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Regulatory Effectiveness: Stakeholder Perceptions of Namibia's Communications Regulatory Framework

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REGULATORY EFFECTIVENESS: STAKEHOLDER PERCEPTIONS OF NAMIBIA'S COMMUNICATIONS REGULATORY FRAMEWORK[1]

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ABSTRACT
Communications regulatory frameworks are established to achieve myriad regulatory objectives. These may include affordable pricing, consumer welfare and competition. A regulatory framework is therefore endowed with regulatory governance measures and regulatory incentives to enable it to achieve these purposes. In applying these measures and incentives, the framework becomes effective, or ineffective, depending on whether the regulatory purpose is met. The purpose of this qualitative exploratory study was to assess the perceptions of the stakeholders, as active participants in the evolution of the framework, regarding the effectiveness of the types of measures and incentives implemented within the Namibian institutional context. Perception studies can be valuable because they offer insight on how the policies, laws and regulations that are implemented are viewed by the stakeholders for whom they are designed and implemented. While these are not the only inputs, knowledge of stakeholder views informs the future redesign of these measures and incentives to make the regulatory framework increasingly more effective. One of the main findings of the research was that the perceived conflict of interests between the ICT policy role of the Ministry of ICT and its shareholder role over Telecom Namibia negatively impacts competition. Its policy support for the dominant role of Telecom Namibia is in conflict with the regulatory purpose of encouraging private investment. The conclusion was that this regulatory governance design measure conflicts with the regulatory framework and requires legislative amendment and a re-design of the framework in an effort to improve competitiveness in Namibia's electronic communications market.

KEYWORDS
communications regulatory framework, regulatory effectiveness, institutional endowment, regulatory governance, regulatory incentives, regulatory purpose, competitiveness, regulatory independence, perception studies, Namibia

INTRODUCTION
Namibia enjoys a wide range of telecommunications services, including 3G and 4G mobile services and low prepaid voice tariffs, indicating relatively affordable pricing. However, the telecommunications sector performance is weak because of the poor penetration of a basket of communications services, in particular data services (Stork, 2011; ITU, 2012). It is therefore important to understand the regulatory environment that affects market development. The sector regulator is the Communications Regulatory Authority of Namibia (CRAN), established under the Communications Act No.8 of 2009, which replaced the National Communications Commission (NCC) in 2011.

The electronic communications market structure is atypical, as the government of the Republic of Namibia directly and indirectly owns all the competing dominant telecommunications companies, namely Telecom Namibia Limited (TN) and Mobile Telecommunications Limited Namibia (MTC) (TN, 2011; MTC, 2011). The Namibian Broadcasting Corporation (NBC) is wholly government owned and is not regulated by the Communications Regulatory Authority of Namibia (CRAN). Furthermore, the Executive is yet to decide to commence Part 4 of the Communications Act, 2009, which creates the universal service fund (USF) (MICT, 2011; MICT, 2012). The universal service policy guidelines were published in April 2013 (MICT, 2013).

In the period prior to 2011, reduction of interconnection rates for mobile traffic termination to NAD0.30[3] and the on-net and off-net price ruling, whereby off-net call prices should be restricted to the level of on-net calls, were some of the key regulatory interventions by the National Communications Commission (NCC, 2011). Contrary to the claims by the Mobile Telecommunications Company Ltd (MTC), its EBITDA[4] margin rose from 50.9% in 2008 to 53.8% in 2009 as a result of the cut in termination rates (Stork, 2010). Service licences, spectrum licences and licence conditions are issued by CRAN in terms of its regulatory powers and functions under the Communications Act (Republic of Namibia, 2009). CRAN converted the telecommunications licences and issued service and technology neutral ECNS and ECS[5] ECNS – electronic communications network service; ECS – electronic communications service. licences from 2012 based on the regulations adopted in 2011 (CRAN, 2011a; CRAN 2012a).

In 2012, CRAN proposed carrier dispute resolution regulations (CRAN, 2012b) in order to address any disputes arising within the provisions of the Communications Act, including access disputes. Also in 2012, it preliminarily classified three operators, PowerCom (Pty) Ltd trading as Leo, MTC and TN as dominant (CRAN, 2012c; CRAN, 2012d).

In January 2012, Guinea Fowl Investments Two Ltd, the shareholder of Leo, had applied to CRAN to transfer Leo to TN (CRAN, 2012e). In June 2012, CRAN approved the transfer subject to the suspensive condition that TN be privatised with a minimum of 25% private shareholding and that the establishment Act of TN be amended to enable

1 This article is based on the research report completed for the Master of Management in ICT Policy and Regulation, University of the Witwatersrand, Johannesburg.
2 The author was previously the CEO of the Communications Regulatory Authority of Namibia (CRAN).
3 NAD – Namibian dollars.
4 EBITDA – company earnings before interest, tax, depreciation and amortisation.
5 ECNS – electronic communications network service; ECS – electronic communications service.

the privatisation (CRAN, 2012f). In a subsequent challenge to that regulatory decision, the High Court ruled that the parties were not given a right to be heard prior to the issuing of the condition, and that the decision was ultra vires and violated the separation of powers principle, as the decision sought to order parliament to amend a piece of its legislation (*Guinea Fowl Investments Two v. Communications Regulatory Authority of Namibia and others).*

The series of regulatory interventions, as outlined above, raised stakeholder interest in the effect of the regulatory decisions on the market structure and in the effectiveness of regulation. In conducting the analysis, a perception study was undertaken because at the time of conducting the research it was too soon after the regulatory decisions had occurred to undertake a full-scale market review. This study aimed to gauge how stakeholders perceived regulatory effectiveness by exploring the promotion of competition through new and converted licences; incentives for new entrants, such as rights of way, infrastructure sharing and interconnection; and spectrum management.

