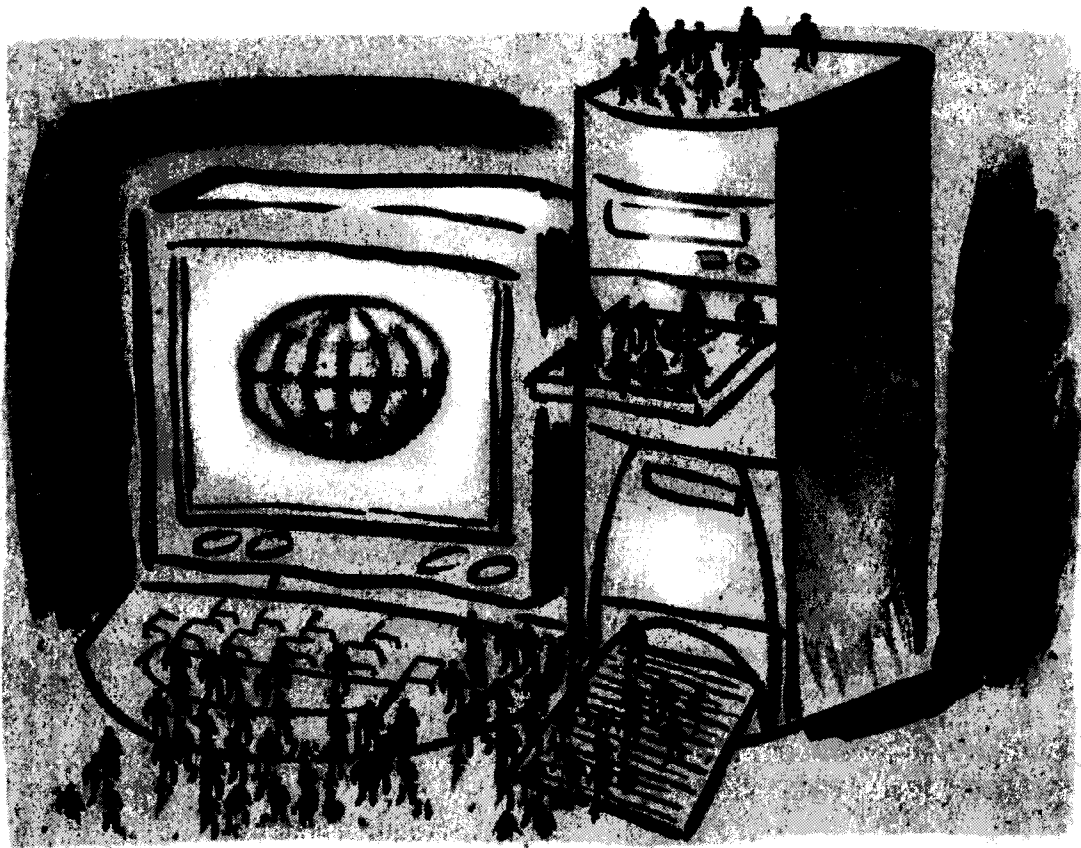


## Telecommunications Law – an Overview

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## Introduction

Internationally, the International Telecommunication Union is in place to regulate telecommunications. Domestically, in South Africa, there is a myriad of legislation – including telecommunications-specific legislation, the Telecommunications Act, 103 of 1996 – and a specialist regulator has been established to regulate telecommunications: the Independent Communications Authority of South Africa (Icasa). Why is this so? What is it about telecommunications that requires such a high degree of regulation?

This chapter begins by addressing these questions, by looking at the question ‘what is telecommunications?’ and then by identifying reasons why the industry is so highly regulated. The chapter then looks generally at the way in which telecommunications is regulated and finally specifically at how it is regulated in South Africa.

The chapter is intended to provide a big-picture overview of how telecommunications is regulated in South Africa. More detail will follow in the succeeding chapters, which will deal with specific issues, such as licensing, interconnection, pricing and universal service.

Primarily, the following are discussed in this chapter: the constitutional framework; national policy; international law; and national legislation, including the Telecommunications Act, the Independent Communications Authority of South Africa Act, 13 of 2000 (the Icasa Act), the Competition Act, 89 of 1998, the Electronic Communications and Transactions Act, 25 of 2002 (the ECT Act) and the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 70 of 2002 (later in this chapter, this Act will be referred to as ‘the Interception Act’). The chapter concludes with a few suggestions for improving the regulatory framework for telecommunications in South Africa.

### 1. WHAT IS TELECOMMUNICATIONS?

‘Telecommunications’ is defined in *Newton’s Telecom Dictionary* as:

The art and science of ‘communicating’ over a distance by telephone, telegraph and radio. The transmission, reception and the switching of signals, such as electrical or optical, by wire, fibre, or electromagnetic (ie through-the-air) means.<sup>2</sup>

The definition holds two concepts. The first is the act of communicating, in other words, imparting and receiving information. The second is the means of communicating, in other words, communications infrastructure.

The Constitution of the Republic of South Africa Act, 108 of 1996 guarantees the right to communicate. Section 16(1) states:

Everyone has the right to freedom of expression, which includes –  
(b) freedom to receive or impart information or ideas ...<sup>3</sup>

<sup>2</sup> H Newton *Newton’s Telecom Dictionary* 18 ed (2002) 733.

<sup>3</sup> s 16(1)(b) of the Constitution.

The right to freedom of expression has been interpreted to mean not only the right to speak and the right to hear speech but also the right to have access to the means by which to communicate.<sup>4</sup>

The Telecommunications Act, which provides for the primary regulation of the telecommunications industry in South Africa, defines telecommunications more narrowly as the means by which to communicate, as follows:

the emission, transmission or reception of a signal from one point to another by means of electricity, magnetism, radio or other electromagnetic waves, or any other agency of a like nature, whether with or without the aid of tangible conductors.<sup>5</sup>

## 2. WHY TELECOMMUNICATIONS IS SPECIALLY REGULATED

There is nothing obvious in definitions or the concept of telecommunications that tells us why it is so specially and highly regulated. So why is this the case?

Traditionally, the answer to why telecommunications has been so regulated has been threefold. First, telecommunications was seen in the same light as other public utilities, such as water and electricity. Governments generally believed that it was their duty to ensure universal access to such services by providing the services themselves.<sup>6</sup> In the White Paper on Telecommunications Policy, 1996, the South African Government articulated the importance of communications in the development of South Africa.<sup>7</sup> Although history has proven that creating and protecting government-owned monopolies may not be the best way to ensure universal service, the development and implementation of effective policies to spur universal service will continue to prove to be key in regulating telecommunications for the future.

Secondly, governments historically thought about telecommunications as a 'natural monopoly'.<sup>9</sup> Therefore, most governments protected a monopoly supplier of services by not allowing competitors to be licensed.<sup>10</sup> This economic model, however, is increasingly becoming inadequate for a number of reasons, not least of which is the advancement of technology.<sup>11</sup> Today, regulatory policy and law

<sup>4</sup> See *TS Masiyiwa Holdings (Pvt) Ltd and Another v Minister of Information, Posts and Telecommunications* 1998 (2) SA 755 (ZS) at 767–8; *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation (Attorney-General of Zimbabwe Intervening)* 1996 (1) SA 847 (ZS) at 858–865. Although the cases cited are Zimbabwean, the Zimbabwean Constitution is substantially similar to the South African Constitution in regard to the right to freedom of expression.

<sup>5</sup> s 1 of the Telecommunications Act.

<sup>6</sup> H Intven (ed) *Telecommunications Regulation Handbook* Module 1 – Overview of Telecommunications Regulation (2000) 1–2.

<sup>7</sup> The White Paper on Telecommunications Policy, GN 291 of 1996 in GG 16995 dated 13 March 1996, chapter 1. See also The New Partnership for Africa's Development, October 2001, para V.B.ii.

<sup>8</sup> Minister of Communications, Dr I Matsepe-Casaburri, Address at the National Colloquium on Convergence Policy, 15 July 2003, docweb.pwv.gov.za/Convergence/speech.html ('In bridging the digital divide through the utilization of the new technologies and expedited by convergence, our perspective on information and communications technology should be to continue to promote universal service, to ensure access for disadvantaged people and ensure that they participate as active producers in the information society, not merely as passive recipients of an imported and distant content:').

<sup>9</sup> CT Foreman (ed) *The Telecommunications Debate in Regulating for the Future – The Creative Balance* (1991) 176.

<sup>10</sup> In terms of s 36(3) of the Telecommunications Act, Telkom SA Limited was granted an exclusive licence to provide certain public switched telecommunication services for a period to be specified in its licence. The period specified was five years (para 3, Licence Issued to Telkom SA Limited to Provide Telecommunication Services under s 36 of the Telecommunications Act, 1996, GN 768 of 1997 GG 17984 dated 7 May 1997). However, despite the period of exclusivity having ended on 7 May 2002, Telkom enjoys a *de facto* monopoly because, as of June 2004, a competitor has not been issued a licence as required by ss 32A(1) and 32B of the Telecommunications Act.

<sup>11</sup> Foreman (note 9 above) 175.

regarding telecommunications are more focused on controlling monopolistic behaviour than on protecting monopolies.<sup>12</sup> The regulation of interconnection and pricing (in addition to regulating for universal service) will be critical in the transition from a monopoly to a competitive market.<sup>13</sup>

Thirdly, it is important to regulate telecommunications specially to the extent that a valuable national resource is involved, namely the radio frequency spectrum. Without the exercise of control over how the spectrum is used and who gets to use it, anarchy might prevail or, perhaps even worse – the dominant participants might prevail at great cost to all other participants and consumers. Historically, governments have seen the radio frequency spectrum as a valuable national resource over which the government must exercise some control. That is still true today to a large extent, although the emergence of new digital technologies will make it less so in the future.<sup>14</sup>

Currently, the main reasons advanced for specialised regulation of telecommunications are –

- to maintain control over the use of a valuable national resource, namely the radio frequency spectrum;
- to control anti-competitive behaviour by dominant players in the market, which in turn will lead to the realisation of universal service and to increased quality and choice; and
- to ensure the development and implementation of effective universal service policies.

### 3. HOW TELECOMMUNICATIONS IS REGULATED

The nature of telecommunications is that it is borderless. In other words, it does not stop at national borders. It therefore makes sense that at least some of the regulation of telecommunications should be (and is) through international law. To some extent, this is true; however, there is still quite a lot of domestic regulation of telecommunications.

In a constitutional state such as South Africa, such domestic regulation is founded in the Constitution. There are also usually one or more pieces of legislation applicable to the industry, usually a telecommunications-specific statute supplemented by other general legislation also applicable to the industry, such as competition legislation. It is argued by some that, as the industry becomes more competitive, there will be less need for telecommunications-specific legislation and increasing reliance on general competition legislation for effective regulation of the industry.<sup>15</sup>

There is also usually some entity responsible for regulating the industry, inter

<sup>12</sup> Minister of Communications, Dr I Matsepe-Casaburri, Address at the National Colloquium on Convergence Policy, 15 July 2003, [docweb.pwv.gov.za/Convergence/speech.html](http://docweb.pwv.gov.za/Convergence/speech.html) ('[Government] must achieve [its] goal and objective through promoting the interests of [its] people through the encouragement of effective competition, ensuring that social obligations are met and that services are matched with commitments to sustainability, resilience and protection of users.')

<sup>13</sup> Intven (note 6 above) 1-1-1-4.

<sup>14</sup> White Paper on Telecommunications Policy para 5.5. With regard to control of the telecommunications frequency spectrum, see inter alia chapter IV of the Telecommunications Act; with regard to the broadcasting frequency spectrum, see inter alia chapter IV and ss 41 and 43 of the Independent Broadcasting Authority Act, 153 of 1993 and chapter VIII of the Broadcasting Act, 4 of 1999 regarding the Frequency Spectrum Directory of the Department of Communications.

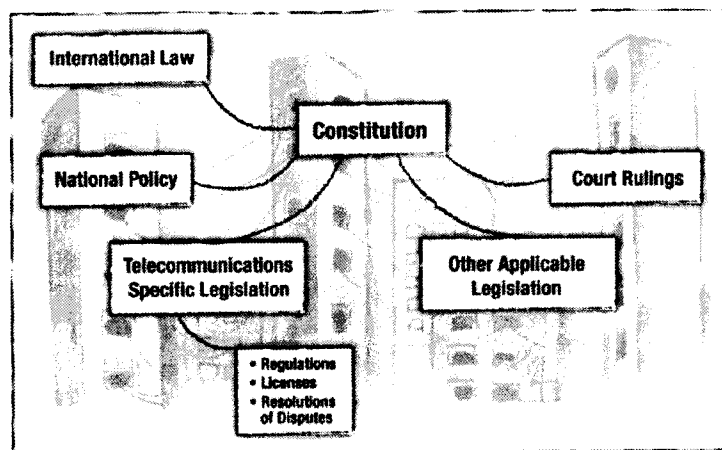
<sup>15</sup> See T Gilbertson *Telecommunications-Specific Competition Regulation in Australia: What Next?* 30 March 2001 available at [www.gtlaw.com.au/binaries/pdf/publications/telecomspecific.pdf](http://www.gtlaw.com.au/binaries/pdf/publications/telecomspecific.pdf), which includes a discussion of the issue not only in Australia but also in the United Kingdom, New Zealand and the European Union.



alia, by issuing licences, resolving disputes and making more detailed rules for the industry. Often, the regulator is independent of both the government and the various players in the industry. Sometimes the various regulatory functions are shared by different government entities.<sup>16</sup>

Also, in most jurisdictions, the courts play a role in either resolving disputes or reviewing decisions of the regulator, or both.

South Africa's regulatory framework follows this general model to a large extent. The diagram below is a bird's-eye view of the regulatory framework. The South Africa-specific diagram at the end of this chapter follows from the discussion set out in the remainder of this chapter.



