

South Africa

Lisa Thornton Inc

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1 Framework

1.1 What are the overall policies and objectives for the electronic communications industry and have these been published in draft or final form? What legislation is relevant to telecommunications and radio frequencies?

The Electronic Communications Act, 2005 (ECA) is the primary legislation regulating the electronic communications industry. It deal with a number of areas including licensing, spectrum, interconnection, rights of way, numbering, broadcasting, competition, universal service and consumer issues.

In addition to the ECA, there is other legislation that regulates certain aspects of the industry:

- Electronic Communications and Transactions Act (ECTA);
- Competition Act; and
- Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA).

In addition to regulating the industry, the government has interests in licensees, *inter alia*, Telkom, Sentech, the South African Broadcasting Corporation, and Broadband Infraco.

1.2 Is South Africa a member of the World Trade Organisation? Has South Africa made commitments under the GATS/GATT regarding telecommunications and has South Africa adopted the WTO Basic Telecommunications Agreement?

South Africa is a member of the World Trade Organisation. In 1994, SA made commitments to open up the value added market segment to competition. In 1997, SA made commitments in terms of the Fourth Protocol on Basic Telecommunications, to open up other market segments, and to establish an appropriate regulatory environment as set out in the Reference Paper.

1.3 How is the provision of electronic communications networks or services regulated? Is the provision of electronic communications networks or services open to competition in South Africa?

Electronic communications networks and services are primarily regulated by the Independent Communications Authority of South Africa (ICASA) in terms of the ECA. However, the Minister of Communications (Minister) is responsible for making policy and issuing policy directions to ICASA and for making key regulatory decisions regarding licensing and spectrum.

There currently exists some competition in the provision of networks and services. However, SA is still transitioning from a regulatory framework protecting certain licensees to a competitive industry. Although nearly 400 licences were converted to individual electronic communications network services (ECNS) and electronic communications services (ECS) licences comparable to the service licences of the incumbents, the establishment of a regulatory framework effectively facilitating competition remains hampered by a number of factors, including that certain key provisions in the ECA are not clear, for example, regarding interconnection, facilities leasing and competition matters.

1.4 Which are the regulatory and competition law authorities? How are their roles differentiated? Are they independent from the government?

ICASA must regulate the electronic communications industry in terms of the ECA, including in respect of competition matters.

The Competition Act relates to competition matters across all industries, including the electronic communications industry. The Competition Act establishes the Competition Commission primarily with investigative powers, the Competition Tribunal with adjudicative powers, and the Competition Appeal Court.

There is concurrent jurisdiction between ICASA and the competition authorities in respect of competition matters in the electronic communications industry. However, exactly how this is supposed to work has not been finally determined, contributing to the limited effectiveness of both regulators.

ICASA is in name, independent. However, in key respects its independence is lacking, i.e., in the appointment procedure (the Minister appoints ICASA Council), and the funding mechanism (ICASA's budget is submitted to Parliament through the Minister). Similar issues arise in respect of the Competition Commission.

1.5 Are decisions of the national regulatory authority able to be appealed? To which court or body?

ICASA's decisions are not appealable; however, its decisions, as well as those of the Competition Commission, may be taken on review to the High Court.

Decisions of the Competition Commission may be heard on appeal or review by the Competition Tribunal. The Competition Appeal Court hears appeals and review decisions of the Competition Tribunal.

2 Licensing

2.1 If a licence or other authorisation is required to install or operate electronic communications networks or provide services over them, please briefly describe the process, timescales and costs.

The provision of ECNS, ECS and broadcasting services (BS) requires either an individual or class licence or must be exempt from licensing. ECNS, ECS and BS licences are either individual or class.

Those licensees that are individual include ECNS of national or provincial scale, and voice telephony ECS that use numbers allocated by ICASA. Licence applications for individual licences may only be made in response to an invitation and in respect of individual ECNS licences, only after a policy direction issued by the Minister.

Class licences include ECNS of municipal scale, data ECS and voice ECS where numbers are sub-allocated by licensees. ICASA must act on class registration applications within 60 days and if it fails to do so, there is a deemed registration.

ICASA has prescribed that certain services may be exempt from licensing, including non-profit ECS, resellers of ECS and private ECNS; service providers must nevertheless apply for exemptions.

Application and licence fees are set out in regulations, with application fees for individual licences left to be decided at the time an invitation is issued. The licence fee for most licences is 1.5 percent of gross profit. Community and public BS licensees and licensees with an annual turnover of less than R13,000,000 are exempt from paying licence fees.

