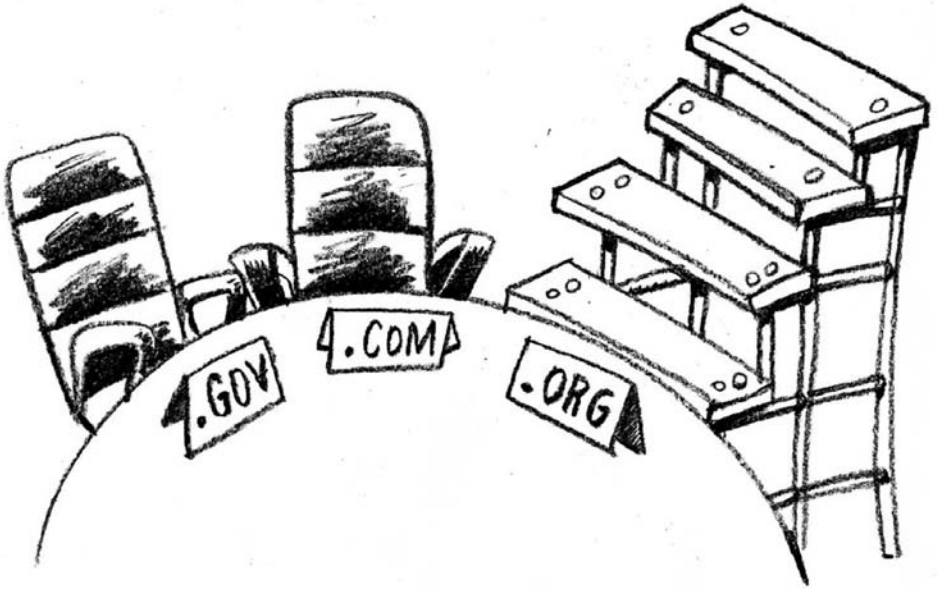


The Telecommunications Regulators

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Introduction

The telecommunications industry in South Africa is regulated by the Minister of Communications (the Minister), the Department of Communications (DoC) and the Independent Communications Authority of South Africa (Icasa). In addition to these three officials and institutions, the Competition Commission plays a role in the regulatory process with regard to competition and related issues. The telecommunications sector regulators are discussed in this chapter, which is divided into the following five topics:

- (1) the use of comparative materials as a tool for analysing telecommunications regulation in South Africa;
- (2) the regulatory framework within which telecommunications regulators operate;
- (3) international instruments and organisations that have a bearing on telecommunications regulation;
- (4) Icasa, including a discussion of the challenges faced by Icasa as a merged regulator, the independence of Icasa and the relationship between the Minister and Icasa; and
- (5) the regulation of competition in telecommunications.

1. COMPARATIVE ANALYSIS

In this chapter a comparative analysis will be made with certain other countries, where appropriate, to illustrate how South Africa is measuring up to international standards with regard to regulation of telecommunications. The Federal Communications Commission (FCC), the United States of America's telecommunications regulator, is one of the oldest and most established regulators.² The FCC has been chosen as a comparator to illustrate that although the Independent Communications Authority of South Africa Act, 13 of 2000 (Icasa Act) has similar provisions to the US Communications Act, the political and constitutional environments within which these two regulators operate are different, and as a result they do not achieve the same level of independence. Malaysia is a developing country similar to South Africa. Malaysia has enacted one piece of legislation to regulate both telecommunications and broadcasting. This is in recognition of convergence.³ Although South Africa acknowledges that convergence is a reality in the industry,⁴ it still has different legislation for each of telecommunications and broadcasting.⁵ Malaysia also faces issues relating to the independence of its regulator, which provides useful comparative research material for South Africa.

Botswana has set a good example in the southern African region with regard to

² The FCC was established in terms of s 4 of the United States Communications Act of 1934 (US Communications Act).

³ For a detailed discussion on convergence, see chapter 9.

⁴ Address by the Minister of Communications, Dr Ivy Matsepe-Casaburi, at the National Colloquium on Convergence Policy, 15 July 2003; available at <http://docweb.pvw.gov.z./convergence/speech.html>.

⁵ Telecommunications is regulated by the Telecommunications Act, 103 of 1996 and broadcasting is regulated by the Broadcasting Act, 4 of 1999 and the Independent Broadcasting Authority Act, 153 of 1993.

the financial independence of its telecommunications regulator.⁶ The Botswana Telecommunications Authority (BTA) is considered to have almost complete financial independence.⁷ This is one of the areas of telecommunication regulation that South Africa needs to improve on. Later in this chapter, the financial independence of Icasa is discussed in detail; that discussion will show that South Africa could learn from Botswana in this regard.

The Office for Telecommunications (OfTel), which is the United Kingdom's telecommunications regulator, has been very open and consultative in its approach to competition. OfTel has published discussion papers regarding issues such as its approach to competition and various critical competition-related definitions such as market dominance.⁸

New Zealand rejected sector-specific regulation in the telecommunications industry.⁹ That country is said to have been the first country to liberalise its telecommunications market fully, under the policy of 'light-handed' regulation.¹⁰ The 'light-handed' method of regulation rejects sector-specific regulation and relies principally on general competition law to regulate market conduct and foster the development of competition. This approach has, according to certain commentators, failed in New Zealand.¹¹ The failure of New Zealand's approach is an illustration that sector-specific regulation may be a necessary starting point, at least for developing countries. Despite the trend introduced by New Zealand and followed by Australia, the opposite trend is on the rise among developing countries. That is, there is a growing belief that telecommunications markets require a strong, independent, well-staffed and adequately funded industry-specific telecommunications regulator.¹² South Africa can learn a lesson from New Zealand, as it is in the early stages of liberalisation.

2. LEGISLATIVE FRAMEWORK OF THE REGULATORS

2.1 Constitution of the Republic of South Africa

Section 192 of the Constitution provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. This section is a constitutional mandate to establish a broadcasting regulator, which was set up as the Independent Broadcasting Authority (IBA) in 1993 in terms of the Independent Broadcasting Authority Act.¹³ The IBA is the predecessor in title of Icasa.¹⁴ Section 192 relates only to broadcasting and does not include telecommunications. The implications of section 192 as regards the independence of Icasa as a merged regulator are discussed in section 4.4 below.

⁶ Botswana Telecommunications Act, 15 of 1996. See s 10.

⁷ International Telecommunications Union Report 'Effective Regulation Case Study: Botswana' (2001) 13.

⁸ See, for example, *OfTel's Effective Competition Review* (February 1998) and *OfTel's Competition Act Strategy* (1 July 2002); available at http://www.oftel.gov.uk/publications/about_oftel/2002/cact0602.htm.

⁹ T Gilbertson 'Beginning of the End of "Light-Handed" Telecommunications Regulation in New Zealand' (13 November 2001) 1; available at <http://www.gtlaw.com.au/t/publications/default.jsp?pubid=296>.

¹⁰ Gilbertson (note 8 above) 1.

¹¹ Gilbertson (note 8 above) 1.

¹² BA Petrazzini 'Regulating Communication Services in Developing Countries' in H Melody (ed) *Principles, Policies and Regulatory Practice: Telecom Reform* (2000) 350; available at www.lirne.net/resources/tr/index.htm.

¹³ Independent Broadcasting Authority Act.

¹⁴ s 18 of the Icasa Act, 13 of 2000.

Section 181 of the Constitution sets out the requirements for independence of the various institutions supporting democracy.¹⁵ Although the IBA is not specifically included in the list of the institutions referred to in section 181, it is arguable that the principles set out in section 181 are applicable to the IBA.¹⁶ The requirements for independence, as listed in section 181, are as follows: (a) the institutions are subject only to the Constitution and the law; (b) they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice; (c) other organs of state, through legislative and other measures must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness; (d) no person or organ of state may interfere with the functioning of these institutions; and (e) the institutions are accountable to the National Assembly and must report on the performance of their functions to the National Assembly at least once a year. Section 4.5 of this chapter will include a discussion on the extent to which Icasa does comply with the provisions of section 181.

Finally, section 195 of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. These principles include the following: (a) promotion and maintenance of a high standard of professional ethics; (b) promotion of efficient, economic and effective use of resources; (c) public administration must be development-oriented; (d) services must be provided impartially, fairly, equitably and without bias; (e) people's needs must be responded to, and the public must be encouraged to participate in policy-making; (f) accountability; (g) transparency must be fostered by providing the public with timely, accessible and accurate information; (h) cultivation of good human-resource management and career-development practices, to maximise human potential; and (i) public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation. Section 195(2)(a) goes on to provide that the principles listed in section 195(1) apply to administration in every sphere of government, organs of state and public enterprises. Icasa, as an organ of state,¹⁷ is bound by the principles set out in section 195.

2.2 Regulatory bodies established in terms of the Telecommunications Act

Prior to its amendment in 2001, section 5 of the Telecommunications Act made provision for the establishment of the South African Telecommunications Regulatory Authority (Satra).¹⁸ Satra was South Africa's first telecommunications regulator. With effect from 1 July 2000, Satra was dissolved and replaced by Icasa in

¹⁵ The institutions listed in s 181 of the final Constitution are as follows: (a) the Public Protector, (b) the South African Human Rights Commission, (c) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, (d) the Commission for Gender Equality, (e) the Auditor-General, and (f) the Electoral Commission.

¹⁶ s 192 of the final Constitution, which mandated the establishment of the IBA, forms a part of chapter 9 of the Constitution, entitled 'State institutions supporting democracy'. The establishment of the institutions listed in s 181 is mandated by provisions forming part of the same chapter.

¹⁷ The term 'organ of state' is defined in s 239 of the final Constitution. Icasa falls squarely within the constitutional definition.

¹⁸ s 5(2)(a) of the Telecommunications Act, prior to its repeal by the Telecommunications Amendment Act, 65 of 2001, provided that, 'There is hereby established a juristic person to be known as the South African Telecommunications Regulatory Authority'.

terms of the Icasa Act.¹⁹ In July 1997, the Cabinet had approved a decision to merge the IBA and Satra; Icasa is the result of this merger. The Telecommunications Act also created the USA,²⁰ the main function of which is to promote the goal of universal service. A detailed discussion of the USA is to be found in chapter 8.

