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TELECOMMUNICATIONS LAW AND REGULATION IN LESOTHO – A CRITICAL ANALYSIS

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

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DECLARATION OF AUTHENTICITY

I,

Likonelo Lebone,

do hereby declare that this paper is my own unaided work that has not been previously submitted for any academic requirement or any examination at any other institute or university.

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ABSTRACT

In 2000, the Lesotho telecommunications sector underwent a fundamental change in structure, from that of monopoly to one of competition. A new regulatory regime was introduced and a regulatory agency, the Lesotho Telecommunications Authority was established to promote telecommunications development and to safeguard competition.

The 2000 legal framework supports competition but fails to adequately minimise the regulatory risk. The new regime also failed to facilitate improved or satisfactory sector performance.

The Lesotho regulatory framework addresses most internationally recognised telecommunications regulatory issues, but most areas needs improvement if sector performance and investor perception is to be enhanced.

Firstly, the Government must give the regulatory Authority functional independence. Secondly, the Authority must revisit various policy areas. For instance universal access policy and programmes that bring affordable services to the rural and urban populations alike must be developed and implemented; complimentary policies that encourage the use of the services and investment in the sector, like investment, consumer protection and competition policies must be adopted; alternative dispute resolution mechanisms, especially for disputes between the regulator and service providers must be introduced and preferred in the sector.

The challenge is to bring telecommunication services to all communities including low-income families and communities in rural and mountainous areas. Thus whatever policies are adopted, universal access and improved sector performance should be a guiding goal which must be pursued rigorously.

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CHAPTER 1

INTRODUCTION

1.1 An overview of Lesotho telecommunications regulation

Prior to 2000, telecommunications services in Lesotho were licensed, regulated and provided by a statutory public enterprise – the Lesotho Telecommunications Corporation (LTC). LTC had monopoly rights in the provision and operation of the telecommunications services and networks.

In June 2000, the Lesotho Telecommunications Authority Act of 2000 was passed into law. The Act changed telecommunication regulation in Lesotho and transformed the structure of the telecommunications sector from that of monopoly to one of competition. The Act was expected to enhance telecommunications development, quality of service and universal access.

The 2000 Act introduced competition in the market and established an independent telecommunications regulator. Almost seven years after the passage of the Act, the performance of the sector remains unsatisfactory and the majority of the population remains un-serviced. This paper explores what has transpired during these years; whether the reality fulfils the expectations and hopes of producers and consumers following the passing of the Act.

1.2 Purpose of study

The purpose of this study is to examine and analyse rules and regulations governing telecommunications services in Lesotho, and to identify the regulatory features which contribute to the success or failure of the sector and are associated with positive outcomes for both producers and consumers. The aim is to identify how the regulation may be reformed to facilitate social and economic development.

The analysis of the law will take into account the purposes of the legislation. The aim is to provide an overview of the telecommunication regulatory policies in Lesotho; critique and appraise, compare and contrast existing regulatory framework with international and regional regulatory trends in the sector and assess how the rules and policies are being implemented. The study will provide recommendations for reform where necessary.

1.3 Research methodology

This study will consider the progress made in policy development and legislative framework in Lesotho. The key legal instruments pertaining to telecommunications sector in Lesotho will be identified and discussed. The key elements will then be compared and contrasted with current regulatory issues identified by regional and international organisations to which Lesotho is a member.

This study will be conducted through desktop study. Policy documents like the Lesotho Telecommunications Policy 1999 and 2005, The Lesotho Telecommunications Corporation Act of 1979, the Lesotho Telecommunications Authority Act of 2000 and reports by various institutions like the Lesotho Telecommunications Authority and the Privatisation Unit will be studied. Recommendations will be based on the identified strengths and weaknesses of the system.

This study will contribute in assessing the effectiveness of the laws and regulations in the development of telecommunication industry in Lesotho and in providing a useful reference point with regard to the state of Lesotho telecommunications regulatory policies and a portfolio of areas which need reform, if any.

1.4 Study limitations

While there may be other reasons for the under-development of the telecommunications sector in Lesotho, this study only considers the impediment caused by the legal rules and regulations. The findings and recommendations will be determined by availability and accessibility of relevant information.

1.5 Chapters' layout

This study comprises five chapters. Chapter one is an introduction chapter providing a synopsis and purpose of the study.

Chapter two provides an understanding on telecommunications services and its development; it also provides perspectives on the regulation of telecommunication services.

Chapter three is an analysis of telecommunications regulatory issues recognised by regional and international organisations involved in telecommunication services issues.

Chapter four provides an account of the development of the telecommunications legal regime in Lesotho and discusses the current legal regime in relation to regional and international recommendations and practices outlined in chapter three.

Chapter five is a concluding chapter. It considers the performance of the sector since the 2000 legal regime was introduced and provides recommendations for legal reform.

CHAPTER 2

AN OVERVIEW OF TELECOMMUNICATIONS

2.1 The first forms of telecommunications

Introduction

The word 'communication' is usually employed to denote correspondence or conversation. People need to communicate for personal reasons (social interactions) and business reasons (economic activities). Throughout history, where people were separated by distance, they devised ways to search, gather and exchange information so as to satisfy their need to communicate. Therefore, communication is a part of every society.

Around the 1840s, messages were sent through trains, which were the fastest means of locomotion in the world then.[1] However, people needed faster means to send and receive messages; therefore a telegraph was invented. The word telegraphy means writing at a distance, denoting the possibility to send written messages over a long distance.[2]

2.1.1 The Telegraph

Telegraphy began in England in 1837.[3] In the United States of America, the first telegraph line was opened in 1844.[4] The telegraph involved the use of electric wires and the transmission of written messages over the electrical systems.

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[1] www.connected-earth.com/galleries/index accessed on 27 February 2006.

[2] The history of telecommunications from 1840-1870, www.document:storing.html accessed on 27 February 2006.

[3] Ibid.

[4] Ibid.

Thus, it was the first form of telecommunications and laid the foundations of electric communications.[5]

The global telecommunications network began in the 1850s, the first attempt being the cable crossing the English Channel to France in 1850.[6] By 1852 cables were connecting England, Holland, Germany, Denmark and Sweden; Italy and Corsica, Sardinia and across to Africa.[7] However, the first functional telegraph line between Europe and America was finished in1866 after two attempts in 1857.[8]

2.1.2 The Telephone

The need to send and receive messages even faster led to the invention of the telephone in 1876.[9] The telephone enabled the transmission of voice/speech electrically.[10] Business men no longer had to travel to make business deals; a producer or seller could make a deal with a supplier or a consumer in another city or another country over the telephone; and friends and family could converse instantly from a distance.

The telecommunications sector has undergone a lot of technological changes since then. Today, there are a number of avenues for the instant transmission of information or messages for either business or personal purposes, to and from businesses and households across the world.[11] The most common of these is the

[5] http://inventors.about.com, www.itu.org accessed on 26 February 2006.

[6] www.connected-earth.com accessed on 26 February 2006.

[7] Ibid.

[8] www.connected-earth.com accessed on 26 February 2006.

[9] The telephone was invented in 1876 by Alexander Graham Bell, http://inventors.about.com accessed on 27 February 2006.

[10] http://inventors.about.com accessed on 27 February 2006.

[11] Ibid.

public switched telephone network (PSTN). Other mediums include cable and satellite connections, microwave system and the Internet.[12]

2.2 The Role of Telecommunications in Society

The telecommunications sector has contributed impressively to the social and economic development of mankind. During the days of the telegraph in the 1830s, the sector facilitated the transmission of news (for example stock exchange news and prices) and created new forms of businesses based on the transmission of such news.[13]

The early contribution to social development can be illustrated by the story of a woman who left an umbrella on a train.[14] She inquired from the railway stationmaster about getting it back. The manager informed her that the umbrella had been located and would be sent back 'down the line'. She exclaimed that umbrellas could be transmitted through the telegraph! The station master made the incident more dramatic by hooking the returned umbrella over the telegraph wire – as if it had literally come back 'down the line'; she was impressed.

The telecommunications sector is a strategically important sector.[15] An effective telecommunications sector provides a low cost channel for searching, gathering and exchanging information, which in turn is a key input in all economic activities.[16]

Telecommunications give individuals, businesses and governments tools to devise more productive, more inclusive and more development-friendly societies and economies. Through the use of information and communication technology

[12] http://hsc.csu.edu.au/engineering_studies/telecommunications/2523/transmissmedia.html accessed on 11 April 2006.

[13] www.connected-earth.com accessed on 27 February 2006, www.itu.org accessed on 15 February 2006.

[14] www.connected-earth.com/Galleries/telecommunicationsage/thetelegraph/developingtelegraphicservices/index.htm

[15] Mustafa M A *Telecommunications policies for Sub-Saharan Africa 1994 World Bank Washington DC* page 1.

[16] WTO World Trade Report, 2003, page 148.

firms can overcome distance difficulties regarding regional and international markets; they can become more competitive and access new markets, and new employment opportunities can be created.[17] This could result in wealth generation, thus ensuring sustainable economic growth.[18]

Information and communication technology can also play an important role in the political development of countries, by enabling greater participation and an easy way for the public to interact with policy makers and government officials.[19] Further, telecommunications makes life more interactive between friends and relatives separated by distance.[20]

Nowadays, most nations agree that information and communication technology (ICT) have the potential to bring about many positive developments in the economies and societies of all countries.[21] According to the International Telecommunications Union (ITU), telecommunications became one of the leading instruments for economic development in the 1990, facilitating economic activity in all economic sectors.[22] Involvement in ICT spurred regional economic growth in places like Taiwan and Bangalore.[23]

A country lacking modern telecommunications infrastructure cannot compete effectively in the global economy or achieve social integration. Therefore, involvement of a country in ICT is not only needed but is also essential. Kofi Anan confirmed this by saying 'people lack many things: jobs, shelter, food, health care and drinkable water. Today being cut off from telecommunications

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[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] WTO Trade Report, note 16 supra.

[21] UNCTAD E-commerce Report, 2003.

[22] Trends in telecommunication Reform – Effective Regulation 2002 ITU, pg 1.

[23] Scott W. 2002. *Regulation and Internet use in Developing countries,* Policy Research Working Papers. Washington: World Bank.

services is a hardship almost as acute as these deprivations and may indeed reduce the chances of finding remedies for them'.[24]

2.3 The World Summit on the Information Society

The rapid expansion of information and communication technologies (ICT) induced the United Nations to call for a World Summit on the Information Society (WSIS).[25] The summit was held in two phases; in Geneva in 2003 and in Tunis in 2005.

The Geneva Summit acknowledged that ICT benefits all aspect of life including public administration, business, education and training, health, employment, environment, agriculture and science. In that vein the Summit undertook to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge. [26] The Society would enable individuals, communities and peoples to achieve their full potential in promoting sustainable development and improving their quality of life.[27] The Summit developed general principles for building the Information Society and an Action Plan.[28]

Building the Information Society is a joint responsibility of Governments, the private sector and the International community. The success of the Society depends on various factors like information and communication infrastructure, enabling legal framework, and confidence and security in the use of ICT.[29] The Geneva Summit encouraged states to observe ethical dimensions of the

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[24] As quoted by Scott -note 23 above.

[25] The UN endorsed the holding of the Summit through Resolution 56/183, see- http://www.itu.int/wsis/basic/about.html accessed on 07 Nov. 2006.

[26] Ibid; over 50 head of States attended the Summit and 175 countries were represented and all gave their political support to the development of the international Information Society.

[27] http://www.itu.int/wsis/docs/geneva/official/dop.html accessed on 07 Nov. 2006.

[28] Declaration of Principles – Building the Information Society: a global challenge in the new Millennium available at http://www.itu.int/wsis/docs/geneva/official/dop.html ; the action plan is available at http://www.itu.int/wsis/docs/geneva/official/poa.html ; accessed on 07 Nov. 2006.

[29] Each must have the opportunity to acquire skills and knowledge to benefit and participate fully in the Information Society and knowledge economy.

Information Society with due regard to cultural diversity and identity, linguistic diversity and local content.[30]

The Action Plan required Governments to develop strategies and policies which encourage investment and cooperation between the civil society and the public sector;[31] improve broadband network infrastructure and improve ICT connectivity for all community and public institutions;[32] promote access to information and knowledge and provide security to ICT users.[33] The Plan encouraged regional and international cooperation on infrastructure development projects to promote universal access and bridge digital divide between developed and developing countries.[34]

The Tunis Summit aimed to implement the Action Plan and to find common ground on issues like Internet Governance and financing mechanisms for the Action Plan.[35] At Tunis, the Summit agreed that Internet governance is an essential element for the Information Society and that Internet governance must be multilateral, transparent and democratic, with the full involvement of governments, the private sector, the civil society and international organizations. Internet Governance should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism.[36]

The Summit further acknowledged that internet governance encompasses both technical and public policy issues and that states have full rights and authority on policy issues. Finally, the summit undertook to remain fully engaged at the national, regional and international levels to ensure sustainable implementation

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[30] http://www.itu.int/wsis/docs/geneva/official/poa.html ; accessed on 07 Nov. 2006.

[31] Cooperation is encouraged in the development of investment promotion strategies, software export support activities, research and development networks and software parks.

[32] Including schools, universities, community centres, libraries, health institutions and post offices.

[33] Security may be provided by appropriate legal framework.

[34] Ibid.

[35] Ibid.

[36] Ibid.

and follow-up of the outcomes and commitments reached during the WSIS process.

2.4 The Information Society in Africa

Regional integration in Africa is recognised as the best possible means for attaining sustainable development of the whole region. In Africa, only regional integration will 'contribute to the global information society; as this would yield economies of scale; generate demand and capital, while at the same time strengthening bilateral ties'.[37] The starting point is 'the utilization and sharing of various IT capacity development institutions in Africa and the adoption of a common regulatory environment in all the sub- regions of Africa'.[38]

African countries pursue integration through participation in various regional organisations including Southern African Development Community (SADC) and Common Market for Eastern and Southern Africa (COMESA). Internationally, global integration is facilitated by organisations like the United Nations, World Trade Organisation, and the International Telecommunications Union.

However, social and economic development cannot happen through access to information alone. Economic livelihood can be improved and income generated through the use of information and creation of knowledge. People can be lifted out of poverty through creation of economic opportunities and the translation of ICT into economic benefits. [39]

Therefore, states need policies that encourage and enhance the use and spread of ICT by the enterprise sector and private consumers; these policies will

[37] Paul Kagame (President of Rwanda) at the Second Africa Regional Preparatory Conference for the WSIS 'Access in Africa', ITU News, No. 2 of 2005, page 17.

[38] John Kufuor (President of Ghana) at the Second Africa Regional Preparatory Conference for the WSIS 'Access in Africa', ITU News, No. 2 of 2005, page 16.

[39] UNCTAD E-commerce and Development Report, 2003.

contribute directly to achievement of social and economic development at the national level.[40]

2.5 Why states regulate the telecommunications sector

The development of the telecommunications sector involves various participants. The participants include users, operators, manufacturers and policy makers who usually have varying interests. For instance, users prefer access to services at low and affordable prices while operators aim for high profits.

States use laws and regulations to reconcile the differing interests in a way that is acceptable to all parties; and that ensures continued participation of all parties in the development of the sector.

A regulatory framework is important in pointing out the roles of each party and how all can work together towards achievement of a common goal of enabling people everywhere to share and utilize information and knowledge in order to achieve their full potential and attain their development objectives.[41]

The legal and regulatory framework promotes investment, technology acceptance and encourages technology use by providing enterprises and consumers with confidence in the security of telecommunication services. [42] It is thus important that the law prevents abuse of administrative powers, as well as abuse of information resources and technologies for criminal and terrorist purposes, while maintaining respect for human rights in the use of new technology.[43]

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[40] Ibid.

[41] WTO World Trade Report, 2003.

[42] Ibid.

[43] Economides N. 2005. Telecommunications Regulation - An Introduction, Richard R. Nelson edition *'The Limits and Complexity of Organisations'* New York Russell Sage Foundation Press.

Regulation is also required 'to ensure that markets operate efficiently and more importantly, for the benefit of consumers, businesses and economies'.[44] At times Governments intervene when markets fail or to facilitate achievement of national goals.[45]

Regulation is necessary mostly in four scenarios;[46] that is when –

- deregulated markets are likely to fail even in the presence of reasonably strict competition law enforcement;
- deviation from economic efficiency is deemed socially desirable;
- the social and private benefits are clearly different, and
- to allow for coordination in technical standards.

The telecommunications sector has always been regarded as a 'natural monopoly' sector because of high costs involved in building telecommunications infrastructure.[47] Regulation in such a sector aims at ensuring that the one firm keeps costs down while continuing to innovate and improve service, just as if it operated in a competitive market.[48] If not regulated, the single firm could dominate the market, restrict quantity and charge monopoly prices for low quality service.[49]

In the telecommunications sector, deviation from economic efficiency is deemed socially desirable; especially because the high infrastructural costs could instigate the concentration of development in profitable areas only, leaving out areas that are sparsely populated or are populated by underprivileged communities where investment would not be profitable.[50] Regulation is therefore

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[44] 'Access in Africa', ITU News, No. 2 of 2005.

[45] Mustafa, note 15 supra.

[46] Economides, note 43 supra.

[47] UNCTAD E-commerce and Development Report, 2003.

[48] Ibid.

[49] Scott Wallsten, note 23 supra.

[50] UNCTAD E-commerce Report, 2003.

necessary to ensure that people are able to make and receive emergency calls even if it were economically inefficient.[51]

Thus, the law employed must include strategies relating to infrastructure and access for all segments of the society so as to minimize digital exclusion and to ensure benefits to the end-user. It must also provide means to improve and expand services to the public and the commercial sector.[52]

Most countries, especially developing countries, need inflows of foreign direct investment (FDI) to improve domestic infrastructure. Private investment requires stable legal environment that protects investment from expropriation.[53] Therefore, in addition to establishing a well-regulated telecommunications market, appropriate investment policies to attract and maintain foreign investment must be adopted.[54] The United Nations Commission on Trade and Development (UNCTAD) suggests that effective implementation of the WTO Agreement on Basic Telecommunications could be useful in this respect.[55]

Mature markets need less regulatory intervention as competition drives companies to offer good services at reasonable rates;[56] the telecommunications market should not be any different. Technical developments have introduced competition in sectors where competition was initially considered impossible/difficult especially in the telecommunications sector.[57] Thus some economies like the European Union consider the telecommunications market as a mature market and so adopt less regulatory intervention;[58] only employing

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[51] Ibid

[52] Trends in telecommunications reform, 2002, ITU.

[53] UNCTAD E-commerce Report, 2003.

[54] Ibid.

[55] Ibid.

[56] Scott Wallsten, note 23 supra.

[57] Ibid.

[58] Carlyle P. 'Regulating Telecommunications – Mixing the message?' *The Scotsman*, October 2, 2003.

regulation to protect the interests of consumers with respect to price, quality and variety of services, as well as universal access to the services.[59]

However, regulation should be used sparingly, and only when there are no good alternatives, because regulation can become a vehicle for protecting the firm's monopoly and profits at the expense of consumer welfare.[60] In an industry with fast technological changes, such as telecommunications, significant variations between costs and prices are apparent since costs fall much faster than prices.[61]

Regulatory agencies in developing countries face other challenges. Firstly, where there are interaction points between the Government and the industry regardless of the regulatory agencies, there is a risk of political intervention and bribes. As a result, regulatory agencies may work hard to encourage entry and investment in the face of a dominant firm while political influences and government frustrate those efforts.[62] Secondly, in practice, the regulatory system is much easier to influence by politicians than the judicial system.[63]

To overcome these challenges, Scott advised developing countries not to allow interactions between the Government and the Industry but to limit such interactions to the regulatory authority and the industry to guard against political influence and bribes to either begin or continue operations;[64] and to adopt quick and efficient dispute settlement mechanisms to minimise political interferences in solving legal problems in the sector.

In regulating the sector, the regulatory setup should not be time consuming, cumbersome or bureaucratic, given that 'when added together the regulatory procedures which are often duplicative, complex and non-transparent can mean

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[59] Ibid.

[60] Scott Wallsten, note 23 supra.

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Ibid.

delays of up to two years to get investment approved and operational';[65] by that time investors might have lost interest and moved on to the less encumbered location.[66]

The rapid technological changes can frustrate regulation because the firm always has more information about its cost structure and technology changes than the regulator, making it difficult for the regulator to independently evaluate the firm and the industry especially because regulators do not generally have the latest technological information.[67] The regulator may then impose entry barriers on the belief that entry would be harmful to the industry, or simply to protect the single incumbent firm because of inadequate information. Further, the firm can control the information available to the regulator and increase the probability of favourable decisions. In any case, the regulator would not be able to ensure that technological changes benefit consumers through decreased prices.[68]

According to Galal, regulation is likely to be most effective, meaning that it results in substantial investment by the private sector, reasonable returns on investment, and greater productivity where it is designed to induce the firm to reveal private information or if the government/regulators manage to reduce the firm's information advantage, induce the firm (through pricing) to operate efficiently, and convince the firm that the government will not expropriate its assets or quasi-rents in the future and if the government introduces safeguarding mechanisms against expropriation of assets or
Quasi-rents.[69]

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[65] Ibid.

