

### 12.1 Roles and Responsibilities & Institutional Arrangements

#### 12.1.1 Policy, Regulation and Service Provision

Policy making for a fast-paced sector requires a number of balances to ensure that the activities of different players are coordinated towards achieving definite ends. The roles and responsibilities of these different players are defined in current policy and legislation and are intertwined, requiring the different institutions to act in collaboration to achieve specific policy objectives outlined in the various laws governing the sector.

This section examines the roles and activities of the different public authorities at each stage of policy making and its execution. It identifies policy gaps and asks questions about further measures that could be included in the implementation of policies, laws and regulations.

#### 12.1.2 Sharing of responsibilities

There are four responsibilities to be shared in line with the policy frameworks that have been put in place. The first is the responsibility to define the final goals to be achieved in the interest of citizens. Government, which produces national policy and introduces bills in Parliament, is the clear driving force in the formulation of the policy ends. Parliament, which passes legislation and holds government to account for fulfilment of policy, plays the primary role in defining the legislation that emanates from policy.

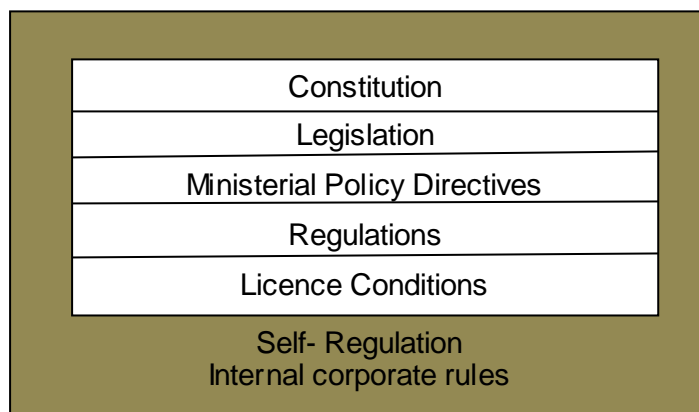
The second responsibility is choosing the means to deliver the desired ends. The regulator and government are the key players. The regulator determines the regulatory regime in accordance with the legislation, licence operators, imposes licence obligations, and interacts with the public. Government issues policy directions from time to time in accordance with legislation, and drafts amendments to the laws for parliamentary consideration.

The third responsibility involves enforcing compliance by everyone with the regulatory and licensing schemes. The regulator establishes the rules of the game and is the lead agency empowered to take action in cases of violation of licence conditions or regulations.

The fourth responsibility is the policy review, such as the current process that involves all role players. Periodic reviews are required because the effectiveness of policy may depend on many aspects, including market conditions that can change rapidly, policy ends that do not take into account prevailing conditions, disruptive technologies, or events or regulations that are not sufficiently strong to manage the sector. The judiciary reviews policies, legislative provisions and activities of various role players in situations where concerned participants resort to the courts for redress.

#### 12.1.3 Policy Instruments

All the White Papers acknowledge that all organs of state, regulatory agencies and service providers must operate within a framework that takes into account the constitutional, legislative and other frameworks provided in law. The policy framework must take into account the following factors:



The Constitution is binding on all role players and is the basis of legislation and all activities in the communications sector. In particular, the Constitution directs the sector policy to uphold and extend the rights of all South Africans as enshrined in the Bill of Rights.

Legislation translates the major policy principles into a legislative framework. Legislation sets the objectives of the communications sector in law, assigns roles to the different players, establishes the procedures that define major activities and provides for enforcement mechanisms.

From time to time, Ministerial Policy Directives are issued for consideration by the Regulator. These Policy Directives must be in line with legislation. Regulations are developed by the Regulator to direct network operators and/or service providers to behave in a particular manner concerning a determination and are issued after a public consultation process involving the operators and other interested parties.

Licence conditions are issued to an individual operator or a class of operators in case licences are not significant and can be licensed through a registration process. The licence conditions contain the parameters of the services to be offered, universal service obligations that are expected from the licensee, and the fees that must be paid to use the radio frequency spectrum.

Self-regulation refers to undertakings made by industry associations, which the industry itself monitors and enforces according to codes of behaviour that are established by the industry associations and submitted to the regulator. Internal corporate rules and policies govern the conduct of the network and/or service providers in their internal operations but many, such as human resources policies, must be submitted to the Authority so that it can monitor transformation and other conditions that may be attached to the licence.

## **12.2 Review of the roles of different Institutions involved in policy**

### **12.2.1 Parliament**

Section 43 of the Constitution vests the legislative authority to pass and amend laws in Parliament. Parliament therefore plays a critical role in translating major policy principles into legislation. The legislation in turn assigns responsibility to government, regulatory authorities and service providers. Parliament, acting through the Portfolio and Select Committees on Communications, holds the government, regulatory authorities and other public entities involved in the sector to account in terms of their annual performance plans, budgets and audits. Parliament has also on many occasions conducted inquiries into the various activities of the communications sector involving public, private and community operators.