2.3 Powers of the Minister in terms of the Telecommunications Act

The powers of the Minister as regards telecommunications regulation include, inter alia, the power to issue policy directions to Icasa, to initiate and participate in certain licensing processes, and to approve radio regulations and other regulations made by Icasa in terms of section 95 and 96 of the Telecommunications Act. Policy directions issued by the Minister in terms of the Telecommunications Act must be consistent with the objects of the Telecommunications Act as set out in section 2.²¹ With regard to the initiation of a licensing process for possible additional public switched telecommunication licences, the Telecommunications Act provides that the Minister shall, by 31 December 2003, determine by way of a market study the feasibility of granting one or more public switched telecommunications (PSTS) licences²² and another mobile cellular telecommunication licence.²³ The public switched telecommunications licence is in addition to Telkom's licence and the proposed Second National Operator's (SNO) licence.²⁴ The mobile cellular telecommunications licence is in addition to the three existing mobile cellular licences.²⁵ As at June 2004, the Minister has not commissioned any such feasibility studies. In terms of section 34(2)(a) of the Telecommunications Act no application shall be lodged or entertained in respect of a licence to provide public switched telecommunications services,²⁶ mobile cellular telecommunication services,²⁷ national long-distance telecommunications services,²⁸ international telecommunications services,²⁹ multimedia services³⁰ or any other telecommunications service prescribed for the purposes of section 34(2) of the Telecommunications Act,³¹ unless such application is lodged pursuant to and in accordance with an invitation issued by the Minister by notice in the Government Gazette. The Minister's powers with regard to licensing also include the power to: (a) accept recommendations made by Icasa³²; (b) request further information from Icasa³³; (c) reject the recommendations of Icasa;³⁴ and (d) refer the matter back to Icasa.³⁵

¹⁹ s 18 of the Icasa Act read with GN 2446, GG 21343 dated 30 June 2000.

²⁰ ss 58–64 of the Telecommunications Act.

²¹ s 5(4)(a) of the Telecommunications Act.

²² s 32A(5)(a) of the Telecommunications Act.

²³ s 37(4)(a) of the Telecommunications Act.

²⁴ s 32A of the Telecommunications Act provides that Telkom and the SNO are the holders of public switched telecommunications (PSTS) licences as of 7 May 2002.

²⁵ s 37(1)(a) of the Telecommunications Act provides that Vodacom (Pty) Ltd and Mobile Telephone Networks (Pty) Ltd shall be deemed to be the holders of licences in terms of the Telecommunications Act to provide mobile cellular telecommunications. s 37(1)(b) of the Telecommunications Act provides that Cell C (Pty) Ltd is the holder of a further mobile cellular telecommunications licence.

²⁶ s 34(2)(a)(i) of the Telecommunications Act.

²⁷ s 34(2)(a)(ii) of the Telecommunications Act.

²⁸ s 34(2)(a)(iii) of the Telecommunications Act.

²⁹ s 34(2)(a)(iii) of the Telecommunications Act.

³⁰ s 34(2)(a)(v) of the Telecommunications Act.

³¹ s 34(2)(a)(vi) of the Telecommunications Act.

³² s 35(2)(a) of the Telecommunications Act.

³³ s 35(2)(b) of the Telecommunications Act.

³⁴ s 35(2)(d) of the Telecommunications Act.

³⁵ s 35(2)(c) of the Telecommunications Act.

In terms of section 35A of the Telecommunications Act the Minister may, notwithstanding the provisions of section 34 and 35 of the Telecommunications Act, with regard to licences referred to in section 34(2) thereof, in specific instances determine the manner in which applications may be made. The determination may include auctions or tenders as a licensing method. The Minister may also prescribe the licensing process and the licensing conditions that will apply. Section 32B(2) empowers the Minister in concurrence with the Minister of Public Enterprises to set aside a percentage of the equity interest in the SNO for Eskom and Transnet. A detailed discussion of telecommunications licensing processes, including the respective roles of the Minister, Icasa and the DoC in such licensing processes, may be found in chapter 5. With regard to the radio frequency spectrum access to the 1800 MHz frequency band, the Minister determines the fees payable in respect thereof and the period of payment of such fees by the mobile cellular operators, Telkom and the SNO.³⁶

In terms of sections 95(3) and 96(6) of the Telecommunications Act, the Minister has the power to approve all radio regulations and all other regulations made by Icasa in terms of sections 96(6)(a), (b) and (c).³⁷ No such regulation or any amendment or withdrawal thereof is valid until it has been approved and published in the Government Gazette by the Minister.

2.4 Powers of the DoC in terms of the Telecommunications Act

Prior to the amendment of the Telecommunications Act during 2001, chapter X of the Telecommunications Act made provision for certain functions to be performed by the DoC with regard to the Human Resources Fund (the Fund).³⁸ These functions were to keep account of the annual contributions to the Fund and of any money accruing to the Fund from any other source. The Fund was to be administered by the Director-General of the DoC in consultation with Icasa.³⁹ Section 80(2) of the Telecommunications Act provided that, in administering the Fund, the Director-General: (a) shall monitor and keep abreast of the human resource needs of the telecommunications industry; (b) shall evaluate the effectiveness of education, research and training in the Republic in meeting those needs; (c) shall identify courses, programmes and schemes which will serve those needs; (d) may entertain applications for grants and subsidies from educational institutions, employers, voluntary associations and community development organisations in the field of education, research and training; and (e) shall monitor and control the use of such grants and subsidies by recipients and beneficiaries thereof.

Section 37 of the Broadcasting Act makes provision for the establishment of the Frequency Spectrum Directorate within the DoC.⁴⁰ The functions of the

³⁶ s 30B(2)(c) of the Telecommunications Act.

³⁷ Telecommunications Act, s 96(1) provides that the Authority (Icasa) may make regulations in relation to: (a) any matter which in terms of the Telecommunications Act shall or may be prescribed by regulation; (b) any technical matter necessary or expedient for the regulation of telecommunication activities; and (c) any matter of procedure or form which may be necessary or expedient to prescribe for the purpose of the Telecommunications Act.

³⁸ Section 15 of Schedule 2 to the Skills Development Act, 97 of 1998 provides that, subject to sub-item (2) thereof, the Human Resources Fund referred to in s 78(1) of the Telecommunications Act continues to exist as if ss 78–87 of that Act had not been repealed. The consequence of this is that the DoC continues to have the powers and functions set out in ss 78–87 of the Telecommunications Act, prior to their amendment by the Telecommunications Amendment Act, 64 of 2001.

³⁹ s 78(4) of the Telecommunications Act, prior to amendment by Act 65 of 2001.

⁴⁰ s 37(1) of the Broadcasting Act.

directorates are to develop policy with regard to the radio frequency spectrum and to undertake technological and economic research of the radio frequency spectrum to ensure the efficient use of the spectrum.⁴¹

2.5 Competition Act, 89 of 1998

The Competition Act, which regulates competition generally in South Africa, creates three institutions for the regulation of competition. These are: the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Competition Commission is headed by the Competition Commissioner, who is appointed by the Minister of Trade and Industry for a period of five years.⁴² The Competition Commission has six divisions arranged according to its core functions. These divisions are: enforcement and exemptions, mergers and acquisitions, compliance, legal services, policy research and corporate services.⁴³ The objective of the Competition Commission is to investigate, control and evaluate restrictive practices, abuse of dominant positions and mergers.

The telecommunications industry, like many other sectors, is subject to the Competition Act. The Competition Commission has concurrent jurisdiction with other sectoral regulatory bodies, in terms of section 82 of the Competition Act. Section 82 requires the Competition Commission to enter into a Memorandum of Agreement with sector regulators.⁴⁴ Pursuant to section 82, Icasa and the Competition Commission have entered into a Memorandum of Agreement. A detailed discussion of this agreement can be found in section 5.2 of this chapter.

The second institution created by the Competition Act is the Competition Tribunal, which is headed by a Chairperson appointed by the President for a period of five years.⁴⁵ The President must also, on the recommendation of the Minister of Trade and Industry, appoint three to ten people to serve on the Tribunal for a period of five years, either on a full-time or part-time basis.⁴⁶ The functions of the Tribunal include to adjudicate on alleged prohibited practices, to impose in respect thereof any remedy provided for by the Competition Act, to adjudicate on any matter that may in terms of the Competition Act be considered by it, and make any order provided for in the Competition Act, to hear appeals from or review any decision of the Competition Commission that may in terms of the Competition Act be referred to it and to make any ruling or order necessary or incidental to the performance of its functions in terms of the Competition Act.⁴⁷

The third relevant institution is the Competition Appeal Court, which has the status of a High Court.⁴⁸ The members of the Competition Appeal Court are appointed by the President on the advice of the Judicial Services Commission.⁴⁹ This Court has jurisdiction throughout the Republic and is a court of record.⁵⁰ It

⁴¹ s 37(4) of the Broadcasting Act.

⁴² s 22(1) of the Competition Act, 89 of 1998.

⁴³ For more information on the Competition Commission, see <http://www.compcom.co.za>.

⁴⁴ s 82 of the Competition Act deals with relationships with other agencies; s 82(1) provides that 'a regulatory agency which, in terms of any regulation has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector (a) must negotiate agreements with the Competition Commission, as anticipated in section 21(1)(h); and (b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement'.

⁴⁵ C ss 26(3) and 29(1) of the Competition Act.

⁴⁶ s 26(2) of the Competition Act.

⁴⁷ s 27(1) of the Competition Act.

⁴⁸ s 36(1)(a) of the Competition Act.

⁴⁹ s 36(2) of the Competition Act.

⁵⁰ s 36(1)(b) and (c) of the Competition Act.

may consider any appeal from or review of the Competition Tribunal, and amend or set aside a decision or an order that is the subject of appeal or review from the Competition Tribunal.⁵¹ The Competition Appeal Court may also give any judgement or make any order as the circumstances may require.

2.6 Independent Communications Authority of South Africa Act, 13 of 2000 (Icasa Act)

The Icasa Act provides for the establishment of Icasa⁵², the dissolution of Satra and the IBA⁵³ and the transfer of the functions of Satra and the IBA to Icasa.⁵⁴ The Icasa Act is divided into five chapters. Chapter 1 deals with introductory remarks, definitions and the objects of the Act. The objects of the Act are to establish an independent authority which is intended, firstly, to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society as required by section 192 of the final Constitution; and, secondly, to regulate telecommunications in the public interest and achieve the objects contemplated by the underlying statutes. The underlying statutes include the IBA Act, the Broadcasting Act and the Telecommunications Act.

Chapter 2 of the Icasa Act provides for the establishment of Icasa, its functions, constitution, appointment of councillors, disqualification from being councillors, term of office, removal from office, filing of vacancies in the council, remuneration, meetings of the council, conflicts of interest, validity of the proceedings of council, staff, financing, and reporting. Chapter 3 of the Icasa Act deals with standing and special committees. These committees are established to assist Icasa in the effective exercise and the performance of its powers and duties.⁵⁵ Chapter 4 comprises the transitional provisions, which regulate the dissolution of the IBA and Satra, the transfer of staff, transfer of assets and liabilities and the Authority's pending matters. Chapter 5 deals with general provisions.