IDENTIFYING THE RESEARCH GAP FOR REGULATORY PERFORMANCE AND EFFECTIVENESS

In 2007, the Namibian Economic Policy Research Unit (NEPRU) stated that due to its institutional weaknesses (NEPRU, 2007), Namibia was lagging behind Botswana and South Africa in telecommunications sector reform and performance. A study of Namibia's telecommunications sector performance for the period 2008 to 2009 included a telecoms regulatory environment (TRE) perception survey, which reported that Namibia's regulatory framework required improvement in order to be evaluated as efficient (Sherbourne & Stork, 2010). The study reported here sought to extend the review to regulatory effectiveness post the 2009 TRE survey, by means of a study to better understand the performance of Namibia's regulatory environment with respect to regulatory purpose, institutional endowment, regulatory governance and regulatory incentives pertaining to the communications sector. The events set out in the introduction above indicate how Namibia's communications regulatory framework is changing and suggest that these changes present fertile ground for generating diverse perceptions about the effectiveness of the communications regulatory framework. This study was conducted during 2012 and represents the conditions at that time.

A NOTE ON THE VALUE OF PERCEPTION STUDIES

A perception study can be criticised for simply reporting opinions. However, noting and understanding the perceptions of stakeholders in a regulatory process can lead to establishing credibility and legitimacy for the regulatory framework in which the stakeholders have buy-in and are willing to cooperate. In explaining the utilisation of perception studies, Galpaya and Samarajiva (2009) argue that the "goal of the TRE is to measure perception among informed stakeholders, those who have expert, in-depth knowledge about (or first-hand experience in dealing with and navigating) the various aspects of the regulatory and policy environment in a given country" and limit the population for participation to senior level decision-makers. The study confirmed that this analytical approach can assist in clarifying the best and worst practices, and in tracking progress in regulation and advances in regulatory performance. In studying sector performance in Namibia, Sherbourne and Stork (2010, p. 21) collected data from three sets of stakeholders, (i) those directly affected by regulation; (ii) sector analysts; and (iii) those with an interest in sector development for public benefit. The study reported here focused on regulatory purpose, the institutional endowment, regulatory governance and regulatory incentives to understand regulatory effectiveness.

REGULATORY PURPOSE AND REGULATORY EFFECTIVENESS

Various authors argue that regulatory intervention is required for competition, through the issuance of licences; removal of barriers to entry; prevention of market failure; protection of consumer interest including increasing access to technology and services; and meeting of public interest objectives as outlined in national policies (Blackman & Srivastava, 2011, p. 10; Intven & McCarthy, 2000; OECD, 2014, pp. 13 and 15). Reasonable services must be provided at reasonable prices and this necessitates regulation (Melody, 2001, p. 159). CRAN was established to achieve these typical aims, as set out in its enabling legislation and the national policy provisions (Republic of Namibia, 2009).

In emphasising the regulatory imperative, Melody (2001) argues that interconnection with dominant licensees on reasonable terms is crucial for new entrants, but will only occur if regulation enforces it. Levy and Spiller (1996, p. 14) state that "… successful regulatory policy encourages both private investment and efficient operation …" These elements all refer to the regulatory purpose, the attainment of which may lead to regulatory effectiveness.

A communications regulatory framework can therefore be argued to be effective when all its various components function in such a manner that its overall purpose is seen to be met. The study considered to what extent this statement could be said to be true for Namibia's framework, with due attention to regulatory purpose, the institutional endowment, regulatory governance and regulatory incentives.

THE INSTITUTIONAL ENDOWMENT

Levy and Spiller (1996) argue that a communications regulatory framework may not be effective and its purposes may not be met because of the way in which the aforementioned regulatory processes interrelate with political and social institutions. They state that effective regulation "… rests on the development of a regulatory governance structure that constrains arbitrary administrative action and thereby encourages private investment, and on regulatory incentives that promote efficiency as well as investment" (Levy & Spiller, 1996, p. 14). In terms of the OECD's regulatory policy and governance framework, all necessary and complementary regulatory mechanisms and structures should be intact to meet the regulatory purpose (OECD, 2014, pg. 14).

Levy and Spiller (1996) identify five non-static elements for any country's institutional endowment. These ideal elements are: legislative and executive bodies, the Judiciary, customs and norms, the character of the competing interests and the country's administrative capabilities. And included therein are the administrative capabilities of the regulator. It is within this institutional endowment that regulatory governance and regulatory incentive principles are implemented.

THE INSTITUTIONAL ENDOWMENT AND REGULATORY GOVERNANCE

In order to assess the perceptions of effectiveness regarding the communications regulatory framework, it is necessary to explore what the normative communications regulatory framework entails. The regulatory governance concept refers to the rules that influence the power of the regulator, i.e., structural independence; financial independence; budgetary independence; role clarity; functionality; power for allocatation of licences, administration of universal service, relationship with government, appointment of the regulator Board and management; accountability; transparency; and predictability. These principles are extracted from Levy and Spiller (1996), Smith (1997), Stern and Holder (1999), Intven and McCarthy (2000), Mustafa (2002), Lodge (cited in Jordana & Levi-Faur, 2004), NERA (2004), Brown, Stern, Tenebaum and Gencer (2006), Montoya and Trillas (2007), Galpaya and Samarajiva (2009), Sherbourne and Stork (2010), ITU (2011b). Furthermore, ideas and elements to design the conceptual framework were adopted from the General Agreement on Trade in Services (GATS) (WTO, 1995), the Telecommunications Regulatory Governance Index (TRGI) (Waverman & Koutrompis, 2011), the Telecommunications Regulatory Environment (TRE) survey approach (Galpaya & Samarajiva, 2009), and the ECTA scorecard design (ECTA, 2009). The approach to regulatory governance in the Communications Act (2009) and national ICT policies also informed the design of the conceptual framework.

