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LICENSING OF COMMUNICATIONS NETWORKS AND SERVICES: CASE STUDY OF MARKET LIBERALISATION IN SOUTH AFRICA AND THE UNITED KINGDOM

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ABSTRACT
The article contrasts the regulatory regime for licensing telecommunications networks and services in South Africa with that of the United Kingdom, in order to illustrate how regulation can be used to restrict competition (South Africa) or facilitate entry into the market (the United Kingdom). The purpose of this article is to suggest possible areas for licensing reform in South Africa, which is currently in the process of reviewing its ICT policy framework. There are three areas where licensing policy can play a key role in promoting competition in the market: infrastructure and services; spectrum licensing; and pro-competitive regulation, which allows for additional licence conditions to be imposed on entities that hold significant market power (SMP). This paper addresses the first issue only (infrastructure and services), as an area that is easily capable of reform. Currently, the system for licensing networks and services in South Africa requires the pre-approval of the regulator to be granted before a licence is issued, which is unduly resource-intensive. This article advocates that South Africa adopt a system of general authorisations for the licensing of networks and services similar to that applied in the United Kingdom. Such an approach would free up the regulator to address other areas that have received insufficient regulatory attention to date, notably spectrum licensing and pro-competitive regulation, both of which fall beyond the scope of this article.

KEYWORDS
licensing telecommunications networks, licensing reform, pro-competitive regulation, class licensing framework, general authorisation regime, telecommunications networks and services, South Africa, United Kingdom

INTRODUCTION
In both the United Kingdom and South Africa, telecommunications services were historically provided by a single fixed-line provider as a public utility service administered by the government. This setup became unsustainable as exponential growth in the sector, fuelled predominantly by the development of value-added services, the proliferation of the Internet and unprecedented customer demand for mobile telephone services, introduced new market players into the industry. This in turn necessitated that the licensing regime be reformed to allow for providers of these new services to enter the market.

Both South Africa and the United Kingdom chose to introduce competition on a phased-in basis rather than all in one go. As a first step, the incumbent fixed-line network operator was carved out of government and reconstituted as a corporation with a distinct legal personality. The incumbent was then partially privatised (as was the case with Telkom SA in South Africa), or ultimately fully privatised (as BT was in the United Kingdom), which further reinforced its independence from the state.

As competition in the sector began to increase, the licensing of new entrants emerged as a key method of introducing competition and ultimately of shaping the structure of the market. South Africa and the United Kingdom initially prohibited the provision of telecoms services without a licence and restricted the number of licensees. In the fixed line sector, restrictions were placed on competition, which resulted in the incumbent operator being granted exclusivity over the provision of certain services for a limited period pending the introduction of competition. In the mobile sector, both countries authorised two network operators on a duopoly basis to begin with - because the Internet had historically been given free reign, no significant restrictions were placed on the authorisation of Internet service providers.

The ways in which these countries subsequently opened up their telecoms markets to competition differed dramatically. One of the key drivers of this difference is how their licensing regimes are structured. In the United Kingdom, the regulator has a clear mandate to promote the twin goals of competition and consumer welfare (United Kingdom [UK], 2003, section 3(1)(b)). By contrast, the primary aims of licensing policy in South Africa have been less clear, possibly because policymakers have never been entirely convinced that consumers would be better served by private sector competition, rather than services provided by the developmental state. This view is borne out in the latest version of the National Integrated ICT Policy Discussion Paper, published in November 2014, in which the promotion of competition is not listed as a key policy objective (DoC, 2014, paragraph 2.2). As a result of this ambivalence, the South African telecoms market is characterised by the top-heavy presence of a number of state-owned enterprises and an oligopoly of private sector players. Following suit, licensing policy in South Africa has been directed at liberalising the regulatory regime for existing market players, while maintaining high barriers to entry for new market entrants.

LICENCE DESIGN
The design of an authorisation regime determines the ease (or difficulty) of entry of new players into a market. Broadly speaking, authorisations can take one of two forms: licences and concessions. Under a licensing regime, the authorisation takes the form of a unilateral act of the licensing authority. In concessionary frameworks, the

authorisation consists of a bilateral contract between the government and the operator. Concessions were more common in countries where the regulatory framework was less developed (Intven, Oliver & Sepulvéda, 2000, pp.2-8 to 2-9) and were used extensively in the South America region. Today, licensing regimes are more prevalent and are the authorisation system of choice in both South Africa and the United Kingdom.

In countries where licensing systems have been adopted, three broad methods have emerged for licensing new entrants: individual licences (which require the pre-approval of the regulator, class licences (where no prior regulatory permission is required, but where licence conditions apply which govern the terms on which providers may provide services in the market), and licence exemptions (where there are no licence requirements and entry is completely open to new entrants).

Generally, licensing regimes that require the pre-consent of a regulator are more resource-intensive to administer, as they necessitate a distinct department or division to be established within the regulator to process licence applications. Class licensing systems that require the regulator to monitor and enforce licence conditions are more costly to implement than exemption regimes, but are cheaper to run than individual licensing regimes. Furthermore, licence application and exemption processes can also be complicated (or simplified) by the way in which they are designed.