3. INTERNATIONAL INSTRUMENTS AND ORGANISATIONS

3.1 International Telecommunications Union (ITU) and the African Green Paper

The African Green Paper was developed by the ITU as a guide to African countries in the regulation of their telecommunications sectors.⁵⁶ It is designed to be a thought-provoking reference document suggesting an appropriate approach and offering a number of potential options for defining and bringing about, as harmoniously as possible, restructuring and accelerated development of the telecommunications sector in Africa.⁵⁷ The African Green Paper was developed by the African Information and Telecommunications Policy Study Group (AITPSG),

⁵¹ s 37(1) of the Competition Act.

⁵² s 3(1) of the Icasa Act.

⁵³ s 18 of the Icasa Act.

⁵⁴ s 4(1)(a) and (b) of the Icasa Act.

⁵⁵ s 17 of the Icasa Act.

⁵⁶ ITU African Green Paper (1995). For more information on the ITU, see <http://www.itu.org>.

⁵⁷ African Green Paper (note 62 above) 5.

which was created at the African Telecommunications Development Conference hosted by the ITU in Harare in 1990.⁵⁸

The recommendations of the African Green Paper that are relevant to this chapter, are those relating to the regulation of competition in the telecommunications industry and to the independence of the regulator. In order to ensure the autonomy and the independence of a regulatory authority, the African Green Paper recommends that such regulatory authority must be created by legislation, which provides, inter alia, for a mechanism for the appointment of its chairman and members.⁵⁹ As regards competition, the African Green Paper recommends that conditions amenable to fair competition should be created, in order to ensure that customers derive all the expected benefits. The African Green Paper recommends, further, that the opening up of telecommunications services to competition must be accompanied by the establishment of rules ensuring equitable access to network infrastructure.⁶⁰

3.2 World Trade Organisation (WTO)

The WTO is the international body responsible for the administration of the General Agreement on Trade in Services (Gats), which includes an Annex on Telecommunications and a Protocol regarding basic telecommunications services. This Protocol is known as the Fourth Protocol to the Gats. The WTO provides a global forum for trade negotiations and dispute resolution. The WTO also monitors national trade policies and provides technical assistance and training for developing countries concerning the implementation of their WTO commitments, including required regulatory reforms.⁶¹ South Africa is a member of the WTO and is a party to the Gats. WTO members are required to establish independent regulators, which will be separate from and not accountable to any supplier of basic telecommunications services. The decisions and the market procedures used by the regulators are required to be impartial with respect to all market participants.⁶² The WTO also requires its members to prevent anti-competitive practices in telecommunications. The Gats provides that appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are major suppliers, from engaging in or continuing anti-competitive practices.⁶³ The anti-competitive practices referred to include anti-competitive cross-subsidisation, anti-competitive use of information obtained from competitors with anti-competitive results, and not making available other services to suppliers on a timely basis, such as technical information about essential facilities and commercially relevant information, which are necessary for them to provide services.⁶⁴

⁵⁸ African Green Paper (note 62 above) 7.

⁵⁹ African Green Paper (note 62 above) 42.

⁶⁰ African Green Paper (note 62 above) 51.

⁶¹ H Intven and M Tetrault 'Overview of telecommunications regulation' in *Telecommunications Regulation Handbook* (2000) Module 1 1-17.

⁶² WTO Reference Paper 'Annex to the fourth Protocol to the Gats Agreement on Basic Telecommunications' (January 1998) section 5.

⁶³ WTO Reference Paper (note 68 above) section 1.1.

⁶⁴ WTO Reference Paper (note 68 above) section 1.2.

3.3 Telecommunications Regulators' Association of Southern Africa (Trasa)

Trasa was formed by the members of the Southern African Development Community (SADC) and came into being on 15 September 1997.⁶⁵ Trasa was established out of two articles in the SADC Protocol on Transport, Communications & Meteorology, namely 10.7 and 13.13.⁶⁶ The main aim of Trasa is to increase communication and co-ordination between regulatory authorities in the SADC region. Trasa seeks to encourage investment in the telecommunications sector by supporting the creation of a common enabling environment. Trasa is an organisation of telecommunications regulators.⁶⁷ The members of Trasa are Botswana, Mozambique, Namibia, South Africa, Tanzania, Zambia, Angola, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Seychelles, Swaziland and Zimbabwe. In terms of the constitution of Trasa, any state that has more than one regulator shall be entitled to single membership and a single vote.⁶⁸

Trasa has as its objectives the co-ordination of regulatory matters and the exchange of ideas, views and experiences on all aspects of regulation of the telecommunications sector throughout the SADC region. Trasa also aims to promote the establishment and operation of efficient, adequate and cost-effective telecommunications networks and services in the SADC region, which meet the diverse needs of customers while being economically sustainable. Trasa further aims to facilitate a uniform level of understanding of regulatory matters and to maximise the utilisation of scarce resources in specialist areas of telecommunications.

The Southern African Transport and Communications Commission (SATCC) acted as the secretariat of Trasa, up to October 1999. The SATCC was responsible for the drafting of the Model Regulatory Framework for Telecommunications. This model was designed to create uniformity of telecommunication regulation among the members of SADC and to harmonise legislation to allow operators on the continent to move freely between countries.

In addition to developing the Model Regulatory Framework, the SATCC has also developed guidelines to help member states in the promulgation of national policies, legal frameworks and regulatory regimes. Examples of the guidelines published by the SATCC are the following:

- interconnection model regulations adopted in Blantyre November 2002 and published by Trasa on 7 May 2003;
- telecommunications tariffs policy and the model Bill adopted in Blantyre November 2002 and published by Trasa on 7 May 2003; and
- policy on ICT priority and the frequency radio spectrum plan for 20 MHz-3100 MHz.

⁶⁵ For more information on Trasa, see [http:// www.trasa.org.bw](http://www.trasa.org.bw).

⁶⁶ Article 10.7 of the Protocol provides for the separation between regulation and operation of telecommunication services. Article 13.13 encourages the creation of regional bodies such as Trasa, to provide a framework for collaboration among members in the same group.

⁶⁷ Intven and Tetrault (note 67 above) 1-17.

⁶⁸ Constitution of Trasa, article 4.1.

The above-mentioned guidelines have been finalised and have been endorsed by all member states. The following guidelines are awaiting approval by member states:

- guidelines on universal access and universal service;
- licensing policy guidelines;
- fair competition guidelines;
- wholesale pricing guidelines; and
- regional frequency spectrum plan (3.1-100 GHz).⁶⁹

4. ICASA⁷⁰

4.1. Formulation and Objects

Prior to the formation of Icasa, the telecommunications industry was regulated by Satra. The White Paper on Telecommunications Policy sets out the objectives of Satra.⁷¹ These objectives were encapsulated in section 2 of the Telecommunications Act, as objectives of the Act. The main object is the regulation of the telecommunications industry in the public interest. Subsidiary objects include ensuring the provision of a wide range of telecommunication services, stimulating and supporting economic growth, stimulating investment in the public telecommunications network, ensuring a level playing field where competitive entry is permitted, and protecting the interests of telecommunications users and consumers.

Icasa operates within the framework of various legislation in addition to the Icasa Act. The legislation includes the final Constitution, the IBA Act, the Broadcasting Act and the Telecommunications Act. All these pieces of legislation influence the functioning of Icasa with regard to some of the issues discussed in this chapter – such as its independence, its relationship with the government and its powers with regard to the regulation of telecommunications and broadcasting. Section 2 of the Icasa Act states that Icasa must also regulate telecommunications in the public interest and achieve the objects contemplated in the underlying statutes, namely the above-mentioned legislation.

Satra and the IBA were both dissolved and replaced by Icasa.⁷² This was an acknowledgement of the realities of convergence between broadcasting and telecommunications and the need for coherent regulation.⁷³ It was also perceived as an attempt by the government to reduce its regulatory budget by avoiding duplication of effort and consolidating the limited skills available.⁷⁴

In Malaysia, broadcasting and telecommunications were brought under the same legislation and the same regulator in 1998, in terms of the Communications and Multimedia Act, 588 of 1998 and the Communications and Multimedia Commission Act, 589 of 1998 respectively. These changes to the regulatory

⁶⁹ Southern Africa Transport and Communications Commission Annual Report 2001–2002 para 13.

⁷⁰ In this chapter, Icasa is referred to interchangeably as the 'Authority', the term used in the Telecommunications Act.

⁷¹ The White Paper on Telecommunications 1996, section 5.8.

⁷² s 18 of the Icasa Act 18.

⁷³ T James (ed) 'An overview of Information Policy Initiatives in Southern Africa, problems and issues emerging from the South African experience – what lessons can we learn?' in *Information Policy Handbook* (2001) chapter 3, paragraph 2.6; available at <http://www.apc.org.book/ictpls/ch3/ch3-5.htm>.

⁷⁴ James (note 81 above) chapter 3, para 3.6.

framework were made in recognition of convergence and the need to have similar regulation for both these sectors.⁷⁵ During the process of amendment of the South African Broadcasting Act in 2002, the Minister expressed a view that despite suggestions that one statute be enacted to regulate both broadcasting and telecommunications, reconciling the Telecommunications Act and the Broadcasting Act would be achieved by first amending the Broadcasting Act.⁷⁶ Notwithstanding that statement, a process is currently underway to develop convergence legislation, which is intended to address the information, communications and technologies (ICT) sector as a whole. This includes media, broadcasting, telecommunications and IT.⁷⁷

In the performance of its functions, Icasa is also bound by the Promotion of Administrative Justice Act⁷⁸ (PAJA), which regulates the requirements of procedurally fair administrative action, and identifies the possible grounds of review of administrative decisions. Icasa should ensure that its actions are lawful, reasonable and procedurally fair as required by PAJA.

4.2 Powers and duties of Icasa

Icasa deals with the day-to-day regulation of the telecommunications industry. Its functions are not so much at the policy-making level but at the operational level, where policy is implemented. In order to ensure effective implementation of government policy, Icasa has been given the power to make regulations.⁷⁹ Icasa is also a licensing authority, in that it participates actively in the licensing process and in issuing of licences.

In telecommunications, there are two types of licence. The first type is smaller, more competitive licences, such as value added network service (Vans) and private telecommunications network (PTN) licences, which are issued and granted by Icasa. The second type is licences issued in terms of section 34(2) of the Telecommunications Act, which are subject to an invitation to apply issued by the Minister. Icasa assists the Minister in developing the criteria to be used in evaluation of applications for the second type of licence.⁸⁰ In such circumstances, Icasa evaluates all applications for licences and makes recommendations to the Minister as to who should be awarded the licence and also proposes the conditions of the licence.⁸¹ If the Minister approves the recommendation of Icasa, Icasa then issues the licence.⁸²

Icasa also has the power to adjudicate disputes arising in the telecommunications industry. In the event that there is a dispute between service providers, or between service providers and consumers, this dispute must be submitted to Icasa for determination.⁸³ It is for this reason that Icasa must be

⁷⁵ World Markets Research Centre, Telecoms Country Report: Malaysia 19 May 2003.