The ICASA Act of 2000 provides for the appointment of the Council of the regulator by the Minister on the advice of the National Assembly. The Broadcasting Act of 1999 provides for the appointment of the Board of the South African Broadcasting Corporation by the President. In this role, Parliament manages the appointment process and makes recommendations to the President.

The Broadcasting White Paper of 1998 dealt extensively with the different roles that Parliament should play in accordance with the Constitutional provisions. Both the Telecommunications and the Postal White Papers provided for Parliament to undertake legislative activities arising out of the policy processes.

The Information and Communications sector is now recognised as an important enabler across various spheres of social and economic activities. The draft Broadband Policy envisages a national strategy to promote the use of broadband technologies in the educational, health, social security, environmental, police and other sectors.

E-Government as part of the Broadband Plan will deliver through electronic services the activities that are governed and regulated by the sector-specific agencies. The draft plan identifies the need for effective coordination and alignment between the agencies responsible for the ICT sector and those who will be responsible for delivering e-services. As an example, e-health services must conform to health standards and communications standards. This will require collaboration between the ICASA and the equivalent regulatory body in health services. This raises questions about how Parliament will oversee the planning and implementation of ICT systems that affect a cross-section of Portfolio and Select Committees. The current system of Parliament entails Portfolio Committees organised on a sector basis, whereas in the future differently structured committees may be required to deal with the new electronic and online services that will be offered in addition to the current offline services.

### **12.2.2 The role of government**

The Constitution vests government with executive powers to run the affairs of the country. Government, through Cabinet, develops national policies whose major principles are captured in draft Bills for submission to Parliament. Government accounts to Parliament for the implementation of the responsibilities assigned to it by Parliament and law. Government also oversees the functioning of public entities and the provision of public services. The Minister of Communications is charged with shareholder responsibility on behalf of government in all State Owned Entities in the communications sector. But the Minister of Public Enterprise exercises this function in the case of Broadband Infraco. The Minister of Communications is responsible for political oversight of the Department of Communications on behalf of Cabinet.

Section 3 of the Electronic Communications Act empowers the Minister to make Ministerial and Policy directives on matters of national policy applicable to the ICT sector and in line with related legislation. There are several areas in which the Minister may make policy directives, including radio frequency spectrum, universal service and access policy, and the application of new technologies.

Since the last White Paper was drafted 15 years ago, there has not been any formal policy and market reviews despite an early identification in the white papers that technological changes were going to affect the provision of telecommunications, broadcasting and postal services in a fundamental way. Many laws have instead been drafted and passed by Parliament in an ad-hoc way.

The lack of development of an all-encompassing national strategy to guide the deployment and adoption of modern communications technologies in the country has been blamed for the poor performance in all tracked indicators. As indicated earlier, the Draft Broadband Policy identified the stimulation of demand for broadband services as important for the successful roll-out of broadband services. The Draft envisages government playing the role of service aggregator to acquire and procure services, network capacity, content and applications for the public sector. The demand-side measures will also see government connecting all government offices and providing a portal for interacting with the public.

The second sphere of government responsibility is the use of modern communications tools to deliver services in the most efficient manner possible. There are skills and resources shortages that make the delivery of services using communications means not only cost effective but the most efficient, taking into consideration the developmental stage of the South African public service. Experience from other countries that have succeeded demonstrates that only a well-coordinated and planned introduction of e-government strategies can overcome initial obstacles and lead to successful implementation. Initiating pilots, evaluating the results and rolling out of large-scale projects requires project management skills such as were deployed during the preparations for the 2010 World Cup. A clear institutional arrangement must be developed within government to enable information sharing on planned projects, the establishment of teams that can jointly plan to develop common networks, platforms and applications, and joint funding of these activities.

## **12.3 The Roles of the Regulatory Agencies**

### **12.3.1 The Role of the Independent Communications Authority**

ICASA was established as an independent communications authority regulating the telecommunications and broadcasting sectors by the ICASA Act 2000 in line with section 192 of the Constitution. Section 192 provides for the establishment of an independent regulatory authority to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representative of the South African society. The Postal regulator was merged with ICASA in 2006 to provide for the regulation of the postal sector.

ICASA derives its mandate and operations from the ICASA Act of 2000, the Electronic Communications Act of 2005, the Broadcasting Act of 1999 and the Postal Act of 2006. As a public entity, ICASA is subject to the Public Finance Management Act (PFMA) and the Promotion of Administrative Justice Act (PAJA).

