

Overview of the Electronic Communications Amendment Bill 2013 [B17-2013]

This overview is not intended to be comprehensive and focuses on what we believe to be the more important aspects of the Electronic Communications Amendment Bill 2013 (“the Bill”). Any questions or suggested corrections can be emailed to dominic@ellipsis.co.za.

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Background & Current Regulatory Framework

Over time it has become obvious that some of the provisions of the Electronic Communications Act 26 of 2005 are difficult to implement or are ineffective when implemented, while some provisions are regarded as so vague as to hinder effective regulation. In order to address these deficiencies, the Department of Communications has, after securing cabinet approval, introduced the [Electronic Communications Amendment Bill 2013](#) into Parliament.

The ICASA Act is being amended simultaneously to ensure consistency across legislation applicable to the sector.

Changes from the previous version

While the version of the Bill released for public comment by the Department of Communications contained several controversial items, most of these have now been relegated to the ICT Policy Review Process. These are:

- the creation, functions and duties of the Spectrum Management Agency;
- some of the amendments to the functions and powers of the Universal Service and Access Agency of South Africa and its governance; and
- ownership and control of licensees

Given that the ICT Policy Review Process may take until 2016 to include, the Department believes that it is timeous to make the other amendments proposed.

Objects of the Bill

The following are listed as the objects of the Bill:

- to align the Act with broad-based black economic empowerment initiatives;
- to incorporate the Authority’s recommendation on ownership and control of commercial broadcasting services;
- to refine licensing issues;
- to improve the competition provisions;
- to improve turn-around times for consultative processes;
- to provide for the terms of appointment and the duties of the Chief Executive Officer;
- improve the governance provisions of the Universal Service and Access Agency of South Africa; to remove regulatory bottlenecks; and
- to provide for matters connected therewith.

Insertion of a definition of “broadband”

“broadband” means an always available, multimedia capable connection with a minimum download speed as determined by the Minister by notice in the Gazette;

The insertion of this definition “is intended to permit a flexible approach to the fast-moving technological advances in this area and avoid amendment of the Bill whenever the parameters need to be adjusted. This definition was proposed in a detailed study which will inform the broadband policy in due course.”

It is perhaps unfortunate that this definition does not reference upload speeds in addition to download speeds.

Amendment to the definition of “electronic communications facility”

The amendment is amended to make it clear that this definition includes access to wiring in multi-tenant buildings as well exchange buildings, carrier-neutral hotels and data centres. This is important as it brings clarity to which facilities may be the subject of facilities-leasing requests as well as better defining the distinction between an electronic communications network and an electronic communications facility.

From Historically Disadvantaged Individuals / Groups / Persons to broad-based black empowerment

The objects of the Act are to be amended to remove the reference to “historically disadvantaged persons, including Black person” and replace it with “broad-based black empowerment”. In similar fashion the Bill proposes that ICASA promote broad-based black empowerment as opposed to historically disadvantaged persons in granting licences under the ECA.

The required equity ownership by historically disadvantaged groups in section 9(2)(b) has been retained for the time being provided that broad-based black economic empowerment requirements prescribed by ICASA under section 4(3)(k) of the ICASA Act may replace it in due course.

We believe that industry should welcome these proposals to bring ICT into line with other sectors.

Facilitating the issuing of policy directions by the Minister

The Bill proposes to amend section 3(2) so as to enable the Minister to issue policy directions to the Universal Service and Access Agency of South Africa (USAASA) (which must take these into account when exercising its power). It also seeks to afford the Minister an opportunity to fulfil his or her own policy mandate by broadening the scope of policy directions that may be issued.

In essence the Minister is afforded a wide discretion on the matters in respect of which policy directions may be issued.

The Bill helpfully clarifies that national policy – and not only policy directions – must be subjected to a public participation process.

Managed liberalisation deleted (but not dead?)

The Bill proposes to remove the only reference to the “managed liberalisation” policy adopted under the Telecommunications Act of 1996 and in terms of which the Minister controlled the rate at which competition was introduced to Telkom.

It is noteworthy, however, that while the specific reference is to be deleted, the essence of this policy remains in that ICASA remains unable to issue individual licences until such time as the Minister has issued a relevant policy direction.

ICASA to provide draft regulations to the Minister

Perhaps controversially in terms of regulatory independence, the Bill proposes that ICASA, instead of simply notifying the Minister of its intention to publish final regulations on a specific subject, must now provide a draft of such regulations to the Minister not less than 30 calendar days prior to their publication.

