

Key considerations in telecommunications regulation: An overview of the South African position

prepared by Dominic Cull, Ellipsis Regulatory Solutions, December 2009

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Introduction

Telecommunications regulation is a vastly complex area of expertise and is most properly left to those who have adopted it as a speciality. Nevertheless a working knowledge of regulatory issues is critical for managers in telecommunications companies and customers of such companies.

In particular, awareness of consumer rights or obligations and an understanding of the regulatory framework for interconnection and facilities leasing will be critical in negotiating agreements and service levels for the provision of electronic communications services.

Legislative Framework in South Africa

The primary Act of Parliament regulating the electronic communications industry in South Africa is the Electronic Communications Act 36 of 2005 (“the ECA”), which replaced the Telecommunications Act of 1996 (“the Telecommunications Act”) on the 19th July 2006. The ECA can be characterised as pro-competitive legislation in stark contrast to the Telecommunications Act, which was protectionist in that it sought to protect the incumbent fixed line provider, Telkom SA Ltd, from the effects of competition.

The ECA covers a wide range of issues, including:

- licensing,
- access,
- infrastructure rights such as way-leaves,
- the management and assignment of frequency
- markets and competition, and
- universal service.

The ECA is convergence legislation which takes into account the blurring between broadcasting and telecommunications in particular.

Other legislation which impacts upon the sector includes:

- the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (“RICA”);
- the Competition Act 89 of 1998 (“the Competition Act”);
- the Film and Publications Act 65 of 1996 (“the Film and Publications Act”);
- the ICASA Act 13 of 2000 (“the ICASA Act”);
- the Broadcasting Act 4 of 1999 (“the Broadcasting Act”); and
- the Electronic Communications and Transactions Act 25 of 2002 (“the ECT Act”).

The Protection of Personal Information Bill 9 of 2009 was recently introduced to the South African Parliament and is intended to regulate comprehensively the use and management of personal information within the digital environment.

Links:

ECA – <http://www.ellipsis.co.za/no-36-of-2005-electronic-communications-act-2005/>

RICA – <http://www.internet.org.za/ricpci.html>

Competition Act - http://www.compcom.co.za/thelaw/thelaw_act_competition_acts.asp?level=1&child=1

Film & Publications Act –

http://www.fpb.gov.za/index.php?option=com_docman&task=cat_view&gid=49&Itemid=103

ICASA Act - <http://www.ellipsis.co.za/independent-communications-authority-of-south-africa-act-2000/>

Broadcasting Act - <http://www.icasa.org.za/tabid/89/Default.aspx>

ECT Act – http://www.internet.org.za/ect_act.html

Protection of Personal Information Bill – <http://www.ellipsis.co.za/protection-of-personal-information-bill/>

Role-players

Department of Communications

The Department of Communications (DoC) is responsible for setting electronic communications policy, overseeing radio frequency spectrum and representing South Africa in international fora such as the International Telecommunications Union (ITU).

www.doc.gov.za

Independent Communications Authority of South Africa

The Independent Communications Authority of South Africa (ICASA) is the independent communications regulator, set up and governed by the ICASA Act. The establishment of an independent regulator is a consequence of South Africa's membership of the World Trade Organisation (WTO) and its accession to the Reference Paper to the Fourth Protocol on Basic Telecommunications which sets out requirements for signatories' regulatory environments.

www.icasa.org.za

Universal Service and Access Agency of South Africa

The Universal Service and Access Agency of South Africa (USAASA) was established under the ECA to promote the goals of universal access and universal service in the under serviced areas of South Africa. Licensees are required to contribute to the Universal Service and Access Fund (USAF) which is intended for use in incentivising and subsidising the roll-out of electronic communications networks in under-served areas.

www.usaasa.org.za

Portfolio Committee on Communications

The Parliamentary Portfolio Committee on Communications (PPCC) exercises oversight over the above three entities. It has powers to conduct inquiries and subpoena documents.

www.parliament.gov.za

Competition Authorities

ICASA is generally regarded as having ex ante regulatory powers, i.e. it acts so as to prevent future anti-competitive conduct. *Ex post* regulation – responding to specific complaints or instances of anti-competitive conduct is the province of the Competition Commission and Competition Tribunal under the Competition Act.

ICASA and the Competition Commission act under a Memorandum of Agreement but jurisdictional difficulties have meant that the Commission has not as yet managed to act effectively against incumbents in respect of conduct which breaches the provisions of the Competition Act.