## 4. THE REGULATION OF TELECOMMUNICATIONS IN SOUTH AFRICA

### 4.1 Constitutional Framework

#### 4.1.1 Supremacy of the Constitution

Since the 1994 elections, South Africa has been a constitutional state.<sup>17</sup> The Constitution is the supreme law of the land. All legislation must be consistent with it and all acts of the government must be consistent with it.<sup>18</sup>

In terms of the Constitution, South Africa has three levels or spheres of government, namely, national, provincial and local.<sup>19</sup> The regulation of telecommunications generally falls to the national sphere.<sup>20</sup>

In terms of the Constitution, there are also three branches of national government, namely, the legislative authority,<sup>21</sup> the executive authority,<sup>22</sup> and the judicial authority.<sup>23</sup>

<sup>16</sup> African Information and Telecommunication Policy Study Group, Telecommunication Development Bureau, International Telecommunication Union African Green Paper: *Telecommunication Policies for Africa approved by the African Regional Telecommunication Development Conference* (Abidjan, 6–10 May 1996) 35–8, 42.

<sup>17</sup> The Constitution of the Republic of South Africa Act, 200 of 1993 (known as the interim Constitution) was promulgated in preparation of the historic 1994 democratic elections in South Africa, and has since been superseded by the Constitution of the Republic of South Africa, 1996 (known as the final Constitution).

<sup>18</sup> s 2 of the final Constitution states that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

<sup>19</sup> s 40(1) of the Constitution.

<sup>20</sup> Telecommunications does not fall within Schedule 4 ('Functional areas of concurrent national and provincial legislative competence') or Schedule 5 ('Functional areas of exclusive provincial legislative competence'). There are items, such as 'building regulations' that do fall within those schedules that are peripherally relevant to telecommunications law, but are not covered in this book.

<sup>21</sup> Chapter 4 of the Constitution.

<sup>22</sup> Chapter 5 of the Constitution.

<sup>23</sup> Chapter 8 of the Constitution.

#### 4.1.2 National legislative authority

The national legislative authority is exercised by the national Parliament,<sup>24</sup> which consists of the National Assembly and the National Council of Provinces.<sup>25</sup> National legislation is passed by Parliament.

Just as legislation must be consistent with the Constitution, subordinate legislation, such as regulations, must be consistent with both the legislation in terms of which it is made, and the Constitution.<sup>26</sup> For example, sections 95 and 96 of the Telecommunications Act empower the regulator, Icasa, to make regulations,<sup>27</sup> which must be approved and published by the Minister of Communications.<sup>28</sup> Such regulations must be consistent with the Telecommunications Act and with the Constitution.<sup>29</sup>

The Telecommunications Act also empowers Icasa, among other things, to issue licences<sup>30</sup> and make orders in relation to disputes.<sup>31</sup> Similar to regulations, licences issued and decisions and orders made by Icasa in relation to disputes must be consistent with both the Telecommunications Act and the Constitution. In other words, Icasa must act in terms of legislation and the Constitution.

The Minister of Communications is empowered in terms of section 5(4) of the Telecommunications Act to issue policy directions to Icasa. Icasa must carry out its functions in terms of such policy directions.<sup>32</sup> Like regulations, policy directions made in terms of the Telecommunications Act must be consistent with both the Telecommunications Act and the Constitution.<sup>33</sup>

The Telecommunications Act also empowers the Minister of Communications, among other things, to invite applications for certain kinds of telecommunication services licences,<sup>34</sup> to make decisions on the granting of certain licences,<sup>35</sup> and in certain instances to determine the manner in which applications for telecommunication services licences may be made and the licensing process.<sup>36</sup> Like Icasa, when the Minister carries out her functions in terms of the Telecommunications Act, she must do so consistently with the Act and the Constitution.<sup>37</sup>

<sup>24</sup> s 43(a) of the Constitution.

<sup>25</sup> s 42(1) of the Constitution.

<sup>26</sup> Required by s 33(1) of the Constitution, lawful administrative action. See also the Promotion of Administrative Justice Act, 3 of 2000.

<sup>27</sup> ss 95(1) and 96(1) of the Telecommunications Act.

<sup>28</sup> ss 95(3) and 96(6) of the Telecommunications Act.

<sup>29</sup> s 239 of the final Constitution defines 'national legislation' as including inter alia 'subordinate legislation made in terms of an Act of Parliament'.

<sup>30</sup> See chapters IV, V and VI of the Telecommunications Act.

<sup>31</sup> See, inter alia, s 100 of the Telecommunications Act.

<sup>32</sup> s 5(4)(d) of the Telecommunications Act.

<sup>33</sup> s 5(4)(a) of the Telecommunications Act indicates that policy directions must in particular be consistent with the objects of the Telecommunications Act.

<sup>34</sup> ss 34(2) and 32C(3) of the Telecommunications Act.

<sup>35</sup> ss 35(2), 30(3)(a), (c) and (e); 36(1), (6), (7), (8) and (9) and 40(1)(a) of the Telecommunications Act (regarding Telkom SA Limited's frequency, public switched telecommunication services and value added network services licences); and s 37(1) of the Telecommunications Act (regarding Vodacom (Pty) Ltd's and Mobile Telephone Networks (Pty) Ltd's mobile cellular telecommunication services licences).

<sup>36</sup> s 35A of the Telecommunications Act.

<sup>37</sup> The Universal Service Agency is also empowered to act in terms of the Telecommunications Act to do certain things. Similarly, s 37 of the Broadcasting Act, 4 of 1999 empowers the Frequency Spectrum Directorate of the Department of Communications to do certain things above. The Department of Communications (the public service arm of the Ministry of Communications) is also empowered in various respects in terms of the Electronic Communications and Transactions Act. Other government departments or organs of state are empowered in terms of legislation, such as the Competition Commission in terms of the Competition Act and the South African Council for Space Affairs in terms of the Space Affairs Act, 84 of 1993. In all cases, the actions of such entities must be consistent with the relevant empowering legislation as well as the Constitution.

#### **4.1.3 National executive authority**

In terms of section 85(2)(b) of the Constitution, the President exercises executive authority together with the other members of the Cabinet by, inter alia, ‘developing and implementing national policy’. National policy is sometimes articulated in government white papers, such as the White Paper on Telecommunications Policy.<sup>38</sup> White papers often lead to the promulgation of legislation, which is primarily the responsibility of Parliament.<sup>39</sup> For example, the White Paper on Telecommunications Policy led to the passage of the Telecommunications Act in 1996.

#### **4.1.4 Judicial authority**

In terms of section 165(2), (3) and (4) of the Constitution, South African courts are independent and subject only to the Constitution. Their role is to exercise judicial authority over the whole of South Africa.<sup>40</sup> In respect of telecommunications, this is carried out primarily in reviewing administrative acts or decisions in terms of section 33 of the final Constitution (‘the right to just administrative action’).<sup>41</sup>

### **4.2 National Policy**

National policy is the responsibility of the national executive. The Minister of Communications (formerly the Minister for Posts, Telecommunications and Broadcasting), supported by the Department of Communications, is primarily responsible for telecommunications policy. However, other ministries – including the ministers of Trade and Industry, Justice and Constitutional Development, and Public Enterprises – are also involved in regulating the industry. The Cabinet cluster that the Ministry of Communications belongs to is the economic cluster, which includes not only the ministries of Communications, Trade and Industry, and Public Enterprises but also the Ministry of Finance.

In addition to the ministerial and departmental involvement in policy-making in the telecommunications industry, the President has established the Presidential National Commission on Information Society and Development<sup>42</sup> and the Presidential International Advisory Council on Information Society and Development to advise the government on information and communications policy with an eye to development.

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<sup>38</sup> Note 7 above.

<sup>39</sup> s 43 of the Constitution. In terms of s 85(2)(d) of the Constitution the national executive is responsible for ‘preparing and initiating legislation’. The President must assent to and sign legislation into law in terms of s 84(2)(a) of the Constitution.

<sup>40</sup> s 165(1) of the Constitution.

<sup>41</sup> See also the Promotion of Administrative Justice Act, 3 of 2000, which is legislation promulgated in terms of s 33(3) of the Constitution.

<sup>42</sup> See [www.pnc.gov.za/](http://www.pnc.gov.za/).

### 4.2.1 Telecommunications policy

Telecommunications Policy is articulated in the White Paper on Telecommunications Policy,<sup>43</sup> which deals with, among other things, universal service,<sup>44</sup> market structure,<sup>45</sup> and an independent regulator.<sup>46</sup>

With regard to market structure, the White Paper on Telecommunications Policy set out that there would be an initial period of exclusivity for Telkom SA Limited (Telkom) to provide basic services in return for an obligation to roll out services to South Africans who had previously not had access to them.<sup>47</sup>

During that period of exclusivity, certain market segments would be open to competition, namely, the customer premises equipment (CPE),<sup>48</sup> private network<sup>49</sup> and value added network services (Vans)<sup>50</sup> segments. In addition, cellular and certain other radio services that had previously been partially competitive – such as paging services – would remain so.<sup>51</sup>

In terms of the White Paper on Telecommunications Policy, the resale of telecommunication facilities leased from Telkom by private and Vans operators was going to be allowed at the beginning of year four of the period of exclusivity,<sup>52</sup> which was May 2001.<sup>53</sup> Furthermore, at the beginning of year six of Telkom's exclusivity period, which was May 2002, it was envisaged that the following additional market segments would be opened up for competition: local loops, public payphones, and national long-distance and metropolitan area networks.<sup>54</sup> It was also envisaged that a second full services operator to compete with Telkom would be licensed by May 2003.<sup>55</sup>

The market structure policy exposition was accompanied by the articulation of several principles. First, it was stated that the definitions of the different market segments were to be determined by an independent regulator and not by Telkom.<sup>56</sup> This principle recognised that Telkom had an inherent ability to act anti-competitively. It was to have a monopoly over basic services and compete in other

<sup>43</sup> For a discussion of the history of telecommunications policy in South Africa, see RB Horwitz *Communication and Democratic Reform in South Africa* (Cambridge University Press 2001).

<sup>44</sup> Chapter 1 of the White Paper on Telecommunications Policy. See chapter 8 herein for a discussion of universal service policy.

<sup>45</sup> Chapter 2 of the White Paper on Telecommunications Policy.

<sup>46</sup> Chapter 5 of the White Paper on Telecommunications Policy. See chapter 4 herein for a discussion of the independent regulator.

<sup>47</sup> Chapter 2 of the White Paper on Telecommunications Policy para 2.6.

<sup>48</sup> White Paper on Telecommunications Policy para 2.10.3. Although the Telecommunications Act does not mention CPE, the CPE market segment is competitive. This issue was discussed in *Findings and Conclusions in terms of Section 27(8)(a) of the Telecommunications Act (No 103 of 1996) on the Section 27 Enquiry on the Provisioning of Wireless Internet Access using ISM Frequencies* in GN 2610 of 2003, GG 25594 dated 16 October 2003. See also the unreported judgment of the High Court (Transvaal Provincial Division) in the matter of *Telkom South Africa Ltd v Nedtel Cellular (Pty) Ltd and 11 Others* (TPD, 22 October 2003, case no 20836/2000) regarding least cost routing devices attached to PABX (private automatic branch exchange) equipment, which automatically choose the 'least cost' route for outgoing calls.

<sup>49</sup> White Paper on Telecommunications Policy paras 2.10.6 and 2.11.2.

<sup>50</sup> White Paper on Telecommunications Policy paras 2.8 and 2.13.

<sup>51</sup> White Paper on Telecommunications Policy chapter 2 figure 1.

<sup>52</sup> White Paper on Telecommunications Policy paras 2.11.2, 2.11.3, 2.12 and chapter 2 figure 1.

<sup>53</sup> This, as of June 2004, has not happened. The Minister of Communications has not acted in terms of s 40(2) of the Telecommunications Act to lift the restriction with regard to Vans providers.

<sup>54</sup> White Paper on Telecommunications Policy para 2.21 and chapter 2 figure 1. This, as of June 2004, also has not happened.

<sup>55</sup> White Paper on Telecommunications Policy para 2.22 and chapter 2 figure 1. Although the process for licensing a second full services licensee in terms of s 32B of the Telecommunications Act has begun, as of June 2004 a licence has not been issued.