[66] Lamech R et al. *What international investors look for when investing in Developing countries – Results from a survey of international investors in the power sector*, May 2003 World Bank.

[67] Galal Ahmed, Nauriyal Bharat – *Regulating telecommunications in Developing countries: outcomes, Incentives and Commitment*, World Bank Policy Research Papers 1995.

[68] Ibid.

[69] Ibid.

2.6 The earliest telecommunications legal regimes

In considering the development of telecommunications regulation, we consider regulation in the United States of America (USA) and the United Kingdom (UK), two of the first countries to participate in the development of the telecommunications industry.

2.6.1 United States of America

In the USA, Graham Bell patented his invention and built the Bell companies.[70] When the Bell patents expired, AT&T the monopoly company faced significant competition in local telecommunications by independent telephone companies.[71] However, AT&T refused to interconnect with the independent companies;[72] because of its large subscriber base, new subscribers would readily favour it to maximise the value of their connections.

The refusal of AT&T to interconnect other companies posed problems. Firstly, the desirable competitive outcome could not be achieved by market forces, as it was beneficial to AT&T to refuse interconnection. Secondly, Interconnection was socially desirable because the independent companies would not succeed if their subscribers had to subscribe to AT&T to reach the latter's subscribers.[73] Regulation was introduced to promote competition and to ensure that AT&T did not drive the smaller companies out of the market.[74]

Regulation of the U.S. telecommunications market was also marked by two antitrust lawsuits that the U.S. Department of Justice (DOJ) brought against

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[70] The telephone invention, http://inventors.about.com accessed on 27 February 2006.

[71] Economides, note 43 supra.

[72] Ibid.

[73] Ibid.

[74] Ibid

AT&T and the Bell System.[75] In the first case, *United States v. Western Electric*, filed in 1949, DOJ claimed that the Bell Operating Companies practiced illegal exclusion by buying both production equipment and customer premises equipment only from Western Electric, a part of the Bell System. DOJ sought divestiture of Western Electric. The case was settled in 1956 with AT&T agreeing not to enter the computer market, but retaining ownership of Western Electric.[76]

The second case, *United States v. AT&T*, started in 1974.[77] The government reintroduced the issue of illegal exclusive relationship of AT & T with Western Electric and further alleged that AT & T was involved in various anti-competitive practices including abuse of dominant position in that AT & T:

a) refused to interconnect telecommunications competitors as well as customers' premises equipment, thus being liable for "refusal to deal";

b) set prices to exclude competitors and practiced predatory pricing;

c) used various discriminatory practices that raised the costs of competitors, and

d) wrongfully monopolized the long distance service market.

The state sought divestiture of both manufacturing and long distance service from local service. The case was also settled by the Modified Final Judgement in 1984.[78] The settlement allowed AT&T to retain its long distance network, but seven regional operating companies were broken away from it.[79] These

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[75] Economides, note 43 supra.

[76] Ibid.

[77] Ibid.

[78] Ibid.

[79] The companies comprised local telephone companies that were part of the original AT&T.

companies remained regulated monopolies, each with an exclusive franchise in its region but not allowed to provide long distance service.[80]

The USA always desired 'universal service'. The ability of customers to receive and make emergency calls played an important role in setting the universal service goal. Consequently, the US congress passed the Communications Act in 1934 and established the Federal Communications Commission (FCC). The purpose of the Act, among others was to promote universal service so as to make available, to all the people of the United States an efficient, nationwide, and worldwide telecommunications systems and services at affordable rates.[81]

In implementing the Act, a structure was established whereby certain groups of subscribers[82] paid more while other groups[83] paid less than true costs of their services.[84] In the 1960s regulators refused price increases of basic local service in an attempt to achieve "universal service"[85] and by 1970, USA achieved universal service; more than ninety per cent of USA households had telephones.[86]

Most of the rules established in 1934 were changed by the Telecommunications Act of 1996. The 1996 Act aimed to "promote competition" and "expand universal service". As a result, regional monopolies were eliminated and competition introduced in all spheres of telecommunications services.[87] The Act mandated interconnection of telecommunications networks, unbundling, non-discrimination, and cost-based pricing of leased parts of the network, and enabled competitors to compete component by component and service by service.

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[80] Economides, note 43 supra.

[81] Ibid.

[82] For example long-distance users, business subscribers and subscribers in locations where telephone service can be provided with relative ease paid more.

[83] For example subscribers in rural and other high-cost locations paid less.

[84] Economides, note 43 supra.

[85] To include as many households as possible even if the was unprofitable; ibid.

[86] Economides note 43 supra.

[87] Ibid.

The Act advanced universal service and required competitors to fund universal service through efficient and competitively neutral manner. The Act required universal services subsidies to be explicit, broadly funded and achieved in a competitively neutral fashion.[88]

2.6.2 United Kingdom

The first telecommunications companies in the UK dates back to the first telegraph companies in the nineteenth century.[89] Most of those companies collapsed because the sector was inefficient. The General Post Office, a state department which provided telecommunications services in competition with those companies took over the surviving companies.[90] By 1912, the post Office was a monopoly supplier of the telecommunications services.[91]

The Post Office was established as a statutory corporation in 1969 by the Post Office Act of 1969.[92] The Act gave the Post Office exclusive privilege of running telecommunications systems, with power to authorise others to run such systems. The Post Office division dealing with telecommunications was renamed British Telecommunications (BT) in 1980, though it was still under the Post Office. The British Telecommunications was established as a distinct corporation by the British Telecommunications Act of 1981.[93]

The 1981 Act introduced competition in the public telecommunications services and the telecommunications equipment market.[94] The Act empowered the Secretary of State, together with the British Telecommunications to license other

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[88] Ibid.

[89] http://www.btplc.com/Thegroup/BTsHistory/History.htm accessed on 12 November 2006.

[90] Ibid.

[91] Ibid; except in a few municipalities like the city of Kingston-upon-Hull, where local service was provided by the City Council.

[92] Ibid.

[93] ibid

[94] Ibid.

telecommunication operators. Around this time, a license was granted to Cable and Wireless to run a public telecommunications network through its subsidiary Mercury Communications.[95]

The Act further authorised the Secretary of State to set telecommunications apparatus standards in consultation with the British Standards Institution. BT was required to connect approved apparatus to its systems.[96]

BT was privatised in 1984 through the Telecommunications Act of 1984. The 1984 Act abolished the BT monopoly;[97] consequently, BT Plc was licensed like other telecommunications operators. The Act established the Office of the Telecommunications (OFTEL), the telecom regulator to safeguard the workings of competition.[98]

The 1984 Act was replaced by the Communications Act of 2003 the current telecommunication legislation in the UK. The Act implements the European Directives on the regulation of the telecommunications market.[99] The new regime considers the telecommunications sector as a developed and a competitive market across the EU. As a mature market, the sector is trusted to regulate itself and competition is expected to drive companies to offer good services at reasonable rates. Less regulatory intervention is encouraged.[100]

The 2003 Act introduced a new industry regulator, the Office of Communications (Ofcom), to replace the Office of Telecommunications (Oftel).[101] It also replaced the licensing regime with a general authorisation regulatory framework which

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[95] Ibid.

[96] http://www.btplc.com/Thegroup/BTsHistory/History.htm accessed on 12 November 2006.

[97] Ibid, the 1981 Act never abolished the monopoly, but provided a balance – it was not up to BT alone to authorise other telecommunications operators, the State Secretary participated in such decision making.

[98] Ibid

[99] Carlyle, note 58 supra.

[100] Ibid

[101] http://www.btplc.com/Thegroup/BTsHistory/History.htm accessed on 12 November 2006.

allows provision of telecommunications services subject to general conditions of entitlement and, in some instances, specific conditions.[102]

2.7 Telecommunications regulation at the international level

At the international level, the International Telecommunications Union (ITU) has been involved in promoting the harmonisation of rules and regulations relating to telecommunications services and equipment since 1865. Today, the ITU is the sole institution regulating the transfer of data throughout the world.[103]

However, numerous other international and regional organisations are involved in telecommunications regulatory issues. These include the Commonwealth Telecommunications Organisation (CTO), the World Trade Organisation (WTO), the Southern African Development Community (SADC) and the Telecommunications Regulators Association of Southern Africa (TRASA), the African Telecommunication Union (ATU) and the European Union.

The work of these organisations is formative in the development of national telecommunications legislations and depending on the nature of the organisation, may be binding on member states.

Lesotho is a member of the South African Development Community (SADC), the World Trade Organisation (WTO) and the International Telecommunications Union (ITU). Consequently, in the development of national legislation, Lesotho is informed mostly by the works of ITU, CTO and TRASA.[104]

The next chapter explores the perceptions of these organisations on good regulatory mechanisms and how governments can incorporate various elements of effective and transparent regulatory practice into their national legislation, operations and activities of their regulatory institutions.

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[102] http://www.btplc.com/Thegroup/BTsHistory/History.htm accessed on 12 November 2006.

[103] ITU became a United Nations agency in 1947; www.itu.org accessed on 15 February 2006.

[104] Lesotho Telecommunications Newsletter Vol. 1 Number 1 2006, page 5.

CHAPTER 3

THE TELECOMMUNICATIONS REGULATORY ISSUES

3.1 Introduction

In developing national regulatory regimes, most Governments consider various elements of effective regulatory practices as recommended by various international and regional organisations involved in telecommunications regulatory issues.

Lesotho is a member of the International Telecommunications Union (ITU), the World Trade Organisation (WTO), and the South African Development Community (SADC). Further, the Lesotho Telecommunications Authority is a member of the Telecommunications Regulators Association of Southern Africa (TRASA). Consequently, in the development of national legislation, Lesotho is informed by the works of these organisations.

3.2 The International Telecommunications Union on telecommunications regulation

The International Telecommunications Union (ITU) was established in 1865. Since its establishment, the ITU has issued numerous guidelines regarding the regulation of telecommunication worldwide.[105]

The evolution of telecommunications technology has caused policy makers around the world to undertake sector reform programmes with a view to utilise

[105] ITU guidelines include the Radio Regulations;[105] a framework agreement covering international interconnection, common rules to standardize equipment to facilitate international interconnection, uniform operating instructions and common international tariff and accounting rules; see http://www.itu.int/ITU-D/aboutbdt.html accessed on 12 April 2006.

technology opportunities and to regulate new areas brought about by technology developments.[106]

ITU analysed reform experiences of many states and discovered that reform programmes worldwide face similar challenges. The Union advises its members on various elements of effective regulatory practice and how Governments can incorporate them into their regulatory mechanisms.

Sector reform programmes usually aim to develop regulatory framework suitable for the industry to grow without compromising consumer rights.[107] In many states, sector reform involves institutional reform characterised by the following three elements:[108]

- the establishment of a regulatory agency /sector specific regulator;
- restructuring of the incumbent operator, and
- introduction of competition.[109]

3.2.1 The establishment and nature of the regulator

In many states the establishment of the regulator involved legislative actions.[110] The establishing legislation normally prescribes the powers and functions of the regulator. ITU recommended that the legislation should be as detailed as possible to avoid uncertainties and to ensure the maximum legitimacy for the regulator to operate and make decisions with confidence.[111]

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[106] Ibid.

[107] Trends in telecommunications reform, 2002, ITU.

[108] Ibid; however, it is possible to achieve institutional reform without the presence of all the three elements.

[109] Trends in telecommunications reform, 2002, ITU.

[110] Ibid.

[111] ibid.

ITU recommended that the establishment of the regulator must precede market structural changes to enable the regulator to acclimatise and develop effective processes and procedures to regulate a competitive market.[112]

The regulator may be a distinct legal entity or a unit within a Government Ministry. But to be effective, the regulator must be autonomous in its operation and decision making.[113]

Autonomy is viewed differently by various jurisdictions but determining factors seems to centre on finance, structure and decision making from those regulated and from the relevant government ministry.[114] For instance, in the United States independence denotes separation from the private operators, the political pressure and interference in decision making and enforcement of decisions; and reliable revenue sources;[115] but the European Union deems an agency as independent if it is legally distinct and functionally independent from the government and telecommunications service providers.[116]

ITU suggested that outside interference be eliminated by not subjecting the leadership of the regulator to political pressure. As a result most countries protect the leadership from abrupt removal or dismissal through guarantying in the law, the tenure of office for a certain term, taking care to provide a different term from the political terms. In addition, the holders of the senior positions may be required, by the same law to relinquish financial ties within the industry.[117]

The regulator requires financial independence and the power to recruit qualified personnel.[118] Maintaining qualified staff requires adequate compensation and

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[112] Ibid.

[113] Ibid.

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] Ibid.

[118] Ibid.

training packages; this could be difficult without a reliable financial source. Further, depending entirely on moneys from either the Government or the industry may compromise the independence of the regulator and its credibility; the regulator must be allowed to find other financial sources.

Independence of the regulator does not imply total divorce from the ministry[119] because the Government has overall responsibility in the performance of government institutions. Therefore, the regulator must cooperate with the relevant ministry to ensure that government goals are not compromised.

The establishing legislation must also address and eliminate overlapping jurisdiction. The role of the telecommunications regulator in relation to other government agencies and the responsibilities of each regulator in relation to the industry must be clearly defined. In practice, the regulator must establish good working relations with other government agencies whose functions may relate to the activities of the telecommunications sector; i.e. competition agencies, consumer protection agencies. In this way, the various institutions complement each other for the overall benefit of the industry.[120]

ITU suggests that independence should be taken as the ability to make decisions without outside interference from those regulated. Consequently, the effectiveness of regulation should be judged by improved connectivity, value for money and more choice for the users; and not only by the strength of safeguards against political interference.[121]

3.2.2 Regulatory powers of the regulator

Regulatory powers comprise three categories – rulemaking, enforcement and dispute resolution while regulatory functions involve policy decisions regarding specific regulatory areas, including licensing, management of spectrum,

[119] Ibid.

[120] Trends in telecommunications reform, 2002, ITU.

[121] Ibid.

competition policy, interconnection, numbering, equipment type approval, universal service and access, price regulation, quality of service and consumer protection.[122]

3.2.2.1 Rulemaking

Regulators are usually bestowed with rulemaking powers either independently or in an advisory role. The rulemaking powers involve enactment of rules, regulations, code of practice/conduct, guidelines and rulings.[123] The involvement of regulator in rulemaking is strategic because being in charge of the implementation and enforcement of the sector laws and regulations, the regulator has first hand knowledge and experience of ways to achieve national goals.

3.2.2.2 Enforcement

The effectiveness of the regulator depends on the credible enforcement of its decisions and rulings. Where there has been an infringement, the regulator must be able to order sanctions and remedial measures as it deems fit in the circumstances. Sanctions may take the form of financial penalties, suspension or revocation of operating licence or imprisonment of company directors; remedial measures may involve compensation to aggrieved parties. ITU recommends that the regulator should have certain discretion in the exercise of enforcement powers, allowing the regulator to choose the appropriate sanction.[124]

To ensure transparency and legitimacy, the regulator has to follow certain procedural guidelines before ordering penalties. The regulator must first notify the concerned operator about the alleged infringement, allowing the provider the opportunity to respond to the allegations. In some instances a hearing may be

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[122] Ibid.

[123] However, some countries do not view rulings as rulemaking; but because those rulings form precedents for future disputes, they form part of applicable rules

[124] Strict suspension and revocation of licence provisions may be inappropriate or even disastrous in a monopoly situation where such a measure may disrupt access to telecommunications service nationwide.

held especially where the sanction imposed involves suspension or revocation of the operating licence.[125]

3.2.2.3 Dispute resolution

A variety of disputes may arise in the telecommunications sector. The disputes may involve -

- the regulator and operators; i.e. involving pricing, service quality, numbering, interpretation of the law or the licence terms;
- operators and users; i.e. involving billing and service interruptions complaints, and
- operators themselves; i.e. involving competition or interconnection issues.

In most jurisdictions, the regulator has the power to adjudicate over consumer disputes as well as disputes between operators themselves. Disputes between the regulator and the operators are dealt with differently. The trend is to submit such disputes to an arbitration tribunal chaired by a judge or person qualified to be a judge or to an international arbitration like the International Centre for Settlement of Investment Disputes (ICSID).[126] Disputes involving complaints against government measures like laws or regulations are usually submitted to independent organisations like the WTO.[127]

With respect to consumer disputes, disputing parties are required to submit to the jurisdiction of the regulator before determining the matter after the parties have failed to solve the dispute themselves. Others jurisdictions allow the regulator to

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[125] Ibid.

[126] ICSID was established in 1966 under the Convention on the Settlement of investment disputes between states and nationals of other states. The Centre has handled telecommunications cases such as the *France Telecom S.A v Argentine Republic (ARB/04/18) and Telenor Mobile Communications S.A v Republic of Hungary (ARB/04/15)*

[127] For instance, in 2000, the United States complaint to the WTO that Mexico maintained laws and regulations which allowed its major supplier to engage in activities which limited market access into the Mexican telecom sector, as well as activities which allowed the imposition of unreasonable discriminatory terms and conditions against US operators.

consider the matter on the request of one party and impose the decision on the other.[128]

With respect to interconnection issues, some states allow the regulator to entertain the matter on request of one party, and impose the decision on the other;[129] others allow the regulator to intervene on its own if parties fail to reach an interconnection agreement within a stated period of time after commencement of negotiations.[130]

In resolving disputes, the regulator is guided by a set of principles aimed at achieving effective dispute resolution mechanism. An effective dispute resolution mechanism must be quick, cost effective, transparent, impartial, convenient, accessible and informal, and some states require confidentiality.[131] Further, the adjudicator must be competent and well equipped to deal with telecommunications issues.

The effectiveness of the resolution mechanism cannot be achieved unless the rulings and the decisions can be enforced. Because the rulings and decisions cannot always be complied with,[132] parties want someone to coerce the defaulting party to comply with the ruling; otherwise consumers or operators would not trust the mechanism or accept the regulator as legitimate. For these reasons, the regulator needs a way of inducing compliance with its rulings. Most states give decisions of the regulator the same status as judgements of senior courts.

Decisions of the regulator are subject to review or appeal by courts of law on the understanding that the independence of the regulator does not guarantee that the regulator will always be right. The review or appeal procedure is usually

[128] Should that other party sought to refuse the jurisdiction of the regulator.

[129] Trends in telecommunications reform, 2002, ITU.

[130] Ibid.

[131] Confidentiality here may relate to the existence of the dispute, the nature of the dispute or the evidence submitted during the proceedings.

[132] Even court decisions are not always complied with.

published so that a party to a dispute is aware of further action it may take. The appeal of a decision usually involves disagreements on questions of law. Review procedure usually involves complaints about procedural irregularities pertaining to the resolution of the matter. Other countries allow the regulator to revisit its decisions and to vary or rescind previously made decisions.

Further, some regulators are allowed to hold re-hearings if new evidence is discovered. For example, in Canada, the Canadian Radio-Television and Telecommunications Commission (CRTC) has powers to vary or rescind its decision, re-hear and seek new evidence;[133] and Trinidad and Tobago allows a party to request a re-hearing if it uncovers new evidence pertaining to the case.[134]

3.2.3 Regulatory functions of the regulator

Regulators around the world have similar functions; these functions relate to licensing, interconnection, universal service and universal access, competition policy, consumer protection, quality of service, price regulation, equipment type approval, numbering, and spectrum management.

3.2.3.1 Licensing

Licensing relates to government authorisation of provision of certain services or engagement in certain activity. In the telecommunications sector, it relates to authorisation of providers to maintain and provide telecommunications networks and services. Licensing policies in the telecommunications sector emerged with the advent of the sector reforms;[135] the first licences were issued upon privatisation of incumbent monopoly providers in order to provide certainty on

[133] Trends in telecommunications reform, 2002, ITU; also see CRTC Decision 2006-17 where Primus Telecommunications Canada Inc requested CRTC to review and vary certain determinations in Telecom Decision CRTC 2006-15 pertaining to win-back rule available at http://www.crtc.gc.ca/archive/ENG/Decisions/2006/dt2006-72.htm accessed on 07 Nov. 2006.

[134] Trends in telecommunications reform, 2002, ITU.

[135] However, some countries traditionally granted concessions or franchises, which like licences, defined the rights and obligations of the network or service provider.

what the operator could or could not do. The licensing policy determines the structure of the markets, the number and types of operators and the degree of competition among them.

Licensing policies differ from jurisdiction to jurisdiction. Generally, the policies provide for either licensing of individual operators, general authorisation or open entry licensing methods. Individual licences are usually employed where the regulators want to manage scarce resources while ensuring the provision of the services. Where this method is adopted the licence is granted under a prescribed procedure and it details what the operator is or is not permitted or required to do.

Under general authorisation, all qualified enterprises are authorised to provide the service under general conditions prescribed in a law of general application. In an open entry approach, general conditions are imposed through regulations or laws, but there are no licensing processes or qualification requirements.

