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UNIVERSITY OF CAPE TOWN

Fadzai Christine

[THE BENEFITS OF AN HAVING AN INDEPENDENT TELECOMMUNICATIONS REGULATORY AUTHORITY: A SADC PERSPECTIVE.]

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University of Cape Town

Miss. Fadzai Christine Chakauya - CHKFAD001

LLM Minor Dissertation in Telecommunications Law

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Commercial Law and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

An analysis of the benefits of having an, 'Independent,' Telecommunications Regulatory Authority. Focus is on the regulation of telephony, particularly cell phone operators.

Supervisor: Mr. Andrew Rens

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Fadzai Christine Chakauya - CHKFAD001

LLM Minor Dissertation in Telecommunications Law

An analysis of the benefits of having an, 'Independent,' Telecommunications Regulatory Authority in Zimbabwe. Focus is on the regulation of telephony, particularly cell phone operators.

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DEDICATION

This paper is dedicated to the memory of my beloved father whose wisdom inspired the dedication to complete this mammoth task and produce a paper he would be proud of. Thank you to my mother for being my pillar of strength and encouraging me to endeavour in my trials with strength and focus

To all my friends and family I say thank you for your patience whilst I researched and for your contribution which is immeasurable. Special thank you to Nyaradzai and Taida. I trust this paper will make all of you proud.

This paper is testament that dreams can come true; the secret to results and true success is in zeal and determination. Stay blessed and keep on shining.

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ABSTRACT

The research paper has a fourfold goal in highlighting the role of an independent regulatory authority in the telecommunications sector. The backdrop of the analysis will be on the ability of the telecommunications regulator to maintain independence whilst at the same time diligently carry out designated duties.

Chapter one delves into the history of chosen case studies on Zimbabwe and South Africa focusing on their paths to privatization and individual impact that the independent regulator has had on the industry. The argument being, although they have similar origins as regards their background to telecommunications, the diverse environments in which the independent regulators operate are different. Therefore the intended results will inevitably vary individually. Assessment will be on the impact on telephony, particularly on cellular operators and not on broadcasting.

Chapter 2 seeks to explore the importance of independence in the regulators office. An in-depth consideration the reasons affecting the ability to be independent will be highlighted. The chapter focuses on the importance of the role of the regulator taking into consideration the guidelines as recommended by the World Trade Organization. Bearing in mind the case studies have similar origins in telecommunications, the diverse environments in which the independent regulators operate are different. Therefore the intended results will inevitably vary individually.

Chapter 3 analyses functions of the regulator and the frameworks adopted to achieve desired goals. Suggestions on prospective reforms of the institution of the independent regulators will be analysed, as a comparison of the chosen case studies. South Africa and Kenya will be used as comparisons, looking to how they have handled problematic issues such as interconnection which some developing nations are still coming to grips with. The diverse nature of the respective institutions would be effective in showing that where impartiality exists it contributes to the independence of the regulators. An in-depth consideration of commitments made to the World Trade Organisation will be tallied against individual performance in promoting competition on the market.

The concluding chapter will look at possible solutions when it comes to tackling potential problematic issues, such as interconnection. An analysis of the telecommunications industries of the United States of America, Canada and Australia will be taken.

Chapter 1

Why regulate the telecommunications industry

1.0 Introduction

The public utility principle looks at the pertinent issue of regulation of the monopoly, and quasi-regulation of telephone, electricity, water and other public utilities. A public utility has traditionally been used in markets relating to telephone, electricity, and water services. The utilities were largely considered as a special category of business that directly affected a public interest. The nature of the market would be such that if left open to self regulation it would be open to abuse. Where basic rights to water, electricity and communication are hinged on a few stakeholders, the services would cater for the privileged and neglect the poor.
Telecommunications can be broadly defined as the transmission of information by means of electromagnetic signals over copper wires, co-axial cables, fibre optic strands or the airwaves. The technology underpins the World Wide Web, e-mail, instant messaging, and both wireless and wire line telephone service. Telecommunications are considered a difficult field to regulate because of its economic, technological and political implications. The complexities relating to the telecommunications industry require effective regulation and must take public policy into consideration.

The natural monopoly in the telecommunications industry primarily existed because of the following reasons. First the large costs involved in setting up a telecommunications network are very cumbersome as they involve large fixed costs. The argument was a single enterprise would be able to provide services at lower costs, than would two or three different enterprises.[1] Secondly the investment required to build central offices and other logistics to enable the networks such as installation and maintenance of switching equipment.[2] Thirdly the notion of many small networks created the prospects of confusion and duplication of resources.[3]

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1 Damien Geradin and Michael Kerf. '*Controlling Market Power in Telecommunications. Anti-Trust vs. Sector Specific Regulation.*' Oxford University Press (2002) pg5

2 Ibid n5, logistics include the purchase, installing and maintenance of switching equipment.

3 V Jeronimo, *'Telecommunications and competition in the European Union.*" at

Network externalities exist in the telecommunications sector. This is where the value of each network increases for each user with the number of network subscribers.[4] Network externalities justified the monopolistic structures that were deemed necessary to enable cross subsidies between different users.[5] Strategic or security concerns dictated the provision of telecommunications services to be reserved to an enterprise often controlled by the state[6]. However the gradual introduction of competition into the market is encouraged as it carries its own set of benefits. This paper deals with the relative benefits of both these institutions and focus on the role of regulation as a bridge to achieving the goals of both. Particular attention will be paid to the telephone industry in relation to mobile cellular providers.

In the early 1980s the standardisation mechanism was aimed primarily toward variety reduction and harmonisation. The governing bodies were engaged in debates that were in favour of standardising telecoms which would keep in line with technical arenas. As Hawkins points out, the old structures dominated by PTOs, remained in place, allowing for stagnant regulation of the telecommunications industry. This method has now fallen away in favour of international regulations from standards bodies such as, the World Trade Organisation which regulates trade rules, and the International Telecommunications Union which sets technical standards in the telecommunications sector.

Standards in the telecommunications sector are now developed in an environment that is more heterogeneous in nature, that take into consideration the types and sources of participants, participator rationales, and the technical subject matter. The implementation of international standards has replaced individual interests with global policies.

As is the norm with most countries monopoly has become a standard form of inception into the world of telecommunications. That institution had its benefits relating to market growth, as will be illustrated during the course of this chapter. Zimbabwe and South Africa will be analysed as case studies in this chapter. Trailing in particular the creation of the Posts and

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http:// www.escanet.org/conference/escaworld3/jer%c3%B3nimo.htm The problems of the interconnection o many small parallel networks, suggested that the true economies of scale and scope existed in limiting the number of network providers.

4 M Armstrong, '*Competition in Telecommunications*" (1991) Oxford Rev of Economic Policy Volume 13 pg 64

5 Damien Geradin and Michael Kerf. '*Controlling Market Power in Telecommunications. Anti-Trust vs. Sector Specific Regulation.*' Oxford University Press (2002) (n 1) pg5

6 M Armstrong, "*Competition in Telecommunications'* (1991) Oxford Rev of Economic Policy, Press Volume 13 pg 65

Telecommunications Regulation Authority of Zimbabwe, (herein after referred to as POTRAZ), came to be established and analyse its level of independence and performance ability.

The regulatory body must be separate from but not accountable to any supplier of basic telecommunications services. Decisions must be impartial with respect to all market participants and foster competition on the market.

Focus of this paper is on how the regulatory body deals with cellular operators. The influx of newer technology such as that of the internet and the impact it has in developing the industry with regards to cellular operators. Cellular operators are making headway in the African market, there is no doubt there is the spirit of competition dominating the market. In Africa there are an estimated 2.4 billion cell phone users, this is the reason why to a large extent there has been an improvement relating to universal access. The leading network manufacturers have come up with innovative handsets to suit the need of the users. Nokia has developed less expensive phones for Africa which is durable and dust resistant, and can be used in the rural markets Motorola has built a low cost handset which has a standby time of two weeks. The handset may be used in areas where there is little electricity. [7] Where there is unlimited availability of handsets, the players in the telecommunications market must facilitate for adequate services to be provided. The provision of these services would serve in achieving universal service goals.

2.0 Monopoly in Zimbabwe

The history of telecommunications in Zimbabwe is that of the traditional Posts and Telecommunications Corporation (PTC), established in 1980 after independence, which was a government- owned company, and was the sole provider and operator of telecommunications in the country. The government sought to provide a monopoly franchise in exchange for a commitment by the operator to provide a reasonable level of service at reasonable rates. This would have been the ideal in providing services to the bulk of the previously disadvantaged communities. Keeping in mind that during the colonial era, communications in particular land lines were limited to the privileged minority of people. In a move to increase the user base the government then established a monopoly in the form of PTC. The PTC was later on privatised and made way for Tel One in order to be able to offer more competitive services than before.

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7 http://www.cipaco.org/spip.php?article1667 accessed 20 September 2010

The purpose of monopolies is to provide services to the urban areas as well as rural areas which are so often the neglected areas. TelOne is still the single dominant player in Zimbabwe, when it comes to telephony as it is the sole incumbent operator. There has been a conservative approach in the possibility of introducing a Second Network Operator. The incumbent has managed to achieve social goals of universal access to a limited extent. The teledensity in Zimbabwe in 2003 had increased to 6.27 from 2.27 in 1998. The figures speak show there has been a greater outreach to the everyday person. There was a teledensity rate of 2% in the rural areas by 1998.[8] The figure did not include cell phones meaning that the teledensity and was soley based on land line statistics from TelOne.

The incumbent sought to promote the use of telecommunication services to enable those who did not have access to such services at affordable rates. The Tel One rates are still the most affordable rates in the country. There is still no competitor to TelOne in relation to fixed lines; therefore the concept of subsidisation is still prevailing. Seeing as there is no fixed line competitor there is insufficient proof to show that cross subsidisation is effective in Zimbabwe. The rates for TelOne are relatively cheaper in that it is less expensive to call cellular phones from the incumbent cellular provider Net One than to call from competing networks. As the telecommunications industry continued to expand, PTC gradually fell behind in its efficiency and technological response to the needs of the people in relation to land lines and not cellular.

2.1 Subsidisation

The incumbent is better equipped to provide for cross-subsidies to achieve universal service goals[9]. PTC was largely concerned with social obligations, such as achieving universal access goals together with universal service. The government was reluctant in opening up the cellular industry, and only did so after a challenge in the courts in 1996.[10] In allowing for competition on the market the government owned operator, NetOne was the first to introduce cell phone

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8 www.uneca.org/aisi/nici/country_profiles/zimbabwe/zimbpol.htm

9 Damien Geradin and Michael Kerf. '*Controlling Market Power in Telecommunications. Anti-Trust vs. Sector Specific Regulation.*' (Oxford University Press), 2002 pg5

10 http:www.itre.org/CountryNews/Zimbabwe.htm. Local Businessman Strive Masiyiwa challenged PTC's monopoly.

coverage in the remote rural areas. The government was reluctant to open up the competition for cellular companies and was forced to do so after a judicial challenge by Econet.[11]
The implementation was designed to capture a new host of consumers in the widely neglected areas in the rural areas. Although few people in the rural areas actually own cellular phones, but the networks have been long established.

With the main objective in justifying its existence to users, the argument from the incumbent is normally that they are subsidizing the costs so as to offer affordable rates to the consumer. This may be the case but truly who is subsidizing what? There is a possibility that the poor rural user could be subsidizing on behalf of the wealthy capitalist. The profits made yearly are a 'black box,' and nobody actually is sure of who is paying for what with the exception of specialized services such as the internet which are billed separately. This subsidising theory has fast fallen out of favour in the evolving economic climate. Consumers need a proper justification of where their money is going. It is unjustifiable to play the subsidisation card, the consumer needs to know who is benefiting otherwise the billing system would be considered to be a rip off to the paying consumers. In Zimbabwe's urban areas where the waiting list has become increasingly overwhelming for the incumbent, the provider has encouraged the use of phone shops to enable consumers who do not have access to land lines. In Zimbabwe phone booths have become a thing of the past owing to the inflation the phone card denominations are too high and ever rising. The progress that had been made in providing telephone coin and card phones in encouraging Universal access has effectively gone to waste, undermining the desired effect to alleviate the shortage of landlines in each home.

2.2 Phasing out Monopoly

The risk of monopoly is that once technological advancements stopped justifying the natural monopoly the incumbent would wither. This is because when there are less expensive ways of producing existing goods and services, the cost function changes and consumers demand improved service at cheaper rates. There was an ongoing vibrant convergence of, telecommunications and computer services, and the industry had to pave way for change.[12]

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[11] Clapperton Mavhunga. 'The Glass Fortress: Zimbabwe's Cyber Guerrilla Warfare.' Pg 5 http://concernedafricascholars.org/docs/acasbulletin80-4.pdf. accessed 27 September 2010

[12] J Bond," *Telecommunications is dead. Long live networking.*" The World Bank, July 1997

A higher and greater demand for wholly new goods and service resulted in the foundation costs of the incumbent being reduced and making profits as a result of their high demand.

3.0 The benefits of privatisation and liberalisation on the Zimbabwean market.

Privatisation is perceived to imply a transfer of state owned enterprises to the private sector. Various studies show that where there is an opening up of the telecommunications market and competition is allowed to flourish, better than ones that are not[13]. With the economy unable to respond to external shocks such as the exchange rate Zimbabwe adopted economic reforms in the 1990s designed to deregulate the markets. It is arguable that competition and efficiency should be an integral part of privatisation. Tel One was established in Zimbabwe with the hope of providing better services: As pointed out by scholars', monopolies even if privatised are far less likely to provide efficient, innovative and inexpensive services to the public.[14] The Zimbabwe story has been testament to this view considering there has been no significant positive change from PTC to the present Tel One, in terms of services delivery. Zimbabwe does not have an existing Second Network Operator in place; therefore focus will be on the cellular operators for purposes of comparison.

"Telecommunications play a key role among backbone services because they affect efficiency growth across a wide range of users." [15] Telecommunications are used by individuals, enterprises and companies alike and where the services quality is effective, it is to the advantage of the consumers.

The quality and pricing of these services affect a wide range of issues such as the capacity of firms to network and compete with foreign and domestic markets. There has always been a need, as with all goods of trade to improve on the quality of service, hence the need to introduce competition to give users a variety of choices. Competition if implemented in a structured manner is designed to introduce benefits to the market as illustrated below. Competition is determinant on the regulations of the country; the policy framework should enable the functionality of new players on the market.

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13 Ahmed Galal et al,"Welfare *Cosequences if Selling Public Enterprises- An Empirical Analysis.*" (Oxford University Press)1994 accessed 15 July 2010

14 http://www.fcc.gov/connectglobe/foreword.html accessed 17 July 2010

15 A backbone is a larger transmission line that carries data gathered from smaller lines that interconnect with it. http://searchtelecom.techtarget.com/sDefinition/0,,sid103_gci211629,00.html. Accessed 3 October 2010.

There is a premise that where there is a turn to competition companies are compelled to increase efficiency, failure to do so will result in them making a loss and shutting down. The cellular revolution in Zimbabwe brought with it a wave of new policies and substantial competition. The landmark ruling in *Retrofit v Posts and Telecommunications*[16], declared that the statutory monopoly of PTC was an unjustifiable hindrance on the right to free expression. A competitor to the incumbent was created in the form of Econet Zimbabwe, a privately owned cellular company. The issue as argued by the government was that the government owned subsidiary in the form of PTC had the sole monopoly over telecommunications. The incumbent's argument was rightfully dismissed as the PTC had admitted to having inadequate capacity to meet the present communication needs of the population and failure to allow new players on the market would be an infringement of the constitutional right to freedom of expression.

Greater market openness encourages effective competition. There is a general expectancy that the more competitors one has in the market, then the lower the rates will be, thereby increasing benefits to the users. This is because the increased competition will force the service provider to be more attractive to the consumer and effectively the rates would go down in order to compete with one another.

Cetaris Paribas states that, " in an environment with all things being equal, the effect of one economic variable on another, holding constant all other variables that may affect the second variable."[17] Where there is an abundance of a product, the price of that commodity will subsequently decrease. Therefore where the services in telecommunications are abundantly available due to many competitors on the market, the pricing of the services should decrease. Conversely where there is a growing need for the services such as 3G services and a limited number of service providers on the market, without an alternative, the price of the product will increase.