<sup>56</sup> White Paper on Telecommunications Policy paras 2.3 and 2.8. The regulator has had occasion to decide such definitions in *Pronouncement – P0001* dated 14 October 1997 (review pending) and *Telkom SA Limited v Internet Solutions (Pty) Ltd*, 14 June 2002, [www.icasa.org.za/contents/?Cmd=Download&ResourceID=313](http://www.icasa.org.za/contents/?Cmd=Download&ResourceID=313) regarding Internet services; and *Independent Communications Authority of South Africa Finding and Conclusions on the s 27 Enquiry on Whether a Virtual Private Network (VPN) constitutes a Managed Data Network Service (MDNS) or not* in GN 1414 of 2001, GG 22349 dated 1 June 2001, [www.icasa.org.za/contents/?Cmd=Download&ResourceID=756](http://www.icasa.org.za/contents/?Cmd=Download&ResourceID=756) and *Telkom SA Limited v AT&T Global Network Services (South Africa) (Pty) Ltd*, 21 June 2002, [www.icasa.org.za/contents/?Cmd=Download&ResourceID=328](http://www.icasa.org.za/contents/?Cmd=Download&ResourceID=328) (review pending) (*Telkom v AT&T*) regarding VPN services.

market segments such as Vans. It was recognised that the regulator had to control such activity.<sup>57</sup>

Secondly, it was stated that telecommunications policy must accommodate new services and technologies,<sup>58</sup> for example, international call-back services<sup>59</sup> and Internet telephony services.<sup>60</sup> It was also stated that telecommunications policy must take account of South Africa's commitments in terms of the General Agreement on Trade in Services (Gats).<sup>61</sup>

Thirdly, the convergence trend was recognised as inevitable, but was not dealt with in any detail in the White Paper on Telecommunications Policy.<sup>62</sup>

On 21 August 2001, the Minister of Communications issued policy directions in terms of section 5(4) of the Telecommunications Act with regard to, among other things, the market structure.<sup>63</sup> The 'policy directions' do not appear in all instances to be directions to Icasa and therefore do not fit the concept of policy directions.<sup>64</sup> They also do not appear to be consistent with the Telecommunications Act in all instances.<sup>65</sup> In fact, the policy directions recommended certain changes to the Telecommunications Act,<sup>66</sup> which were in time effected by the Telecommunications Amendment Act, 64 of 2001.<sup>67</sup>

Nevertheless, the policy directions with regard to market structure provided for the following –

- A Second National Operator (SNO) to compete fully with Telkom would be licensed in 2001.<sup>68</sup>
- Telkom's licence would be amended to allow it to provide fixed-mobile services.<sup>69</sup>
- The Telecommunications Act would be amended to licence Sentech (Pty) Ltd (Sentech) to provide international telecommunication gateway services and multimedia services from 7 May 2002.<sup>70</sup>
- The Minister would direct the regulator to conduct a market assessment (to be completed by 31 December 2004) into the economic feasibility of the provision of additional public switched telecommunication services (PSTS)

<sup>57</sup> White Paper on Telecommunications Policy paras 2.10, 2.10.7 and 2.13. The regulator has had occasion to control such activity in *SAVA/Telkom Section 53 Determination*, 10 September 1999 (set aside on procedural grounds in *Telkom Limited v Mayimele-Hashatse NO and Others*, (TPD, 17 April 2000, case no 27451/99, unreported); *Judgement of the Authority in the Matter heard before the South African Telecommunications Regulatory Authority on the 6 & 7 June 2000*, 28 June 2000 (set aside on procedural grounds in *Telkom SA Limited v Dikgale NO and Others*, (TPD, 20 March 2001, case no 19341/2000, unreported) and *Telkom v AT&T* (note 56 above).

<sup>58</sup> White Paper on Telecommunications Policy para 2.4.

<sup>59</sup> Despite this policy statement, the regulator issued a ruling on 12 August 1997 that call-back services require international telecommunication services licensing in terms of s 32(1) of the Telecommunications Act, published in GN 1200 of 1997 in GG 18214 dated 15 August 1997. A review of this ruling is still pending in the High Court in case number 97/023795. Icasa has indicated that it will not attempt to initiate criminal proceedings in terms of s 101 of the Telecommunications Act pending the outcome of the review proceedings (see attachment SA1 to the Applicant's Supplementary Affidavit to its Founding Affidavit).

<sup>60</sup> Despite this policy statement, s 40(3)(a) of the Telecommunications Act provides that 'no person who provides a value-added network service shall permit that service to be used for the carrying of voice until a date to be fixed by the Minister by notice in the Gazette'. Thus, Internet telephony is prohibited, until the Minister acts in terms of s 40(3)(a) of the Telecommunications Act.

<sup>61</sup> White Paper on Telecommunications Policy para 2.4.

<sup>62</sup> White Paper on Telecommunications Policy para 2.5.

<sup>63</sup> GN 791 of 2001 in GG 22603 dated 21 August 2001.

<sup>64</sup> See, for example, para 4.2 of the policy directives regarding additional services licences, para 6.4 regarding voice over Vans and paras 7.2–7.3 and 8.1 regarding spectrum fees.

<sup>65</sup> See, for example, para 2 regarding Telkom and fixed-mobile services and paras 7.1 and 8.1 regarding spectrum licensing.

<sup>66</sup> See, for example, paragraph 3 of the policy directives regarding services licenses for Sentech (Pty) Ltd.

<sup>67</sup> s 32C of the Telecommunications Act.

<sup>68</sup> The policy direction was amended by GN 652 of 2002 in GG 23372 dated 26 April 2002. As at June 2004, this licensing process has not been completed.

<sup>69</sup> s 36A was inserted into the Telecommunications Act by the Telecommunications Amendment Act, 2001 to define 'public switched telecommunication services' to include, inter alia, fixed-mobile services.

<sup>70</sup> s 32C was inserted into the Telecommunications Act by the Telecommunications Amendment Act, 2001, to indicate that Sentech must be granted an international telecommunication gateway services licence and a multimedia services licence with effect from 7 May 2002.

licences and the Minister would issue an invitation to apply (ITA) for at least one more services-based licence to commence services by the year 2005.<sup>71</sup>

- SMMEs (small, medium and micro-enterprises) would be licensed to provide services in under-serviced areas from 7 May 2002.<sup>72</sup>
- The Minister would conduct a policy review in order to determine the feasibility of allowing voiceover Vans after 21 August 2003.<sup>73</sup>
- Telkom, the SNO and the three mobile cellular telecommunication services providers would be licensed to use 1800 MHz by 21 February 2002 and would be allowed to apply for and be automatically granted use of third-generation (3G) services licenses.<sup>74</sup>

Apart from guaranteeing certain existing licensees and other state-owned entities additional services licences and access to the frequency spectrum, all of the policy directions could have been carried out in terms of the existing legislation, which gives the regulator the authority to prescribe additional licence categories for licensing,<sup>75</sup> in terms of the procedural provisions of the Act.<sup>76</sup>

#### 4.2.2 Convergence policy

Conceptually, 'convergence' is a term used in the information and communications industries to apply to the blurring of the lines between information services, the technologies or media used to carry services and the entities that provide services or technologies. Thus, the term encompasses the convergence of services (for example, telecommunications, computing, consumer electronics, publishing and broadcasting), technologies or media (wireless and wireline communications conduits, computers, newspapers and other traditional print media) and companies.<sup>77</sup>

Convergence has received some attention in policy-level debates in South Africa. In addition to being mentioned in the White Paper on Telecommunications Policy, it was one of the issues addressed in the White Paper on Broadcasting Policy 1998.<sup>78</sup> This policy was followed by, inter alia, the promulgation of the Icasa Act – the merger of the Independent Broadcasting Authority (IBA) and the South African Telecommunications Regulatory Authority (Satra) into Icasa being prompted partly by convergence.

Convergence was again raised in the Green Paper on E-Commerce, 2000.<sup>79</sup> It stated, inter alia –

<sup>71</sup> s 32A(5) was inserted into the Telecommunications Act by the Telecommunications Amendment Act, 2001, to indicate that the Minister would determine by way of a market study the feasibility of granting more PSTS licences; and s 32A(6) was inserted to indicate that such licence could come into effect only by 8 May 2005 and that at least one additional licensee would be licensed to provide services-based competition. The Minister has not, as at June 2004, published her determination of the market study required by s 32A(5); nor has the regulator published its findings of a market assessment in terms of the policy directions. No services-based competitors have been licensed as at June 2004.

<sup>72</sup> As at June 2004, the licensing process for under-serviced area licences has not as been completed.

<sup>73</sup> As at June 2004, the Minister has not published the findings of a policy review regarding voice over Vans.

<sup>74</sup> ss 30A (regarding 1800 MHz) and 30B (regarding 3G) were inserted into the Telecommunications Act by the Telecommunications Amendment Act, 2001, allowing PSTS and MCTS licensees access to the 1800 MHz and 3G frequency spectrum.

<sup>75</sup> s 33(1)(b) of the Telecommunications Act.

<sup>76</sup> ss 34 and 35 of the Telecommunications Act.

<sup>77</sup> L Thornton 'South African Broadcasting Policy and Law in the Light of Convergence' (2002) vol 8, no 1 *Southern African Media Law Briefing* 6.

<sup>78</sup> White Paper on Broadcasting Policy, May 1998, chapter 7 ('Digital Convergence and Multi-media') and para 11.3 ('A Single Regulator for Broadcasting and Telecommunications').

<sup>79</sup> Green Paper on Electronic Commerce for South Africa, November 2000, chapter 9 ('Infrastructure, Access and Convergence').

With the convergence on Broadcasting, Telecommunications and Information Technologies, the infrastructure capable of supporting e-commerce has become almost ubiquitous in developed countries. Electronic services infrastructures must converge to support electronic commerce applications. Convergence will have broad consequences for domestic policies such as technology and innovation policies, trade policy, telecommunications policy, broadcasting policy and competition policy.<sup>80</sup>

Convergence also found some recognition in the 2001 amendments to the Telecommunications Act,<sup>81</sup> in particular in the addition of section 32C of the Act regarding multimedia services.

In July 2003, the Minister of Communications opened the National Colloquium on Convergence Policy, which will probably lead to a national policy and legislation on convergence.<sup>82</sup> Following the National Colloquium, the Department of Communications engaged certain industry players and representatives in the development of convergence legislation. This process of engagement led to the publication for public comment of a draft Convergence Bill in December 2003.<sup>83</sup>

A policy process such as that which led to the White Paper on Telecommunications Policy has not been followed and therefore there has been no clear articulation of government policy regarding communications convergence preceding and informing the legislative process.

Convergence policy is discussed more fully in chapter 9 herein.

#### **4.2.3 Competition policy**

The government's policy document that led to the promulgation of the Competition Act was the Proposed Guidelines for Competition Policy – A Framework for Competition, Competitiveness and Development, published by the Department of Trade and Industry in November 1997.<sup>84</sup> It deals with general competition policy, which applies, inter alia, to the telecommunications industry. Relevant provisions of the Competition Act are set out in brief in paragraph 4.4.3 below.

#### **4.2.4 Electronic communications policy**

In July 1999, the Department of Communications issued a Discussion Paper on Electronic Commerce Policy.<sup>85</sup> The Discussion Paper was followed by a Green Paper on Electronic Commerce for South Africa in November 2000.<sup>86</sup> However, a White Paper articulating national policy on electronic communications did not precede the promulgation of the ECT Act in 2002. The policy around electronic communications is discussed more fully in chapter 5 herein.

<sup>80</sup> Green Paper on Electronic Commerce, November 2000, para 9.1.

<sup>81</sup> Telecommunications Amendment Act, 64 of 2001.

<sup>82</sup> Minister of Communications, Dr I Matsepe-Casaburri, Address at the National Colloquium on Convergence Policy, 15 July 2003; available at [docweb.pwv.gov.za/Convergence/speech.html](http://docweb.pwv.gov.za/Convergence/speech.html).

<sup>83</sup> GN 3382 of 2003 in GG 25806 dated 3 December 2003.

<sup>84</sup> Available at [www.polity.org.za/html/govdocs/policy/competition.html?rebookmark=1](http://www.polity.org.za/html/govdocs/policy/competition.html?rebookmark=1).

<sup>85</sup> Discussion Paper on Electronic Commerce Policy, 1999 available at [docweb.pwv.gov.za/Ecomm-Debate/myweb/docs/discuss-full.html](http://docweb.pwv.gov.za/Ecomm-Debate/myweb/docs/discuss-full.html). Attached to the Discussion Paper was a Report on Electronic Commerce Legal Issues available at [docweb.pwv.gov.za/Ecomm-Debate/myweb/docs/report.html](http://docweb.pwv.gov.za/Ecomm-Debate/myweb/docs/report.html).

<sup>86</sup> Green Paper on Electronic Commerce for South Africa, 2000 available at [docweb.pwv.gov.za/Ecomm-Debate/myweb/greenpaper/index.htm](http://docweb.pwv.gov.za/Ecomm-Debate/myweb/greenpaper/index.htm).

#### **4.2.5 Interception and monitoring policy**

The White Paper on Telecommunications Policy dealt briefly with interception matters. It was stated at paragraph 10.4, *inter alia*, that the Interception and Monitoring Prohibition Act, 127 of 1992 should be reviewed in order to ensure that sufficient safeguards are in place to ensure that government's right to intercept telecommunications traffic should be stringently controlled.

The South African Law Review Commission presented a Report on the Interception and Monitoring Prohibition Act in October 1999 to the Minister of Justice and Constitutional Development, which included proposals for amending the Interception and Monitoring Prohibition Act.<sup>87</sup> The Regulation of Interception of Communications and Provision of Communication-Related Information Act, 70 of 2002 (Interception Act) followed, being passed finally by Parliament in 2002 and signed by the President in January 2003.<sup>88</sup> Interception policy and legislation is discussed more fully in chapter 12 herein.

#### **4.2.6 Policy regarding state-owned enterprises**

Chapter 3 of the White Paper on Telecommunications Policy mentioned that the policy of state-owned enterprises in the telecommunications industry would be subject to the government's general policy on state-owned assets. National policy with regard to state-owned enterprises is set out in a policy framework document, entitled *An Accelerated Agenda Towards the Restructuring of State Owned Enterprises – Policy Framework*, published by the Minister of Public Enterprises in August 2000 (*State Owned Enterprises Policy Framework*).<sup>89</sup>

With regard to the telecommunications, it was stated generally –

Since the late 1980s, there have been trends towards the restructuring of nationalised telecommunications services. New technology has meant that telecommunications is no longer a natural monopoly, and the international trend is towards private sector development in the telecommunications sector and privatisation of state-owned monopoly providers. There is a trend toward vigorous competition, which has lowered prices and improved services. ...<sup>90</sup>

The policy document was published after the government had sold a 30 percent stake in Telkom to Thintana Communications LLC<sup>91</sup> and a three percent stake to Ucingo Investments (Pty) Ltd, a consortium of black investors. The policy document indicated that the government was considering the possibility that Transnet Limited (Transnet) and Eskom Holdings Limited (Eskom) could form part of a competitor to Telkom (which has become known as the SNO) and was working on the proposed initial public offering for Telkom.<sup>92</sup>

<sup>87</sup> South Africa Law Review Commission – Project 105 – Report on the Interception and Monitoring Prohibition Act (Act 127 of 1992), October 1999; available at [wwwserver.law.wits.ac.za/salc/report/seclegsum.html](http://wwwserver.law.wits.ac.za/salc/report/seclegsum.html).

