

ECA Amendment Bill

MultiChoice, M-Net and Orbicom

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TEAM



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INTRODUCTION



We welcome the opportunity to address the draft Bill

Critically important to the ICT sector going forward

We focus on Bill from broadcasting perspective

Recent developments – cabinet review

TWO MAJOR THEMES

1. Unintended impact of Bill on broadcasting matters

- Bill is informed by White Paper which recognized DoC would conduct separate broadcasting policy review
- But some Bill provisions spill over to broadcasting
- Many of these provisions not applicable to broadcasting

2. Need for cross-cutting issues to be addressed

- Although there are two departments, reality of convergence means there are cross-cutting issues for broadcasting and telecommunications (e.g. OTTs, net-neutrality)
- These issues not dealt with in the Bill
- Important that there is co-ordination between the departments going forward

OVERVIEW OF ISSUES WE ADDRESS

Our detailed written submission engaged substantively with the Bill

Today's presentation will give a high level summary of our position on:

1. Spectrum issues
2. High demand spectrum and the WOAN
3. Open Access
4. ICASA'S independence
5. Competition law issues
6. How to deal with cross-cutting issues going forward

Willing to provide further written input if required

SPECTRUM ISSUES



Numerous provisions of the Bill apply to broadcasting and broadcasting signal distribution spectrum

Our main concerns:

1. Bill does not ensure specific bands to be preserved for broadcasting and doesn't provide enough role for Minister of communications
 - Requirement for “co-ordination” not enough
2. Not appropriate for Minister of TPS to exercise wide powers on broadcasting spectrum
 - This is ICASA's domain – independent regulation extends to regulation of broadcasting spectrum

SPECTRUM ISSUES (2)

3. Unworkable that spectrum licences be renewable annually
 - Does not take into account significant investment by Individual service licences
4. Bill overlooks complexity of migrating existing spectrum users
 - Will be prejudicial to broadcasters

Our proposal – Bill's approach to spectrum needs to be completely reformulated, taking into account the broadcasting context

HIGH DEMAND SPECTRUM AND THE WOAN



Bill envisages that Minister of TPS could determine certain broadcasting spectrum is high demand and must be assigned to the WOAN

- Would subject broadcasting to all the restrictions associated with high demand spectrum
- There is no support for this in the White Paper
- WOAN is concerned with broadband and will not provide broadcasting signal distribution

Our proposal – Bill's provisions on high demand spectrum and the WOAN should exclude spectrum used for broadcasting and broadcasting signal distribution

OPEN ACCESS

Bill proposes open access regime for all ECNS licensees, including broadcasting signal distributors

- But White Paper was concerned with open access so that broadband access could be improved
- Open Access in broadcasting signal distribution already provided for in chapter 9 of the ECA (administered by Minister of Communications)
- Sentech is the common carrier and is obliged to provide broadcasting signal distribution on non-discriminatory and non-exclusive basis

Our proposal - Open Access provisions should only apply to ECNS licensees providing electronic communications services

ICASA'S INDEPENDENCE

Bill appears to undermine ICASA's independence and powers by:

- obliging ICASA to comply with Minister's policies and policy directions and
- shifting some of ICASA's powers, functions and duties (e.g. virtually all ICASA's spectrum powers are proposed to be transferred)

Constitutional Court has made it clear that an institution will be considered independent only if it enjoys a degree of protection from government control

Our proposal – those provisions which undermine ICASA's independence and unduly fetter ICASA's discretion should be removed from the Bill

COMPETITION LAW ISSUES

Significant changes are proposed to s67 of ECA dealing with competition law issues

Our main concerns:

1. Bill reduces ICASA's discretion and independence on competition law issues
2. Bill proposes extensive and onerous obligations on ICASA including compelling ICASA to conduct ex ante regulation of every market and market segment
3. Bill's due process provisions are inadequate
4. The Bill does not use opportunity to rectify significant defects in the ECA e.g. ex post competition powers inappropriately given to ICASA, definition of SMP etc

COMPETITION LAW ISSUES (2)

In sum, the amendments proposed to section 67 amount to a requirement for ICASA to undertake blanket ex ante regulation

This approach is unwarranted and highly inappropriate

- No motivation for this approach in the Memo
- Does not give ICASA discretion to decide
- Will require massive resources

Throughout the world, ex ante competition regulation is the exception rather than the norm

- Ex ante regulation only applied in limited circumstances in certain markets
- ECA and ECA Bill is out of step with international best practice

Our proposal – requirement for blanket ex ante competition regulation by ICASA should be removed.

CROSS-CUTTING ISSUES GOING FORWARD



We urge DTPS to keep in mind context in which broadcasting operates and challenges we face

Some of our key issues:

- Need for regulatory parity with OTT services
- Net neutrality
- Anti-piracy measures

These issues are cross-cutting and need attention from both departments / Ministries

Our proposal – Any future Bills emanating from either department should be considered by both departments as well as portfolio committees and ideally should be processed concurrently

THANK YOU