-breaks or supermarket queues is no basis for banning them.

2.3.2.2. "expiring" appliance or vehicle warranties does not justify compulsory, non-expiring, or prohibitively costly warranties.

2.3.2.3. shopping hours do not warrant mandatory 24x7 hours.

2.3.3. The question to be asked and answered for complaints to be taken seriously is the extent to which complaints are (a) fully informed, (b) rational, (c) will not backfire on complainers or those they claim (without mandate) to represent, or (d) unfairly impact others.

2.3.4. Most importantly, "consumer power" (freedom of choice under free competition) determines what is offered by suppliers. Every rand spent is a vote in the market democracy for what consumers really want. Consumers hire and fire the worlds supposedly most "powerful" firms by the minute. They do so ruthlessly and heartlessly without care of consideration for the impact on providers. This is why most of the world's firms in the "Fortune 500" are gone within a few years. Their "market power" is non-existent when it confronts consumer freedom.

The belief that "market power" determines what consumers choose is a popular (yet understandable) myth. Providers are always and everywhere at the mercy of consumers.

In other words, "complainers" are in effect not complaining about providers, but about the revealed other consumers. It is as hard to believe as it is obviously true that providers prosper or suffer in direct proportion to their ability to please consumers more than rivals. We all experience the supreme power of choice daily.

2.4. **SEIA**. The purpose of a properly conducted Socio-Economic Impact Assessment (RIA or SEIA) is to quantify hoped-for benefits versus potential costs. All government policy proposals are required to be preceded by good faith SEIAs. As far as we can tell, there is no SEIA for these proposals, which might be a fatal flaw.

We accordingly humbly request ICASA to shelve these proposals until it has a *bona fide* SEIA (by which we mean one that is not produced merely to legitimise predetermined proposals).

(The accompanying SEIA on Radio Spectrum Policy can be regarded as a model of how SEIAs ought to be conducted.)

2.5. **Competition**. Widely accepted conceptions of effective competition are subject to the following considerations (interrogated at length below):

2.5.1. Consumer freedom of choice (aptly called "consumer sovereignty" by the eminent South African economist, William Hutt), is the most important ingredient of pro-consumer competition policy. It should be focused on demand, not as has become the norm, on supply.

2.5.2. Typically and erroneously, almost all competition discourse presumes the issue to be about the rights, interests, market share, and behaviour of suppliers. Many misleading pejorative terms are applied to competitive strategies (see below).

2.5.3. Effective competition is not primarily about prices. It is a much richer concept, including:

2.5.3.1. Consumer access and convenience.
2.5.3.2. Diversity of offerings.
2.5.3.3. Innovation.
2.5.3.4. Capital formation.
2.5.3.5. Investment incentives.
2.5.3.6. Technology.
2.5.3.7. Marketing.
2.5.3.8. Quality.
2.5.3.9. Packages and bundles.

2.5.3.10. Presentation and ambiance.
2.5.3.11. Warranties and insurance.
2.5.3.12. Brands and reputation.
2.5.3.13. Credit.
2.5.3.14. Specials.
And more.

2.6. **Analysis**. Each of these deserves more in-depth consideration than can be included in a single submission.

We will happily provide elaboration and sources on request.

2.7. **Uniformity in a complex world**. Markets and consumer interests are too complex for a "one-size-fits-all" or "vanilla" regulatory regime. If there are regulations they should, first and foremost, allow for complexity and diversity, and should create enabling environments for maximum consumer choice and satisfaction.

2.8. **Consumers**. Accordingly, a consumer-centric policy is preferable, according to which *consumers*, not suppliers or regulators, are free to choose between a diversity of present and, more importantly, future offerings and innovations.

2.9. **The poor**. Consumers, especially the poor, who are more aware than the rich that every rand matters, should be trusted to make informed context-specific choices that are appropriately tailored to their unique needs.

2.10. **Separation of Powers**. The Draft envisages substantive law amounting to legislation. A critical constitutionally question (according to Constitutional and High Court judgments) is whether they would be constitutional, and should not be by way of parliamentary legislation.