Research indicates that the cost to communicate in South Africa remains high even though the regulation of the sector to provide reasonable prices for services is one of the key objectives of policy and statutes. The competition framework outlined in section 10 of the Electronic Communications Act was introduced to give power to the regulator to intervene in situations where significant market power was evident, resulting in high prices and dominance abuse. The determination of markets and the outline of pro-competitive measures in situations where there is no effective competition are provisions contained in law but they have not been implemented in the past seven years.

ICASA has taken action to lower the termination rate mobile operators pay to each other for the termination of calls and identified the need for intervention in the digital broadcasting signal wholesale distribution market to ensure fair pricing.

Under current legislation the Minister is also empowered to issue, from time to time, policy directives to the Independent Communications Authority regarding any matter the Minister feels ICASA must consider and act upon in the implementation of the law. These directives are an important instrument enabling government and ICASA to respond to technical and

other developments that may not have been anticipated in the original legislation. As the convergence of technologies gather pace, the ability of both the Minister and ICASA to take appropriate action timeously will become important. Before the Minister issues the directive, he or she must first consult the Authority, notify the public of the intentions to issue a directive, and solicit public comment. After this, the policy directive is issued to ICASA, which must consider it. Yet the statutes governing ICASA require it to again publish draft regulations based on the directive for public input. The consultation required is lengthy and repetitive, effectively preventing timeous and effective decisions. An amended law could allow for a quicker process if the public consultation processes were combined, and the draft regulations were published at the same time as the initial policy directive. In some cases the outcomes of a policy directive or even of legislative clauses have yielded results that are contrary to the policy aims. This raises the question of whether ICASA should not be required to consult the Minister prior to finalizing the regulations. This would enable the Minister to confirm that the regulations are in line with policy objectives that the directive originally sought to address. Such a consultative process becomes more important, taking into consideration that there is no room for government participation in the consultation processes of the Authority.

### **12.3.2 Constitutional Independence of ICASA**

Despite the Constitutional requirement for an independent regulatory authority, which is reflected in the founding legislation, discussions about the meaning of independence have arisen depending on decisions made and activities undertaken by the regulator or government.

There have been many Constitutional reviews and judgements in South Africa concerning the conditions under which constitutional independence can be exercised and therefore how it is guaranteed. In its first review, considering the provisions for the independence of the Public Service Commission, the Reserve Bank, the Auditor General and Public Protector, the Constitutional Court observed that independence must be considered “against the background of the nature of the particular institution” taking into consideration its particular powers and functions. The Court ruled though that factors relevant to independence related to provisions for appointment, tenure, and removal from office as well as institutional independence.

These judgements suggest that constitutional independence relates to such factors as financial independence, institutional independence and administrative independence with respect to matters directly related to the institution’s mandate, appointment procedures for its officers and their security of tenure. The current provisions that established ICASA were crafted to meet these constitutional independence tests.

The changing technological environment and market uncertainty has thrown into focus the roles and responsibilities of various players, as well as the definition of independence. The 2005 Canadian Review of the Telecommunications Policy Report considered the question of independence from the policy perspective in a similar manner to the persistent question about the relationship between policy and regulation in South Africa. This Review Panel concluded that the independent regulator was bound by legislated policy and that “statute is the formal expression of a legislative policy, therefore before a statute can be drafted, the policy sought to be implemented by it must be determined.”

The Review discussion document indicated that even different regulators could be required to regulate some activities that now fall in the ambit of ICASA in the South African environment. *“Around the world today, it is generally accepted that the best approach to allocating governance and operating functions within the telecommunications sector is as follows:*

- Governments, including ministries and cabinets, develop telecommunications and ICT policies and implement them through laws, fiscal measures and government programs.
- Regulators implement the policies and laws, acting in an objective professional and transparent manner, independent of the interests of any specific service provider.
- Network operators and service providers (which are generally non-government companies) build and operate networks and provide services within the policy and regulatory framework.

### **12.3.3 Funding of ICASA**

Funding ICASA has become a serious discussion point since the enactment of the Electronic Communications Act of 2005. This Act mandated ICASA to put in place a number of pro-competition measures, including the identification of markets and developing pro-competition strategies and interventions.

The discussion on technological trends indicate the need for a stronger regulator to manage the convergence of communications and other technological developments that could increasingly bring about uncertainty in the sector.

The Draft Broadband Policy identifies a strong and capable regulator as a necessity in order to ensure interconnection and the regulation of the open access environment that the policy seeks to put in place.

The coming together of markets that were historically separate, the emergence of the internet as a dominant medium of communications, and the new innovative applications and services will require a strong, transformed and effective regulator to ensure:

- a) There is a level playing field between unequal entities using different technological platforms;
- b) Technological neutrality and net neutrality;
- c) Fair and equal treatment of new entrants and the opening up of the market; and
- d) Effective consumer protection.