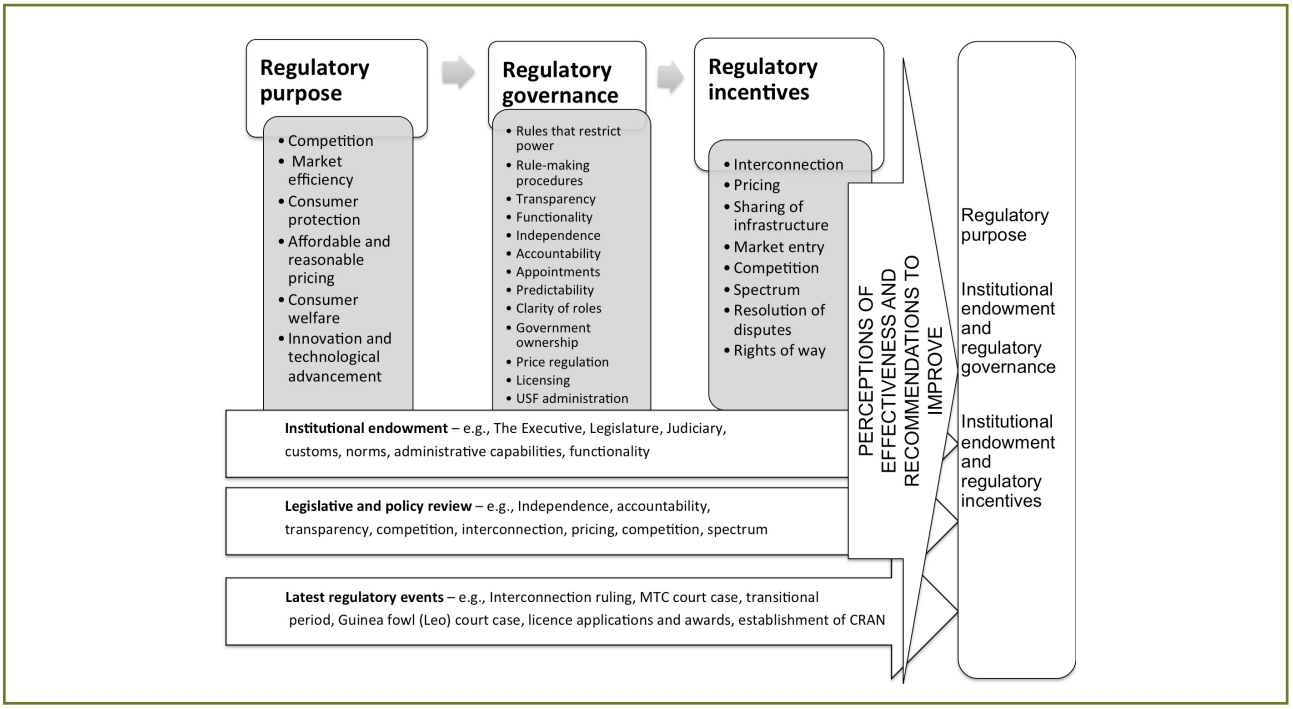
THE INSTITUTIONAL ENDOWMENT AND REGULATORY INCENTIVES

The concept of regulatory incentives refers to the incentives granted to relevant stakeholders in order to encourage compliance with regulation. These incentives apply with respect to price regulation; competition; private ownership; market entry; interconnection; infrastructure sharing; rights of way; spectrum administration; and dispute resolution. The parameters of this concept were extracted from Levy and Spiller (1996); Montoya and Trillas (2007); Tenbücken and Schneider (2004); Galpaya and Samarajiva (2009); Namibia's TRE as reported on by Sherbourne and Stork (2010); as well as the GATS, TRGI and TRE surveys and ECTA scorecard. These perspectives were further informed by a review of the Communications Act (2009) and the national ICT policies.

THE CONCEPTUAL FRAMEWORK: THE "IDEAL TYPE" DESIGN AND ACTUALISATION OF AN EFFECTIVE REGULATORY FRAMEWORK

The common elements, dimensions and indices of effective regulatory frameworks, as mentioned above, are the much-needed dimensions and principles for assessing the communications regulatory framework in a given country. These elements are necessary in order to interpretate how effective the framework is perceived to be on the basis of how it is addressing the regulatory aims. These elements were therefore considered to be the appropriate ones to construct the conceptual framework as the basis for assessing stakeholder perceptions, using widely accepted regulatory objectives, illustrated in Figure 1 below. The five main units of analysis are: (i) regulatory purpose; (ii) institutional endowment; (iii) regulatory governance in relation to the institutional endowment; (iv) regulatory incentives in relation to the institutional endowment; and (v) perceptions of effectiveness of Namibia's communications regulatory framework.

FIGURE 1: CONCEPTUAL FRAMEWORK FOR ASSESSING PERCEPTIONS OF STAKEHOLDERS



This conceptual framework has the academic value of providing a well-defined model that comprises various factors used to assess the perceptions of effectiveness of regulatory frameworks by stakeholders. The study goes beyond simply recording the subjective opinions of the stakeholders. It proposes a well-defined approach for utilising perceptions to construct a view of the phenomenon of regulator effectiveness, by recording the views of stakeholders and the reasons for such views, with concrete examples, based on factual developments, validating those views with a legal and theoretical analysis, and obtaining material recommendations for improvement.

RESEARCH APPROACH – DOCTRINAL ANALYSIS OF LAWS AND INTERVIEWS

Qualitative research methods can reveal the subjective views of participants, in particular contexts based on their experiences. Interpretivism denotes that there are various realities and various perspectives (Neuman, 2011, p. 94; Clarke & Dawson, 2000, pp. 54-56), and in-depth studies are needed to explore the inherent complexities in phenomena. For this study, doctrinal analysis was used to review and interpret the applicable policy and legislation (Clarke & Dawson, 2000), while semi-structured interviews were used to explore stakeholder perceptions. The participants were selected based on their experience of the regulatory environment (Thompson & Walker, 1998). Triangulation of the data was conducted by critically assessing the perceptions held, through comparing and contrasting this data with data obtained from the review of policy and law, not simply accepting the perceptions at face value (Neuman, 2011). This approach enhances the validity of the data. This article reports on the perceptions of senior decision-makers from industry, government, regulators and advocacy groups, of whom the majority of respondents were from industry, thus presenting a strong industry focus in this particular article. The article presents selected findings, and translates the key analytical points into a simple diagnostic chart, using the "traffic light" analogy (Government Digital Services, 2012), indicating perceptions of effectiveness (green), partial effectiveness (amber) or ineffectiveness (red).

