

“Institutional Framework: Jurisdictional boundaries and roles of different agencies”

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By:

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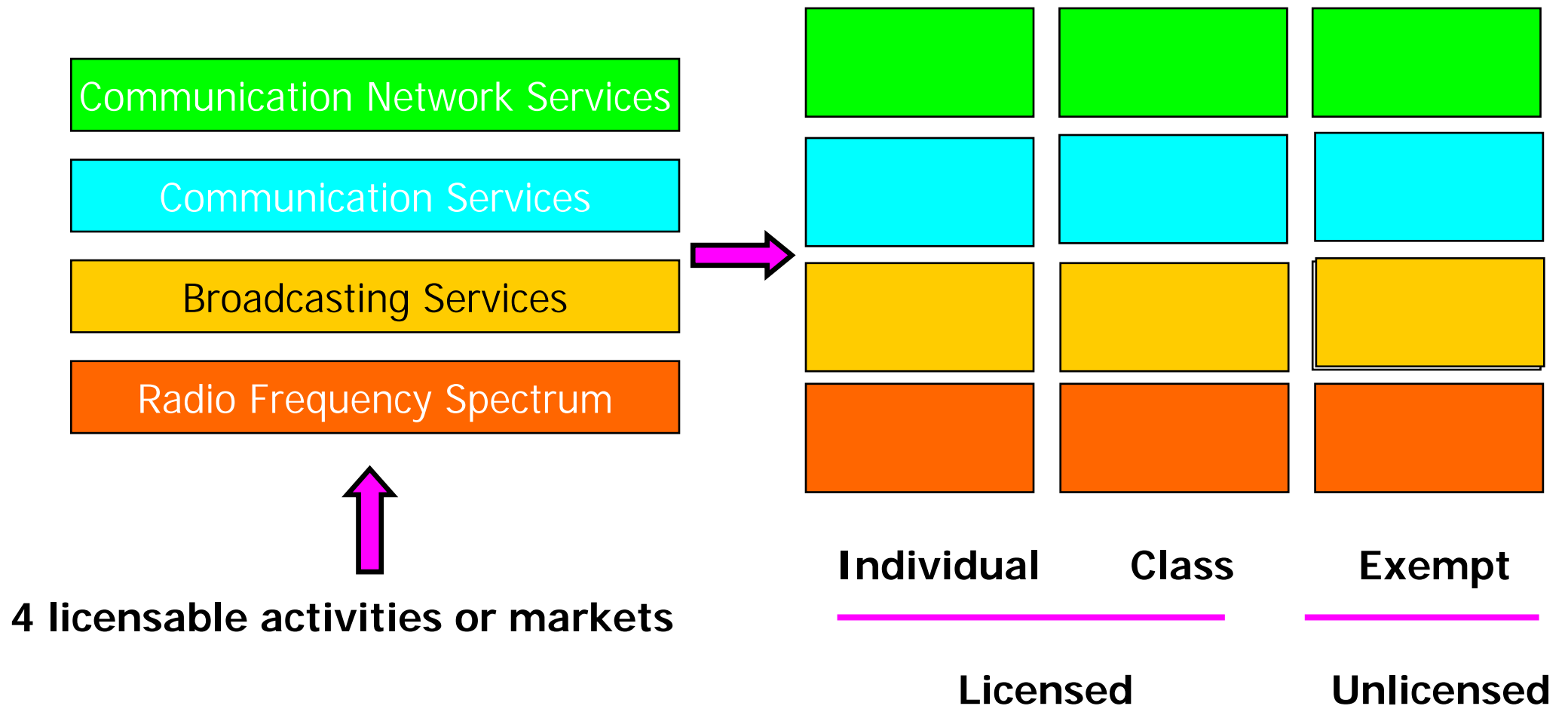
Overview

- **Overview of the South African ICT sector**
- **Application of competition law principles in South Africa**
- **Role and responsibility of sector specific regulator and general competition authority**
- **Examples of jurisdictional co-operation/overlap**
- **Lessons for other countries revising regulatory frameworks**

Overview of South African Communications Sector

- Significant legislative reform for convergence
 - Vertical to horizontal, technology neutral, “unified” licensing framework
- Competition (*ex post*) and sector specific laws (*ex ante*)
- Monopoly legacy in fixed (despite new entrant)
- Duopoly legacy in mobile (despite third entrant)
- High, increasing market concentration & vertically integrated incumbent(s)
- Significant state shareholding in line with policy of “developmental state”
- Relatively high retail and wholesale prices
- “Cheapest” mobile broadband in the world (bandwidth and caps low)
- Current policy debates: Cost of doing business; undersea cable access, LLU; VANS

Electronic Communications Act – Horizontal Licensing



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Policy or Market Failure?