3.2.3.2 Interconnection

Interconnection allows users from different networks to interact, thereby facilitating a wider connection and better value for each connection as 'the more people connected, the greater the value of a connection to all'.[136] However, market incentives may lead dominant providers to refuse to interconnect with new providers thereby making it difficult for the new firm to enter the market (consider the USA Bell case discussed above). Such a situation could jeopardise the provision of competitive telecommunications services. For this reason, interconnection is crucial in the development of the telecommunications sector; and it is the most important regulatory issue around the world.[137]

[136] Mustafa, note 15 supra.

[137] Trends in Telecommunication Reform *Interconnection Regulation*, 2000-2001 ITU 3rd Ed.

3.2.3.3 Universal service and universal access

Universal service and universal access are regarded as important policy areas in most jurisdictions. Universal service relates to the desire for country-wide connection to the national public telecommunication network; the aim being to connect all or nearly all households to the telecommunications network on similar conditions and as far as possible on low charges.[138]

Universal access relates to availability of access to as many community members as possible so that every person has access to telecommunications services in their community, whether from pay phones or community centres.[139] The type of services usually considered when determining universal service and access are basic voice-grade fixed access to the public switched telephone network; other countries include value added services including the Internet.

The overriding objective of both policies is to reach populations and communities which would otherwise not be reached, including low-income families and high-cost areas such as rural areas.[140] Universal service or access obligations are usually imposed on operators through legislation or through licences; and regulators always have the responsibility to implement and monitor their implementation. Developing countries find it difficult to achieve universal service, an achievable goal for these countries is universal access.[141]

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[138] Mustafa, note 15 supra.

[139] Ibid; to achieve this countries normally provide that every person must have access to a public phone within a certain distance from their home.

[140] Ibid, also see Trends in telecommunications reform, 2002, ITU.

[141] Ibid.

The universality programmes are funded through various ways. [142] They may be financed through:

- mandatory licence conditions requiring operators to provide the service;
- cross – subsidies whereby revenues from profitable customers are used to finance service to low-income or high cost users;
- universality funds whereby operators are required to make annual contributions based on their revenues for specific services or to contribute part of interconnection charges;[143]
- access deficit charges whereby the incumbent is required to offer service at below the cost price and other operators are required to contribute to finance the deficit.

3.2.3.4 Competition policy

Policy makers and regulators face many challenges in the transition from a monopoly environment to a competitive market; their task being to guide the sector from monopoly to effective competition with respect to infrastructure and service provision. In order to promote fair competition clear rules and regulations are required.

With respect to market structure, the trend is to regulate mergers and cross-subsidies.[144] The usual procedure is to require merger notification, and if anticompetitive effects are eminent, prohibit the merger or grand conditional approval. Some states require the merged firm to divest assets or operations to eliminate anti-competitive effects.

[142] Trends in telecommunications reform, 2002, ITU.

[143] The fund may be financed by other methods, including government budgets, or levies on operators.

[144] Trends in telecommunications reform, 2002, ITU.

Again, regulators may require firms involved in anti-competitive practices like predatory pricing or discriminatory practices to divest.[145] The separation allows the regulator to determine cross-subsidisation if any, and to ensure that the incumbent does not favour its subsidiaries over competitors with respect to interconnection charges and other business dealings.

In order to manage cross-subsidisation, regulators usually require operators to keep separate accounts regarding services they provide; for instance, to separate interconnection accounts from accounts of other commercial activities. Some countries require separate accounts for different services.[146]

Where the market structure involves a monopoly operator in one sector and competitive operators in other sectors the monopoly operator may charge high prices in the monopoly sector and subsidise low prices for competitive services. That behaviour impairs competition as new market entrants or other competitors may not be able to match the subsidised price in the competitive markets. Consequently, most jurisdictions prohibit cross-subsidisation.[147]

3.2.3.5 Consumer protection

Most states have consumer protection regimes to protect consumers from unlawful business practices and exploitation. Consumers and investors usually have differing interests. Consumers are more content where there is a larger network, better quality and low prices but investors prefer high prices, and high return on investment. The balance is usually achieved through regulation and development of consumer policies.

Regulation ensures that consumers get good quality at affordable prices while investors get reasonable investment returns. In the telecommunications sector,

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[145] Divestiture refers to separation of business activities of a telecommunications operator into different entities/separate companies; when this happens, the separated companies are required to have their own separate accounts and management and administration.

[146] I.e. United States and Canada.

[147] Trends in telecommunications reform, 2002, ITU.

the legal provisions in most states generally protect consumers against cramming,[148] slamming,[149] misleading advertising, inaccurate billing,[150] and disclosure of personal information.[151]

Consumer dispute resolution procedures usually involve service providers as forums of first instance. The practice is to require operators to develop consumer policies with accessible, [152] inexpensive, quick and easy complaint procedures. Regulators serve as appellate bodies for unresolved consumer complaints.

Usually, the consumer is required to exhaust all internal complaint procedures of the operator before approaching the regulator. Upon receiving the complaint, the regulator investigates the complaint; seeks response from the operator and makes the decision based on the findings of the investigation and the submissions of the parties.

After making the decision, the regulator may order operators to compensate aggrieved consumers, for example in a slamming case the operator may be ordered to pay the cost of switching the consumer to their chosen operator.

In some jurisdiction, regulators use public opinion to induce service providers to offer better services; by publishing information relating to violations of the law the public is influenced to prefer law abiding service providers.

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[148] The practice of billing consumers for services not requested by the consumer; thus legislation would give consumers the right to choose which services they want.

[149] The practice of switching the service provider of the consumer without consent of the consumer.

[150] Consumers have the right to be billed on accurate service provision records, the right to require itemized bills to ensure that the bill relates to services they enjoyed and the right to be notified before services are terminated for non-payment of accounts.

[151] Personal information relating to address, credit history or calling patterns of the consumer should not be disclosed; and the request of the consumer that their name be removed from the public telephone directory must be heeded.

[152] The procedure must allow consumers to lodge complaints by telephone or any mode of communication.

3.2.3.6 Quality of service

Regulators generally regulate quality of service especially regarding basic telephone service on the understanding that left alone operators would pursue high returns at the expense of consumers. To determine quality of service provided by operators, regulators consider indicators like the following:

- development indicators which involve consideration of the level of teledensity; including pay phone teledensity and the growth in access lines;
- network performance indicators like call completion/failure rates, and
- customer service indicators involving customer satisfaction regarding the service provider; this may include consideration of provider's fault clearance rate.

Most states promote quality of service standards by either prescribing minimum quality of service standards or introducing incentives. Quality of service requirements usually include provisions for the protection of competitors; requiring among others the incumbent to provide quality service with regard to interconnection, so as to guard against poor service due to interconnection and interconnection delays which may frustrate competitors.

With a view to promote high quality interconnection practices many states establish interconnection quality of service monitoring requirements, introducing significant penalties for non-compliance and requiring operators to separate interconnection operations from other operations.[153]

[153] To achieve a meaningful separation, an interconnection unit may be established mainly to provide interconnection services to other competitors, including subsidiaries and affiliates on equal terms.

3.2.3.7 Price regulation/Tariff policies

Operators use tariffs as the element to meet their profitability criteria; as the basis to offer and sustain a service at a profit.[154] However regulation is necessary to ensure that operators do not make excessive profits at the expense of users by charging excessive prices. Tariff policies facilitate provision of services at affordable prices while allowing investors reasonable profits. The tariff regulation ensures that investors get enough returns to meet service and investment obligations, keeping prospective investors interested while the majority of the population benefits from essential services at affordable prices.[155]

States use various price schemes like discretionary pricing, rate of return regulation, price cap regulation or rate rebalancing.[156] Discretionary pricing is common where government is the service provider. The scheme favours social objectives[157] over economic gains. It permits charging below cost prices for connection, subscription and local calls and allows the recovery of the shortfall through above-cost prices for domestic and international long distance calls.[158] The scheme differentiates between business and residential users whereby the former pay more for similar services than the latter.[159]

Rate of Return Price Scheme

The rate of return scheme provides service providers with a certain guaranteed profit rate.[160] The prices are set according to the overall revenue required to

[154] Trends in telecommunications reform, 2002, ITU.

[155] Ibid.

[156] Ibid.

[157] The scheme emphasis affordable service and service provision to the majority of the population.

[158] The assumption is that businesses are major users of international and long distance calls and because the service is crucial for their operations, the will pay the higher prices

[159] The assumption is that because connection for businesses is valued more than household connection, payment should be aligned with the value of the service to the user.

[160] Trends in telecommunications reform, 2002, ITU.

cover the costs and the stated profit. If the operator earns more than the stated profit rate, the regulator may order price reductions.

Because the provider has private information about its costs, this may induce the provider to act strategically and inflate costs or over-invest with a view to earn high guaranteed profits rather than maximizing the service. The provider may also shift costs from unregulated to regulated services, especially where the regulator is unable to identify the rate base appropriately.

Further, the scheme does not encourage providers to operate efficiently by reducing operating costs as they know that any shock to their costs will be passed on to the users immediately. Because of these shortcomings, most states favour the price cap scheme over the rate of return scheme.[161]

Price cap price scheme

Price cap pricing scheme allows the provider to increase prices annually at the rate equal to an inflation measure (which is usually set as the general consumer/retail price index (CPI)), less a certain figure (X) representing the production gain of the provider. Because CPI is usually set by other agencies; the scheme requires a proper price index system. The regulator determines the value of X and in doing so, good practice requires the regulator to consultations with providers so as to prevent disputes on the value of X.

Under this scheme, the tariff increase is imposed without reference to the firm's costs, which makes this regime favourable for limiting the firm's opportunity to distort its cost data or shift the cost of competitive services on to monopoly services.

Sub-Saharan countries, including Lesotho, need to adopt tariff policies which do not focus on protection of existing customers but on facilitation of rapid increase

[161] Ibid.

in the number of customers and quality of service provided. [162] These countries may tolerate high prices for a given time, bearing in mind that firms may withdraw service from unprofitable customers if prices cannot be increased and an alternative funding cannot be found. The priority for these countries is universal access where people are able to at least receive and make emergency calls.

3.2.3.8 Numbering

Technological development brought about new services which require deployment of numbers; and new market entrants require numbering resources. Consequently telephone numbering is a scarce resource which requires proper management.[163] The task of regulators is to administer numbering resources so as to protect the resource without restricting competition.

The management of numbering resources in many states involves at least three tasks:

- the development of national numbering plan;
- allocation of numbering resources, and
- the ongoing management of numbering resources.[164]

Management of numbering resources involves management of carrier identification codes;[165] number portability;[166] and allocation of numbers to operators. The law usually states the terms and conditions regarding these issues; for instance how to apply for numbers, who may apply, and sometimes when to apply and the time within which to make decisions those applications.

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[162] Mustafa, note 15 supra.

[163] Trends in telecommunications reform, 2002, ITU.

[164] ibid

[165] Especially where users in long distance calls are allowed to choose the carrier they wish to use to complete a call; the carrier requires identification codes.

[166] The practice is to require service providers to allow the user to change service providers without having to change their telephone number; to have their number transferred to a different location or to use their number for subscribing for new different service.

Most regulators have the power to refuse requests for numbers. The common reasons for refusal include technical shortcomings, eligibility of the applicant and failure to utilise previous allocations. Further, number allocations are assigned under certain conditions. Typical conditions relate to ownership of the numbers,[167] use and activation of the numbers,[168] reporting,[169] fees and network interference.[170]

Most regulators have the right to withdraw numbers. Numbers may be withdrawn for various reasons, including failure to comply with usage conditions like activation time frame, deactivation of all numbers or if the withdrawal is necessitated for state security reasons. Withdrawn numbers are usually left dormant for a certain time to prevent confusion and misdialled calls.

In developing numbering plans, regulators consider future numbering needs so as to ensure long-term numbering capacity. ITU requires members to develop national numbering plans in consideration of international commitments and agreements relating to reservation, assignment and use of numbering resources at the international level; especially ITU-T Recommendation E.164, ITU-T Recommendation 164.1, ITU-T Recommendation 166/X122 and ITU-T Recommendation X121.[171] Further, regional arrangements and recommendations must be adhered to.[172]

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[167] Many countries do not give assignees ownership of numbers but have the right to use them subject to certain conditions.

[168] Usually the assignee does not have the right to transfer the assigned numbers without the consent of the regulator; the assignee is not allowed to use the numbers except for the prescribed purposes. The assignee is also usually required to activate the numbers within a certain time, usually set at six months to two years; failure of which may deprive the assignee of the use of the numbers.

[169] The assignee is usually required to report to the regulator on a regular basis, activation and deactivation of assigned numbers.

[170] Generally the assignee is required to pay a certain fee for the use of the assigned numbers; assignees are usually prohibited from using numbers that may interfere with the national numbering plan

[171] Trends in telecommunications reform, 2002, ITU.

[172] Various regional bodies manage numbering resources at the regional levels, these bodies include the North American numbering Committee for North American and some Caribbean countries; the European Union has also issued Directives relating to numbering for example Directive 98/61/EC which imposes obligations on member states regarding operator number portability and carrier pre-selection.

3.2.3.9 Equipment type approval

Countries usually wish to protect telecommunication networks from harmful equipment and to prevent harmful interference by radio equipment. Consequently, many national laws require service providers to comply with equipment standards.[173] Compliance is required to be displayed on the equipment and users have to be provided with equipment user manuals in the language of the country in which the equipment is distributed and installed.[174]

Type approval normally involves three components-

- establishing technical standards governing type approval;
- developing testing and certification mechanisms, and
- developing monitoring and compliance mechanisms.[175]

Technical standards are usually set out in legislation. Many countries set their technical standards to synchronize with those in other countries and as required by international and regional bodies or under bilateral or multilateral agreements specifying technical standards.

Regulators need to be equipped to monitor compliance with the prescribed standards; they must have authority to conduct inspections or market surveys; review documents relating to telecommunication equipment and determine compliance with prescribed standards.[176]

The procedure for equipment approval usually involves examination and testing of a sample by the regulator who subsequently makes a decision whether or not the sample complies with applicable technical standards. Some states allow

[173] Trends in Telecommunications Reform, 2002, ITU.

[174] Trends in Telecommunications Reform, 2002, ITU.

[175] Ibid.

[176] Ibid.

manufacturers to self-test equipment they manufacture, except that radio equipment is usually tested and examined by regulators. Where manufacturers are allowed to self-test equipment, those manufacturers are responsible for the accuracy and correctness of the compliance declaration accompanying the equipment. Some international agreements allow approval by one member to be recognised in jurisdictions of other member states.

3.2.3.10 Spectrum management

Radio-communication spectrum is a very important national resource. As a result countries develop spectrum management strategies. Regulators manage and develop policies and strategies for national and international spectrum coordination. At the international level, ITU_R plays an important role and determines frequencies for particular services.

At the national level, regulators assign spectrum bands for different users including mobile and cellular communications, emergency services, national security agencies and fixed telecommunications. Most regulators reserve some spectrum for future use in order to accommodate new services brought about by technological developments. In making assignments at national level, regulators normally operate within the parameters set by ITU-R.[177]

Some regulators reserve the right to reclaim and reassign spectrum. Reasons for reclaiming spectrum vary from making way for new services to where the assignee fails to make efficient use of it. Regulators are required by law to provide notice of withdrawal to the assignee; the period of notice required range from one year to five years, unless the assignee agrees to release the spectrum early.[178]

Poor spectrum management may have devastating consequences; for instance the United States had problems deploying net-generation services because

[177] Ibid.

[178] Ibid.

required spectrum had been assigned in large blocks to different users like Defence Department, television broadcasters and satellite operators.[179]

Most states prohibit private ownership of spectrum or indefinite use by one user. Most manage spectrum through licensing where licences are allocated on a first come first served basis or through auctions. First come first served scheme is common where enough spectrum exist to meet the demand. Auctions are prevalent where spectrum demand exceeds supply. The winning bidder is usually required to use the frequency efficiently and in a manner that promotes network development.[180]

Spectrum licences usually contain coverage obligations requiring licensees to achieve stated population coverage. The licences are normally non-transferable, except with the approval of the regulator. Some countries require network sharing to recover licence fees provided competition is maintained. More importantly, licensees are required to ensure efficient use of the spectrum without causing harmful interference to other users.[181]

3.3 The World Trade Organisation (WTO) on telecommunications regulation

The WTO is an international organisation which deals with the rules of trade between member states.[182] A series of negotiation rounds has led to agreements between member states; these agreements form the legal ground-rules for international commerce.[183] The WTO deals with telecommunications issues under the framework of the General Agreement on Trade in Services[184] (GATS)

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[179] Ibid.

[180] Regulators usually undertake pre and post investigation to very that bidders are not affiliates or involved in anti-competitive behaviour like collusion or bid-rigging.

[181] Trends in Telecommunications Reform, 2002, ITU.

[182] WTO is a successor to the General Agreement on Tariffs and Trade, an agreement which set up a multilateral trading system after the Second World War; currently WTO has 149 members; (as of 11 December2005); for a full list see - www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[183] http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm accessed on 15 February 2006.

[184] http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm

and specifically under the Annex on Telecommunications[185] otherwise referred to as the Basic Agreement on Telecommunications.

The GATS applies to governmental measures[186] "affecting trade in services"[187], except services supplied by governmental authorities if those services are not supplied on a commercial basis or in competition with one or more service suppliers".[188]

The agreement on Basic Telecommunications provides a framework of rules to ensure that telecommunications regulations permit all service suppliers access to and use of basic public telecommunications, both networks and services on reasonable and non-discriminatory basis.[189]

3.3.1 General Agreement on Trade in Services (GATS)

The GATS distinguishes between general and specific obligations. General obligations apply to all members' governmental measures and services sectors. General obligations require members to ensure that their laws, rules or regulations or other regulatory measures do not favour services or service providers of one member, but treat similar foreign services or suppliers equally.[190]

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[185] The Annex is part of the Services Agreement; see http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm

[186] The measures subject to GATS provisions include measures by local, central and regional government entities as well as non-governmental bodies exercising delegated regulatory powers.

[187] GATS article 1.1; WTO classifies services into twelve broad sectors; list available at http://www.wto.org/english/tratop_e/serv_e/serv_e.htm

[188] GATS Article I: 3(b) and (c).

[189] http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm accessed on 12 April 2006

[190] Art. II; this is the so called Most Favoured Nation (MFN) Principle; members may not offer better terms to services or service providers of one member without offering similar terms to services or service providers of all other members.

Secondly, members are required to publish or otherwise make regulatory measures publicly available.[191] For example licensing procedures comprising licensing terms, requirements and time frames must be published. The measures must be administered in a reasonable, objective and impartial manner.[192] The relevant authority must make decisions promptly and must communicate the decision to the applicant without delay,[193] allowing for prompt review of those decisions by impartial agencies.[194] The review procedure must be simple and accessible. Further, the measures must provide for appropriate remedies.[195]

Specific obligations apply to members who have made specific commitments[196] under the agreement. These obligations are the market access and the national treatment obligations contained in Part III of GATS.[197]

The market access obligation requires Members to allow foreign services and service suppliers to enter their markets unless provided otherwise in the schedule of specific commitments. Members are prohibited from maintaining measures which may restrict access to their markets.[198] The prohibited restrictions include limitations of the following –

- the number of service suppliers through numerical quotas, monopolies, exclusive suppliers or economic needs test requirements; or
- the total value of transactions or assets, through numerical quotas or otherwise;

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[191] Art. III: 1, this is the transparency principle; the obligation does not require disclosure of information if that disclosure would impede law enforcement, prejudice legitimate commercial interests or otherwise be contrary to public interest.

[192] GATS Art. VI: 1

[193] Art. VI: 3

[194] The measures must permit an aggrieved party to challenge the administrative decision.

[195] Art. VI: 2

[196] The agreement requires members to designate service sectors where it allows foreign supply and to decide on the terms, limitations and conditions on market access and the extend to which it favours national suppliers over foreign suppliers; once the commitment is made, the member ay not apply or maintain measures which negate its commitments.

[197] Art. XVI and XVII respectively.

[198] Art. XVI: 1.

- the number of service operations; or
- number of natural persons to be employed in the service sector; or
- the amount of foreign capital or participation, or restricting licences to suppliers of a certain legal status (company, joint venture).[199]

The national treatment obligation prohibits discrimination of foreign suppliers unless measures favouring local services or suppliers are included in the schedule of specific commitments.[200] Consequently, the licensing regime must allow investors from other member states to enter the market on similar terms applicable to local investors.

Members may adopt, in terms of GATS Article XIV measures contrary to the above principles if necessary to protect public morals, national security, maintain public health, or protect human, animal and plant life, or to secure compliance with regulations that do not violate the provisions of the GATS;[201] provided that such measures do not constitute arbitrary, unjustifiable discrimination or disguised restrictions on trade in services.[202]

GATS require members to ensure, through regulation that activities of monopoly suppliers are not inconsistent with GATS obligations including scheduled commitments.[203] Major providers must be obliged to provide interconnection to other operators in a pro- competitive manner and on non-discriminatory,[204] transparent,[205] fair and cost-oriented conditions,[206] and to this end, interconnection charges must be kept separate from other charges.