There is a serious possibility if not probability that the proposals would, if implemented, be the subject of prolonged and costly constitutional law proceedings.

2.11. **Public Input and PAJA**. The Constitution (especially from section 70) and the Administrative Justice Act require rational administrative action, which includes genuine good faith public participation. Public input must have a substantive influence on what is done administratively and legislatively.

Evidence before ICASA does not appear to have influenced the Draft materially (since it's early iterations). This could also lead to needlessly costly and prolonged litigation.

2.12. **ICASA reconsideration**. Given these considerations, it is submitted respectfully that the Draft would be counter-productive because it is narrowly focused on a single aspect of complex consumer rights and interests.

3. Substantive Introduction

3.1. The Free Market Foundation (FMF)

For those unfamiliar with it, the FMF is one of the world's most eminent and respected policy institutes and thinktanks. It is an independent public benefit organisation (PBO) founded in 1973 (nearly 50 years ago) to promote and foster open markets, prosperity for all, an open society, the rule of law, personal liberty, and economic and press freedom. It is financed primarily by members and donors, and by consultancy fees and sponsorships.

The Objectives and Principles listed below are important because they determine everything that follows.

The FMF is entirely independent, autonomous and politically unaligned. It has no association with nor preference for, and does not represent, any political party, formation, union, business, government, NGO or civil society organisation. All funding is conditional upon the FMF never being expected to compromise its Objectives and Principles.

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

- Human rights and democracy.
- Access to media and a free press.
- The open society, rule of law, and personal and economic freedom.
- High economic growth and reduction of poverty and unemployment.
- Development and fostering of free enterprise on a national and international basis.
- Education of the government and the general public regarding sound economic principles.

The FMF's guiding Principles include:

- All people have the right to life and to conduct it as they see fit, provided they do not impinge the similar rights of others.
- All people have the right to own and control property, including the produce of their efforts, and to dispose of it as they see fit.
- No person may initiate force or the threat of force against any other person.
- The only economic system consistent with these fundamental rights is a market economy.

3.2. **Competition – Nature and Misconceptions**

3.2.1. The telecommunications sector is subjected to a problematic form of "double jeopardy". It serves two competition policy "masters", ICASA *and* the Competition Commission (CompCom). It is suggested respectfully that ICASA confines itself to its areas of expertise, and leaves competition policy to the CompCom.

This does not deny that ICASA must consider competition within its mandates, such digital migration and spectrum allocation, but it should leave market competition to the CompCom thereafter.

3.2.2. Issues regarding the nature, purposes and workings of competition are raised above and elaborated here. This is arguably the most important aspect of the Draft.

3.2.3. A great deal has been said and written about telecommunication ("telecom") competition, especially associated with ICASA and the Competition Commission. For some reason there are double standards. What it taken for granted in other contexts is presumed not to apply to telecoms. This is a serious mistake. It results in many false assumptions and anti-consumer measures.

3.2.4. Flawed and inadequate conceptions of competition include:

3.2.4.1. That prices are mistakenly presumed the most important aspect of competition.

3.2.4.2. That charging more is mistakenly called “monopoly pricing”; charging less is “predatory pricing”; charging the same is “collusive pricing”.
This is clearly irrational, and, since there is nowhere else to go, perfectly legitimate business can be accused of violating “competition policy”.

3.2.4.3. That products and services are mistakenly presumed identical (in “direct competition”), despite the fact that what appears identical might entail no competition, and what appears totally different (“indirect competition”) might be more directly competitive.

3.2.4.4. That a single supplier is called a “monopoly” and two a “duopoly”, when neither is true (see “contestability” below).

3.2.4.5. That co-operation, collaboration, joint ventures, partnerships, co-ops, business associations and the like are disparaged as “collusion”.
Paradoxically, most “collusion” is pro-competition and pro-consumer. It is a competitive strategy, which is why it is almost always objected to by competitors rather than consumers.

There are countless obvious examples of collaborative virtue: sharing of resources, bulk buying and selling, branding, technology and innovation, training, lobbying etc.

3.2.4.6. In short, the motive for most “collusion” is to be more competitive.

3.3. **Competition Policy**

Below is a more substantial textual analysis of optimal competition policy.