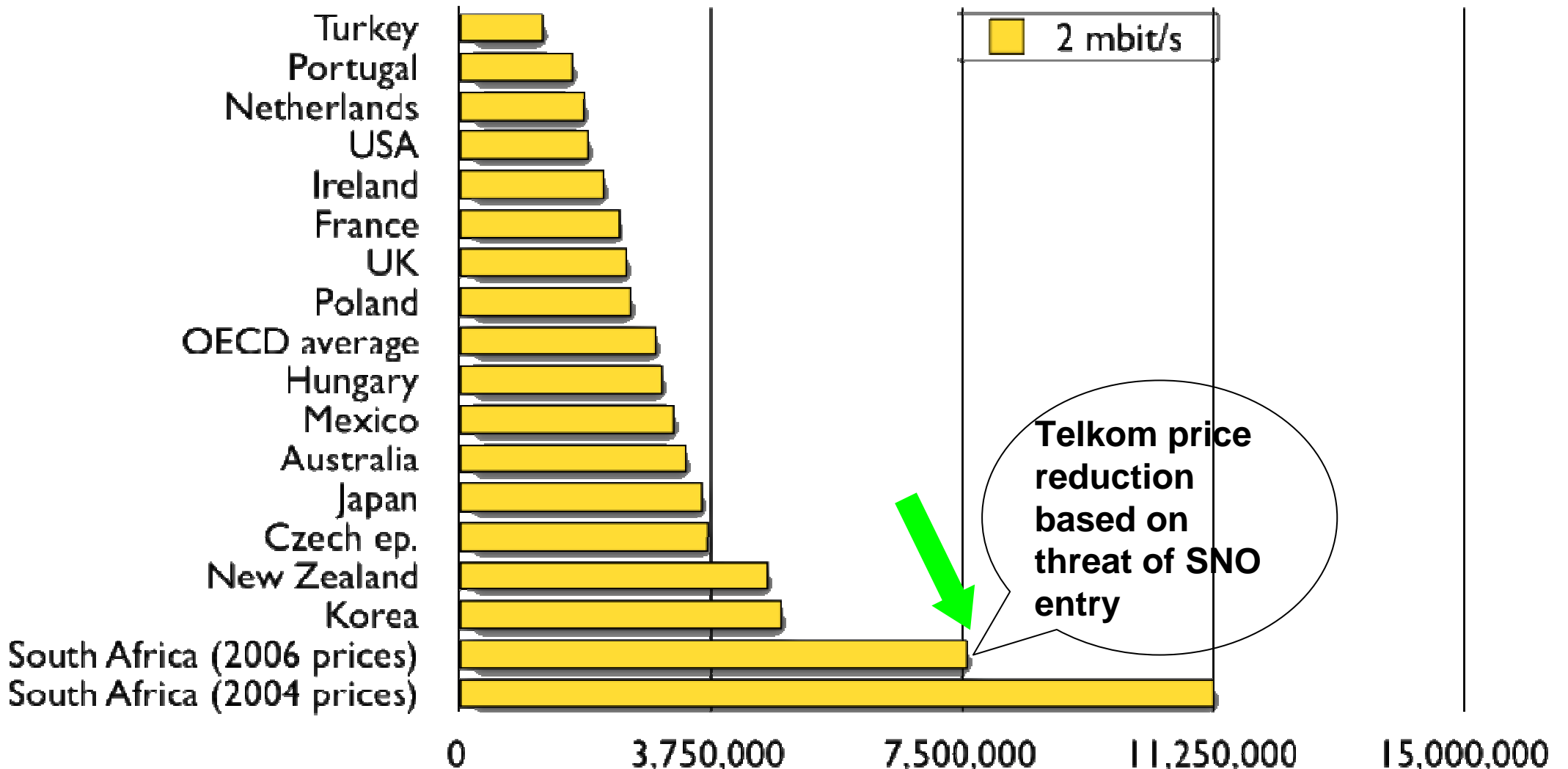
“Underlying most of regulatory economics is the existence of problems associated with lack of competitive entry. It is this which makes markets fail or succeed.”