On the face of it this appears to be a step back towards the position under the Telecommunications Act of 1996, in terms of which the Minister was required to approve regulations prior to their finalisation.

The Bill also proposes a new section 79B which would empower the Minister to access information held by ICASA or USAASA or any other person where this information is required by the Minister for the performance of his or her functions.

Changes to the service licensing framework

The following amendments are proposed to the service licensing framework:

- The deletion of the requirement that any electronic communications network service, broadcasting service or electronic communications service where a state entity (directly or indirectly) holds an ownership interest of greater than twenty-five (25%) percent of the share capital of the person providing such service must hold an individual licence.
- Changes to section 13 and section 16 of the ECA are intended to make it clear that individual and/or class licences - or control over them - may not be let, sub-let, assigned, ceded or in any way transferred without the prior written permission of ICASA after application in the prescribed manner.
- Changes to section 16 are intended to specify that a licensee may not through the holding of multiple class licences assume the scope of coverage of an individual licence.
- The turnaround time for the processing of registering class licences is to be reduced from 60 days to 30 days.

- It is also proposed to enable ICASA to prescribe the intervals at which registrations may be submitted and allows the transfer of a class licence upon notification to ICASA. ICASA's approval is required for class licence transfers, but approval will be deemed to have been given if ICASA does not respond within a specified period of time.
- Specifying the class electronic communications service licences may be issued for the provision of 'electronic communications services of district municipality or local municipal scope operated for commercial purposes.

The latter proposal is in our view problematic and indicates a fundamental misconception as to the nature of electronic communications services. The explanatory memorandum is silent on this proposed change.

Universal Service Obligations

Amendments are proposed to section 8 of the ECA to make it clear that ICASA can designate licensees to which universal service and universal access obligations may be imposed and then proceed, subject to Chapter 10, to impose additional terms on such licensees in respect of such obligations. This must be done after consultation with USAASA.

Rapid Deployment Guidelines

Proposed changes to sections 20 and 21 are intended to remove current uncertainty around the legal status of the guidelines by clarifying that the Minister will issue policy and/or policy directions whereafter ICASA will prescribe regulations governing how ECNS licensees may exercise their infrastructure rights (having regard to the policy and/or policy directions). The policy and/or policy directions must be issued by the Minister within 12 months of the coming into force of the Electronic Communications Amendment Act 2013. ICASA will then have a further 6 months in which to finalise the regulations.

While the amendment is welcome, the time periods set out are, unfortunately, unrealistic given the nature of the rights in question and their intersection with the rights of non-licensees such as municipalities.

Spectrum trading to be allowed

One of the most welcome provisions of the Bill relates to reiterating that the letting, sub-letting, ceding, sharing or transferring of radio frequency spectrum licences is permissible, subject to any conditions that ICASA may determine to be appropriate in the course of approving assignment, cession or transfer of spectrum. It follows that ICASA will be required to draft appropriate regulations governing the terms and conditions applicable to letting / sub-letting / transfer of spectrum licences, including an application form.

Our view is that ICASA is already in a position to draft the required regulations, but it has previously shied away from doing so. Hopefully the proposed amendment will provide a spur to this happening: introducing secondary trading in spectrum is probably one of the most critical short-term interventions that can be made to introduce greater efficiencies into the use of spectrum in South Africa.

Spectrum licence application turnaround times

The Bill proposes that ICASA must notify applicant for spectrum licences of its decision in respect of such application within 60 business days of receipt of the application.

Type approval

The Bill seeks to clarify that type approval certification is required, *inter alia*, by persons possessing electronic communications equipment and facilities.

Interconnection

Amendments in the Bill aim to redefine the reasonableness of interconnection requests. Currently an interconnection provider is entitled to refuse a request for interconnection on the basis that it would not be, *inter alia*, financially feasible to interconnect with the interconnection seeker. The Bill proposes to change “financial feasibility” to “economic feasibility” which is “more apt because of the criteria that can be taken into account in considering the feasibility of the request”.

Further amendments are intended to ensure that interconnection agreements are not in any way discriminatory compared to comparable network services provided by a licensee to itself or an affiliate.