Individual licences are a common method of authorising new entrants in service categories that are limited with respect to competition – either because the government has taken a policy decision to artificially restrict the number of licensees in a particular category (such as, for example, by placing a limit on the number of facilities-based competitors during the early stages of the market liberalisation process), or because a scarce resource is to be licensed in the context where demand for it exceeds supply (such as spectrum, for example). However, the way in which individual licences can be applied for and awarded can vary dramatically. Key questions that regulators should ask themselves in deciding whether to restrict or liberalise the market include the following:

i. When an applicant is applying for a licence, should the application be made following an invitation to apply (ITA) or should the regulator be able to accept unsolicited applications only?
ii. If by invitation, who should issue the invitation, the regulator or the Minister in charge of the sector?
iii. Should the application take the form of an auction (where the highest bidder wins) or a merits-based competitive selection process (where the best candidate wins, as judged by an independent third party, usually the regulator)?
iv. How comprehensive should the application process be? For example, should the applicant be required to present a business case, substantiated by extensive supporting documentation or should the applicant merely fill in a form describing the services that it wishes to provide in very simple terms? Should there be any pre-qualification criteria?
v. Before awarding the licence, should the regulator invite comment from the public on the applications that it has received and hold a hearing? Or should the licence applications be awarded or declined on a purely administrative basis?

In closed markets it is common to require applicants for certain types of licences (particularly network operator licences) to submit extensive licence applications following an invitation to apply (ITA), and pursue a lengthy evaluation process on the merits thereof before finally choosing a winner (infoDev/ITU, n.d.a). South Africa is a good example of a country that has used licensing to maintain fairly high barriers to entry, and will be discussed in more detail below. However, as markets have become more competitive, many jurisdictions have moved away from onerous individual licensing systems to class licensing regimes, notably in the European Union (EU) (infoDev/ITU, n.d.b).

Class licences are a useful tool for simplifying the authorisation regime where there is no limitation on the number of market entrants, but where there are significant regulatory objectives that can be achieved by establishing general conditions, such as, for example, mandating interconnection or imposing consumer protection requirements (Intven, Oliver & Sepulvéda, 2000, pp.2-10). Under a class-licensing regime, any entity may provide a telecom service or operate a telecom network without the pre-approval of the regulator, provided that it adheres to the terms of the class licence.

Member states of the EU are required by law to licence networks and services under a general authorisation (EU, 2002b). Individual licensing methodologies are kept to the bare minimum – and are usually restricted to finite resources where demand exceeds supply – such as numbers, or auctions for high-demand spectrum. This is considered in the context of the United Kingdom later.

Licence exemptions are typically used where an activity is technically caught within the definition of activities subject to regulation (such as offering a telecom service to the public) but where no justification exists for imposing any licensing requirements (which would be the case with remote control devices to open up a garage, for example, which use the spectrum). Licence exemptions can either take the form of an individual exemption (granted to a specific telco) or a blanket exemption (granted in respect of a particular category of services).

Company specific exemptions would most likely be unlawful in many jurisdictions. As more players have entered the market, jurisdictions such as the EU have introduced anti-discrimination rules to prevent regulators and policymakers from favouring certain companies to the exclusion of others. The EU rules on state aid, set out in the Treaty on the

Functioning of the European Union (TFEU), are a good example of this: EU member states are prohibited from granting state aid (such as subsidies or other preferential treatment) to local businesses where this will distort competition and create an unequal playing field (EU, 2008, Articles 107 to 109). In Africa, by contrast, because there is no pan-African treaty organisation comparable to the EU, no similar rules exist. This has sometimes led to unusual exceptions being made for state-owned enterprises. In South Africa, for example, a statutory exemption was granted to government-owned broadcasting signal distributor Sentech, which allowed Sentech to bypass the very onerous individual licence application procedures for a telecommunications licence under the then Telecommunications Act, 1996 (RSA, 1996, section 32C). Such blatant favouritism would not have passed legal muster in the EU. Then again, it is unlikely that the special dispensation granted to Sentech would have withstood constitutional scrutiny under the equality clause of the South African constitution either, had it been challenged in court (which it was not).[1]

For this reason, where they are to be found, blanket licence exemptions are more common and are far less likely to fall foul of the law. The use of spectrum in the industrial, scientific and medical (ISM) bands provides a good example of an instance where blanket licence exemptions have been applied very successfully. ISM spectrum was historically used for very low devices like microwave ovens and remote controls. However, when the telecoms sector began to grow, and communications networks became increasingly capacity-constrained, regulators and policy makers in many countries opted to allow ISM spectrum to be used for Wi-Fi services on a licence exempt basis.[2]

TELECOMS LICENSING IN THE EUROPEAN UNION

In order to understand the limitations of the South African licensing system, it is necessary to first discuss the licensing system in the United Kingdom, which has generally been successful in promoting competition in the local telecoms market. Nevertheless, it should be noted at the outset that regulatory regimes in the developed world are not always an appropriate benchmark for developing world economies, where socio-economic circumstances may be different. However, in the South African context, reforming the licensing regime for telecommunications networks and services would be relatively easy to implement and would require fewer resources to manage in the long term.

Because the United Kingdom is a member of the European Union (EU), it must comply with EU law. The European Common Regulatory Framework (CRF) consists of five directives, the most important of which, for licensing purposes, are:

i. **The Framework Directive (EU, 2002c)** – which creates the overarching regulatory framework within which the other directives sit
ii. **The Authorisation Directive (EU, 2002b)** – which simplifies the authorisation regime by mandating a system of class licensing
iii. **The Access Directive (EU, 2002a)** – which deals with access to interconnection and associated facilities.

All of the above directives were amended in 2009 by the 'Better Regulation Directive' (EU, 2009). The CRF requires all member states to adopt a class licensing system, under which communications providers (CPs) provide electronic communications networks and services under a system of general authorisations, which apply to all of them equally.