In our context as relates to telecommunications where there is an increase in competition namely the more network operators there are on the market, then ultimately the tariffs should lower in turn. In Zimbabwe there are three mobile phone operators, namely Net One a subsidiary partially owned by the government and two privately owned operators Econet the largest cellular

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[16] Retrofit (PVT) LTD v Posts and Telecommunications Corporation 1996 (1) SA 847, Justice Gubbay of Zimbabwe held that s26 (1) of the Postal and Telecommunications Act of Zimbabwe was unconstitutional, it went against the right to freedom of expression. http:/www.hrcr.org/safrica/expression/retrofit_telecomm.html

[17] Ceterais Paribus rule. http://www.investopedia.com/terms/c/ceterisparibus.asp accessed 3 October 2010

operator in Zimbabwe and Telecel. The most dominant of those three is Econet as it is always the first to offer newer products to the consumers in the form of technologically advanced services,

It is interesting to note that in Zimbabwe the rates are equally priced with an insignificant difference in price amongst the varying network. Tariffs at one point increased by 1 000 % across the board for all networks in 2008. [18] This amounted to less than a percent difference in tariff pricing. However a move in government's fiscal policy has seen all telecommunications operators being permitted to charge rates in foreign currency[19]. The change to hard currency has to date failed to make a difference in charge as regards tariffs; in as recently as June 2009 when tariffs were reviewed downward all the networks were within a US$0.01 difference in billing charges.

Effective competition should ideally result in the introduction of new product lines. It is commendable that Econet has come up with continual ways to renovate their strategy, which remains to be emulated by other operators in Zimbabwe. Since the inception of the dollarization wave in Zimbabwe, rates have become very expensive and out of reach for the majority of the consumers.[20] Econet has come up with text cards that give a lower tariff on text messages, and separate ones when it comes to air time exclusively for calling purposes.[21] The variation enables the consumer to make an informed decision when purchasing air time that is specific to the individual needs and lifestyle. The ability of Econet to be innovative shows the commitment to fuelling the spirit of competition and keeping in touch with the consumers. The effort to introduce these user oriented policies show a dedication to the spirit of competition on the market by Econet.

An introduction of consumer oriented packages is at times a direct effect of effective competition. The issue of effective competition is also highlighted in that there turns out to be that need to capture a specific market and to provide services, such as use of the internet, GPRS and roaming services. The customer is at liberty to choose the services that they want in accordance to whether they can afford the service or not. The logic behind it is to better the services on offer to the consumer so as to keep them on the market and to lure potential customers by continually renovating themselves. It is these continuous reinventions by the

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18 Sunday Mail of Zimbabwe, 27 April 2008.
19 Financial Gazette of Zimbabwe, week 0f 12 January 2009
20 Herald Newspaper of Zimbabwe 3 February 2009
21 www.econet.co.zw accessed 10 February 2009

competition that make the industry more vibrant. New strategies such as the introduction of prepaid lines was initiated to allow consumers to live within their means, first introduced by Net One and then privately owned Econet, which then followed up with a new exclusive service of a bridge between contract and prepaid lines in their brand product, Liberty.[22]

An increase in the introduction of newer services will be an indication of whether competition is being fostered. Traditionally the Telecommunications sector was characterised by offering plain old telephone services (POTS). These consisted of basic telephony access. Pretty awesome new services (PANS) have become the current phenomena, and offer services such as the internet and VoIP amongst other services.[23] When there is competition on the market there are the ongoing benefits of introducing pretty awesome new services. The application by Econet to introduce VoIP services is a clear advantage of competition.[24] Where there is competition it creates a need to improve services and to capture an untapped and needy market, the competitors will inevitably come up with more effective products to meet their consumer's requirements. Econet Wireless in the case of Zimbabwe was one of the pioneers in offering internet services to their customers in Eco Web. However the use of these services is limited to a few who have access to the lines specifically made to experiment this relatively new technology in Zimbabwe. Only 1000 lines were introduced last year offering this service in the form of 3G. [25] The other two competitors are yet to follow suit, but the challenge is out there and Telecel has been granted a licence for 3G services. These new services amongst others, further the interests of that section of users which has access to the internet. Currently there are an estimated 500 000 internet users in Zimbabwe. The demand for this service has grown to the level that Econet has introduced internet cafes to cater for this sector of the market that is generally under serviced.[26]

An improved quality of the network of the network should be evidenced as a result of competition. The greatest disadvantage of monopoly is that in most cases than not, it turns out to

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[22] http://www.thisdayonline.com/archive/2001/03/15/20010315comm02.html. Product services offered by Econet Zimbabwe, including brand new package Liberty.

[23] George H.Helmeir. "*The Bridge. POTS and PANS:Telecommunications in Transition.* .'Volume 28. Number 1- March 1998. http://www.nae.edu/Publications/TheBridge/Archives/EngineeringCrossroads/POTSandPANSTelecommunicationsinTransition.aspx

[24]Econet applies for VoIP.
-At http://www.balancingact-africa.com/node/14692. Issue No 132. Accessed 10 September 2010.

[25] Lebo Nkatazo at http://www.newzimbabwe.com/business-876-econet+launches+3g+technology/business.aspx.. 'Econet Launches 3G -Technology.' Accessed 19 July 2010

[26] Econet Zimbabwe establishes internet cafes in 2001. At http://www.thisdayonline.com/archive/2001/03/15/20010315comm02.html . Accessed 15 October 2009

be inefficient and leaves a lot wanting in terms of quality and services. In 1998 it was noted that the PTC had a waiting period of 7 years to acquire new connections, that the waiting list had to be closed because the number of applicants where too great.[27] The disarray of matters was propelled in that the quality of service for those who had access to it was equally unacceptable, the telephone completion rate was less than 30% and the fault clearance rate was substandard. With ideals of competition as a way to offer better services, that is not always the case in Zimbabwe.

The more competitors there are on the market the better the quality of service should be, so as to give effect to the notion of valuable competition. With competition in the market the operators will have to offer better services to retain their user base. Additional improvements on the quality of service are mutually reinforcing because services are mutually complementary in facilitating trade.[28] Although there has been a notable increase in the number of cellular providers it is unfortunate that the quality of services has not improved. The telephone completion rate is appalling such that there have been numerous calls by the regulating body POTRAZ for networks to be improved and networks have responded by setting up more boosters to ease the congestion.[29] It must be noted that the greatest hindrance prior to February 2009 was that of inflation as the costs kept on escalating in Zimbabwe dollar. With the recent adoption of system of dollarization and inception of the foreign currency based system of billing there has been an improvement of services.[30] One of the main reasoning behind the awarding of the foreign currency licenses prior to 2009, was that cellular providers maintained that they were unable to purchase equipment. This limited the network providers ability to boost its performance as the cost was to exorbitant in foreign currency on the back drop of high inflation and poor charges billed in local currency, hence the justification of appalling service. [31]

Universal Service goals may be achieved where the operators are seeking to improve on their network user base. Competition forces telecommunication operators to compete in attracting customers and to expand network coverage. In support of this point there has been an increase in demand of the available network coverage; the competitors have gone so far in

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27 Waiting list is enormous for PTC in Zimbabwe at http://www.itre.org/CountryNews/Zimbabwe.htm.

28 Improved service and quality of services where there is competition on the market. At http://allafrica.com/stories/200911301171.html. Accessed 19 June 2010

29 Herald Newspaper of 21 November 2008. Call by POTRAZ to improve services across the board in Zimbabwe.

30 http://www.marketresearch.com/product/display.asp?productid=2735428

31 The Herald Newspaper 5 January 2009, FOLIWARS license awarded to Net One as well as Telecel.

setting up boosters even in the most remote of areas, such as Gokwe and Muzarabani.[32] Econet has recently released 20 000 lines to bridge the gap between those who did not have access to cellular services and those with limited access to fixed lines. Although service providers are going a long way in achieving universal service, it sometimes comes at a cost to the consumers. Evidently the network providers in particular Econet continuously release prepaid lines, into an already over flooded market further fuelling the congestion on the networks. This is one of the disadvantages of competition where capitalism is the driving force behind making profits at the expense of quality service to the consumers.

4. South Africa

Keeping in line with general telecommunications models similar to that of Zimbabwe focus will be made on another SADC country in relation to mobile telephony. Comparing the two countries emphasises how it is possible to have a similar background in telecommunications, but how different the progression becomes. The contrast will highlight how the progression is largely dependent on the efficiency of the regulator. It is necessary to understand the background of South African telecommunications as a main comparison with Zimbabwe. In assessing the progression a similar arrangement of the phases will be used. Focusing on the remarkable stance on encouraging competition through the Independent Commissions Authority Of South Africa,(hereinafter referred to as ICASA, and making a further comparison with Kenya which has gone a long way in fostering good facilitation of competition through the Communications Commission of Kenya, (hereinafter referred to as CCK.)

4.1 Privatisation

Privatisation is perceived to imply, "a transfer of state owned enterprises to the private sector."[33] With the economy unable to respond to external shocks most countries decided to privatise the markets. A distinction must be made between privatisation and deregulation of the telecommunications industry.

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32 Zimbabwe's Financial Gazette of 23 January 2007.

33 Definition of privitasation at http://www.thefreedictionary.com/privatisation. Accessed 10 0ctober 2010

"Privatisation relates to a transfer of ownership of a co-operation from being government controlled to a private entity. Deregulation refers to the removal of government intervention of a particular industry, to stem and to increase competition."[34]

It is arguable that the competition and the efficiency should be an integral part of privatization. Monopolies even if privatised are far less likely to provide efficient, innovative and inexpensive services to the public. This observation has been true when taking into consideration the fate of Zimbabwe, looking at the Posts and Telecommunications sector, which was the incumbent and then privatized in 1994, becoming Tel One. The level of service has not changed drastically and one wonders what may be done to improve the situation to more acceptable levels. The same may be said for South Africa where competitors to the incumbent have undercut pricing of ADSL services.[35] Although privatisation in South Africa is not flawless, but there has been good progression with Telkom providing competitive rates and services.[36] A second motive behind a telecom privatising, is the desire to reinvigorate the telecommunications sector by promoting greater management efficiency and easier access to sources of capital, and sometimes to reduce government debts.[37] Privatising an incumbent operator is one of the ways used to introduce the private sector and usher in liberalisation.

4.2 Competition in South Africa

It is established in the international community that the idea of a monopoly in terms of telecommunications as with other sectors has ceased in having the desired effects that it was created for. The last two decades have seen a wave of privatisation so as to keep in sync with the general prosperity of the nations at acceptable levels. Privatisation came about in recognising that competition was the way to go in internationally standardizing the telecoms sector. The world is going through a robust economic burst, with new technological enhancements and advancement at every turn it became necessary to regulate these new inventions such as the Internet, digitalization and cellular telephony that invaded the traditional telecommunications sector.

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[34] http://www.oecd.org/dataoecd/42/49/15172081.pdf Deregulation In The Service Sector. Difference between privatisation and deregulation.

[35] Hilto Tarant. 'Telkom Simply Refuses To Compete.' at http://www.moneyweb.co.za/mw/view/mw/en/page292671?oid=496889&sn=2009+Detail&pid=287226

[36] Telkom Price Reductions in the Pipeleine at https://secure1.telkom.co.za/ir/news/sens/sensarticle_207.jsp..

[37] World Telecommunication Development Report. *'Reinventing Telecoms.'* 2002 International Telecommunications Union at http://www.itu.int/ITU-D/ict/publications/wtdr_02/material/WTDR02-Sum_E.pdf . pg 43Accessed 3 Otober 2010

The quality and pricing of these services offered in the telecommunications industry affect a wide range of issues, such as the capacity of firms to network and compete with foreign and domestic markets. As with all goods of trade and services there is a perpetual need to improve on the quality of services, hence the need to introduce competition to give the users a variety of choices. The facilitation of new products such as 3G and internet services were received well in South Africa's market with broadband fast becoming popular across the board with all networks. However the high tariffs may prove to be a deterrent in the future when it comes to increasing the user base.

Once there is a turn to competition companies are compelled to increase efficiency, failure to take this into cognizance and to be shallow and inefficient when it comes down to effectiveness, will ultimately result in a loss of revenue and eventually cause them to shut down as they will be operating at a loss. This move to competition as considered in this chapter is necessary to analyse how the telecommunications sector has developed in Africa. It is important to note whether the move to competition has been a successful one, not only in theory but in actuality.

Telecommunications sectors around the globe have generally been subjected to an organization of a monopolistic operator, and Telkom is no different in this theory. The rationale behind this form of establishment was mainly for four reasons as highlighted by Geradin[38] as follows: Firstly the argument in favour of the 'natural monopoly,' was one that the establishment of telecommunications networks involved large fixed costs and that a single enterprise would therefore be able to provide services at a lower cost than that to be provided by two or more different enterprises. Secondly the concept of network externalities, which is where the value of a network increases for each user, with the number of network subscribers, seemingly justified organizing the telecommunications sector on a monopoly basis. This is because for a given number of total subscribers, the value of a single network is much greater than the total value of several smaller unconnected networks. Strategic concerns also connected with the security of a nation dictated that the provision of telecommunications services be reserved to a particular enterprise controlled by the state. As shall be noted in the case studies for example, South Africa prior to 1994 controlled the telecommunications sector as a form of tightening their grip on the

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38 Damien Geradin and Michael Kerf. 'Controlling Market Power in Telecommunications. Anti-Trust vs. Sector Specific Regulation.' (Oxford University Press), 1994. Pg 5

apartheid regime. An overall stringent control of the market called for the reinforcement of the principles and purposes of the government in trying to protect their national security as they saw fit.

Another concern was that monopolistic structures were deemed necessary to enable cross subsidies between different services and users, so as to enable an enterprise to compensate for losses incurred because of some activities or users such as the rural telephony, with the excess profits gained from some other activities such as urban telephony and or international services.[39] A distinction must be made between cross subsidisation and cream skimming.

"Cross subsidisation refers to profits made in one area or type of services which are used to pay for services in another area or a different type of service. The cream skimming effect refers to where excess profits are made at the expense of other services."[40]

The market if opened up too quickly would result in an increase in excessive profits being made by the companies and, effectively wipe out the revenues required to operate the cross subsidies. In essence the process would erode the benefits of subsidisation, where governments where to allow for and encourage competition before its goals have been achieved. Armstrong points out that, "there was a notion that too many small networks created the prospects of confusion and duplication of resources."[41] All of the above reasons were set out and accepted as the reasons as to why the state had to have exclusive control of the telecommunications sector.

5. Background to liberalisation

The repressive apartheid regime restricted the benefits of telecommunications sector to the minority. South Africa in the new Constitution sought to make amends and reflect the new post apartheid South Africa of equality and non discrimination. In so doing the government came up with legislation to enforce its new goals. The right to freedom of expression is entrenched in Chapter 2 the Bill of rights guarantees the freedom to expression. This includes;

a) "Freedom to the press and other media;

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[39] David L. Kaserman. John. W. Mayo. Joseph E. Flyn. *Cross subsidisation in telecommunications. Beyond the Universal Fairytale. Journal of Regulatory Economics.* Volume 2. Pg231-249. (1990) at http://www.springerlink.com/content/l2wj61453h307577/

[40] Diederick Lund and Tore Nielssen. '*Cream Skimming Dregs Skimming and Pooling: On The Dynamics Of Competitive Screening.*'The Geneva Papers On Risk And Insurance Theory Volume 29, Number 1: 2004 at http://www.springerlink.com/content/n0u347970k08j6g3/. Cream skimming.

[41] Jamison, Mark M. *Leadership and the Independent Regulator.* Vol 1 of 1 Policy Research Working Paper pg 3 at– http://econ.worldbank.org/external/default/main?pagePK=6416525...

b) Freedom to receive or impart information or ideas;

c) Freedom of expression and or artistic creativity;

d) Academic freedom and freedom of scientific research.

The rights in subsection (1) do not extend to the advocacy of hatred that is based on race, ethnicity, gender or religion that constitutes incitement to cause harm."[42] The commitment of the regulatory authority must be based on maintaining these values in relation to the users. So where there is a delay in providing essential services, such as basic communication it may be seen as an infringement of this important right.

The telecommunications regulations within SADC are regulated by the Common Market for Eastern and Southern Africa (COMESA), to ensure regional conformity and implementation of policies.[43] With a standardization of the quality of services being offered there should be an improvement of the networks. The differences in the market growths of Kenya, South Africa and Zimbabwe, serve to highlight the importance of standardization when it comes to bridging the digital divide. The statistics are poised to suggest that there is still a long way to go in accomplishing universal service, especially in rural areas. The rural population even where they have access to telecommunications services are unable to afford the rates.

