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Overview of electronic communications regulation in South Africa

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Content

Introduction 3
Legislative Framework in South Africa 4
Role-players 5
Department of Communications 5
Independent Communications Authority of South Africa 5
Universal Service and Access Agency of South Africa 5
Portfolio Committee on Communications 5
Competition Authorities 6
State-owned Enterprises 6
National Consumer Commission 6
Policy environment 6
National Broadband Policy 7
National Radio Frequency Spectrum Policy 7
Electronic Communications Licensing 7
Service licensing framework in South Africa 7
Licence exemptions 9
Control and ownership of licences 10
Infrastructure rights 10
Access 11
Local Loop Unbundling (LLU) 11
Carrier Select and Carrier Preselect 12
Consumer Protection 12
Code of Conduct Regulations 12
End-user and Subscriber Service Charter Regulations 12
Code of Conduct for People with Disabilities 12
Price controls 12
Radio Frequency Spectrum 13
Allocation vs. Assignment 13
Licence-exempt frequency 14
Spectrum licence fees 14
Spectrum trading 14
Numbering 14
Number portability 14
Films and Publications 14
Registration 15
Child pornography and the child pornography hotline 15
Interception and Monitoring 15
Customer registration 15
Assisting with investigations 16
Intermediary liability 16

Introduction

Electronic communications 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.

This overview is intended as a basic primer in South African law and regulation relating to electronic communications and it is hoped it will empower licensees and potential licensees to appreciate the legal and regulatory environment. It is, of course, not intended to be exhaustive, nor should it be relied upon without further specific consultation.

This overview does not cover broadcasting-specific licensing or regulation nor does it venture into postal regulation.

Please address any queries or suggestions in respect of this overview to dominic@ellipsis.co.za.

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"). The ECA can be characterised as pro-competitive legislation in stark contrast to the preceding 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 attempts to take into account the blurring between broadcasting and telecommunications in particular. Wide-ranging amendments to the ECA were tabled in late 2012 and are expected to be finalised in 2013.

Other legislation which impacts upon the sector includes (i.e. this is a non-exhaustive list):

- the ICASA Act 13 of 2000 ("the ICASA Act") which established the communications sector regulator – the Independent Communications Authority of South Africa ("ICASA") – and sets out its powers as well as sanctions which can be imposed on licensees for non-compliance with their licence terms and conditions. The Department of Communications issued the ICASA Amendment Bill 2012 during November 2012 and it is anticipated that this will be finalised during 2013.
- the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 ("RICA") which sets out a lawful intercept regime and details the obligations of electronic communications service providers in co-operating with law enforcement authorities and storage of traffic data;
- the Electronic Communications and Transactions Act 25 of 2002 ("the ECT Act") which creates legal exemptions for information intermediaries where they act as such (e.g. as a mere conduit or hosting provider). The ECT Act is also up for amendment during 2013 through the Electronic Communications and Transactions Amendment Bill 2012.
- the Competition Act 89 of 1998 ("the Competition Act") which legislates against anti-competitive practices such as collusion and cartels;
- the Film and Publications Act 65 of 1996 ("the Film and Publications Act") which requires ISPs and others to register and sets out obligations around child sexual abuse images and exposure of children to pornography;

- the Protection from Harassment Act 17 of 2011 ("the Harassment Act") which obliges electronic communications service providers to assist where a person alleges harassment by means of electronic communications.

The Protection of Personal Information Bill 9 of 2009 was introduced to the South African Parliament in 2009 and is intended to comprehensively regulate the use and management of personal information within the digital environment. It is likely to be finalised during 2013.

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).

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.

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-serviced areas.

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.

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 Competition Commission has not as yet managed to act effectively against incumbents in respect of conduct which breach the provisions of the Competition Act.

State-owned Companies

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 Infraco has 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. 2013 is likely to see increased pressure for these two entities to be merged into a single state network provider. Telkom is also a State-Owned Company and now cited as Telkom SA SOC Ltd.

National Consumer Commission

The National Consumer Commission (NCC) is charged with enforcing consumer rights under the Consumer Protection Act 68 of 2008. It has taken a special interest in the electronic communications industry and 2012 will see a number of high profile matters relating to service provider contracts heard by the Consumer Tribunal.