Instead of requiring CPs to apply for different licences according to the platform over which the service is provided (such as fixed or mobile) or the service itself (such as national long distance versus international, or voice versus data) as used to be the case in European jurisdictions such as the United Kingdom, there are now only two broad categories for networks and services which are subject to the general authorisation regime. These are:

i. **Electronic communications networks (ECNs)** – being a transmission system which permits signals to be conveyed regardless of the type of information conveyed (European Union [EU], 2002c, Article 2(a)), and
ii. **Electronic communications services (ECSs)** – being a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals over an ECN, including a broadcasting network, but excluding broadcasting content (EU, 2002c, Article 2(c)).

Under the general authorisation regime, the CRF prohibits EU member states from requiring the consent of the national regulatory authority (NRA) to be given as a pre-condition to the provision of networks and services. So keen has the EU been to lower barriers to licensing that, although member states may require CPs to register with the NRA first (EU, 2002b, Article 3.2), they may not require NRAs to acknowledge receipt of registrations as a pre-condition to providing networks or services, as this would effectively amount to an individual licensing system (EU, 2002b, Article 3.3).

Whilst the general authorisation regime is meant to apply across the board to all CPs who provide networks and services, the CRF allows NRAs to impose targeted conditions on certain CPs, such as:

1 Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996 prohibits discrimination on arbitrary grounds. However, section 36 permits the right to equality to be limited, where this is reasonable and justifiable.. Although there was an outcry at the time that the then Telecommunications Act was amended to confer on Sentech these additional privileges that were not available to any other telcos at the time, no stakeholders ever challenged the amended legislation in court. At the time, the other telcos chose not to challenge these statutory amendments in court, in part presumably, as they were unwilling to risk incurring the political disfavour of government.

2 In the EU, the Authorisation Directive requires member states to refrain from making the use of spectrum subject to individual licensing, where the risk of harmful interference is negligible. In the United Kingdom and in South Africa, the ISM bands are generally licence exempt for Wi-Fi applications.

i. **SMP conditions:** NRAs may impose pro-competitive conditions on entities that hold significant market power (SMP) in relevant markets that are not sufficiently competitive. The purpose of allowing NRAs to impose *ex ante* obligations in this way is to prevent dominant firms from abusing their position in the market. Pro-competitive conditions may only be imposed following a comprehensive market review. Examples of the obligations that NRAs may impose on SMP firms include the duty not to discriminate (EU, 2002a, Article 10), the requirement to provide network access (EU, 2002a, Article 12), a requirement to comply with price controls, cost recovery, cost orientation of tariffs and cost accounting rules (EU, 2002a, Article 13).

ii. **Access related conditions:** NRAs may impose conditions relating to network access and interoperability (EU, 2002a, Article 5.1). Unlike SMP conditions, which are linked to market power, access conditions can be imposed on anybody (EU, 2002a, Articles 5.1(a) and (ab)). In the United Kingdom, for example Ofcom has imposed an access condition on BT to provide interconnection, in order to ensure any-to-any connectivity. 'End-to-end connectivity' is the process of enabling retail customers to make calls to other customers or services on their own providers' networks or on other providers' networks (Ofcom, 2006).

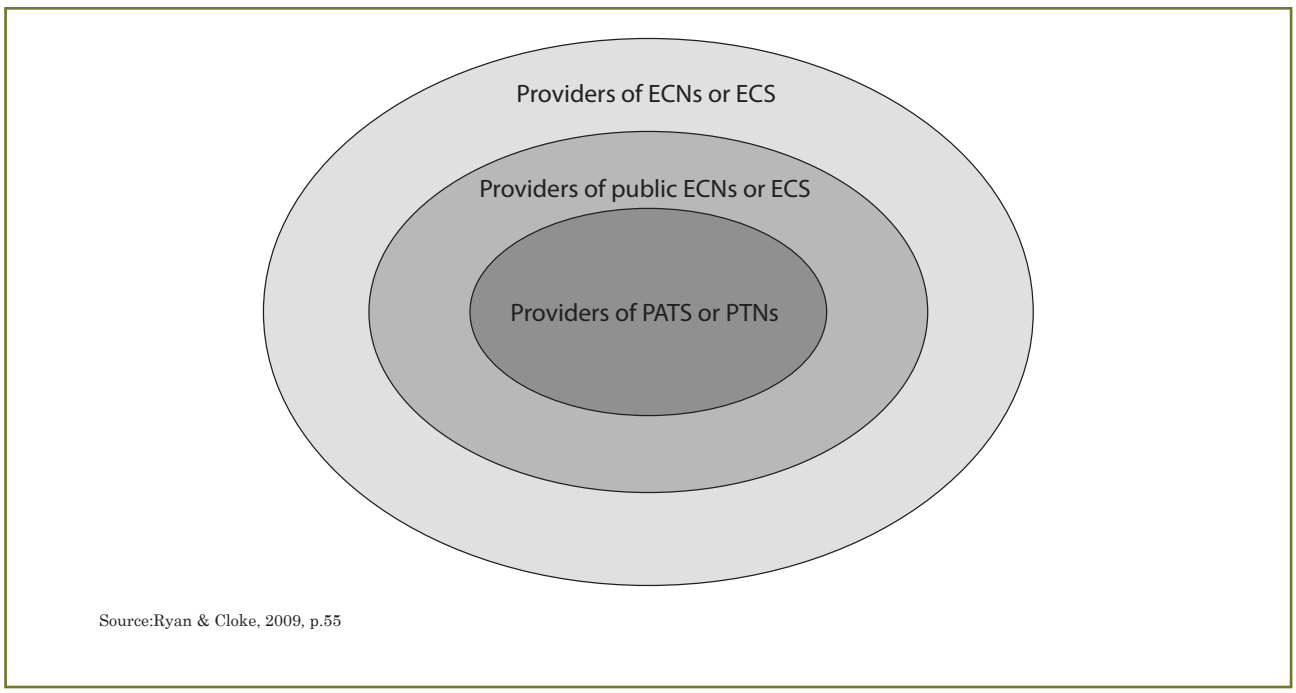
iii. **Universal service conditions:** NRAs may require CPs to make specific services available to end users at an affordable price, regardless of their location, even if it would be unprofitable for them to do so (EU, 2002d, Article 3). Examples of universal service conditions that NRAs are empowered to impose include disability services (EU, 2002a, Article 7), directory enquiry facilities (EU, 2002a, Article 5) and the provision of access from a fixed location (EU, 2002a, Article 4).