- *Martin Cave, 2006*

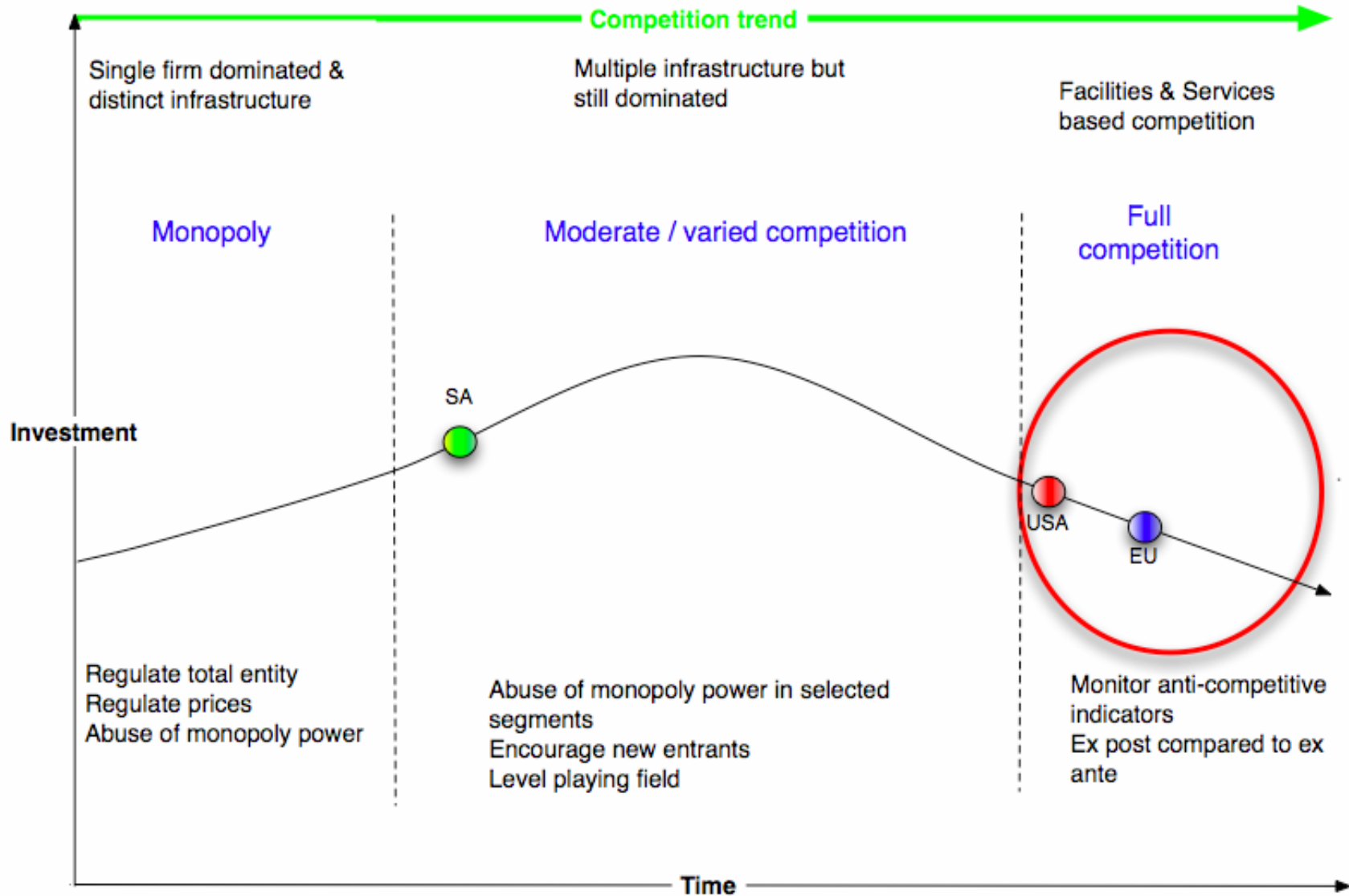
“The country's access deficit [the lack of broadband connectivity] was not due to market forces not working, but due to the fact that we have not had a working market. If there is one market that responds to market incentives, it is the telecoms market”.