FINDINGS AND ANALYSIS

FRAMING THE REGULATORY PURPOSE: INSTITUTIONAL ENDOWMENT, POLICY AND LEGISLATION AND KEY REGULATORY EVENTS

The Communications Act (2009) establishes the independent regulatory authority for the Namibian communications sector, the Communications Regulatory Authority of Namibia (CRAN). The state-owned Enterprise Governance Council (SOEGC) Act (2006) recognises CRAN as a state-owned enterprise (SOE), limiting its financial and structural independence. In terms of the Communications Act, the regulator may award service and spectrum licences, and must set up and administer the universal service fund (USF). CRAN exercises the regulatory role and the MICT exercises the policy role. The CRAN Board is appointed by the MICT, and CRAN must submit its annual report to both the MICT and the SOEGC, not to Parliament. CRAN is required to disclose its decisions, the reasons for its decisions and interpretations of such decisions, and to keep public registers of proceedings, registers of licences and allow for public inspections. CRAN may not change its decisions without following due process in terms of the SOEGC Act (Republic of Namibia, 2006).

In terms of the applicable laws, the Executive plays a major shareholder role in respect of regulated SOEs such as Telecom Namibia, as well as SOEs not regulated by CRAN, such as the National Broadcasting Corporation (NBC) (Republic of Namibia, 1991), while the Executive also executes a policy role via the Ministry of ICT, raising many opportunities for conflict of interest. Parliament does not play any oversight role as a multi-party democratic institution.

In recording the data from key industry informants, the enactment of the Communications Act (2009) by Parliament and the adoption of the Overarching ICT Policy (MICT, 2009a), the Telecommunications Policy (MICT, 2009b) and the Broadcasting Policy (MICT, 2009c) by the Executive were perceived as a positive development by industry stakeholders, consumer advocacy groups, academics, government respondents, the regulator and expert respondents. The study revealed that the Namibian communications policies, laws and regulations contain many of the best practice elements, generally regarded as requisite for an effective communications regulatory framework. However, these policies are either not implemented efficiently or not implemented at all. In certain instances, the legislation contradicts the provisions of the policies.

The following examples are cited in support of this finding: (1) The Overarching ICT Policy of 2009 includes a statement to the effect that government will divest shareholding in ICT SOEs (MICT, 2009a). However, by the end of 2012 no action had been taken in this regard and government still retained complete control over such shareholdings, including ownership of Telecom Namibia. (2) With respect to rights of way, industry stakeholders believed that their complaints to CRAN about failure to get servitudes from the City of Windhoek were taking too long to be responded to and were not being adequately addressed. In their view, this was because CRAN's role was as mediator with the City of Windhoek and the limitations placed on it in legislation prevented it from being more proactive on rights of way. (3) The time-consuming licence applications process for spectrum licences (the time taken for application, publication of notice for public comment in the *Government Gazette*, comments process, review of comments, final decision) added to the perception of the limited effectiveness of the regulator, noting the importance of spectrum licensing for the introduction of new mobile and broadband technologies.

These weaknesses negatively affect the regulatory purpose of promoting competition, technological innovation and sector development, thereby negatively affecting consumer welfare in the long term.

The High Court of Namibia reviews the decisions of the regulator in terms of the Communications Act (2009), and the stakeholders perceive this as a partially effective mechanism for advancing the regulatory framework. The regulator must give reasons for its decisions and in this manner accountability is instilled with respect to the regulated entities and consumers, in line with the guidance of the OECD (2014). The High Court reviews decisions of the regulatory authority. Although the Act grants CRAN relatively wide discretionary power, this avenue for review provides industry with an opportunity to challenge CRAN's decisions. The review mechanism of the High Court is seen to have the power to curtail the wide powers of the regulator. Thus, with respect to the role of the Judiciary, the High Court of Namibia exercises its crucial checks and balances role. However, it requires the necessary training in ICT policy and regulatory matters, in order to be able to review the decisions of the regulator appropriately. Industry and expert stakeholders perceived this dimension as only partially effective, noting their criticism of the High Court decision on the transfer of Leo from Guinea Fowl Investments to TN. Their criticism was that the High Court erred in its decision, by upholding the review and setting aside the decision of CRAN to conditionally approve the application for transfer of a telecommunication licence. Moreover, the stakeholders were dissatisfied by the effect of the courts decision. The effect was that CRAN could not impose the type of condition it wanted to, therefore the merger transaction was approved without any conditions. The concerns that were expressed were that the decision resulted in reducing competition in the market and concentrating market power in a public telecommunications company, resulting in government controlling the sector. This discourages private investment, as the private company is replaced with a public company. However, the broad independence and credibility of the judicial system and the relative independence of the regulator allows for sufficient credibility of the Judiciary with respect to the telecommunications sector, as propounded by Stern and Holder (1999), hence the perception of partial effectiveness.

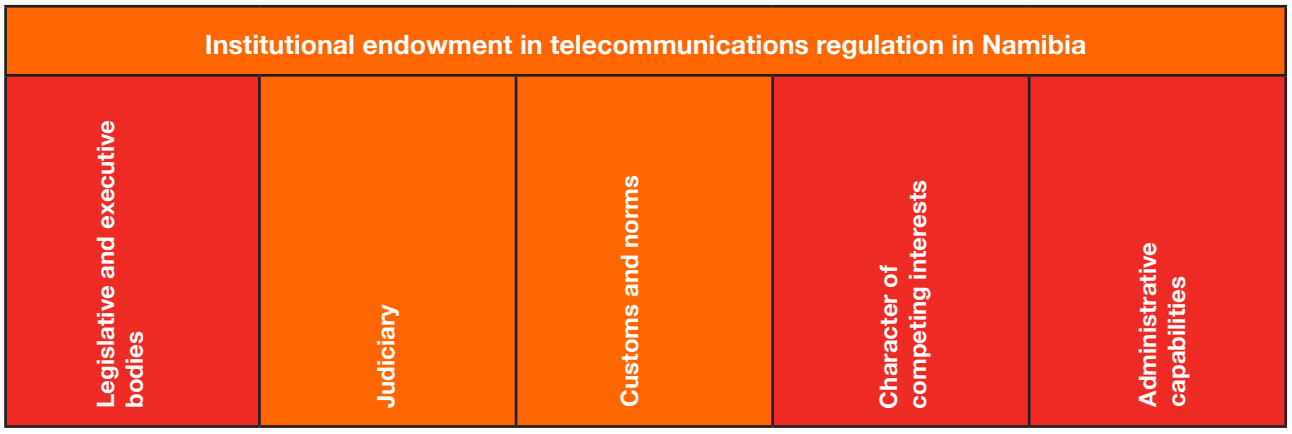
With respect to customs and norms, Namibia has a culture of informal settlement of disputes, which may compromise the integrity of CRAN if followed. Industry stakeholders perceived this dimension to be only partially effective, because the custom of informal meetings, in particular attempts at political engagement by the Executive with respect to the MTC 4G spectrum application (New Era, 2012), does not constitute governance best practice. Stakeholders need to participate in formal procedures to have matters addressed and resolved, because conduct that appears improper will bring the regulator's integrity into question (Brown et al., 2006, p. 63).