Finally in this regard, the Bill stipulates that registrants for class licences are also entitled to make interconnection requests. This is important given the attitude of some of the incumbent operators that they will not interconnect with anyone that does not have individual licences.

Facilities leasing

In a similar fashion the Bill reveals an intention to amend “financial feasibility” to “economic feasibility” for the purpose of determining the feasibility of a facilities leasing request & sets out further provisions to ensure that facilities leasing agreements are not in any way discriminatory compared to comparable network services provided by a licensee to itself or an affiliate.

The Bill revisits the neglected concept of essential facilities: a new subsection would have it that requests for the leasing of essential facilities are deemed “to promote the efficient use of electronic communications networks and services”. Further, recipients of a request to lease essential facilities would be required to agree on non-discriminatory terms and conditions for the implementation of the lease within 10 business days of receiving the request. Such recipient must otherwise provide that the request is not technically or economically feasible within the 10 business period. In the absence of agreement on the terms and conditions to be applied ICASA is empowered to impose appropriate terms and conditions within 5 business days of receiving notification of a failure to agree.

The Bill sets a definite date – 3 years after the coming into force of the Electronic Communications Amendment Bill 2013 – from which any exclusivity provision prohibited under section 43(10) of the ECA will be regarded as invalid. Such prohibited provisions include agreements relating to access to international electronic communications facilities that restrict the ability of third parties to access such facilities.

These changes are generally welcome. It should be noted, however, that ICASA has still to determine which electronic communications facilities are to be regarded as essential facilities (which it will hopefully do before the proposed amendment to make these more accessible is finalised).

Competition

Comprehensive amendments are proposed to section 67 of the ECA, which sets out the process which ICASA must follow in determining whether a market is characterised by a lack of competition such that ICASA would be justified in imposing pro-competitive licence conditions on licensees found to have Significant Market Power in such a market. The Bill draws a clear line between ex ante competition regulation – falling within ICASA’s jurisdiction – and ex post competition regulation which is more properly the domain of the Competition Commission.

This section is highly technical in nature. It is to be hoped that the intended amendments act to simplify the implementation of the section given the difficulties which ICASA has experienced in this regard to date.

Establishing a National Broadband Council

A new section 72A to be inserted into the ECA empowers the Minister of Communications to establish a National Broadband Council (NBC) which will have the role of advising the Minister on broadband policy and its implementation. Members of the NBC are to be drawn from both the public and the private sectors.

The proposed functions of the NBC are to:

- coordinate overall broadband implementation by government at national, provincial and local government levels;
- facilitate the monitoring and measurement of broadband penetration in South Africa;
- develop a broadband implementation plan that supports the Broadband Policy for South Africa which plan must include, without limitation, skills development, research and development of broadband priority areas;
- advise the Minister and the Minister of Finance on government investment in electronic communications facilities and networks that contribute to broadband at national, provincial and local government level to avoid unnecessary duplication;
- recommend measures to increase uptake and usage of broadband as well as enhance public awareness on the benefits of broadband; and
- annually survey and evaluate the status of broadband penetration in the Republic including, without limitation, household broadband penetration and electronic communications network connectivity to municipalities and broadband providers.'

The E-Rate is revised, again

The E-Rate intervention is intended to promote use of the Internet in schools by requiring that service providers grant a 50% discount on Internet services provided to schools. The implementation of this intervention has been remarkably unsuccessful to date so an intention to amend the current legislative position is welcome.

The Bill proposes to make it clear when an electronic communications service licensee should give the discount and when the licensee is entitled to a discount from the electronic communications network service licensee. A new subsection is proposed to make it clear that the USAASA can pay a charge on behalf of a school and will in such instance be entitled to the 50% discount. The distinctions between public and independent schools and between public and private colleges will fall away if the Bill is finalised in its current form.

USAASA

There are a number of provisions in the Bill relating to the operation and performance of USAASA (which to date has underperformed). The changes proposed are intended to make it clear that USAASA is subject to the Public Finance Management Act and to improve its governance.

Other amendments seek to ensure there is consistency in provisions relating to universal access, universal service and needy persons. Interestingly there is also a proposal that the Minister of Communications, acting with the concurrence of the Minister of Finance, may prescribe additional uses of money held in the Universal Service and Access Fund (USAF).

Conclusion

We welcome the majority of the proposed amendments and the intention behind them. It seems unlikely, however, that the Bill will be finalised during 2013, particularly given the looming 2014 elections.

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