2.2 What other requirements, permits or approvals must be met or obtained before networks may be installed or operated and services provided?

In addition to service licensing, if a service provider intends to use spectrum, that provider must obtain the required spectrum licence. All equipment must be type approved by ICASA.

2.3 May licences or other authorisations be transferred and if so under what conditions?

Individual or class licences may be assigned, ceded or transferred with the prior permission of ICASA.

2.4 What is the usual or typical stated duration of licences or other authorisations?

Individual ECNS licences are issued for twenty years, ECS licences for fifteen years, and BS licences for from ten to fifteen years. Class ECNS and ECS licences are issued for ten years, and class BS licences for seven years.

3 Public and Private Works

3.1 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

The ECA grants to all ECNS licensees certain rights regarding access to land, including, *inter alia*:

- to enter upon any land and construct and maintain facilities,

subject to environmental regulations;

- to use underground conduit pipes;
- to construct and maintain facilities under streets, roads and footpaths;
- to place gates on property owners' fences; and
- to cause trees or vegetation to be cut, subject to environmental regulations.

ECNS licensees must exercise their rights in accordance with regulations to be prescribed by ICASA.

3.2 Is there a specific planning or zoning regime that applies to the installation of telecommunications infrastructure?

No; however, the Minister is required, in consultation with the Ministers of Provincial and Local Government, Land Affairs, Environmental Affairs, *inter alia*, to “develop guidelines for the rapid deployment and provisioning of electronic communications facilities”, facilitating governmental approvals, e.g., zoning approval, and resolving disputes with landowners.

3.3 Are there any rules requiring established operators to share their infrastructure, e.g. masts, sites, ducts or cables (i.e. dark fibre)? Are there any proposals to mandate 'passive access' to such basic infrastructure?

There are no existing or proposed rules requiring the sharing of or access to facilities. Interconnection regulations made in terms of the Telecommunications Act require Telkom to co-locate unless it is not ‘technically feasible’; however, these regulations, now functionally obsolete, have never been enforced.

4 Access and Interconnection

4.1 Is network-to-network interconnection and access mandated, and what are the criteria for qualifying for the benefits of interconnection?

In terms of chapters 7 and 8 of the ECA, every licensee must interconnect and every ECNS licensee must provide facilities, upon request, on terms negotiated, unless the request is unreasonable. ICASA may exempt licensees from their obligations, but only if they do not have significant market power (SMP). ICASA must promulgate regulations to facilitate interconnection and facilities leasing.

In terms of chapter 10 of the ECA, ICASA may impose specific licence conditions regarding, *inter alia*, interconnection and access, on licensees determined to have SMP.

ICASA has neither made regulations in terms of chapters 7 and 8 nor imposed licence conditions in terms of chapter 10.

4.2 How are interconnection or access disputes resolved? Does the national regulatory authority have jurisdiction to adjudicate and impose a legally binding solution?

According to chapters 7 and 8, if the parties are unable to agree on terms and conditions, and the dispute is referred to ICASA, ICASA may do one of three things:

- impose the terms and conditions;
- propose terms and conditions and instruct the parties to renegotiate; or
- refer the matter to the Complaints and Compliance Committee (CCC).

If referred to the CCC, the CCC must hear the matter and make a recommendation to ICASA as to the appropriate action, which could include, if the licensee has repeatedly been found guilty, suspension or revocation of its licence.

Regarding implementation disputes, the CCC must hear and decide matters on an expedited basis in accordance with regulations to be prescribed by ICASA.

Chapter 10 provides for ICASA to issue cease and desist orders where a licensee is found to have engaged in an anti-competitive act. The regulations required to implement these provisions have not been promulgated.

Similarly, the Competition Act prohibits anti-competitive acts, including abuses of dominant positions, charging an excessive price and refusing to give access to an essential facility. The Competition Commission investigates anti-competitive acts and the Competition Tribunal adjudicates.

Although there have been complaints filed with ICASA and the Competition Commission, there have been no successful prosecutions, due mainly to dominant players employing delaying and diversion tactics, taking advantage of legislative impreciseness and inexperienced regulators.

4.3 Are any operators required to publish their standard interconnection contracts and/or prices?

Although ICASA must provide a regulatory framework that may include reference offers containing model terms and conditions, and may impose licence conditions requiring publication of offers, it has done neither.