Incumbents

In South Africa the incumbents are regarded as Telkom (fixed line) and Vodacom and MTN (mobile). A second tier of incumbent operators would include Neotel, Cell C and iBurst. The general interest of the first tier is the preservation of the status quo which favours them due to economies of scale and control of network infrastructure. These players generally seek to delay regulatory processes designed to stimulate competition.

State-owned Enterprises

The South African Government has taken policy decisions to intervene in the provision of electronic communications facilities where it is of the view that there is market failure. Broadband Infracore recently received an IECNS licence and will be providing national long-distance and international cable services at prices based on a cost plus basis. Sentech is the national signal distributor and has been earmarked for the development of a national wireless backbone using WiMAX technology.

New entrants

The regulatory landscape in South Africa received a significant jolt in January 2009 when ICASA issued infrastructure licences – equivalent to those held by the incumbent - to some 543 value added network operators. Many of these are seeking to become telco competitors to the incumbents and therefore have an interest in the speedy and effective implementation of the regulatory framework set out in the ECA.

Policy

As noted above the setting of policy with regard to electronic communications is a competency held by the South African Government through the Department of Communications (DoC).

In terms of Chapter 2 of the ECA the Minister of Communications is entitled to issue both policy and policy directions. In doing so the Minister is required to consult with ICASA and to follow a public policy process.

There has been a policy vacuum in South Africa but, subsequent to new appointments made pursuant to the 2009 election, this is being rapidly addressed.

National Broadband Policy

The Department of Communications issued a Draft National Broadband Policy in October 2009 and is currently consulting with stakeholders with a view towards the adoption of the final policy by the South African Cabinet in March 2010.

<http://www.ellipsis.co.za/draft-national-broadband-policy/>

National Radio Frequency Spectrum Policy

The Department of Communications issued a Draft National Radio Frequency Spectrum Policy in October 2009 and is currently consulting with stakeholders with a view towards the adoption of the final policy by the South African Cabinet in March 2010.

<http://www.ellipsis.co.za/draft-national-spectrum-policy/>

Local and Digital Content Development Strategy

The Department of Communications issued a Draft Local and Digital Content Development Strategy in October 2009 and is currently consulting with stakeholders with a view towards the adoption of the final policy by the South African Cabinet in March 2010.

<http://www.ellipsis.co.za/draft-strategy-on-local-and-digital-content-development/>

Electronic Communications Licensing

The registration and granting of electronic communications licences in South Africa is performed by ICASA under the Electronic Communications Act of 2005.

Why are there licensing requirements?

Governments impose licensing requirements so as to ensure that:

- Scarce resources such as frequency and numbers can be efficiently allocated and coordinated
- Services are provided in under-serviced and rural areas
- They have authority over licensees for the purposes of regulating markets and competition, and
- Consumers are protected in their dealings with service providers.

When is a licence required?

As a general rule a license is required whenever communications are carried from one point to another or where communications services are provided across public boundaries.

Service licensing framework in South Africa

There are two main categories of service licence available under the ECA:

- **Electronic Communications Network Service (ECNS)** licenses: these licenses authorise the holder to roll-out and operate a physical network. This network can be made up of any technology you choose: radio equipment (for a wireless network), copper cabling, fibre optic cabling etc. ECNS licensees can also enter into commercial arrangements with other licensees to allow them to use the electronic communications network owned and operated by the ECNS licensee.
- **Electronic Communications Service (ECS)** licenses: these licenses allow you to provide services to customers over your own or somebody else's network. This will typically be the licence held by an ISP which does not operate its own network or network facilities.

Examples:

- Telkom has a telephone or voice network which covers most of South Africa. The network consists of phone lines, switches and other hardware and in order to operate this network Telkom requires an ECNS licence. Telkom then provides voice services to its customers over this network – in order to provide these voice services it will require an ECS licence.
- Vodacom has a GSM network which also covers most of South Africa and consists of their masts and towers which have radio equipment located on them. They will require an ECNS licence in order to own and operate this network and an ECS licence in order to provide their services – voice, data, SMS, MMS etc – over this network.
- An ISP wishes to provide internet connectivity to customers. It does not have its own network

(although it may own some hardware) but relies on the services of a network owner and operator such as Telkom (i.e. an ECNS licensee) to carry its services to its customers. In this example the ISP itself does not require an ECNS licence (it does not own and operate the network) but only requires an ECS licence so that it can provide its services to its customers over Telkom's network.