⁷⁶ Address by the Minister of Communications, Dr Ivy Matsepe-Casaburi, Tabling of Broadcasting Amendment Bill, NCOP, 7 November 2002.

⁷⁷ For information on the policy developments see <http://www.docweb.gov.za>.

⁷⁸ Promotion of Administrative Justice Act, 3 of 2000.

⁷⁹ ss 95 and 96 of the Telecommunications Act grant Icasa powers to make radio regulations and any other regulation that the Act permits.

⁸⁰ s 34(2)(c) of the Telecommunications Act.

⁸¹ s 35(1)(a) and (b) of the Telecommunications Act.

⁸² s 35(6) of the Telecommunications Act.

⁸³ s 100 of the Telecommunications Act.

independent from all industry participants and from the government. Icasa owes its primary obligation to consumers, to protect them from unfair business practices, poor quality service, and harmful or inferior products.⁸⁴ With regard to the radio frequency spectrum, Icasa has the duty to plan, control and manage it.⁸⁵

4.3 Structure

Apart from its council, Icasa has the following organisational components: (a) Chief Financial Officer;⁸⁶ (b) Broadcasting Service;⁸⁷ (c) Engineering Service;⁸⁸ (d) Telecommunications Service and Legal;⁸⁹ and (e) Legal, Consumer Protection and Secretariat.⁹⁰

4.4 Challenges facing Icasa as a merged regulator

Unlike the broadcasting regulator, which is provided for in section 192 of the final Constitution, the telecommunications regulator is not provided for specifically in the Constitution. Some authors feel that this is because the broadcasting regulator regulates areas of political priority such as freedom of expression, and that it was for this reason that the office was provided for in the Constitution.⁹¹

Below are a few examples of statutory provisions that illustrate the extent of the government's involvement in telecommunications as opposed to broadcasting.

The Minister, in terms of the Telecommunications Act, has to issue an invitation to the public to apply for the licences provided for in section 34(2).⁹² In terms of section 41(1) of the IBA Act, on the other hand, the IBA (now Icasa) has the power to invite applications for broadcasting licences. Members of the public can also, of their own accord, apply to Icasa for a broadcasting licence.⁹³

The Minister, in terms of section 35A of the Telecommunications Act, can determine new licensing procedures and dispense with the provisions of sections 34 and 35 of the Telecommunications Act.⁹⁴ There is no equivalent provision in either the IBA Act or the Broadcasting Act. As a result, the Minister has more powers to intervene in the licensing process in telecommunications than in broadcasting.

The decision whether or not to grant a licence in terms of the IBA Act falls within the powers of the Authority, whereas in terms of section 35(1)(a) of the Telecommunications Act, the Authority must make recommendations to the Minister with regard to all the licences listed in section 34(2).⁹⁵ The Minister has

⁸⁴ See <http://www.icasa.org.za/default.aspx?page=1009>.

⁸⁵ s 28(1) of the Telecommunications Act.

⁸⁶ Reporting to the Chief Financial Officer are the financial manager and the senior managers for procurement, library services and management and development.

⁸⁷ Reporting to the General Manager for this division are the senior managers for policy development and for licensing and monitoring.

⁸⁸ Reporting to the General Manager of this division are the senior managers for frequency spectrum and monitoring and regions.

⁸⁹ Reporting to the General Manager of this division are senior managers for telecom policy analysis and development, for licensing, enforcement and numbering administration.

⁹⁰ Reporting to the General manager of this division are the senior managers for legal, consumer protection and council support, and for secretariat and international relations.

⁹¹ For this reason the IBA is said to have enjoyed more independence than Satra. Also see J White 'An introduction to telecommunications liberalisation and regulation in South Africa' (unpublished paper) 9–11.

⁹² s 34(2) of the Telecommunications Act provides for the following licences: a public switched telecommunications service (PSTS), mobile cellular telecommunications service (MCTS), natural long-distance telecommunication service, an international telecommunication service; a multimedia service or any other telecommunication service prescribed for the purpose of the subsection.

⁹³ s 41(4) of the IBA Act.

⁹⁴ s 34 of the Telecommunications Act deals with the applications for telecommunications licences and s 35 deals with the decisions and applications.

⁹⁵ s 5(1)(a) of the Telecommunication Act provides that, after Icasa has considered the applications, it must make recommendations to the Minister and propose licence conditions.

the power to either accept or reject the recommendation of Icasa.⁹⁶

Section 5(4)(a) of the Telecommunications Act provides that the Minister may, from time to time by notice in the Government Gazette, issue to the authority policy directions consistent with the objects set out in section 2 of the Telecommunications Act. Section 5(4)(d) of the Telecommunications Act provides that the Authority shall perform its functions in terms of the Act in accordance with the policy directions issued under section 5(4)(a). This section gives the Minister the power effectively to supplement telecommunications legislation. The equivalent provisions in the broadcasting legislation protect Icasa's independence.

The Minister has to approve all the regulations made by Icasa pursuant to the Telecommunications Act.⁹⁷ The Minister, on behalf of the government, has financial and ownership interest in both Telkom and the SABC, which are both subject to regulation by Icasa. Therefore, it is possible that the Minister will not approve regulations that would negatively affect either of these two entities. The unilateral withdrawal by the Minister of the interconnection guidelines, discussed in 4.5.1 'The relationship between the Minister and Icasa' below, is an example of this phenomenon.

4.5 Independence of the Regulator

The term 'independence', as used in the context of telecommunications regulation, does not imply independence from government policy or the power to make policy, but rather independence to implement such policy without undue influence from politicians or industry lobbyists.⁹⁸

Where there is one operator that enjoys a protected monopoly, there is generally no need to have a separate regulator. The government and the main operator share the regulatory responsibilities. In these instances, the operator can even make decisions, which, in a fully regulated environment, would be made by the regulator. However, where there is more than one operator, and in particular where a particular operator is not wholly owned by the government, the need for a regulator is clear. The African Green Paper, in its recommendation regarding the need for the national regulatory authority (NRA), states that there is a need for the NRA because it is inconceivable in a liberalised competitive market that the public telecommunications operator (PTO)⁹⁹ could at the same time be the ultimate regulator. If this were the case, the requisite of impartiality with respect to the competitors of the PTO would be undermined.¹⁰⁰ In the matter between Telkom and AT&T,¹⁰¹ Telkom decided to withhold services from AT&T because it was of the view that the services were being used for illegal purposes. Telkom, as an operator, cannot on its own decide whether to grant the services or not. It is the duty of the regulator, in this instance Icasa (or Satra, as it was at the time), to determine whether or not a licensee is in breach of its licensing conditions. This view was

⁹⁶ s 35(2) of the Telecommunications Act.

⁹⁷ In terms of s 95 of the Telecommunications Act Icasa may make radio regulations; s 96 provides that Icasa may make regulations in relation to any other matter in terms of the Telecommunications Act, any technical matter necessary or expedient for the regulation of telecommunication activities and any matter of procedure or form which may be necessary or expedient to prescribe for the purpose of the Act. s 96(6) states that s 95(3) shall apply to the provisions of s 96 with the necessary changes.

⁹⁸ Melody (note 9 above) 19.

⁹⁹ The PTO is a facilities-based operator such as a telephone company that provides telecommunications services to the public for compensation.

¹⁰⁰ African Green Paper (note 62 above) 35.

¹⁰¹ *AT&T Global Network Services SA Pty (Ltd) and Others v Telkom SA Limited and Others* (TPD, case no 27624/99, 16 November 1999, unreported) as discussed by M Zlotnick 'South Africa Telecommunications regulation: a review and prospects for the next five years' (2000) 3; available <http://link.wits.ac.za/training/te11.html>.

supported by the decision in this case, which was that the regulator should decide whether or not AT&T should be given the services it required and it is that it is not for Telkom to decide. The Courts have, however held that Telkom may disconnect or refuse to provide services if it is of the opinion that a licensee is violating the conditions of the licence or that the services would be used for an illegal purpose.¹⁰² It is important for the major operator to submit to the jurisdiction of the regulator and for the regulator to function independently of such operator. Telkom should therefore submit to the jurisdiction of Icasa, despite its ownership by and accountability to the government.

The independence of the regulator is essential in relation to issues such as the credibility of the regulator, the enforceability of its decisions and investor confidence in the regulatory system.

Consistently with the requirements of independence as set out in section 181 of the final Constitution, the Icasa Act provides that Icasa must be independent and subject only to the Constitution and the law. The law in this context includes, inter alia, the Icasa Act, the Telecommunications Act, the Broadcasting Act and the IBA Act.¹⁰³ Icasa must also be impartial and must perform its functions without fear, favour or prejudice and must function without any political or commercial interference.¹⁰⁴

4.5.1 The relationship between the Minister and Icasa

The Telecommunications Act also regulates the relationship between the Minister and Icasa. The Minister has powers, in terms of that Act, to make policy directions consistent with the objects of the Act as set out in section 2.¹⁰⁵ Icasa exercises its powers and performs its functions in terms of both the enabling legislation and the policy directions made by the Minister.¹⁰⁶ The Minister does not decide for or impose upon Icasa how its powers should be exercised.

The independence of the regulator ensures that the regulator will make independent decisions that do not unduly favour one participant over another. For example, the regulator must not be seen to be granting licences to certain applicants because of their affiliation with or close ties to the ruling party. In Malaysia, there is a perception that licence awards have favoured bidders of Malay origin with close links to the ruling UMNO party. Tajuddin Ramli of the TRI, which owns Celcom, is one such example.¹⁰⁷

In South Africa, there has been a certain amount of conflict between the Minister and Icasa regarding the exercise of the Minister's powers in terms of the Telecommunications Act and whether that exercise of powers interfered with the independence of Icasa. Examples of these instances of conflict, or where such conflict may arise, are set out below.

The Minister holds the majority shareholding in Telkom. The Minister thus has an interest in its success. Icasa, on the other hand, is expected to regulate through legislation and regulations, supplemented by the policy directives of the Minister.

¹⁰² *Digital Express Network (Pty) Ltd. v Telkom SA Limited* (TPD, case no 26876/99, 4 October 1999, unreported).

¹⁰³ s 3(3) of the Icasa Act.

¹⁰⁴ s 3(4) of the Icasa Act.

¹⁰⁵ s 5(4)(a) of the Telecommunications Act.