In South Africa the Universal Service Agency was established in terms of the Telecommunications Act, to deal with two important factors of Universal Access, meaning access to electronic communications and broadcasting services as determined from time to time, and that of Universal Service which relates to the universal provision of electronic communications services and broadcasting services as determined with time.

South Africa is a signatory to both GATTS and the World Trade Organisation Regulatory Framework Reference Paper.[44] In its accession to the Reference Paper, South Africa made very liberal promises. Amongst them included;

- the facilitation of a Second Network Operator,
- an opening up of the air waves

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42 Constitution of the Republic of South Africa 1996, Chapter 2 Bill of Rights

43 Monica Kerrets-Makau. '*Benchmark Indicators For African National Telecom Regulary Authority Websites.*' Pg 39 at http://lirne.net/resources/nra/NRAchapter5.pdf. '.COMESA uniformity in telecommunications sector in Southern easten countries in Africa. Kenya, South Africa and Zimbabwe are members of COMESA.

44 World Trade Organisation Reference Paper, at http://www.wto.org/english/news_e/pres97_e/refpap-e.htm.

- telex services
- private leased circuit services
- voice services except over valued added network
- mobile cellular including mobile data and
- satellites-based services.[45]

Most of these agreements had very little to no restrictions. The steam in the engine showed the eagerness of the regulator to change the perception of the industry to suit the post -apartheid South Africa to the new light of democracy...

What followed was a vibrant telecommunications sector that quickly put the regulator at that time SATRA and its subsequent body following its dissolution, ICASA to test.

5.1 Liberalization of the market

The main events in the telecommunications sector in South Africa as outlined below in chronological order will be discussed in greater detail below. Up until 1992 and the licensing of Telkom, the market was under monopoly control of the Post Master General, and its primary motivation was to uphold apartheid values. This changed when South Africa gained independence in 1994.

a) Telkom was licensed and came into operation in 1992
b) VODACOM and MTN were licensed in 1992/1993
c) Independent Broadcasting Act. No 152 of 1993, (Hereinafter referred to as IBA), was subsequently established in 1994.[46]
d) The Telecommunications Act Of 1996, was enacted which made provisions for other licensees in the industry. Telkom still maintained its monopoly and Value Added Network Services could not use VOIP technology, with mobile operators still under an obligation to use Telkom's fixed lines. Progression in terms of actual liberalization was still limited in that, the Minister and not the regulator being granted the authority to issue licenses including Telkom's new Public Switch Telephone Network and Value Added Network Service licenses. Precise deadlines on liberalization in the White Paper paved

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[45] Zandi Lesame.' *The New Independent Authority Of South Africa: its Challenges and Implications For Telecommunications Liberalisation in the country.*' South African Journal For Communication Theory and Research. Volume 26. Issue 2. 2000 pg28-pg36 at http://www.informaworld.com/smpp/content~db=all~content=a787875361.

[46] Statutes of the Republic of South Africa. Independent Broadcasting Act No 153 of 1993

way for Ministerial dating provisions, which meant that the market was determined only by the Minister if she wanted to issue licenses. Minister's discretion to issue licenses instead of the independent regulator, proved to have uncertainty regarding the treatment of new entrants. The Minister in essence was not under an obligation to open up the market in a timely fashion and this was a concerning position to the international community.

e) South African Telecommunications Regulatory Authority (SATRA) established in 1997. It was responsible for telecommunication regulation and licensing which was separate from that of the Independent Broadcasting Act
f) 1997 Strategic equity partner in Telkom, thereby becoming privately owned. The removal of Telkom from government control squashed the conflict of interest and potential bias that would arise in allowing in new entrants.
g) Cell C, third mobile operator licensed in 2000, thereby increasing the competition in the market.
h) ICASA Act, merge of Independent Broadcasting Act and South African Telecommunications Regulatory Authority.
i) 7 May 2002, formal end of Telkom Monopoly, but in reality the element of monopoly is present within the industry.
j) NEOTEL awarded license in 2006 as Second Network Operator, after a much awaited decision to choose an applicant reflecting acceptable levels of Black Economic Empowerment representation. The fact that operations had not commenced effectively maintained Telkom's status quo as the monopoly.
k) 2008, second network operator NEOTEL finally launched.

6. Conclusion

The need to regulate the telecommunications market cannot be understated. The independence of the regulator directly affects the regulation of that market. The dominant position in monopoly structures ceased to serve its purpose, in terms of improving the quality of service. The introduction of competition on the market in Zimbabwe and South Africa, have resulted in better service than that of a single network operator. The regulator has to take into account the economic principles relating to network effects being the value of the network to each user

increases with every addition of other users to the network. [47]Secondly the regulator must take into account regulation of interconnection and consider the effects of technological convergence on for regulation.

[47] Jun Zhang. Mobile Service Pricing Strategy analysis From Social Tie and Network Effects. at http://www.canavents.com/its2008/abstracts/187.pdf

Chapter 2

The Importance of an independent regulator

1. Introduction

The telecommunications reform process in developing countries is linked to the economic and political conditions in the developing countries. The interdependent nature of the telecommunications environment would make it difficult for the regulators to exercise its discretion. The telecommunications industry in developing countries is more directly linked to the overall performance of the economy. It is more inclined to link with the issues affecting development such as job creation and improving the quality of life. As a result of this strong link it becomes difficult to separate the political influence from the role of the regulator. However if effective competition is to be fostered it is necessary to separate the two.

The World Trade Organisation Reference Paper requires its members to establish regulators separate from and not accountable to any supplier of basic telecommunications services.[48] The term is often misunderstood to imply that the regulator is free from government control but this is not the case. The independence should be from politicians and industry lobbyists. The telecommunications reform process in developing countries is linked to the economic and political conditions in the developing countries. The interdependent nature of the telecommunications environment would make it difficult for the regulators to exercise its discretion. It is important to note that the more dynamic the industry and market environment, it becomes imperative to foster independence within the market to allow for effective competition.

2.0 Who is the independent regulator?

The World Trade Organisation (herein after referred to as the WTO,) is the International body that is responsible for the administration of the General Agreement in Trade of Services (GATS), which includes an annex on Telecommunications and a protocol regarding basic telecommunications services. The Protocol is known as the Fourth Protocol to GATS. The WTO

[48]WTO Reference Paper, paragraph 7 at http://www.itu.int/newsarchive/press/WTPF98/WTORefpaper.html..

monitors national trade policies and provides for trade negotiations and dispute resolution. The WTO provides for a forum that is designed for global trade negotiations and dispute resolution. Article 5 of the World Trade Organization reference paper on basic communications, provides that,

> '.... there shall be established by the members, a regulatory body that is separate from, but not accountable to any supplier of basic telecommunication services and the decisions and decisions of the regulator shall be impartial with respect to all market participants [49].'

This is not a standard in itself but it is rather a statement on the two basic standards that must exist, which is separation and non -accountability to any telecommunications supplier. It does not define what independence ought to be, nor does it highlight the parameters to which it ought to be set against for it to be considered as independent.

As regards the above definition, there is independence in so far as political interference or lobbyists in the industry, but not from the role of government role in creating operational policies in the industry. The regulator, as pointed out by Melody, "though independent it remains a part of the government." [50] The argument made being that, "independence implies the ability to acquire specialized skills being managed without interference and to be held responsible for the results according to the set standard of performance."[51]

PTO management is especially important and can be insured by specific structural reforms relating to government influence on the board regulators and the governments accountability standards. As illustrated by Melody, "the effective competition of an industry is determinant on the regulator; therefore there is a need to foster a culture of transparency and accountability in the regulators operations."[52] It is of paramount importance that the regulators dealings with the government remains at arm's length and not delve into political influence, but rather be one that allows the market to grow in healthy competition. The result would be an achievement of industry performance objectives of intended government policies, but only when

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[49] World Trade Organization Reference paper on Telecommunications, Article 5 available at http://www.itu.int/newsarchive/press/WTPF98/WTORefpaper.html 2 May 2008

[50] William H Melody, *Meaning of and importance of independence in telecommunications reform. Telecommunications Policy*, Vol 21 p197, available at www.sciencedirect.com accessed on 14 May 2008.

[51] Ibid pg 197

[52] Ibid at 98

regulatory decisions are made on substantive merits and not merely on bias of political favouritism.

Petrazzini points out that, "the impact of competitive markets on prices is beneficial as it may lead to a reduction of prices."[53] The instance in Kenya were prices significantly came down, may be compared to that of Chile were tariff rates reduced by a substantial amount, up to 70%. This goes to prove that competition in telecommunications boosts network penetration and is not always a hindrance to universal service obligations. The introduction of cellular services has come a long way in increasing the quality of the competition on the market. Privatised systems in Africa have achieved larger scales of the tele-density growth than their state owned counterparts. The administration of competition in an unbiased manner will lead to social goals being achieved, without detriment to the economic goals of the market investors.

3.0 POTRAZ an independent regulator?

The WTO makes provision for an independent regulatory body that must be separate from, not accountable to, any supplier of basic telecommunications services. Economies that are able to create a competitive telecommunications market realize greater gains for the society, such that operators must take the prices of other competitors into account if they are to survive. The establishment of an independent regulator is necessary in order to advance the needs of the public. This is because there is a perpetual need to protect the competing operator from the influence of the prevalent incumbent, so as to create a fair playing field.

Purpose and functions of POTRAZ

Primary goals of the Independent regulator as given in the Postal and Telecommunications Act of Zimbabwe and to which are of relevance to this paper are to:

- " ensure market restructuring so as to promote competition.
- to promote the expansion of telecommunication services;
- to monitor tariffs charged by cellular telecommunications, postal and telecommunication licensees;
- ensure new entrants get access to the network of incumbents

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53 BA Petrazzini '*Regulating Communication Services in Developing Countries*' in H Melody (ed) Principles, Policies and Regulatory Practice: Telecom Reform (2000) 350; available at http://www.lirne.net/resources/tr/index.htm. Accessed 10 July 2010

- monitoring the activities of the operators to ensure that they comply with their obligations, including accounting separation requirements', price and quality requirements and universal service obligations.
- administer the rules applicable to number portability and allocation of frequency;
- ensure non discriminatory access by all competitors to resources such as telephone numbering
- in certain cases, to impose sanctions upon the Operators when necessary and;
- providing advice to governments telecommunications matters.
- administering the interconnection regime." [54]

Impartiality is of paramount importance given the role of the regulator in the sector as one of allocation of scare resources. An independent regulator must decide on a number of important issues such as how many competitors to let into the market, whether to allow particular services or not and equity in pricing of operator tariffs. These are some of the significant issues that the regulator must decide on and it is therefore imperative for the regulator to be independent and as free as possible from government influence, so as to decide what is in the best interests of the telecommunications market. As has been previously highlighted for there to be a vibrant telecommunications industry it is necessary for there to be a viable and sound economy, so that investors may be encouraged to upgrade. However where there is distinct prejudice this is an unachievable goal and the monopoly will benefit at the expense of its competitors. At this injunction it becomes necessary to explore the role of POTRAZ, the independent regulatory body of Zimbabwe, and establish if it is truly independent and the effect its intervention has had on the market

3.1 Ensure market restructuring so as to promote competition

The regulator must be in a position to make firm and quick decisions if there is to be progress to facilitate competition and not to hinder it. A regulator must be in clear control of the market in that there must not create a situation that may result in confusion. Most recently, Econet and Telecontract who had been waiting for years were finally granted approval to provide VoIP

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[54] Zimbabwe's Postal and Telecommunications Act Chapter 12:05. Sections 3 and 4 of the Act.

services in Zimbabwe. [55]In spite of a calling from Econet pressurizing POTRAZ to submit its policy framework, the regulator had still been slow in responding. The contention over the use of VoIP in Zimbabwe is an example of what happens when the regulator has no back bone. POTRAZ confirmed that there were people who were illegally using this service yet there was still no official clarity as to the issue from POTRAZ. [56] Where the independent regulator fails to be decisive the market will speak for itself and anarchy will reign. The losses will be to the disadvantage of the economy which loses out on potential profits as well as the community which is being denied enjoyment of the use of that service. The independence and impartiality of the regulator in Zimbabwe is however highly questionable. There have been a number of questionable incidents which cast doubt on impartiality as will be discussed in later chapters. Incidents will be presented emphasizing the problem of having a discriminatory regulator.

3.2 Promotion of the expansion of telecommunication services

There must be provisions that encourage the growth of the telecommunications sector. This includes the facilitation of interconnection by the incumbent to allow new entrants onto the market. Facilitation of fair regulations which are not arbitrary in nature encourages confidence in the market from potential investors. POTRAZ in this regard has at times gone against the spirit of competition and allowed discriminating in granting a license that was never on offer. In 2004 Tel One regained its monopoly as being the sole provider to access all international telecommunications services and to provide international interconnection capacity to all other public licensed telecommunications including internet companies. [57] The matter was taken to court where it was established that Tel One was going against doctrine of fair competition, therefore it was struck down.[58]

The decision placed the impartiality of POTRAZ into question; it sought to further governments interests at the expense of stakeholders. It is unfair that new services that are being denied to the people of Zimbabwe. Government is not likely to stimulate competition in the telecommunications sector when it is the one in control of the dominant service provider. It is

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55 8 licenced for VoIP in Zimbabwe. Available at http://www.itu.int/ITU-D/ict/newslog/Eight+Licensed+For+VoIP+Including+Three+Newcomers+Zimbabwe.aspx. .

56 VoIP had still not been licensed in Zimbabwe since 2007. Available at http://www.kubatana.net/html/archive/inftec/070325smail.asp?sector=INFTEC&year=0&range_start=1.

57 www.afrol.com , 4 February 2004

58 Clapperton Mavhunga. 'The Glass Fortress: Zimbabwe's Cyber Guerrilla Warfare.' Pg 5 Available at http://concernedafricascholars.org/docs/acasbulletin80-4.pdf. Accessed 3 October 2010

therefore necessary for the government to relinquish control so as to enable the regulator to create policies that in the interest of the public. [59] Invitations by POTRAZ to operators for license upgrades applications have been called for to enable networks to offer new services. It remains to be seen whether the regulator will follow through and actually grant the licenses. [60] The notion behind the invitation being that where there are newer services market penetration will increase, thereby resulting in the economies of scale which would ultimately result in a reduction of tariffs.

POTRAZ has cleared a number of frequencies in preparation of new services, being 3G and VoIP. There has been that suggestion that with access to these services the telecoms industry should prove to be more vibrant, enabling operators to adjust their charges downwards if the costs permitted them to do so. In March 2009 POTRAZ made a commitment to join its Southern African counterparts and offer 3G services.[61] This will be done under a blanket license, but the Minister of Communications is yet to make the frequencies required to make the services available in place. The new Minister of Finance is the one pressuring the regulator to avail the frequencies, so as to improve the accessibility of communication to all and increase revenue. A Second Network Operator in Tele Access was supposed to have been seen the establishment of a competitor of the incumbent fixed line network in Zimbabwe, in accordance with its commitments to the World Trade Organisation. For technical reasons Tele Access has not been able to take off since 2003, when POTRAZ and Tele Access signed an agreement allowing the latter to become the Second Network Operator in Zimbabwe, and its licence was subsequently revoked.[62]

3.3 Consumer oriented policies

A regulator must take into consideration the impact their decisions will have in the consumers. The regulator must not make rigid and harsh decisions which in turn negatively impact on the very consumer they ought to be protecting. POTRAZ has failed the users in so far as protecting their right to communication, as Zimbabwe falls on the verge of a communications breakdown

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59 Hank Itven and Mc Carthy Tetraul (eds) Telecommunication Regulation Handbook (2000). Published by the World Bank. 'Overview of Telecommunications Regulations: Module 1" pg 7

60 Zimbabwe Herald Newspaper. 10 February 2009

61 Potraz introduces 3G in Zimbabwe. Available at http://www.wirelessfederation.com/news/category/potraz. accessed 3 October 2010.