The ECA breaks down the licence categories into the two subcategories set out in Table 1 below.

The licensing framework is technology-neutral. Thus, for example, while Telkom was restricted to the provision of fixed lines services in terms of the Public Switched Telecommunications Network (PSTN) licence issued to it under the Telecommunications Act, it is under no such restriction in terms of the IECNS and IECS licences which it now holds. Indeed Telkom is already providing mobile services while the mobile network operators are self-providing fixed lines to service their backhaul requirements.

Individual ECNS and ECS licences are issued for twenty years. Class ECNS and ECS licences are issued for ten years. All of these licence types can be renewed upon payment of a renewal fee.

Annual licence fees are set at 1.5% of Gross Profit (total revenue derived from licensed services less total costs directly incurred in the provision of such services). The calculation of the amount due must be based on audited financial statements (or sworn statements where audited statements are not required by law), which must be submitted along with the payment.

Fees can be paid quarterly or annually: late payments will be subject to stiff interest penalties and fines for non-compliance.

ICASA General Licence Fee Regulations 2009 - <http://www.ellipsis.co.za/general-licence-fee-regulations/>

Licences may be assigned, ceded or transferred after the approval of an application to ICASA. A transfer application fee is payable.

Service licensing is distinct from two other forms of licensing: type approval and frequency licensing. Where these latter forms of licensing are required they must be obtained separately. An ECNS licence is required before a licensee will be entitled to apply for radio frequency spectrum licensing.

Licence exemptions

Certain services are regarded as being of limited socio-economic importance and can be provided on a licence exempt basis, subsequent to application for a licence exemption to ICASA having been granted.

See <http://www.ellipsis.co.za/guide-to-service-licence-exemptions-under-the-eca/> for further information.

ECNS LICENCES	Individual ECNS	This allows you to roll out your own network nationwide or across a province.
	Class ECNS	<p>A class ECNS allows you to roll out your own network in a district or local municipality. In other words you will choose to operate in a municipal area and provide access services to consumers in that area.</p> <p>This is the form of licence you would require if you wanted to set up your own network focusing on a smaller area. South Africa has 48 district municipalities and 231 local municipalities as well as 7 metropolitan municipalities.</p>
ECS LICENCES	Individual ECS	<p>This licence allows you to provide services to your customers over the network of an ECNS licensee, including voice or VoIP services which use numbers taken from the National Numbering Plan. Examples of other services that can be provided include:</p> <ul style="list-style-type: none"> • Internet access • Email • Hosting • Protocol conversion • Virtual Private Networks (VPN) • Multi Protocol Labelling Systems (MPLS) <p>The National Numbering Plan is a document drawn up by ICASA setting out all the different kinds of numbers used in South Africa. A distinction is drawn between geographic – where the number is linked to a specific location, e.g. 011 566 3000 – and non-geographic – where the number is mobile, e.g. 083 000 0000. The number range usually associated with VoIP services is the 087 range.</p>
	Class ECS	This licence allows you to provide the same services as the Individual ECS licence except for voice services requiring numbers from the national numbering plan. If you have one of these licenses you will need to enter into commercial arrangements with one or more ECNS licensees who have the networks to carry your services to your customer.

Table 1: Licensing under the Electronic Communications Act 36 of 2005

Control and ownership of licences

ICASA released a Discussion Paper on ownership and control of telecommunications and broadcasting service licences in November 2009. Until such time as this process is completed the regulations promulgated under the Telecommunications Act – although completely unsuited to the new licensing framework – continue to apply.

<http://www.ellipsis.co.za/discussion-document-on-ownership-and-control-of-licences>

Infrastructure

Under Chapter 4 of the ECA ECNS licensees have broad rights to enter upon land for the purpose of constructing and maintaining electronic communications facilities, subject to environmental and other applicable regulation.

In practise the exercise of these rights involves extensive negotiation with local government and agencies such as SANRAL, which operates South Africa's national road network. Certain local government bodies have indicated their intention to pass by-laws regulating the access of electronic communications licensees to municipal property.

The Minister of Communications has not yet gazetted guidelines for the rapid deployment and provisioning of electronic communications facilities contemplated under the ECA. Such guidelines would centralise processes for obtaining way-leaves and permissions, facilitating infrastructure deployment and sharing.

Access

The term “access” incorporates

- Interconnection
- Facilities leasing, and
- Essential facilities.