4.4 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

ICASA may prescribe regulations establishing a framework of wholesale interconnection and facilities leasing rates taking into account chapter 10, which deals with competition matters.

The existing regulations (under the now repealed Telecommunications Act) set up a pricing regime (albeit a discriminatory one). However, those regulations are functionally obsolete as licence categories have changed with the completion of the licence conversion process.

ICASA has failed to regulate interconnection and facilities leasing pricing in terms of the ECA, due to, *inter alia*, ambiguous legislative language in this regard.

4.5 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

ICASA has the authority to require accounting separation as a licence condition on licensees determined to have SMP. It does not appear that ICASA has the authority to require functional or legal separation.

The Competition Tribunal has the authority to order divestiture in certain circumstances where a prohibited practice has been found to have occurred.

4.6 How are existing interconnection and access regulatory conditions to be applied to next generation (IP-based) networks?

The ECA does not make a distinction between technologies used in respect of regulating interconnection and facilities leasing.

4.7 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

The Minister has issued a policy direction to ICASA that all licensees must have access to the local loop, and that local loop unbundling must be completed by 2011.

There are no cable TV operators in South Africa.

4.8 Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed?

The ECA provides that notwithstanding a finding of SMP, ICASA may exempt ECNS licensees from the obligation to lease fibre loops servicing residences on the condition, *inter alia*, that the network is newly constructed in an area not previously served by the licensee.

5 Price and Consumer Regulation

5.1 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

In terms of the Telecommunications Act, the retail prices of Telkom, Vodacom and MTN, were, to some extent, regulated by the imposition of price caps. Nonetheless, retail prices in SA remain comparatively high.

Under chapter 10 of the ECA, ICASA may impose retail price controls as licence conditions. This, however, must be preceded by determinations by ICASA of relevant markets, the effectiveness of competition in markets, SMP, and appropriate pro-competitive licence conditions.

5.2 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

ICASA has made regulations setting out a licensee code of conduct, minimum standards for end-user and subscriber service charters, and a code of conduct with regard to people with disabilities.

6 Numbering

6.1 How are telephone numbers and network identifying codes allocated and by whom?

ICASA must prescribe a numbering plan for the efficient use and allocation of numbers, to accommodate the various protocols used and services provided, and to transform the numbering plan to a non-geographic numbering system utilising electronic numbering allowing the interoperation between telephone numbers and the Internet domain name system.

ICASA has not prescribed numbering plan regulations in terms of the ECA; however, there are numbering plan regulations made in terms of the Telecommunications Act.

In terms of the ECA, the provision of ECS using numbers allocated by ICASA requires an individual ECS licence. Thus, only individual ECS licensees may obtain allocations from ICASA.

ECTA established the .za Domain Name Authority to assume responsibility for the .za domain name space.

6.2 Are there any special rules which govern the use of telephone numbers?

The specific rules governing the use of numbers are located in the numbering plan regulations.

6.3 How are telephone numbers made available for network use and how are such numbers activated for use by customers?

There are rules in the numbering plan regulations regarding the issuance of numbers to customers, including, *inter alia*, that the allocation must be controlled by the original applicant even though sub-allocations are allowed, and the number must be used for the purpose stated in the original application and in accordance with any conditions imposed by ICASA.

6.4 What are the basic rules applicable to the 'porting' (i.e. transfer) of telephone numbers (fixed and mobile).

ICASA was required to prescribe regulations in terms of the ECA to ensure that number portability was introduced in 2005. Although ICASA has not prescribed number portability regulations in terms of the ECA, there are number portability regulations made in terms of the Telecommunications Act, dealing with number portability between fixed licensees on the one hand and mobile licensees on the other.

The implementation of number portability is dependent on specifications, *inter alia*, to be negotiated between licensees and published by ICASA. This process has not been completed in respect of geographic (fixed) number portability.

Mobile number portability is currently being implemented.

7 Submarine Cables

7.1 What are the main rules governing the bringing into South Africa's territorial waters, and the landing, of submarine cables? Are there any special authorisations required or fees to be paid with respect to submarine cables?

An ECNS licence authorises the landing of a submarine cable in SA. No special rules govern the landing of submarine cables although the Minister proposed some time back to impose rules that would require licensees to, *inter alia*, obtain a separate authorisation from the Minister.

There are other regulatory requirements applicable, such as those under the National Environmental Management Act for an Environmental Impact Assessment, and the Sea-Shore Act for a sea-shore lease.