Stakeholders perceived the administrative capabilities of the institutions with respect to the regulatory processes of CRAN and the policymaking processes of the MICT as weak, inefficient and bureaucratic. Stakeholders believe that the institutional endowment is undermined by the lack of consistent application of the relevant policies and legislative provisions. In particular, there are competing social and economic interests between the consumer welfare role of the regulator and the profit motives of the licensees that have not been addressed. There are also competing interests among the licensees, as competitors, that require regulation by CRAN. For example, the NBC is largely unregulated except for licensing and licence conditions; the USF legal provisions are not operational; and dominant operators charge inequitable rates for infrastructure sharing. These competing interests have for the most part remained unresolved and have created the perception of an ineffective regulatory system.

Indeed, Namibia's communications regulatory framework operates in an environment that is dominated by political involvement in regulatory matters and government shareholding in dominant ICT SOEs. This creates the risk of regulatory capture for the partially independent regulator, as it is structured in such a fashion that it can be unduly influenced by the Executive in terms of its financial plans and strategic activities, as this requires approval from the Executive branch of government. Furthermore, the Minister makes CRAN Board appointments. In terms of the OECD governance principles for regulators, the funding source, or in this case the approving authority, should not influence regulatory decisions (OECD, 2014, pp. 99-98).

In summation, the conservative role of the legislative and Executive bodies, the difficulty in successfully addressing competing interests through regulation and the weaknesses identified in administrative capabilities across the policy and regulatory institutions lead to perceptions of ineffectiveness in promoting sector development. The Judiciary and customs and norms are considered to be only partially effective, resulting in an institutional endowment that can only be considered to be partially effective, as indicated in Figure 2 below.

FIGURE 2: PERCEPTIONS OF EFFECTIVENESS OF THE INSTITUTIONAL ENDOWMENT



REVIEW OF REGULATORY GOVERNANCE IN RELATION TO THE INSTITUTIONAL ENDOWMENT, POLICY AND LEGISLATION, AND KEY REGULATORY EVENTS

This section discusses issues of regulatory independence from industry and government, regulatory accountability, as well as the process of regulatory decision-making. The key analytical points are highlighted in Figure 3 below.

CRAN is not a structurally independent regulator because of its classification as an SOE, despite the provisions of the Communications Act (2009) concerning the establishment of an independent regulatory Authority and organisational separation from the MICT. The dual classification creates a governance conflict of interest for the Minister of ICT as the line shareholding Minister for these SOEs, as against its ICT policy role. This conflict of interest may compromise CRAN in its role as sector regulator. Even where it has demonstrated the ability to take independent decisions, such as in the *Guinea Fowl–Leo* transfer decision cited above, this does not make the regulator structurally independent. CRAN has taken independent decisions in handling licence applications and awarding such licences for service and spectrum licences (CRAN, 2011b), despite attempted political interference from the then Prime Minister regarding MTC's 4G-spectrum application (New Era, 2012). Considering this, the dimension of decision-making was analysed as effective.

The Minister of ICT has approval powers over the budget and strategic plan of the regulator (Republic of Namibia, 2009). This creates the potential for political interference and regulatory capture. Even where the regulator may not allow political interference, this does not make the regulator financially independent, especially if government approves the budget, but does not fund the regulator sufficiently. Government approval of the budget is not needed to promote accountability, as the accountability and transparency provisions contained in the Communications Act (2009) already deal with this matter. This dimension of financial independence was analysed as ineffective.

The separation of roles and responsibilities between the regulator and the Minister are clearly defined by the Communications Act (2009) and the national ICT policies. The MICT makes policy and CRAN regulates it, except where indicated otherwise. Industry stakeholders, however, have the perception that the roles are not clearly and correctly defined, because the Ministry could have an indirect say, using the budget as a back door, to either support or deny particular projects of the regulator. Ministerial approval of the budget can impede progress of certain regulatory projects and thus affect regulatory processes and decisions. In terms of the OECD guidance on governance principles, an effective regulator must have clear objectives and these must be clear to the stakeholders (OECD, 2014, p. 31). NERA (2004, p. 2) reported that in South Africa, the functional ambiguity between regulator and policy-maker impacted negatively on the regulator's effectiveness and integrity. Despite stakeholder perceptions, the fact that the MICT makes policies requiring CRAN to take certain regulatory steps in terms of government policy does not make CRAN an extension of the Ministry or lacking in independence, as long as (i) there is no interference in CRAN's implementation of the policy (Melody, 2001); and (ii) CRAN does not receive instructions in this regard (Montoya & Trillas, 2007). Given the perceived lack of role clarity, this dimension was perceived as only partially effective.