62 Tele Access in Zimbabwe had its licence revoked as the Second Network Operator in Zimbabwe. Available at http://www.encyclopedia.com/doc/1G1-96196576 Accessed 4 October 2010

due to the very expensive tariffs that the providers were allowed to charge. From paying very little to make a call, consumers have been thrown into the lion's den and are now paying up to US $0.39 per minute for a phone call which cost less than US$0.10 before the changes.[63]

POTRAZ displayed questionable behaviour concerning their ability to strike a balance between allowing the service providers to operate freely and the consumer's entitlement to fair treatment. The anomaly saw cellular consumers being blindsided by the network providers, when in December 2008. Econet revoked their contract line services from the consumers.[64] The disregard to public sentiments ought to be impermissible. The operator failed to give adequate notice and contract lines were migrated to prepaid overnight and inconvenienced the consumers. On the other hand Net One, Telecel and Econet are now billing accounts in US$ has seen an improvement in the telecommunications sector as the cellular operators are offering new services such as 3G. [65]The development of a fibre optic network by Econet is a positive result of the benefits of boosted capital acquire from increased revenue.[66]

POTRAZ has the difficult task of balancing the needs of the service providers and that of protecting the consumers. Although the situation is delicate in that the change to dollarization was inevitable, but the consumers should have been given the option of deciding whether or not they wanted to continue with the contract lines or if the charges are out of their reach, opt to migrate to prepaid lines. How is it then possible to have the same contracts when the offer has been changed and the conditions are different from those signed to in the original contracts? Surely there is no meeting of the minds and consumers are now left with exorbitant bills and no recourse. This near wily behaviour, although brought upon due to harsh economic conditions on the part of the network provider, should have been duly communicated to the network users and given them the option to continue with the initial contract or to pursue the prepaid route in line

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63 Tariff hikes in Zimbabwean dollar were less than equivalent of US $0.10. available at http://www.itnewsafrica.com/?p=1358.Tarrif hikes in Zimbabwean dollar were less than equivalent of US $0.10.

64 Mobile Operators in Zimbabwe Face Off. Available at -http://allafrica.com/stories/201005070675.html.

65 Dollarization does wonders for the telecommunications sector in Zimbabwe. Available at http://www.marketresearch.com/product/display.asp?productid=2735428. Accessed 4 October 2010

66 Kabweza. 'Of Econets Liquid Telecom Fibre and Harare's Digital Revolution.' Available at http://www.techzim.co.zw/2010/03/of-econets-liquid-telecom-fibre-and-harare%E2%80%99s-digital-revolution/ Accessed 4 October 2010

with the change in currency. The average civil servant in Zimbabwe earns US$100;[67] shockingly the average telephone bill from TelOne is estimated to be US$300 per month.[68]

In some cases the regulator seeks to protect the interests of the consumers. In an unprecedented move POTRAZ took a definitive stance on the incumbent provider Tel One to reopen lines that had been cut off due to non payment. There is an ongoing row with regard to tariffs. Disconnection went against the spirit of humanity as the bills were exorbitant.[69] TelOne was advised to review the tariffs and make submissions to parliament by June 2009. TelOne was charging US$0.19 to mobile phones, and government owned Net One was charging US$0.25 per minute. Change came in July 2009, when tariffs were reduced, in accordance to POTRAZ recommendations. Tariffs were reduced by an average of US0.04 in the respective networks. However this is still out of reach for the average user although. Econet reduced its tariffs to US$0.24 per minute. [70]

3.4 Investor sensitive policies

In order to foster quality competition, the telecommunications market must be attractive to potential investors. Market liberalization allows the competition to flourish by attracting the investments needed to build competing networks. The regulator must create an environment that is free from unnecessary regulation, in order to ensure that markets are able to perform efficiently. The inception of repressive laws such as which allow security services to monitor the phone calls and e mails, it makes the field unattractive to potential investors. [71] The Postal and Telecommunications Act allows for the chief of Defence Intelligence, the Director-General of the Presidents Department of National Security, and the Police Commissioner General of the Zimbabwe Revenue Authority to make applications regarding the interception of communications.[72] The monitoring intercepts calls and messages during the course of their transmission through a telecommunication postal or any other related service system, where

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67 Average Zimbabwean civil servant salary is $100. At http://www.afrol.com/articles/33826

68 Zimbabwe Independent Staff writer at http://www.theindependent.co.zw/business/22755-chamisa-orders-review-of-exorbitant-telone-bills.html. Call for review of TelOne tariffs by Minister. Accessed 4Februry 2010

69 http//www,newzimbabwe.com/news-380-Trl-one%20told%20/news.aspx

70 Econet Zimbabwe website at http;/www.econet.co.zw/view_newsflash.asp?xnfid=7. Accessed 4 October 2010

71 Interception of Communication Act of 2007 passed in Zimbabwe, to allow for interception of calls. Available at http://www.kubatana.net/html/archive/inftec/070806ciz.asp?sector=LEGISL&year=0&range_start=1

72 Postal and Telecommunications Act of Zimbabwe [Chapter12:05] Act No 4/2000 s98. Accessed 5 October 2010

there are reasonable grounds for the applicant to believe that a serious offence that has been or is being or probably will be committed.

The problem lies in that there is no real privacy amongst the network operators and investors may not be willing to be party to a potential spy game between the government and its subscribed users. Alternatively there has to be proof that the communication is indicative of a potential threat to national security of the country. Moreover the telecommunications service providers are expected to ensure that hardware and software facilities and devices are able for the interception of the communications. Investors are unlikely to be eager participants in aiding interceptions, taking into consideration the existing networks Net One, Econet and Telecel are currently party to the interceptions.

A situation that depicts an overregulation of the market must be avoided. Telecel the third largest cellular provider had its license temporarily revoked in 2005 citing a failure to disclose and remit their foreign currency earnings[73]. This was done without a thought in mind of the subscribers to the network, or the threat of discouraging potential investors. Although they were later allowed to continue with their service, clearly POTRAZ proved to be a toothless bulldog, as it failed to protect the users of that network. Where government is less interfering on the market, the free hand environment attracts investors.

4.0 Critic of POTRAZ

Due to the wanting nature of the telecommunications industry in Zimbabwe, it seems that it operates as an oligopoly, where the competitors are no better than the incumbent. Over the years there has been a seemingly positive inclination, to allow competition but there is no substantial improvement in the quality of services. "Misuse of the dominant market has resulted in poor service, high prices and uncompetitive practices."[74] There is need to limit political interference to maintain independence. Governments must refrain from interfering with telecommunications regulation so as to further competition and foster good relations with investors.

It suffices to say that the monopoly operator is still dominant in Zimbabwe, although it did make way for competition. But as a result of the deepening financial crisis that is the status

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[73] Potraz cancels Telecel license available at http://www.bizcommunity.com/Article/238/78/17436.html.. Accessed 12 May 2008

[74] Peter L Smith. *Mitigating Regulatory Risk in Telecommunications* available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/workshop_dec04_e/mitigating_regulatory_risk.pdf.

quo at the moment, it is difficult for true competition to prosper to its full potential in Zimbabwe. The quality of the services being offered leaves a lot to be desired. Where the regulator is truly independent then there can better competition, to enable implementation of policies without interference from self interested politicians. Once there is interference regarding policy making, the institution loses credibility in the international market, and is detrimental to the potential benefits to the consumers. Where competition exists, the market, not the government, becomes the most effective regulator. In overprotecting government policies, such as allowing the interception of communications, it is a violation of consumer protection and inevitably deters investors from the market.

A development of the management role must be mastered. The role of POTRAZ as a regulator must not only be one of authority but one of leadership as well. In the instance of the decision to allow the use of foreign currency as the formal currency, POTRAZ knowing that there would be an outcry over increasing tariffs, should have prepared the market consumers for the inevitable outcry regarding the bills. It is understandable that operators had to be allowed to raise their tariffs so as to keep afloat. It would have been advisable for POTRAZ to have laid out a detailed memo to the public on why rates increased, and explain it was for the benefit of continuity.

In spite of incidents of incompetency, POTRAZ has at times come out to protect the consumer by calling for a reduction in tariff rates to the regional norm, and has succeeded in the elimination of US $50 security deposits of contract lines for Net One which is government owned[75]. After subsequently considering the nature and justification by the operating service providers, POTRAZ then made an informed decision and they called for the reduction of tariffs in June 2009, which had found the industry in near turmoil. The decision was taken into compliance and the mobile cellular providers complied by reducing their tariffs.

The regulator must facilitate speedy and affordable interconnection so as to encourage private investors on to the market. The private sector has greatly advanced the technological sophistication of the telecommunications industry in Zimbabwe. It suffices to note that Econet is the solely privately owned cellular operator in Zimbabwe and their services are the most advanced, being the first to offer 3G services and apply for 4G facilities. Net One and Telecel are yet to offer 3G packages to their consumers, and this is primarily due to the limited funds of

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75 The Zimbabwe Herald Newspaper. 9 February 2009

the government, who have interests in the companies. Lack of funding slows down the development of the market and concurrently inhibits progress to the targeted market.

In an in-depth analysis to ascertain the independence of the regulator some questions arise relating to the authenticity in the decision making of the regulator. Given the circumstances in Zimbabwe one cannot help but speculate of ways to inhibit political interference as regards the operations of the regulator and gracious increase consumer validation whilst maintain respectable relations with the operators, and whether that would better the functionality of the regulator and liberalization of the market. The role of POTRAZ is complex as the industry at the moment is in a near stagnant zone. The balance between protecting the public and appeasing the investors is a difficult one to strike. The issues regarding the economies of scale have to be considered in order to protect the market and prevent abuse from the government and industrial lobbyists. Although government intervention may at times be necessary in protecting the consumers, there must be a limit to government intervention. A middle ground between the two extremes must be explored in order to benefit all the relevant stakeholders.

5. Establishment of ICASA

The Independent Commissions Authority of South Africa, (herein after referred to as ICASA) was established in 2000 by the ICASA Act Of 2000. It was established as the regulator and the main licensing body in the broadcasting and telecommunications sector. The convergence of the broadcasting, telecommunications and information technology sectors saw the enactment of the Electronic Communications Act 35 of 2005, repealed Independent Broadcasting Authority and SATRA.

The independence of the regulator must be seen to be impartial and to be fair to the applicants in the issuing of licenses. Prior to the establishment of ICASA there was SATRA in 1997[76], which was the body responsible for telecommunications in South Africa, and the body responsible for the regulation of broadcasting was the Independent Broadcasting Authority[77]. The Constitution of South Africa provides for fairness in S192 and fairness is catered for the two establishments. The inclusion of independence made the two bodies invulnerable to undue

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[76] SATRA established by South Africa's Telecommunications Act of 1997. It was responsible for regulating telecommunications in South Africa, but is no longer in existence.

[77] Statutes of South Africa. Independent Broadcasting Act 53 of 1993. No guarantee of independence for the telecommunications regulator was made.

influence as it has real accountability that is tangible in nature. Independence is specifically provided for in s192 of the Independent Broadcasting Act, which requires the broadcasting regulator to be independent but the requirement is not catered for by the Constitution relating to the telecommunications regulator.

5.1 Critic of the independence of ICASA

Independence is expressly provided for in S3 (3) of the ICASA Act, meaning that ICASA should be subject to the Constitution and the law maintaining impartiality and functioning without interference from the political and commercial world. Perhaps the following factors would inhibit the level of independence of the authority.

Section 6A empowers the Minister to establish a performance management system. The method of appointment insinuates the officers chosen by the Minster would have their allegiance to the appointer. Section 5 of the ICASA Act permits the Minister, on approval of the National Assembly, to appoint the councillors. One would rather advocate for a panel rather than an individual to be responsible for making appointments. There would be an emphasis on the ability of the councillors to be impartial.

The Minister determines the remuneration of the Councillors and the Chairperson as outlined in s10 of the ICASA Act. This is highly detrimental to the credibility of the institution, as there would be an over willingness from the councillors to vote in favour of the Ministers choice of applicant.. Largely owing to affiliation where ones level of remuneration would be affected by their choice. It is important to have financial independence as noted in chapter one. In a ruling regarding the *New National Party v Government of South Africa 1993/CC*, [78] the court made a clear distinction between the importance of financial independence and that of the administrative independence of the authority. In so doing the court in its ruling confirmed that there was a serious undermining of the independence of the Authority where the Minister adjudicated on the performance management. The court pointed out that the lack of financing of the Authority undermined the independence of the regulator. Although there is good quality competition in multiple network operators, the benefits of a thriving competitive environment

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78 New National Party v Government of South Africa 1999 (3) SA 191

. Court confirmed that performance management by the Minister undermines the independence of the Regulator.

remain to be seen. There is no reduction of tariffs or improved service delivery as in developed nations that are as pro-competitive as in developed nations such as Canada. There is a perpetual compromise on independence where the regulator us underfunded as is the instance with ICASA, with a threat of officers taking bribes to increase their incomes.

6.0 Issues to be addressed in efficient regulation.

To encourage fair competition ICASA needs to ensure that the following areas are successfully regulated:

(a) Universal service obligations and accessing financing, Universal Service goals have been passed on even into privatization of the cellular sector. The Regulator facilitated for the Vodacom and MTN licenses on the condition that certain social and economic development targets were to be met. Both companies were tasked to achieving 70% population coverage target within a four year period and both agreed to install community service telephones in underserviced areas. [79]

(b) Tariff control. Rates charged on telecommunications providers should not be aimed at deterring potential investors, or pushing new entrants out of the market, due to expensive pricing. Price cap regulations are encouraged where the average increase in prices each year is restricted by the rate of inflation less a productivity factor that is set by the regulator.

(c) Prohibitions on cross subsidy and discrimination.

(d) Interconnection

There is not a single definitive meaning of the word interconnection, the Electronic Communications Act Of 2005 of South Africa describes interconnection as being link of two telecommunications systems to enable the users of either system to communicate with users of, or utilise services provided by means of, the other system or any other telecommunications systems[80] It is evidenced from the definition that the entrant needs assistance from the incumbent in establishing itself and to allow their subscribers communication on the market and access to their services.

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[79] Universal Service Agency Impact Document. July 2005 pg 7. accessed 18 November 2008 at http://www.usa.org.za/docs/gen/USA%20Impact%20Study%20Report%202005-6.pdf.

[80] Electronic Communications At Of 2005 of South Africa defined in s1.

Privatisation is only effective in so far as competition is allowed to flourish. Therefore interconnection rates must be reasonable and services must be accessible, reliable and affordable. Interconnection rates must be reasonable to ensure the new entrants have access to the incumbent facilities and services, to enable competition on the market. Efforts to encourage a competitive telecommunications sector have seen the long awaited Second Network Operator, Neotel launching, thereby dismantling the monopoly that Telkom possesses. It remains to be seen whether the increase in competition will eventually result in a reduction of tariffs. South Africa's telecommunications regulator has acted in good faith, having provided for the interconnection of MTN and Virgin Mobile, and most recently with the Second Network Operator, Neotel. Third cellular provider Cell C was only considered after a judicial review and an out of court settlement.[81]

7.0 Communications Commission of Kenya

This body is established under the Kenya Communications Act No 2 of 1998 of Kenya. What makes the body so unique in relation to this thesis is that the institution is neither an independent regulator nor is it under any legal obligation to be impartial.[82] Its sole object and purpose is to license and regulate telecommunications in accordance with the law. The CCK is expected as with its regional counterparts to promote private investment, foster competition and universal access. The regulator is not limited to communication services but rolls over to the broadcasting regulation as well. The CCK is regarded to be an independent body subject to the relevant laws of the country, including that of the relevant minister to issue guidelines relating to broadcasting services and information technology amongst other functions.

The greatest shortcoming of the CCK is that they have still not allocated the license to a Second Network Operator, but as regards the mobile network industry they have made commendable progress in regulating the telecommunications sector in Kenya. [83]
Decisions made by the CCK may be appealed to the appeals tribunal, which handles conflict resolutions amongst the industry players and arbitrates the decisions.[84] In the ten years since its establishment the tribunal has made 3 decisions to date.

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81 E. Teljeur, A. Gillwald, Dr. G. Steyn and D. Storer. '*Regulatory Frameworks Impact and Efficacy.*' Volume 2 pg 5 at http://www.tips.org.za/files/725.pdf .