8 Radio Frequency Spectrum

8.1 Is the use of radio frequency spectrum specifically regulated and if so, by which authority?

Spectrum is primarily regulated by ICASA. The Minister has the authority to approve (or disapprove) the radio frequency band plan and to decide whether the migration of users that are government entities, is permitted.

8.2 How is the use of radio frequency spectrum authorised in South Africa? What procedures are used to allocated spectrum between candidates - i.e. spectrum auctions, comparative 'beauty parades', etc.?

Spectrum licences are awarded on an *ad hoc* basis.

ICASA may make regulations and criteria for awarding licences for competing applications and has recently proposed regulations which indicate that the evaluation criteria and selection process, which might include a beauty parade or auction or both, will be set out in invitations to apply for specific spectrum.

8.3 Are distinctions made between mobile, fixed and satellite usage in the grant of spectrum rights?

Spectrum licences are awarded consistent with the band plan, which indicates which spectrum is designated for which type of service.

8.4 How is the installation of satellite earth stations and their use for up-linking and down-linking regulated?

The installation of satellite earth stations is regulated no differently than the installation of facilities in respect of other spectrum. A spectrum licence and an ECNS licence are required.

The Minister has issued a policy direction to ICASA to issue an invitation for individual ECNS licences for the provision of satellite infrastructure.

8.5 Can the use of spectrum be made licence-exempt? If so, under what conditions?

ICASA may exempt certain uses of spectrum from the licensing requirement, and prescribe the conditions under which unlicensed use may take place. It has prescribed certain spectrum licence exemptions including for the use of the 2.4 GHz band for wide band wireless systems, *inter alia*.

8.6 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Application and licence fees for the various uses of spectrum have been prescribed by ICASA on an *ad hoc* basis. ICASA has recently proposed spectrum fees based on certain formula depending on type of use.

8.7 Are spectrum licences able to be traded or sub-licensed and if so on what conditions?

The ECA enjoins anyone from using spectrum without a spectrum licence granted to that person, and therefore sub-licensing is not allowed.

Spectrum licences may be transferred, but only twelve months after the date of issue or in the case of commercial operations, twelve months after the facilities are operational.

9 Data Retention and Interception

9.1 Are operators obliged to retain any call data? If so who is obliged to retain what and for how long? Are there any data protection (privacy rules) applicable specifically to telecommunications?

In terms of RICA, all service providers must store communications-related information that identifies the origin, destination, termination, duration, and equipment used. The time period for retention is three years.

In addition, service providers must gather and retain personal information about customers regarding their identity and contact details.

In broad terms, RICA itself is data protection legislation. It prohibits interception and monitoring except in the specific circumstances set out. Similarly, the Promotion of Access to Information Act prohibits the disclosure of certain personal information. There are some voluntary privacy provisions set out in ECTA. However, the South African Law Reform Commission has drafted comprehensive data protection legislation, which has been approved by Cabinet for consideration by Parliament.

9.2 Are operators obliged to maintain call interception (wire-tap) capabilities?

RICA establishes an obligation on services providers to have the capability to intercept communications.

9.3 What is the process for authorities obtaining access to retained call data and/or intercepting calls? Who can obtain access and what controls are in place?

The circumstances under which government entities or other persons may intercept or monitor communications include, *inter alia*:

- if a judge issues a direction on application of a law-enforcement officer;
- interception with the written consent of one of the parties to the communications;
- interception in the carrying on of a business;
- interception by law-enforcement personnel to prevent serious bodily harm;
- interception by law-enforcement personnel to determine the location of a person in an emergency;
- interception in a prison; and
- monitoring of the radio frequency spectrum by the regulator.

Similarly, RICA prohibits the provision of communications-related information except if, *inter alia*, a judge issues a direction on application of a law-enforcement officer.

Unauthorised interception or provision of communications-related information is a criminal offence subject to fines and imprisonment.

10 The Internet

10.1 Are conveyance services over the internet regulated in any different way to other electronic communications services? Which rules, if any, govern access to the internet at a wholesale (i.e. peering or transit) and/or retail (i.e. broadband access) level? Are internet service providers subject to telecommunications regulation?

Internet networks are regulated as ECNS. Internet services are regulated as ECS (and not BS, which attract additional regulation in respect of *inter alia*, content). If an entity is merely a content provider, it does not need a licence or fall within the ambit of the entities that are regulated under the ECA.

