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Analysis of the Electronic Communications Bill (B31-2018)

1. Introduction

The Electronic Communications Amendmend Bill (B31-2018) is a by-product of the National Integrated ICT Policy White Paper released in September 2016 by the Department of Telecommunications and Postal Services. The existence of the 2016 National Integrated ICT Policy White Paper requires that all relevant laws such as the Electronic Communications Act (No 36 of 2005) and the Electronic Communications Transactions Act (No. 25 of 2002) will, and where necessary be amended in line with the new National Integrated ICT Policy White Paper.

2. What the Bill is about and what it seeks to address

The Bill is about reinforcing competition regulation; addressing supply side issues and infrastructure roll-out including open access to infrastructure and rapid deployment, as well as improved management of scarce resources especially the spectrum

3. Problem

3.1 Rapid deployment

- Infrastructure is duplicated and that has had a negative impact on the environment



- There's no balancing the rights of ECNS licensees (i.e mobile operators) and those of landowners to enter public or private property to deploy critical broadband infrastructure.

3.2 Spectrum

- The roles and responsibilities between the Minister and ICASA are unclear resulting in institutional inefficiencies .

3.3 Open acces

- The broadband infrastructure market is concentrated and characterised by a few very strong and vertically integrated mobile operators (Vodacom, MTN, Telkom and Cell C). Infrastructure whether mobile or fixed is seen as a competitive advantage rather than as a facility to be shared to stimulate competition.

3.4 Competition

- There is a need to strengthen cooperation between ICASA and the Competition Commission to draw on the expertise of the Commission to assist it in defining and reviewing markets for competition purposes.

4. Root causes

- There's no consistent, simple and coordinated approach among government departments and agencies to process applications for approvals, permits and other assents for deployment and construction of electronic communications infrastructure.



- There are no dispute resolution mechanisms and this has often led to court challenges between municipalities and ECNS licensees (mobile operators)
- The spectrum regime is exclusive and this only promotes economic growth for a few market players at the expense of broader socio-economic development and equitable broadband spectrum which is in high demand.
- The current infrastructure market, particularly in relation to broadband, is characterised by ineffective competition, infrastructure sharing bottlenecks, duplication of infrastructure and inefficient use of scarce resources
- There are no regular reviews of the effectiveness of competition in individual markets including an ongoing assessment of the relevance of traditional market definitions. The interests of user/consumers must be paramount in weighing up options and determining if competition related interventions remain relevant and/or necessary.

5. Intended outcome of the Bill

The overarching vision of the communication sector in achieving Government's development objectives for the country is captured in the National Development Plan, the plan states that;

“ICT will continue to reduce spatial exclusion, enabling seamless participation by the majority in the global ICT sector, not simply as users but as content developers and application innovators”. To realise this, it is crucial that;

“All people, regardless of who they are, their social or economic status or where they live, can access communications services and content and can therefore participate actively in society and realise the benefits and opportunities of ICTs”.



If this is to be achieved, according to the National Development Plan both supply (infrastructure, networks and resources) and demand issues (including facilitating e-astuteness, accessibility by persons with disabilities and the availability of relevant services and content in all languages) must be addressed.

6. The Bill (B31-2018) itself

The long title of the Bill allude to “lowering of cost to communication” and yet nowhere in the Bill itself where this intention is made explicit in the form of a provision or a clause. By implication it is assumed that expanding and coordinating broadband infrastructure will automatically lower the cost of communication. Stakeholders would have expected that the Bill captures the mood of consumers by being specific in lowering the costs to communicate by means of a clause dedicated to low communication costs.

Chapter 3A of the Bill particularly **section (6)** states that, “ The Minister responsible for Telecommunication and Postal Services must issue a policy direction to the Authority (ICASA) in terms of section 5(6), directing the authority to issue an invitation to apply for the wireless open access network service licence and radio frequency spectrum licence.” The following section, namely **section (7)** repeats what it said in the above section (6). Both clauses **section (6) and (7)** sound tautological and perhaps need re-wording.

Section 13 of the Bill and in particular the insertion of **section 20A** allude to the establishment of the Rapid Deployment National Co-ordinating Centre (RDNCC) and it is not made clear whether the RDNCC will also establish branches across all nine provinces for purposes of easy access and efficiency. Especially when taking into



account **section 20J** of the Bill which states that, “The RDNCC must engage with departments and other organs of state across all three spheres of government responsible for the granting of approvals, authorisations, licences, permissions [...]”.