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

Interconnection and facilities leasing agreements entered into between licensees must be filed with ICASA and require prior approval by the regulator before they can come into force.

Under the ECA ICASA is required to finalise regulations which will give effect to Chapter 7 of the ECA (Interconnection) and Chapter 8 (Facilities Leasing & Essential Facilities) and which will set out the manner in which disputes relating to the reasonableness of interconnection and facilities leasing requests.

Essential facilities are electronic communications network facilities which are of such a nature that they cannot reasonably be duplicated. These would include the local loop as well as international submarine cable landing stations and earth stations.

Links:

The latest set of draft interconnection regulations - <http://www.ellipsis.co.za/new-3rd-draft-interconnection-regulations/>

The latest set of facilities leasing regulations - <http://www.ellipsis.co.za/new-draft-facilities-leasing-regulations/>

The latest list of essential facilities – <http://www.ellipsis.co.za/draft-list-of-essential-facilities-g24122007-g30612/>

The setting of pricing principles governing interconnection and facilities leasing is highly contentious but essential in facilitating the entrance of competition into the market. Although there is some dispute in this regard, the majority view is that ICASA is required to have consideration to the provisions of Chapter 10 of the ECA before it can impose any kind of pricing regulation. This is discussed in further detail under Markets and Competition below.

Local Loop Unbundling (LLU)

The Minister of Communications has directed ICASA to complete the LLU process in 2011 but it is highly improbable that this deadline will be met. The local loop is the last-mile copper (and, increasingly, fibre) connection from street level distribution boxes to customer premises equipment in homes or businesses. The local loop is likely to be regarded as an essential facility as it is not capable of being duplicated within reason.

The unbundling of the local loop is critical to allowing the offering of alternatives voice and broadband offerings by new entrants.

Carrier Select and Carrier Preselect

ICASA is yet to finalise regulations allowing consumers to preselect or select on a case-by-case basis the service provider which they wish to utilise to make calls. The finalisation of these regulations is likely to stimulate competition provided that this is accompanied by price regulation of the provision of ECNS services under Chapter 10 of the ECA.

Consumer Protection

ICASA is mandated to perform a consumer protection role and to advance the interests of consumer of electronic communications in general. ICASA has not, in general, been effective in this role.

Code of Conduct Regulations

The objective of these regulations is to set acceptable standards of conduct for licensees in their dealings with consumers & to protect the rights of consumers in the electronic communications market.

The Regulations are applicable to all ECS and ECNS licensees to the extent that they deal with consumers (i.e. natural persons including end-users who use and/or receive for their own use the service and/or products of a licensed service).

<http://www.ellipsis.co.za/code-of-conduct-regulations/>

End-user and Subscriber Service Charter Regulations

The purpose of the Service Charter Regulations is to set out the minimum standards to be observed by ECNS and ECS licensees in providing licensed services. These standards relate to service availability, connectivity failure, the handling of complaints, times for installation and activation and times for fault clearance. Licensees must report to ICASA on their compliance every six months.

<http://www.ellipsis.co.za/end-user-and-subscriber-service-charter-regulations-2009/>

Code of Conduct for People with Disabilities

This Code sets out the obligations of licensees providing services to disabled persons.

<http://www.ellipsis.co.za/disability-regulations/>

Code of Conduct relating to Subscriber Equipment

In December 2009 ICASA released a Draft Code of Conduct on the sale, lease, rental or subsidisation of subscriber equipment, intended for finalisation before mid-2010. The draft Code focuses on the protection of consumers in circumstances where they wish to enter into a service contract with a bundled or subsidized handset or other subscriber equipment.

<http://www.ellipsis.co.za/draft-code-of-conduct-on-the-sale-lease-rental-or-subsidisation-of-subscriber-equipment/>

Price controls

The best service which ICASA could provide to consumers is to take steps to address the high cost of communication in South Africa. Under chapter 10 of the ECA, ICASA is empowered retail price controls as pro-competitive licence conditions in the licences of licensees found to have Significant Market Power (SMP).

The process to be followed is, however, convoluted and ICASA is yet to complete it in respect of any particular market.

Radio Frequency Spectrum

The Department of Communications (DoC) is responsible for interaction with the ITU and represents South Africa at the World Radio Communication Conferences convened by the ITU every four years. The Minister of Communications has the ultimate authority over the band plan which sets out the uses to which the various frequency bands can be put by the users thereof. South Africa falls within ITU Region 1 and the band plan will largely accord with that agreed to under the ITU's auspices.