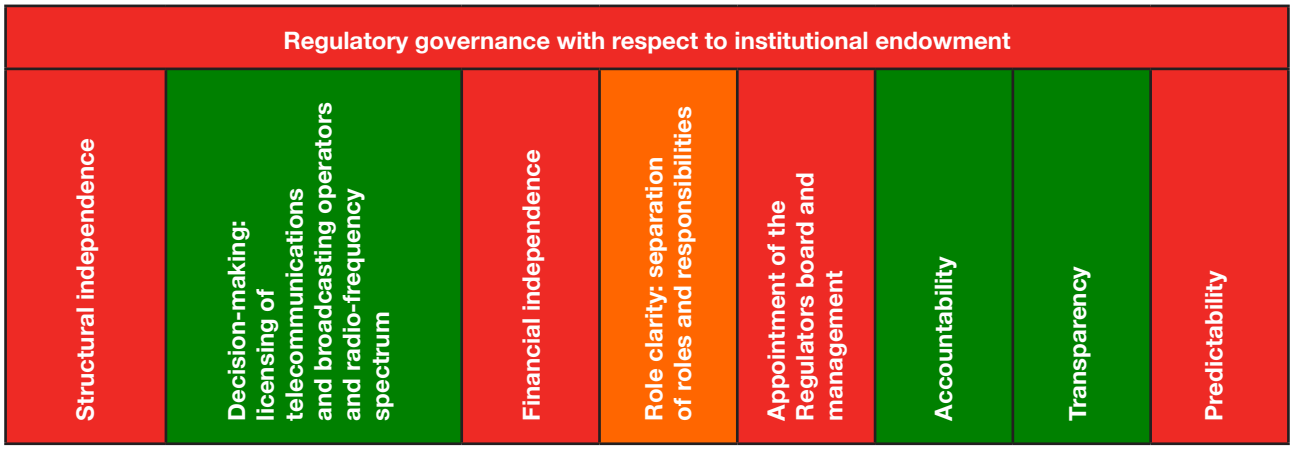
The management of the regulator is appointed by the Board and the Board is appointed in turn by the Executive, not by Parliament (MICT, 2010). Despite appointment following a credible, transparent recruitment process, subject to the SOEGC guidelines (Republic of Namibia, 2006), the role of the Executive creates the perception that the regulator's independence is compromised. Therefore, this dimension is classified as ineffective, based on the strong negative perceptions of the industry and expert stakeholders and advocacy groups.

The regulatory framework is perceived to be transparent as the regulator is required to, and does, publish notices of proposed regulations for consultation. All notices and all decisions are published in the *Government Gazette* of the Republic of Namibia. This dimension is considered to be effective.

According to Stern and Holder (1999), a regulatory framework may be regarded as predictable based on its transparent manner of communicating proposed regulations. This is applicable to the Communications Act (2009) that outlines a clear process to promote predictability in the exercise of regulatory decisions. However, despite the rule-making regulations that prescribe how changes to regulations must be made, stakeholders perceive regulatory governance as unpredictable. Industry stakeholders claim that the final decisions are uncertain. There are so many stakeholders that have a say in the licence-application and rule-making processes, as there is wide public consultation. Hence the outcomes are unpredictable as the regulator attempts to find the appropriate balance. While considering all views is an important part of regulatory decision-making, predictability is necessary for industry to ensure that it can strategise and plan with reasonable certainty. Considering the perceptions of the stakeholders that the system does not provide reasonable certainty (Stern & Holder, 1999; Brown, et al, 2006, p. 60), this element is classified as ineffective.

A regulatory framework needs to be properly governed in order to effectively restrain the arbitrary use of power. The governance of Namibia's communications regulatory framework does not effectively prevent potential abuse of power. For example, the lack of structural independence of the regulator and the ministerial appointments of the Board of the regulator create opportunities for potential political interference. This does not align with best practice for regulatory governance and effectiveness. Overall, the regulatory governance dimension is perceived as ineffective, as the majority of its constituent elements are perceived as ineffective.

FIGURE 3: PERCEPTIONS OF EFFECTIVENESS OF REGULATORY GOVERNANCE



REVIEW OF REGULATORY INCENTIVES IN RELATION TO THE INSTITUTIONAL ENDOWMENT, POLICY AND LEGISLATION, AND KEY REGULATORY EVENTS

In terms of the Communications Act (2009) the regulator must promote competition; licensees must share telecommunications infrastructure; and the Authority may prescribe prices and approve interconnection agreements and must intervene and resolve disputes. In terms of the policy provisions, the Authority's roles include the responsibility to promote efficient competition (MICT, 2009a); prevent any abuse of a dominant position; and encourage the sharing of networks between operators at non-discriminatory rates (Republic of Namibia, 2009). From a policy perspective, competition is potentially addressed by proposing to dilute government shareholding in ICT SOEs (MICT, 2009a), which would benefit Namibia through the ability to attract international investors and technology partners with possible market efficiencies to be gained. Government policy states (MICT, 2009a, p. 19):

> So long as Government continues with shareholding participation in ICT SOEs, Government will separate its policy development and regulatory roles from its role to maximise shareholder value. Commercialised state-owned enterprises in the ICT sector are managed separately from its policy and regulatory responsibilities.

However, in terms of the Post and Telecommunications Companies Establishment Act (Republic of Namibia, 1992), only the state may hold shares in TN. Namibia is not implementing the national policies that advocate divestment of government shareholding in ICT SOEs (MICT, 2009a). The NBC is not regulated by CRAN and is not legally obliged to share infrastructure (Republic of Namibia, 1991). Thus, the policy and regulatory environment for competition provides few, if any, real incentives to foster competitive markets in this sector. The competition segment is perceived as ineffectively regulated as government controls the major part of the sector.

Market entry is only addressed by the existence of consistent licensing rules and various new service and technology-neutral licences issued by CRAN to spur competition. This is, however, perceived as a bureaucratic process. The limitation on mergers and acquisitions of foreign-owned companies does not incentivise market entry to encourage competition. Coupled with majority or sole government ownership, the transfer of ownership of Leo to TN places the last of the major telecommunications companies under the indirect sole shareholding of government, thereby concentrating ownership in public hands.

As represented in Figure 4 below, pricing regulation has been enforced, to a limited degree, in respect of mobile voice service, through the pricing regulation interventions with respect to the mobile termination rates (MTRs) and the on-net and off-net rates (Stork, 2011). As indicated by Stork (2011), fixed and mobile broadband is, however, an area that would require future regulatory intervention. The dimension of price regulation is therefore perceived as partially effective.