Section 20A (3) also allude to the establishment of the Rapid Deployment Steering Committee and also explain its membership. The provision however fails to specify the qualifications or knowledge background needed nor the relevant experience required for such membership. Such requirements will be similar to the National Radio Frequency Spectrum Planning Committee contemplated in **section 24** of the Bill (pg 20) where such requirements are made explicit.

Section 20D (4) of the Bill admonishes property owners by saying; “Property owners may not cause damage to electronic communications networks or facilities.” If such a possibility exist as implied in this clause it follows that in the event that a property owner causes damage to electronic networks and/or facilities the Bill is obliged to specify the penalties and/or procedure to be followed by a licensee in order to hold the property owner accountable for the damages he or she may have caused. The Bill must specify what is that procedure.

Titled amendment of section 25 of the principal Act (bottom of pg 13 of the Bill), **section 16** stipulates that, “If an electronic communications network service licensee finds it necessary to move any electronic communication facility [...] the reasonable cost of the alteration or removal must be borne by that local authority or person.” This clause doesn’t sound fair since the removal of any electronic communication facility is to the benefit of the licensee but the cost are to be borne by the local authority or person, more clarity is needed on this clause.

7. Beneficiaries/Stakeholders



Those who are likely to benefit from this Bill are the electronic service network licensees such as MTN, Vodacom, Telkom, Cell C, etc. The Bill enables these big players in the ICT sector to expand their infrastructure so as to reach as many areas as it is possible. The difference however is that with the introduction of the Electronic Communications Bill this infrastructure will be co-ordinated to avoid duplication. Conversely, the availability of the radio frequency spectrum for all role players in the ICT sector would be a game changer in the sense that ECSN licensees will now use the spectrum and rely less on the physical infrastructure.

Other stakeholders who stand to benefit in the promulgation of this Bill are municipalities, government departments and institutions like clinics, hospitals, etc with the availability of more broadband. The real beneficiaries however will be the small players and new entrants in the telecommunication market as open access will enable them to use the available infrastructure and radio frequency spectrum. The availability of the spectrum will create more competition as more players enter the ICT market and this will have an impact in lowering the costs to communication as the Bill seem to suggest.

8. Any costs in the implementation of this Bill?

The establishment of the Rapid Deployment Co-ordinating Centre as well as the Rapid Deployment Steering Committee will both need funding; the former will need staff personnel to run it while the latter will require funding to compensate members. The department will need to explain whether provisions have been made in the department's budgetary projections for the implementation of this Bill once it becomes an Act.



9. Conclusion

The Bill is a welcome government intervention in the Information and Communication Technology sector. The ICT sector as a global phenomenon is forever changing and each country must keep up with the technological advancement happening worldwide. Keeping apace with global trends must not however be oblivious to domestic challenges. It is imperative that the South African public; consumers, entrepreneurs, industry players as well as government are all active participants of the technological revolution. The Fourth Industrial Revolution bespeak of ICT as the pinnacle of economic progress and it is very important that all countries embrace it.

The availability of the spectrum is indeed a game changer, due to the fact that the lack of the spectrum has been cited as one of the reasons that keep costs to communication very high. The logic is that mobile operators are forced to build additional infrastructure and this cost them billions that they have to recoup from customers through high communication costs.

It is however comforting to learn that government and through its **ICT Policy White Paper** and with the introduction of the Electronic Communications Bill (B31-2018) is intent on addressing the issues of communication costs. The **ICT Policy White Paper** argues: “As a first step towards meeting national goals, the spectrum need to be defined and treated as a public good used to meet public interest objectives. Spectrum generally needs to be managed and used effectively and efficiently; and broadband spectrum in particular, needs to be governed in line with a paradigm shift towards the non-exclusive assignment of highly contested spectrum in bands where demand exceeds the amount of spectrum.”



10. References

1. Department of Telecommunication and Postal Services (2018), Presentation for the
 2. PC on Telecommunication and Postal Services
 3. Electronic Communications Amendment Bill (B31-2018), Republic of South Africa
 4. National Integrated ICT Policy White Paper
 5. The National Development Plan (2012), The Planning Commission
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