¹⁰⁶ s 5(4)(d) of the Telecommunications Act.

¹⁰⁷ World Markets Research Centre Report (note 81 above) 14.

This begs the question whether the Minister can be neutral in matters affecting Telkom.

Icasa receives its funding from the government.¹⁰⁸ The Ministry has to allocate funding to Icasa from its own budget. This compromises the independence of Icasa, in that should Icasa rule against Telkom, it would have indirectly ruled against the government and thereby against the ‘hand that feeds it’. Any decision that adversely affects Telkom indirectly affects the Minister and may therefore affect Icasa’s funding.

In terms of section 43(3) of the Telecommunications Act, Icasa shall prescribe guidelines relating to the form and content of interconnection agreements to be concluded amongst telecommunications service operators. These guidelines are of great interest to Telkom as the holder of the public switched telecommunications licence,¹⁰⁹ as competitors will have to interconnect to its infrastructure. The final guidelines were published on 15 March 2000.¹¹⁰ On 14 April 2000, the Minister withdrew these guidelines without consulting Icasa.¹¹¹ Icasa continued to treat the guidelines as valid, whilst Telkom was of the view that it was not bound by the guidelines due to the Minister having withdrawn them. As a result, Icasa approached the High Court for a ruling on the validity of the guidelines. The court held that the functions of the Minister as provided for in the Telecommunications Act, with regard to the amendment or withdrawal of guidelines, were limited to approval of the guidelines or approval of the withdrawal thereof. The Minister could therefore not on her own initiative withdraw or amend the guidelines. The Court held that the interconnection guidelines were valid and remained enforceable.¹¹²

The controversies surrounding the licensing of the 51 percent stake in the second national operator (SNO) and of the third mobile operator (Cell C), also raise concerns about the independence of Icasa. The controversy with regard to the licensing of the 51 percent stake in the SNO relates to the provisions of section 35A of the Telecommunications Act. Prior to the amendment of the Telecommunications Act in 2001,¹¹³ only sections 34 and 35 made provision for licensing processes and methods. In terms of these two sections, the Minister issues an invitation to apply for any of the licences listed in section 34(2)(a).¹¹⁴ Thereafter, the Minister discusses with Icasa the evaluation criteria in respect of the applications. Icasa conducts the evaluation and does all that is necessary to ensure that the best applicant is recommended to the Minister, including requesting further information from the bidders. After following the process as set out in section 34(3), Icasa makes recommendations to the Minister regarding the best applicant(s).

One of the amendments to the Telecommunications Act was the insertion of section 35A, which grants the Minister the powers to prescribe the manner in which applications can be made, notwithstanding sections 34 and 35 of the Act.

¹⁰⁸ s 15(1) of the Icasa Act.

¹⁰⁹ s 43(1)(a) of the Telecommunications Act provides that any public switched telecommunications service licensee shall, when requested by any other person providing telecommunication services, interconnect its telecommunication systems to the telecommunication system of the other person, in accordance with the terms and conditions of an interconnection agreement entered into between the parties.

¹¹⁰ Interconnection guidelines issued by the Authority in terms of s 43 of the Telecommunications Act, 1996 GN 1265/2000 GG 20993 of 2000.

¹¹¹ Notice of withdrawal. GN 1680/2000 GG 21108 dated 14 April 2000.

¹¹² See Chapter 6 herein.

¹¹³ s 10 of the Telecommunications Amendment Act, 65 of 2001.

¹¹⁴ See the discussion in paragraph 2.2 above.

The licensing process is therefore currently regulated by sections 34, 35 and 35A. Section 35A provides that, 'notwithstanding sections 34 and 35: (a) in the case of a licence referred to in section 34(2), the Minister may in specific instances determine the manner in which applications may be made, such as by way of auction or tender or both and the licensing process and the licensing conditions that will apply; and (b) for all other licences the Authority may in specific instances prescribe the licensing conditions that will apply.'

The initial process for the invitation of interested parties to bid for a 19 percent stake and also for a 51 percent stake in the SNO, through a notice of invitation published in the Government Gazette.¹¹⁵ After receiving the 19 percent bids, Icasa evaluated and recommended a preferred applicant to the Minister, who accepted such recommendation. After receipt and evaluation of the 51 percent bids, Icasa made recommendations to the Minister for the rejection of the two preferred applicants on the grounds that their applications did not fulfil the requirements of the invitation.¹¹⁶ The Minister, in terms of the Telecommunications Act, has the power to either accept the recommendations, or to request further information or to refer the matter back to Icasa.¹¹⁷ On 31 January 2003, the Minister announced that she agreed with the decision of Icasa that the two applicants should not be awarded the 51 percent stake in the SNO. The Minister also stated that she was going to exercise her powers in terms of section 35A and prescribe the process to be followed in the next invitation to applicants for the 51 percent.¹¹⁸ The process to be followed was subsequently announced. The process would be divided into four phases, the first phase being the submission of expressions of interest to pre-qualify. The second phase would be one-on-one negotiations between the pre-qualified bidders and the SNO working committee. The third phase would be the evaluation of applications and the making of recommendations by Icasa, and the fourth phase would be the integration, awarding and issuing of the licence. The SNO working committee would be appointed by the Minister and headed by the Deputy Director-General of Communications. All negotiations would be confidential and without prejudice.¹¹⁹

There are two issues of concern about this approach. First, the SNO working committee seems to have replaced Icasa in this instance, in that the evaluation of applications for licences, including the request for further information, is usually done by Icasa but in this case would be done by the SNO working committee.¹²⁰ Icasa threatened to institute legal action requesting the court to make a ruling as to whether section 35A was lawful.¹²¹ The Minister then suggested that a joint committee be formed which was to be made up of members from both Icasa and the DoC. The joint committee was, however, not formed. The DoC did the pre-qualification of applicants based on one-on-one negotiations, after which Icasa processed the best and final offer. This is not satisfactory, because it creates the 'sharing' of powers, with regard to the evaluation of applications for licences, between the Minister and Icasa. This 'sharing' of powers compromises the independence of Icasa in that the decision is made jointly with the Minister while

¹¹⁵ Notice of Invitation. GN 755 amended by GN 786/2002 GG 23460 dated 24 May 2002.

¹¹⁶ Media release 'Icasa's recommendations to the Minister on the 51% equity interest in the SNO' 31 January 2003.

¹¹⁷ s 35(2) of the Telecommunications Act.

¹¹⁸ Minister of Communications Matsepe-Casaburi outlines the process to award the 51% in the Second National Operator 4 February 2003.

¹¹⁹ The invitation to apply was published on 31 March 2003: GN 965/2003 GG 24682 31 March 2003.

¹²⁰ s 34A of the Telecommunications Act.

¹²¹ 'Minister, Icasa put heads together over second licence' *Business Day* 13 March 2003.

under normal circumstances Icasa would have done the screening of the applicants, and then have submitted a shortlist of the preferred applicants to the Minister. Subsequent to this process, Icasa made the recommendation that the preferred applicants not be awarded the 51 percent stake in the SNO.¹²²

The second concern about the process actually followed is that there was a great deal of secrecy surrounding the process of negotiations: they were confidential and without prejudice. Thus, the process was not transparent. The effect of a process that is not transparent is that it may affect investor confidence in the regulatory regime. Icasa was also concerned about the secrecy surrounding the bidding process as prescribed by the Minister.¹²³ Although there was an outcry in the industry about the decision of the Minister and the effect this would have on the independence of Icasa, it is likely that the decision of the Minister could not be shown to be unlawful in that it lay within the powers granted to her in terms of section 35A. This section allows the Minister in specific circumstances (which are not described anywhere in the Act or in the policy directions) to determine the manner in which applications may be made. There is no basis for suggesting that the search for a holder of a 51 percent stake in the SNO is not the specific circumstance envisaged by this section. The section further allows the Minister to determine the licensing process and the licensing conditions that will apply in those undefined specific circumstances. This section is silent about the role of Icasa, should the Minister decide to exercise these wide and undefined powers.

When the insertion of section 35A was originally discussed, Icasa was opposed to it for various reasons.¹²⁴ First, because the categories of licence referred to in section 34(2) of the Telecommunications Act are not an exhaustive group, and thus the proposed amendment permitted the Minister to potentially prescribe the licensing conditions for all licences, including the licences that are not listed in section 34(2).¹²⁵ Secondly, the government did not clearly explain the reasons for the insertion of section 35A. It was clear that section 35A gives the Minister powers that are fairly wide and that detract from Icasa's licensing powers, but the new section also compromises the independence of Icasa in that it permits the Minister to be represented at the evaluation stage of the licensing process. As a result, the Minister may know who the preferred applicants are before recommendations are made by Icasa. Despite recommendations by Icasa regarding the amendment or the possible deletion of section 35A from the proposed amendments to the Telecommunications Act, the legislature did not amend or delete the proposed amendment.

Seen in this light, it appears that the government wishes to retain some powers with regard to the licensing process, despite the effect of this power, namely to encroach on the independence of Icasa. One cannot help but conclude that Parliament intended to retain for the Minister more than mere policy-making powers, including the power to prescribe to Icasa on issues generally within its jurisdiction, such as the evaluation of applications for licences.

The process of licensing Cell C was also surrounded by allegations that the

¹²² On 29 August 2003 Icasa made recommendations to the Minister to reject the two preferred applications that had been recommended by the SNO Committee.

¹²³ Statement by Mandla Langa, the Chairperson of ICASA, on 7 February 2003.

¹²⁴ Icasa submissions to Parliament regarding the Telecommunications Amendment Bill, September 2001 14–15.

