

ICT Policy, Legislation and Regulation What a Difference a Year Makes - Or does it? 2014 in Review

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South Africa Connect, South Africa's Broadband Policy was published in December 2103, ushering in 2014 with great promise. The policy, among other things, called for the removal of policies that constrain competition and the rollout of broadband. It singled out service based competition, wholesale access, and co-ordinated build policies, as key components. Recognising the importance of effective implementation, a regulator equipped with the capacities and competencies to carry out the job, was emphasised. Did we make progress in 2014? Let's take a look.

ICASA Act and EC Act Amendments

Parliament passed and the President assented to the Independent Communications Authority of South Africa (ICASA) Amendment Act, which came into operation 10 May 2014, and the Electronic Communications (EC) Amendment Act, which came into operation 21 May 2014.

The Good

A number of amendments eliminated anomalies that existing in the previous legislation. Other positive aspects include:

- the obligation placed on ICASA that when it makes regulations and issues licences, it must set out penalties and remedies that are appropriate for the offence of contravening regulations and licence conditions;
- the obligations that ICASA's council meet at least once a month, and that minutes are published on ICASA's website inter alia (although it does not appear that this practice has been put in place).

Transfers of control of licences

New provisions were inserted into the EC Act to require prior approval before transferring control of a licence, creating parity between transfers of licences and transfers of control of licences. Unfortunately, however, the regulations setting out the procedures for transfers have not been amended to apply also to transfers of control. This likely will have to be done prior to ICASA deciding whether to approve, for example, the proposed purchase of Neotel by Vodacom. And in a new twist, ICASA issued a warning that transfer applications will not be approved "which do not have 30% equity ownership by HDGs". Whether this applies to transfers of control, remains open.

Negotiating Rights of Way

The amendments to the EC Act regarding rights of way place deadlines on the obligations of the Minister to issue policy and policy directions and ICASA to make regulations. The Minister's deadline is twelve months, which is 21 May 2015. ICASA's deadline is 18 months, which is 21 November 2015. If these deadlines are met, the policy and regulations should clarify the relative rights of licensees and land owners, resulting in processes that are more fair and transparent. Disputes are currently being settled by the courts without regard to wholesale access or coordinated build policies emphasised in the broadband policy.

Ex ante Competition Regulation

A group of amendments to the EC Act go to clarifying the provisions requiring ICASA to prescribe regulations regarding market power and the imposition of pro-competitive licence terms and conditions - a thing ICASA has not been able to do under the previously cumbersome legislative provisions.

The Not So Good

Licensing

The following, non substantive language was deleted from the individual licensing provisions: "In consideration of the implementation of the managed liberalisation policies". However, the substantive provision - that the Minister must first issue a policy direction before ICASA may invite, accept and consider new individual electronic communications network services (ECNS) licences - remains. Therefore, the problem remains; the Minister must issue a policy direction and ICASA must then issue an invitation to apply before any potential new entrant can even apply for a licence. Not only is this not good policy in 2014, it makes no sense in light of the court's decisions in the Altech matter, which resulted in hundreds of individual licences being issued in the licence conversion process, negating the effectiveness of limiting the number of new entrants.

The EC Act provisions regarding class licences were amended to specifically provide that more than one class licence may be awarded (curious, because it was not previously prohibited). On the other hand, a provision was inserted indicating that the class licences awarded to one entity may not collectively assume the scope or coverage of an individual licence, which, in the case of the ECNS licence, is geographic in scope. So, for example, an entity may not obtain ECNS class licences that would collectively encompass one entire province.

It is, however, difficult to see how this provision applies to electronic communications services (ECS) licences (as opposed to ECNS licences) because what distinguishes an individual licence is that it can provide voice using numbers allocated to it by ICASA. However, just in case there was not enough confusion, the following additional category of class licences was inserted - "electronic communications services of district municipality or local municipal scope operated for commercial purposes". So, now, if a licensee wants to provide ECS nationally, but not with numbers obtained from ICASA, what licence is required? An individual licence (which appears might be the case now) or a class licence (which was definitely the case before the amendment).

An open and transparent licensing regime can be really easy to get right. Instead, we have managed to make ours more obscure and closed in 2014.

Ex post Competition Regulation

Without much notice, the provisions in the EC Act empowering ICASA to consider complaints of anti-competitive conduct by licensees have been deleted, leaving this essential task solely to the competition authorities to be decided in terms of the Competition Act without regard to the nuances set out in the EC Act.

Essential Facilities

A new procedural provision regarding the negotiation of agreements for essential facilities was inserted, requiring agreement within 20 days, after which ICASA must, within 20 additional days, impose terms and conditions. Unfortunately, the licensee from which essential facilities are requested can still block or delay that the provision of essential facilities by arguing to do so is not technically or economically feasible. Now might be a good time for ICASA to finalise essential facilities regulations, which were published for comment in 2007.

E-rate

The 50 percent discount afforded public schools in terms of the EC Act was extended to all public health establishments, independent schools, public and private colleges and private further education and training institutions. The real difficulty, however, has not been addressed. Just how do institutions get access to the discounts? Current regulations do not answer this question. Amended regulations will be necessary to give effect to these expanded E-rate provisions.