LICENSING IN THE UNITED KINGDOM

Before the CRF was transposed into British law in 2003, it was an offence for anybody under the United Kingdom Telecommunications Act 1984 to run a telecommunications system unless authorised to do so by a licence granted under that Act (United Kingdom, 1984). There were several licence categories, each of which contained a different set of restrictions, and different licences were intended to provide different services. As Conradi (2009) has described it, the United Kingdom licensing system was 'a complex and confusing system without any overriding logic to it. Whilst a fantastic arrangement for telecoms lawyers it was clear that the system was generating obstacles to competition in the market' (Conradi, 2009, p.1).

The United Kingdom Communications Act transposed the CRF into law in 2003. The Act empowers the sector regulator, Ofcom, to set general conditions of entitlement (GCs) which apply to CPs who provide networks and services. Although Ofcom has the discretion to require CPs to pre-notify it before commencing a licensed activity (United Kingdom, 2003, section 33), Ofcom has never exercised this power. There are 24 GCs in total, all of which apply to CPs equally, but only according to the types of services that they supply, such as public or private electronic communications networks or services, public services and networks only, or publically available telecommunications services (PATS). It is up to CPs rather than Ofcom to ascertain which GCs are applicable to them and to conduct their business accordingly. The relationship between these three categories of communications provider is as follows:

FIGURE 1: TYPES OF COMMUNICATIONS PROVIDERS IN THE UNITED KINGDOM



Source:Ryan & Cloke, 2009, p.55

For operators who hold SMP, Ofcom may introduce pro-competitive regulatory measures, so as to impose SMP conditions, following a market review. SMP conditions are a form of asymmetrical licensing, in that, unlike the general authorisations, which apply to all CPs, the SMP conditions apply only to firms that have been found to be dominant in a relevant market. Over the years, the United Kingdom regulator has imposed various retail and wholesale SMP conditions on dominant firms, including in relation to markets such as fixed and mobile call termination, leased lines and the like (for example, Ofcom, 2013).

With respect to BT in particular, the regulator sought to extract a number of undertakings at the outset, in relation to a number of markets that were characterised by market failure and where BT was so clearly dominant that that the outcome of a market review was a foregone conclusion. Following a strategic review of the United Kingdom telecommunications sector (Ofcom, 2005), BT voluntarily agreed to a number of behavioural and structural undertakings under competition law to avoid a reference to the Competition Commission under the Enterprise Act, 2002 (Ofcom, 2010). This obviated the need for Oftel (Ofcom's predecessor) to conduct an initial market review into all of BT's activities, although Ofcom periodically reviews and updates the undertakings to ensure that they remain proportionate and current (Ritchie, 2009, pp.93-124). By contrast, neither the sector specific regulator in South Africa, the Independent Communications Authority of South Africa (ICASA), nor the competition authorities sought to extract similar undertakings from Telkom and the other big players, Vodacom and MTN, when implementing the new licensing regime under the Electronic Communications Act 36 of 2005 (ECA). This was an opportunity missed, which resulted in the larger telcos being under-regulated at the outset, pending market reviews that took several years to finalise after the ECA was brought into law. This is borne out most notably by the fact that ICASA only published regulations lowering mobile call termination rates in 2010, some four years after the ECA first came into force (ICASA, 2010). This point is discussed in greater detail below.

PUTTING SOUTH AFRICA UNDER THE SPOTLIGHT

Legally, the South African telecoms market is partially liberalised within a converged licensing structure. The enactment of the ECA has undoubtedly facilitated increased levels of competition, by partially lifting some of the very draconian restrictions on licensing that existed under the now repealed Telecommunications Act, 1996, whilst simultaneously imposing new restrictions under the ECA. As a result, the South African market remains highly concentrated. The fixed line market is structured around two traditionally vertically integrated fixed networks, in the form of Telkom and Neotel. The mobile market operates effectively as a near-duopoly between MTN and Vodacom following Cell C's late entry into the market and its relatively small market share subsequently (Esselaar, Gillwald, Moyo & Naidoo, 2010, p.20). The effect of Vodacom's recent buy-out of second fixed-line network operator, Neotel, remains to be seen. Initiatives such as the rollout of metropolitan fibre optic networks (by Dark Fibre) and the long distance fibre optic network (being constructed by Fibreco), should assist the liberalisation process in the long term.

At the centre of the problem is that the South African licensing framework has been caught in a tug of war between the competing policy objectives of encouraging private sector participation by liberalising the market (primarily through the enactment of the ECA and the partial privatisation of Telkom) on the one hand and, entrenching and expanding the role of the state in the provision of telecommunication services (by increasing involvement through the creation of a state-owned infrastructure company, Broadband Infraco, in 2009 and via Sentech) on the other. One view is that (Esselaar et al., 2010, p.8):

> increased state provision and investment in the sector is a direct result of policy and regulatory and institutional failure to fully liberalise and introduce competition … Not only has this led to concentrated markets … high prices, constrained access and high input costs, which ultimately constrains the development of the information society in South Africa …

Ironically, there would have been less of a perceived need to counterbalance oligopolistic private sector tendencies with greater government involvement and protectionism had competition been introduced much earlier. In the face of this legacy, government 'has struggled with the dual roles of adopting policy and legislation that is enabling for the industry on the one hand, and protecting state commercial interests on the other' (Esselaar et al., 2010: p.6).