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[199] Art. XVI: 2.

[200] Art. XVII: 1; Discrimination is deeded to exist if the conditions of competition favour local services or suppliers.

[201] Art. XIV.

[202] Ibid

[203] GATS Art. VIII

[204] The conditions of interconnection by the major operator should not discriminate unfairly between subsidiaries of the major operator and the interconnecting competitors

[205] Interconnection procedures must be transparent, regulatory guidelines must be published in advance to facilitate negotiations between operators

3.3.2 WTO Basic Telecommunications Agreement (BTA)

WTO members agreed on the Protocol on Basic Telecommunications in 1997, commonly known as the WTO Basic Telecommunications Agreement (BTA) to provide for specific issues relating to the telecommunications sector.[207] BTA applies to measures that affect access to and the use of public telecommunications transport networks and services.[208]

BTA reiterates the need for transparency and requires publication of information relating to operation of telecommunications services.[209] The information to be published includes information on standards setting bodies, licensing procedures, licence conditions, and applicable tariffs.[210]

The BTA requires members who make commitments on the telecommunications sector to allow service suppliers from other member states access to and use of basic telecommunications networks and services on reasonable and non-discriminatory terms. Members must allow service suppliers to transmit information within and across borders for intra-corporate communications and to access information stored in machine-readable form.[211]

Members may, in their telecommunications commitments put conditions[212] on access to and use of basic telecommunications networks and services provided the conditions are necessary to protect technical integrity of the networks and

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[206] Interconnection charges must be cost-based, taking that cost inefficiencies of the incumbent operators are not transferred to interconnection charges

[207] Telecommunications is a sub-sector of the Communications sector; see http://www.wto.org/english/tratop_e/serv_e/serv_e.htm

[208] BTA section 2; telecommunications sub-sector include the following services - Voice telephone services; packet-switched data transmission services; circuit-switched data transmission services; Telex, telegraph, and facsimile services; private leased circuit services; electronic mail; voice mail; on-line information and data base retrieval; and electronic data interchange (EDI).

[209] BTA section 4.

[210] ibid.

[211] BTA section 5 (a) and (b).

[212] Conditions must be stated in the schedule of special commitments, see s 5 (g).

services and to ensure compliance with the schedule of specific commitments.[213] The conditions may include the restrictions on resale or shared use of services; requirement to use certain technical interfaces for interconnection; inter-operability of services; equipment type approval, and registration and licensing requirements.[214]

Further, Members may adopt measures to ensure security and confidentiality of messages, but such measures should not allow arbitrary, discriminatory or restriction on trade in services[215]. Developing countries are allowed to maintain measures necessary to strengthen domestic telecommunications infrastructure and service capacity.[216]

The agreement encourages cooperation between member states, between states and service suppliers, and between member states and the international organisations.[217] Further cooperation is required in various fields including development programmes, development of standards necessary for compatibility and inter-operability of networks and services, technology transfer and special programmes to support least developed member states.[218]

3.4 Southern African Development Community (SADC) on telecommunications regulation

SADC[219] is a regional trade integration organisation composed of fourteen southern African countries.[220] Among other things, SADC aims to use regional

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[213] BTA section 5 (e).

[214] BTA section 5 (f).

[215] BTA section 5 (d).

[216] BTA section 5 (g).

[217] Especially the International Telecommunications Union, United Nations Development Project and the International Bank for Reconstruction and Development.

[218] BTA section 6 (a) and (d); and s 7

[219] SADC was initially established in 1980 as a Coordinating Conference with the aim to lessen economic dependence of the members on the then apartheid South Africa. It was transformed into a development community in 1992 upon the signing of the SADC Declaration and Treaty at Windhoek, Namibia; see http://www.sadc.int/english/about/history/index.php accessed on 12 April 2006.

integration to achieve development and economic growth, poverty alleviation, increased standard and quality of life, and support for the socially disadvantaged in Southern Africa.[221]

Upon the signing of the SADC Treaty,[222] members agreed on the Protocol on Transport, Telecommunications and Meteorology.[223] The Protocol contains SADC recommendations regarding regulatory framework in transport, telecommunications and meteorology. Telecommunications regulatory issues are dealt with under Article 10.[224]

3.4.1 The Protocol on Transport, Communications and Meteorology

The protocol requires members to develop common sector specific policies to facilitate the provision of reliable, effective and affordable telecommunications services within the community.[225] Members are required to adopt compatible laws and regulations; including rules and regulations relating to equipment type standards, numbering plans and universal service aspects.

The SADC organisation operates through a number of sector-specific technical units. The technical unit responsible for telecommunications matters is the Southern Africa Transport and Communications Commission (SATCC-TU).[226] SATCC works in close cooperation and collaboration of the Telecommunications Regulators Association of Southern Africa (TRASA).

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[220] SADC members are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe, see http://www.sadc.int/english/about/profile/index.php.

[221] http://www.sadc.int/english/about/objectives/index.php accessed on 12 April 2006.

[222] The SADC Treaty and Declaration is available at http://www.sadc.int/english/documents/legal/treaties/index.php

[223] The Protocol is available at http://www.sadc.int/english/documents/legal/protocols/transport.php

[224] Ibid, accessed on 15 February 2006.

[225] Article 10.1 SADC protocol on Transport, Communications and Meteorology.

[226] SATCC is based in Maputo Mozambique; see www.sadc.int.

The works of SATCC include the SADC Telecommunications Policy guidelines and Model Bill adopted in 1998;[227] the tariff guidelines and model regulations,[228] and the interconnection guidelines and model regulations.[229] These documents together with the Protocol provide guidelines for the regulation of telecommunications in the region.

The model policy guidelines, regulations and draft bill are guidelines only and are not binding; but they provide a good basis for harmonised and common telecommunications policies and law in the region.

3.4.2 SADC Telecommunications institutional regulatory framework

The model policy requires SADC members to separate regulation and operation of telecommunications services.[230] Members are required to establish national independent regulatory bodies to regulate and monitor telecommunications service provision.[231] Members must facilitate the introduction of financially independent and commercially viable business enterprises and the provision of high quality services and responsive service delivery.[232] The policy encourages members to privatise state owned enterprises and Governments to withdraw from operations of privatised enterprises.[233]

Members are also required to encourage private sector cooperation and participation in human resource development[234] and research and development

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[227] SADC Model policy and Model bill on telecommunications, 1998 Southern African Transport and communications Commission available at www.trasa.org.bw; the Model policy and Bill have gained acceptance in most member states including Lesotho, Mauritius, Malawi, Mozambique, Namibia, Swaziland, and Zimbabwe.

[228] SADC Policy Guidelines on tariffs for telecommunications services and Model Telecommunications Regulations on tariffs, 2000 SATCC available at www.trasa.org.bw.

[229] SATCC Model telecommunications regulations on interconnection, 2000 Blantyre; available at www.trasa.org.bw.

[230] Art. 10.7; also see section 2.3 of the SADC Telecommunications Policy.

[231] Art. 10.7 (a) – Protocol on Transport, Communications and Meteorology.

[232] Art. 2.4 (d) and Art. 10.2 (a) (i) SADC Protocol on Transport, Communications and Meteorology.

[233] Clause 2.6.3 – SADC Telecommunications Policy.

[234] Art. 10.10 Protocol on Transport, Communications and Meteorology.

programmes.[235] Cooperation is also encouraged with international organisations like the International Telecommunications Union and the International Standards Organisation in activities related to promotion of common business interests; network expansion and maintenance and establishment of international standards.[236] At the same time, members must take measures to prevent technology dumping.[237]

3.4.3 The SADC Telecommunications Regulator

In SADC, an independent regulatory body, (herein after referred to as regulator) involves a distinct legal entity, separate from both the Government and operators.[238] SADC encourages three-tier separation of powers involving government in policy making, independent regulators licensing and regulating the sector and providers operating in competitive environment.[239]

The regulator must have all powers relating to appointment and removal of its staff[240] and be free to collect and control its financial resources. However, the Minister may have the power to approve annual budget, appropriate bank accounts, policies and procedural rules for the administration of the funds.[241] The source of funding may be Government budget, grants or loans, licence or service fees or a certain percentage of revenues of all operators in the market.[242]

The regulator may be a small collegial body of between three and five full-time members.[243] The collegial body is advantageous because it involves a

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[235] Art. 10.5 (e) Protocol on Transport, Communications and Meteorology.

[236] Article 10.6 and 10.11 Protocol on Transport, Communications and Meteorology.

[237] Art. 10.5 (c). Protocol on Transport, Communications and Meteorology.

[238] Clause 2.5.2 SADC Telecommunications Policy; section 4 of SADC Model telecommunications Bill.

[239] See 2001 SADC Declaration in Information and Communication Technology available at www.tralac.org/scripts/content.php?id=440 SADC Declaration on ICT; paragraph (a).

[240] S 20 (b) Model telecommunications Bill; clause 2.5.11 Telecommunications policy.

[241] Section 16 (3) of the Model Bill.

[242] Section 16 (1) Model Bill, clause 2.5.10 Telecommunications Policy.

[243] Clause 2.5.7 telecommunications policy; section 7 (1) of Model telecommunications Bill.

participatory approach and collective responsibility; and if members are full-time, they are able to master their responsibility and avoid conflict of interest. The appointment of the members must be consultative, competitive and transparent[244] and appointed members must have the knowledge, qualification or experience in relevant fields.[245]

Once appointed members must be protected from arbitrary or abrupt removal. Consequently, members must be guaranteed office tenure of not more than five years. However, members may be removed only upon the recommendation of a judicial body, for cause involving misconduct or incompetence.[246]

3.4.4 The responsibilities of the regulator

Primary areas of importance in SADC are ICT infrastructure development,[247] Community participation and governance in ICT development,[248] ICT in business development and Human resources development.[249] In regulating these areas, SADC recognises the following regulatory areas[250]

- universal service and access;
- interconnection and tariff policies;
- investment and ownership control;
- management of scarce resources;
- fair competition and consumer protection; and

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[244] Section 7 (1) telecommunications Bill, clause 2.5.9 telecommunications Policy.

[245] Relevant fields includes economics, accountancy, engineering, telecommunications technology, public policy, law, business practice or finance; see section 7 (5) (b) telecommunications Bill.

[246] See s 7 (3) and s11 Telecommunications Bill; clause 2.5.9 Telecommunications Policy.

[247] See 2001 SADC Declaration in Information and Communication Technology ; paragraph (b);

available at www.tralac.org/scripts/content.php?id=440 .

[248] Ibid paragraph (c); where care has to be taken not to increase disparities between the rich and poor and urban and rural populations.

[249] Ibid paragraph (d) and (e); members committed to remove e-commerce barriers and to develop a comprehensive human resource development plan.

[250] Telecommunications Policy Clause 2.5.5; Art. 10.10, 10.8 Protocol on Transport, Communications and Meteorology.

- human resource development and research and development.

The regulator must have rule-making and enforcement powers. Rule-making powers include the power to issue administrative orders, rules and regulations necessary to implement telecommunications laws; rules and regulations necessary for proper functioning of the regulator;[251] licensing rules and regulations;[252] regulations for the management of spectrum;[253] technical standards applicable to telecommunication equipment and customer premises equipment[254] and enforcement orders.[255]

The regulator must also have investigative powers, including the authority to undertake equipment inspections and the authority to impose appropriate sanctions and penalties for non-compliance with the law and other regulations.[256] Orders issued by the regulator must have similar status as a judgement of a superior court[257] so that if the violator fails to comply with the order, enforcement can be induced in a similar manner used to enforce court judgements.

3.4.4.1 Licensing

Licensing responsibilities of the regulator include granting, reviewing and classifying telecommunication licences.[258] The regulator must assume responsibility for consumer protection in the telecommunications sector and must provide consumer dispute settlement services for disputes between users and service providers.[259]

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[251] S 20 Model Bill.

[252] S 31 Model Bill.

[253] S 52 (1) (d) Model Bill.

[254] S 50 Model Bill.

[255] S 59 (2) Model Bill.

[256] S 58 and 59 Model Bill.

[257] S 60 Model Bill.

[258] Article 10.8 (c) Protocol on Transport, Communications and Meteorology; clause 2.5.5 Model policy, s 20, 27 and 28 Model Bill.

[259] S 61 Model Bill, clause 2.5.5 Model policy.

3.4.4.2 Management of scarce resources

The regulator is responsible for management of scarce resources like frequencies and numbers and must establish allocation procedures which must always consider existing and expected future usage.[260] Further, the regulator must ensure national, regional and international co-ordination with respect to temporary scarce resources like calling numbers.[261]

3.4.4.3 Universal service/access

SADC members agreed to develop common understanding on universal service elements. Members agreed to characterise universal service by whether a service is –

- essential with regard to social or cultural reasons;
- reasonably accessible to all people on equitable and non-discriminatory manner;[262] and
- affordable.[263]

Members agreed to take reasonable steps to promote universal service and universal access.[264] Universal service and universal access has similar attributes as discussed on page 31 above.[265] In developing universal service policies, members must assure continued service to existing users, access to the telecommunications network to all potential users at standard and affordable terms for all users.[266] To ensure compliance with universal service obligations,

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[260] Art. 10.8 (e) and (i) Protocol on Transport, Communications and Meteorology; s 20 and s 50 Model Bill; clause 2.5.5 Model Policy.

[261] ibid.

[262] Including people with disabilities.

[263] Art. 10.3 (a) Protocol; s 49 Model Bill, clause 2.5.5 Model Policy.

[264] S 21 (1) (a) Model bill.

[265] See definition of Universal service and universal access on the Glossary terms on the Model policy.

[266] Clause 3.1 Model policy.

members are encouraged to establish universal service Units under the regulator or the Ministry responsible for telecommunications.[267]

Universal policies must consider special needs of persons with disabilities and the needs of rural populations. If the incumbent monopoly supplier fails to provide service to rural or under-serviced areas, members may give the opportunity to other providers.

SADC members may finance universal service/access through various methods. Members may establish national universal service funds funded by either contributions from interconnection charges or a certain percentage of operators' annual revenues.[268] In the alternative, each operator may be required to establish a universal access fund, the proceeds of which are used only with the approval of the regulator to provide access to un-serviced areas or under-serviced including providing service to people with disabilities. The provider may choose to provide the service directly.[269] The Government may also subsidise provision of service to rural and under-serviced areas.[270]

3.4.4.4 Tariff policies

In 2001, SADC members adopted tariff guidelines and model tariff regulations.[271] Under these instruments, members are required to adopt cost-based tariff schemes without allowing below cost charges.[272] Tariffs must be applied in a non-discriminatory manner; identical services must attract similar charges.[273]

Tariff policies and tariff schemes must be based on the following principles –

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[267] Ibid.

[268] Ibid, also see s 49 (2) Model Bill.

[269] Clause 3.1 Model policy, s 49 (2) Model bill.

[270] Clause 3.1 Model Bill.

[271] SADC Policy Guidelines on tariffs for telecommunications services and Model Telecommunications Regulations on tariffs, 2000 SATCC.

[272] Clause 3 Tariff policy guidelines; Reg. 4 (1) Model tariff regulations

[273] Reg. 4 (5) Model tariff regulations; clause 4.4 tariff policy guidelines.

- affordable tariff to facilitate demand increase and ensure access to the majority of the population;[274] and
- reasonable investment returns for the providers to attract more investment.[275]

The guidelines and the model regulations prescribe a tariff setting procedure.[276] The procedure facilitates agreements between operators and the regulator. Where they fail to agree, members are required to establish a tribunal chaired by a judge or a person qualified to be a judge to determine appropriate tariffs.[277] The tribunal has to deliver a decision within thirty days of getting the case.[278] The regulations require service providers to publish approved tariffs for public information.[279] The regulator may maintain the right to review and vary approved tariffs.[280]

3.4.4.5 Interconnection

In May 2000 TRASA developed "Guidelines on Interconnection"[281] intended to guide national regulatory authorities in developing country-specific interconnection principles and in November of the same year SATCC issued model interconnection regulations.[282] These documents provide substantive guidelines for SADC members with respect to interconnection issues.

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[274] Reg. 4 Model tariff regulations; clause 3.3 tariff policy guidelines

[275] Clause 3.3 tariff policy guidelines.

[276] The procedure involves the proposal by the operator, the proposal may be countered by the regulator; if the operator refuses the counter proposal the matter may be submitted to a tribunal; see s 42 Model Bill; clause 4.11 tariff policy guidelines; Reg. 5 tariff regulations.

[277] S 42 (6) Model Bill; the tribunal must be composed of three members appointed by the Chief Justice; also see Reg. 9 tariff Model regulations.

[278] S 42 (8) Model bill; Reg. 9 (3) tariff Model regulations.

[279] S 42 (11) Model Bill; Reg. 6 tariff Model regulations.

[280] Reg. 8 tariff Model regulations; the policy may require the provider to comply with the order to vary tariffs, failure to comply must be an offence and the regulator must have authority to impose fine for that non-compliance

[281] Guidelines on interconnection for SADC countries 29 May 2000 TRASA.

[282] Model Telecommunications interconnection regulations, 2000, SATCC Blantyre.

Consequently, members are required to base interconnection guidelines on principles of transparency, objectivity, non-discrimination[283] and party autonomy. The regulator may interfere only in cases of dispute.

Public telecommunications operators are required to interconnect with other service providers, to enter into interconnection agreements[284] and to submit those agreements to the regulator for approval.[285] The agreement must contain safeguard measures relating to cases of network breakdown,[286] data protection and network integrity maintenance. The regulator may set interconnection quality standards[287] and require interconnecting providers to comply. Providers must ensure that interconnection does not impair the quality of service.[288]

Parties must be free to negotiate their terms and charges under a prescribed negotiating procedure.[289] If parties fail to agree on terms or charges, the regulator may prescribe terms and set interconnection charges on application of one or both parties;[290] the party requesting interconnection should bear the cost.[291]

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[283] Clause 5 interconnection Model regulations; s 38 (2) (a) Model Bill, interconnecting providers must offer similar terms to both its affiliates or subsidiaries and other operators.

[284] Interconnection Model Regulations - clause 15.

[285] Ibid - clause 5 (1) (b).

[286] Ibid -clause 8 – the service must be maintained during network breakdown and the situation must be restored as soon as possible.

[287] Ibid - clause 13 and clause 6.

[288] Ibid - clause 13.

[289] Ibid - clause 15 -A party requesting interconnection makes an application to start negotiations; negotiations have to start within one month of the application and the agreement must be concluded within twelve months.

[290] s 37 (3) Model bill

[291] Interconnection Model regulations - clause 11.

3.4.4.6 Numbering

The regulator has the task of developing and administering national numbering plans.[292] The numbering plans must be developed within the framework of the international numbering scheme.[293] The regulator must issue distinctive access numbers for each provider.[294]

3.4.4.7 Fair competition

In 2002 TRASA prepared a study report on fair competition in the telecommunications sector.[295] The purpose of the report was to identify, review and analyse competition issues in order to develop policy guidelines and model regulations for the ICT sector in the SADC region. The study discussed markets and competition in the ICT sector; fair competition concepts and issues;[296] and the procedures and remedies of dealing with those issues.

The report acknowledged the lack of experience in the application of general competition law in the ICT sector within the SADC-region.[297] However, it encouraged members to set clear rules and obligations to guide the sector from monopoly to effective competition with respect to infrastructure and service provision.

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[292] Art. 10.8 Protocol on transport, Communications and Meteorology; clause 9 (2) interconnection Model regulations; clause 3.5 Model policy s 20 (g) Model Bill.

[293] Interconnection Model regulations - clause 9 (2); clause 3.5 Model telecommunications policy

[294] Interconnection Model regulations - clause 9 (1).

[295] The report is available at www.trasa.org.bw.

[296] It discusses issues like abuse of dominant market position through predatory pricing and refusal to supply essential facilities; anti-competitive co-operation through horizontal or vertical agreements; market sharing or bid-rigging.

[297] Cases in the ICT sector in SADC normally involve interconnection charges; i.e. cellular operators claiming that interconnection charges to terminate traffic in the incumbents' fixed network are too high, and sometimes combined with the fixed operator's complaint that the interconnection charges to terminate traffic in the cellular operators' networks are too high. For example see Botswana Telecommunications Corporation v Mascom Wireless (Pty) Ltd, the dispute was settled by the Botswana Telecommunications Authority (BTA), See BTA ruling No 1 of 2003 available at www.trasa.org.bw.

The report recommended establishment of national competition regulations based on principles of non-discrimination, transparency and technology neutrality. The rules must prevent possible abuses of dominant market position by incumbent operators and create greater certainty amongst the existing and potential players in the sector.

The rules must provide for:

- consumers welfare by ensuring maximum benefits in terms of choice, quality and value for money;
- fair competition by preventing market distortion or restriction; and
- efficient infrastructural investments.