82 Kenya Commissions Act no2 of 1998 at http://www.kenyalaw.org/kenyalaw/llr.app/frames.php

83 Global Technology Forum. Ghana's and Kenya's contrasting Fortunes. http://www.globaltechforum.eiu.com

8.0 Factors affecting independence of regulators.

The issue of independence is of paramount importance amongst the telecommunications regulatory authorities. Where there is a regulatory authority it is a perceived expectation to make the institution accountable, it is responsible for opening up the market and encouraging potential entrants on to the market. The regulator has to be impartial in their findings, but how may these be encouraged given the pressures that the regulators face. What follows is a consideration of several factors which are essential in encouraging and retaining the regulators independence. It is necessary to look into the personal qualities of the regulators. The regulator must have qualities that relates to the performance of the work at hand.[85]

It is necessary to understand the overall purpose of standardization of these qualities to appreciate the complexities surrounding their duties. In order to understand the qualities one must appreciate the relation between standardization of the regulators and legislation depicting what the office is permitted to do. Where there is standardization of qualities one ought to possess such as self awareness and pro-activity the "business" benefits of standardization work will reflect through the consistency and transparency of the board decisions. Long term project strategies encourage the regulator to maintain their focus in achieving future goals.

Self-interests in standards such as being a pacesetter are a positive attribute as it encourages innovative thinking and if standardized will have a positive impact on the regulators performance in the office. [86] The regulator must have courage and confidence to stand by their decisions and implement regulation. These qualities are essential in maintaining the credibility of the regulatory office; a compromise of these might deter investors from the market. In order to establish which individual possesses these qualities one may look to past professional experience in the office of management and or regulation. An individual must have an in-depth understanding of principles of corporate governance which encourages accountability and transparency and incorporate them in the duties as a regulator.

The following qualities may be attributable to an effective regulator. One must be

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[84] Kenya Communications Act no 2 of 1998 s26

[85] Principles of Corporate Governance A White Paper from The Business Roundtable. May 2002 at http://www.alcoa.com/global/en/about_alcoa/corp_gov/pdfs/BRTPrinciples_CorpGov.pdf at pg 9. Accessed 13 October 2010

[86] Dilawar Hussain. 'New Apex Regulator Hawk or a Dove.' Dawn Business January 19 2009. At http://www.dawn.com/2009/01/18/ebr1.htm.

- "open and accessible

– always available to have high level discussions of issues and proposal
- competent and efficient with good internal control systems of operation.
- reasonably strict and not a push over.
- proactive rather than reactive.
- pragmatic and practical.
-satisfies business needs, puts in place legislation and regulation that is in line with business needs.
-takes care of the expectation of consumers.
-self-funded and not over reliant on government funding.
-accountable to people, to government and capable of being sued for its actions.
-transparent in the way regulation is written."[87]

There can be no real standardization of this quality element except to look into individual's qualifications and experiences that relate to corporate governance issues

8. 1. Financial independence

As emphasized by Melody, "the regulator though independent remains a part of the government and is not a complete entity within itself."[88]The regulator has the ability to manoeuvre its policies into effect when he is responsible for its own budget, and where there is liberty to generate income from license fee penalties and alternative sources such as Non Governmental Organizations which encourage the development of the telecommunications industry.

When there is financial independence, it is a presumption that there will be better remuneration for the regulators as they will be paid based on service, therefore where there is adequate compensation the regulators are less susceptible to accepting bribes from the Operators to ignore penalties and other misdemeanours. From an African context it would not be premature to say that the lack of financial independence is the root of most of the inefficiency of the Regulatory authorities. Citing Zimbabwe as a point of first reference, POTRAZ is dependent on the government for its funding and remuneration. The arrangement has proved to be detrimental

[87] Qualities of a regulator at http://www.articlesbase.com/regulatory-compliance-articles/12-qualities-of-a-highly-effective-regulator-848684.html. Posted 3 April 2009

[88] William H Melody, Telecommunications Policy Volume 21 p197

to the institution as the regulators are lowly paid and corruption has become the order of the day to put food on their tables. It would not be surprising that their incompetence in fast tracking the implementation of services such as 3G and VoIP, which has dragged on for over 3 years to date, is due to a lack of motivation to perform as a result of depreciated salaries and inactivity on the market. [89].

South Africa's ICASA is financed by the government, with the councillor's remuneration being fixed by the Minister of Communications.[90] ICASA is financed by parliament and by other monies approved by cabinet.[91] This means in essence that they are potentially dangerously reliant in keeping in the Ministers good books so as to have better remuneration and benefits. Should the Minister make a decision that they do not agree with they may be potentially lured to agree so as to increase their benefits. The temptation would not be as great where the institution is independent of the Minister and has its own resources. In the past before ICASA came into existence the legislation governing SATRA gave the Minister far too much authority over the industry, but with the inception of ICASA the minister's powers are limited to consultation with the council. However the transition has still kept the authority financially dependent on the government and the level of true impartiality becomes questionable when the other party is holding the key to the councillors survival. Especially on compromising situations involving the Minister where there are disputes arising that involves Telkom, which is owned by the government. Where the Regulator is underfunded there can be little or no independence at all. ICASA being under funded meant that it could potentially really never be independent in the true sense of the word. The funding of the Regulator is essential in maintaining independence and its ability to meet its mandate.

Kenya on the other has a unique situation in that the CCK is a financially independent regulator[92]. The CCK does not rely on government funding but rather, it is reliant on its own funds as its source of income in license fees amongst other sources. The requirement of having audit reports submitted to the Minister who in turn presents them to parliament[93], makes the institution accountable and therefore more credible as there is apparent transparency in their

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89 www.newzimbabwe.com accessed 19 November 2008
90 ICASA Act of South Africa, s 10
91 Ibid s15 (1)
92 Kenya Commissions Act No 2 of 1998 s18
93 Kenya Commissions Act No 2of 1998 s 19 and 20

conduct. The idea that there is better remuneration would make the regulator more efficient and perhaps even more diligent in their work, as the officers will be encouraged by the good salaries.

Financial independence deters bad behaviour on the regulators part. However the over independence in terms of funding of the regulator may at times lead to questionable double standards where the regulator is also a player on the market. The CCK once came under fire for guaranteeing a local company a contract for the development of an under seas cable project. [94] This seemingly questionable gesture was toned down by the regulator in affirming its decision as a cabinet decision to facilitate the infrastructure so as to have broadband in Kenya.

In analyzing these three scenarios, it is important to note that the financial independence of the regulator is important in so far as creating independence. Where there is an over reliance on the government there is a danger of opening up the regulatory institution to corruption and hinder true progress in the sector , as investors are less willing to enter into markets that are over regulated by the government. Better remuneration of the officers normally means less corruption and that is what the institutions should aim to maintain, as it bears an impact of ensuring credibility.

8.2 Administrative Independence

There is a need to be administratively independent from the government so as to have impartiality. The Regulator must be able to run its daily business without over interference from the government. The regulator must be one that is dynamic in nature, which is up to date with the technological and market trends. [95]

Taking ICASA as a prime example, ICASA councillors are appointed by the Minister of Communications, with the parliament short listing candidates, passing the list onto the minister to pick the candidates she wants and then back to parliament to decide if they agree with the minister's choice of candidate.[96] This consultative procedure between the relevant Minister of Communications and parliament is designed to depoliticize the process and pave the way for fairness in picking the appropriate candidates for the position. The deliberate disclosure of

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94 www.eastandard.net, accessed 29 November 2008, comment on the undersea cables contract awarded to Teams limited, by James Anywanza, 'Is Communications Commissions of Kenya a regulator or a player?'

95 William H Melody, Telecommunications Policy Volume 21. Comment on the importance of 'independence' in telecom reform,' p198

96 South Africa's ICASA Act s5

persons disqualified from holding office[97], shows the commitment of ICASA to being transparent with their administrative procedure in electing councillors. This is a commendable in that investors would more relaxed knowing that the election process is that of a solid nature and that they are dealing with competent individuals on the Regulatory board.

In Zimbabwe as is the situation in Kenya, the appointments are made by the government Minister[98], in the former and with the latter there are presidential and Ministerial appointees[99]. In both scenarios how would it then be possible to have true independence when ones obligations lie with the incumbent as a result of government being a majority shareholder? True impartiality in decision making becomes questionable[100]; can one bite the hand that feeds you? It is not necessary to make consultations when appointing councillors, and this in my opinion is a grey area that paves for loyalty problems in the future based on political patronage and not on merit.

In Kenya the Communications Commission was subsequently dissolved by the Minister in 2005 amidst allegations of corruption.[101] The introduction of performance based salaries and evaluation program would go a long way in ensuring the quality of people assigned to be officers. The move to get rid of corrupt officers goes a long in stamping authenticity on the particular regulator. The weeding out of suspicious officers is highly commendable as it reflects an action of good faith, especially to new investors who fear prejudice.

8.3 Accountability

The regulator must be accountable not only to the government, but to the public who are the consumers. The policies must be seen to protect the interests of not only the investors, players and government, but to all interested parties including the public.[102] Public access to the annual reports on industrial achievements of government policy objectives, industrial developments and how the regulatory performed in the industry must be encouraged.[103].Remuneration of the council is fixed by the board in consultation with the Minister.[104]

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97 South Africa's ICASA Act s 6

98 Zimbabwe's Postal and Telecommunications Act, Chapter12.05

99 Kenya Commissions Act No 2 of 1998

100 Lisa Thornton, ***Telecommunications Law in South Africa.*** 2006 pg 104

101 http://www.ictregulationtoolkit.org/en/PracticeNote.aspx?id=2643. Kenya's Minister of Communications dissolved the Communications Commission of Kenya in 2005.

102 Melody,' comment on the importance of independence in telecommunications reform pg 198

103 Ibid at 198

104 Kenya Commissions Act no 2 0f 1998

Corruption and bias are kept at bay in South Africa under ICASA, whereby if an applicant is denied a license, there must be reasons for that denial that must be convincing and presented to the board. The documents are made available to the public, for inspection in relation to licensing.[105]

There is procedure to be followed when dealing with operators that include;

(i) submission of financial reports

(ii) Auditor general's report

(iii) Information on licenses granted, revoked or renewed in the preceding year

(iv) Any other information which the Minister may require in writing.[106]

The Minister then presents these documents to parliament. The open system of communication makes the procedure more credible and the regulator less prone to unscrupulous tendencies. The commendable transparency in the procedure allows for question and answer sessions where there is uncertainty.

In stark contrast in Kenya, the CCK is not allowed to divulge any information on licensing procedures. Except for a Gazette Notice stating that a license has been granted, to whom and for what particular service. The whole process is therefore shrouded in mystery and raises eyebrows as to the legitimacy of the process as whole. It gives the impression that corruption and underhand dealings have become the order of the day as there is no real accountability. The unique nature of the telecommunications sector in South Africa decisions may be subject to review by the Competition Commission, [107] which seeks to promote fair competition on the markets. Kenya does not have this Commission in place. Zimbabwe has a Competition and Tariffs Commission set up in the Competition Act14:28 of Zimbabwe. The Commission may review tariffs. [108] The presence of the Competition Commission in South Africa if amended may make the institution of ICASA subject to review and therefore add credibility to its decisions. [109] Regulators have the power to control the operation of the industry subject to the constraints defendable to the Competitions Competition. The duties of the Competition Commission would then entail the reviewing of tariffs to determine if they are fair.

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105 ICASA Act of South Africas16(1) and (2)

106 ICASA Act of South Africa s16

107 South Africa's Competition Commissions Act, 1998 (Act no 89 of 1998). Competition Commission established by the Act.

108 Competition and Tariffs Commission of Zimbabwe at http://allafrica.com/stories/201009100551.html.

109 Competition Commission of South Africa may only make recommendations relating to the regulator. http://www.mg.co.za/article/2009-07-31-icasa-agrees-to-look-into-high-cellphone-rates

The administration of regulatory justice and fairness is vital for the creation of regulatory certainty .There is several precompetitive devices used in South Africa through statutes. Namely s13 (3) of the Electronic Communications Act of South Africa, which empowers the regulation of ownership or control of a license to promote competition within the ICT sector. S52 of the now repealed Telecommunications Act of 1996 set limitations on the control of telecommunication services. S53 of the Telecommunications Act of South Africa prohibits uncompetitive actions in the industry. S10 of the Electronic Communications Act of South Africa is aimed at protecting consumer interests by prohibiting firms from inducing competition through collusion., from creating a dominant position or from that abuse of such a dominant position It is commendable that South Africa has put these measures in place to protect the consumer, it must be noted that efforts by ICASA to dismantle the monopoly should be diligent, so as to compliment a competitive environment. Transparency is of paramount importance if the regulator is to maintain its credibility

8.4 Political influence

For so long as there is undue interference from the government there is a danger that investors will shun that particular market in favour of those which allow them to act in their own space. The government's role is to create an enabling environment for telecommunications sector to operate in. The protection of the citizens from profiteering of unscrupulous market entrants should be encouraged, so as to enforce the goals of guaranteeing universal access. Interference within the market is counterproductive as it deters the investors. There needs to be balance of the two aims to achieve market equity.

In South Africa, powers of the Minister over ICASA were watered down after the dissolution of SATRA. [110] The Minister is the one who decides who to allow into the market and had the power to issue new licensing procedures. The Minister may influence the regulator in that; she still has the say in the appointment of the councillors[111], approves the remuneration packages for the councillors, and approves the appointment of experts who are not South African citizens[112]. However some power has been given to the regulator as ICASA now has the power to make regulations without consulting the Minister, but is obliged to inform her when it intends

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110 Lisa Thornton. '*Telecommunications Law in South Africa.*' 2006 pg 112

111 ICASA Act of South Africa s10

112 ICASA Act of South Africa s14

on using that power.[113]Similarly in Kenya, the Minister is largely responsible for the appointments in the regulators office and determines the remuneration of the councillors as well.[114]

It is essential to have a solid base from which the regulator is allowed to operate from, so it may be independent. The conditions must not resemble those of an intimidating nature and must reflect fairness and equity on the part of the Minister toward the regulator. Where possible the role of the Minister should essentially be watered down to be advisory in nature and not one that is dictatorial. In Zimbabwe there is the looming danger of government imposing restrictions on the network and thereby interfering with the decisions of the regulators. Decisions that are of questionable nature are being channelled through the regulator so as to maintain control.[115] For example the reluctance in opening up the air waves to protect government interests should not be permissible. Disturbing allegations of interception of phone conversations, reduces both consumer and investor confidence in the ability of regulators to deliver fairly.[116] Decisions by ICASA vetoed or changed unilaterally by the Minister, for example tariff increases where to an extent inferred on by the minister.[117]

The role of the regulator is not limited to policy making but to implementation as well. It is recommended in the updated Electronic Communications Act of South Africa that the regulator, ICASA be permitted to consider the role of managed liberalisation and in so doing may only accept and consider applications for individual electronic communications network service licences in terms of the policy directions as issued by the Minister.[118] The sharing of the roles has in precedent shown that conflict will inevitably arise from this joint power sharing provision.

The CCK is not immune to ministerial influence either, although the primary role is to issue policy directives and directives. There was clear was political interference when it came to the licensing of the third mobile phone operator. [119] The political controversy relating to the

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113 Electronic Communications Act No 36 of 2005 Sec4(5)

114 Kenya Commissions Act No 2 of 1998 s25(1)

115 Zimbabwe Standard Newspaper of 25 May 2008

116 www.newzimbabwe.com accessed 19 0ctober2008

117 William H Melody, Attracting Investment for competition to Telkom, at http://www.wits.ac.za/papers/wm20030220.htm. Accessed 3Ocober 2010

118 South Africa's Electronic Communications Act no 36 of 2005 sec5(1)

119 Econet license in Kenya reinstated available at http://wirelessfederation.com/news/date/2007/07/22/ Acessed 4 October 2010

applicant ECONET in Kenya resulted in the latter duly engaging in a legal battle with the Minister, who sought to revoke the license granted to ECONET.[120] So where a regulator is under the undue influence of the Minister there will be controversial situations, which go against the spirit of competition.

9. Conclusion

Developing countries are faced with more complex challenges relating to policy consideration and implementation. Reform in developing countries must attract the necessary technological knowhow of foreign companies, to work on traditional infrastructures in improving the industry. In economies such as that of Zimbabwe that are unstable, the foreign investors will if allowed to, eventually control the market. Their advantage being they have access to the necessary capital needed to boost the telecommunications sector. The market in Kenya although relatively smaller in comparison to developed nations, has managed to foster good competition, and maintained a position of constructive engagement with the telecom market players. The importance of independence is that competition is allowed to grow in an uninhibited environment.