The effects of the lack of a clear mandate to promote competition have been borne out in the High Court case of *Altech Autopage Cellular (Pty) Ltd v Chairperson of the Council of the Independent Communications Authority of South Africa & Others*,[3] discussed below. While the *Altech* case helped to open up the local market, subsequent statutory initiatives have attempted to restrict, if not reverse, some of the pro-competitive effects of the High Court's decision.

CONTEXTUALISING *ALTECH V. ICASA*

In order to appreciate the impact of the *Altech* case on the South African telecommunications market, it is necessary to understand the historical context that gave rise to the *Altech* decision as well as the events that have unfolded subsequently.

In South Africa, telecommunications services were provided as a monopoly service under the control of the then Minister of Transport and Communications (Horwitz, 1992, pp.2-3). In 1991, Telkom was incorporated as a corporation, under sections 3(1) and 4(1)(b) of the now repealed Post Office Act 44 of 1958, with the state as the 100% shareholder.

3 *Altech Autopage Cellular (Pty) Ltd vs Chairperson of the Council of the Independent Communications Authority of South Africa & Others,* Case no: 20002/08, High Court, Transvaal Provincial Division (unreported).

Telkom remained a wholly owned state enterprise until 14 May 1997, when the government sold a 30% equity stake in the company to a foreign consortium. Government floated a further 28% of its shares in Telkom on the stock exchange in March 2003. Telkom was listed on the Johannesburg Stock Exchange (JSE) in South Africa on 4 March 2003 and on the New York Stock Exchange (NYSE)) on 6 March 2003. However, Telkom was never fully privatised. To date, the South African government remains the largest individual shareholder in Telkom with a shareholding of 39.8%.[4]

On the regulatory front, the state's interests were initially reinforced by the fact that telecom service providers operated under licences issued by the Postmaster-General, who in turn reported to the Minister (RSA, 1958, section 78(1A)(b)). Thus the Postmaster-General effectively functioned in three capacities – as the regulator, and as a representative of the line ministry and Telkom, all at the same time. In 1991, the Post Office Act, 1958 was amended (RSA, 1991), so as to transfer the Postmaster-General's regulatory and licensing powers to Telkom (RSA, 1991, section 34).

The positioning of Telkom as regulator and operator became increasingly untenable as growth in the telecoms sector began to explode in the 1990s. In the early 1990s, the South African government held extensive public consultations regarding the reform of the sector. This took the form of a Green Paper and then a White Paper, which set out the government's policy position on sector regulation before the Telecommunications Act was promulgated into law in 1996.

The Telecommunications Act introduced two key reforms. Firstly, the new legislation established a sector-specific telecom regulatory agency (which ultimately became ICASA) to take over all of Telkom's regulatory functions (RSA, 1996, section 96). Secondly, the Telecommunications Act granted Telkom a statutory monopoly over the provision of fixed-line services but gave the Minister of the then newly constituted Department of Communications (DoC) the discretion to liberalise the market over time. Two aspects of the regulatory reforms ushered in by the Telecommunications Act were to prove particularly problematic over time:

i. Line ministry problem: The first wrinkle is that the responsibilities for policy formulation for the telecom sector, regulatory oversight of ICASA (via Parliament) and shareholder management of Telkom and Sentech are all located within the DoC – rather than with the Department of Public Enterprises (DPE), the government department ordinarily tasked with overseeing state owned entities.
ii. Continued direct state involvement in regulatory processes: Secondly, the Telecommunications Act requires the Minister of Communications not only to approve, but in some instances to overturn regulatory decisions taken by ICASA. Specifically, the Act gives the Minister the final say over regulations written by ICASA (RSA, 1996, section 96), the selection of certain types of licensees (RSA, 1996, sections 34-35), and in some cases allows the Minister to deviate from pre-existing statutory licensing processes (RSA, 1996, section 35A).

This state of affairs wholly undermines the independence of the regulator. It is highly inappropriate, given the South African government's already high levels of investment in the local telecom industry. The Telecommunications Act institutionalises the conflict of interests between state holdings in the sector and the promotion of competition, borne out in the conversion of Altech's old-style telecommunications service licence to new style network and service licences under the ECA, ultimately giving rise to the *Altech* litigation.

Leading up to a discussion of the *Altech* decision, it is useful to give an overview of the passage into law of the ECA, which replaced the Telecommunications Act on 19 July 2006. The ECA was meant to revamp the Telecommunications Act, which had fallen behind developments in technology and had become increasingly anachronistic. The old Act had been passed into law when Telkom SA was still dominant and wholly state owned, and mobile services were in their infancy. As such, the Telecommunications Act was primarily focused on regulating fixed line services, leaving mobile telephony under-regulated. This became problematic as the mobile sector began to grow and as Vodacom and MTN became dominant to the point where the number of mobile subscribers exceeded the number of fixed line subscribers. In this context, there was a growing recognition amongst policymakers and industry stakeholders that a major overhaul of the regulatory framework was overdue.

