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**The Changing ICT Regulatory Landscape -
Some Recommendations for Amendments to the
EC Act**

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Issues

- Market Structure and Service Licensing
- Interconnection and Facilities Leasing
- Competition Matters

Regulatory Best Practices

- Transparency
- Fairness
- Clarity
- Flexibility

Services

- Electronic Communications network services (ECNS) - make available an ECN
- Electronic Communications services (ECS) - conveyance of EC over an ECN
- Broadcasting services (BS) - broadcasting over an ECN

Licensing

- Individual
- Class
- Exempt

Individual Licences

- National and provincial ECNS
- Commercial and public broadcasting (national and provincial)
- Voice using own numbers
- ECNS, ECS and BS owned more than 25% by state

Class Licences

- Municipal ECNS
- Community and low power broadcasting

Licence Exempt

- Non profit ECS
- Resellers of ECS
- Private ECNs
- LANs

Licences

	Electronic Communications Network Services	Electronic Communications Services	Broadcasting Services
Individual	<ul style="list-style-type: none"> - for profit national and provincial - state owns 25% + 	<ul style="list-style-type: none"> - voice telephony - state owns 25% + 	<ul style="list-style-type: none"> - commercial and public national and provincial - state owns 25% +
Class	<ul style="list-style-type: none"> - for profit municipal 	<ul style="list-style-type: none"> - data services 	<ul style="list-style-type: none"> - community - low power
Exempt	<ul style="list-style-type: none"> - private ECNs - small ECNs such as LANs 	<ul style="list-style-type: none"> - non-profit - resale of ECS 	

Recommendations - Licensing

- Delete different treatment for entities owned +25% by the state
- Delete Policy Directions for iECNS licensing
- Delete ITA for iECNS and iECS licensing
- Exempt services, eliminating the requirement for permission from ICASA
- Clarify that transfers of individual licences requires prior approval
- Delete requirement to apply for transfers of class licences
- Shorten the class registration process

Interconnection

- Interconnection
- Facilities Leasing

Obligation to Interconnect

- ◆ All licensees must interconnect and all ECNS licensees must provide facilities
- ◆ Icasa may exempt those that do not have SMP
- ◆ Those exempted may interconnect

Reasonableness Test

- ◆ Technically and financially feasible
- ◆ Will promote the efficient use of communications networks and services

Essential Facilities

- Icasa must prescribe list of essential facilities that must be provided
- List must be provided and review it every 36 months

International Facilities

- ◆ No agreements with exclusivity provisions, provisions creating undue barriers to use of facilities, or provisions restricting leasing, selling or otherwise providing
- ◆ Any existing provision is invalid from a date to be determined by the Minister

Regulations – EC Act

- ◆ Agreement principles, eg pricing, quality, co-location, unbundling
- ◆ Framework / time frames / procedures
- ◆ May include Reference Offers (RIOs and RFLOs)

Reasonableness Disputes

- ◆ Requester notifies Icasa of dispute in terms of regulations
- ◆ Icasa determines reasonableness within 14 days or such longer period that is reasonably necessary

Unwillingness or Inability to Negotiate or

- ◆ Either party notifies Icasa of dispute
- ◆ Party is deemed to be unwilling or unable to negotiate or agree if agreement not concluded within prescribed time frames
- ◆ No time frame legislated for Icasa to make a decision

Unwillingness or Inability Rulings

- ◆ Impose terms and conditions
- ◆ Propose terms and conditions
- ◆ Refer the dispute to the Complaints and Compliance Committee

Implementation Disputes

- ◆ Either party may notify the Complaints and Compliance Committee
- ◆ Dispute is resolved in terms of regulations prescribed
- ◆ Dispute is resolved on an expedited basis

Submission of Agreements to Icasa

- ◆ Agreement becomes effective and enforceable upon submission, except
 - If court order otherwise
 - Icasa notifies parties of inconsistency with regulations
- ◆ Icasa must provide copies of agreements to anyone who requests them

Review of Agreements by Icasa

- ◆ Icasa must review all agreements, except where parties have been exempted from obligation to interconnect
- ◆ Review is for consistency with regulations
- ◆ If term(s) is not consistent, Icasa must direct the parties to renegotiate
- ◆ Renegotiated agreements must be submitted for review

Pending Proposals for New Regulations

- ◆ Interconnection Regulations – Notice 898 of 2007
- ◆ Facilities Leasing Regulations – Notice 899 of 2007
- ◆ Essential Facilities Regulations - Notice 1800 of 2007

Recommendations - Interconnection

- Clarify that parties may not discriminate in favour of their affiliates in any way
- Clarify ICASA's right to regulate interconnection no matter what it does in terms of Ch 10
- Clarify what heightened scrutiny will be afforded essential facilities
- Delete discriminatory provision in relation to international facilities

Competition

- Ex Ante
- Ex Post

Ch 10 Ex Ante Regulation

- ▶ Define anti-competitive acts + procedures for complaints
- ▶ Define markets, Significant Market Power, Ineffective competition
- ▶ Impose pro-competitive licence conditions

Section 67(4) - Defining Markets ...

- ▶ Markets
- ▶ Ineffective competition in markets
- ▶ Significant Market Power of licensees
- ▶ Pro-competitive licence conditions

Significant Market Power

- ▶ Dominant
- ▶ Control of Essential Facilities
- ▶ Vertical relationship that could harm competition

SMP - *Dominant* - S7 CA

- ▶ At least 45% of the market
- ▶ Between 35% and 45% of the market, unless it can show that it does not have market power
- ▶ Less than 35% of that market, but has market power

SMP – Dominant - *Market Power* - CA

- ▶ Power to control prices, or
- ▶ Power to exclude competition, or
- ▶ Power to behave to an appreciable extent independently of its competitors, customers or suppliers

SMP - *Control of Essential Facilities*

- ▶ ECF or combination of ECFs and other facilities used to provide any service in terms of EC Act –
 - exclusively or predominantly provided by a single or limited number of licensees, and
 - cannot feasibly (whether economically, environmentally or technically) be

SMP - Vertical Relationship that could Harm Competition

- ▶ Competition Act - the relationship between a *firm* and its suppliers, its customers, or both
- ▶ ICASA decides whether it is harmful

Markets

- ▶ Entry barriers
- ▶ Dynamic character and functioning

Ineffective Competition

- ▶ Market share of licensees
- ▶ Forward looking assessment of *market power*

Pro-competitive Licence Conditions

- ▶ Fair, reasonable and non-discriminatory access (a and c)
- ▶ Time periods and penalties (b)
- ▶ Obligation to publish information (d and e)
- ▶ Separate accounting (f)
- ▶ Accounting methods (g)
- ▶ Price controls (h and i)
- ▶ SA broadcasting programming (i)
- ▶ Records (j)

Recommendations - Competition

- Clarify and distinguish (eliminate confusion) the various matters that must be determined, eg, markets, ineffective competition, SMP, and pro-competitive licence conditions
- Obligate licensees to provide ICASA with information
- Clarify that licence conditions re interconnection and facilities leasing are in addition to regulations
- Authorise ICASA to order structural separation

Questions?

Lisa Thornton Inc produces a weekly update of relevant legal and regulatory matters affecting the ICT industries. Should you wish to subscribe, send a request to info@thornton.co.za.