The Minister also controls the use of frequency for security services and other Government uses.

Allocation vs. Assignment

An allocation of frequency is a stipulation as to the uses to which a particular band can be put. In order to promote efficiency bands can be allocated to different uses on a primary, secondary or licence-exempt basis, with the latter uses having a duty to mitigate any interference caused to the services of those using the band for its primary allocation.

An assignment of frequency is the awarding of a radio frequency spectrum licence to a user in terms of Chapter 5 of the ECA.

Assignment of Spectrum

The awarding of frequency licences is a competence held by ICASA. To date ICASA has followed a first-come-first-served basis but it will shortly finalise regulations setting out the mechanisms to be employed in assigning frequency in bands where demand exceeds supply. It is anticipated that the regulator will seek to use beauty contests or auctions or a truncated methodology which combines the two. Such assignments will only occur after an ITA has been issued by ICASA.

Spectrum is awarded on a technology neutral basis subject to the allocation set out in the band plan.

Licence-exempt frequency

ICASA has issued regulations setting out bands which may be used without a frequency license, subject to certain technical restrictions.

The most important of these bands for telecommunications purposes are the 2.4GHz ISM band and the 5.4GHz Outdoor Hiperlan band which are used extensively for the provision of Wi-Fi services in rural areas.

<http://www.ellipsis.co.za/licence-frequency-exemptions-amended/>

Spectrum licence fees

ICASA is planning to employ Administrative Incentive Pricing (AIP) in order to try and promote the efficient use of spectrum under the ICASA Spectrum Licence Fee Regulations 2009 but the relevant regulations have not been finalised. Fees are currently paid in accordance with the Radio Regulations and are desperately in need of review.

Spectrum liberalisation

South Africa does not currently allow any secondary trading in spectrum licences.

Numbering

ICASA is responsible for the management of the national numbering plan and the issuing of allocations of numbers to licensees. The numbering plan is currently under review and numbering regulations finalised under the Telecommunications Act are currently in use.

Only the holders of IECS licences are entitled to allocations of numbers. Such entitlement includes geographic (fixed) and non-geographic (mobile, VoIP) numbers.

No fee is currently payable to ICASA in respect of any application for an allocation of numbers.

Number portability

Regulations and practical arrangements in respect of mobile number portability were finalised in 2008 and it is possible to port a number from one mobile network to another. Regulations in respect of fixed number portability are expected to be finalised in 2010.

Film and Publications Board (FPB)

Registration

Both ISPs and Internet Cafés are required to register with the Film and Publication Board (FPB) in terms of Section 27A(1)(a) of the Film and Publication Act. This is to assist the FPB in its attempts to provide South Africans with an opportunity to make an informed choice about the kind of movies and other content which they want to see.

Probably the most important issue for the FPB is the fight against child pornography and the exposure of children to pornography and other inappropriate material. You need to take your responsibilities here very seriously and ensure that you take active steps to report child pornography and cooperate with investigations into it.

Child pornography and the child pornography hotline

The FPB launched the PRO CHILD Hotline in 2008. The primary purpose of the Internet Hotline is to prevent distribution of child pornography (child sexual abuse images) when detected through the internet and there is a team of analysts actively trying to track down child pornography.

The website is also intended to alert Internet Service Providers of the criminal activities, relating to child pornography and or sexual abuse images used /hosted on their servers or distributed through their infrastructure.

The hotline will be available 24hrs a day and 7 days a week to enable members of the public to immediately report discovered child pornography (child sexual abuse images). The Hotline also cooperates closely with Law Enforcement Agencies (LEAs).

<http://www.fpbprochild.org.za/Home.aspx>

Interception and Monitoring

The South African Government has passed various laws aimed at assisting the Law Enforcement Authorities (LEAs) to fight against crime and terrorism by intercepting and monitoring electronic communications. The primary Act is RICA.

The central feature of RICA is a prohibition against the interception of monitoring of communications outside of the authorised exceptions. It also, however, sets out specific provisions with regard to electronic communications service licensees.

Customer registration

RICA requires that providers of electronic communications services obtain certain information from subscribers in the sign-up process. This is typical Know-Your-Customer legislation.

Assisting with investigations

Electronic communications service providers may be approached by the police or another LEA to assist them with a criminal investigation through the interception of live communications or the provision or archived communication information.

There are currently no data retention requirements on South African licensees, other than in terms of laws of general application.