Unlike the comprehensive policy formulation process that had preceded the passage of the Telecommunications Act into law, no similar process accompanied the ECA. In July 2003, the then Department of Communications sought to bypass the Green Paper/White Paper process by holding a 'National Colloquium on Convergence Policy' over a period of a few days. Following the colloquium, a drafting committee was established that launched immediately into preparing the Convergence Bill, which ultimately became the ECA after undergoing several iterations in Parliament. By contrast with the Telecommunications Act, the drafters of the ECA had no clearly articulated policy framework to guide them.

Ostensibly, the ECA was meant to reform the regulation of the electronic communications sector in South Africa, and also to promote competition. The passage of the ECA was accompanied by extensive amendments to the Independent Communications Authority of South Africa Act 2000, which guides ICASA. The ECA and the ICASA Amendment Act, 2006, read together, had three broad objectives, namely:

i. The harmonisation and reform of infrastructure regulation across telecommunication and broadcasting networks: Similar to the United Kingdom, different licences were required depending on the service provided (such as fixed line, mobile telephony and value added network services (VANS)) and the platform over which the service was provided (broadcasting signal distribution versus telecommunications).
ii. The consolidation of broadcasting legislation: There had been duplication of broadcasting legislation, which

4 See: http://www.telkom.co.za/about_us/company_information/shareholding.html

the ECA aimed to rationalise. The ECA did not attempt to harmonise content regulation across different platforms, because content regulation remains platform dependent.[5]

iii. The harmonisation of the powers and functions of the regulator with respect to infrastructure regulation and content regulation: ICASA had historically enjoyed a much higher degree of independence from the Minister of Communications in the performance of its broadcasting regulatory functions than in relation to telecommunications.[6]

Following from this, the ECA replaced the Telecommunications Act and the Independent Broadcasting Authority Act, 1993. The Broadcasting Act, 1999 continued in force, primarily with the purpose of regulating the South African Broadcasting Corporation, but mostly with provisions dealing with the licensing and regulation of the broadcasting sector removed.

PARTIAL REFORM OF THE LICENSING REGIME

At first glance, the ECA appeared to depart dramatically from the existing legislation by adopting a system of licensing and SMP regulation similar to that in the EU. Notably, the ECA dispensed with the previous service- and sector-based distinctions that had existed under the Telecommunications Act and the IBA Act. Under the old Acts, an entity could potentially be required to hold two, or sometimes three licences, according to the type of service that they wished to provide, all with different rights attached. To give just a few examples, some of these licence categories included the following:

FIGURE 2: LICENCE CATEGORIES UNDER THE NOW REPEALED TELECOMMUNICATIONS ACT

Licence type	Service licensed	Rights attached to licence
PSTS (public switched telecommunication services)	Fixed line services	Included the right to operate a network.
MCTS (mobile cellular telecommunations services)	Basic mobile services (includes the right to operate a network)	Included the right to operate a radio access network, but fixed links had to be obtained from Telkom (or the second national operator, Neotel) until a date set by the Minister by notice in the *Government Gazette*.
Multimedia services	Enhanced services	Included the right to operate a national network, but excluded the right to provide voice services until a date set by the Minister by notice in the *Government Gazette.*
Carrier of carriers	Wholesale international voice and data	Included the right to operate a national network, but excluded the right to provide retail services.
USALs (under-serviced area licences)	Regional fixed and mobile services in under-serviced areas	Included the right to operate a regional network and to provide voice services over that network.
VANS (value-added network services)	Enhanced services	Historically excluded the right to self-provide own network facilities or provide voice services until a date set by the Minister by notice in the *Government Gazette.*
PTNs (private telecommunication networks)	Private business services	Historically excluded the right to self-provide own network facilities. Such facilities had to be obtained from Telkom (or the second national operator, Neotel).

Source: RSA, 1996

The ECA dispensed with these complexities by introducing two platform and technology neutral infrastructure-based service licence categories for electronic communications network services (ECNS) and electronic communication services (ECS). These categories roughly correspond to the concept of an ECN and an ECS in the EU respectively.

In theory, the ECA allows for ECNS and ECS providers to be licensed in one of three ways: individually, via a class licence and/or via a licence exemption. On the face of it, this appears to be a radical departure from the Telecommunications Act, which required all telecommunications services to be individually licensed. However, in practice the 'class' licensing system introduced by the ECA is not a general authorisation regime. So-called 'class' licensees still require the pre-approval of the regulator to be given (which is the hallmark of an individual licensing system), albeit in accordance with a less onerous procedure than that required of applicants for 'individual' licences.

5 It is not practicable to harmonise content regulation, because different content platforms lend themselves to different degrees of regulation. Traditionally, only certain types of content have been subject to regulation, namely broadcasting content transmitted over terrestrial, satellite and cable platforms. Other forms of content such as Internet content and interactive voice services, are usually left unregulated, subject to self- or co-regulation or alternatively, to very light touch statutory regulation.

6 Historically, the regulation of broadcasting under the IBA was protected under Chapter 9 of the South African Constitution. Chapter 9 institutions are required to report directly to Parliament via the National Assembly rather than via a line ministry. Whereas the IBA reported to Parliament and had complete freedom over licensing and other regulatory processes, SATRA reported to the Minister of Communications. The constitutional status of ICASA as a Chapter 9 institution was never resolved, following the merger of the IBA and SATRA into ICASA. As a result, there is still some debate as to whether the institutional independence afforded by Chapter 9 extends to ICASA as a whole or only to its broadcasting regulatory functions.