<sup>88</sup> The Interception Act is, as at June 2004, not yet in force.

<sup>89</sup> Available at [www.dpe.gov.za/resourceLib/Policy%20Document%20-%20Full%20Version.pdf](http://www.dpe.gov.za/resourceLib/Policy%20Document%20-%20Full%20Version.pdf).

<sup>90</sup> State Owned Enterprises Policy Framework at 141.

<sup>91</sup> Thintana Communications is a partnership between SBC Communications Inc (60 percent) and Telekom Malaysia Berhad (40 percent). The 30 percent stake in Telkom was sold in a tender process in which only one final offer was received, in 1997.

<sup>92</sup> State Owned Enterprises Policy Framework at 144–5.



State-owned enterprises involved in telecommunications include Telkom, Transnet, Eskom and Sentech. Legislation regarding state-owned entities is discussed at paragraph 4.4.13 below.

#### 4.2.7 Future policy proceedings

Section 96B of the Telecommunications Act requires the Minister of Communications to develop an information, communication and technology (ICT) strategy, which must be reviewed every two years, in order to 'bridge the digital divide' in terms of section 2(s) of the Act.<sup>93</sup>

Chapter II, Part 1 of the ECT Act concerns a national e-strategy. Section 5 directs the Minister of Communications to develop a national e-strategy, to be reviewed annually.<sup>94</sup> The national e-strategy is to deal with, among other things, universal access,<sup>95</sup> maximising benefits for historically disadvantaged persons,<sup>96</sup> the development of human resources<sup>97</sup> and facilitating the use of electronic communications and transactions by SMMEs.<sup>9</sup>

Chapter II, Part 2 of the ECT Act concerns an electronic transactions policy. In terms of section 10 of the ECT Act, the Minister is directed to develop an electronic transactions policy.<sup>99</sup> The Minister must publish policy guidelines in the Government Gazette on issues relevant to the electronic transaction policy.<sup>100</sup>

### 4.3 International Law

In addition to domestic law and policy, South Africa is also obliged in terms of international law to regulate telecommunications.

One example<sup>101</sup> of South Africa's international obligations is in terms of Gats.<sup>102</sup> Generally, Gats provides that any signatory country cannot treat service providers from other countries any less favourably than it treats service providers from its own country. This is known as the 'most favoured nation treatment' principle.<sup>103</sup> Gats also requires all laws affecting trade in services to be published.<sup>104</sup>

The Annex on Telecommunications, which forms part of Gats, requires access to telecommunication facilities (essential facilities) on a non-discriminatory basis.<sup>105</sup> It also requires publication of, amongst other things, conditions affecting access to essential facilities.<sup>106</sup> In 1994, South Africa also made specific initial commitments in terms of Gats to open up the value added telecommunications services market segment to competition.<sup>107</sup>

<sup>93</sup> As at June 2004, no policy has been published.

<sup>94</sup> As at June 2004, no policy has been published.

<sup>95</sup> s 6 of the ECT Act.

<sup>96</sup> s 7 of the ECT Act.

<sup>97</sup> s 8 of the ECT Act.

<sup>98</sup> s 9 of the ECT Act.

<sup>99</sup> As at June 2004, no policy has been published.

<sup>100</sup> s 10(3) of the ECT Act.

<sup>101</sup> For other examples of how international law interacts with telecommunications policy, see L Thornton 'International Law Relating to Electronic Communications and its Relationship to South African Law', paper presented at the E-Commerce Law conference hosted by the Institute for International Research at Sandton, South Africa, 22 January 2004.

<sup>102</sup> South Africa is a signatory to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, which includes the Agreement Establishing the World Trade Organisation and the Gats.

<sup>103</sup> Article II of Part II of Gats.

<sup>104</sup> Article III of Part II of Gats.

<sup>105</sup> Item 5 of the Annex on Telecommunications, Gats.

<sup>106</sup> Item 4 of the Annex on Telecommunications, Gats.

<sup>107</sup> South Africa, Schedule of Specific Commitments, GATS/SC/78, 15 April 1994.

The Annex on Negotiations on Basic Telecommunications also forms part of Gats. The negotiations in terms of this Annex led to the Fourth Protocol on Basic Telecommunications, which has formed part of Gats since 1998. In terms of the Fourth Protocol, South Africa made certain additional commitments to open up other telecommunications market segments. These included –

- basic fixed line (duopoly by and feasibility study for more competitors by the beginning of 2004);
- mobile cellular (three providers by beginning of 2004 and a feasibility study for more competitors by January 1999);
- satellite (duopoly by and feasibility study for more competitors by the beginning of 2004); and
- resale (liberalisation by end of 2003).<sup>108</sup>

At the same time, South Africa made commitments with regard to establishing an appropriate regulatory environment, including for, among other things, competitive safeguards and interconnection. Such commitments are contained in a document called the Reference Paper, which forms part of South Africa's Schedule of Specific Commitments, Supplement 2.

Unlike with domestic law, a private party generally may not call upon South Africa to abide by its international obligations in South Africa.<sup>109</sup> Only another signatory to the relevant international agreement may do so. Ultimately, governments must settle disputes at the World Trade Organisation (WTO) in terms of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which also forms part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

However, in terms of certain provisions of telecommunications legislation, administrative bodies must act in terms of international law and therefore South African courts can order them to do so. Icasa must act in a manner that is consistent with South Africa's international law obligations in terms of section 4(1)(c) of the Icasa Act. Similarly, sections 32A(5)(b) and 37(4)(b) of the Telecommunications Act provide that the Minister must conduct market studies to determine whether South Africa should license additional competitors in the PSTS and mobile cellular telecommunication services (MCTS) market segments, respectively. In conducting the market studies, the Minister must consider South Africa's international obligations, among other things. Section 1(2) of the Telecommunications Act also states that, 'in interpreting any provision of this Act regard must be had to the International Telecommunication Conventions concluded at Malaga and Torremolinos in 1973 and Nairobi in 1982 and the Radio Regulations of the International Telecommunication Union.'<sup>110</sup>

<sup>108</sup> South Africa, Schedule of Specific Commitments, Supplement 2, GATS/SC/78/Suppl 2, 11 April 1997. As at June 2004, only the obligation regarding a third MCTS licensee had been met.

<sup>109</sup> s 231(4) of the final Constitution provides two exceptions to this general proposition: it states that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. Once an international agreement forms part of South African law, it may be enforced by South African courts.

<sup>110</sup> The Constitution and Convention of the International Telecommunication Union has been amended since the plenipotentiary conferences in Malaga/Torremolinos in 1973 and Nairobi in 1982 referred to in the Telecommunications Act. In addition, amendments were made in Nice in 1989, Geneva in 1992, Kyoto in 1994, and Minneapolis in 1998. Presumably s 1(2) of the Telecommunications Act applies in regard to such amendments as well.

Similarly, in terms of section 1(2)(b) of the Competition Act, it must be interpreted 'in compliance with the international law obligations' of South Africa. Section 1(3) also states that '[a]ny person interpreting or applying' the Competition Act, 'may consider appropriate foreign and international law'.

Finally, the final Constitution provides, in section 233, that when interpreting legislation, a court must prefer any reasonable interpretation that is consistent with international law, to an interpretation that is not consistent with it. Similarly, section 39 of the final Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must, inter alia, consider international law and may consider foreign law.

## 4.4 National Legislation

### 4.4.1 Telecommunications Act

The primary legislation regulating telecommunications in South Africa is the Telecommunications Act. Section 2 of the Telecommunications Act provides that the primary object of the Act 'is to provide for the regulation and control of telecommunications matters in the public interest'.

The Telecommunications Act basically does three things.<sup>111</sup> First, it sets out fundamental rules for the telecommunications industry. For example, section 32 states that no one may provide a telecommunications service without a licence.<sup>112</sup> Similarly, section 30 states that no one may transmit a signal by radio or use radio apparatus to receive a signal without a licence.<sup>113</sup> Sections 43 and 44 of the Telecommunications Act require PSTS licensees to interconnect with and provide telecommunication facilities to any other licensee who makes a request.<sup>114</sup>

Secondly, the Telecommunications Act initially established the telecommunications regulator, known as Satra (South African Telecommunications Regulatory Authority). Satra was later merged into Icasa in terms of the Icasa Act. At the same time the establishment provisions in the Telecommunications Act were repealed and replaced by provisions in the Icasa Act.<sup>115</sup> In addition, the Telecommunications Act established the Universal Service Agency (USA)<sup>116</sup> to, among other things, manage the Universal Service Fund (USF).<sup>117</sup>

Thirdly, the Telecommunications Act also sets out that Icasa must establish other rules for the telecommunications industry by, inter alia, making regulations. Regulations are made by Icasa, and approved and published by the Minister of Communications, in terms of sections 95 (radio regulations) and 96 (regulations) of the Telecommunications Act.<sup>118</sup>

<sup>111</sup> The major issues covered in the Telecommunications Act are licensing, interconnection, pricing and universal service.

<sup>112</sup> See chapter 5 herein.

<sup>113</sup> See chapter 5 herein.

<sup>114</sup> See chapter 6 herein.

<sup>115</sup> See chapter 4 herein.

<sup>116</sup> Chapter VII of the Telecommunications Act. See chapter 8 herein.

<sup>117</sup> s 59(4) of the Telecommunications Act. In terms of s 64 of the Telecommunications Act, the President may, any time after 15 November 2001, issue a proclamation for the dissolution of the USA and for its functions to be assumed by Icasa.

<sup>118</sup> For a discussion of the regulation making process, see *Telkom South Africa Limited v Icasa, Mandla Langa NO, Wireless Business Solutions (Pty) Ltd and the Minister of Communications* (TPD, 19 March 2001, case no 109014/2000, unreported).

Icasa is specifically empowered by the Telecommunications Act to make the following regulations, *inter alia* –

- in terms of section 34(1) – the manner in which applications for certain telecommunications service licences are to be made.<sup>119</sup>
- in terms of section 30(2)(b) – the procedures in relation to applications for frequency use licences.
- in terms of sections 43(3) and 44(5) – rules to be used by the parties in negotiating interconnection or facilities leasing agreements.<sup>120</sup>
- in terms of section 45 – the manner of determining fees and charges for the kinds of telecommunication services licensees where insufficient competition exists, for example for PSTS licensees.
- in terms of section 46 – the way in which telecommunication services licensees keep accounts and records.
- in terms of section 67 – the annual contributions for telecommunication services licensees to the USF.<sup>121</sup>

Icasa also prepares a frequency band plan in terms of section 29 of the Telecommunications Act<sup>122</sup> and prescribes a numbering plan in terms of section 89 of that Act.<sup>123</sup> In addition, Icasa also is empowered to make certain licensing decisions.<sup>124</sup> Icasa also holds enquiries,<sup>125</sup> monitors compliance with the Telecommunications Act,<sup>126</sup> considers contraventions by licensees<sup>127</sup> and initiates prosecutions for contraventions of the Telecommunications Act that are listed as offences.<sup>128</sup>

To a large extent, the market structure is determined by the Telecommunications Act. Section 33(1)(a) indicates that licences will be granted only in the categories set out in the Telecommunications Act, namely:

<sup>119</sup> However, in terms of ss 34(2) and (3) and 35A, the Minister of Communications determines the manner in which applications are to be made under certain circumstances.

<sup>120</sup> The rules must include rules regarding 'the time by or period within which interconnection pursuant to the agreement shall be carried out' (s 43(3)(a)), 'the quality or level of service to be provided by means of the one telecommunication system for the other telecommunication service' (s 43(3)(b)), and 'the fees and charges payable for such interconnection' (s 43(3)(c)). The Act refers to the regulations as 'guidelines'. However, the use of the term 'guidelines' does not mean that the rules are not binding. ss 43(2) and 44(4) of the Telecommunications Act state that every agreement for interconnection and facilities leasing must be lodged with Icasa and Icasa must determine whether the agreement is consistent with the relevant guidelines. Also, s 43(6) (which is applicable to facilities leasing (see s 44(6)) as well as interconnection) states that, where terms of an agreement are not consistent with the relevant guidelines, they are not enforceable between the parties.

<sup>121</sup> In terms of s 66(2) of the Telecommunications Act, the Minister of Communications determines the formula for distributing funds out of the USF in line with the various purposes set out in s 66(1) of the Act. In terms of s 66(4), the Minister of Communications also determines categories of needy persons, the manner of making application for funds and the manner in which funds will be distributed.

<sup>122</sup> Basically, a frequency band plan sets out how the frequency spectrum may be used: s 29(2) of the Telecommunications Act.

<sup>123</sup> A numbering plan is basically a scheme of identification to ensure that telecommunications is correctly directed to the point of intended reception: s 89(2) of the Telecommunications Act.

<sup>124</sup> s 35(1) of the Telecommunications Act. However, the Minister of Communications makes the decision to grant or not to grant certain licences such as PSTS and MCTS licences in terms of s 35(1)(a) read with s 34(2)(a) of the Telecommunications Act.

<sup>125</sup> s 27 of the Telecommunications Act. For example, Icasa held a s 27 inquiry into the trial and launch of new services and in conclusion issued guidelines to promote fair trading principles and discourage uncompetitive behaviour by dominant licensees: GN 3165 of 2003 in GG 25659 dated 3 November 2003.

<sup>126</sup> See, *inter alia*, ss 98 and 99 of the Telecommunications Act.

<sup>127</sup> See s 100 of the Telecommunications Act regarding disputes generally and ss 43, 44 and 32A(3) and (4) of the Telecommunications Act regarding interconnection and facilities leasing and sharing.