¹²⁵ s 34(2) of the Telecommunications Act.

executive interfered with the licensing process. Nextcom (Pty) Ltd (Nextcom), which was one of the applicants for the third cellular licence, brought legal action against Icasa, the Minister and Cell C among others, for the review and the setting aside of the recommendation that Icasa made to the Minister regarding the third cellular licence.¹²⁶ Nextcom alleged that the licensing process was beset with irregularities including non-disclosure of interest in the process by the councillors, as well as political interference by the Minister in Satra's deliberations.¹²⁷ Nextcom alleged further that Mr Maepa, who was the Chairman of Satra at the time, was pressured by the Minister and the President's office (through the President's office) to withdraw from the licensing deliberations. Mr. Maepa alleged in his affidavit that he was pressured to recuse himself from the deliberations because he could not be relied upon to support a recommendation that Cell C be awarded the licence.¹²⁸

4.5.2 Councillors' obligations to ensure independence of the Regulator

The councillors appointed to Icasa must be independent from the industry, and must avoid conflicts of interest in the performance of their duties. Section 12 of the Icasa Act prohibits the participation of a councillor in any matter where he or she has either a direct or indirect interest in the outcome of it. In relation to the granting of a licence, a councillor may not vote, attend or in any other manner participate in any meeting or hearing of the council, nor be present at the place where the meeting is held, if he or she or his or her family member is a director, member or business partner or associate of, or has an interest in the business of, the applicant or of any person who made representations in relation to the application. A family member is defined in the Icasa Act as a parent, child or spouse, including a person living with that person as if they were married to each other. With regard to any other matter, a councillor may not vote, attend or in any other manner participate in a meeting or hearing nor be present at a place where the meeting is held, if he or she has any interest which may preclude him or her from performing his or her functions as a councillor in a fair, unbiased and proper manner.¹²⁹

Section 12 of the Icasa Act further provides that if, during the course of any proceedings before the council, there is reason to believe that a councillor has any interest as described above, such councillor must fully disclose the nature of his or her interest, and the meeting will decide in his or her absence if he or she can continue to participate in that particular discussion. Should the councillor be found guilty of contravening section 12, he or she is liable for a fine not exceeding R250 000 or for imprisonment for a period not exceeding five years, or both.¹³⁰

¹²⁶ *Nextcom (Pty) Ltd. v Funde* 2000 (4) SA 491 (T), discussed by M Zlotnick 'South Africa Regulation: A new review and prospects for the next five years' (note 109 above) 14–15.

¹²⁷ *Nextcom v Funde* in Zlotnik (note 109 above).

¹²⁸ *Nextcom v Funde* in Zlotnik (note 109 above).

¹²⁹ s 12(1)(b) of the Icasa Act.

¹³⁰ s 12(4) of the Icasa Act.

4.5.3 Elements of the independence of the regulator

4.5.3.1 Administrative independence

The notion of administrative independence of a constitutional institution was interpreted in the case of the Independent Electoral Commission (IEC) v Langeberg Municipality¹³¹ to mean that there must be no control over those matters directly connected with the functions that the particular institution, in that case the IEC, has to perform under the Constitution and the applicable legislation.¹³² Although this case does not deal with Icasa, it is relevant to a discussion on administrative independence in that one of the issues addressed in it, namely the independence of the IEC, is pertinent to Icasa. The court considered the question of whether the IEC was an organ of state, and whether the IEC can be independent of the national government and still be part of the state. The court held that the IEC is described in the Constitution as an institution supporting democracy and is therefore an organ of state, but it is not subject to the control of the national executive and is therefore not an organ of state in a sphere of government. The independence of the IEC is entrenched in the Constitution in terms of section 181, read with section 190. The independence of Icasa is also entrenched in the Constitution.¹³³ Administrative independence would include matters such as the appointment of councillors, their tenure of office and their removal from office. The extent to which the State has a say in these issues, in addition to the provisions of the Icasa Act, determines the extent of the administrative independence of Icasa.

- **Appointment of councillors**

Icasa is constituted by a council consisting of seven councillors. The councillors are appointed by the President on the recommendation of the National Assembly.¹³⁴ The National Assembly, prior to making its recommendations to the President, must ensure that the public participates in the nomination process to ensure transparency and openness.¹³⁵ The nominated candidates must then be short-listed in an open and transparent manner. The names of the short-listed candidates are then submitted to the President for approval.¹³⁶

The level of independence of the regulator from political parties varies from one country to another. The extent thereof depends on the political and constitutional structure of the particular country. In South Africa, a person cannot be considered for a position as a councillor if he or she is an office bearer or employee of any

¹³¹ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 225 (CC) para 29.

¹³² Paragraph 29 of the IEC case says “The second factor, “administrative independence” implies that there will be no control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires to ensure its independence, impartiality, dignity and effectiveness. The Department cannot tell the Commission how to conduct the registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not the Commission must be put in funds to enable it to do what is necessary.”

¹³³ Constitution of the Republic of South Africa, Act 108 of 1996. s 192 provides constitutional protection for the IBA.

¹³⁴ s 5(1) of the Icasa Act.

¹³⁵ s 5(1) of the Icasa Act. See also ‘Nominations for appointment as a councillor of the South African Telecommunications Regulatory Authority (Authority) in terms of the Telecommunications Act’, GN 1608/1996.

¹³⁶ s 5(1)(c) of the Icasa Act. The commissioners who constitute the FCC are also appointed by the President with the advice and consent of the Senate. In this regard see s 4(5) of the US Communications Act (note 1 above).

political movement or organisation of a political nature.¹³⁷ Contrast this with the position in the United States, where three out of five FCC Commissioners can be from the same political party.¹³⁸

- **Tenure of office of councillors**

To ensure continuous independence of Icasa, the councillors are not appointed for a lifetime. On the contrary, their contracts are for a specified period. In terms of section 7(1) of the Icasa Act, the chairperson holds office for a period of five years from the date of his or her appointment. With the exception of three councillors who were appointed to the first council after the Icasa Act came into operation, (whose identity was to be determined in accordance with schedule 2 of the Icasa Act), the councillors shall be in office for a period of four years.¹³⁹ The councillors are employed for a fixed period in order to ensure the development of institutional memory and some continuity in the functioning of Icasa. The purpose of the rotation is to ensure that the independence of the councillors is not compromised either by developing relationships with industry players or in any other way.

During their term of office, councillors are not allowed to hold any other remunerative employment, occupation or office which is likely to interfere with the exercise of their functions in terms of the Icasa Act or the underlying statutes, or which can create a conflict of interest between such employment, occupation or office and his or her office as a councillor.¹⁴⁰ A councillor, at the end of his or her term of office, can be reappointed for an additional term.¹⁴¹

- **Removal from office**

Section 8 of the Icasa Act sets out the grounds on which a councillor may be removed from office. These grounds include (a) misconduct; (b) inability to perform the duties efficiently; (c) absence from three consecutive meetings of the council without the permission of the council; (d) contravention of section 7(6) which prohibits the councillor from having any other remunerative employment or occupation which is likely to interfere with the exercise by any such councillor of his or her functions in terms of the Act or the underlying statutes, and (e) his or her becoming disqualified as contemplated in section 6(1).¹⁴² A councillor can be

¹³⁷ s 6(e) of the Icasa Act.

¹³⁸ s 4(5) of the US Communications Act.

¹³⁹ Icasa Act. Schedule 2 of the Icasa Act provides for the procedure for the determination of the names of the councillors who must vacate their offices two years after appointment.

¹⁴⁰ s 7(6) of the Icasa Act.

¹⁴¹ s 7(5) of the Icasa Act. The commissioners of the FCC are also appointed for a period of five years in terms of s 4 of the US Communications Act of 1934. However, in Malaysia the members of the Communications and Multimedia Commission are appointed for a term of not less than two (2) years but not more than five (5) years in terms of s 10 of the Malaysian Communications and Multimedia Commission Act, 589 of 1998.

¹⁴² s 6(1) of the Icasa Act deals with various grounds of disqualification. These include if a person (a) is not a citizen of the Republic; (b) is not permanently resident in the Republic; (c) is a public servant or the holder of any other remunerated position under the State; (d) is a member of Parliament, any provincial legislature or any municipal council; (e) is an officer or employee of any political party, movement or organisation of a party-political nature; (f) his or her family member has a direct or indirect financial interest in the telecommunications or broadcasting industry; (g) his or her business partner or associate holds an office in or with or is employed by any person or body, whether corporate or unincorporated which has an interest contemplated in paragraph (f); (h) is an unrehabilitated insolvent, has been declared by a court to be mentally ill or disordered; (i) has at any time been convicted of the crimes listed in paragraph (j)(i) and (ii); (j) has been sentenced after the commencement of the Constitution Act of 1993 to a period of imprisonment of not less than one year without the option of a fine; and (k) has at any time been removed from an office of trust on account of misconduct.

removed from office on a finding by the National Assembly and the adoption of a resolution by the National Assembly calling for that councillor's removal from office.¹⁴³ The President has powers, in terms of section 8(3) of the Icasa Act, to suspend a councillor from office at any time after the start of the proceedings of the National Assembly for the removal of the councillor. Once the National Assembly adopts the resolution calling for the councillor's removal from office, the President must remove him. The African Green Paper recommends that in order to ensure the independence of the regulator, the chairman and the members should only be removed on special and stipulated grounds or by Parliament.¹⁴⁴ This may, however, not be a guarantee of independence if the state has an interest in the PTO, because the State may prefer councillors whom it knows will give favourable decisions.

4.5.3.2 Financial independence

'Financial independence' was interpreted in the Langeberg decision to mean the ability to have access to funds reasonably required to enable the IEC to discharge the functions it is obliged to perform under the Constitution and relevant legislation.¹⁴⁵ Financial independence is important in that, if the regulator is properly funded, it will be able to perform its functions properly and to attract qualified people to implement its regulatory objectives. A regulator that is not properly funded can affect the industry negatively, in that it will not be able to carry out its functions effectively and efficiently. For example, if a regulator is unable to settle industry disputes timeously, this may adversely affect the stability and competitiveness of the market.

• Funding of Icasa

Section 15 of the Icasa Act provides that the Authority is financed from money appropriated by Parliament. Section 15(3) provides that all revenue received by the Authority other than by appropriation by Parliament must be paid into the National Revenue Fund within 30 days after receipt of such revenue. Icasa must account to the government for its use of the funds. Section 16(b) provides that Icasa must, within three months after the end of each financial year, supply the Minister with a copy of the annual report, the financial statements of Icasa and the Auditor-General's report on those financial statements. In addition to the provisions of the Icasa Act, Icasa is bound by the Public Finance Management Act (PFMA).¹⁴⁶ 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 it applies. Chapter 5 of the PFMA applies to departments and constitutional institutions. Icasa is listed as one of the constitutional institutions.¹⁴⁷ The PFMA sets out the duties of the officials within a department or constitutional institution, as well as the reporting responsibilities and sanctions for non-

¹⁴³ s 8(2) of the Icasa Act. In Malaysia only the Chairman is required to obtain permission from the Minister to hold any remunerative post. It appears that the other members of the commission can have other remunerative posts while serving in the commission.

¹⁴⁴ African Green Paper (note 62 above) 36.

¹⁴⁵ *IEC v Langeberg Municipality* (note 142 above) para 29.

¹⁴⁶ Public Finance Management Act, 1 of 1999 (PFMA).

¹⁴⁷ When the PFMA came into effect on 1 April 2000, the IBA was listed as a constitutional institution in Schedule 1, and Satra was listed as a public entity in Schedule 3. These schedules have been amended since then, to reflect Icasa's status as a constitutional institution.

compliance.