10.2 Is there any immunity (e.g. 'mere conduit' or 'common carrier') defence available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

ECTA provides for the limitation of liability for service providers, if such providers are members of an industry representative body that has been recognised by the Minister, and have adopted that body's code of conduct.

10.3 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Although there is no obligation on service providers to monitor use, there is an obligation to take down offending information upon receiving a take down notice in terms of ECTA in order to retain the legislative limitation of liability in respect of caching, hosting and information location tools.

10.4 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any 'net neutrality' requirements?

There are no net neutrality requirements in South Africa.

10.5 How are 'voice over IP' services regulated?

Voice over IP services are not regulated differently than other voice services.

10.6 Are there any rules to prevent, restrict or otherwise govern internet or email communications, in particular, marketing and advertising communications?

ECTA provides that anyone who sends unsolicited commercial information must give the recipient the opportunity to be removed from the list, and provide information on how that person got on the list.

11 USO

11.1 Is there a concept of universal service obligation; if so how is this defined, regulated and funded?

The ECA establishes the Universal Service and Access Agency of South Africa (USAASA) to promote universal service, under the direction and control of the Minister. The Minister must determine the meaning of universal service and universal access.

The ECA also establishes the Universal Service and Access Fund (USAF), to which licensees contribute 0.2 percent of annual turnover. Money is to be paid out of the USAF if Parliament appropriates money for that purpose.

ICASA may place universal service obligations (USOs) on individual licensees.

12 Foreign Ownership Rules

12.1 Are there any rules restricting direct or indirect foreign ownership interests in electronic communications companies whether in fixed, mobile, satellite or other wireless operations?

All licensees must be either citizens, or entities registered in SA with their principle place of business in SA.

ICASA, in granting licences, must ensure that services, viewed collectively, are provided by persons or groups from a diverse range of communities in SA, and must promote the empowerment of HDIs. In respect of new individual licences, ownership by HDIs must be no less than 30 percent or some other percentage prescribed by ICASA. Although HDI is not defined in the ECA, ICASA has recommended that it include South African citizens who are black people, as well as women and people with disabilities; associations whose majority members are such persons; and juristic persons, where greater than 25 percent of the share capital is held by such persons.

In respect of commercial BS licensees, foreigners may not exercise control, have a financial interest or interest in voting shares or paid-up capital in a licensee of more than 20 percent, or constitute more than 20 percent of the board of directors.

13 Future Plans

13.1 Are there any imminent and significant changes to the legal and regulatory regime for electronic communications?

Although the ECA come into force less than five years ago promising to substantially alter the regulatory framework leading to competition and universal service, it has become apparent that in addition to the huge amount of regulatory work that needs to be completed by ICASA, the ECA must be amended if it is to be successfully implemented. The 2009 elections brings renewed hope that this will happen. There are a number of proceedings in process, such as the development of broadband policy, that might lead to the required legislative amendments. In the meantime, there will be incremental movements to improve the competitiveness of the industry as ICASA continues to implement, where it is able, the provisions of the ECA.



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Lisa Thornton founded Lisa Thornton Inc in 2000 to provide high quality, solution oriented services to the ICT industry in South Africa focusing on telecoms, broadcasting and new media. She recently founded the sister company, Lisa Thornton Consulting, in the USA, to focus on broadband development projects.

Lisa has been named the sole leading individual lawyer in the area of technology, media and communications law in South Africa by PLC Which Lawyer, the leading telecommunications lawyer in Cross Border - Communications Handbook, and is listed in the International Who's Who of Business Lawyers. Lisa was the most highly nominated individual for inclusion in the upcoming publication, "Digerati: everyone you need to know in SA technology".

Her colleagues and clients have said that "Lisa has one of the sharpest minds in her field", and is "the best telecoms lawyer that I have had the privilege of working with".



Lisa Thornton Inc is a leading South African law firm for the ICT industry providing a range of services including contractual, commercial, regulatory, competition, administrative and constitutional law, as well as policy advice, to all sectors of the industry including telecommunications, broadcasting, new media and computing.

The firm has experience in South Africa, the USA, and in a number of African countries other than South Africa, and has done work for various international organisations. The firm's clients include large and small businesses, entrepreneurs, civil society, regulators, governments, and academia.

Lisa Thornton Inc offers an alternative to the experience of working with large firms. Although it is small, it is able to deliver high quality, professional, solution oriented and timely work product on both small and large matters by focusing on one subject matter, and by teaming up with trusted colleagues outside the practice as and when necessary.