<sup>128</sup> s 101 of the Telecommunications Act.

<sup>129</sup> 'Public switched telecommunication services' is defined in s 1 of the Telecommunications Act as 'the provision of telecommunication services to an end-user on a subscription basis or for a fee referred to in section 36'. S 36A defines it as a 'telecommunication service to the general public on a subscription basis'. Telkom is, as at June 2004, the only PSTS licensee.

- public switched telecommunication services (PSTS);<sup>129</sup>
- mobile cellular telecommunication services (MCTS);<sup>130</sup>
- national long-distance telecommunication services;<sup>131</sup>
- international telecommunication services;<sup>132</sup>
- local access telecommunication services;<sup>133</sup>
- public pay-telephone services;<sup>134</sup>
- international telecommunication gateway services (carrier of carriers);<sup>135</sup>
- multimedia services;<sup>136</sup>
- under-serviced area services;<sup>137</sup>
- value added network services (Vans);<sup>138</sup>
- private telecommunication network services.<sup>139</sup>

Its license was granted in terms of s 36 of the Telecommunications Act. The second PSTS licensee, the SNO, is to be granted a licence in terms of s 32B of the Telecommunications Act, however, as at June 2004, the licence has not yet been granted.

<sup>129</sup> See s 37 of the Telecommunications Act. Vodacom (Pty) Ltd, Mobile Telephone Networks (Pty) Ltd and Cell C (Pty) Ltd are licensed as MCTS providers.

<sup>131</sup> 'National long-distance telecommunication service' is defined in s 1 of the Telecommunications Act as 'a telecommunication service comprising the conveyance of signals between the network of any licensee providing local access telecommunication services in an area, and the network of the same or of another licensee providing such service in another area, and includes ...'. See s 38 of the Telecommunications Act. No such licences have been granted as at June 2004, although the Minister could invite applications in terms of s 38 read with s 34(2) of the Telecommunications Act. Telkom may provide such services in terms of its PSTS licence in terms of s 36(1)(b)(i) of the Telecommunications Act.

<sup>132</sup> 'International telecommunication service' is defined in s 1 of the Telecommunications Act as 'a telecommunication service ... which – (a) originates in a telecommunication system in the Republic and terminates in a telecommunication system in another country or vice versa; or (b) originates and terminates in a telecommunication system in another country but is conveyed via a telecommunication system in the Republic'. No such licences have been granted as at June 2004, although the Minister could invite applications in terms of s 34(2) of the Telecommunications Act. Telkom may provide such services in terms of its PSTS licence in terms of s 36(1)(b)(i) of the Telecommunications Act.

<sup>133</sup> 'Local access telecommunication service' is defined in s 1 of the Telecommunications Act as 'a telecommunication service provided within a defined geographic area, comprising the conveyance of signals – (a) between any customers of the licensee within that area; and (b) to and from a customer of the licensee and the network of any public service telecommunication licensee with whom the licensee is interconnected at a point in that area, and includes ...'. See s 39 of the Telecommunications Act. No such licences have been granted as at June 2004, although applications may be made in terms of s 39(1) of the Telecommunications Act. Telkom may provide such services in terms of its PSTS licence in terms of s 36(1)(b)(ii) of the Telecommunications Act.

<sup>134</sup> See s 39 of the Telecommunications Act. No public pay-telephone services licences have been granted as at June 2004, although applications may be made in terms of s 39(2) of the Telecommunications Act. Telkom may provide such services in terms of its PSTS licence in terms of s 36(1)(b)(ii) of the Telecommunications Act.

<sup>135</sup> 'Carrier of carriers' is defined in s 1 of the Telecommunications Act as 'a telecommunication service ... which – (a) originates on the telecommunication system of a public switched telecommunication service licensee or mobile cellular telecommunication services licensee or an under-serviced area licensee in the Republic and terminates in a telecommunication system in another country or vice versa; or (b) originates and terminates in a telecommunication system of an operator licenses in another country to provide international services, but is conveyed via a telecommunication system in the Republic on a wholesale basis, but which specifically excludes the termination of international telecommunication services to end-users directly in the Republic'. Sentech Limited is licensed to provide international telecommunication gateway services, enabling it to operate as a carrier of carriers in terms of s 32C of the Telecommunications Act.

<sup>136</sup> 'Multimedia service' is defined in s 1 of the Telecommunications Act as 'a telecommunication service that integrates and synchronises various forms of media to communicate information or content in an interactive format, including services such as (a) Internet through television; (b) pay-per-view; (c) video on demand; (d) electronic transactions (including e-commerce); (e) text; (f) data; (g) graphics; (h) animation; (i) audio; (j) visual content, but shall not include ...'. Sentech Limited is licensed to provide multi-media services in terms of s 32C of the Telecommunications Act. Additional licence applications could be invited by the Minister in terms of s 32C(2) of the Telecommunications Act.

<sup>137</sup> Under-serviced area licenses to provide any telecommunication services may be granted, on application invited by the Minister of Communications, to small businesses as defined, in under-serviced areas determined by the Minister, in terms of s 40A of the Telecommunications Act. As at June 2004, no under-serviced area services licenses have been issued.

<sup>138</sup> 'Value-added network service' is defined in s 1 of the Telecommunications Act as 'a telecommunication service provided by a person over a telecommunication facility ... to one or more customers of that person concurrently, during which value is added for the benefit of the customers, which may consist of ...'. Many Vans providers are currently licensed to provide Vans and others may apply in terms of s 40 of the Telecommunications Act.

<sup>139</sup> 'Private telecommunication network' is defined in s 1 of the Telecommunications Act as 'a telecommunication system provided by a person for purposes principally or integrally related to the operations of that person and which is installed onto two or more separate, non-contiguous premises and where the switching systems (nodes) of at least two of these premises are interconnected to the public switched telecommunication network as contemplated in section 41'. Many private telecommunication network licensees are currently licensed and others may apply in terms of s 41 of the Telecommunications Act.

<sup>140</sup> The only other categories that have been prescribed are those of GMPCS service and GMPCS earth gateway service, GMPCS referring to global mobile personal communication by satellite. Both categories were prescribed in GN R27 published in GG 23012 dated 8 January 2002. Although Icasa has accepted applications, as at June 2004 no licences have been issued. Icasa issued a notice of intention to prescribe new categories for certain legacy categories, such as paging, communal repeater, broadcasting distribution, asset tracking, special event, test, mobile data and trunk services (GN 357 of 2002 published in GG 23235 dated 15 March 2002), but as at June 2004, Icasa has not prescribed any of those categories.

Section 33(1)(b) of the Telecommunications Act provides that Icasa may prescribe other categories of licence that may be issued.<sup>140</sup> In terms of section 33(2) of the Telecommunications Act, Icasa may also prescribe telecommunication services and activities that may be provided without a service licence.<sup>141</sup>

Also, section 42(1) of the Telecommunications Act is a deeming provision, which provides that anyone who had authority to provide telecommunication services in terms of section 78(2)(b) or (5) of the then Post Office Act, 1958 prior to the commencement of the Telecommunications Act is deemed to be licensed in terms of the Telecommunications Act. Such licences include, for example, the mobile data telecommunication services licence issued to Wireless Business Solutions.<sup>142</sup>

#### **4.4.2 Independent Communications Authority of South Africa Act (Icasa Act)**

The Icasa Act was promulgated in 2000 to create Icasa, an independent regulator,<sup>143</sup> to replace both the IBA<sup>144</sup> and Satra.<sup>145</sup> In terms of section 2 of the Icasa Act, Icasa is, inter alia, to 'regulate telecommunications in the public interest'. A more detailed discussion and analysis of the Act appears in chapter 4 herein.

Icasa acts through its Council.<sup>146</sup> It may, however, establish committees to which it may delegate or assign functions.<sup>147</sup> It may also delegate any power or duty (excluding the power to make regulations) to any councillor or to the chief executive officer, who is appointed by Icasa in terms of section 14(1)(a) of the Icasa Act.<sup>148</sup>

In terms of the Icasa Act, Icasa exercises powers and performs functions in terms of the underlying telecommunications and broadcasting legislation, namely, the Telecommunications Act, the Independent Broadcasting Authority Act, 153 of 1993 (IBA Act) and the Broadcasting Act, 4 of 1999.<sup>149</sup> The Icasa Act is primarily administrative or procedural legislation, whereas the underlying statutes are primarily substantive legislation. Icasa must perform its functions in accordance with the Icasa Act as well as the underlying legislation, in order to 'achieve the objects' of the underlying statutes.<sup>150</sup>

In addition, Icasa must perform in terms of other primarily procedural legislation, such as the Public Finance Management Act, 1 of 1999 (PFMA),<sup>151</sup> the Promotion of Administrative Justice Act, 3 of 2000 (PAJA),<sup>152</sup> and the Promotion of Access to Information Act, 2 of 2000 (PAIA).

<sup>140</sup> To date, no such services or activities have been prescribed. But see 'Findings and conclusions in terms of s 27(8)(a) on the s 27 enquiry on the provisioning of wireless internet access using ISM frequencies' GN 2610 of 2003 in GG 25594 dated 16 October 2003 regarding wireless local area networks, more commonly known as hotspots.

<sup>141</sup> National Mobile Data Telecommunications Licence issued on 27 June 1997 by the Director-General of the Department of Communications to Vula Mobile Data (Pty) Ltd trading as Wireless Business Solutions.

<sup>142</sup> s 2 of the Icasa Act. See also s 192 of the final Constitution requiring an independent regulator for the broadcasting industry.

<sup>143</sup> The IBA was established by the Independent Broadcasting Authority Act, 153 of 1993 to regulate broadcasting.

<sup>144</sup> See chapter 4 herein.

<sup>145</sup> s 3(2) of the Icasa Act.

<sup>146</sup> s 17 of the Icasa Act.

<sup>147</sup> s 91(1)–(5) of the Telecommunications Act. In terms of s 91(3) of this Act the chief executive officer may allocate any staff member to perform powers or duties delegated to him or her.

<sup>148</sup> s 4(1)(a) and (b) of the Icasa Act.

<sup>149</sup> s 2(c) of the Icasa Act.

<sup>150</sup> See ss 4(2), 15(2) and 16(1)(b)(2) of the Icasa Act.

<sup>151</sup> See, in particular, s 35(8) of the Telecommunications Act regarding telecommunication services licensing.

<sup>152</sup> s 2 of the PFMA. In terms of s 3 of the Act, the Act applies to government departments; public entities such as the Competition Commission, constitutional institutions such as Icasa, and to parliament and provincial legislatures.

The object of the PFMA is ‘to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies’.<sup>153</sup>

The object of the PAJA is to give effect to section 33 of the Constitution, which provides for the right to just administrative action.<sup>154</sup> The requirements of just administrative action are threefold:

- procedural fairness, including the right to reasons when rights have been adversely affected;
- lawfulness; and
- reasonableness.

Where the legislature, judiciary, executive or any organ of state<sup>155</sup> – for example, the Minister and Department of Communications, Icasa, or the USA (as well as state-owned enterprises<sup>156</sup>) – acts administratively (as opposed to legislatively or judicially), it must do so in accordance with section 33 of the Constitution.<sup>157</sup>

A large portion of the PAJA is dedicated to the meaning of ‘procedural fairness’.<sup>158</sup> Other provisions deal with judicial review of administrative decisions, including setting out grounds for review. Such grounds include grounds relating to procedural fairness,<sup>159</sup> lawfulness<sup>160</sup> and reasonableness.<sup>161</sup> Consistent with the right to just administrative action, section 6(1) provides that all administrative action is subject to review.

Although a constitutional right to just administrative action is unusual in comparison with other constitutional dispensations around the world, it is consistent with the striving towards open, fair, responsive and accountable government that permeates South Africa’s Constitution.<sup>162</sup> Another notable piece of legislation that public bodies must comply with in relation to open and accountable government is the PAIA, promulgated in terms of section 32 of the

<sup>154</sup> s 33 of the final Constitution states that ‘(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2), and (c) promote an efficient administration.’

<sup>155</sup> s 8 of the final Constitution indicates to whom the Bill of Rights is applicable. s 239 of the Constitution defines organ of states as: ‘(a) any department of state or administration in the national or provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer’.

<sup>156</sup> If a state-owned enterprise is exercising a power or performing a function in terms of a constitution or exercising a public power or performing a public function in terms of any legislation, then it is considered to be an organ of state in terms of s 239 of the Constitution.

<sup>157</sup> Although the PAJA excludes from its ambit certain decisions made by the national executive in terms of s 1(i) (in the definition of ‘administrative action’), it does not exclude decisions taken in ‘implementing legislation’ in terms of s 85(2)(a) of the Constitution.

<sup>158</sup> See ss 3, 4 and 5 of the PAJA. Generally, procedural fairness includes adequate notice, the right to be heard, and the provision of reasons for decisions. See s 3(2)(b) of PAJA.

<sup>159</sup> See s 6(2)(c) of PAJA.

<sup>160</sup> See s 6(2)(a), (b), (d)–(g) and (i) of the PAJA. ‘Lawfulness’ means that administrative action was taken in the terms of the empowering provision.

<sup>161</sup> See s 6(2)(h). South African courts have not yet defined reasonableness; however, recent decisions seem to suggest that reasonableness means ‘justifiable in relation to the reasons given’, which is the wording that was set out in s 24(d) of the interim Constitution. See *MEC for Public Works, Roads and Transport, Free State and Another v Morning Star Minibus Hiring Services (Pty) Ltd and Others* 2003 (4) SA 429 (O); *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province and Another* 2001 (2) SA 215 (T).

<sup>162</sup> L Thornton ‘The Constitutional Right to Just Administrative Action – Are Political Parties Bound?’ (1999) 15 SAJHR 351 at 360.