The telecommunications reform process in developing countries is linked to the economic and political conditions in the developing countries. The interdependent nature of the telecommunications environment would make it difficult for the regulators to exercise their discretion. The telecommunications industry in developing countries is more directly linked to the overall performance of the economy. It is more inclined to link with the issues affecting development such as job creation and improving the quality of life. As a result of this strong link it becomes difficult to separate the political influence from the role of the regulator.

The SADC context shows that there is still a long way to go on real independence. The regulators are subject to political interference. Where the regulator is allowed to operate in a free and reciprocal environment that encourages progression, investors are more willing to come in to a market that will not prejudice their interests.

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120 Econet wins reprieve from government. http://www.bizcommunity.com/Article/111/78/16427.html. Aceeses 2 October 2010

CHAPTER 3

Functional Framework of an Independent Regulator

1.0 Introduction

The regulator must be a well oriented board that is organized and knowledgeable if they are to keep up with the international trends. Exposure to the international methods of sustaining independence and dealing with technological advancement should be encouraged. For this reason the need arises to attend international telecommunications conferences to equip the regulators with education, so they make informed decisions. There are fundamental policy issues for developing countries that are rather complex in nature. As pointed out by Melody, there has been an increasing recognition of telecoms as an important infrastructure resource, with its effects being wide felt on the economy. The *BT MCT Global Communications Report 1997/97* is an illustration of the benefits of telecoms trading of infrastructure on the economy. The impact on developing countries have largely been less market driven in comparison to developed countries.

Knowledge is the essence to values, and experience is the greatest teacher. Taking this saying into account and given the economic environment in Africa, how best can the regulators become familiar with their expected roles in opening up the market and maintain independence? The potential solution lies in various sources. Participations in international conferences are a method of keeping abreast with international standards. In recognising the need to have intentional telecommunications standardisation, World Telecommunications Development Conferences are held in recognition of the need to regulate the telecommunications industry and how to measure progress in reducing the digital divide. It is at these informative conferences that independent regulators may come up with realistic solutions of how to solve their own potential problems, such as internet regulation and interconnection issues which African countries have had limited exposure to. These agencies as recommended by the World Trade Organisation are designed to regulate private activities instead of just disbursing grants land benefits.[121]

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121 http://www.itu.int/ITU-D/confrence/wtdc/index.html. Accessed 5 October 2010

The ideal regulator must be free from executive control. The telecommunications sector is not a simple one to regulate primarily because of the stakeholders involved. On one hand there is the issue of increased private investment, pitted against the goals of achieving developmental goals such as achieving universal service and universal access. The latter has the everyday person's needs at the centre of its purpose, whilst the former is more concerned with making profits but has to take into consideration public interest as it has an impact on the functions of the industry. The respective governments must have policies in place that will allow for government regulation giving regard to public interest. It would be imperative to identify clear objectives and develop a model that will regulate these objectives. In South Africa, ICASA set definitive universal service goals as part of the obligations.

The nature of these institutions must be such that, for them to have credibility they must be independent of executive control and be answerable to questions in decision making, made lawfully in its capacity as the regulator and without prejudice to the industry players and consumers. While the independent regulator is not an arm of the executive, it is a body that has been created subject to government initiative, so as to carry into effect legislative policies embodied in the enabling statute

2.0 Policy Objectives

The crux of the contentious issue of regulation is such that everyone has access to reasonable services at reasonable prices. The implementation of this seemingly simple principle often proves to be a mammoth task. The difficulty lies in implanting the principle effectively, as will be analysed in the case studies. A delicate balance has to be struck between maintaining an economic responsibility on one hand, and that of living up to the social obligations on the other. The position is far from being an enviable one, the economic advancement is important, as the service provider ought to satisfy the full range of customer demand and supply these under conditions of optimal efficiency. Whilst the social responsibility entails that the service should be made available to everyone under reasonable terms, regardless of whether it is profitable to do so. The contentious nature of the obligations effectively means that there is a need to regulate both the economic efficiency and social need.

The telecommunications reforms currently do not for the larger part reflect an inclination toward social goals, with the preference seemingly favouring economic goals. This is largely due to the

fact that the policies are designed to encourage investment in a market directly linked to the economy. The need to create jobs at tomes takes precedence over the social obligation to roll out telecommunications in the rural area. The advantage that economic objectives have over social obligations has seen controversial decisions being made in developing countries. The social policy consideration is being taken into account though as it is imperative for the survival of the providers, particularly in developing countries where the universal access goals are being achieved through privately owned cellular operators, by rolling out services in the rural area. The effect that an increased user base has on network externalities may provide for a situation where economic goals are achieved simultaneously with social goals. The modernized telecom networks are being established, to extend the network to people who were not provided with the service and or where under serviced. The policies must look to achieve

(1) Universal accessibility to basic telephony at affordable prices.

(2) Opportunity for telephone company shareholders to earn a reasonable return on their investment:

(3) Equitable treatment of subscribers in terms of service and price:

(4) Assurance that telephone companies do not unfairly take advantage of their monopoly dealings with competitors; and

(5) Encouragement of the development and widespread availability of new technology and innovative services, to respond to the needs of business and residence customers.[122]

For social Goals relating to issues of Universal Access and Universal Service to be achieved, as well as economic goals, there must be a marked effect of competition on the market

3.0 Background to regulatory designs

There is a need for certainty in the market. The regulator must come up with regulations that conform to giving certainty and flexibility to the industry. In ensuring interconnection and access to unbundled services, the allocation of frequency and price and quality controls are easily protected by the regulators, without favour to existing participants. Certainty in their rules is entrenched in years of consultation and provide for greater regulatory assurance, thereby

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[122] The Canadian Regulator, in its policy objectives looked to the noted as a method to attain its objectives and to increase its efficiency as a Regulator. Pg 15 at http://www.telecomreview.ca/eic/site/tprp-gecrt.nsf/eng/rx00056.html#T2

minimizing the danger of delays and other inconveniences which may result. The telecommunications regulation not only takes into consideration the commercial attributes, but by social welfare concerns as well hence the importance of universal access and universal service funds.

Monopoly based regulation, was common at the inception of telecoms regulation as it protected the government monopoly. However as will be illustrated in the growths of developing countries, it is evidenced that neither public nor regulated PTOs can meet the demands of the present telecommunications due to the ever-increasing demand for the product. Under market liberalisation, competition becomes a tool for effective regulation that may assist in achieving fundamental economic and social policy goals. Although the results are not immediate the desired outcome is dependent on the regulators policies which must reflect liberalist views. Monopolistic structures may be encouraged to desist from being dominant in the industry, as this will discourage investors from the market. The regulators must look to a system that functions well in developing countries, and move away from the heavy hand of regulation. The policies must reflect an adequate commitment to encouraging fair interconnection terms and conditions for new entrants.

The following chapter relates to chosen case studies focusing on Zimbabwe, South Africa and Kenya, it is necessary to then analyse exactly which type of regulation would optimally result in a truly independent authority. The economic features of the telecommunications industry are such that, it operates within market powers. The presence of such markets means that there is an opportunity of abuse that opens up. An abuse of the market should it be permissible, would result in negative effects which would be particularly targeted onto the consumers. Either through, the implementation of high prices as a direct effect or unreliable network services and or alternatively through an indirect exposure, which would be that of plans to either prevent competition entirely or to substantially reduce the competition.

As has been discussed in earlier chapters, there was a justified need for the monopoly at the inception of Telecommunications so as to achieve the desired goals, but with improving technological advancements such as the use of cellular phones, there was a need to open up the market to competition. Large economies of scale have implications on affordability and access of services but these have fallen away in preference for competition, but how does the regulator

maintain their independence when dealing with new applicants and current operators including the dominant market position of the incumbent?

4.0 Regulatory designs.

The duty of a regulatory authority is primarily to promote market competition in the sector. This gives substance to the general conception that, competitive markets ideally produce both social as well as consumer benefits.[123] It is with this vision in mind that the regulator should ideally put structures in place so as to foster healthy competition in the industry.

There needs to have telecommunications specific regulations and ensure impartiality on a realistic level cannot be understated. These are referred to as anti-trust rules that are designed so as to encourage competition and to reduce bias when it comes to market entry level, keeping in mind that the role of the independent regulator amongst other duties is to ensure market restructuring to promote competition.[124] This means that the conditions given by the regulator must not be too stringent and discourage investors. It would be ideal to relax the conditions so that the investors' are lured into a hassle free market.

"Competition duly forces the telecommunication operators to compete in attracting customers, resulting in lower costs, quality guarantees, improved services and expanded network coverage." [125] Network operators must be taken to task by the regulator so that they are pushed into effective competition which will subsequently compel telecommunications operators to provide good services, lower tariffs and ensure competitive practices.

Rules dealing with the firms enjoying substantial market power may be applied.[126] It is a reasonable analysis to point out that an indignant abuse of the dominant market position will inevitably result in poor services and high tariffs. Such is the case in Zimbabwe where the situation is very appalling in that there is over-congestion of the networks and the regulator has failed to deal with this problem effectively.[127] Telephony and cellular services are low in quality and the services are border lining to being of unacceptable standards. The call termination rate leaves a lot to be desired as the network is impermeable at times, especially during the off peak

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123 Frank Vibert. Memorandum of the UK Model of the Independent sector economic regulator and the public interest. 2007.

124 Geradin and Kerf note 2, at 11.

125 Muriuki Muuriethi, Evolution of Telecommunications Policy Reforms in East Africa.pg 7 accessed 28 November 2008 at http://link.wits.ac.za/journal/j0301-muriuki-fin.pdf.

126 Bishop et al note 18. Discussion on market power.

127 Sunday Mail of Zimbabwe of 14 January 2009, comment on POTRAZ

hours more so between 8pm and 11pm. To further the consumers predicament the tariffs are still very exorbitant, which inherently defeats the purpose of justifying billing in US Dollar, ultimately implemented to curb the profits being eroded by the hyper inflationary economic environment and the over devaluation of the Zimbabwean Dollar. The regulators stance is by and large an enigma and one cannot help but wonder why POTRAZ is not showing its muscle and taking the operators to task.

The regulator must essentially foster competition on the market, but how? A discussion will follow regarding how the regulator may come up with regulatory designs to encourage competition as well as use interconnection as a tool to effectively foster competition on the telecommunications market.

4.1 Competition rules as an instrument of regulation

There is a need to maintain regulation to protect public interest and objectives, so as to ensure affordable pricing of tariffs, and providing universal access to communications services. Antitrust rules function is so far as making the market impartial and open. The rules I have chosen to analyze are detailed below;

There are rules designed to prevent mergers which reduce competition on the telecommunications market. A Competition Commission assists grey areas such as where merged companies operate together and impose tariffs. For example in South Africa, the Competition Act has dealt with issues of effective competition[128]. Competition rules are used interchangeably with Anti-Trust rules as it has one meaning and are designed to regulate the trade and prevent unfair practises from the players in the industry and to promote competition.[129] "In the event of an inquiry, the anti-trust authorities may order a partial division of the assets so as to operate separately from one another and create real competition, or may alternatively impose conditions designed to regulate the conduct of the merged firm so as to prevent anti-competitive patterns."[130]

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128 Competition Act of South Africa, Act no 89 of 1998 s12

129 Definition of anti-trust authorities and its purpose in the telecommunications industry. available at http://legal-dictionary.thefreedictionary.com/Competition+law. Accessed 2 October 2010

130 Damien Geradin and Michael Kerf. '*Controlling Market Power in Telecommunications. Anti-Trust vs. Sector Specific Regulation. At* 'http://rru.worldbank.org/documents/publicpolicyjournal/294kerf.pdf. Accessed 2 October 2010

The implementation of rules that deal with, firms enjoying substantial market power.

"Market power is the power held by a firm over price and the power to subdue competitors[131]." In the case of Zimbabwe the dominant market power holder would be Econet Wireless which has substantial infrastructure over NetOne. The aim of this rule is to, "prevent those firms from abusing their monopoly position to take advantage of end users and or other operators."[132] Such as the case in the latter, where Econet Wireless became the pioneer company the charge their offer 3G Services in Zimbabwe, lines offering this service being priced at US$25 per month.[133] Where effective anti- trust rules are being adhered to, competition in the form of another 3G provider such as Telecel, may reduce the tariffs.[134]

Rules that guard against anti-competitive agreements between operators may be invoked. There are practices that are acceptable in competition such as agreements that are made in friendly competition so as to foster efficiency, those that facilitate the entry of new products such as VOIP and those that facilitate information flow. However there are those practices that "inhibit competition by engaging in prohibited behaviour, such as limiting investments through collusion and overcharging interconnection rates, sharing markets and bid rigging."[135] The above named practices go against the spirit of market competition and an effective regulator should be alert enough to detect anomalies on the market.

The mission ICASA is bound to is to,

"Create a competitive environment for delivering a wide range of high quality communication services at affordable prices in order to assist in the overall economic growth and social development of the country."[136]

There are several provisions in the legislation that ensure this motto and help to ensure fair competition in the market. For example s53 of the Telecommunications Act of South Africa condemns uncompetitive actions. It touches on unbecoming behaviour from operators where the

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131 Definition of market power available at http://economics.about.com/library/glossary/bldef-market-power.htm. Accessed 3 October 2010

132 Ibid pg 12

133 3G lines offered by Econet Zimbabwe. Available at http://economics.about.com/library/glossary/bldef-market-power.htm. Accessed 4 October 2010

134 Telecel planning to launch 3G services in Zimbabwe. At http://www.techzim.co.zw/2010/05/telecel-one-million/. Accessed 4 October 2010

135 Geradin and Kerf pg 12

136 South Africa's ICASA Act of 2000 preamble available athttp://www.icasa.org.za/LegislationRegulatory/Acts/ICASAAct/tabid/84/ctl/ItemDetails/mid/499/ItemID/7/Default.aspx. Accessed 4 October 2010

regulator intervenes when it comes to issues such as discrimination and undue preference. The section ideally seeks to protect the consumers' interests and the speedy resolutions of complaints. S52 of the Telecommunications Act of South Africa imposes a limitation on the control of telecommunication services. The legislations assist in preventing the abuse of the market by one dominant party.

The administration of regulatory justice and fairness is important for the creation of certainty, which encourages potential players to enter the market with the confidence that, they will be treated fairly and without prejudice. ICASA maintains that there is transparency in their dealings despite the Cell C contention, as can be seen in the manner in which they strive to have regulatory fairness as indicated in the above mentioned provisions. A step to ensure fairness is through the adjudication process. In reality the fairness of ICASA is questionable when taking into consideration the issuing of the third cellular licence process. The process was marred with controversy and had to be referred to judicial review, and was settled out of court.[137]

4.2 Interconnection regulation

For there to be competition there has to be interconnection at a reasonable price there are several ways regulators could possibly decide to determine interconnection regulation. Whichever method the regulator chooses must reflect the spirit of competition in reasonable pricing, to suit the needs of that particular economy.

Backward looking cost based pricing. Wholesale market for interconnection with the price being set to cover both operating and fixed costs with a fair rate of return provided. It has its benefits but the lack of incentives for cost reduction is deterrence from this method.

"Backward-looking prices are determined by the cost of the project at the time the project is built, a lower construction cost implies lower access prices, and therefore a smaller profit flow."[138]

Long -run incremental cost. The modern trend is towards the adoption of:

"Forward-looking cost rules," whereby the costs used to determine access prices are based on the current cost of rebuilding facilities to provide the existing service, using the best

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137 Cell C battles to get 3rd cellular provider licence available at http://www.cellular.co.za/news_2001/06032001-cellphone_license_review_rocked_.htm. Accessed 2 October 2010

138 . G. Guthrie,J Small and J. Wright. *Pricing Access; Forward- looking v Backward --Looking Cost Rules.* pg 2.http://profile.nus.edu.sg/fass/ecsjkdw/forward%20looking%20costs%20revised.pdf . Definition of backward looking operation costs. Accessed 3 October 2010

technology. This method does not make use of actual operator costs in determining the price but rather uses hypothetical figures using current technology brought at current prices."