Communications Ministry split

On 25 May 2014, the President did away with the former Ministry of Communications and created the new Ministry of Telecommunications and Postal Services (MoTaPS) and Ministry of Communications (MoC). According to the President's media statement, the MoC is to be responsible for communication policy and strategy, information dissemination and publicity, and branding SA abroad, and "will be formed out of" ICASA, the SABC, GCIS, Brand SA and the MDDA.

Exactly how ICASA (or for that matter, the MDDA) helps further the goals stated was not at first (or now) apparent. Nor was it at first apparent exactly how the duties would be split.

However, by Presidential Proclamation, the President transferred the administration of the following Acts, inter alia, to the new MoTaPS:

- Sentech Act
- Postal Services Act, South African Post Bank Ltd Act and South African Post Office SOC Ltd Act
- Electronic Communications and Transactions Act
- EC Act
- State Information Technology Agency Act

The President also later transferred the administration of the Broadband Infraco Act to the MoTaPS.

The President transferred the powers and functions of GCIS as well as the administration of the following Acts to the MoC:

- Films and Publications Act
- Broadcasting Act
- ICASA Act
- MDDA Act

Nevertheless, there remain problems. For example, giving the MoC authority to administer the ICASA Act (appoint Icasa, etc) and then giving MoTaPS authority to administer the EC Act doesn't work real well. In terms of the ICASA Act, ICASA can make recommendations to the Minister (ie, MoC) in terms of the underlying substantive legislation. However, the MoC does not administer all of the underlying legislation. The MoTaPS, for example, administers the EC Act.

On the other hand, in terms of the EC Act, the Minister (ie, MoTaPS) makes policy and policy directions - both in terms of electronic communications and broadcasting matters. Therefore, according to the EC Act, the MoTaPS (not MoC) has the authority to issue policy and policy directions in respect of electronic communications and broadcasting matters that are set out in the EC Act, for example, digital migration.

The confusion could be cleared up by a full audit of all legislation previously administered by the previous Ministry of Communications. A more nuanced re-allocation of legislative provisions then could be done. However, the inherent difficulty of giving responsibility over a converged ICT industry to two separate Ministers, remains.

Regulations

Call Termination Regulations

In a bold regulatory move, ICASA published new call termination regulations in February 2014, establishing asymmetric rates, because of the entrenched dominant positions of Vodacom and MTN. Not unsurprisingly, Vodacom and MTN took the regulations on review to the High Court. And also not unsurprisingly, the High Court decided that ICASA's procedure was in violation of administrative justice. The Court gave ICASA until October to revise the regulations. Also, not unsurprisingly, ICASA dropped the severity of the asymmetry when it published new call termination regulations in October 2014.

So, what does this tell us? One, ICASA's capacity and competencies to carry out its mandate is not sufficient. Two, dominant players will take ICASA to court (or threaten to take ICASA to court) if ICASA makes a decision that they do not like (negatively affects profits), thereby taking advantage of ICASA's capacity and competency shortfalls. ICASA, in turn, becomes more reluctant to make bold (ie, necessary) regulatory moves.

Cost to Communicate Programme

ICASA gave notice of its intention to implement a Cost to Communicate Programme in June 2013, incorporating voice call termination, as well as the following.

- value chain analysis (to identify where along the value chain, there is ineffective competition, leading to regulatory interventions)
- local loop unbundling regulations
- regulations for broadcasting wholesale transmission services

Although ICASA promised regulations to be finalised by April 2014, apart from requests for information from licensees, ICASA has been silent.

ICASA published revised draft Bitstream and Shared/Full Loop Regulations in September 2013, and then an explanatory note three months later. Hearings to be held in February 2014 were cancelled. A workshop was held in March 2014. Sadly, no regulations have been made.

In the Cost to Communicate Programme, ICASA stated that it has finalised the market inquiry and that it will initiate a regulation making proceeding in respect of broadcasting wholesale transmission services. More than fifteen months later, without explanation, ICASA withdrew its inquiry findings, but has not made regulations.

Pending Proceedings

- Digital Migration - the last official policy document appears to be the proposed amendment to the digital migration policy published by the then Minister in December 2013. ICASA published the Final International Mobile Telecommunications Roadmap, 2014 and draft radio frequency spectrum assignment plans in November 2014.
- Policy Reviews - these documents were published in November 2013: National Integrated ICT Policy Review Discussion Document and Broadcasting Policy Review.

Conclusion

The broadband policy makes assumptions that more universal connectivity is good, that lower prices are good. Are we making progress towards these goals?

It seems to me that if we want to make progress, we need to identify the key regulatory issues - wholesale access; access to unbundled facilities, coordinated build and facilities sharing - whatever they are - and get them right? Kind of what ICASA did with call termination regulations (minus the court battle).

Instead, we keep re-imagining the policy and legislative framework without ever getting around to effective implementation. Don't get me wrong, I think we do need to reimagine the regulatory framework from time to time. And now is a good time to do that. But we also have to regulate the hard issues. We have to get serious about giving the regulator the capacities and competencies to do that. And then get out of the way and let them do it.

There has been a flurry of inactivity (and intermittent activity) in 2014. But are our citizens, communities and country better off than they were a year ago? Or can we do better?