The competition authority (where one exists) must be responsible for promotion of fair competition and enforcement of competition regulations in the sector; even where a telecommunications sector regulator exists. However, because the functions of the competition authority and the telecommunications sector regulator may overlap, the two agencies must co-operate with each other and establish formal and informal communication channels and routines so that they can, on frequent basis, share information and assist each other in handling competition related issues in the sector and ensure that application of fair competition policy take account of the specific characteristics of the sector. [298]

Further, care must be taken to harmonise the relevant laws;[299] the establishing Acts must clearly define and cross-reference roles and responsibilities making clear which regulatory agency is responsible for what issues.

Where the sector regulator exists but no competition authority exists or vice versa, the incumbent authority must put a strong emphasis on staff training. The

[298] They may develop soft-ware systems that allow them to file and process complaints and to potentially share and process information electronically

[299] Competition law may conflict with sector legislation in that competition law usually promotes full competition in all market segments while sector legislation may provide for exclusivity for one operator in certain market segments

competition authority must acquire sufficient technical expertise to deal with competition issues in the ICT sector, especially in the areas of network access, interconnection and costing; the sector regulator must acquire the knowledge and practical experience in working on interpretations and analysis of competition law issues.

The responsible authority must have sufficient investigative powers regarding potential violations against competition rules. The rules and regulations may prescribe procedures to be followed in carrying out the investigations or may require the authority to:

- use public processes and invite comments on proposed rules or major decisions;
- publish all decisions, rules, decision - making procedures, notices, consultation papers and other significant regulatory developments; and
- provide written information to major operators on complex matters.

In resolving competition disputes the authority must consider user interests, the effect of the decision on competition and, where appropriate, the availability of technically and commercially viable alternatives to the services or facilities requested.

Determination of anti-competitive conduct must follow these three steps:

- definition of the relevant market;
- assessment of market power in the relevant market; and
- determination whether there is any anti-competitive conduct, i.e. breach of any of the prohibitions; abuse of a dominant position or anti-competitive co-operation.

Finally, the report recommends that the responsible authority must have necessary powers and tools to effectively enforce its determinations and decisions; and to impose penalties where a violation has been discovered. The

penalty must be substantial and determined on the basis of the actual or expected harm on competition.

3.4.4.8 Other regulatory areas

The SADC instruments mandate the regulator to monitor and facilitate new and advanced services;[300] set quality standards and undertake equipment type approval;[301] promote participatory development in human resource development, technology transfer, research and development and local investment.[302]

Further, the regulator may require service providers to contribute to universal service, human resource development and local ownership and participation.[303] Finally, the regulator represents the members in dialogues, regional and International conferences concerning telecommunications services and issues.[304]

3.5 Telecommunications Regulators Association of Southern Africa (TRASA) and the Southern Africa Telecommunications Association (SATA)

The Telecommunications Regulators Association of Southern Africa (TRASA) was established in 1997.[305] The members of the association are autonomous telecommunications regulators in SADC. The association pursues SADC goals concerning the growth and development of the telecommunications sector in the region and works closely with SATCC.[306]

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[300] Clause 3.6 Model telecommunication policy.

[301] Clause 3.7 Model policy; s 51 Model Bill; Art. 10.8 (f) Protocol on Transport, Communications and Meteorology.

[302] Clause 3.8; 10.10 and 10.5 Model policy.

[303] Clause 3.9 Model policy; s 49 Model Bill.

[304] Clause 3.10 Model policy.

[305] www.trasa.org.bw/index.php TRASA was developed pursuant to article 10.6; 10.7 (separate regulation from provision of service) and 10.13 (establishment of industry bodies -collaboration) of the Protocol; like SADC TRASA requires separate regulatory authorities with distinct legal persona; also the authority must have powers to regulate service providers and implement universal service programmes, monitor performance and enforce licence conditions.

[306] The stated objectives of TRASA include to co-ordinate regulatory matters and provide peer review forum for its members, promote establishment of efficient, adequate, cost-effective and sustainable telecommunications networks and services throughout the region, and encourage members to share

Before the establishment of TRASA, the activities of TRASA were carried out by the Southern Africa Telecommunications Association (SATA).[307] Today SATA is a forum for telecommunications operators, fixed and mobile operators owning telecommunications networks in the SADC region.[308] SATA encourages its members to take a leading role in the development and provision of telecommunications infrastructure and services in order to attain viable and efficient telecommunications in the region.

SATA cooperates with SADC Governments in telecommunications policy development programmes and in providing solutions for new areas of concern in the sector. It encourages its members to cooperate in issues relating to fraud prevention, data protection, network security and cyber crime so as to assist in alleviating these problems. It conducts research; identifies and evaluates international standards and recommendations deemed essential for regional implementation.[309] The Association also provides peer review forum for its members.

3.6 The African Telecommunications Union (ATU)

ATU is a specialised agency of the African Union dealing with telecommunications issues.[310] ATU Co-ordinates Africa's contribution to the work of global decision-making conferences for treaty-making, standards-setting and policy-formulation with the aim of ensuring that Africa gets an equitable share of globally allocated resources like frequency spectrum and internet addresses.[311]

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technical knowledge and expertise and develop common understanding of telecommunications regulatory issues.

[307] SATA was established in 1980 pursuant to provisions of SADC Treaty and the Protocol on Transport, Communications and Meteorology; prior to 1999 it was known as the Southern African Telecommunications Administrations; see www.sata-sec.net accessed on 5 September 2006.

[308] http://www.sata-sec.net/constitution.php?article=article16 accessed on 5 September 2006.

[309] http://www.sata-sec.net/whatIS.php?article=whatIS26.

[310] ATU was established in 1977; prior to 1999 it was known as Pan African Telecommunications Union, see http://www.atu-uat.org/about.htm accessed on 5 September 2006.

[311] http://www.atu-uat.org/services.htm accessed on 5 September 2006.

The Union provides a forum for its members to formulate effective policies and strategies with a view to achieve universal access and full inter-country connectivity.[312] It provides a forum to exchange information, providing service providers the opportunity to participate in the development of policy and regulatory frameworks.[313] Further, the Union promotes harmonization of policy and regulatory frameworks in Africa and to this end it intends to develop telecommunications model laws for adoption by regional economic communities.[314]

Lesotho is obliged to comply with WTO and SADC rules.[315] The recommendations of ITU and TRASA, though not binding are substantially informative and influential in the regulation of the provision of telecommunications services in Lesotho; and activities of SATA are also important in that two of Lesotho operators Telecom Lesotho (Pty) Ltd and Econet Ezi-Cel function under the guidelines of that association.

The next chapter discusses regulation of telecommunications in Lesotho with reference to the above regional and international regulatory trends and practices.

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[312] ATU members are African States, but interested organisations may join the union as associate members.

[313] Ibid.

[314] http://www.atu-uat.org/market.htm accessed on 5 September 2006; the Union encourages establishment of regional regulators associations like TRASA and the West Africa Telecom Regulators Association; and recognizes regional economic communities like SADC, COMESA and ECOWAS as partners in the fulfilment of its objectives.

[315] However the Model policy guidelines and Model regulations are only informative but not binding.

CHAPTER 4

THE DEVELOPMENT OF TELECOMMUNICATIONS REGULATION IN LESOTHO

4.1 A brief overview of Lesotho History

Lesotho is a least-developed landlocked country situated in Southern Africa. Enclosed on all sides by the Republic of South Africa[316] Lesotho is about 30, 355 square kilometres two thirds of which is rocky mountains. The population is about 1, 8 million, and due to the topography of the country, the majority of the population lives around town centres[317] and selected rural areas of high economic activity[318] particularly in the low lands. For instance Maseru, the capital, has the population of about 170 000.[319] However, a substantial percentage, (about 38%) of the population lives in rural areas.[320]

The Basotho nation emerged as a nation in the 1820s following the Mfecane wars.[321] Due to further subsequent wars in the region, Moshoeshoe I, the founder of the Basotho Nation, placed the nation under the British Protection and in 1868 Lesotho was declared a British Protectorate.[322] Consequently Lesotho was governed and regulated by the British High Commissioner, located in the Cape of Good Hope.[323]

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[316] Lesotho Review of Commerce, Industry and Tourism, 2004 pg 3.

[317] The country is divided into ten administrative towns namely: Maseru (the capital), Mafeteng, Mohales'Hoek, Quthing, Qhachas'Nek, Mokhotlong, Thaba-Tseka, Butha-Bothe, Leribe and Teyateyaneng.

[318] For example Semonkong, Mt Moorosi, Morija and Maputsoe.

[319] http://www3.nationalgeographic.com/places/countries/country_lesotho.html?source=G1200 accessed on 20 November 2006.

[320] Lesotho Bureau of Standards, 2001, www.bos.gov.ls accessed on 11 April, 2006

[321] See Lesotho Review of Commerce, Industry and Tourism, 2004, pg 3.

[322] Ibid.

[323] Ibid.

The High Commissioner issued Proclamations and Orders to regulate activities in Lesotho, chief among them the General Law Proclamation 2B of 1884.[324] Proclamation 2B provided in part that the law in Lesotho, as far as the circumstances of Lesotho permit shall 'be the same as the law for the time being in force in the Colony of the Cape of Good Hope'.[325] The British Protectorate ended in 1966 when Lesotho became an independent state.

4.2 The first regulation of telecommunications services in Lesotho

Prior to 1860, Lesotho had no organised communication system; international communication (in the form of letters) to and from Lesotho was sorted out in Aliwal North in the Eastern Cape.[326] However, when the country was declared a British Protectorate in 1868, an organised communication system was required to serve the administration staff in Maseru and the Governor in the Cape. Consequently, a postal service was established around 1872 in Maseru.[327]

The postal services at that time included telegraph services. These services were regulated through the Post Office Administration and Shipping Combinations Discouragement Act of 1911 of the Union of South Africa which became the law of Lesotho through the Lesotho Post Office Proclamation of 1916.[328]

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[324] Proclamation 2B of 1884 as amended by the General Law Proclamation No. 12 of 1960. The received law was applicable especially where one party was not 'African'; with respect to enactments, it related to enactments as of 1884. The Proclamation provided that enactments subsequent to 1884 needed endorsement by Lesotho Legislature.

[325] Proclamation 2B of 1884 as amended by the General Law Proclamation No. 12 of 1960. The received law was applicable especially where one party was not 'African'; with respect to enactments, it related to enactments as of 1884. The Proclamation provided that enactments subsequent to 1884 needed endorsement by Lesotho Legislature.

[326] Scott A H. 1980. *The Cancellations and Postal Markings of Basutoland/Lesotho Post Offices and their Historical background'*. Bergvliet South Africa: Auctions Pty Ltd South.

[327] Ibid.

[328] Proclamation No. 27 of 1916 clearly states in the preamble that it is intended to enforce the 1911 Act; the 1911 Act is annexed to the Proclamation as a schedule. The 1884 General Proclamation stated that the Laws in Lesotho shall be the same as the Laws applicable in the Cape Colony provided among others, that enacted Laws would apply in Lesotho if specially endorsed by Lesotho Parliament.

4.2.1 The Lesotho Post Office Proclamation of 1916

The 1916 Proclamation was administered by the Postmaster General,[329] who was appointed by the High Commissioner. He was responsible for the administration and regulation of postal and telegraphic services in Lesotho. The Postmaster General had monopoly rights over the provision of telecommunications networks and services; he also had regulatory powers.[330]

However, the Proclamation allowed Railways operators and other private operators, under licence by the Postmaster General to maintain and work telegraph lines for purposes of their systems.[331] The Postmaster general was permitted to expropriate private lines or systems upon a six month notice; disputes relating to the amount of compensation were subject to arbitration.[332]

The Proclamation prohibited transmission of telegrams containing content which was repugnant to law or decency.[333] For instance, it was unlawful to transmit telegrams containing libellous, obscene, or blasphemous content. Also prohibited was transmission of false, fraudulent or altered telegrams.[334]

Other prohibitions sought to maintain the integrity of messages. These prohibitions included opening other peoples' telegrams,[335] theft or destruction of

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[329] S 2 of the Proclamation; but note that the Postmaster General even for activities performed in Lesotho, was the Postmaster General of the Union of South Africa as it then was. The Postmaster was authorised to delegate any of his powers.

[330] Section 80; the powers included construction and maintenance of telegraph lines, transmission, receipt, and collection of telegrams as well as authorizing others to use telegraph lines to transmit and receive public telegrams.

[331] Section 80 (1).

[332] Section 81; this provision was not investor friendly and probably scared away potential foreign investors, fortunately, it was not carried over to the subsequent law.

[333] Section 92.

[334] section 106 (1) (b)

[335] Section 100; except that a guardian was allowed to open mail addressed to a minor under their custody – minor was not defined.

telegrams[336] and forging or falsifying telegrams.[337] Signing telegrams with the name of a person without that person's consent or with a fictitious name was also prohibited.[338]

The post officers were prohibited from divulging contents of telegrams to people not designated as receivers; intercepting or destroying telegrams, delaying delivery of telegrams to recipients and using any information acquired from the contents of a telegram for personal benefit.[339] However, the officers were obliged to detain telegrams suspected of containing information relating to crimes or offences and to hand over those telegrams to the Public Prosecutor.[340]

4.2.2 The Post Office Proclamation of 1962

The 1916 Proclamation was replaced by the Post Office Proclamation of 1962.[341] By that time, the number of telephone subscribers was very low. For instance in 1962 there were less than six hundred subscribers;[342] and upon independence in 1966, the number of subscribers had not reached one thousand.[343]

The 1962 Law replaced the Postmaster General with the Controller who became the head of the Department of Posts and Telegraphs in Lesotho. [344] The Controller was appointed by the High Commissioner.

The 1962 law was substantially similar to the 1916 law. The powers of the Postmaster General with respect to service provision, infrastructure development

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[336] Section 106 (1) (a).

[337] ibid.

[338] Section 106 (1) (c).

[339] Section 107.

[340] Section 122.

[341] The Post Office Proclamation N0. 3 of 1962.

[342] According to TCL records, the 1963 telephone directory showed only 568 subscribers, residence subscribers were only 64.

[343] The 1966 telephone directory showed a total of 800 subscribers.

[344] Section 3 (1) and (2).

and licensing were transferred to the Controller.[345] And, the Controller was permitted to detain telegrams suspected of containing information relating to crimes or offences, whether the crime had been committed or was about to be committed, and to hand over those telegrams to the Public Prosecutor.[346]

The 1962 law retained the 1916 prohibitions stated above;[347] and contained the following additional provisions –

- it prohibited transmission of telegrams containing seditious content;[348]
- it clarified that the minor whose communication might be intercepted by a parent/guardian must be sixteen years old or less;[349] and
- it permitted Officers to intercept communication.[350]

Further, the 1962 Law introduced tariff regulation. It empowered the Controller to prescribe telegraph call and rental charges;[351] including special rates and conditions for rural exchange lines.[352] This provision indicates a preferential policy towards rural areas; unfortunately, it was not carried over to subsequent laws.

4.3 The Reform of the telecommunications sector in Lesotho

4.3.1 The Lesotho Telecommunications Corporation Act 1979

The 1962 Proclamation was replaced by the Telecommunications Act No.12 of 1979. The 1979 Act separated the regulation of telecommunications from the

[345] Section 34.

[346] Section 104.

[347] See section 47, 90, 91.

[348] Section 47.

[349] Section 37; see note 335 above.

[350] Section 84; the law did not specify circumstances under which the officers might exercise this power so the provision could be abused by unscrupulous officers.

[351] Section 49.

[352] Section 57.

Post Office administration and regulation. It established the Lesotho Telecommunications Corporation (LTC), a state enterprise[353] mandated to provide telecommunications services and to take over Government responsibilities in the telecommunications sector. When LTC came into being, Lesotho had about 3 529 lines in service with a total capacity of 40 90 lines; [354] and a teledensity of about 0. 36.[355]

4.3.2 The Lesotho Telecommunications Corporation

The Act gave LTC exclusive rights to establish and provide telecommunications[356] networks and services in Lesotho. Further, LTC had regulatory powers;[357] it had the power to grant permits and licences to other telecommunications operators.[358] Although LTC was the service provider and regulator, the provision shows first attempts to introduce competition in the sector.

During its period, LTC licensed only one operator -Vodacom Lesotho (VCL) (Pty) Ltd in 1996. Vodacom Lesotho was a joint venture between LTC and Vodacom RSA and was licensed to provide a variety of services including mobile and fixed GSM, fax services, voicemail services, GSM payphones, Internet, paging and calling centres for a period of five years.[359] The joint venture deal prohibited LTC from competing with VCL.[360] Thus, the joint venture had a nationwide monopoly on wireless services. The licensing of VCL did not introduce competition in the market but another monopoly supplier.

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[353] Section 3 Telecommunications Act 1979.

[354] LTC Kingdom of Lesotho Telecommunications Development plan, (vol. 1) 1991-2010.

[355] Report and Recommendations for the Telecommunications for Lesotho, 1997, Southern African Transport and Communications Commission.

[356] Telecommunication was defined as transmission, emission, or reception of signs, signals, writing, image and sound or intelligence of any nature by wire, radio, optical or other electromagnetic systems.

[357] Section 4 (a).

[358] Section 4 (b).

[359] LTC profile, 2000, Privatisation Unit.

[360] Report and Recommendations for the Telecommunications sector in Lesotho, 1997, Southern Africa Transport and Communications Commission.

The Government had direct control over LTC as the Government was the sole shareholder.[361] LTC was obliged to implement Government directions regarding the performance of its functions[362] and the Act permitted the Government to direct LTC to perform some operations gratuitously or at lower rates.[363]

However, unlike in the 1962 law, the Act did not specifically designate special treatment for rural areas. Unfortunately, the LTC Act reintroduced expropriation powers and permitted LTC, upon three months notice, to take over the whole or part of telecommunication installations and plant whether constructed before or after the LTC came into being.[364] Disputes regarding compensation payable were to be solved through arbitration.[365]

Although the Corporation was obliged to establish and maintain a reserve fund for expansion purposes,[366] it had no obligation to operate profitably. LTC was expected to make just enough money to meet its financial obligations.[367] The Act stated that:

> as far as possible the *total earnings* of the Corporation *shall not be more than is sufficient to meet the necessary* outlays for capital expenditure out of revenue, the repayment of loans and payment of interest on loans, operations, maintenance, replacement, betterment, depreciation and training or other *financial liability.*[368] *(My emphasis)*

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[361] Section 26 (2).

[362] Section 7 (1).

[363] Section 31 (1); however the Act provided no details on these operations.

[364] Section 8 (1).

[365] Section 8 (2).

[366] Section 28 (2).

[367] Section 24 and section 29.

[368] Section 24 (2). Also see section 29 (2).

The Act retained the prohibitions of the previous regimes. For instance, the Act prohibited interception of communications;[369] transmission of messages containing blasphemous, indecent, obscene, offensive, defamatory or seditious matters.[370] The Act made it an offence to forge, alter, send or transmit a false, altered or forged message; knowingly utter forged, altered or false messages.[371] Further, the Act prohibited signing messages with the name of another person or with the name of a fictitious person.[372]

The telecommunications officers were allowed to detain and disclose certain messages to the police department.[373] In a state of emergency, the Prime Minister was authorised to order -

- interception of messages to or from certain persons;
- disclosure of telecommunications messages to an officer.
- non – transmission of certain messages or detainment of certain messages .[374]

The Corporation was managed by a Board of Directors composed of senior Government officials[375] under the chairmanship of the Minister of Transport and Communications. Obviously the Board members had other obligations; therefore the Board business was secondary. Further, membership did not require any knowledge of issues in the telecommunications sector.

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[369] The right of the guardian to open communication addressed to children not older than sixteen was maintained under section 37 (2).

[370] Section 51 (1).

[371] Section 41 (1) (a), (b) and (c).

[372] Section 41 (1) (d).

[373] Section 52.

[374] Section 53 (1) (c).

[375] Section 20, members included Permanent Secretary from ministries of Transport and Communications, Finance, Economic Planning, Information and Technology and Directors of Postal Services and National Security.

The Corporation had authority to appoint and remove staff, to establish their remuneration and benefits[376] and to manage its own finances. The Act designated Lesotho Bank as the banker for the Corporation unless the Board decided otherwise.[377]

4.3.3 Privatisation of LTC

LTC had difficulties for most of its period in operation and accumulated large debts before it was privatised.[378] Some of the problems were attributed to the legal impediments under which LTC operated. For instance, the lack of the obligation to operate profitably was cited as an encouragement for poor performance and lack of innovation; and the apparent lack of knowledge on the part of the policy making body was cited the reason for poor ineffective policy directions.[379]

Other problems related to management and operational aspects. For about five years before privatisation LTC faced various industrial disputes.[380] There were a series of labour strikes, lock outs and litigation.

Consequently, the performance of the Corporation was very poor.[381] For instance, in 1980 when LTC came into operation, teledensity was about 0.36 per

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[376] Section 6.

[377] Section 27 (2).