- *David Lewis, Competition Tribunal, 2007*

Leased line costs based on the OECD leased line basket at US\$ PPP



Competitiveness in SA



Application of competition law principles in SA

- Competition policy is shaped by broader economic and political transformation (e.g. BEE and HDI quota for licenses)
- SA law and policy underpinned by pro-market principles:
 - Markets foster innovation
 - Markets are more efficient in allocating the right goods, for the right customers at the right price
 - Economic regulation to constrain market power of incumbents
 - Independent regulation
- 1996 Act limited in preventing or stopping anti-competitive conduct
- 2006 Act addresses this but application requires various detailed steps be taken first and requires significant financial and human resources to implement
- Important not to confuse policy and market failure

Translated into law: Chapter 10 “Competition Matters”

- General enabling provision to direct an entity to *cease or refrain* from:
 - Any act likely to substantially prevent or lessen competition
 - Giving undue preference
 - Causing undue discrimination

Prescribe by Regulation

Due process

- Prescribe regulations defining the relevant markets/market segments that pro-competitive conditions may be imposed, where licensees have SMP and where there is a finding of ineffective competition.

Fair Administrative action

Consultation

- Forbear from regulation where certain conditions are met

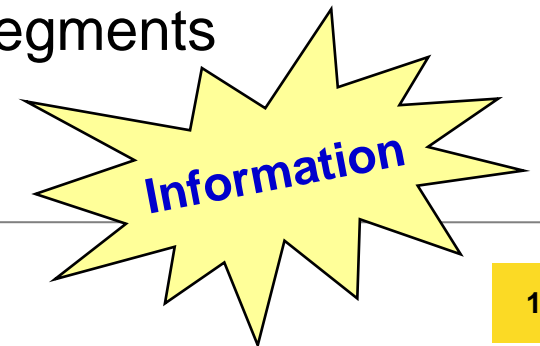
Factual inquiry

Forbearance

- Law permits forbearance
- Draws on the Canadian Telecommunications Act
- Within “undue preference regulations”, the Authority may refrain from determining undue preference or conduct likely to substantially prevent or lessen competition, if:
 - refraining is consistent with the objects of the Act;
 - the service or class or services is subject to sufficient competition to protect the interests of users;
 - refraining will not impair the establishment or continuance of a competitive market.
- Above must all be determined, *as a question of fact*
- Unused to date and untested: unclear if the bar is too high?

Market Definitions - Process

- *Define and identify* the retail or wholesale markets or market segments for pro-competitive measures where there is SMP *and* ineffective competition
- Set out the *methodology* for measuring effectiveness of competition
 - Complicated exercise in fact finding and regulation making
- Declare licensees with SMP in that market or market segment
- Set out the pro-competitive measures the Authority may impose as a remedy
- Provide for monitoring and investigation of anti-competitive behaviour in the market or market segment
- Schedule for periodic review of markets and market segments



Why define markets?

- Modeled on European approach
- To ensure regulation is appropriate, targeted and proportional
- To regulate only where there is market failure
- To understand the competitive dynamics of markets
 - How do different companies impact on each other?
 - In which market does this interaction take place?
 - To prevent companies from being able to behave independently from their competitors
- It is the initial step in competition analysis and provides the context in which to evaluate the level of competition and the impact of anti-competitive conduct in a given market

What is Significant Market Power (SMP)?

- Dominance (defined in competition law)
- Control over essential facilities, OR
- Has a vertical relationship that the Authority determines could harm competition in the applicable market or market segments

Status of SA market definition process

- Prioritised call termination market enquiry and leased lines
- Call termination is on average 52% of the retail rate
- Interconnection has increased over 500% since 1994
- Calling Party Pays (“CPP”) gives terminating operators a monopoly over the provision of call termination to their subscribers and without price controls, terminating rates are set inefficiently high
- General inquiry and findings to be published
- Inquiry process has thus far taken about 1 year
- Law requires regulations (and consultation)

Possible consequences

- Basic remedies for all operators (derived from law):
 - Obligation to interconnect
 - Obligation not to discriminate
 - Price transparency (e.g. publish tariffs)