<sup>163</sup> s 32 of the final Constitution states that ‘(1) Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.’

Constitution, which guarantees a right of access to information.<sup>163</sup> The objects of the PAIA, as set out in the preamble, are to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information and to promote actively a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.<sup>164</sup>

#### 4.4.3 Competition Act

The Telecommunications Act is industry-specific legislation for the telecommunications industry. It regulates a number of issues, including competition issues.<sup>165</sup> The Competition Act, on the other hand, is not industry-specific, but relates generally to competition matters across all industries. It applies *inter alia* to the telecommunications industry. Section 3(1) of the Competition Act indicates that it applies to ‘all economic activity within, or having an effect within’ South Africa.

Section 3(1A), which was inserted by the Competition Second Amendment Act, 39 of 2000, deals with concurrent jurisdiction and states –

In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority,<sup>166</sup> ... , this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

A regulatory authority would include, for example, Icasa and the USA.

Sections 3(1A)(b), 21(1)(h) and 82(1) and (2) deal with how concurrent jurisdiction is to be exercised. Section 3(1A)(b) provides as follows –

The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation,<sup>167</sup> must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).

Section 21(1)(h) makes it the responsibility of the Competition Commission to negotiate agreements with other regulatory entities and to coordinate and harmonise the exercise of jurisdiction over competition matters with the relevant industry regulatory authority, and to ensure the consistent application of the

<sup>164</sup> The specific objects are expanded upon in s 9 of the PAIA.

<sup>165</sup> For example, specifically, s 53(1) of the Telecommunications Act provides that ‘[i]f it appears to the Authority that the holder of a telecommunication licence is taking or intends taking any action which has or is likely to have the effect of giving an undue preference to or causing undue discrimination against any person or category of persons, the Authority may, after giving the licensee concerned an opportunity to be heard, direct the licensee by written notice to cease or refrain from taking such action, as the case may be’. Similarly, s 36(1)(d) provides that ‘[w]here it appears to the Authority that Telkom, in the provision of its telecommunication services, is taking or proposing to take any step which confers or may confer on it an undue advantage over any person who may in future be granted a licence in competition with Telkom, the Authority may direct Telkom to cease or refrain from taking such step, as the case may be’.

<sup>166</sup> ‘Regulatory authority’ is defined in s 1(1) of the Competition Act as ‘an entity established in terms of national, provincial or local government legislation or subordinate legislation responsible for regulating an industry, or sector of an industry’.

<sup>167</sup> ‘Public regulation’ is defined in s 1(1) of the Competition Act as ‘any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority’.

<sup>168</sup> s 82(2) (regarding the Competition Commission) and 82(1) (regarding the other regulatory authority, such as Icasa) of the Competition Act.

<sup>169</sup> s 82(3) of the Competition Act.



principles of the Competition Act. Section 82 also obliges the Competition Commission as well as other regulatory agencies to negotiate the agreement contemplated in section 21(1)(h).<sup>168</sup> It also provides for certain matters to be covered in the agreement.<sup>169</sup> The Competition Commission and Icasa entered into an agreement in terms of sections 21(1)(h) and 82(1)–(3) with effect from 16 September 2002.<sup>170</sup>

In terms of subsections (i) and (j) respectively of section 21(1), the Competition Commission also has the responsibility to participate in proceedings of another regulatory authority, such as Icasa, and advise and receive advice from another regulatory authority.

Not unlike the Telecommunications Act, certain basic rules are set out in the Competition Act. Chapter 2 prohibits certain anti-competitive practices. Part A of chapter 2 prohibits agreements or practices between parties in a horizontal relationship if such agreements or practices are anti-competitive.<sup>171</sup> Price fixing, dividing markets and collusive tendering are per se considered anti-competitive practices.<sup>172</sup> Part A of Chapter 2 also prohibits agreements between parties in a vertical relationship if such agreements are anti-competitive.<sup>173</sup>

Part B of Chapter 2 of the Competition Act prohibits abuses of dominant positions. Such abuses include charging an excessive price,<sup>174</sup> refusing to give access to an essential facility,<sup>175</sup> engaging in an exclusionary act,<sup>176</sup> and price discrimination.<sup>177</sup>

Part C of Chapter 5 indicates that complaints may be initiated by the Competition Commission<sup>178</sup> or by any person.<sup>179</sup> It also sets out that complaints must be investigated by the Competition Commission<sup>180</sup> and referred to the Competition Tribunal for adjudication if a prohibited practice has been determined.<sup>181</sup>

Chapter 3 of the Competition Act sets out the rules with regard to mergers, defined in terms of section 12(1)(a) as any transaction ‘where one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm’. Mergers generally will not be approved if they are anti-competitive.<sup>182</sup>

There are different rules with regard to small, intermediate and large mergers. Parties do not automatically have to notify the Competition Commission regarding a small merger.<sup>183</sup> However, intermediate and large mergers require

<sup>170</sup> GN 1747 of 2002, published in GG 23857 dated 20 September 2002.

<sup>171</sup> s 4(1)(a) of the Competition Act.

<sup>172</sup> s 4(1)(b) of the Competition Act.

<sup>173</sup> s 5(1) of the Competition Act.

<sup>174</sup> s 8(a) of the Competition Act.

<sup>175</sup> s 8(b) of the Competition Act.

<sup>176</sup> s 8(c) and (d) of the Competition Act.

<sup>177</sup> s 9 of the Competition Act.

<sup>178</sup> s 49B(1) of the Competition Act.

<sup>179</sup> s 49B(2) of the Competition Act.

<sup>180</sup> s 49B(3) and (4) of the Competition Act.

<sup>181</sup> s 50 of the Competition Act. s 51 of the Competition Act allows a complainant to refer the complaint to the Competition Tribunal for adjudication even if the Competition Commission does not do so.

<sup>182</sup> s 12A of the Competition Act.

<sup>183</sup> s 13 of the Competition Act.

<sup>184</sup> s 13A of the Competition Act.

<sup>185</sup> ss 13 and 14 of the Competition Act. However, certain matters regarding small and intermediate mergers may be considered by the Competition Tribunal upon the request of the parties, in terms of s 16(1) of the Competition Act.

<sup>186</sup> ss 14A and 16(2) of the Competition Act. Decisions by the Competition Tribunal regarding mergers may be appealed to the Competition Appeal Court in terms of s 17 of the Competition Act.

<sup>187</sup> s 19 of the Competition Act.

notification before implementation.<sup>184</sup> The Competition Commission considers and determines whether to allow small and intermediate mergers,<sup>185</sup> whereas the Competition Tribunal considers and determines whether to allow large mergers.<sup>186</sup>

The Competition Act also establishes the Competition Commission,<sup>187</sup> the Competition Tribunal<sup>188</sup> and the Competition Appeal Court.<sup>189</sup> The functions of the Competition Commission include the investigation of anti-competitive vertical and horizontal agreements and practices, abuses of dominant positions, and mergers.<sup>190</sup> Part B of chapter 5 of the Competition Act provides the Competition Commission with powers to enter and search under a warrant and the power to summons when investigating compliance with the Competition Act.

The functions of the Competition Tribunal include the adjudication of prohibited anti-competitive conduct and the hearing of appeals or reviews of decisions of the Competition Commission.<sup>191</sup> The Competition Tribunal has wide powers to make appropriate orders, including ordering administrative penalties and divestiture.<sup>192</sup>

The functions of the Competition Appeal Court include the hearing of appeals and reviews of decisions of the Competition Tribunal.<sup>193</sup>

Decisions of the Competition Appeal Court, as well as those of the Competition Tribunal and the Competition Commission, may be 'served, executed and enforced' as if they were orders of the High Court.<sup>194</sup>

Section 78 of the Competition Act empowers the Minister of Trade and Industry to make regulations in terms of the Act. Section 79 empowers the Competition Commission to prepare non-binding guidelines to indicate the Commission's approach to matters within its jurisdiction.

#### **4.4.4 Electronic Communications and Transactions Act (ECT Act)**

The primary object of the ECT Act is to 'enable and facilitate electronic communications and transactions in the public interest'.<sup>195</sup> It does not regulate telecommunications infrastructure in the manner of the Telecommunications Act. Rather, it removes some of the either real or perceived legal uncertainties regarding electronic communications and transactions and facilitates the use of telecommunications, the conduit over which electronic communications and transactions take place.

The ECT Act deals with a number of specific matters, including:<sup>196</sup>

<sup>188</sup> s 26 of the Competition Act.

<sup>189</sup> s 36 of the Competition Act.

<sup>190</sup> s 21 of the Competition Act sets out the functions of the Competition Commission.

<sup>191</sup> s 27 of the Competition Act sets out the functions of the Competition Tribunal.

<sup>192</sup> ss 58, 59 and 69 of the Competition Act.

<sup>193</sup> s 37 sets out the functions of the Competition Appeal Court.

<sup>194</sup> s 64(1) of the Competition Act.

<sup>195</sup> s 2(1) of the ECT Act.

<sup>196</sup> See A de Villiers and L Thornton 'The South African Electronic Communications and Transactions Act' (2002) vol 3, issue 11 *World Internet Law Report* 18; L Thornton 'Staying on good terms with the ECT Act' (2003) vol 3, no 5 *Without Prejudice* 9.

<sup>197</sup> Chapter II, Part 1 of the ECT Act.

<sup>198</sup> Chapter II, Part 2 of the ECT Act.

<sup>199</sup> Chapter III of the ECT Act.

<sup>200</sup> Chapter IV of the ECT Act.

- a national e-strategy;<sup>197</sup>
- an electronic transactions policy;<sup>198</sup>
- legal recognition of electronic communications and transactions;<sup>199</sup>
- e-government;<sup>200</sup>
- cryptography;<sup>201</sup>
- authentication services;<sup>202</sup>
- consumer protection;<sup>203</sup>
- personal data protection;<sup>204</sup>
- critical databases;<sup>205</sup>
- administration of the .za domain space;<sup>206</sup>
- limitations of liability for information system services providers;<sup>207</sup>
- cyber inspectors;<sup>208</sup>
- cyber crimes.<sup>209</sup>

Chapter III of the ECT Act removes some of the legal uncertainties regarding electronic communications and transactions. Fundamentally, it provides that information and agreements are not without legal force and effect merely on the grounds that they are wholly or partly in the form of a data message.<sup>210</sup> ‘Data message’ is defined as ‘data generated, sent, received or stored by electronic means and includes voice, where the voice is used in an automated transaction; and a stored record’. ‘Data’ in turn is defined as ‘electronic representations of information in any form’.<sup>211</sup> The remaining provisions of chapter III provide detail to this fundamental premise. The detail is with regard to, among other things, the legal requirements for a writing,<sup>212</sup> a signature,<sup>213</sup> an original,<sup>214</sup> the retention of documents<sup>215</sup> and the admission of electronic evidence.<sup>216</sup>

Although many of the provisions of the Act have not been fully implemented and therefore tested, most of them appear to be geared to facilitate the use of electronic communications. The key to whether the provisions will actually facilitate electronic communications, and to what extent, will be how, and how effectively, they will be implemented.

Chapter X establishes a ‘za Domain Name Authority’ to assume responsibility for the .za domain name space. Essentially, the Authority will administer or license others to administer the distribution of names and corresponding numbers for the South African country code, .za, used for communicating over the Internet. This function is similar to the function that Icasa assumes with regard to number distribution in telecommunications systems other than the Internet in terms of section 89 of the Telecommunications Act.

<sup>197</sup> Chapter V of the ECT Act.

<sup>198</sup> Chapter VI of the ECT Act.

<sup>199</sup> Chapter VII of the ECT Act.

<sup>200</sup> Chapter VIII of the ECT Act.

<sup>201</sup> Chapter IX of the ECT Act.

<sup>202</sup> Chapter X of the ECT Act.

<sup>203</sup> Chapter XI of the ECT Act.

<sup>204</sup> Chapter XII of the ECT Act.

<sup>205</sup> Chapter XIII of the ECT Act.

<sup>210</sup> ss 11(1) and 22(1) of the ECT Act.

<sup>211</sup> s 1 of the ECT Act.

<sup>212</sup> s 12 of the ECT Act.

<sup>213</sup> s 13 of the ECT Act.

<sup>214</sup> s 14 of the ECT Act.

<sup>215</sup> s 16 of the ECT Act.

<sup>216</sup> s 15 of the ECT Act.

Chapter XI of the ECT Act provides for a limitation of liability for information system services providers under certain circumstances. The circumstances include membership in an industry representative body recognised by the Minister in terms of section 71 of the ECT Act and the adoption of the code of conduct of that representative body.<sup>217</sup> Once a services provider has met the requisite conditions, it is not liable as a mere conduit of information<sup>218</sup> for the storage of data for the purposes of onward transmission (caching),<sup>219</sup> for hosting data,<sup>220</sup> or for providing location tools.<sup>221</sup> Although there is no obligation on services providers to monitor the use of their information systems,<sup>222</sup> there is an obligation to take down offending information upon receiving a complaint.<sup>223</sup>

A more detailed review of all of the provisions of the ECT Act is set out in chapter 10 herein.

#### ***4.4.5 Regulation of Interception of Communications and Provision of Communication-Related Information Act (Interception Act)***

Similar to the ECT Act, the Interception Act does not regulate telecommunications infrastructure in the manner of the Telecommunications Act. Rather, it sets out the circumstances under which government entities or other persons may or must intercept or monitor communications and establishes that in all other circumstances such interception or monitoring is prohibited.<sup>224</sup>

When it comes into force, the Interception Act will repeal the Interception and Monitoring Prohibition Act, 127 of 1992, which currently and similarly provides that interception and monitoring are prohibited<sup>225</sup> except if a judge directs otherwise.<sup>226</sup> Unlike the current legislation, the Interception Act sets out other exceptions and also establishes certain obligations on telecommunication services providers with regard to intercepting and monitoring communications and facilitating the interception and monitoring of communications.<sup>227</sup>

Section 2 of the Interception Act provides that, subject to the Act, no person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to do so, at any place in South Africa, any communication.<sup>228</sup> The proviso 'subject to the Act' means, *inter alia*, subject to the

<sup>217</sup> s 72 of the ECT Act.