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

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

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

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

3.4. **All controls are *people* controls.**

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

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

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

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

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

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

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

3.5. **Efficient markets**

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

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

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

3.6. **Consumer Democracy**

Consumer policy that reflects concern about "market share" or "market power" entails a contradiction. It says "compete, but don't win".
Furthermore, a firm that grows should be celebrated and complimented because the degree to which its market share grows is the degree to which it is better at serving consumers.

If consumers decide to buy mostly or only from X, current competition policy victimises consumers rather than business winners. Policies should not force consumers to buy from firms against which they vote with their rands. It should not force suppliers which consumers do not want onto them. Competition policy should especially not protect losers. Insolvency is a vital aspect of market efficiency.

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

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

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

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

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

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

3.7. Contestable Markets

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

Leaving the nirvana world of early neoclassical economics, as Chicago-economist Harold Demsetz (1969) termed it, an exploration needs to be undertaken of what contestability means in the competitive context of real markets. Firstly, the new theory (re)introduced the distinction between *competition in the market* and *competition for the market*, which is to say that a disturbance of equilibrium can be endogenously motivated. Yet, this does not change the fact that the theory is still fundamentally incommensurable with anything that would resemble real markets. A particularly noteworthy aspect of the theory concerns the implicit assumption that competition in Baumol's model[1] means competition for consumer markets. The supply-side is defined away through the assumption of perfect knowledge and perfect capital markets (i.e. no return spreads). These assumptions immediately beg the question of on which basis an entrant could threaten the incumbent (apart from the fact that neoclassical consumers already live in a happiness end-state which makes ambitions for inventing new technology superfluous).

3.8. Applied to the Telecommunications Market

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

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

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

The explanation appears to be that the supply-chain ecosystem exerts a disciplining effect on what MNOs can and cannot do. This disciplining effect can only play out to the advantage of consumers when the elements of the mobile value chain are contestable.

By way of example, if we assume that MTN had taken the decision in the early 2010s to roll out LTE in South Africa's metros and we also assume that Vodacom's shareholders had decided to cash in dividends for five years and keep on going with 3G data, then the market would have forced Vodacom shareholders to correct their decision very quickly. This logic essentially applies to the whole value-chain ecosystem. It is inconceivable that within two decades six or seven new technological standards would have been implemented in the SOE-world of fixed-line incumbents. The reason is not that there is anything intrinsic to managers of MNOs that would justify the conjecture that they are particularly keen to overhaul the production structure of their company every three years; they just have to, to maintain their business.

Administrators of public monopolies, in turn, are not subjected to market discipline because there is no threat that a rival will leap ahead by implementing a new technology. This demonstrates that the competitive advantage firms can reach is first and foremost a consequence of innovation efforts on the supply-side of the value chain. Note that the ontological nature of one megabit of data is such that it is hard to differentiate. But the same megabit can be fast; you can get it fast or slow; you can get it reliably at peak times in Sandton; you can get it in rural areas; and you can get it for more or less money. Until the 1990s, you got a fixed-line minute, or you did not; you paid what you had to pay; you had to take the phone you were given; and in most low-income and lower-middle income countries you had to wait for years until you were connected even where there was a network (unless you paid some incentive to speed up the process).

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

3.9. Public Monopoly

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

As to the quality of both economic reasoning and empirical evidence that could corroborate the claim of ineffective competition and SMP, the authors of the *Market Inquiry* document do not succeed in submitting any argument that goes beyond commonplace assertions. Here are four examples to illustrate the depth of reasoning.

The first example concerns **roaming** ("Upstream Market 3"):

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

The causality is that markets are ineffectively competitive because MTN and Vodacom have done their job, namely, to provide coverage to all municipalities. The first question to ask the authors is why Telkom and Cell C are not offering their services in these municipalities? There must be some inherent economic reason that two network operators are sufficient. The verdict "ineffective competition" is derived from section 7 of the Competition Act, which the authors quote: "In terms of section 7 of the Competition Act a dominat [*sic*] firm has market share of 45% …" In other words, the fact that it is somewhere defined that 45 percent is constitutive of dominance (irrespective of the specific nature of the market), firms in all markets that meet this criterion are dominant implying. That consumers are harmed, and regulatory intervention is warranted. So, what about the towns with one bank branch only, one gas station or one butcher? It is presumably unnecessary to elaborate on this.