To complicate things further, the ECA empowers ICASA to designate whether an activity is individually licensed, class licensed or licence exempt, depending on what the ECA euphemistically refers to as its 'impact' on 'socio-economic development' (RSA, 2005, section 5(3)(e)). Some activities are pre-categorised in the ECA as follows:

FIGURE 3: LICENCE CATEGORIES UNDER THE ECA

	Electronic communications network services	Electronic communications services	Licensing methodology
Individual	For profit national and provincial infrastructure providers. Providers in whom the state owns 25%+	Voice telephony providers who use numbers from the national numbering plan. Providers in whom the state owns 25%+	No unsolicited applications are permitted for an individual licence. An application for a licence may only be made following an ITA issued by ICASA. ICASA must follow a comprehensive notice and comment procedure and hold public hearings before issuing an individual licence (RSA, 2005, section 9).
Class	For profit municipal infrastructure providers, but not where the state owns 25%+	Data services, voice telephony not using numbers from ICASA, but not where the state owns 25%+	Any person may apply for a class licence on an unsolicited basis at any time. ICASA must decline or approve the licence within 60 days, otherwise the licence will be deemed to have been granted (RSA, 2005, sections 16-19).
Exempt	Small ECNs such as local area networks, PTNs	Non-profit ECS, resale	ICASA currently requires exemptees to notify it before providing a licence exempt service, which defeats the purpose of a licence exemption regime (RSA, 2005, section 5(6)).

Source:RSA, 2005

This has introduced an unnecessary layer of complexity into the licensing regime, as the geographic coverage of a licensee's operations does not always fit neatly into municipal, provincial or national boundaries.

In some cases, the new regime lowers some of the barriers to entry for new market entrants, but in other cases has erected new ones. The ECA has maintained obstacles to entry for new market entrants that previously existed under the Telecommunications Act, particularly for individual licensees. Notably, the ECA still precludes some categories of applicants from applying for a licence of their own accord, unless an ITA has been issued. Applicants for national infrastructure based licences no longer have to rely on the Minister of Communications to finally approve their applications, as was the case for PSTS and MCTS licence applicants under the Telecommunications Act. This is a good thing, as the concurrent licensing powers that ICASA and the Minister previously shared under the Telecommunications Act invariably caused significant delays for new market entrants (as occurred with Neotel and Cell C), particularly when the Minister and ICASA did not agree on who the licensee should be. However, the Minister still retains the upper hand in determining market structure under the ECA: notably, ICASA may not issue an ITA for an individual ECNS (I-ECNS) licence unless the Minister has first authorised this by way of a policy direction (RSA, 2005, section 5(6)).

In other instances, the ECA has erected new barriers to entry where none existed before. Under the Telecommunications Act, VANS providers who wanted to provide voice services using numbers allocated by ICASA could simply apply to ICASA for a new licence whenever they wanted to. This right has been stripped away under the ECA. Now, no prospective providers of voice services, to be paired to numbers from the national numbering plan, may apply for an individual electronic communications service (I-ECS) licence on an unsolicited basis (RSA, 2005, sections 5(3) and 9).

LICENCE CONVERSIONS UNDER THE ECA

Because the licensing regime ushered in by the ECA differed from that under the Telecommunications Act, ICASA was required to convert existing telecommunications service licences to the new ECA licence categories (RSA, 2005, sections 92-93). Under the ECA, certain ground rules apply to the conversion process:

i. Firstly, ICASA is mandated to convert existing licences on no less favourable terms (RSA, 2005, section 93(1)). The only exception to this is that the ECA forbids ICASA from conferring any monopoly or exclusionary rights under the new licence regime (RSA, 2005, section 93(7)). As such, it is not open to ICASA to extend the exclusivity provisions in Telkom's licence, for example.
ii. Secondly, the ECA requires ICASA to issue separate ECNS and ECS licences to licensees whose existing licences authorises them both to provide services and operate telecommunications networks or facilities (RSA, 2005, section 93(4)). The implications of this are that ICASA is required to issue two licences in the place of all existing vertically integrated licences, such as fixed line (PSTS) and mobile (MCTS) licences.

ALTECH AND THE CONVERSION OF VANS LICENCES

Altech had historically held a VANS licence under the Telecommunications Act, which it asked ICASA to convert to I-ECNS and I-ECS licences under the ECA. However, ICASA, under pressure from the Minister of Communications, attempted to limit the number of VANS licensees who were entitled to receive a converted I-ECNS licence. In response to this, Altech referred a dispute to the High Court, and won.

The facts giving rise to the *Altech* decision bear some mention, as they provide a fascinating insight into the structural conflict of interest that subsisted between the Minister and ICASA. The seeds of this institutional tension had been planted by statute, firstly under the Telecommunications Act and reinforced under the ECA. Historically, the Telecommunications Act treated VANS as a sub-category of telecommunications services. Section 40(2) of the Act required VANS to lease their telecommunications facilities exclusively from Telkom until 07 May 2002, and then from Telkom and the second national operator (Neotel) on a duopoly basis, until a date set by the Minister in the *Government Gazette*.

On 03 September 2004, the Minister of Communications published a series of determinations in the *Government Gazette*. The determinations provided as follows in relation to VANS licensees: 'In terms of section 40(2) of the [Telecommunications] Act, 01 February 2005 shall be the date from when value added network services may also be provided by means of telecommunication facilities other than those provided by Telkom and the Second National Operator or any of them'. Initially, ICASA took the view that the legal effect of the determinations was that, after 01 February 2005, VANS licensees were at liberty either to self-provide their own telecommunications facilities, or to lease their facilities from a third party other than Telkom or Neotel (ICASA, 2004: clause 2.2(b)). On 22 November 2004, ICASA issued a media release, which confirmed its view that VANS were entitled to self-provide their own facilities from 01 February 2005. ICASA subsequently published draft regulations along the same lines.