Policy environment

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.

It is generally recognised that South Africa's communications policy is overdue a comprehensive overhaul – this was last done in 1996. A National Policy Colloquium was held in the first six months of 2012 in an effort

to address this and an ICT Policy Panel comprising experts in the field has been formed to advise the Minister in the development of a Green Paper during 2013.

National Broadband Policy

The Department of Communications adopted a National Broadband Policy in July 2010. A review of this document commenced in 2012 and should be finalised in the first half of 2013.

National Radio Frequency Spectrum Policy

The Department of Communications adopted a National Radio Frequency Spectrum Policy in April 2010.

Electronic Communications Licensing

The registration and granting of electronic communications licences in South Africa is performed by ICASA under the ECA.

Service licensing framework in South Africa

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

- **Electronic Communications Network Service (ECNS)** licences: these licences authorise the holder to roll-out and operate a physical network. This network can be made up of any technology the holder may 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)** licences: these licences allow the holder to provide services to customers over its 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), it only requires an ECS licence so that it can provide its services to its customers over Telkom's network.

It is helpful to consider the following fundamental distinctions between these licence types:

- **Wholesale vs. Retail:** An ECNS licensee wholesales network capacity to ECS licensees or other ECNS licensees for resale – it does not deal with the public. An ECS licensee on the other hand offers retail services to the public (and may also provide wholesale services for resale to third parties).
- **Physical vs. Virtual Networks:** An ECNS licensee operates physical networks made of facilities such as fibre or base stations. An ECS licensee operates virtual networks such as VPNs and MPLS networks.

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 payable in terms of the ICASA General Licence Fee Regulations 2012. The Regulations set out the manner of calculation of annual licence fees and update the various administrative fees payable for licence applications, amendments and the like.

Formula:
Pa = Payable Annual licence Fee
R = Revenue from licensed services
B = applicable percentage per table below dependent on license revenue in accordance with this schedule read with regulation 3(1).
Pa = R x B

License Revenue (R) (Rand)	Percentage applied (B) (%)
0-50 000 000	0.15
50 000 001 – 100 000 000	0.20
100 000 001 – 500 000 000	0.25

500 000 001 – 1 000 000 000	0.30
1 000 000 001 +	0.35

Licensees are further required to pay a contribution to the Universal Service and Access Fund (USAF) – an entity set up by Government to fund development of services in rural areas – amounting to 0.2% of annual turnover derived from licensed services.

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 the holder to roll out and operate an electronic communications network nationwide or across a province.
	Class ECNS	A class ECNS licence allows the holder to roll out its own network in a district or local municipality. In other words, the licensee will choose to operate in a municipal area and provide access services to consumers in that area. This is the form of licence required by operators wanting to set up their own network focusing on a smaller area. South Africa has 48 district municipalities and 231 local municipalities as well as 7 metropolitan municipalities.
ECS LICENCES	**Individual ECS**	This licence allows the holder to provide services to 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: • Internet access • Protocol conversion • Virtual Private Networks (VPN) • Multi-Protocol Labeling Systems (MPLS) 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.

	Class ECS	This licence allows the holder to provide the same services as the Individual ECS licence except for voice services requiring numbers from the national numbering plan. A CECS licensee will need to enter into commercial arrangements with one or more ECNS licensees who have the networks to carry services to the 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.

Holders of individual licences are required to have a minimum 30% of equity held by persons from historically disadvantaged groups. This term in essence covers people of colour, women and people with disabilities.

Indications are that there will be a move towards a broad-based system of empowerment applicable to licensees over the next 3 years.

Compliance with licence terms and conditions and applicable regulation

Holders of service licences issued by ICASA under Chapter 3 of the ECA are required to observe the licence framework as set out in the Compliance Manual Regulations, 2011. For more information please see http://www.ellipsis.co.za/licensee-compliance-framework-finalised/.

Infrastructure rights

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. There is an advanced industry process to get this done.

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 (financially or technically). 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.

ICASA has finalised the Interconnection Regulations 2010 which will give effect to Chapter 7 of the ECA (Interconnection) and the Facilities Leasing Regulations 2010 which give effect to Chapter 8 (Facilities Leasing & Essential Facilities). These documents also set out the manner in which disputes relating to the reasonableness of interconnection and facilities leasing requests will be processed.