Like Icasa, the FCC receives its funding, in the United States, from the government. Like Icasa, the FCC is required to deposit any revenue it receives, such as moneys received from licence application fees, in the general fund of the Treasury, to reimburse the government for amounts appropriated for use by the FCC in the carrying on of its functions in terms of the Communications Act.¹⁴⁸

Unlike Icasa and the FCC, the Botswana Telecommunications Authority (BTA) is generally considered more financially independent because, with the exception of non-regulatory activities, neither the Minister of Works, Transport and Communications nor the Minister of Finance has any involvement in its budget. The BTA has, ever since its first year of operation, financed its budget exclusively through regulatory fees and investment income.¹⁴⁹ Ninety percent of the BTA's budget is financed by regulatory fees.¹⁵⁰ To ensure financial accountability, an independent audit firm is appointed annually to audit the books of the BTA. In addition, the financial reports are submitted to the Auditor General for a further audit. The African Green Paper recommends that in order for a regulator to be truly independent, it should preferably be self-financing and have its own budget.¹⁵¹ The following are suggested sources for revenue: (a) fees for granting of licences for installation and operation of telecommunication services; (b) fees for carrying out type approval of subscriber terminal equipment; (c) levy charges/fees for all users of the spectrum management; (d) inspection fees payable by suppliers of equipment; (e) possibly a fixed fee (charged annually or as appropriate) payable by all users of the national network; and (f) fees chargeable on opinions given on agreements between various players in the market including the PTO.¹⁵²

• Remuneration of councillors

In terms of section 10 of the Icasa Act, the remuneration of the chairperson and other councillors is to be determined by the Minister with the concurrence of the Minister of Finance, subject to any applicable national legislation envisaged by section 219(5) of the Constitution.¹⁵³ It is important that the councillors be adequately compensated in order to ensure that Icasa is able to attract the best qualified people in the industry and to minimise the risk of councillors being susceptible to corruption.

4.6 Staffing of the Regulator

There is an important link between the staffing of the regulator and issues such as the funding of the regulator, the substantive credibility of the regulatory decisions and the independence of the regulator. If the regulator is well funded it will be able to attract highly qualified human resources. Icasa, like other regulators, requires a

¹⁴⁸ s 8(2)(e) of the US Communications Act.

¹⁴⁹ ITU Report: Effective Regulation Case Study: Botswana (note 6 above) 13.

¹⁵⁰ ITU Report: Effective Regulation Case Study: Botswana (note 6 above) 13.

¹⁵¹ African Green Paper (note 62 above) 36.

¹⁵² African Green Paper (note 62 above) 36.

¹⁵³ s 219 deals with the remuneration of people holding public office. s 219(5) provides that national legislation must establish a framework for determining the salaries, allowances and benefits of judges, public prosecutors, the Auditor-General and members of any commission provided for in the Constitution, including the broadcasting authority referred in s 192.

range of professionals such as economists, lawyers, financial analysts, accountants and engineers. South Africa, like all developing countries, has a shortage of these skills. In this regard, Icasa has to compete with the state and industry players to attract the skilled people. Staff salaries generally constitute ninety percent of a regulatory agency's expenditure.¹⁵⁴ The proper funding of a regulator is therefore a determinant of the regulator's ability to attract the best skills in the industry. If the people employed by the regulator are sufficiently qualified, the public and industry participants will have confidence in the substance of its decisions.

Apart from the council, which is appointed by the President, Icasa has the authority to appoint its own staff.¹⁵⁵ This includes the Chief Executive Officer and such other staff as Icasa may deem necessary to assist it in the performance of its functions. When Icasa was formed, all the employees of both Satra and the IBA were transferred to it.¹⁵⁶

Linked to the independence of the regulator and the staffing of the regulator is the problem of a shortage of skills and the movement of the few skilled people from one industry player to another, and from Icasa to industry. Because of the shortage of skills in the telecommunications industry, competition exists between the operators, the government and the regulator to attract the best qualified people. This creates mobility on the part of skilled people within the industry. Icasa may be affected in its ability to attract skills by insufficient funding. In addition, the phenomenon of a small pool of highly skilled people may have an effect on the independence of Icasa. For example, if a person who was previously employed by Icasa moves to any operator, they bring with them knowledge about Icasa and its operations. This may compromise the independence of Icasa, either through the information that these people have or through their relationships with their previous employers and co-workers.

5. COMPETITION REGULATION

5.1 Telecommunications regulation and competition

As in the case of basic services such as water and electricity, governments generally play an active role in the provision of telecommunications services in the early stages of development of the sector. It is for this reason that the state is the only shareholder in the first PTO in most countries. South Africa is no exception. Prior to 1997, the South African government was the only shareholder in Telkom.¹⁵⁷ The telecommunications industry requires continuous injection of capital to keep up with developments in technology.¹⁵⁸ Governments in general on their own cannot provide the required capital, hence the need to privatise the PTO or part thereof and thereby attract private sector capital. Privatising the PTO or part thereof and the introduction of other service providers to the industry, such as the SNO in South Africa, introduces competition, as private companies have to try to compete to provide the best service at a reasonable price to the consumers. The

¹⁵⁴ Melody (note 9 above) 358.

¹⁵⁵ s 14 of the Icasa Act.

¹⁵⁶ s 19 of the Icasa Act.

¹⁵⁷ In 1997 the Government sold a 30 percent interest in Telkom to Thintana Communications, a consortium made up of SBC International Inc, a US Corporation, and Telkom Malaysia.

¹⁵⁸ Intven and Tetrault (note 67 above) Module 1 1-1.

competition between the various operators has to be regulated to ensure a level playing field for all the parties.

Competition, generally, is regulated by the Competition Commission in terms of the Competition Act.

Chapters 2 and 3 of the Competition Act deal with prohibited practices and merger control. Prohibited practices include restrictive horizontal practices,¹⁵⁹ restrictive vertical practices,¹⁶⁰ abuse of dominance¹⁶¹ and price discrimination by a dominant firm.¹⁶²

Similarly, section 53 of the Telecommunications Act empowers Icasa to issue a written notice to a licensee who is taking or intends to take any action which can cause undue discrimination against any person or category of persons.¹⁶³ The purpose of the notice is to instruct the licensee to cease or refrain from taking such action. Section 53(2)(a) of the Icasa Act authorises Icasa to make regulations to ensure efficient and effective monitoring and investigation of uncompetitive actions.¹⁶⁴ Icasa must also report to the Minister on the overall status and efficiency of these regulations.¹⁶⁵

Chapter 3 of the Competition Act empowers the competition authorities to consider all acquisitions of control by one entity over another (mergers) where certain financial thresholds are met. Section 52 of the Telecommunications Act allows Icasa to pass regulations restricting or prohibiting the ownership or control or the holding of any financial or voting interest in a telecommunications service of any category or kind, to two or more telecommunications services of the same category.¹⁶⁶ This section allows Icasa to consider transfers and mergers of various services provided, thereby ensuring fair competition.

5.2 The relationship between the Competition Commission and Icasa

Icasa and the Competition Commission entered into a Memorandum of Agreement ('the Agreement') effective from 16 September 2002. The Agreement was entered into pursuant to the provisions of section 82 of the Competition Act.¹⁶⁷ The purpose of the Agreement is to establish the manner in which the parties, that is Icasa and the Competition Commission, will interact with each other in respect of the investigation, evaluation and analysis of mergers and acquisition transactions and complaints involving telecommunications and broadcasting matters.¹⁶⁸ The Agreement sets out the procedures to be adopted by both regulators in investigating matters falling within the ambit of the Agreement. The Agreement

¹⁵⁹ s 4 of the Competition Act.

¹⁶⁰ s 5 of the Competition Act.

¹⁶¹ s 8 of the Competition Act.

¹⁶² s 9 of the Competition Act.

¹⁶³ s 53(1) of the Telecommunications Act: 'If it appears to the Authority that the holder of a telecommunications 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.'

¹⁶⁴ s 53(2)(a) of the Telecommunications Act states: 'The Authority may, with regard to the matters referred to in subsection (1), make regulations to ensure efficient and effective monitoring and investigation of Uncompetitive actions, ensuring protection of consumer interest and for the speedy resolutions of complaints in regard thereto.'

¹⁶⁵ s 53(2)(b) of the Telecommunications Act.

¹⁶⁶ s 52(b) of the Icasa Act.

¹⁶⁷ Memorandum of Agreement entered into in between the Competition Commission of South Africa and the Independent Communications Authority of South Africa (GN 1147/2002 GG 23857 dated 20 September 2002 para 1.1.

¹⁶⁸ Memorandum of Agreement (note 180 above) para 4, 4.2.1–4.2.3.

also sets out the procedures to be followed by applicants whose transactions require the approval of both the Competition Commission and Icasa.¹⁶⁹

A joint working committee constituted by representatives of both Icasa and the Competition Commission has been created. The three main functions of the committee are to manage and facilitate co-operation and consultation in respect of matters dealt with by both parties in terms of the agreement, to propose, when necessary, any amendment of or supplementation to the agreement and to advise management of both parties on issues affecting competition in the telecommunications and broadcasting sectors.¹⁷⁰ The agreement also provides for the sharing of such information as may be necessary to give effect to the agreement.

There are currently no matters that have been finalised by Icasa and the Competition Commission pursuant to the Memorandum of Agreement.¹⁷¹

In the United Kingdom, OfTel has issued guidelines regarding telecommunications disputes that also fall within the scope of the United Kingdom Competition Act.¹⁷² In terms of those guidelines, the Director General, who is the head of OfTel, has powers to apply the Competition Act. OfTel has concurrent jurisdiction with the Fair Trading Commission, which is the United Kingdom's competition regulator. The guidelines set out inter alia instances where the Competition Act will be applied and not the Telecommunications Act. Such instances have been determined by taking cognisance of the fact that under the United Kingdom's Competition Act, OfTel has more powers than it does under the Telecommunications Act, in particular with regard to the kind of information that can be requested from a party to a dispute and with regard to searches and seizures.

Interconnection disputes are excluded from the application of the United Kingdom's Competition Act. The rationale behind the exclusion is that interconnection disputes are industry-specific rather than based on general competition law, and the regulator is required in terms of the Telecommunications Act to investigate and to make determinations on them. Disputes about anti-competitive behaviour such as predatory pricing, price squeezing, price discrimination, excessive pricing, refusal to supply services (but excluding interconnection disputes and bundling) are dealt with in terms of competition law.¹⁷³ In South Africa the procedure to deal with disputes in respect of which both the competition regulator and the telecommunications regulator have jurisdiction, is set out in paragraph 3.3 of the Memorandum of Agreement. In terms of this procedure, the complainant only lodges the complaint with one regulator. The regulator with whom the complaint has been lodged will then notify the other regulator if it is of the view that both regulators have jurisdiction over the matter. Both regulators will then consult with each other and evaluate the complaint in order to establish how the matter should be managed in terms of the agreement.