- SMP players could be required to comply with:
 - Price controls
 - Separate accounting requirements
 - Obligations regarding recovery of costs and cost orientation

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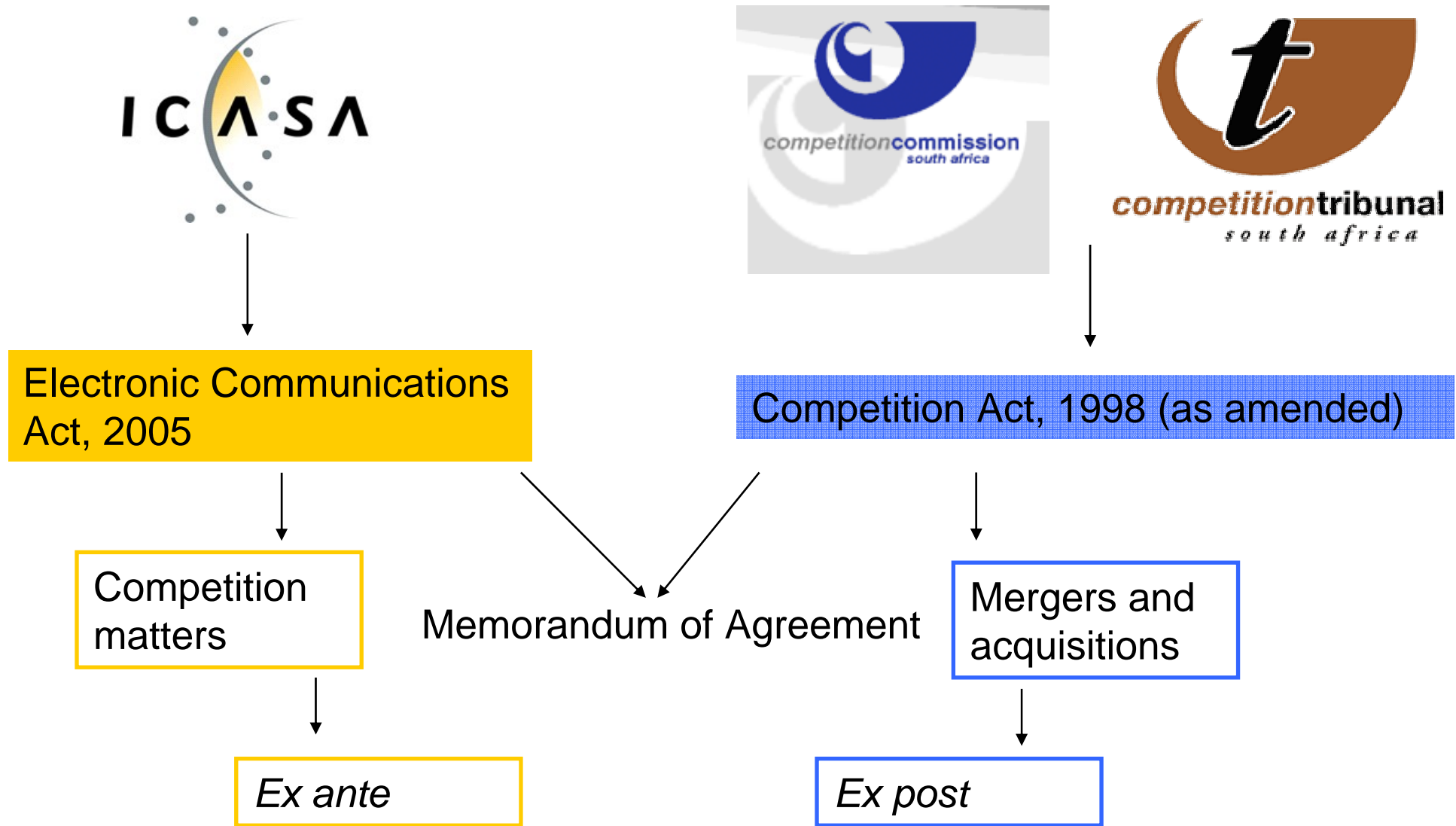
Sector specific vs. competition authority regulation