Research by the Department of Communications in 2012 concluded that there is a need for the sources of funding to be diversified in order for ICASA to have funding certainty and taking into consideration other burdens on the national fiscus. This study reported that, internationally, there are three broad approaches to funding of similar regulatory bodies:

1. Formal allocation in the government budget.
2. Reliance on market sources of funding (through collection of fees), but still dependent on government to approve budgets. The government approves the amounts allocated to the regulator each year and this is either retained by the regulator from fees collected or allocated to it from a "kitty" made up of funds collected by the regulator.
3. Self-funding and control of funding - in this instance, the regulator keeps all fees and revenues earned in the execution of its duties and independently determine its own budget.

However, most regulators use a hybrid of one or more models depending on the prevailing financial management legislation in the country as well as the founding legislation of the particular regulator. According to the ITU's World Telecommunication Regulatory Database 2005, of the 119 countries that provided information on the breakdown of their regulatory authority's financing sources, 66% indicate that they rely on a combination of sources for their funding whilst only 33% rely on a single source of funding.

ICASA requires a funding model that reinforces its independence from all stakeholders (including industry and government) and ensures sufficient funding for the effective execution of its mandate.

Such a funding model would:

- Ensure stable and predictable cash flow.
- Allow for financial flexibility.
- Allow for the recruitment and retaining of skilled staff.
- Incentivise pro-competitive regulation.
- Enhance ICASA's credibility.

## **12.4 Universal Service and Access Agency (USAASA)**

The Telecommunications Act of 1996 established the Universal Service and Access Agency of South Africa (USAASA). Section 82 of the Electronic Communications Act 2000 provides for the functions of the Universal Service and Access Agency.

Chapter 10 discusses the concept of universal service and access in the future in more detail, as well as the operations of the USAASA, and the possible funding models.

The Electronic Communications Act provides for USAASA to recommend to the Minister what constitutes universal access by all areas and communities to the electronic communications services and electronic communications network services. The Agency is further charged with the responsibility to monitor the extent to which universal access and service have been achieved.

The Act provides that the Minister may require recommendations from the Agency in relation to policy on any matter relating to universal access and service. It also directs the Agency to inform ICASA of any matter relating to universal service and access.

The Act also provides for the Agency to manage the Universal Service and Access Fund. In terms of this law, ICASA determine the basis and manner of the contributions of licence holders to the Universal Service and Access Fund. The Minister is required to determine the threshold of contributions as a percentage of annual turn-over. ICASA should identify under-served areas and review the list of under-served areas at least twice a year. The Minister is required to determine the types of needy persons.

## **12.5 The .zaDomain Name Authority**

The Electronic Communications and Transactions Act of 2002 provides for the establishment of the Domain Name Authority. The Domain Name Authority is established as a section 21 company and its overall mandate is to manage and administer the .za namespace. The Authority is also charged with the responsibility to resolve disputes arising in the domain name space. There are several disputes over the use domain and registered trademarks.

The Domain management arrangements in South Africa have many independent operators who administer second-level domain names including the State Information Technology Agency. In addition to these entities, the Internet Corporation for Assigned Names and Numbers (ICANN) has overall responsibility for managing the Domain Naming System (DNS). It administers the root domain, delegating control over each Top Level Domain (TLD) to a ccTLD administrator, such as .za Domain Name Authority (DNA). Because the DNS is not centralized, the administration of the second-level domain is further delegated to the above-mentioned registry operators who administer the DNS with a great degree of independence. Some countries have third and fourth-level domain administrators' names.

**Policy Questions:**

1. How can the provisions for ministerial policy directives be improved without undermining the independence of ICASA? What changes would safeguard the regulator's independence and at the same time ensure transparent interaction between ICASA and government? What other mechanisms could be used to ensure alignment between policy and regulation?
2. Is the existing structure of ICASA appropriate to regulate the converged environment? How should ICASA be funded?
3. The provisions dealing with universal service and access are contained in all the communication laws and policies. Is the institutional arrangement between the decision makers adequate to fulfill the universal service and access provisions?
4. The provisions of the Electronic Communications Act on Universal Service Fund separate the management of the Fund from the determination of under-served areas. The definition of needy persons is also separated from the management of the Fund. Is this the best mechanism to promote effective use of the Fund? What measures can be developed to foster cooperation?
5. The domain names are taking on increasing importance as their commercial value rises, and as global internet and e-commerce increase. Cyber-squatting took on global proportions until regulatory regimes dealt with the registration of names by persons not entitled to them. Should South African names that are intrinsically of national importance or relevance be treated differently from corporate or brand names for reasons of public interest.