Presumably as a result of intense lobbying by industry stakeholders with vested interests, the Minister sought to backtrack on the determinations. The turning point came on 30 January 2005, when the Minister issued a press statement in which she stated that the intention behind determinations had not been to allow VANS to self-provide their own facilities, and that VANS providers would need to lease their facilities from another licensee. The media statement provided as follows (ioz@internet.org.za,2005):

> The issue of self-provisioning was issued in the government's policy determinations only in relation to mobile cellular operators in terms of fixed links, to give full meaning to the intention to reduce the costs of telecommunication services in SA, *it is the intention that VANS operators may obtain facilities from any licensed operator and as specified in the determinations.*
>
> It is not the government's intention to license every single activity that can be provided by a VANS operator, as this would lead to an absurd result. I can assure the sector that the Convergence Bill [which the draft ECA was then called], when tabled, will bring much needed certainty to the sector in this regard. (Emphasis added).

This press release was not published in the *Government Gazette,* as the Telecommunications Act did not allow the Minister to withdraw a determination after it had been issued. To circumvent this provision, Ivy Matsepe-Casaburri, the then Minister of Communications, stated that the press statement did not seek to amend the determinations but sought merely to 'clarify' them.

As a result, the Minister declined to approve the draft VANS regulations, which ICASA was required to submit to her for approval under sections 96(6) and 95(3) of the Telecommunications Act. The court papers in the *Altech* litigation revealed that the Minister sent a fax to ICASA on 08 February 2005, mandating it to redraft the VANS regulations so as to remove any explicit reference to self-provisioning from the final VANS regulations (*Altech* v ICASA and others), to which ICASA eventually conceded.

ICASA then embarked on the process of converting VANS licences under the ECA. Initially, ICASA indicated that it would issue both ECNS and ECS licences to VANS licensees. However, the Minister of Communications disagreed. On 17 September 2007, in a stunning disregard of the regulator's independence, the Minister published a set of policy directions under the ECA, in which she directed ICASA to consider whether "some or none" of the existing VANS licensees should receive I-ECNS licences (Minister of Communications, 2007: clause 3).

In response to ministerial pressure, ICASA issued various draft licence conversion matrices, in which it stated that it was considering awarding I-ECNS licences to a select group of five VANS licensees (which excluded Altech) – in general disregard of the provisions of the ECA (ICASA, 2007). This was the straw that broke the proverbial camel's back. Altech then sued ICASA in the High Court and won.

CONCLUDING REMARKS

Following the *Altech* judgment, ICASA granted and issued 288 I-ECNS licences, as well as granting, without issuing, another 256 I-ECNS licences in January 2009 (ICASA, 2009a, 2009b). This has helped to liberalise the market significantly by facilitating the rollout of networks and services by alternative providers. However, because the individual licensing process under the ECA remains so onerous, the market effectively remains closed to new market

entrants who want to roll out larger scale voice and data networks, unless they are able to take transfer of I-ECNS and I-ECS licences from an existing licensee.

South Africa should aim to transition to a full class licensing regime, such as in the United Kingdom, where there are no bars to entry, other than access to spectrum and a pair of pockets that are deep enough to fund network rollout. The fact that so many network licensees were authorised following the *Altech* judgment means that it no longer makes sense to maintain artificial restrictions to entry for telecommunications networks and services and network services licensees. Rather, ICASA should focus its resources and attention on more important issues, such as licensing high-demand spectrum to enable the deployment of faster broadband (which has repeatedly been delayed) and pro-competitive regulation.

POSTSCRIPT: THE CURRENT POLICY REVIEW PROCESS

Before the national and provincial elections on 07 May 2014, there were some indications that changes might be underway. In January 2014, the DoC issued a draft National Integrated ICT Policy for consultation, effectively a policy Green Paper, which raises questions about options for reforming the regulatory framework. The Green Paper does not raise any substantive proposals to reform the licensing framework. Disappointingly, the draft policy document merely summarises the existing licensing framework in paragraph 5.2.3 of the ECA, without suggesting that it needs to be reformed in any way (DoC, 2014: 24). Instead, the paper rehashes the somewhat tired question as to whether policy is best served by promoting facilities-based competition (where there are no or limited restrictions on the number of licensed network operators) or service-based competition (where the number of network operators remains restricted) (DoC, 2014: 44).

The Green Paper was followed by an amendment to the ECA in April 2014. If submissions regarding licensing were received from the public in response to the Green Paper, these never found their way into the 2014 Electronic Communications Amendment Act (RSA, 2014), which has kept the existing licensing framework almost intact. This was an opportunity missed.

In November 2014, the Ministry of Telecommunications and Postal Services published a discussion paper on the proposed national integrated ICT policy, which sets out various options for policy reform in a number of areas. There are a few promising indications that reforms may be introduced in specific areas, including positing spectrum trading and spectrum sharing as policy options (Ministry of Telecommunications and Postal Services, 2014, pp.97-98) and proposing to enhance ICASA's powers to conduct more regular market reviews, while generally strengthening ICASA's ability to impose pro-competitive regulation on SMP designees (Ministry of Telecommunications and Postal Services, 2014, pp.44-46). The introduction of a general authorisation regime for telecommunications networks and services is not presented as an explicit policy option.[7] This should be addressed when the National Integrated ICT Policy is translated into legislation.

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7 Like the Green Paper that preceded it, the discussion paper seeks opinion on whether service-based or facilities-based competition is optimal, or a hybrid between the two (Department of Telecommunications and Postal Services, 2014: 50-51).

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