Sector Specific	Competition Authority
Ex-ante	Ex-post
Multiple policy objectives	Underlying principle: Pareto efficiency - no individual can be made better off without another individual being made worse off
Focuses on a specific sector	Economy-wide
Focused on potential threat to competition	Focused on actual threat to competition

- 1997 Competition Policy Guidelines identified concentrated market structures and associated anti-competitive practices as the key to underlying problems of competition in the economy
 - *Competition Act No. 89 of 1998, as amended*
 - Competition Commission
 - Competition Tribunal
 - Competition Appeal Courts
 - Manages concurrent jurisdiction with all SSR's, in accordance with a memorandum of agreement
- Policy through sector specific laws
 - 2000 – ICASA Act
 - 2005 - *Electronic Communications Act No. 36 of 2005*
 - Chapter 10 specifies approach to competition policy
 - Also provides for the relationship with competition authorities
 - Either authority may ask for and receive advice from the other on relevant proceedings

- to prohibit anti-competitive agreements, practices or arrangements between firms
 - to prevent abuse of dominance or monopoly position
 - to regulate merger activity (approve or deny)
 - 1 telecom merger – prohibited
 - *Telkom and BCX*
 - Economy wide
- to facilitate market entry into ICTs (and postal) through the issuing of licences and spectrum
 - creation of a regulatory framework that promotes competition
 - protect consumers and competitors
 - Sector specific (and other non-economic sectoral goals)

Roles and Responsibilities



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Jurisdictional Overlap

- The Competition Act explicitly creates concurrent jurisdiction with a sector regulator where both have legislative mandate to address anti-competitive conduct and requires a MOA
- MOA signed between ICASA and Commission in 2002:
 - Identifies and established procedures for the management of areas of concurrency;
 - Promotes co-operation
 - Provides for the exchange of information and the protection of confidential information
- Currently being revised
- Challenges of implementation
- Non-cooperation by parties
- Inappropriate lodging of cases with the Commission (e.g. interconnection charges)

Challenges of jurisdictional overlap

- Act envisages both *ex ante* (markets) and *ex post* (cease and desists) regulation for ICASA
- Both require the promulgation of regulations as a condition precedent for regulating
- *Section 67(9): “Subject to the provisions of this Act, the Competition Act applies to competition matters in the Electronic Communications Industry”*
- ICASA must fulfil all the *ex ante* pre-requisites of the law to “oust” jurisdiction from the Commission
- As processes are medium to long term - concurrency is in tact
- **Problem:** Current wording presents opportunities for “forum shopping” and “legal gaming” by operators
 - ICASA not yet in a position to exercise full ambit of its powers
 - Wording suggests Commission does not possess jurisdiction

Addressing jurisdictional overlap

- ***Institutional:*** Complicated by history of jurisdictional “grabbing” during recent reform process
- ***Operational:*** Different perspectives/mandates – different results
- ***Market:*** Exacerbated by monopoly legacy
- ***Legal:*** Situation needs clarification: *Complementary Jurisdiction*
- ***Policy:*** Different roles of the agencies requires clarification
 - Is the perception that ICASA and Commission carry out same/similar functions?
 - Is the market mature enough for ex post regulation by general competition authority? IS this desirable?
 - Does it have sufficient expertise? Capacity? Delivery?
 - Will this secure non-economic, redistributive policy goals?
 - What other models exist for co-operation and referral of matters?

Jurisdictional Cooperation

- MOA being revised
- Commission participates in ICASA public processes
- ICASA participating in process to review Competition Act, including, concurrent jurisdiction

- ***Mweb vs. Telkom (2007)***
 - Margin squeeze
 - Broadband service priced such that the retail service is below the wholesale price to ISPs
 - Telkom disputes the jurisdiction of the Commission
 - Court date set for April 2008

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Lessons for other countries revising regulatory frameworks

- EC has the framework directive to be implemented by NRA's
- SA has had to define the framework for market studies
 - Complex combination of fact finding and regulation making
 - Resource intensive
 - Information asymmetries
 - Non-cooperation by operators
- Increase competition enforcement powers as simply as possible
- Onus on operators
- *Ex ante vs. ex post*
- Resolve any jurisdictional overlaps
- Funding and staffing concerns must be addressed
- Allow time for transition if requirements to implement are onerous

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- ✓ **Questions and Answers**