[378] Report and Recommendations for the Telecommunications sector for Lesotho, 1997; Southern Africa Transport and Communications Commission.

[379] Ibid.

[380] For instance, labour problems emerged in mid 1993 where staff members accused management of financial mismanagement, a series of strikes and work stoppages followed and the Managing Director was suspended; Report and Recommendations for the Telecommunications Sector of the Kingdom of Lesotho 1997, Southern Africa Transport and Communications Commission.

[381] The LTC Profile prepared by the Privatisation Unit stated that call completion rate was about 58 per cent for outgoing international calls, less than 45 per cent for incoming calls and about 35 per cent with respect to national calls. About fifty faults were reported per 100 lines per day; fourteen per cent of those faults were attended on the same day while only 28 per cent were repaired within seven days.

cent;[382] but almost two decades later, by the end of 1999 fixed line teledensity was about 0.95 per cent, significantly below regional levels of 3.4 per cent.[383] In addition, a minimum of 22 000 people were waiting to be connected by 2000.[384] They could not be connected due to lack of funds and capacity.[385] Financially, LTC lost more than twelve million Rand in 1997 and was relying on Government for daily cash requirements.[386]

The Government reacted by privatizing LTC in November 2000.[387] The privatised company was expected to extend its network and expand telecommunications penetration throughout the country especially in the rural areas; and to improve quality of service through investment decisions which would increase company efficiency.[388]

Upon privatisation, there were two monopoly operators: LTC in the fixed line market and VCL in the cellular services market. There were about 14 000 fixed line subscribers and 6 600 mobile subscribers making for a teledensity of about 0.95 per cent.[389] The majority of the fixed line connections were in Maseru while the remote rural areas in the highlands had the lowest connections.[390]

The privatisation of LTC brought about the reorganisation of the telecommunications market. The government sold seventy per cent of its

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[382] Report and Recommendations for the Telecommunications for Lesotho, 1997, Southern African Transport and Communications Commission.

[383] LTC profile, 2000, Privatisation Unit; also see Ntho at the National dialogue on Privatisation and restructuring of the Lesotho Economy September 1999 Maseru.

[384] Ibid.

[385] Mashologu M T at the National Dialogue on Privatisation and restructuring of the Lesotho Economy, 1999 Maseru.

[386] Ibid.

[387] Privatisation Unit Annual Report, 1 April 2004 to 31 March 2005

[388] Maope A K 'keynote address' at the National dialogue on privatisation and restructuring of the Lesotho Economy September 1999 Maseru.

[389] Demand for telecommunications services in Lesotho page 7; 2004 Sechaba Consultants; also see www.itu.int/osg/spu/intset/focus/bands.pdf.

[390] ibid.

shareholding in LTC to Mountain Kingdom Communications,[391] after a bidding process.[392] It retained thirty per cent shareholding with the intention to eventually sell it to Basotho investors.[393] 3.5 per cent shareholding was allocated to an employee share participation scheme as per the privatisation agreement.[394]

The Government undertook to discharge LTC debts and expunge its government debt and tax obligations as of 31st March 1999.[395] Mountain Kingdom Communications established a local company and operates under the name Telecom Lesotho (Pty) Limited whose shareholders are the consortium holding seventy per cent shares and Lesotho Government with a thirty per cent shareholding.[396]

The LTC –VCL joint venture arrangement also ended in 2001.[397] In November of the same year LTC shareholding of twelve per cent in VCL was sold to Sekhametsi Investment Consortium, a local investment group.[398] VCL became the first wholly private enterprise in the telecommunications sector.

The privatisation deal included five years monopoly privilege in the fixed line services[399] and a right to provide mobile services in competition with VCL.[400]

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[391] A consortium including RSA Eskom Enterprises, Econet Zimbabwe and Mauritius Telecom; Mauritius Telecom pulled out soon thereafter, by 2006 Eskom was planning to leave.

[392] The Corporation was sold for US$17M –see clause 6 of the Privatisation agreement; however, the Privatisation Unit received only one qualifying bid concerning LTC, see Privatisation Unit Annual Report, 2004/5 and the Privatisation Unit press release of 3rd May 2000 referenced ' bid opening for 70 per cent of Government shares – Lesotho Telecommunications Corporation'.

[393] Privatisation Unit Annual Report, 2004/5.

[394] Privatisation Unit Annual Report, 2004/5; also see clause 14 of the sale of shares agreement between the Government of Lesotho (LTC) and Mountain Kingdom 2000.

[395] Clause 12 – Privatisation agreement, 2000.

[396] Demand for Telecommunications services in Lesotho, 2004, Sechaba consultants; also see http://www.telecom.co.ls/about/shareholders.php

[397] LTC Profile 2000, Privatisation Unit.

[398] LTC profile 2000, Privatisation unit

[399] Regulation 18 of the LTA Regulations 2001 permits the Authority to grant exclusive licence; and Telecom Lesotho licence – Condition 1.1; also see clause 11 of the sale of shares agreement between the Government of Lesotho (LTC) and Mountain Kingdom 2000. The exclusivity period was later extended by a period of twelve months.

Telecom Lesotho subsequently established a subsidiary company, Econet Ezi-Cel Lesotho (EEL) to provide mobile services in competition with VCL. EEL began operations in 2002.[401]

Consequently, after privatisation, three telecommunications operators surfaced – Telecom Lesotho (TCL) as a monopoly provider for fixed line services, its subsidiary company Econet Ezi-Cel Lesotho and Vodacom Lesotho in the mobile services market. These are telecommunications services providers as of today.

4.4 The telecommunications law in Lesotho

The telecommunications sector in Lesotho is regulated by the Lesotho Telecommunications Act of 2000 as amended, rules and regulations made thereunder. In addition, Lesotho has to adhere to commitments made under the WTO and to heed recommendations of SADC and other organisations to which it is a signatory.

4.4.1 International obligations

As the member of WTO and SADC, Lesotho is bound by the provisions of GATS, BTA and the SADC protocol on Transport, Communications and Meteorology as discussed in Chapter three above.

Under the auspices of GATS, Lesotho made commitments in nine out of twelve sectors.[402] Under the telecommunications sub-sector,[403] commitments were made under sectors like electronic mail; electronic data interchange (EDI), on-line information and data base retrieval and processing and value added

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[400] Demand for Telecommunications Services in Lesotho, 2004; Sechaba Consultants; also see clause 11 of the sale of shares agreement between the Government of Lesotho (LTC) and Mountain Kingdom 2000.

[401] Demand for Telecommunications Services in Lesotho, 2004; Sechaba Consultants

[402] WTO services classification contains twelve broad sectors, see http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm.

[403] Telecommunications is a sub-sector of the communications sector; see http://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

facsimile services. No commitments were made on other sub-sectors like voice telephone services, packet-switched data transmission services, telex services, telegraph services, facsimile services and private leased circuit services. In these sub-sectors, the obligations of Lesotho are limited to transparency in regulating the sub-sectors, and not to discriminate between foreign suppliers;[404] but the Government may introduce market access limitations and national treatment limitations.

In all committed sectors, including the telecommunications sub-sectors, Lesotho maintained no national treatment limitations and no market access limitations except that wholly foreign owned enterprises may be required to satisfy a minimum equity capital requirement of US$200 000 while joint ventures must have foreign equity of US$50 000 in cash or in kind. Entry of natural persons is subject to immigration and labour laws. These commitments are binding on Lesotho and the laws of the country have to comply with them. The current telecommunications law contain no measures which are contrary to these commitments.

4.4.2 Lesotho Telecommunications Authority Act 2000 /Info-Communications Authority Act 2000

The privatisation of LTC was accompanied by a new telecommunications legal regime - the Lesotho Telecommunications Authority Act of 2000,[405] later re-designated as the Info-Communications Authority Act 2000.[406] The 2000 Act was based on the SADC Model Bill and basically incorporated most of the provisions of that Bill in pursuance of the SADC protocol on Transport, Communications and Meteorology.

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[404] http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm#commitments accessed on 17 November 2006.

[405] Act No. 5 of 2000, available online at www.lta.org.ls ; this Act was drafted by the Price Waterhouse Consulting firm with technical assistance from SATCC and funded by USAID.

[406] As per the Info-Communications Act No 4 of 2006, an Act amending LTA Act 2000.

The 2000 Act separated regulatory functions from service provision. The Act divested LTC of regulatory and licensing powers and established the telecommunications regulatory body, the Lesotho Telecommunications Authority (LTA)[407]. The Act provided for the restructuring, privatisation and commercialisation of LTC.[408]

4.4.3 The Lesotho Telecommunications Authority/ Info-Communications Authority

The Authority was initially referred to as an autonomous and independent institution.[409] Pursuant to the 2006 amendment Act, the authority is no longer referred to as such.[410] The change undermines the credibility of the regulatory body as it could be taken as an extension or a department of the Ministry.

The LTA Board, its powers and functions

The duties and powers of the Authority are exercised by the LTA Board composed of seven members[411] appointed by the Minister. Board members do not serve on a full-time basis, they are paid sitting allowance.[412]

The Minister is obliged to appoint people with good financial standing and no criminal record.[413] Further, the Act prohibits board members from having direct interests in any licence issued by the LTA.[414] Collectively, they must have

[407] Section 4; the regulatory authority continue to use the name 'Lesotho Telecommunications Authority' (LTA) even after the amendment Act provides a change of name to Info-Communications Authority.

[408] Section 62 of the LTA Act 2000.

[409] Section 4 LTA Act 2000.

[410] S 5 Act 4 of 2006.

[411] Note that the membership is higher than SADC recommendation by two members.

[412] S 23.

[413] Section 6 prohibits appointment of people who have been declared insolvent or bankrupt, or who have been convicted of criminal offences involving dishonesty.

[414] Section 6.

knowledge, qualification or expertise in various fields including telecommunication technology, law, engineering and business practice.[415]

However, the Minister is not obliged to consult any agency in making the appointments.[416] Thus, the appointment procedure is contrary to SADC recommendation of a consultative procedure.[417]

Board members hold office for a period of three years, but may be re-appointed. They are subject to a code of conduct prescribed by the Minister who may remove a member for misconduct, physical or mental illness.[418] In removing a member, the Minister must heed the recommendations of a tribunal headed by a judge or a person qualified to be a judge.[419]

The Board has authority to –

- issue, amend and renew licences with the approval of the Minister;[420]
- revoke or suspend licences;[421]
- administer the numbering plan and;[422]
- administer radio frequency spectrum with the approval of the Minister;[423] and establish procedures and principles of interconnection;[424]
- employ and remove staff and to establish operational divisions of the Authority;[425]

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[415] Section 5 (4), other fields are economics, public policy accounting and finance.

[416] S 5 as amended; before the 2006 amendment, the appointment procedure was consultative involving an Appointment Recommendation Committee composed of nominees from the Ministries of Communications, Finance and Trade and the Attorney-Generals Chambers.

[417] See pages 51.

[418] Section 8.

[419] Section 8 (3) and (4).

[420] Ibid.

[421] Section 30 as amended.

[422] Section 16.

[423] Section 52 as amended.

[424] Section 16.

- issue licensing procedural rules[426] and any orders, rules and directives as may be necessary to carry out its duties[427] and
- employ and remove staff and to establish operational divisions of the Authority.[428]

The Authority has the responsibility to promote:

- network development, universal service and access to telecommunications services[429];
- the range and quality of telecommunications services and other consumer interests[430];
- private ownership of telecommunications operations;
- sustainable and fair competition between telecommunications service providers[431]; and
- telecommunications services that will satisfy reasonable demands of the least advantaged members of the community for the provision of services such as emergency services, call-box services, and directory information services.[432]

Contrary to SADC recommendation, the Authority has no mandate in regional or international matters. The 2000 Act gave the regulator responsibilities in inter-governmental agreements, international meetings and telecommunications negotiations and dialogues[433] but the 2006 amendment Act removed that

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[425] Section 16.

[426] Section 30 as amended.

[427] Section 16.

[428] Section 16.

[429] Section 15(2) (a).

[430] Section 15 (2) (c).

[431] Section 15 (2) (f).

[432] Section 15 (2) (h).

[433] Section 15 (j) and section 17.

mandate from the regulator.[434] The Act did not expressly transfer the mandate to the Ministry of Communications, but the ICT policy did.[435]

The activities of the Board are financed by Government and other sources like licensing and regulation fees; and fines levied on telecommunication service providers.[436] LTA is obliged to submit annual budget to the Minister and six months after the end of each financial year, submit operations and audited financial reports.[437] The Minister is obligated to present the reports in parliament after 30 days of receipt.

In the exercise of its functions, the Authority must observe the directives of the Minister regarding performance of its duties including conditions to impose on licensees, tariff guidelines and determination of technical standards.[438] In a nutshell, the Minister can intervene in day-day operations of the Authority and vary whatever decisions the Authority takes.

The above provisions indicate that the Authority is not functionally independent from the Ministry. Its governing body is appointed by the Minister and operates under directives and guidelines issued by the Minister. Further, regulatory decisions are influenced by the regulated entities because the Minister is the shareholder in the incumbent and sits on its Board. Thus Ministerial decisions and directives will always appear impartial as the decision maker has an interest in one of the operators. Whether the decisions will be fair or unfair, other parties and third parties will always wonder; this indicates lack of trust in the regulatory process.

The regulator is crippled by ministerial interference making regulation unpredictable, unreliable and ineffective. This situation can affect investment

[434] Section 15 (j) and section 17 were deleted by section 8 and section 10 of the amendment Act.

[435] 2005 ICT Policy for Lesotho, clause 4.1.4.

[436] Section 19 (1).

[437] Section 20.

[438] Section 3 as amended.

negatively because, if investors believe, rightly or wrongly that regulatory risk is high, they will not invest in Lesotho or will consider that risk in their investment decisions. Consequently, the sector may suffer from lack of investment and experience poor quality and choice or short term high yielding investment with no sustainable sector development.[439]

4.4.4 Licensing of operators

The Act requires telecommunications service providers to apply and obtain operating licences from LTA;[440] LTA has the power to issue telecommunications licenses upon approval of the Minister.[441]

The licences prescribe what operators may or may not do. Each licence describes the services the licensee may provide.[442] New services may not be introduced without the approval of the Authority setting out tariff rates for those services.[443]

LTA is authorised to grant exclusive licences[444] and to determine that some services may be provided without licence if that determination would not harm consumers or service providers.[445] The Authority must first obtain approval from the Minister before making that determination.[446]

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[439] Lamech, note 66 supra.

[440] LTA Act, 2000 Section 27.

[441] Section 16 (e) as amended.

[442] Section 31, these services include exchange services; national long distance services; public pay telephone services; international public switched voice and data services; and private telecommunications services –services not interconnected with the public switched network, and subject to prohibitions against resale, provided exclusively for transmission and reception by one person or employees or among persons under common ownership or control or their employees.

[443] LTA Act section 40 (2).

[444] Reg. 18; LTA Regulations 2001; exclusive service is defined as telecommunications services provided by one person over the whole country or by two people in specific areas of the country.

[445] Section 28 (1).

[446] Ibid, as amended by s 13 of the 2006 amendment Act.

LTA may limit the number of telecommunications services providers by limiting the number of licences it may issue.[447] In 1999, a report by Booz.Allen indicated that a full-service second national operator (SNO) would not be viable in Lesotho in the five immediately succeeding years due to

- the small market size,
- the lack of commercial power and low population densities in rural areas, and
- the high costs of serving subscribers in rural mountainous areas.[448]

The report urged LTA to review the situation after five years to determine whether the market conditions can allow a second national operator.

The three operators were licensed in accordance with the Act.[449] Telecom Lesotho (TCL) was granted an exclusive licence with respect to fixed line services for a period of five years.[450] The exclusivity period was later extended for one year; and is scheduled to end on the 8th day of February 2007.[451]

VCL and EEL were granted fifteen year licences to provide cellular services. [452] TCL was granted a twenty year licence.[453] The licenses are renewable[454] and transferable; but, a licence may not be transferred without the approval of LTA.[455]

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[447] Regulation 17; LTA Regulations 2001; in a discussion with LTA official it surfaced that LTA has not pronounced itself on this issue.

[448] Booz.Allen & Hamilton 'the revised market and economic analysis report, March 1999 as quoted in Booz.Allen & Hamilton 'Lesotho Telecommunications Privatisation and Evaluation report' – a market analysis in the telecommunications sector and strategic options for the privatisation of LTC' 2000.

[449] The licences are available at http://www.lta.org.ls/Licensing/telecoms.html

[450] TCL licence, condition 1.1

[451] LTA third amendment to TCL licence; the extension was an incentive to a new investor replacing Eskom RSA and perhaps to enable Government to find a strategic or suitable investor, see http://www.store.eiu.com/product/50000205LS-sample.html.

[452] Paragraph 5 of the Terms of the Licence; VCL and EEL licences.

[453] Paragraph 5 of Telecom Licence terms.

[454] Paragraph 7 VCL and EEL Licence terms and paragraph 7 of Telecom licence terms.

[455] LTA Act 2000 Section 32.

TCL is licensed to provide all telecommunication services except mobile radio-communication services;[456] with five years exclusive rights in the provision of national and international basic voice services[457] and basic data services;[458] and leased line services within Lesotho.[459]

TCL has complained a couple of times that its exclusivity rights were infringed. In 2003, TCL challenged the decision of the Authority to license Afric Communications and Investment (Pty) Ltd to provide voice services using Voice-Over Internet Protocol (VOIP). The case was submitted to arbitration. The arbitrator, Gilbert Marcus Sc, held that a calling card system using VOIP infringed on TCL exclusive rights because that system involved real time two-way speech conversations involving no value added services.[460]

4.4.5 Specific Licensees obligations

Licences issued by LTA are subject to the provisions of the Act, Rules and Regulations issued under the Act.[461] This part considers specific licence obligations with reference to the Legal provisions in the aforementioned legal instruments.

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[456] TCL licence, paragraph 3.

[457] Basic voice services are defined as telecommunication service whereby real-time two-way speech conversation is conducted without any additional service having been provided with respect to the real time two way conversation and any deliberate removal or addition to the information content of the real-time speech conversation see TCL licence condition 1.1.1; and TCL licence Definition of basic voice services;

[458] Defined as services concerning the conveyance of messages other than two way speech messages, in real time without additional service having been provided with respect to the conveyance of the messages and any deliberate removal or addition to the information content of those messages; see TCL licence condition 1.1.2; and TCL licence definition of basic data services

[459] Involving the provision of unswitched communications link between two Network Terminal points, which link is reserved for the exclusive use of the Customer TCL licence condition 1.1.3; and see TCL licence definition of leased line services

[460] Telecom Lesotho v LTA and others, October 2003; the Arbitrator found no evidence that any value added services were being provided.

[461] VCL, EEL and TCL licence, clause 10.

4.4.5.1 Network Development

LTA is mandated to promote network development.[462] It seeks to fulfil that obligation by inserting certain requirements in the licences it issues. The requirements are set out as licence conditions binding on the telecommunication services providers.

The licences impose system expansion requirements on the licensees. TCL was obliged to provide capacity for 40 000 new lines.[463] Further, TCL was required to set up a total of 185 000 lines in five years.[464] The rural areas were allocated only eight per cent of the total lines required in the first year and ten per cent for the subsequent years. Upon extension of the exclusivity period, TCL was required to connect further 5 000 lines during the extended exclusivity period but there was no geographical distribution prescription.

TCL was also required to set up a certain number of public pay telephones annually for a period of five years.[465] The minimum number of public telephones, unconditionally guaranteed required in all five years was 4250.[466] However, the license had no specific geographic distribution for the public pay phones requirement.

Failure to meet the annual target commitments attracted financial penalties. Continued failure entitled LTA to impose increased penalties, cancel the exclusivity period or revoke the licence.[467]

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[462] LTA Act 2000 section 15 (2) (a).

[463] Paragraph D, Annex B TCL licence.

[464] i.e. 25,000 fixed lines in the second year, 30,000 in the third year, 40,000 in the fourth year and 50,000 in the fifth year.

[465] 495 public telephones in the first year, 715 in the second year, 935 in the third year and 1, 155 and 1375 in the fourth and fifth years respectively; see Annex B, TCL licence Notes to B and C.

[466] 450 in year 1, 650 in year 2, 850 in year 3, 1050 in year 4 and 1250 in year 5; again the numbers relate to additional lines to be connected at the end of each year, above the number existing on the effective date (9 February 2001) or connected in each previous year; see note 471 above.

[467] Telecom Lesotho licence paragraph 6 (c); condition 2.3.