The method is popular as it overcomes the problems of incentives of cost reduction. In 1994 OFTEL switched away from fully allocated costs based on historical accounts, to a system based on the computation of forward-looking incremental costs reflecting current replacement costs of capital assets.[139]

Efficient component pricing is, "a methodology that addresses access pricing by emphasizing the opportunity cost of the integrated access provider. The relevant opportunity cost will depend on market conditions, including product differentiation, bypass, and substitution possibilities. In the most elementary situation, if the incumbent receives the same profits from interconnection and access as it does from sales of the retail product, the competition can enter the market only if they are more efficient in providing retail functions than the incumbent."[140] This is disadvantageous to the user because, "the incumbent operator raises retail prices to maximize profits and results in down streaming costs to new operate in enforcing interconnection."[141]

5.0 Responsibilities of the Regulator

The role of regulation is to allow the regulatory authority to perform the following functions.[142]

1. selecting new operators
2. preparing and granting new licences;
3. regulating tariffs;
4. administering quality and technical, standards;
5. resolving disputes between operators and users;
6. administering the universal service regime;
7. monitoring the activities of the operators to ensure that they comply with their obligations, including accounting separation requirements an quality requirements , and universal obligations;
8. in some cases oppose sanctions upon sanctions on the operators when necessary;

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[139] Ibid at pg 3

[140] Definition efficient component pricing at http://www.regulationbodyofknowledge.org/glossary/define/Efficient%20components%20pricing%20rule%20(ECPR)/ . Accessed 4 October 2010

[141] Lisa Thornton, *Telecommunications Law in South Africa*. 2006 pg 114

[142] Geradin &Kerf (n2)at 16

9. providing advice on telecommunications matters.

The regulator is not limited to the functions above. The regulator is mainly responsible for licensing of new operators and achieving social responsibilities such as promoting universal service and universal access.

The regulator is responsible for interconnecting the networks through policy framework affecting the operators and not physically. Although there is no single definition of the term interconnection, the World Trade Organisation describes interconnection as, "the linking with supplies providing public telecommunications transport networks or services in order to allow the uses of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken."[143]On the other hand the International Telecommunications Union defines interconnection as being the, "commercial and technical arrangement under which service providers connect their equipment networks and services to enable customers to have access to customer services and networks of other service providers." [144]

The responsibility of the regulator is to ensure maximum economic efficiency by controlling market power and ensuring a level competitive ground for all competitors. The regulator must decide on the number of entrants it will allow on the market and the conditions of entry. A selective process is followed as economies differ in nature and not all operators who may wish to invest will be allowed to do so. An essential role of the regulator that cannot be undermined is that of interconnection which in effect the root of competition is. Where new operators enter the market, they will inevitably rely on the incumbents' network to survive at the initial stage of inception.

An analysis of how several countries have dealt with interconnection logistics is necessary because interconnection conditions determine the amount of competition on the market. It is of paramount importance that interconnection prices are reasonable such that they promote service based competition; ensuring new entrants on the market are able to compete with existing operators. Where interconnection rates are too low too many competitors may enter

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[143] World Trade Organisation Reference Paper Sec 2(1) at http://www.ictregulationtoolkit.org/en/PracticeNote.3239.html.

[144] Definition of interconnection at http://www.itu.int/newsarchive/press/WTPF98/WTORefpaper.html#Interconnection. Accessed 4 October 2010

the market, resulting in negative network facilities due to a delay facility bases competition. The regulator has the challenging task of coming up with the right balance of the two.

Interconnection facilitates the competitor to be able to transfer calls from other operators to their own as well as to the incumbent. Where interconnection rates are exorbitant it inhibits potential investors from investing in the country. If the interconnection costs are too high, the competitors will not be financially motivated to enter the market. The regulators role is to ensure new entrants that the interconnection rates are affordable and can be objectively facilitated by the regulator. The regulator when introducing new operators onto the market should be reasonable in determining interconnection charges between the new entrant and the incumbent. If the interconnection rates are too high the new entrant may be reluctant to enter the market thereby limiting competition where the costs are too high.

Globally regulatory authorities have found different ways of dealing with the interconnection dilemmas. An option would be to allow the potential operator to fund its own interconnection cost. The interconnection cost if exorbitant, and will inevitably deter investors as the costs to set up will have a negative impact on potential profits. If at all the competitor does manage to come in under these harsh conditions, the tariffs charged for their service will be harsh on the consumer to make up for the setup costs.

A more favourable route would be formulating rules requiring the incumbent to grant the competitor access to its local infrastructure.[145] Interconnection is defined in the now Telecommunications Act of South Africa Section 1, as the linking of two telecommunications systems so that users of either system may communicate with users of, or utilise services provided by means of, the other system or any other telecommunications system.

Facilities leasing refers to,"A vertical relationship between network service providers and other service providers. One service provider leases the facilities of another in order to provide services to end-users."

However the facilities need not necessarily only be leased, as the wording of the Telecommunications Act of South Africa makes reference to both lease or otherwise make available telecommunication facilities."[146]

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[145] T Kiesling and Y Blondeel, "The EU Regulatory Framework in Telecommunications," (1998), 22,Telecommunications Policy 571, pg 573

[146] J Lawrence. *Meaning of interconnection and facilities leasing*. Pg 173 at http://www.idrc.ca/uploads/user-S/11619605231O6_IntFacLeas.pdf.

"The facilities to which a service provider would want to have access would include wire, antenna, towers, underground ducting, cables, buildings, fixed links, and land on which the facilities are located. The market trends also affect interconnection capabilities and necessities of cable phones interconnection and fixed lines development"[147].
In most African countries, there is a delay in commencement of operations of the Second Network Operators due to problems linked to political influence, or to delays in the interconnection process. This is different to the situation with mobile phone operators who are more willing to interconnect the new entrants, which has seen an improvement in the sector. Internet connections are also largely dependent on interconnection. These are facilitated by the Public Network Access Points, or Internet Exchange points. The global trend has seen the cost of this interconnection drop over the last couple of years, but in developing nations it is still a laborious task with crippling costs to the provider. Internet connectivity is largely unregulated, but the providers often voluntarily provide interconnection as is also beneficial to them in increasing the number of network users on their networks.

Another important function of an independent regulator is to ensure universal service. This may be classified as a social responsibility. Universal service is defined by the words of OFTEL in the UK as, 'the provision of basic voice telephony or its equivalent for all those that are reasonably requesting it, regardless of where they live.' However the problem here is that there is no definition of affordability or reasonableness. How does the regulator peg the pricing? The additional concept of common tariffs as highlighted in the European Commission Interconnection Directive Draft 2002/21/EC, gives interconnection directives a better specification to the definition, focusing on geographical averaged pricing for provision of that service[148]. The WTO Reference Paper takes this initiative very seriously and most countries have established a prerogative to achieve it as shall be analyzed in the following chapters. The unique nature of telecommunications is such that it requires economic input to achieve universal service; these arise from the following factors:
(a)Network externalities.

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[147] ibid
[148] Nicholas Garnham. Universal Service defined in the European Commission Interconnection Directive pg199 http://lirne.net/resources/tr/chapter16.pdf . Nicholas Garnham.

This refers to the concept that, "the greater the size of the network the greater the benefit to the other users of the network." [149] It is therefore necessary to provide support to some customers whose costs of service provision exceed the revenues they bring in, seeing as the true economic value of customers is greater than the willingness to pay from each individual customer. Based on individual needs the customer will seek a network most affordable to them.

(b) Network users may generate significant levels of profitable incoming traffic, while themselves generating, and subsequently paying for few, if any outgoing calls. This is due to the unique two-way network nature of telecommunications.

(c)Telecommunications allows simple communication and in a way may be regarded as a substitute for transport costs, as an industry it has great economic input which may not necessarily be reflected in the price of telecom itself. The regulator bears the burden of looking into the issue of universal service, which is not an enviable position. Universal Service is a regulatory problem for the regulator, has more questions than answers, especially when it comes to issues concerning cross subsidy.

The regulator must promote universal access. Barriers to universal access are present not necessarily in the costs directed to the consumer, but in the way that service and billing and payment options are structured. A major incentive to the users would be where you have low income users faced with relatively high upfront connection and rental charges, also the inability to control usage and ultimately the cost. The question has been asked as to, "who regulates the regulator?"[150] The International Telecommunications Union makes the following recommendations in order to achieving progress relating to universal service, it is difficult to come up with an international meaning for the word. The ITU looks to the following principles in attempting to come up with a definition. Information refers to the collection of the relevant statistics on a regular basis. Aim to establish targets with the operators, preferably in the license conditions. Affordability relates to essentially ensure the services are reasonably priced. Technology oriented goals mat be set, for example encourage wireless local loop which is cheaper than cables. Lastly look to monitoring the market, it is important to monitor the progress of networks and to enforce targets

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[149] Network externalities defined at http://economics.about.com/cs/economicsglossary/g/network_ex.htm

[150] Professor The Lord Norton of Louth 'Who regulates the Regulator" Centre for the study of Regulated Industries pg 1 at http://www.bath.ac.uk/management/cri/pubpdf/Occasional_Lectures/12_Norton.pdf

6.0 Functionality of the regulator

According to Melody, "where there is effective separation of basic functions between the government and the regulatory authority, the market will have a significant growth. Independence encourages clarity and stability." [151] Independence is of utmost necessity when it comes to the functions of the regulator. In understanding this pivotal characteristic of the authority, it is imperative to critique the characters of the officers of the regulatory institution. The determination of their being will outline their ability to perform their duties. The regulatory officers must be of a firm backbone to be able to withstand the pressures of work and to effectively make decisions that are beneficial to the state as a whole and not necessarily to individual companies. The office of the independent regulator must be free from prejudice and not succumb to political pressures. As pointed out by Jamison in his article, "being a utility regulator has its risk as the independence of the regulator effectively erodes power from the politicians and the operators."[152] It is probable that when politicians appoint utility regulators to establish an unspoken outlook that creates a certain amount of stability in the industry. In Zambia a regulator was fired for allowing a politically unpopular tariff increase even though the increase was required by the law. An independent regulator must desist from being biased and refrain from making decisions that are contradictory to government policy. The institutions must rather aim, "to be independent enough to implement regulatory policy without undue influence from the politicians."[153]

Administrative independence is of paramount importance when dealing with the telecommunications market. A regulator is generally considered to be independent when "he or she has arms lengths relations with the consumers, private interests and politicians."[154] It would be advisable if the persons chosen to be regulators would keep themselves free of controversy and adhere to the mandate as stipulated to them. How this is possible to maintain, is the

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[151] William H Melody. *Attracting Investment for Competition to Telkom.at* http://link.wits.ac.za/papers/wm20030220.htm William H Melody.

[152] Mark Jamison. '*An insight into the leadership skills required for an independent regulator.*' at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/06/28/000112742_20050628084853/Rendered/PDF/wps3620.pdf . Accessed 20 June 2008

[153] . William Melody. Abstract calls for independence from political influence. http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VCC-3SWY089-1&_user=10&_coverDate=04%2F30%2F1997&_rdoc=1&_fmt=high&_orig=search&_origin=search&_sort=d&_docanchor=&view=c&_searchStrId=1481934811&_rerunOrigin=google&_acct=C000050221&_version=1&_urlVersion=0&_userid=10&md5=cd6b8d38226dcc954448b237f06b3174&searchtype=a. Accessed 3 October 2010

[154] Smith Warrick. 1997. "*Utility Regulators. The Independence Debate," Public Policy for the Private Sector*, Note No 127, Washington D.C: The World Bank

problematic question that many a regulator has been faced with during the course of duties. The answer although not a simple one may be found in investigating how other regulators have taken on their duties and how they have seemingly managed to maintain their independence. Laws have to be put in place so as to position organizational autonomy of the regulators. One suggested method is to prohibit the regulator from having a stake in the operator's financial success. If allowed to benefit the regulator would be placed in a quandary where, if he is a beneficiary to the operators stake; decisions would ultimately result in potential bias toward competitors so as to further the company's interests. The stability of the company would be of a personal interest to the regulator, as they would be stakeholders. It would be advisable for the regulator not to accept anything in forms of gifts, lunches and other miscellaneous favours from any operator, so as to avoid being lured into granting favours to the operators.

"Integration of staggered terms of appointments and strict terms and conditions of office ensure effectiveness of the regulatory authority." [155] If one is in office for too long they tend to become relaxed and may not be as diligent in pursuing new goals. Fixed and staggered terms of appointment for the regulators encourage fresh thinking as new officers might mean different ideas. In knowing that there is a limit to the number of years that one may have in office, sends out a message even to the operators and competitors that were we have the misfortune of possible corruption of regulators that person is not guaranteed a place in office for eternity. Therefore one has to legally conduct business so as to adhere to the laws of the nation or they will face irreparable repercussions once the individual leaves office.

The methods for this sort of arms length handling would be fixed and staggered terms for the regulators to ensure fair minds that do not fall into the trap of complacency. Once someone has been in term for too long creates a potential environment for complacency. It becomes more difficult to be objective toward the operators, creating undue influence toward potential competitors seeking to penetrate the market.

A restriction regarding the removal of regulators in office without justified cause is advised. In essence that is where the dismissal is not wholly substantiated by statutory or constitutional authority for the institution; the dismissal should be regarded as unfair. The afore mentioned when used as a method to protect the regulator will inevitably create a free and fair

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[155] M. Kerr. M.Schiffler and C.Torres. *'Telecom Regulators:Coverging Trends.'* Available at http://rru.worldbank.org/documents/publicpolicyjournal/230Kerf-0516.pdf. Terms and conditions of the office of the regulator. Accessed 2 October 2010

environment in which to make good decisions. The officer keeps in line with their mandate as a regulator, knowing that their jobs are secure irrespective of the decision that one may choose to make.

Appraisal methods determine the level of independence that a regulator is entitled to a review of the decisions made by the regulatory board should be by the courts rather than by the ministry[156]. The separation encourages the independence of the regulatory institution to make justifiable and fair decisions, as the decisions become subject to independent scrutiny. In courts the reviews are subject to the analysis of an independent party, whereas the Ministry may not be in agreement with the policy making of the regulator and reject its proposal. In the event of conflict between the minister and the regulatory body, the matter may be brought to the courts for resolution.

Political independence means that there is a limit on communication with politicians, not that regulator disregards government policy. The demarcation must be clearly defined and must not interfere with the functions of the regulator. The regulators must clearly resist the temptation to compromise their authority, either by making all communication put to paper and not telephonically. When facts are placed on paper they discourage corruption as they implicate the responsible party. It would be helpful for the officers to insist on all matters spoken about to be placed on public record so as encourage transparency and ultimately avoid conflict[157]. What cannot be part of the public record will definitely not worth listening to as it would reflect some underhand tactics on either party. The encouragement of recording communications should therefore be a deterrence method of discouraging corruption amongst politicians to seek favours which would culminate in the heightening of independence amongst the regulators without fear of being intimidated.

6.1. Limitations on the regulator

The ability of the regulatory authority to operate its policy framework within its own confines is often deterred by interference. The independence of a regulator is not one that is absolute in

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156 Cell C bid came under judicial review after irregularities. Available at http://www.hellkom.co.za/news/local/1869-Cell-C-provisionally-awarded-cell-licence.htm. Accessed 3 October 2010

157 A regulator in the California public utilities Commission insisted on this method and it proved to do wonders, insisting on documentation of telephone records allowed the regulator to carry out his duties without the political pressures. Available at http://www-wds.worldbank.org/external/default/wdscontent. Accessed 3 October 2010

nature. As with all institutions it is susceptible to public sentiments which would advocate for cheaper rates and improved services. The budgetary provisions, in which regulatory board is confined to work within, are to be considered. License provisions in relation to the duties of the regulator and the applicants The political realities of undue influence on the market regulations, be it directly or indirectly, and laws of that country, which must be adhered to, even the questionable ones in Zimbabwe relating to interception..

Independence of the regulator does not mean that it is not accountable to anyone. There is no absolute regulator, but an independent regulator subject to the laws of that country. While it is true that although the regulator is not entirely independent as an organization in terms of the laws by which they operate by. The regulators are there to referee the industry and be decision makers of the law as presented to them by statute and the lawmakers. The regulatory board by virtue of being creatures of statute need the law to survive, but it is the minds of those councillors, which ensure that the job carried out effectively in regulating telecommunications. One has to look at independence of a councillor in the office of the regulator, in relation not only to accountability, but also to certainty and flexibility. It is not an easy task to expect one to have all these qualities but these are the optimum when expecting an efficient and independent regulator.