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 local loop is the last-mile copper (and, increasingly, fibre) connection from street level distribution boxes to customer premises equipment in homes or businesses. While it was Government's expressed intention to complete an unbundling process by 2011, it is unlikely that significant progress will be made towards this objective in 2013.

Carrier Select and Carrier Preselect

Licensees are obliged to offer carrier preselection, but in practice ICASA has not regulated origination rates for voice calls or finalised a Consumer Code and the service is accordingly not available in South Africa.

Consumer Protection

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

Code of Conduct Regulations

The objective of the Code of Conduct Regulations is to set acceptable standards of conduct for licensees in their dealings with consumers and 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).

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.

Code of Conduct for People with Disabilities

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

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 to address 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 has only managed to apply it in respect of the relatively simple voice call termination market. The Call Termination Regulations set out the manner in which voice termination rates are subject to a glide path reduction to April 2013.

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 National Radio Frequency Plan.

The governing regulations are the Radio Frequency Spectrum Regulations 2011.

Licence-exempt frequency

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

The most important of these bands for telecommunications purposes are the 2.4GHz ISM band, the 5.4GHz Outdoor Hiperlan band and the 5.8GHz ISM band, which are used extensively for the provision of Wi-Fi services in rural areas.

The relevant bands and applicable restrictions are set out in Annexure B to the Radio Frequency Spectrum Regulations.

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, which came into force on 1 April 2012.

Spectrum trading

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 National 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

Both mobile and geographic number portability are enabled in South Africa, although there remain challenges to porting certain number ranges (particularly 080x and 086x).

Films and Publications

Registration

Both ISPs and Internet Cafés are required to register with the Film and Publications Board (FPB) in terms of Section 27A(1)(a) of the Film and Publications 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. Licence holders need to take their responsibilities here very seriously and ensure that they 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 ISPs 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 24 hours 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).

Interception and Monitoring

The South African Government has passed various laws aimed at assisting the 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. However, it also 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.

Intermediary liability

ISPs fulfill a central role in the modern information activity by acting as a conduit and clearing house for the transmission of electronic communications. South African law recognises the special position of ISPs and the need for them to be protected against liability in respect of third party content and activities which take place over their networks.

As is the case in many other jurisdictions, a "safe harbour" is created for ISPs through the operation of Chapter XI of the ECT Act.

A "service provider" under the ECT Act is defined as a person providing services including "the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service".

Section 73 of the ECT Act stipulates that a service provider "is not liable for providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages via an information system under its control". This immunity holds only where the service provider:

- is a member of an IRB and has adopted and implemented the code of conduct of that IRB;
- does not initiate the transmission;
- does not select the addressee;
- performs the functions in an automatic, technical manner without selection of the data; and
- does not modify the data contained in the transmission.

The section 73 "mere conduit" immunity does not interfere with the right of the courts to order a service provider to terminate or prevent unlawful activity in terms of any other law which may apply.

Hosting, caching and information local tools

This legislative immunity also covers hosting of content, caching of content and the provision of tools such as hyperlinks which are designed to assist users to find information. In all of these instances there are further requirements set out in the relevant section and which in essence stipulate that the provision of the service or performance of the activity must take place at arm's length, in accordance with industry standards and that the service provider should not have knowledge of unlawful activity.

Take-Down Notice Procedure

Section 77 of the ECT Act creates a procedure which allows a complainant to notify a service provider or its designated agent of unlawful activity in a written notice which sets out the right which has been infringed and the location or nature of the infringing material or activity under the control of the service provider. A service provider is obliged to act expeditiously to remove or disable access to infringing content, failing which it may lose the immunity it has in respect of hosted content under section 75 of the ECT Act.

No general obligation to monitor

Section 78 of the ECT Act explicitly states that services providers are not under any general obligation to monitor the data which it transmits or stores or to actively seek facts or circumstances indicating an unlawful activity. This is recognition of practical reality: even a small Internet access provider would find it impossible to monitor all the content flowing over its systems due to the volume of content and the speed at which it travels.

Internet access providers are further under a Constitutional imperative to respect the privacy of their subscribers and are prohibited under RICA from any unauthorised interception and/or monitoring of electronic communications.