<sup>218</sup> s 73 of the ECT Act.

<sup>219</sup> s 74 of the ECT Act.

<sup>220</sup> s 75 of the ECT Act. Knowledge of the offending information or activity will negate the limitation of liability in terms of s 75(1)(a) and (b) of the ECT Act.

<sup>221</sup> s 76 of the ECT Act. Knowledge of the offending information or activity or receiving financial benefit will negate the limitation of liability in terms of s 76(a), (b) and (c) of the ECT Act.

<sup>222</sup> s 78 of the ECT Act.

<sup>223</sup> See ss 74(1)(e), 75(1)(c) and (2), 76(d) and 77 of the ECT Act.

<sup>224</sup> Chapters 2, 3 and 4 of the Interception Act. Chapter 6 establishes interception centres for the interception of communications.

<sup>225</sup> s 2(1) of the Interception and Monitoring Prohibition Act.

<sup>226</sup> s 2(2) of the Interception and Monitoring Prohibition Act. Interception directions are issued by designated judges to certain law enforcement personnel in terms of s 3 of the Interception and Monitoring Prohibition Act and are executed in terms of s 5 of the Act.

<sup>227</sup> Chapters 5 and 7 of the Interception Act. Telecommunication services providers are defined in s 1 of the Interception Act as those persons providing services in terms of chapter V of the Telecommunications Act.

<sup>228</sup> s 2 of the Interception Act. 'Intercept' is defined in s 1 of the Interception Act as 'the aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication, and includes the – (a) monitoring of any such communication by means of a monitoring device; (b) viewing, examination or inspection of the contents of any indirect communication; and (c) diversion of any indirect communication from its intended destination to any other destination'.

<sup>229</sup> s 3 of the Interception Act. Interception directions, *inter alia*, are issued by designated judges to certain law-enforcement personnel in terms of chapter 3 of the Interception Act and are executed in terms of chapter 4 of that Act.

<sup>230</sup> s 4 of the Interception Act.

exceptions set out in the Interception Act. Such exceptions are:

- Where an interception direction has been issued;<sup>229</sup>
- By a party to the communications;<sup>230</sup>
- With the written consent of one of the parties to the communications;<sup>231</sup>
- Indirect communications<sup>232</sup> in the carrying on of any business,<sup>233</sup> but only under certain conditions;<sup>234</sup>
- By certain law enforcement personnel to prevent serious bodily harm;<sup>235</sup>
- By certain law enforcement personnel to determine the location of a person in an emergency;<sup>236</sup>
- In a prison;<sup>237</sup>
- The monitoring of signals by persons responsible for installing, operating and maintaining equipment;<sup>238</sup>
- The monitoring of the radio frequency spectrum by Icasa.<sup>239</sup>

Similarly to the prohibition on intercepting communications, the Interception Act also prohibits telecommunication services providers from providing real-time or archived communication-related information.<sup>240</sup> There are the following exceptions.

- Where an interception direction has been issued;<sup>241</sup>
- Where the information relates to a customer, the information may be provided to that customer;<sup>242</sup> and
- With the written consent of the customer to which the information pertains.<sup>243</sup>

Chapter 5 of the Interception Act obliges telecommunication services providers, at their own expense, to have the capability to intercept communications over their telecommunication services networks and to store communication-related information.<sup>244</sup> The details of, inter alia, the type of capabilities required and the

<sup>229</sup> s 5 of the Interception Act.

<sup>232</sup> 'Indirect communications' is defined in s 1 of the Interception Act as 'the transfer of information, including a message or any part of a message, whether – (a) in the form of – (i) speech, music or other sounds; (ii) data; (iii) text; (iv) visual images, whether animated or not; (v) signals; or (vi) radio frequency spectrum; or (b) in any other form or in any combination of forms, that is transmitted in whole or in part by means of a postal service or a telecommunication service'.

<sup>233</sup> s 6 of the Interception Act.

<sup>234</sup> In terms of s 6 of the Interception Act, the conditions are (1) that the purpose of the interception must coincide with one or more of the purposes set out in the Act, (2) that the interception must be affected by or approved by the system controller as that term is defined in the Act; (3) that the telecommunication system involved must be provided for use, wholly or partly, in connection with the relevant business; and that the system controller must have made all reasonable efforts to inform in advance any person who intends to use the telecommunication system concerned that indirect communications transmitted by means thereof may be intercepted or the indirect communication is intercepted with the express or implied consent of the person who uses the telecommunication system. In this regard, see L Thornton 'Where legislation stands on personal e-mail in the office' (15 October 2003) *Business Report*.

<sup>235</sup> s 7 of the Interception Act.

<sup>236</sup> s 8 of the Interception Act.

<sup>237</sup> s 9 of the Interception Act.

<sup>238</sup> s 10 of the Interception Act.

<sup>239</sup> s 11 of the Interception Act.

<sup>240</sup> s 12 of the Interception Act.

<sup>241</sup> s 13 of the Interception Act. Real-time and archived communication-related directions, inter alia, are issued by designated judges to certain law-enforcement personnel in terms of chapter 3 of the Interception Act and are executed in terms of chapter 4 of that Act.

<sup>242</sup> s 12 of the Interception Act.

<sup>243</sup> s 14 of the Interception Act.

<sup>244</sup> s 30(1)(a) and (b), (4) and (5) of the Interception Act.

<sup>245</sup> s 30(2), (3), (6)–(8) of the Interception Act. The Department of Communications invited all telecommunication services providers to participate in a consultative process regarding such details by GN 2611 of 2003, GG 25597 dated 16 October 2003. As at June 2004, however, no such details have been finally determined by the Minister.

<sup>246</sup> s 46 of the Interception Act.

type of communication-related information to be kept and for how long, are to be determined by the Minister of Communications.<sup>245</sup> The Minister also may exempt small Internet service providers from compliance and may impose conditions on such exemption.<sup>246</sup> In terms of section 56 of the Interception Act, telecommunication services providers who have been convicted more than once of the offence of not providing such capability may have their licences revoked by the Minister of Communications after consultation with Icasa.

Chapter 7 of the Interception Act obliges telecommunication services providers to gather, retain and disclose certain personal information about customers.<sup>247</sup> In terms of section 41 of the Interception Act, whenever a cellular phone or SIM-card<sup>248</sup> is lost, stolen or destroyed, the owner or possessor must report the loss, theft or destruction to the police.

Section 44 of the Interception Act provides that the Minister of Justice and Constitutional Development must declare electronic equipment that is primarily useful for the interception of communications to be 'listed equipment'. In terms of section 45 of the Interception Act, such listed equipment may not be manufactured, assembled, possessed, sold, purchased or advertised unless in accordance with a certificate issued by the Minister in terms of section 46.

A more detailed discussion of the Interception Act is set out in chapter 11 herein.

#### 4.4.6 Space Affairs Act

The Space Affairs Act was promulgated in 1993 (Act 84 of 1993). It provides, inter alia, that the Minister of Trade and Industry is to determine policy regarding space affairs.<sup>249</sup>

It also provides for the establishment of the South African Council for Space Affairs (SACSA).<sup>250</sup> The functions of the SACSA are generally to 'take care of the interests, responsibilities and obligations' of South Africa 'regarding its space and space-related activities in compliance with international conventions, treaties and agreements'.<sup>251</sup> In particular, the SACSA may issue licences in terms of section 11 of the Space Affairs Act with regard to:

- Launching from South Africa;
- Launching from another state by a South African entity;
- Operating a launch facility in South Africa;
- Participation by private entities in space activities where South Africa has international obligations or where national interests may be affected; and
- Any other space activities prescribed by the Minister of Trade and Industry.

'Launching' is defined in the Space Affairs Act as:

the placing or attempted placing of any spacecraft into a suborbital trajectory or

<sup>247</sup> ss 39 (with regard to telecommunication services providers other than MCTS providers) and 40 (with regard to MCTS providers).

<sup>248</sup> 'SIM-card' is defined in s 1 of the Interception Act as 'the Subscriber Identity Module which is an independent, electronically activated device designed for use in conjunction with a cellular phone ...'.

<sup>249</sup> s 2 of the Space Affairs Act. As at June 2004, no policy has been determined.

<sup>250</sup> s 4 of the Space Affairs Act.

<sup>251</sup> s 5(2) of the Space Affairs Act.

into outer space, or the testing of a launch vehicle or spacecraft in which it is foreseen that the launch vehicle will lift from the earth's surface.

And 'spacecraft' is defined as 'any object launched with the purpose of being put and operated in outer space'. As at June 2004, no licences have yet been issued.

#### **4.4.7 Post Office Act (regarding Telkom)**

The Post Office Act, 44 of 1958 provides for the formation of, inter alia, Telkom,<sup>252</sup> and for the transfer of certain assets and liabilities from the State to Telkom.<sup>253</sup> Chapters 1B and II [sic] deal with staff and pension matters and finances, respectively, regarding Telkom.

Telkom has the authority to provide telecommunication services in terms of sections 36 (PSTS) and 40(1)(a) (Vans) of the Telecommunications Act.<sup>254</sup>

Section 130 of the Telecommunications Act provides that, notwithstanding any provision of law to the contrary, the Minister of Communications may transfer so much of the government's equity interest in Telkom as the Cabinet shall approve for achieving the objects of the Telecommunications Act. In March 2003, Telkom sold 27,7 percent of its shares to the public.

#### **4.4.8 Legal Succession to the South African Transport Services Act (regarding Transnet)**

The Legal Succession to the South African Transport Services Act, 9 of 1989 provides for the formation of, inter alia, Transnet,<sup>255</sup> and for the transfer of certain assets and liabilities from the South African Transport Services to Transnet.<sup>256</sup> Section 9 ('Telecommunication and Electricity Supply Networks') of Schedule 1 ('Operating Provisions, Operating Powers and Offences') of the Legal Succession to the South African Transport Services Act provides that, subject to section 2 of the Telecommunications Act, which sets out the objects thereof, Transnet may construct and operate telecommunications networks.

Transnet has the authority to operate a private telecommunications network (PTN) in terms of section 41(1)(c) of the Telecommunications Act. Section 32C of the Telecommunications Act indicates that Transnet (as well as Eskom) will hold such percentage of the equity interest of the SNO set aside for them by the Minister of Communications with the concurrence of the Minister of Public Enterprises,<sup>257</sup> but that the final equity interest will be determined by the value of the contributions each of them makes to the SNO.<sup>258</sup> In April 2002, the Minister of Communications determined that a 30 percent interest in the SNO will be allocated to Transnet and Eskom.<sup>259</sup> In May 2002, the Minister of Communications

<sup>252</sup> s 3 of the Post Office Act.

<sup>253</sup> s 4 of the Post Office Act.

<sup>254</sup> See also ss 30(3)(a), (c) and (e); 30A(2); and 30B(2) of the Telecommunications Act regarding frequency use licences.

<sup>255</sup> s 2 of the Legal Succession to the South African Transport Services Act.

<sup>256</sup> s 3 of the Legal Succession to the South African Transport Services Act.

<sup>257</sup> s 32B(2) of the Telecommunications Act.

<sup>258</sup> s 32B(3)–(5) of the Telecommunications Act.

<sup>259</sup> GN 652 of 2002, in GG 23372 dated 26 April 2002.

<sup>260</sup> GN 755 of 2002, in GG 23427 dated 15 May 2002. As at June 2004, this final determination has not been made.

indicated that the final determination will later be determined.<sup>260</sup>

#### **4.4.9 Eskom Conversion Act (regarding Eskom)**

The Eskom Conversion Act, 13 of 2001 concerns the conversion of Eskom into a public company to be owned by the state, to be known as Eskom Holdings Limited.<sup>261</sup> Before the coming into force of the Telecommunications Act, Eskom had the right to operate a private telecommunications network (PTN) in terms of an authority granted to it by the then Postmaster-General in terms of the then Post Office Act.

Eskom now has the authority to operate its PTN in terms of section 41(1)(c) of the Telecommunications Act. Section 32C of that Act indicates that Eskom (and Transnet) will hold such percentage of the equity interest of the SNO set aside for them by the Minister of Communications, with the concurrence of the Minister of Public Enterprises,<sup>262</sup> but that the final equity interest will be determined by the value of the contribution of each of them in the SNO.<sup>263</sup> In this regard, see further paragraph 4.4.8 above regarding Transnet.

#### **4.4.10 Sentech Act (regarding Sentech)**

The Sentech Act, 63 of 1996 provides for the transfer of ownership of Sentech from the South African Broadcasting Corporation (SABC) to the state,<sup>264</sup> for the transfer of assets and liabilities regarding broadcasting signal distribution from the SABC to Sentech,<sup>265</sup> and for the conversion of Sentech to a public company to be known as Sentech Limited.<sup>266</sup>

Traditionally, Sentech was a company with the object of providing broadcasting signal distribution services only.<sup>267</sup> However, its objects were amended by the Telecommunications Amendment Act of 2001 to include 'telecommunications services in accordance with the provisions of the Telecommunications Act'.<sup>268</sup> The Telecommunications Amendment Act also provided that Sentech would be issued with two types of telecommunication services licence, namely an international telecommunication gateway service licence enabling it to operate as a carrier of carriers, and a multimedia services licence.<sup>269</sup>

<sup>261</sup> s 3 of the Eskom Conversion Act.

<sup>262</sup> s 32B(2) of the Telecommunications Act.