Situations that compromise the ability of the institution of the regulator to be independent may arise. Where a regulator becomes a key player in the telecommunications industry, it may prove to be a dilemma. When the regulator becomes a part of the law making community in regard to that industry it develops a personal interest in the market. A failure to comment on happenings in the sector will inevitably amount to an act of omission on the part of the regulator. The omission to act may result in laws of inequity being passed, to benefit the regulators interests in the market, to the detriment of the other operators and consumers. Hence there are underlying implications of both positive and negative malperformance as remaining silent will also have its implications. [158]

A failure to act will prejudice an applicant where no decision has been made on the issues; Econet had been waiting on POTRAZ after 3 years to make a decision regarding VoIP services. In Kenya the CCK came under scrutiny by guaranteeing the Investment of Teams

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[158] Jamaica Gleaner Newspaper 2000, at http://www.jamaica-gleaner.ocm/gleaner/20001024/lead/lead3.html "Our budget still waiting cabinet approval," October 24, 2000 decision by Winston Hay to speak with the press on the decision by the Jamaican government to authorize the telecommunications budget. Accessed 19 November 2009

Limited, a consortium of local companies, in an under the sea cable project.[159] The decision was justified as a method of allowing Kenya to follow the trend of establishing submarine cables in improving broadband.

6.2 *Critique of the role of the regulator*

The regulator is faced with the two roles of being an authority and that of being a leader as relates to character. To be a leader one must possess the following qualities amongst others so as to fulfil in part the onus of being regarded as independent in nature. An officer in the regulators office must ideally be: Stable enough so as to give a critical analysis of events. The officers in question ideally should have open-mindedness and be alert to threats and situations, which threaten the traditional status quos and defy traditional solutions. The regulatory authority, ought to be bold enough to take upon difficult issues and to allow for new innovations and facilitate resolutions. To achieve the desired results they must be level headed, and aim to be objective toward proposals. Goleman et al describes the ideal officer as, "adopting a self directed approach to enhancing emotional intelligence."[160] Emotional thinking motivates people and helps offices understand what is truly valuable.

As pointed out by Jamison, "the regulators are a body of authority."[161] The two roles are distinct in nature as shall be illustrated. The authoritative aspect of the regulation demands that the regulator protects the people and the system from external threats. Authority provides solutions by applying established instruments from political science, management, law and engineering amongst other duties. It restores order so as to allow the continuation of work where there has been a disruption of events of the normal day-to-day running of the industry. The regulator has to ensure that there is normality in the following of established rules and procedures and without wastage of time and resources in addressing the matter.

As illustrated in the case studies, the work of independence is specifically complex when it comes to smaller economies. Dealing at an arm's length with politicians is almost unachievable as there is little regard, in most instances, for these institutions by politicians. The

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159 James Anywanza. *Is Communications Commission of Kenya(CCK) a regulator or a player*? Financial Standard. 25 March 2008 at http://www.estandard.net/mag/mag.php?id=1143983777&catid=49. . Accessed 5 October 2010

160 Goleman Daniel . 1994. *Emotional Intelligence*, New York. Bantam Books pg 109-112

161 Jamison , Mark A. *"Leadership and the Independent Regulator."* pg 6 and page 7 at http://www-wds.worldbank.org/external/default/wdscontent Accessed 3 October 2010

politicians so often bulldoze the regulator into making decisions that suit the needs of the existing regime. The fact that there is an overall interest in the telecommunications industry means that the regulator is hardly free to act on intuition alone, and mostly goes with the status quo in a smaller economy. Jamison suggests in his article that in, "Africa almost everyone their fingers in the cookie jar and will do anything to get as much out of it,"[162] albeit to the detriment of the network users. That means almost all the politicians want to benefit from the potential benefits and will use their influence to attain maximum profits in the telecommunications industry. Underhand dealings in the form of bribery and corruption will make the regulator boards decisions questionable.

7.0 Conclusion

The regulators primary function is to create a sound investment climate for investors. Therefore there is a need for the institution to have utmost credibility in their presentation. In attracting potential competitors into the market there must be transparency in procedure and independence that is well entrenched in the Regulator. It suffices to say that officers of the Regulator must be a people of integrity that are principled in their wisdom and can be fair and impartial in their interactions with the market participants.

"Effective regulation determines that the consumer protection comes first, ideally so by promoting competition to choice and value for money, providing incentives to promote and improve efficiency and ensure services provide for a better quality of life to the consumers."[163]

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[162] Jamison Mark. "*Leadership and the Independent Regulator.*" -pg 6 and page 7 at www://www-wds.worldbank.org/external/default/wdscontent. Acessed 10 October 2010

[163] Benefits of consumer protection at .http://www.consumeraction.org.au/downloads/CuttingtheRedTape-effectiveconsumerregulation150307.pdf. Accessed 10 October 2010

CHAPTER 4

Adapting to global standards

1.0 Lessons to be learnt: An International Comparison

The African community has a lot to be learnt from international communities, and their regulators. In considering the development of role the independent regulator plays, regarding issues which are yet to affect Africa on a large scale, such as the internationally contentious regulation of the internet. The following is an open ended number of issues SADC regulators may learn from others experiences.

2.0 Adapting the role of the regulator:

It is necessary to look to the international community to ascertain how they have dealt with telecommunications issues. A lot may be learnt when it comes to contentious issues such as interconnection and the regulatory authority. In considering the role of the regulator, Mansell points out three issues which must be taken into account. [164]

"Firstly that of achieving social goals, aimed at providing public network services, therefore the regulator has to keep abreast with technological advancements. The regulatory authority must familiarise itself with the expected international standards of delivery relating to the subject matter in question. [165]Secondly the regulator must be able to control the market power of the incumbent operator. The decisions must not affect the market entry barrier in a negative way; they must promote favourable market entry environments. [166]Thirdly where there is an appreciation of standards the regulator will come up with policies that encourage the development of national information and communication infrastructure.[167]."

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[164] Mansell R. "*Designing Networks to Capture Customers: Policy and Regulation Issues for The New Telecom Environment.* 'at http://lirne.net/resources/tr/chapter07.pdf Accessed 1 October 2010
[165] Ibid at pg 80
[166] Ibid at pg 87 and pg 88
[167] Ibid at page 86

2.1 United Kingdom

The duty of the regulator is to promote market competition in the sector reflects a belief that competitive markets will produce social benefits as well. The regulator is an evolving creature dependent on the changing nature of the industry; therefore the laws must reflect the changing role of the institution so as to effectively serve its purpose in society.

The incentive based regulatory framework provides for market efficiency without the regulator getting involved in management decisions .The limited interference is set to bring efficiency improvements onto the market as well as have social benefits to the consumers as a result of progressive reforms such as, the lowering of tariffs and an improvement in the quality of services. The open ended nature of the interaction is such that legislators and regulators do not find themselves in conflicting roles at the expense of the consumer. Regulators provide for surety in the sector and promote investments in a stable market.

UK has sought to review the nature of their regulatory regime to review the classic model, which so often finds the regulator under pressure.[168] Largely due to social concerns the need to give better services at lower costs. Poverty and income distribution lists call for a change in approach from the regulators. Recommendations to change the regulatory framework have been suggested below:

(a) Deconstruction of duties

An initial approach would be to keep the competitive markets focus of the existing model and to rely on the regulator being able to decompose the new public interest duties as part of their detail. The move will assist the Regulators to incorporate the old role of public protection around that of competitive markets.

(b) Reformulate Duties

An alternative consideration would be to modify the competition and the market efficiency focus of the existing classical model and put the new public interest concerns at the centre of the regulators tasks. This would include a reflection of the social needs in statutory legislature.

(c) Recentralise Duties

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168 Bishop, M Thompson D. ;*Regulatory Reform and productivity Growth In The UK'S Public Utilities'* Applied Economics, 24(11), November, 1181-90 at http://direct.bl.uk/bld+091243477&ETOC.HTM. Accessed 4 October 2010.

Allowing the Minister to have full control of the industry may be an option the UK is looking at. The reasoning behind it being that there will be less conflict. The ministerial directives and policies to be implemented would be within the general duties of the government. The constant conflicts are presently affecting regulators in Zimbabwe where the Minister has as a say in the regulators duties. The benefits

2.2 Interconnection Regulation

Australia.

Where there is overregulation of the market there may be a lack of competition on the market. After opening up the markets to competition and calling for Telstra to open up its network to its competitors, the former monopoly incumbent has been embroiled in interconnection disputes in Australia.[169] The disputes have resulted in Telstra's decision not to proceed with a new high-speed network and to launch a constitutional challenge to aspects of its regulation.[170] There has been a rapid slowing down in infrastructure development, with Telstra pulling out of their fibre optic network construction due to what they deem unreasonable interconnection conditions, forcing them to give rival competitors access to its networks at low cost rates. So where there are harsh laws on interconnection this will dampen the market. This is a valuable lesson to be learnt by the African regulators.

Interconnection rates must not only benefit the new entrants, but protect the incumbent as well so as to promote competition on the market. The interconnection rates must not be ridiculously low, nor must they be too high, they must be reasonable in nature.

2.3 Canada.

Regulation has been a mixture of competition and regulation of the market.[171] Competitive market forces are what drive technology forces on the market, and so the need for the regulator to spur competitive environments. World class results have been established largely to the fact that the interconnection rates have been reasonable and encouraging to potential entrants on the market. The telecommunications networking is a crucial factor in deciding competition and so

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169 Telstra interconnect settlement with Chime Communications available at http://archive.iinet.net.au/about/mediareleases/02/mediarelease2.html, Accessed 12 October 2010

170 http;//www.theage.com.au/news/business/Telstra-turns-to-constitution-in-high-court-challenge-of-acc/2007/01/24/1169594362838.html . Accessed 14 October 2010

171 http:/www.crtc.gc.ca/Eng/publications/reports/_review05.htm. Accessed 12 July 2010.

far Canada is a shining example of how to handle difficult interconnection issue, which African countries and others could learn from.

Monopoly based regulation, was common at the inception of telecoms regulation as it protected the government monopoly. However as was illustrated in the growths of developing countries, it is evidenced that neither public nor regulated private monopoly PTOs can meet the demands of the present telecoms. Under market liberalisation, competition becomes a tool for effective regulation that may assist in achieving fundamental economic and social policy goals. Although the results are not immediate the desired outcome is dependent on the regulators policies which must reflect liberalist views. Monopolistic structures must desist from being dominant in the industry, as this will discourage investors from the market. How competition are fostered into the model. Look to a system that functions well in developing countries.

2.3 America

The regulatory authority in America, the US Federal Communications Commission, and FCC has been one of the most successful regulators to date. They have broad mandates and significant freedom to interpret and enforce their mandates. However theirs is a unique model, as few countries have the degree of independent as granted to the FCC. The degree of independence is not as attached to the government as we have in the SADC region. According to Melody, this liberal model moves the politics away from the telecoms sector and allows the market to regulate itself.[172] It encourages the regulatory decisions to be made on their substantive merits, and not based on political favouritism or powerful industry players.

As pointed out by Jamison in his paper, "Regulatory independence generally means that the regulator and the regulatory institution deal at arm's length relationships with the operators, consumers, private interests and political authorities."[173]

Independence is problematic because the regulator in the long run also becomes a player whilst developing and shaping independence, as they play an advisory role to ministers on policy matters. Independence is made even more difficult in small economies as the arms length

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[172] William H Melody. *Attracting Investment for Competition to Telkom.at* http://link.wits.ac.za/papers/wm20030220.htm . William H Melody. Accessed 10 November 2009

[173] Jamison Mark. "*Leadership and the Independent Regulator.*" pg 6 and page 7 at www://www-wds.worldbank.org/external/default/wdscontent.. Accessed 12 June 2010

restriction is difficult to maintain where potentially established; "everyone wants a piece of the pie."[174]

2.4 The Caribbean

From a developing country to another, SADC countries may benefit from the policy implementations from the Caribbean. In answering the question on how service can be provided at affordable prices to the rural consumer? The Caribbean has dealt with this issue by prioritising the completion of unfinished networks. The completion of these networks will not only stimulate market growth, but will promote universal service. The Caribbean has looked into lobbyists for the fulfilment of universal access obligations, through engaging consumer interests groups to carry forward the view of smaller states. Perhaps SADC may also come up with a regional body to lobby the social obligations to the international community. The bulk of the investors are from Western countries, and are more interests in making profits than achieving social obligations in a foreign country. Local authorities must not be blinded by profits and prejudice their own social goals in favour of the desire to increase market growth. There must be a balance and the middle ground should have benefits to both parties. Again the issue of independence comes in as the regulator must not be biased toward industry lobbyists.

3 Recommendations

In light of the above conclusions, the following is recommended for the regulator to implement the following strategies. "Independent regulators will have to encourage newer technological advancements from the service providers, to ensure the network providers are in line with the competitive global markets." [175] The regulators must essentially create appropriate and tactical strategic policies for the growth of the telecommunications market, not only in cellular telephony but in broadcasting as well. A systematic approach to gathering the evolving needs of the market will allow them to come up with evolving policies to suit implementation of the changes. In understanding the competitive arena there can be quick facilitation regarding the implementation of superior services.

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[174] Ibid at page 8

[175] Principles of Corporate Governance A White Paper from The Business Roundtable . May 2002 at http://www.alcoa.com/global/en/about_alcoa/corp_gov/pdfs/BRTPrinciples_CorpGov.pdf at pg 9. Accessed 13 October 2010

3.1. Management role of the regulators

There are practical limitations that do not allow the African Regulator to fully meet their desired targets and inhibit their functionality. These obstacles are related to a lack of understanding at times of the b technological advancements being applies for such as VoIP, with some countries being wary of it as illustrated by the contention in Zimbabwe. VoIP removes the need for phone to phone communication, in preference to phone to computer communication, more specifically over the internet. Several actions may be taken to counter knowledge obstacles such as:

a) Providing the necessary training for the regulator looking toward the advanced technology in lines with global trends. An insight into how first world countries and other developing nations have dealt with the predicaments. A specific regulator may learn from other's successes or mistakes in implementing strategies beneficial to the consumers. This awareness can be achieved through seminars and international conferences relating to telecommunications. These conferences are in recognition of problems of lack of expertise to implement the policies and frameworks. The demand differing as requested by existing and potential network providers, together with the ever changing needs of the network users.

4.0 Conclusion

Suggestions that may encourage impartiality if excellent competition is to be fostered in the telecommunications industry have been analysed. It however remains to be determined whether Africa will be a beneficiary to a legacy of independent regulators, given the particular case studies discussed. The conditions in which regulators operate leaves room for improvement aiming to be at par international standards. The regulators can only be truly independent where there is financial independence, accountability, limited political interference as well administrative independence. An enforcement of these would enable the regulator to effectively perform their duties. The difficulty remains as to how best to implement these pre-requisites. It is one thing to know what must be done, but the struggle regards to how it will be done.

It remains to be determined whether in the coming years Africa will have an independent regulator but given the lessons to be learnt from other countries, the regulators have a chance to

redeem themselves in the nature of their policies and in fostering quality information on the market. Even the models in the UK, Canada and the United States have not managed to successfully eradicate anti-competitive behaviour on the market. The issue of regulation is a complex one, and is a learning point for everyone. Essential considerations need to be made when considering the roles of the authorities and in effectively regulating the markets. The learning curve is steep but if regulators learn to pick the positives out of one another's systems and implement them accordingly it will be a milestone for the telecommunications sector in Africa.

Conclusion

It suffices to say that the benefits of an independent regulator cannot be understated. The vulnerability of the telecommunications market is such that it should be regulated in a manner which encourages investment. The concrete issue in attracting investment is to make the investors want to operate within the country. Where a regulator fails to be decisive in its approach the industry will not grow to its potential, as the investors will shun the market. The regulator has to be independent in their operations and limit the political influence and desist from unfair practises which prejudice the network operators. The role of the regulatory authority is not an easy one and therefore developing countries must come up with policies that reflect the complex nature of the market. In recognising the dynamic nature of telecom technology and service opportunities, the regulatory authority must minimise the market entry barriers, so as to improve the industry. If competition is to be an effective tool of regulation, then it needs to be used in a transparent manner. The manner in which new entrants enter the market must not be biased as it will have a bearing on the quality of the network. Independence keeps a check on anti competitive practices which will discourage new investors from the markets

The regulator must desist from being rigid in nature and desist from protecting PTOs which are still dominant on the market, yet their services are lacking in terms of quality. The regulatory authority must seek to promote value and efficiency of the network, to benefit the users of the network. There is a need to achieve goals, such as the achievements of universal access and universal service. The regulator must come up with policies that show their commitment to achieving social goals. Where there is more independence in the authorities, SADC countries will be beneficiaries to better investment and improve the quality of services they are currently offering.

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