5.3 Objectives of regulation of competition in telecommunications

There are various issues peculiar to competition in telecommunications, which

¹⁶⁹ Memorandum of Agreement (note 180 above) para 3.3.

¹⁷⁰ Memorandum of Agreement (note 184 above) paragraph 4.2.

¹⁷¹ The following matters are currently pending: SAVA/Telkom regarding a dispute about discriminatory pricing, ICSPASA/Telkom regarding the cell server and the least route calling device, Brian Byrne/Telkom and OmniLink/Telkom. As of 4 February 2004 these matters had not been finalised.

¹⁷² *OfTel's Competition Act Strategy* (note 7 above).

¹⁷³ *OfTel's Competition Act Strategy* (note 7 above).

require regulation, for example interconnection and universal service. These issues exist alongside general competition issues, such as abuse of dominance in the market, excessive pricing, cross-subsidisation of competitive markets, and universal service. The competition regulator, together with the telecommunications regulator, has to regulate both the general competition issues and the issues peculiar to telecommunications. The ability to regulate these issues efficiently determines whether competition will succeed or not.

The general trend in telecommunications markets is that the dominant operator will do all that is possible to resist competition and to maintain and entrench its monopoly for as long as it can. The bulk of the disputes between the dominant operator, new competitors and the regulator will in most circumstances have to do with these issues. It is therefore important that there should be clear policies on how the regulator must deal with these issues. The laws applicable and the definitions of concepts should be clear to all parties concerned. It is for this reason that it is preferable for regulators to consult with industry participants and the public in general, with the aim of clarifying and defining concepts. The regulator should also issue guidelines, regulations or communication statements describing the procedures and the definitions applicable to telecommunications.¹⁷⁴

The discussion below focuses on only two of the objectives of competition regulation, namely the prevention of abuse of a dominant position, and overpricing associated with cross-subsidisation.

The regulation of competition in telecommunications must prevent the dominant operator from abusing its dominant position to drive new competitors out of the market or render them uncompetitive.

Although the concept of market power is an economic and competition concept, for the purposes of the telecommunication industry this concept must be adapted to the industry. The following are examples of behaviour which is generally viewed as symptomatic of abuse of dominance: (a) refusal or delay of the provision of facilities; (b) the provision of facilities at excessive prices or on discriminatory terms; (c) predatory pricing and cross-subsidisation of competitive services; and (d) bundling of services, designed to provide the dominant firm with exclusive advantages in subscriber markets or requiring a competitor to obtain services or facilities which it does not truly need.¹⁷⁵

Competition regulation must also prevent the dominant operator from charging excessive prices and using excessive revenue generated to cross-subsidise services in the competitive markets. Cross-subsidisation becomes an issue of concern during the transition from monopoly to open market competition. During the monopoly, the government generally promotes cross-subsidisation. For instance, long distance and international calling often cross-subsidises local calling. This is generally seen as an advantage to consumers, in that more local calls are made than long distance or international calls.

Cross-subsidisation offers an unfair advantage to the dominant operator. The regulators try to prevent the dominant operator (either as a condition in its licence or through other forms of regulation) from implementing cross-subsidisation,

¹⁷⁴ *Ofel's Effective Competition Review* (note 7 above). See also Malaysian Communication and Multimedia Commission: Guidelines on dominant position in a communications market RG/DP/1/00; available at <http://www.mcmc.gov.my/guidelines/dp/gdp/asp>.

¹⁷⁵ Intven and Tetrault (note 67 above) 5-16.

which will adversely affect the ability of the competitor from participating fairly in the market.

5.4 Sector-specific regulation versus general competition regulation

New Zealand has moved from state monopoly to a fully liberalised telecommunications market. When competition was first introduced in New Zealand in 1987, the regulation of competition in the telecommunications industry was left to the Commerce Commission ('CC'), which is the general competition regulator. This was done in terms of the 'light-handed' approach that rejects sector-specific regulation and relies on general competition law. After more than ten years since the introduction of competition in New Zealand, an enquiry was conducted as to reasons why competition was not developing at the expected rate. The enquiry revealed, inter alia, that there was a need for sector-specific regulation.¹⁷⁶ Subsequent to the findings of the enquiry, the Telecommunications Act of 2001 was enacted. This Act introduced the office of the Telecommunications Commissioner, who acts as a regulator of telecommunications within the CC.¹⁷⁷

There are unique features of the telecommunications industry, which distinguish it from other markets. These features cannot be effectively regulated solely by general competition laws. It has been said that New Zealand's 'light-handed' approach failed for the following reasons:¹⁷⁸

- An undertaking was given by Telecon, the dominant fixed line operator at the time, to the government, upon privatisation, to separate its businesses (thereby separating local, long distance, mobile and value-added operations from one another). Telecon did not comply with this undertaking but instead it merged its businesses. The reason for merging Telecon's businesses was to avoid monitoring and reporting its business activities separately.¹⁷⁹
- The Commerce Act¹⁸⁰ provided in section 36 that a competitor alleging that the dominant operator is acting in an uncompetitive manner, must prove that an incumbent is dominant in the market, that the incumbent has used its dominant position and has therefore acted in an anti-competitive manner. It has been submitted that it is difficult to prove abuse of dominance in developing countries, as certain conduct, when undertaken by a dominant incumbent in a developed country, would have different effects on competition than those which would result from the same conduct in a developing country. So, what would not affect competition in a developed country may well have an adverse effect on competition in developing countries, hence the need for sector-specific regulation at the early stages of competition in developing countries telecommunications industries.

Gilbertson states that, 'Even if "dominance" and "purpose" can be shown, demonstrating "use" will always be a problem in developing industries. The incumbent will only be deemed to "use" its dominance if it does something, which

¹⁷⁶ Gilbertson (note 8 above).

¹⁷⁷ s 9 of the New Zealand Telecommunications Act of 2001.

¹⁷⁸ Gilbertson (note 8 above) 1.

¹⁷⁹ Gilbertson (note 8 above) 3.

¹⁸⁰ Commerce Act of 1986 (New Zealand).

it would not do, or could not do, in a competitive market.’ This enables incumbents to engage in a wide range of conduct that would be permissible in a competitive market but which has an anti-competitive effect in a developing market. Examples of conduct that passes the ‘use’ test, but which is prohibited by foreign regulators because of its anti-competitive effect in developing telecommunications markets, include highly targeted price discounting, use of the Baumol-Willig Rule in interconnection pricing, refusal to provide local call resale, and refusal to allow rebilling. For these reasons, section 36 of New Zealand’s Commerce Act can be a useful constraint (particularly on retail behaviour) once the market has become competitive, but cannot be relied upon to ensure the market becomes competitive. The use of competitive benchmarks in an uncompetitive industry prevents the emergence of effective competition’;

- In terms of the Commerce Act, all participants in the telecommunications markets were forced to resort to litigation to enforce behavioural protections.¹⁸² This always has a negative effect on competition because the nature of the telecommunications industry is such that timing of events has a major impact.¹⁸³ It has been said that litigation is slow and costly and open to substantial manipulation and delay by the incumbent. As such, litigation often fails to produce definite outcomes and only results in remedies after the conclusion of the proceedings. By this time it may well be too late to prevent substantial harm to the development of competition.¹⁸⁴
- The New Zealand Government invested a lot of political capital in the ‘light-handed’ approach. As a result, it was difficult for them to accept that the light-handed approach was not working and that there was a need for sector-specific regulation.¹⁸⁵

The competition regulator might not, in every jurisdiction, have the necessary expertise to understand the complex disputes that arise in the telecommunications sector, hence the need for sector-specific regulation.

¹⁸² Gilbertson (note 8 above) 3.

¹⁸³ Gilbertson (note 8 above) 3.

¹⁸⁴ Gilbertson (note 8 above) 3.

¹⁸⁵ Gilbertson (note 8 above) 3-4.

Conclusion

The environment within which a particular sector operates is important for its development. The telecommunications industry requires capital on a continuous basis, in order to be sustainable and to expand in accordance with government policy and public expectations. Governments are not able to provide the required capital, hence the need for local and foreign investment.

A stable legal environment is essential to foreign investment. In telecommunications, in addition, an independent regulator is an important requirement for a stable legal environment. Market confidence in the impartiality of regulatory decisions generally increases with the degree of independence of the regulator from both operators and the government.¹⁸⁶ Initiatives should be taken by both Icasa and the government to ensure that the independence of Icasa is not compromised under any circumstances.

Another advantage of foreign investments is that in addition to providing capital, privately owned operators can make rational economic decisions about the supply of telecommunications services, without the influence of potentially conflicting imperatives that may arise from government ownership.¹⁸⁷

The funding of the regulator is essential to its ability to meet its mandate. Steps should be taken to ensure that Icasa is well funded. This could include the South African government following the funding model used in Botswana.¹⁸⁸

To ensure the independence of Icasa, there should be a clear distinction between the powers of the Minister and those of Icasa. The Minister should not have unlimited powers in a licensing context, such as those conferred by section 35A of the Telecommunications Act. This blurs the distinction between the functions of the Minister and those of Icasa.

In the event that there is uncertainty with regard to the relative powers of the Minister and Icasa, courts should be approached to make a ruling. The decision in the *Telkom SA Limited v Icasa* case¹⁸⁹ is important in creating a stable legal environment, in that it separates the powers of the Minister and those of Icasa with regard to the withdrawal of regulations made pursuant to sections 95 and 96 of the Telecommunications Act.¹⁹⁰

Also important to a stable environment is the legal framework within which the industry operates. Broadcasting and telecommunications are still governed by separate legislation. Telecommunications and broadcasting legislation should be reconciled to ensure that there are no discrepancies in their provisions. As the convergence era unfolds, legislation should reflect the changes in the industry. South Africa may even consider the example set by Malaysia by having one statute for both telecommunications and broadcasting.

The fact that the government is a major shareholder in Telkom raises concerns with regard to its ability to establish and maintain a regulatory framework that will

¹⁸⁶ Intven and Tetrault (note 67 above) 1-5.

¹⁸⁷ Intven and Tetrault (note 67 above) 1-5.

¹⁸⁸ See para 4.5.3.2 above, in which the funding of Icasa is discussed.

¹⁸⁹ Note 122 above.

¹⁹⁰ See the discussion in para 4.4.

be fair to other industry participants. The ideal situation, as set out in the African Green Paper, is ‘to shift government responsibility away from the ownership and management of public companies towards the establishment of a policy and regulatory framework’¹⁹¹

Icasa should take steps to ensure that the general public is aware of its existence and role. Icasa should also ensure that decisions are reached timeously and efficiently. This also applies to decisions made by the Competition Commission.

¹⁹¹ African Green Paper (note 62 above) 8.