<sup>263</sup> s 32B(3)–(5) of the Telecommunications Act.

<sup>264</sup> s 2 of the Sentech Act.

<sup>265</sup> s 3 of the Sentech Act.

<sup>266</sup> s 4 of the Sentech Act.

<sup>267</sup> 'Broadcasting signal distribution' is defined in the Independent Broadcasting Authority Act (s 1) as 'the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed to any geographical broadcast target area by means of a telecommunications process, but excluding the use of facilities which operate on frequencies outside the broadcasting services frequency bands'.

<sup>268</sup> s 5 of the Sentech Act.

<sup>269</sup> s 32C(1) of the Telecommunications Act. Sentech's licences were published by GNN 684, 685, 686 and 687, GG 23405 dated 8 May 2002 (frequency licences amended by GN 1300, GG 24783 dated 22 April 2003).

<sup>270</sup> Amendments to the Sita Act were promulgated in the State Information Technology Agency Amendment Act, 38 of 2002, however, only certain of the provisions of the 2002 Sita Amendment Act have come into force. Proclamation R3 of 2003, GG 24348 dated 31 January 2003.

<sup>271</sup> s 2(1) of the Sita Act.

<sup>272</sup> s 6 of the Sita Act.

<sup>273</sup> s 3(4)(a) of the Sita Act.

<sup>274</sup> s 3(4)(b) of the Sita Act.



#### **4.4.11 State Information Technology Agency Act (regarding State Information Technology Agency)**

The State Information Technology Agency Act, 88 of 1998 (Sita Act) was promulgated in 1998,<sup>270</sup> to create the State Information Technology Agency (Pty) Ltd (Sita).<sup>271</sup> The object of Sita is 'to provide information technology, information systems and related services in a maintained information systems security environment to, or on behalf of, participating departments and organs of state.'<sup>272</sup>

Participating departments and organs of state initially were the Central Computer Services of the Department of State Expenditure,<sup>273</sup> Infoplan,<sup>274</sup> the sub-component Information Systems within the Department of Safety and Security,<sup>275</sup> and any other department approved by the Minister of Public Service and Administration.<sup>276</sup> Section 3(5) of the Sita Act provides that government departments (as defined<sup>277</sup>) must participate in the formation of Sita, subject to section 3(6), which provides that participation will be phased in over a period determined by Cabinet on the recommendation of the Minister of Public Service and Administration.

Sita may exercise the following powers and functions in order to carry out its object, in terms of section 7 of the Sita Act:

- Provide data processing services;<sup>278</sup>
- Provide information technology and information systems training;<sup>279</sup>
- Provide application software development and maintenance services;<sup>280</sup>
- Promote the effective utilisation of information technology to enhance the efficiency at all levels of the public service;<sup>281</sup>
- Provide technical, functional and business advice and support regarding information technology;<sup>282</sup>
- Provide information technology and information systems management services<sup>283</sup>; and
- With regard to any of the stated functions, act as a procurement agency in respect of information technology requirements.<sup>284</sup>

Sita may also perform any other function as determined by the Minister of Public Service and Administration.<sup>285</sup>

Chapter 6 ('Service Delivery') of the Act provides that Sita and participating

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<sup>275</sup> s 3(4)(c) of the Sita Act.

<sup>276</sup> s 3(4)(d) of the Sita Act.

<sup>277</sup> 'Department' is defined in s 1 of the Sita Act as 'a national department, provincial administration or organizational component listed in Schedules 1 and 2 of the Public Service Act 1994 (Proclamation 103 of 1994), and for the purpose of this Act, the entity known as Infoplan will be regarded as a department'. Schedule 1 of the Public Service Act sets out departments (and their heads) and Schedule 2 sets out provincial departments (and their heads).

<sup>278</sup> s 7(2)(a) of the Sita Act.

<sup>279</sup> s 7(2)(b) of the Sita Act.

<sup>280</sup> s 7(2)(c) of the Sita Act.

<sup>281</sup> s 7(2)(d) of the Sita Act.

<sup>282</sup> s 7(2)(e) of the Sita Act.

<sup>283</sup> s 7(2)(f) of the Sita Act.

<sup>284</sup> s 7(2)(g) of the Sita Act.

<sup>285</sup> s 7(2)(h) of the Sita Act.

<sup>286</sup> Amendments to the Cosmec Act were promulgated in the General Intelligence Laws Amendment Act, 52 of 2003; however, most of the provisions of the 2003 General Intelligence Laws Amendment Act relating to the Cosmec Act have commenced. The others will commence on a date to be proclaimed by the President in terms of s 26 of the Amendment Act.

<sup>287</sup> s 2 of the Cosmec Act.

departments and organs of state must enter into agreements to regulate the relationship between them.

#### **4.4.12 Electronic Communications Security (Pty) Ltd Act (regarding Electronic Communications Security)**

The Electronic Communications Security (Pty) Ltd Act, 68 of 2002 (Comsec Act) was promulgated in 2002<sup>286</sup> to create Electronic Communications Security (Pty) Ltd (Comsec).<sup>287</sup> The Comsec Act's principal object is to ensure the security and protection of critical electronic communications,<sup>288</sup> which are defined as 'electronic communications held by organs of state which are necessary for the protection of the national security of the Republic'.<sup>289</sup>

In terms of section 7(2) of the Comsec Act, Comsec must do certain things in order to carry out the purposes of its functions, which functions are set out in section 7(1) of the Act. The things that Comsec must do are:

- Develop, design, procure, invent, install or maintain secure electronic communications systems or products and do research in this regard;
- Provide secure electronic communications services, systems and products;
- Provide cryptographic services;<sup>290</sup>
- Train and support users of the electronic communications systems, products and related services provided; and
- Provide consultancy services on the security and protection of electronic communications services, systems and products.

Its functions are:

- To protect and secure critical electronic communications against unauthorised access or technical, electronic or any other related threats;
- To provide, with the concurrence of the National Intelligence Agency defined in the Intelligence Services Act, 38 of 1994, verification services for electronic communications security systems, products and services used by organs of state;
- To provide and coordinate research and development with regard to electronic communications security systems, products, services and any other related services; and
- To perform any other function not inconsistent with the Comsec Act that is necessary for the effective functioning of Comsec.

Section 7(6) of the Comsec Act requires telecommunication services providers to assist Comsec as necessary for the execution of the functions of the Comsec Act

<sup>286</sup> s 3 of the Comsec Act.

<sup>287</sup> s 1 of the Comsec Act.

<sup>290</sup> 'Cryptographic service' is defined in the ECT Act as a service 'designed to facilitate the use of cryptographic techniques' to ensure the authenticity and integrity of electronic data, to ensure the source can be correctly ascertained or to ensure that only the intended recipient can access the data. The phrase used in the Comsec Act, 'cryptographic services', however, is not defined in the Comsec Act or any other legislation.

by Comsec. Comsec must make a request and the assistance is to be provided at the expense of Comsec.

In terms of section 7(7) of the Comsec Act, Comsec is exempt from any of the licensing requirements of the Telecommunications Act.

In terms of section 17(1) of the Comsec Act, no organ of state may procure or access electronic communications products without verification and approval by Comsec. In terms of section 17(4), if an organ of state does not obtain the verification and approval of Comsec, any expenditure is regarded as unauthorised for the purposes of the PFMA.

Section 17(1), (2) and (5) of the Comsec Act provides that Comsec must request an analysis of the electronic communications security needs of organs of state every two years, and organs of state must submit such analysis to Comsec. Thereafter, Comsec, if it believes that it should attend to the electronic communications security needs of an organ of state, must enter into an agreement with that organ of state for the provision of the necessary services by Comsec.

Section 21 of the Comsec Act provides that Comsec must for its own account provide protection to the critical electronic communications infrastructure of organs of state. It must also coordinate research and development regarding possible security risks to critical electronic communications infrastructure. The Minister of Intelligence Services identifies critical electronic communications infrastructure on the recommendation of Comsec.

#### ***4.4.13 Legislation regarding other state-owned enterprises***

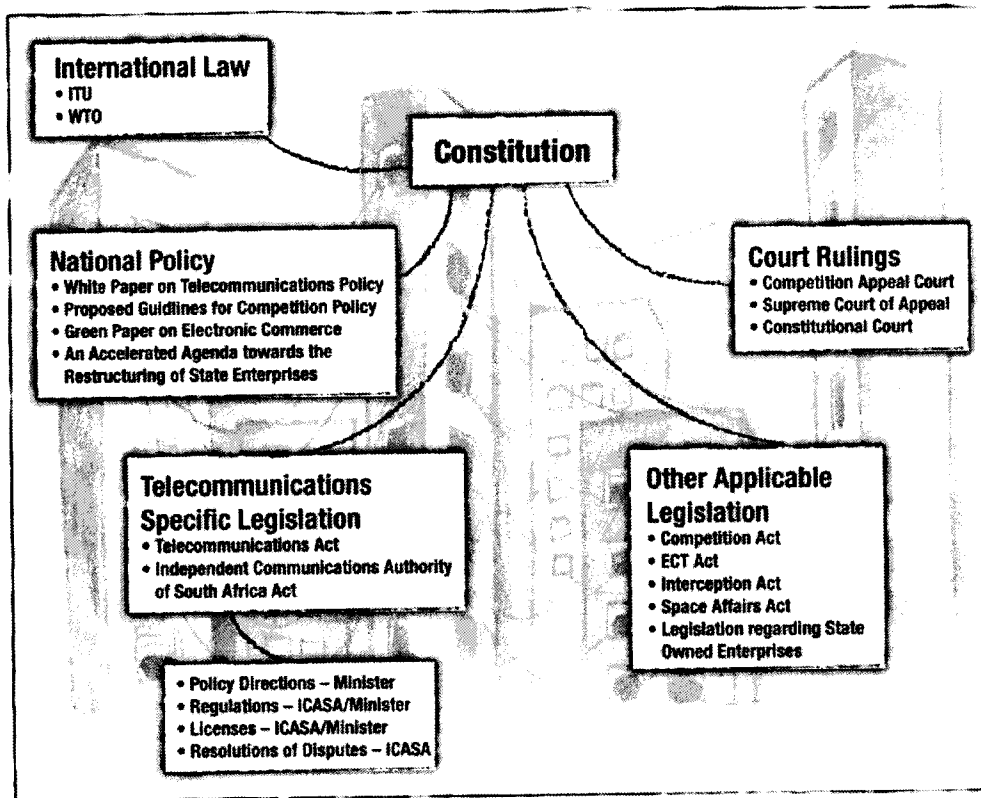
In addition to those state-owned enterprises mentioned above, section 41(1) of the Telecommunications Act instructs the Minister of Communications, with the concurrence of the Minister of Education, to establish an entity to construct and operate a PTN for public schools and public further education and training institutions and other institutions determined by the Minister of Education.

Similarly, section 41(11) instructs the Minister of Communications, with the concurrence of the Minister of Transport, to establish an entity to be known as Maritime and Aeronautical Radio Services to construct and operate a PTN to fulfil South Africa's international obligations in terms of the following conventions:

- International Convention for the Safety of Life at Sea 1974-78;
- Annexure 12 to the Convention on International Civil Aviation 1944;
- International Convention on Maritime Search and Rescue 1979.

As at June 2004, neither of the entities mentioned in section 41 of the Telecommunications Act has been established.

The diagram below is a bird's-eye view of the regulatory framework for telecommunications in South Africa, summarising the preceding discussion.



## Conclusion

South Africa has made great strides in developing best practice telecommunications policy and regulation over the past 10 years, since the inception of democracy. The White Paper on Telecommunications Policy was an excellent and forward-looking policy document. Unfortunately, however, not all of the policy articulated in that document has actually been implemented. The ECT Act is hailed in some circles as ranking amongst the best electronic communications legislation in the world. Time will tell whether the implementation of that legislation will be effective.

As can be gathered from the overview presented in this chapter as well as the discussions in the rest of the chapters of this book, there are some areas of concern in the regulation of telecommunications that should be addressed urgently. Some of these areas include:

- The licensing of an SNO;
- The implementation of carrier pre-select and number portability;
- The further liberalisation of the market and licensing of additional

- competitors;
- The lifting of the restriction on telecommunication services licensees to obtain telecommunication facilities from Telkom only;
- The lifting of the restriction on PTNs to not resell spare capacity;
- Fast-tracking of interconnection and facilities leasing disputes;
- Enforcement of the regulatory framework requirement on Telkom to produce regulatory accounts;
- Review of the rate regime;
- Changing the rate review process to allow public participation; and
- More effectively implementing universal service policy.

The development of a convergence policy has also become urgent. Technology convergence is here. The regulatory framework must follow if South Africa is not to be left behind the next generation of telecommunications. What is required immediately is the lifting of the restriction on voice over Vans – which would facilitate the regulatory convergence of voice and data telecommunication services. The convergence of mobile and fixed telecommunication services began in 2001, with the Telecommunications Act being amended to allow Telkom, the SNO and the under-serviced area licensee to provide fixed-mobile services and Telkom and the SNO access to the 1800 MHz and 3G frequency spectrum. The eventual convergence of telecommunication and broadcasting services has already begun with the granting to Sentech of a multimedia licence.

In the process of following drafting convergence legislation, the opportunity should be taken to draft legislation that is clear, flexible and forward looking. It should also be used to consolidate many varied pieces of legislation that regulate the industries, in particular the Telecommunications Act, the Icasa Act and the various pieces of broadcasting legislation.

Also, it is critical that the regulators, Icasa and the Competition Commission, be given the required resources in terms of both money and human resources to enable them effectively to regulate rampant anti-competitive conduct in the industry. It is also important that Icasa be given more independence in the carrying out of its powers and duties.

With the changes suggested, the regulators can and should act decisively in regulating an industry that is good for South Africans and South Africa.