In 2004 LTA established that TCL had failed to meet connection obligations for the first and second years respectively. TCL had failed to meet its target obligations by about 26 per cent with respect to fixed line connections and about 72 per cent with respect to public payphones.[468] LTA fined TCL an amount of M11 681 500.00.[469] The fine was later reduced to M9 774 000.00 after TCL argued that the public pay phones penalty was unfair because it had no exclusive rights on the provision of public pay phones.[470]

Subsequently, a dispute arose between LTA and TCL about the interpretation of the roll-out obligations in the TCL licence. LTA claimed that the overall commitment was for 185 000 fixed lines within the stated five year period. TCL claimed that the overall commitment was for 50 000 lines for the stated period as per the privatisation deal and that LTA had no authority to deviate from the provisions of the privatisation deal.[471]
The licence, in Annex B, has an explanatory note which reads:

> all numbers reflect the *total number* of *additional lines* to be connected at the end of each year, *above the number existing* on the effective date or connected *in each previous year.*[472] *(My emphasis)*

The above provision clearly supports the argument of LTA. TCL did not raise the alleged deviation when the licence was issued but waited until its performance was questioned. Without determining whether or not TCL had a right to raise the issue then, this occurrence indicates lack of good faith on the part of TCL in its dealings with the Authority.

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[468] LTA Report on TCL Roll-out Targets obligations, 2004/01/15.

[469] About US$1 629 000; the licence has a formula for calculating the penalty amount; 80% failure attracts M1 500 (US$250) fine per unconnected line; 65% failure attracts M2, 500 (about US$417) fine per unconnected line.

[470] This we learned from an interview with one of LTA Officials.

[471] See speech by Minister of Telecommunications in his address to Parliament on 22 June 2006; available at www.lesotho.gov.ls/articles/2005/speech_Thabane_Telecom_Gov.htm.

[472] Annex B to TCL licence.

The issue was settled by Government intervention; in June 2005 the Minister of Telecommunications indicated that the privatisation deal required connection of 50 000 fixed lines.[473] Consequently, LTA had to accept this position.

The licences for mobile operators have no specific system expansion requirements safe to state that LTA shall set out those requirements in consultation with the licensees.[474] LTA may impose financial penalties or revoke the licence if licensees fail to comply with prescribed requirements.[475] The Authority is authorised to calculate applicable penalty.[476]

4.4.5.2 Universal Access/ Service

The LTA Act mandated LTA to promote universal service and access.[477] The 2005 ICT Policy also require the authority to[478]-

- develop specific indicators of ICT access that reasonably meet Lesotho's socio-economic aspirations;
- provide for universal service obligations in all licenses issued for infrastructure development;
- implement the universal service policy;
- advice and participate in the Universal Access Fund Steering Committee chaired by the Ministry of Communications Science and Technology.

[473] See speech by Minister of Telecommunications in his address to Parliament on 22 June 2006; available at www.lesotho.gov.ls/articles/2005/speech_Thabane_Telecom_Gov.htm. The Privatisation deal containing target obligations was not accessible. The Privatisation Unit had no record of it and stated that it was handed over to LTA, the author was not able to secure or access that document.

[474] VCL licence condition 1.1.

[475] VCL licence, condition 1.3; paragraph 6(c).

[476] Unlike the TCL licence, the mobile services licences do not have a penalty calculation method.

[477] Section 15 (2) (a).

[478] ICT Policy clause 4.2.3.

The Act does not define universal access or service but provides that LTA must ensure that telecommunications services, especially basic telephone services are accessible to the widest number of users.[479]

LTA developed a Universal Access/Service Strategy in 2003; with the objective to make telecommunications services accessible to a larger group of the population through extending network coverage and installing public pay phones or multifunctional tele-centres.[480] The Strategy paper adopted the universal service and access definitions as discussed above.[481]

The operators' licences define universal service in different terms. Consequently, universal service could mean different things for different operators.

TCL licence does not define universal access but defines universal service as –

a) local basic voice services to the public, including from public pay phones;

b) local telegraph services;[482]

c) local telex services.[483]

The licence requires the company to provide basic voice and date services to every person who reasonably requests provision of those services.[484]

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[479] LTA Act 2000 Section 48 (1).

[480] However, the strategy did not state the universal access goal in terms of time, distance, population or any other criteria.

[481] See pages 31 above.

[482] Defined as telegraph services which originates and terminates within the same switching area; and local switching area is defined as the area within a fixed radius (defines differently for each licensee form a central office

[483] Defined as telex services which originates and terminates within the same local switching area, see TCL licence Definitions.

[484] TCL licence condition 3.

The mobile operators' licences define universal service in broad general terms; it is 'the provision of telecommunication services so as to be easily accessible and affordable to the public at large without any limitation whatsoever'.[485] The operators are obliged to meet universal service requirements as LTA may prescribe from time to time.[486]

The Act gives LTA two options regarding universal access funding.[487] It may establish a fund into which all providers are required to contribute prescribed amounts annually. The proceeds of the fund may be used for the development and expansion of telecommunications infrastructure in areas where there are no services and to provide access to more users including those with disabilities.[488]

In the alternative LTA may require each operator to establish a universal access fund. The proceeds of those funds must be used only with the approval of LTA and solely for the expansion of country-wide telecommunication service infrastructure.[489]

Licences issued to TCL, VCL and EEL required licensees to contribute 2 per cent of their gross annual turnover into the universal access/service fund.[490] The funds may be used for the expansion of telecommunication services in the rural and high cost areas of the country and for the development of universal service.[491] The fund is currently administered by the Ministry as per the 2005 ICT Policy.[492]

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[485] VCL and EEL licences, definitions

[486] VCL and EEL licences, condition 28

[487] S48, LTA Act 2000.

[488] LTA Act 2000 section 48 (2)

[489] Ibid.

[490] TCL licence condition 33; VCL and EEL licence condition 28.1

[491] TCL licence condition 33; VCL and EEL licence condition 28.1

[492] ICT Policy for Lesotho clause 4.1.1.

LTA never prescribed universal access obligations for mobile operators and the contributions had never been paid because LTA suspended the contribution requirement till March 2006.[493] Operators were expected to voluntarily roll out services into un-served profitable areas while LTA acclimatised to its role. The plan failed because operators claimed that the new areas were unprofitable and consequently stopped further rollout.[494]

TCL expansion target obligations show that a substantial degree of priority was given to urban areas, indicating a decision to promote more development, increased access and better quality in urban areas while connection of the rural areas was of secondary importance.[495]

LTA has never set system expansion requirements for mobile operators.[496] This, plus the lack of activity in universal access programmes, is perplexing in a country presumably pursuing universal access strategy and suggests that universal access aspirations are probably paid lip-service.[497]

4.4.5.3 Consumer Interests and the range of telecommunication services

LTA is further mandated to promote the range and quality of telecommunication services and other consumer interests;[498] more especially to protect consumers lacking competitive alternatives.

The three operators are required to provide a range of services including, resale services,[499] public emergency services[500], public pay phone services[501], directory

[493] The suspension was alluded to in the Universal service/access Strategy paper and confirmed in an interview with LTA officials; operators are expected to start paying these contributions in the 2006/7 financial year.

[494] LTA annual report 2003/4.

[495] See page 83 above.

[496] This was deduced from a meeting with one of the LTA officials.

[497] The LTA universal access/service strategy for Lesotho indicated that LTA would pursue universal access strategy and aim to have all major towns and roadways and designated minor towns and villages covered by telecommunications networks by the end of 2005; however it was not clear whether an action plan to implement these aims strategy was ever developed.

[498] S 15 (2) (c).

information services,[502] operator assistance services[503] and customer information services.[504] The operators are not expected to provide any of these services if LTA agrees that the circumstances prevent operators from reasonably providing the services on safety grounds or other circumstances beyond the control of the operators.[505]

However, the Act has no substantive consumer protection provisions safe to require service providers to provide de-listed services under non-discriminatory practices, within reasonable time, at reasonable and non-discriminatory charges;[506] more especially, service providers are obliged not to discriminate against particular persons or class of persons with regard to charges or other conditions of service.[507]

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[499] Services purchased from licensee and made available to a customer together with additional services the requesting service provider may provide; service providers may be prosecuted for restricting resale of their services under section 39; also see TCL licence definitions and condition 5; also see VCL and EEL licence definitions and condition 2.

[500] Defined as free two-way voice telephone services available to the public at all times for purposes of notifying emergency organisations about an emergency; See TCL licence definitions and condition 7; VCL and EEL licence definitions and condition 4.

[501] Service involving installation, repair and maintenance of public pay phones and provision of basic voice, directory information, operator assistance and public emergency services; TCL licence definitions and condition 8.

[502] Regulation 29 requires licensee to provide LTA with directory information regarding its subscribers; and TCL is obliged to provide printed directory to all basic voice services subscribers; the directory is to include name, address and telephone number of each subscriber and international dialling codes; directory must be available in forms appropriate for blind or other disabled persons; TCL condition 9; VCL and EEL licence condition 5.

[503] The service which allow the member of the public to request to be connected to another person; TCL licence definitions and condition 10; for VCL and EEL – the service include telecommunication service through which to report emergencies and maintenance problem in the licensed system, VCL and EEL licence condition 6.

[504] Licensees are obliged to provide information about their services, costs and directory services to persons to whom they provide services; TCL condition 11 and VCL and EEL licence condition 7

[505] I.e. see TCL licence condition 11.2, 10.2, 9.8, 8.2, 5.2; VCL and EEL licence conditions 7.2, 6.2, 5.4, and 4.4.

[506] LTA Act 2000 section 35.

[507] TCL licence condition 23 and VCL and EEL licence condition 20.

The licences require licensees to:

- issue consumers and customers with accurate bills stating the true extend of providing the service;[508] there is no requirement for itemised billing;
- cooperate and collaborate regarding number portability – the cost and feasibility of porting numbers from a customer's former provider to the new provider;[509]
- provide maintenance services for customer premises equipment upon reasonable request by customers;[510]
- notify persons likely to be affected by an anticipated service interruption except in cases of emergency, or where continued service may damage the network system or where the subscriber failed to pay service charges.[511]

The Authority does not have a detailed consumer protection policy. Neither the Act nor the licences address cramming or slamming. Personal information is protected in that operators are obliged to heed a customers request for non-disclosure of personal information in public directories.[512]

4.4.5.4 Quality of telecommunication services

The Authority is mandated to promote the quality of telecommunication services.[513] Consequently LTA requires TCL to meet certain quality requirement

[508] TCL licence condition 17.1; VCL and EEL condition 13.

[509] TCL licence condition 19.4; VCL and EEL condition 16.

[510] TCL licence condition 12.1; VCL and EEL condition 8.1.

[511] TCL licence condition 13; VCL and EEL condition 9.

[512] Operators must heed request of customers who do not want their information to be included in the public directory.

[513] LTA Act 2000 section 15 (2) (c).

and to keep performance records.[514] Quality of service is determined in terms of call failure rates, fault clearance rates and connection waiting period.

For the first year, TCL call failure rate was not to exceed the rate in the twelve previous months. For the second and three years of operation national call failure rate was not to exceed 10 and 5 per cent respectively; and call failure rate for international calls was not to exceed 15 and 10 per cent respectively.

Fault clearance provisions in TCL licence favour urban areas and business over other users;[515] for instance seventy percent of faults affecting businesses must be cleared within twenty four hours; eighty-five percent within seventy-two hours, provided all faults are cleared within 7 days.

In urban areas the figures are forty per cent in twenty-four hours, fifty-five in seventy-two hours and seventy per cent in 7 days. The figures are lower for rural and residential faults whereby the requirement is clearance of thirty per cent of faults within twenty-four hours, forty-five per cent within 72 hours and sixty per cent in 7 days.[516] The licence sets payphone serviceability at ninety –five per cent for the second and third years respectively.

With respect to connection waiting period, the provisions also favour customers in urban areas. The licence required TCL to connect those customers within fifteen days in the second year and ten days in the third year. Customers in rural areas had to wait thirty more days for connection in the second year and twenty more days in the third year.[517]

Failure to adhere to the above stated quality requirements attracted financial penalties set at fifteen per cent of TCL annual revenue in the previous financial

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[514] TCL licence condition 16; record must include call failure rates, faults and serviceability of public pay phones.

[515] The licence sets time limits within which to clear fault in 24 and 72 hours and 7 days categories and differentiates between urban, rural, business and residential faults.

[516] TCL licence condition 16 and Annex D.

[517] They are to be connected with 45 days in the first year and 30 days in the third year; see Annex D of TCL licence.

year.[518] In 2003, LTA established that TCL had failed to connect about 5 000 applicants, fifty three per cent of them located in Maseru. Further, sixty two per cent of the applicants had been waiting since 2002.[519] TCL was consequently fined M315 625[520] in accordance with the licence conditions.[521] The fine is a once off fine;[522] consequently TCL no longer had any motivation to improve quality of service.

Mobile operators are also required to meet quality requirements as set out in the rules and regulations; the requirements are not specified in the licences .[523] The mobile operators are required to keep record of their quality requirements performance showing call failure rates and faults for each licensed service provided. [524] Fault clearance reports must be recorded in terms of twenty-four and seventy-two hours and seven day periods in relation to specific categories of customers.[525] LTA may fine mobile operators for failure to comply with the prescribed requirements.[526]

4.4.5.5 Competition policy issues

The Authority has the duty to promote fair competition[527] between telecommunication service providers.[528] The service providers are obliged to

[518] TCL licence condition 16.1 and Annex D.

[519] LTA Annual Report 2003/4.

[520] About US$52 604.00.

[521] TCL licence Annex D, penalty clause.

[522] TCL licence, Annex D - penalty clause.

[523] See VCL and EEL licence condition 12.1.

[524] VCL and EEL licence condition 12.2.

[525] VCL and EEL licence condition 12.3.

[526] VCL and EEL licence condition 12.1.

[527] The terms 'competition' or 'unfair competition' are not defined in any of the legal instruments.

[528] LTA Act 2000 section 15 (2) (f).

provide services on a competitive and non-discriminatory manner and to refrain from unfair competition practices.[529]

Practices that constitute unfair competition include –

- collusion between service providers or potential service providers in setting tariff rates, exploiting issued licences or applying for a licence;
- agreements to restrict competition;[530]
- providing false information relating to approved tariff rates and charging tariffs contrary to the tariff structure;
- cartels,[531] abuse of dominant position,[532] and anti-competitive mergers and acquisitions;[533]
- fraudulent and indecent advertising of telecommunications services or equipment,[534] and bribery,[535]
- charging unreasonable prices for services.

LTA licences issued to TCL, VCL and EEL prohibit unfair competition practices.[536] The licensees are prohibited from engaging in activities which may restrict competition. The prohibited activities further include abuse of dominant position independently or jointly with others and anti-competitive dealings.[537] The

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[529] Reg. 20 (1) and (3); LTA Regulations 2001; services are to be provided on a first come first served basis to all qualifying persons within a covered geographic market.

[530] Reg. 20 (2) (a) and (l); since 'competition' is not defined, it may be difficult to identify the agreement prohibited by this section.

[531] Reg. 20 (2) (f) with respect to price fixing, market sharing or public procurement of telecommunications equipment.

[532] Reg. 20 (2) (g), restricting entry or driving a competitor out of the market; the regulations provide no indication of when a firm is 'dominant' in this sector.

[533] Reg. 20 (2) (h) and (m); it is not clear when the amalgamation of firms is a 'merger' or 'acquisition', the two are not defined.

[534] Reg. 20 (2) (k).

[535] Reg. 20 (2) (j) – accepting, offering or giving bribes.

[536] See Telecom Licence condition 22; and VCL and EEL licence condition 19.

[537] Offering differing conditions in similar transactions with other trading parties whereby some parties gain competitive advantage; cross-subsidising some businesses and engaging in practices which distort competition.

licensees are obliged to keep records of their dealings with any business, including their subsidiaries, relating to provision of licensed services.[538]

Lesotho does not have a competition authority or a comprehensive competition legislation.[539] The task of monitoring competition policy in the sector falls on LTA. LTA has the power to investigate unfair competition complaints, adjudicate over those complaints and issue remedial orders or orders requiring service providers to cease and desist from such activities. The authority may declare as void any anti-competitive agreements.[540] Further, a service provider found to have engaged in unfair competition practices may be fined M500 000.[541]

So far, no formal unfair competition complaints have been filed with LTA; and LTA has not undertaken any anti-competitive investigation.

4.4.5.6 Interconnection

Interconnection provisions in the Act require telecommunications operators to enter into interconnection agreements and to share physical connections with each other and with value added service providers.[542] A party may refuse to negotiate an interconnection agreement under certain circumstances[543] or to enter into interconnection agreement if to do so would be unreasonable in the light of System Expansion Requirements or if it would be inappropriate on technical or economic grounds.[544]

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[538] See Telecom Licence condition 22.5; and VCL and EEL licence condition 19.2.

[539] Preparations are underway to develop a competition policy and law; for a list of laws with a bearing on competition policy see the Inventory of Laws with a bearing on Competition policy and Law, a study prepared by M. Makara for the Ministry of Trade and Industry Cooperatives and Marketing.

[540] Rule 118 (7) (d).

[541] Rule 118, 119; the fine is payable for each month or part of the month during which the unfair competitive practice continues.

[542] LTA Reg. 26(1) and Reg. 27; 'value added service services' are not defined in the Act or the regulations.

[543] Where the interconnection provider is exempted from obligation to interconnect; or interconnecting operator does not have authority to provide services for which interconnection is requested or interconnection would unreasonably impair the quality of the services provided by the interconnect provider; Rule 125 (8).

[544] TCL licence condition 18.2, VCL and EEL condition 15.2.

In negotiating the agreement, the parties must act in good faith.[545] Interconnection requests must receive reasonable priority over customer orders.[546] Where the interconnecting party provides confidential information, that information must be kept confidential and not disclosed to any other person; further the information must be used for interconnection purposes only.[547]

The interconnection agreement must address various issues including the scope and interconnection specification, charges, amount of interconnect capacity to be provided, inter-operability, traffic management and measurement, and system maintenance.[548] The agreement must be in writing, and together with a summary of its principal terms, it must be submitted for approval to the authority[549] at least 30 days before its effective date.

The agreement must contain formal dispute settlement procedure; but disputes arising before, during or after negotiations may be submitted to the Authority for determination. Where an interconnection request is alleged to be unreasonable, the dispute may be referred to the Authority for mediation[550] and where the parties cannot agree on when to commence negotiations, the Authority may prescribe the date on which to start negotiations and compel parties to commence negotiations on that date.[551]

If parties fail to agree on interconnection charges or other conditions, the Authority may prescribe binding charges and impose conditions.[552] And if the completed agreement fails to comply with the provisions of the Act, the Authority

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[545] Rule122.

[546] Rule 123 (3).

[547] Rule 123 (2) and 130.

[548] Rule 120.

[549] LTA Act section 36 (2), Reg. 27 and rule 133 (1).

[550] Rule 125 (4) and (7)

[551] Rule 125 (6).

[552] LTA Act Section 36 (3), the Authority may act upon application by either party or on its own motion

may order that the terms be modified.[553] If parties fail to agree, the authority may impose the modified terms if those terms promote fair competition.[554]

The above provisions are endorsed in the licences. The licences permit the authority, on request of any party, to intervene and impose interconnection conditions if parties fail to reach an interconnection agreement within 3 months of starting negotiations.[555]

In approving interconnection agreements and resolving interconnection disputes, the Authority is obliged to ensure that interconnection arrangements are not discriminatory towards users and that interconnection is provided on fair and reasonable charges.[556] The costs must reflect direct interconnection charges, incremental cost and reasonable return on investment.[557] Price differences must be justified by direct costs and not types of services or customers.[558] In resolving disputes relating to costs, the Authority must be guided by direct cost considerations.[559]

The regulations provide a detailed procedure for lodging an interconnection dispute. The procedure allows all involved parties to make written and oral representations and responses to the Authority. Further, the submission of a dispute to the Authority does not preclude parties from negotiating a settlement and resolving the issues between themselves.[560]

The interconnection agreement between TCL and VCL dates back to 1996 when VCL entered the market. TCL adopted the same agreement for interconnection

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[553] The authority may act upon application by one party or on its own motion; see section 36 (4)

[554] LTA Act section 36 (4); rule 133 (3) and (6)

[555] TCL licence condition 18.6, VCL and EEL condition 15.6.

[556] LTA Act section 36 1; rule 121 and 124.

[557] LTA Act section 37 (2) (d) and Rule 121 (1) and 124.

[558] LTA Act section 37 (2) (a) and (c).

[559] Ibid.

[560] Rule 132 (3).

with EEL.[561] The parties have recently[562] submitted a revised agreement to LTA for approval; by November 2006 LTA was yet to respond.

The Authority has not received formal interconnection related complaints or disputes, nor has it, on its own, intervened in negotiation of interconnection agreements.

4.4.5.7 Tariffs and Rates

LTA has the responsibility to monitor the rates and charges of all telecommunications services.[563] The charges must cover incremental costs of providing the service and a reasonable return on investment.[564] The Act or the Regulations provides no guidelines on what constitutes a 'reasonable return'.

LTA is required to approve tariffs and charges using *price cap formulas.*[565] The LTA Rules[566] provide a procedure for tariffs determination. Services providers are required to submit tariff proposals to the Authority for approval.[567] The proposal must be accompanied by all information relating to the rates and charges of concerned services, accounting and costing information.[568] The Authority may request further information.[569] The authority is obliged to publish the proposal for public comment.[570]

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[561] Information provided in an interview with TCL officials.