The second question to ask is whether MTN and Vodacom exploit their so-called "duopoly" by charging different prices for voice and data in Johannesburg or Cape Town. If MTN and Vodacom were to charge cost-based prices for the services they render to subscribers in small municipalities, they would have to charge tenfold the price. They do not do this, not because they are Good Samaritans, but because of two very tangible market-related reasons.

- Firstly, a cost-based price differentiation along geographical and demographical boundaries is almost unsolvable from an accounting perspective.[63] How do you price a piece of the backbone that branches off to provide fibre to the little municipality? What does the MNO finance professional make of the fact that a radio module in Sandton possibly amortizes in three years or less while the one in Pofadder only in fifteen years or never?
- Secondly, consumers perceive price differentiation along geographical factors as unfair.

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

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

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

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

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

Vodacom CEO, Shameel Josub, stated that of the 11,000 sites it has in South Africa, over 7,000 are shared.[64]

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

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

- **Tower type**: towers differ considerably dependent on deployment architectures, e.g. macro tower, roof top tower, small cell, distributed antennae system (DAS) etc.;
- **Tower height**: which differs according to the terrain and environmental typology in order to ensure that the appropriate coverage footprint is achieved;
- **Technology** deployed at a tower or other facility (2G/3G/LTE/5G), which is spectrum dependent; and
- **Tower functionality**: cellular towers perform different functions, for example, microwave hub-towers are key towers that connect several other towers, unlike point-to-point (PTP) microwave links which uses a single hub-tower to create a sector of coverage that can backhaul multiple towers.

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

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

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

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

> The ITU data suggests that South Africa’s prices are not disastrously high, but neither are they as low as they could be, particularly in comparison to South Africa’s peers in the BRICS group. (para. 49)
>
> … while South Africa’s prices are not the lowest, the download speeds experienced by South
> African customers are much faster than anywhere else in the continent, including large comparator countries like Egypt, Morocco, Ghana, Nigeria and Kenya. (p 56)
>
> Figure 13 illustrates that while mobile data speeds in South Africa are *extremely* high by African standards (see figure 12), they are no better than average in the more advanced grouping. Interestingly, while South African prices are higher than India and Russia’s, the speeds provided in South Africa are much higher. Put in an appropriate context, therefore, South Africa’s speed and quality performance looks neither excellent nor terrible. However, the examples of China and Turkey demonstrate that there is plenty of room for improvement. (para 58/59). While South Africa’s prices are not the lowest, the proportion of the population with access to LTE (approaching 80%) is much higher than most other countries. (para 60)
>
> A barrier to lower mobile data prices in South Africa which has frequently been cited is the lack of spectrum assigned to the mobile operators. This is since having access to spectrum lowers the cost to operators of rolling out both improved coverage and capacity, since it requires them to build fewer base stations. In addition, large amounts of spectrum are necessary to provide high speed mobile broadband, especially as the demand for data increases rapidly. *If operators with inadequate spectrum assignments are struggling to meet data capacity requirements from their existing customers, this lowers their incentive to reduce prices as lower prices will lead to higher volumes which could result in declining network quality.* There are therefore a number of reasons why spectrum assignment is critical to achieving cheap, high quality mobile broadband.

> South Africa is well behind the leading countries when it comes to assigning spectrum for mobile broadband, having assigned about half the spectrum compared to the UK for example, and with an extremely low assignment per operator.

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

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

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

The word "monopoly" was originally perceived as an exclusive legal right of sale covered by government and usually ensured by patent or licence. In the seventeenth century "monopoly" was defined by Sir Edward Coke as an "allowance by the King to any person or corporate for the sole buying, selling, making, working or using anything, whereby any person or corporate are sought to be restrained of any freedom or liberty that they had before.[2] " In the eighteen century another definition was developed by Samuel Johnson: the "exclusive privilege of selling anything.[3]" In the course of time "monopoly" been reinterpreted to mean the private accumulation of so-called "economic power" or an entity that has total or near-total "control" of a market.[4]
But being large does not confer "control". Regardless of size, suppliers must behave competitively to keep attracting consumers.