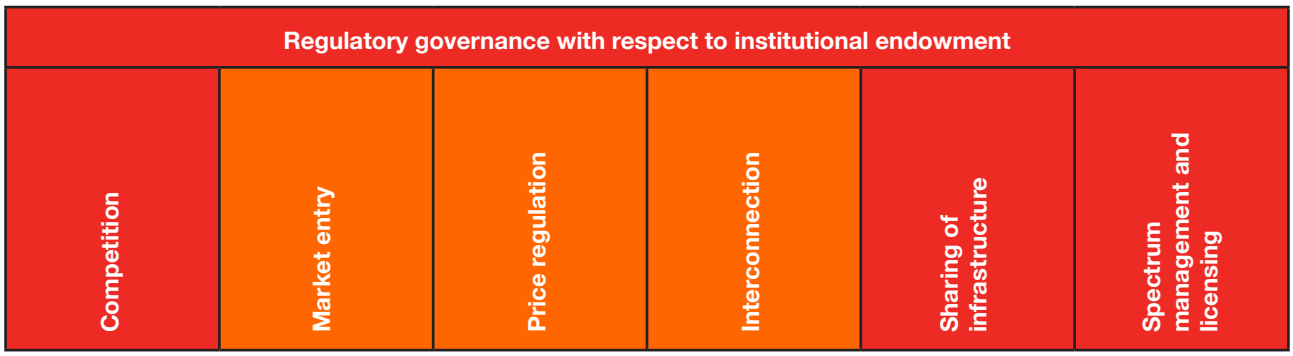
Interconnection rate regulation is also generally lacking. The MTR's rate ruling by the NCC allowed for greater competition amongst licensees and had a positive impact on the regulatory framework by allowing cheaper consumer voice services (Stork, 2010). However, issuing interconnection guidelines and addressing complaints by licensees about possible further rate reductions require further regulatory intervention. This is, however, a moot point where there is a shift to fixed and mobile monopoly provision.

The sharing of infrastructure is encouraged but not practically enforced. The pricing to share infrastructure, contrary to legislative provisions of the Communications Act (2009), is deemed too high, discriminatory, and requires regulatory intervention. The regulatory failure to address these complaints has left this aspect of the regulatory framework ineffective.

Spectrum is managed by CRAN, but the licensing process is perceived as inefficient, despite the fact that it allows for public consultation. The licensing period can be expedited and complaints of illegal spectrum use must be investigated and addressed fully.

The institutional implementation of the communications regulatory framework does not encourage liberalisation. This is contrary to the policies and the laws promoting it, as evidenced by government domination of the sector, contrary to its regulatory purpose. Overall, the regulatory incentives dimension is not perceived as effective by industry stakeholders, as demonstrated in Figure 4 below.

FIGURE 4: PERCEPTIONS OF EFFECTIVENESS OF REGULATORY INCENTIVES



IMPROVEMENTS REQUIRED: GEARING TOWARDS AN EFFECTIVE COMMUNICATIONS REGULATORY FRAMEWORK

IMPROVING THE INSTITUTIONAL ENDOWMENT

To improve the administrative capability, the MICT and CRAN alike should develop clear business, policy and regulatory processes, to be communicated to stakeholders. These processes should contain clear timelines. CRAN should make and practically enforce regulations outlining dispute resolution regarding the sharing of infrastructure, pricing and interconnection. CRAN should also recommend to the Judicial Service Commission, the MICT and the Parliamentary Standing Committee on ICT the need to facilitate training in ICT policy and regulation for judges, civil servants and parliamentarians, to ensure the competent and independent review of regulatory actions and the correct application of ICT policies. CRAN should invite stakeholders to open and transparent consultations procedures and not follow informal dispute settlement processes. There are conflicting provisions in the Communications Act (2009) and national ICT policies, with respect to government ownership of ICT SOEs and the independence of CRAN. To cure this disharmony, the Communications Act (2009) should be amended to ensure that it is in line with the ICT policies.

IMPROVING REGULATORY GOVERNANCE

CRAN is not structurally independent and should be de-classified as an SOE. It should report annually directly to Parliament and the Board should be appointed by Parliament. The MICT should relinquish its conflicting roles, as per its ICT policies, and divest some of its shares in MTC and TN. To ensure predictability, transparency and accountability, CRAN should advise on, and publish a schedule of, planned regulatory engagements for the information of its stakeholders. If CRAN is to remain an SOE accountable to the MICT, the Executive branch of government should delegate the shareholder powers over TN, MTC and NBC to the Ministry of Trade and Industry. Legislative amendments should be made to the establishment statutes of TN, MTC and NBC in this regard. The MICT should, however, still execute the national policy role over the telecommunications industry, whose policies are binding on CRAN to make regulations. The USF provisions in the Communications Act (2009) should be put into operation and the regulations should be made to enable the implementation of the regulatory objectives of socio-economic welfare. CRAN should not obtain budgetary approval from the MICT. The Board should approve the budget of CRAN and the Board must be held accountable to Parliament in terms of its performance agreements and annual report.

The proposed separation of roles to attain improved regulatory governance, independence and incentives should ideally be structured as presented in Table 1 below. In terms of this structure, CRAN would be structurally and financially independent in terms of the regulatory governance dimension. The Judiciary would ensure the checks and balances and Parliament would hold the regulator accountable. This role can be delegated to a standing committee of Parliament.

CRAN would also be independent in its regulatory decision-making, in terms of its powers regarding the regulatory incentives such as competition, because the conflicting role of the MICT would have been removed. With this structure, CRAN stands a better chance to minimise or avoid regulatory capture and political interference to achieve the regulatory purpose. This approach would provide clearer role definition to the stakeholders.