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

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

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

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

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

The Coase invariance thesis (better known as the Coase theorem), which goes back to the works of Nobel laureate Ronald Coase, states that the initial distribution of ownership rights is irrelevant because the market outcome will always reach the same optimal result from the consumer point of view. It is noteworthy that Coase used the example of regulation of spectrum assignment in the US broadcasting industry in his famous paper “The Federal Commission of Communications” published in 1959[2] in which he developed the basis for the Coase theorem which in its ultimate version was published in the even more famous paper "The Problem of Social Cost" published in 1960.3

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

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

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

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

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

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

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

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

3.10. **Consumer Sovereignty**

The celebrated (anti-apartheid) economist, William ‘Bill’ Hut, was an internationally recognised consumer policy expert. He argued that the best that can be achieved in an imperfect world is for consumers to be maximally empowered to exercise “sovereignty”, that is to vote with every rand they spend for what they want.

The only real form of competition is money competition, decision about how to allocate money. Every consumer decides whether to buy soap or save for a summer holiday. Everything supplied competes with everything else supplied.

MNOs compete for rands with Eskom.

As for the narrow (and misleading) conceptions of competition, mobile providers compete with each other in many ways. If they satisfy consumers better than competitors, they prosper. And they should.

It makes no sense for competition policy to victimise success. That amounts to victimising consumers. If consumers choose freely to allocate all mobile spending to X, it should be praised, not criticised. It has zero “market power”. Only consumers have market power – they and they alone (should be free to) decide which suppliers fail (called by Schumpeter “creative destruction”, and which prosper (falsely called “market power”).

ICASA says it is *for* consumers, yet everything in the draft regulations is vendor-focussed. The proposal curtails consumer rights. They are told what they *must* buy, and for how long.

There is a huge misconception that providers make these decisions. They spend all day trying to fathom what consumers want: price, period, quality, technology, packages, units, outlets, credit, loyalty rewards, quantity and so on.

A dangerous myth grips public discourse, that the only things that matter are transferability and duration. Much more determines consumer behaviours, above all the power to decide for themselves.

4. CLAUSE 3 of the Draft - Amendment of regulation 8A of the Regulations

Unused voice and SMS services … shall not expire before … 6 months.

4.1. Why 6 months? Why not 6 days or 6 years? Or any other purely arbitrary period?

4.2. There is no rational answer. Every benefit has a cost (TANSTAAFL), so a feeling rather than rational analysis dictates. Six days feels short, and 6 years feels long, so something that is no more rational is chosen.

4.3. Getting support for such proposals is a well-documented flaw in social science. Ask consumers if they want a Rolls Royce or a bakkie, and they choose the former, yet they buy more of the latter. Why?
Ask it they prefer a 5-year warranty to no warranty (“voetstoots”) on used appliances, and they say the former, yet choose the latter. Why?

4.4. The reason is precisely the same as why consumers prefer rapidly expiring to enduring data. What is the reason?

4.5. The most honest answer (without prohibitive research) is that no one knows. They and only they know why they chose A rather than B, C, D or E.

4.6. The best we can do is speculate. All things considered, consumers chose to get less because it costs less.

4.7. TANSTAAFL. No one knows better than a consumer what cost-benefit trade-off is best for them personally. Everyone’s circumstances are unique.

4.8. There is substantial (though unfortunately not complete) freedom of competition. Every provider is desperate to get business. They spend many hours trying to work out what consumers want. If they knew, or if ICASA knew, there would be no need for extremely costly and complex “market surveys” and “consumer research”.

4.9. The fact it that the revealed reference of consumers is for cheaper expiring data. If consumers want to pay the price of non-expiring data, they are free to do so, provided providers are free to offer whatever they, and they alone, think consumers prefer. In the real world, consumers weigh up complex mixes unique to themselves. A one-size-fits-all approach necessarily victimizes everyone. No one is perfectly “normal” or “average”. Six months is sub-optimal for every consumer. Individual interests cannot be precisely there to the second. Ideally, options must range from minutes to eternity. Some now provide never expiring options; others for very brief periods.

4.10. There are excellent tried, tested and proven reasons for "expiring data'. Since ICASA will have received much on this, such as balance sheet, technology, liability etc. problems, we do not elaborate here, except to stress the crucial importance of any viable enterprise to be free to plan for the future as it wishes, to innovate and differentiate its products from others, and to stand or fall by its decisions. If these do not meet consumer needs, then the enterprise will ultimately fail. Imposing any blanket regulation interferes with the ability of an enterprise to respond to consumer preferences and in this case, for cheaper data.

5. CLAUSE 4 of the Draft – Transferability of Data regulation 8B of the Regulations

5.1. As with (almost) all well-intentioned policies, this will have serious "unintended consequences". That such consequences are called "unintended" is unduly generous to policy-makers.

5.2. When it is known in advance, as it is in this case, which adverse consequences will follow, they are "intended consequences".

5.3. In other words, regulators want those negative impacts as a kind of trade-off for what usually amounts to hoped-for amorphous unquantified benefits, any or most of which never materialize.

5.4. In this case the implications re obvious:

5.4.1. TANSTAAFL; there are no free lunches. Who will pay for this one? No one expects declining profits (on average). Some suppliers will be better-off, others may be driven out of business.

Who will pay is obviously, and always, the consumer. The price of transferable data will obviously be higher.

ICASA insists that it wants lower prices, yet undermines itself, and ensures that it will be accused of having failed, by driving prices up and up. Why would ICASA inflict this on itself? It is irrational to do so.

For lowest prices, consumers need maximum freedom of choice.

5.4.2. By far the bigger effect will be an entirely unregulated secondary market ranging from shack-dwellers to large firms. People will buy huge data bundles, and resell at a profit, or even at cost merely to have had the convenience of lots of data during the initial periods of usage uncertainty.

5.4.3. Additionally, perhaps more distressingly, a scam artis market will be created.

5.4.4. The irrationality of this idea is clear when other products and services are considered. There is a constant battle against "black market" ticket sales.

Someone who buy a box of potatoes and eats only half cannot require the shop that sold them to transfer unused potatoes to others.

A car guarantee is not transferable. It is confined to the vehicle and the owner.

The idea discriminates against people, especially the poor, who might not have contacts who want to buy. A pensioner, farm worker, shack-dweller, street vendor etc might not have anyone to whom to transfer unused data, whereas an office or factory worker could sell it easily. To whom might ICASA employees transfer unused data?

When ICASA faces the booming "informal" secondary market it would create if it proceeded, what could ICASA do? It could try to regulate or ban it? Who would enforce such a plan? Nobody.

We all know perfectly well that the secondary, underground and hard crime market will boom. Consumers will be taken for a ride and cheated in very large numbers. Middle- and upper-income group consumers will brush it off and move on. As always, the primary victims will be the poor, vulnerable, elderly, unemployed and unsophisticated members of society.

The injustices that will be visited upon these people – who all decent people care about and want to see better-off – are unconscionable.

What will happen is that authentic consumers will be forced to pay much more, and underhand "jobbers" will laugh all the way to the bank.

6. OTHER

6.1. This submission does not address other proposals directly, such as biometric mandates. All come at a heavy price, always paid for by the universal victim, the consumer. Nothing will affect average profits.

6.2. Policies might favour one firm over another, which is why they work and spend so hard to influence ICASA. None lobby for consumers. ICASA alone can be consumer-centric.

6.3. All of this and more should be addressed and quantified in an independent SEIA undertaken by recognised, experienced and impartial experts.

6.4. We will address other concerns as future opportunities arise.

6.5. We point out, as others have done, the human rights implication for mandatory biometrics. They, like most else, should be left to market competition. Let vendors weigh cost-benefit challenges.

6.6. It is also suggested that ICASA not impose "vanilla" uniformity under conditions of extreme diversity and complexity. That would be neither feasible nor desirable.

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with

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Disclaimer:
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