TABLE 1: PROPOSED ROLE SEPARATION

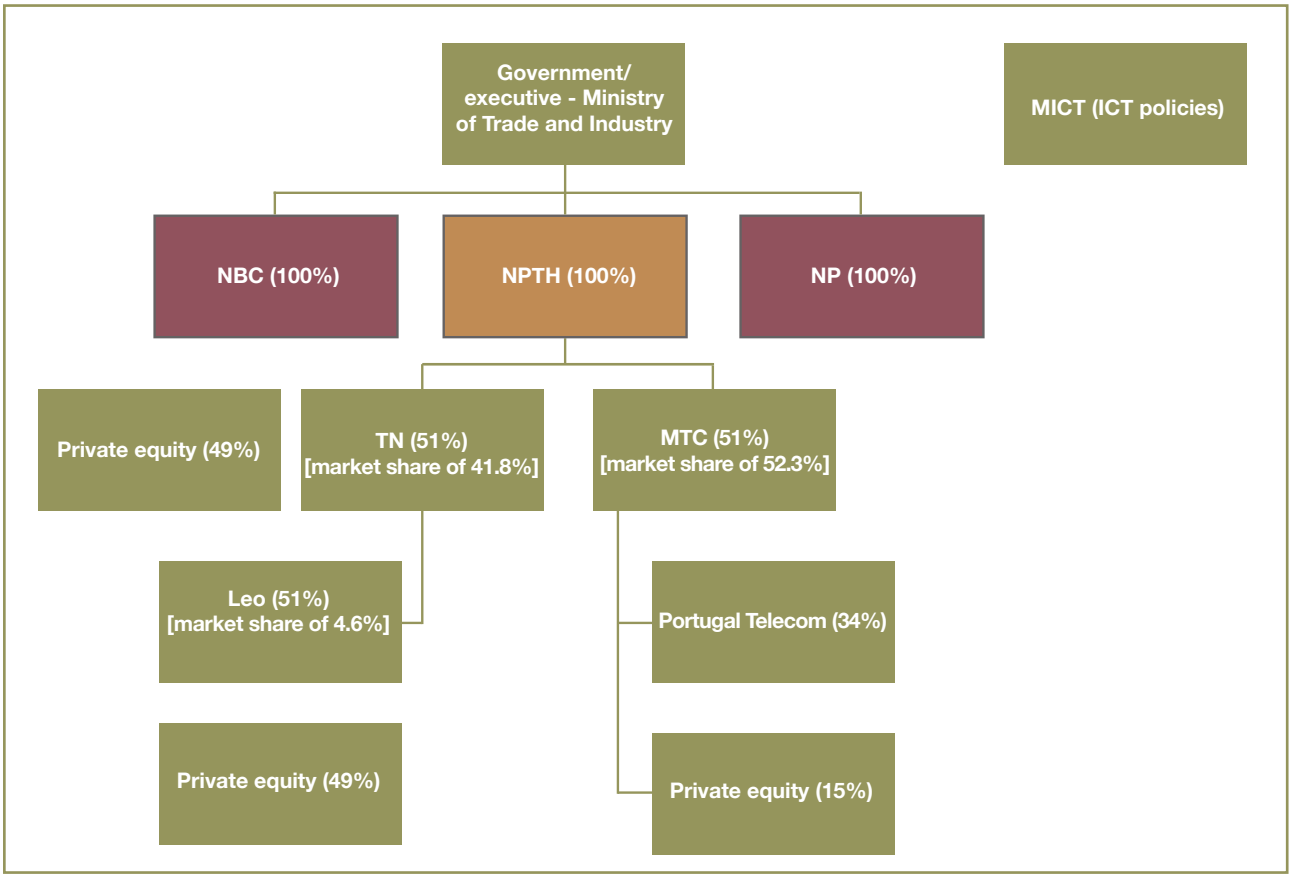
CRAN (regulatory independence and incentives	Parliament (regulatory governance)	Judiciary (regulatory governance)
Budget Financial investments Business plan Management appointment Price regulation Competition Licensing Spectrum management Interconnection Sharing of infrastructure Resolution of conflict Administration of USF	Receipt of CRAN Annual Report Receipt of USF Annual Report Board appointment and remuneration	Judicial review

Figure 5 below depicts the proposed government shareholding structure. This structure demonstrates that the ICT policy role could remain the domain of the MICT. There would be only limited conflict of interest, if the Ministry of Trade and Industry would exercise the shareholding powers over the ICT SOEs. This structure emphasises that policy and shareholding roles can be distinct and mutually exclusive.

Furthermore, the proposed structure indicates that TN could be 51% owned by government and 49% privately owned. This proposed structure is likely to enable an effective regulatory framework by introducing a better regulatory governance framework and allowing for better regulatory incentives. Competition would also be addressed if government dominance of the ICT sector were to be reduced through the introduction of private ownership.

For these purposes, in Figure 5 below green indicates shareholding that is favourable for competition and private investment; amber indicates that the sole shareholding is likely to be risky for private investment and competition, but not as risky as the shareholding that is coded red; while red indicates shareholding that is not favourable for an effective communications regulatory framework.

FIGURE 5: PROPOSED GOVERNMENT OWNERSHIP STRUCTURE AND ROLE SEPARATION OF MICT



IMPROVING THE LANDSCAPE FOR REGULATORY INCENTIVES

CRAN should consider introducing regulations for cost-based tariffing and cost accounting procedures to ensure fair and equitable pricing. To encourage greater market entry, the 51% Namibian ownership requirement should be reduced. The Communications Act (2009) should be amended in that regard, so that potential investors would not require political exemptions from the Minister of ICT for higher foreign shareholding. The Ministry of Local Government and MICT are to jointly draft and publish a national policy and legislation, to set a national standard for servitudes.

CONCLUSION

Namibia is perceived as having achieved lower pricing for mobile voice services for consumers, due to its mobile termination rate caps and the off-net and on-net tariff reductions. Affordable pricing of mobile services partially addresses consumer welfare. However, particular consumer welfare objectives such as universal service cannot be achieved, because the universal service fund has not yet been established, one of the primary aims of creating an independent regulator. The overall perception is that no competition exists in Namibia's communications regulatory environment, because of the government's dominance of the sector and no protection is being afforded to smaller licensees by the regulator. In other words, the institutional design, the regulatory governance and the regulatory incentives have not led to the perception that Namibia's communications regulatory framework has achieved its purpose. The assessment of actual regulatory effectiveness still remains an area for future research.

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