[562] Around the last days of September or early days of October 2006.

[563] Section 40 (1).

[564] Section 40 (1).

[565] LTA is to determine the price cap regime; see Reg. 12 (4), Rule 110 (1), 111 (3) (a).

[566] LTA Administrative, Procedural and Service Provision Rules 2000.

[567] Section 41 (5), and (6), TCL licence condition 15, VCL and EEL licence condition 14.

[568] LTA Act section 41 (2), (4), and 44.

[569] Rule 111 (3) (b).

[570] Through any appropriate media where it is open for public inspection - Rule 114 (1) and rule 109 (4).

The Authority must examine and verify the accompanying documentation and ensure that the proposal adheres to the formulas specified in the licence.[571] Because operators have all information relating to their performance while the Authority has less information and relies on the operator to verify that information, information submitted to the Authority may be conjured, which may cause the authority to make decisions favourable to the company based on inaccurate premises. This is particularly true with respect to the fixed lines monopoly supplier; information provided by mobile operators may be compared against each other to determine a fairer picture.

Unless LTA rejects the proposed tariffs in thirty days, the proposal is presumed to have been approved.[572] In considering the proposal, the authority is obliged to consider submitted public comments.[573] The Authority may reject the proposal and make a counter proposal. If the service provider rejects the counter proposal, the decision of the Authority is final.[574] This is contrary to SADC recommendation of an arbitration tribunal to solve tariff disputes.[575]

The Authority and the service provider are required to ensure that applicable tariffs are adequately published.[576] Tariffs may be reviewed once a year.[577] Presently, the authority has commissioned a study to provide modalities of introducing a cost based tariff regime.[578]

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[571] Rule 111 (3) (a).

[572] Section 41 (3); rule 108 (2) and 109 (2) and 112 (1); also see TCL licence condition 15 (7); proposal may be approved or disapproved, TCL licence condition 15 (4), VCL and EEL licence 11 (5).

[573] Rule 114 (3) (a).

[574] Section 41 (6).

[575] See page 55 above.

[576] Section 41 (8), Rule 112 (4); Reg. 11 (3); also see TCL licence condition 15 (9).

[577] Rule 110 (2) (3).

[578] LTA annual report 2004/5 page 8.

4.4.6 Dispute resolution Mechanism

4.4.6.1 Consumer Disputes

The authority has powers to adjudicate on disputes between telecommunication service providers and consumers or subscribers. 'Consumers' are natural persons who are current, past or future users of telecommunication services;[579] and a subscriber is a current user who is responsible for all charges and rentals thereof.[580]

The Authority entertains complaints where parties failed to reach a settlement on their own. Firstly, service providers are required to develop internal complaints handling policies and to provide complaints handling services. The procedures must contain the time frame for handling disputes and company strategy on billing accuracy and disaster or emergency management.

Secondly, the dispute settlement procedure must contain an appeal mechanism.[581] The complainant (consumer or subscriber) may submit a claim to the Authority only if the service provider failed to satisfactorily solve the complaint.

The complainant must submit the unresolved complaint to the Authority in writing. The complaint must clearly identify both parties providing full contact details of both the complainant and the service provider against whom the complaint is brought.[582] It must contain all facts relating to the claim, articulating the efforts taken to resolve the claim with the service provider. [583] The complainant must

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[579] Rule 3 - LTA Administrative, Procedural and service provision Rules 2000.

[580] LTA Act section 2.

[581] VCL and EEL licence condition 14.

[582] Rule 20 (3) (a) (b) LTA Administrative, Procedural and service provision Rules 2000.

[583] Rule 20 (3) (d) LTA Administrative, Procedural and service provision Rules 2000.

ensure that the information provided is true, accurate and complete.[584] Further, the complainant must state the specific remedy sought.[585]

The complainant may request a hearing; but LTA has the discretion on the manner of handling the complaint even on whether or not to allow a hearing.[586] LTA Rules set out detailed hearing and pleadings procedure to be observed from the time a complaint is filed to the time after a complaint has been adjudged.[587] The rules cover a wide range of issues including pleadings time frames and time determination guidelines;[588] pleadings specifications;[589] signature verification[590] and legal representation;[591] depositions, subpoenas and pre-hearing conference; expert examination and the hearing itself.[592]

After the hearing, LTA may issue a final decision[593] or a final statement ordering the service provider to perform certain actions or imposing penalties on the service provider.[594] However, a party may request LTA to reconsider or to clarify its decision.[595] LTA may deny or grant part or the entire reconsideration request.[596] The decisions of LTA are subject to review by the High Court.[597]

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[584] LTA Regulations 2001 Reg. 13 (1).

[585] Rule 20 (3) (c); 22 (2) LTA Administrative, Procedural and service provision Rules 2000.

[586] See Rule 20 and 22 - LTA Administrative, Procedural and service provision Rules 2000.

[587] See part 9 and part 10 - LTA Administrative, Procedural and service provision Rules 2000.

[588] Rule 32, 33 and 34 of the LTA Administrative, Procedural and service provision Rules 2000.

[589] Documents are to be printed in black ink, 2.5 margins, double spaced on A4 paper; or if handwritten it must be legible; rule 38 LTA Administrative, Procedural and service provision Rules 2000.

[590] Onus of verifying signatures rests with the person who files the document; rule 39 LTA Administrative, Procedural and service provision Rules 2000.

[591] Rule 40, parties and witness may be represented by counsel; LTA Administrative, Procedural and service provision Rules 2000.

[592] Part 10; LTA Administrative, Procedural and service provision Rules 2000.

[593] Rule 53 LTA Administrative, Procedural and service provision Rules 2000.

[594] Rule 21 (3) (b) LTA Administrative, Procedural and service provision Rules 2000.

[595] Rule 54 and 55 LTA Administrative, Procedural and service provision Rules 2000.

[596] Rule 54 (4) LTA Administrative, Procedural and service provision Rules 2000.

[597] Rule 56 and 27 (5) LTA Administrative, Procedural and service provision Rules 2000.

LTA has handled numerous consumer complaints. Most complaints are against Telecom Lesotho for failure to connect customers. In 2003, over 5 000 people complained to LTA that despite paying connection fees, TCL failed to provide the required service.[598]

Other complaints involved billing and fault clearances.[599] TCL billing is belated by a month and not itemised. As a result, customers are never aware of their current telecommunications obligations. The situation is exacerbated by poor internal communication system at TCL; for instance a customer required to terminate TCL services and to settle all outstanding bills. The presented bill was not up-to-date although another department of the company had an up-dated bill. Later he received communication from the company depicting outstanding bills. Subsequently, he received a letter of demand from the company lawyers, demanding payment and threatening litigation. [600] Although the customer paid the bill, the incident shows how inconvenient TCL system can be.

Other complaints involved telecommunications fraud where customers with Internet access, complained about bills depicting calls made to numbers unknown to them. TCL later found that the telephone lines were exposed when customers downloaded software or other articles from certain Internet sites.[601] It was not clear how LTA dealt with these cases.[602]

4.4.6.2 Disputes between Operators/service providers

The Authority has adjudicative powers over disputes and complaints arising between telecommunications service providers including matters relating to

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[598] LTA Annual Report 2003/4.

[599] Billing complaints involve all three operators.

[600] Information provided in an interview with Mr Sello Lejakane of LTA.

[601] The sites range from porn to music and religious sites.

[602] Information provided in an interview with Mr Sello Lejakane of LTA.

interconnection and competition issues;[603] contractual obligations relating to rates and charges and conflicts in frequency co-ordination.[604]

The Rules provides a procedure for dealing with competition and interconnection complaints. The Authority is empowered to investigate competition claims and to provide the alleged wrongdoer with an opportunity to make response representations.[605] Where evidence of violation of fair competition provisions exists, LTA may require the service provider to take remedial action, cease and desist from the violating activity or impose a fine.[606]

Resolution of disputes involves written representations by both parties where each party indicates legal grounds for maintaining its position. LTA may hold a hearing. To date the Authority has not received a request to adjudicate on a dispute between service providers.

4.4.6.3 Disputes between the Authority and operators/service providers

Although there are areas where disagreements or disputes are anticipated between the Authority and the service providers,[607] there are no legal provisions regarding settlement of such disputes either in the Act, Rules or Regulations or in the licences. For instance, the licences' anticipate disagreements on licensees' proposed charges but fails to prescribe the procedure for dealing with those disagreements.[608] Instead the decision of the regulator is final. This assumes that the decision of the regulator is always right or fair, which is not the case.

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[603] LTA Act section 61 and section 37; Rule 119 and Rule 132.

[604] Rule 119 LTA Rules 2000.

[605] Rule 46 LTA Rules 2000; representations may be oral in a hearing or written.

[606] Rule 118 LTA Rules 2000.

[607] I.e. in setting the applicable charges; billing process, quality of service provisions; target obligations; accounting systems or complaints of the operator against regulatory decisions affecting the operator.

[608] TCL licence 15.6 and VCL and EEL licence condition 11.5.

As a result, such disputes have been subjects of litigation.[609] Litigation process is usually long and expensive and may not be appropriate in economic matters as a delayed decision may be obsolete by the time it is issued. For instance the *TCL v Afric Communications* case started in courts of law, but the need for a speedy resolution induced parties to agree on arbitration.[610]

Investors need a functioning and efficient legal system which offers quick redress, credible and enforceable legal rules describing their rights and obligations while preventing Government from altering the rules at will.[611]

4.4.6.4 Revocation and Suspension of Licences

Non-compliance with licence conditions may result in revocation or suspension of the licence;[612] the licence may also be revoked or suspended for fraud or misrepresentation made when applying for the licence.[613] The Act is silent on whether Minister's approval is required to suspend or revoke a licence.

Further, the licences permit the authority to revoke a licence if licensees become bankrupt or are liquidated[614] and if they fail to –

- pay annual licensing fees;
- comply with directives of the authority;
- notify the authority on shareholding change or joint venture programmes.

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[609] For example TCL v Afric Communications discussed on page 82 above.

[610] The Arbitration Agreement of September 2003 between TCL, LTA and others.

[611] See Lamech, note 66 supra.

[612] Section 30 as amended, Rule 60 LTA Administrative, Procedural and service provision Rules 2000 provide for suspension and revocation for licence conditions if the breach is serious or repeated.

[613] Rule 60 (1) (b) LTA Administrative, Procedural and service provision Rules 2000.

[614] See TCL, VCL and EEL licenses clause 6.

TCL licence may also be revoked for licence violations relating to[615] -

- system expansion requirements,;
- universal service/access obligations,
- quality of service,
- public emergency services,
- public pay phone services,
- directory and customer information services,
- operator assistance services and
- interconnection obligations.

The authority is required to give licensees 30 days notice of its intention to revoke a licence and an opportunity to respond to the matters raised in the notice.[616] However, Rule 60 requires the authority to give licensees 60 days written notice with written reasons of the intended suspension or revocation and an opportunity to make oral or written representations to the authority before the authority makes a decision.[617]

The lack of clear general legal provisions relating to revocation and suspension of licences may discourage potential investors who require reassurance that revocation and suspension powers will be used for serious violations and only if everything else have failed to induce compliance. Further, it is worrying that a licence can be revoked for breaches that can be easily remedied like providing customer and directory information services.

[615] TCL licence clause 6 (c).

[616] LTA Act section 30, as amended.

[617] Rule 60 (3), LTA Administrative, Procedural and service provision Rules 2000.

4.4.7 Other provisions of the Act

Other provisions of the Act deal with telecommunication equipment standards and inspection, communication protection, tariffs and rates and the management of the use of the radio frequency spectrum.

The Act gives the Authority power to prescribe the type of telecommunication equipment[618] that may be used.[619] Equipment manufactured or imported for the sole use of the Department of Defence, Criminal enforcement department, and the National Security Department is exempted from type approval requirements.[620] However, all terminal equipment must conform to ITU standards or other standards prescribed by the Authority.[621]

The equipment may be approved by reference to equipment used in other countries recognised by the Authority;[622] all equipment manufactured in RSA is automatically approved.[623] Failure to adhere to the prescribed type of equipment is an offence and carries a penalty of M6 000 upon conviction.[624]

The Act does not have substantive provisions relating to protection of communications safe to prohibit intentional modification or interference with the contents of any telecommunications message and interception or monitoring of

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[618] Equipment that require approval include telephone instruments, fax machines, cordless telephones, cellular telephones and other equipment intended to be attached to licensed telecommunications network- see Rule 137 (1).

[619] Section 50 (1).

[620] Rule 144 (3).

[621] Rule 137 (3).

[622] Section 50 (3); Rule 140 (1).

[623] Also recognised are mobile telecom equipment and satellite earth station equipment approved under EU Directive 98/13/EC within the European Commission Technical Rules 019 (ED2), 020 (ED2) and 030 – see Rule 140 (2).

[624] About US$1 000; see Section 50 (2) and (7).

telecommunication messages without the authority of LTA or other Government authority.[625]

The Lesotho telecommunications market has been open for competition for almost six years now. The next chapter considers how the market re-structuring under the 2000 Act has affected the telecommunications service delivery in Lesotho and provides recommendations for the review of the telecommunications law in Lesotho.

[625] Section 57 (1) (e) and (f).

CHAPTER 5

RECOMMENDATIONS AND CONCLUSIONS

This part of the paper considers performance of the telecommunications sector since the sector was opened up for competition. The performance of the sector is determined by market and operators' performance considering the following factors:

- provision of service in both rural and urban areas;
- unmet demand;
- technical and operational quality;
- service affordability; and
- investment return and investment protection.

Did the number of users increase?

The number of fixed lines grew from 19 294 in 2001 to 35 101 in 2003; an increase of 15 807 lines in two years making for fixed lines teledensity of 0.9 per cent and 1.5 per cent respectively.[626] Thereafter growth rate decreased as the following two years recorded a combined increase of only 3 899 additional lines making for teledensity of 1.6 and 1.7 respectively.[627] As of September 2006, TCL reported 42 675 active lines, indicating that 2005 increase could be more than a combined increase of the two preceding years.[628]

In contrast, the mobile sector recorded 27 000 connections in 2001 and 209 000 in 2005, making for a teledensity of 1.2 and 8.9 respectively; an improvement

[626] LTA Annual Report, 2004-05; the report showed that the most increase was recorded in the year 2002/3 as about 11, 101 lines were connected – from 24 000 to 35 101; 2001/2 recorded 4, 706 additional lines – from 19 294 to 24 000.

[627] Ibid; the numbers were 2, 130 and 1, 769 fixed lines in 2004 and 2005 respectively.

[628] An increase of about 3 675 lines; the figure may go up in the three remaining months of 2006.

rate of more than five times the rate of the fixed line operator.[629] In the last six years, the fixed line and mobile operators attained 2.9 and 13 per cent coverage of the population respectively.[630]

Telecom Lesotho is the sole provider of Internet international bandwidth. Currently there are five Internet service providers in Lesotho and about 2 600 Tele-bureau centres.[631] Many telephone users are not aware of services like caller waiting, teleconferencing, video conferencing or voice box. [632]

Although more people have access to the telecommunication services than at the time of privatisation, there are concerns. The first concern relates to performance of the fixed lines operator whose growth rate is declining; particularly because areas rive with economic activity remain un-served though investment in these areas could bring relatively high returns.[633] The second concern is that the proportion of the population directly connected to the national network remains low and lastly the rural areas remain largely un-served.[634]

Recommendation:

a) LTA must undertake a study to determine why operators are failing to expand services to profitable areas.

b) LTA must develop a strategy to increase connections in the rural areas.

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[629] LTA Annual Report, 2004-05.

[630] Communications Sector Liberalisation Framework Consultative Paper, LTA November 2006.

[631] LTA Annual Report 2004/5.

[632] Kamaray K 'Demand Study for telecommunications services in Lesotho' 2004 Sechaba Consultants Maseru Lesotho.

[633] LTA Annual Report 2004-05; Speech by the Minister of Communications and Broadcasting in Parliament on 22 June 2005.

[634] LTA annual report 2004/5.

Is the service reaching the rural population?

The majority of fixed lines connections are concentrated in the low lands, with the capital Maseru having the highest connections.[635] Other concentrations are along the RSA border where commercial activities are prevalent. For example see Annex A, B, and C being coverage maps of Telecom Lesotho, Vodacom Lesotho, and Econet Ezi-Cel Lesotho respectively.

The Government desires to develop and deploy ICT so as to decrease the digital divide between urban and rural areas and the haves and have-nots by 2015. To achieve this goal the Government undertook to establish ICT public access points in places such as post offices, schools, libraries and rural health care clinics.[636] However, the policy failed to stress the continuing digital divide between the urban and rural areas and to devise special initiatives or clear strategies for narrowing the gap.

Recommendation:

a) The Ministry, together with LTA must develop a clear and detailed strategy to bring telecommunications services to the rural communities or at least to enable those communities to receive and make emergency calls. For instance the policy must state that the goal is for every person in a community to have access to telephone services within a certain prescribed distance. Further, the strategy must have an action plan with identifiable milestones; for example that certain specified communities will be connected by a prescribed time.

b) The authority may develop an incentive scheme for providers who expand to rural or highlands areas in excess of prescribed minimum

[635] Subscribers per area information provided by LTA; information valid as at 31st September 2006.

[636] ICT policy for Lesotho 2005, page 18 and 22.

requirements. The incentive package may include tax benefits[637] or reduction of annual fees or universal access contributions payable towards the universal fund.

Has the number of pending applications decreased?

At the end of September 2006, TCL had about 4468 pending applications,[638] a significant drop from over 20 000 waiters five years ago. However, the drop in the number of waiters does not necessarily mean that the company is efficient. It could indicate that prospective consumers have less expectation of ever getting a telephone installed; for instance TCL failed to connect more than 5 000 customers in 2003 and was fined for failure to meet licence target obligations.[639]

Failure to meet target obligations and to connect customers in profitable areas could indicate inefficiency; the failure to connect applicants, as it was felt countrywide could have dissuaded potential customers from applying for the service.

Recommendation:

a) at the end of the exclusivity period, introduce competition in all services; and

b) prescribe quality of service requirements and closely monitor performance.

[637] It is noted that tax benefits requires consent of the Lesotho Revenue Authority but if it is possible if the Government is committed to bring telecommunications services to the rural areas.

[638] The information provided in an interview with TCL officials.

[639] LTA Annual Report 2003/4.

Tariffs - Are telecommunication services affordable?

Most customers find telephone tariffs high, and are struggling to meet their telecommunications obligations. Some people cut down water and electricity in order to meet telecom service obligations while others were disconnected form the service.[640] Most potential users find the connection fee high, and this is a constraint to many potential users including small business.[641]

LTA is currently reviewing the tariff setting policy with a view to introduce cost based tariff system. The Authority has an important task of balancing the interests of users and that of investors. The authority has to guard against inherent problems of the cost based tariff system.[642]

Recommendation: The Authority must

a) introduce competition to assist in dealing with the information advantage TCL have regarding involved costs and curb the risk of inflated costs simply because those costs are recoverable;

b) ensure that operators operate efficiently so that benefits of technological developments are passed on to users through price reductions; the system should not be used to encourage inefficiency.

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[640] Kamaray, note 664 supra. Information from LTA indicated that by August 2006 about 18 000 subscribers had been disconnected for various reasons relating to unsatisfactory payment discipline.

[641] For instance, the Kamaray Study showed that 80 per cent of those surveyed were willing to pay for the services but only 56 per cent could afford to; and about 75 per cent were willing to pay for sell phone services but only 32 per cent could afford to.

[642] See page 37 above.

Quality of service – Are consumers satisfied and confident in using the services?

Telecommunications users in Lesotho are generally not satisfied with the quality of service. TCL takes too long to provide services even in Maseru.[643] More than half TCL users and one third cell phone users experience problems every three months.[644] Some customer service centres are ineffective and unsatisfactory. Mobile phone users experience asymmetrical audio link problems (one party can hear) whereby a return call has to be made, effectively increasing telecommunications costs.[645]

Many mobile users experience poor network reception in some areas, including viable urban areas.[646] Faults are cleared at least after a week[647] although public pay phones are generally reliable where they are available especially in the highlands.[648]

The quality of service in the country is obviously poor; if the quality is to improve the have to seriously consider introducing competition in the fixed lines market. As suggested earlier, competition or the threat of competition may induce TCL to improve performance and service quality.

[643] I.e. The Administrative Officer for the Ministry of Trade and Industry waited more than twelve months for connection of new lines.

[644] Kamaray, note 664 supra.

[645] Ibid.

[646] Kamaray, note 664 supra.

[647] TCL took about three weeks, mobile operators at least a week.

[648] Surveyed users indicated that the phones are in working order most of the time.

Recommendations: The Authority must-

a) undertake a study and re-evaluate the prudence of introducing a second network operator, perhaps to serve the rural and highlands areas;[649]

b) develop quality of service requirements and monitor implementation closely, operators should be fined for non-compliance and the authority should take this task very seriously.

c) develop detailed consumer protection and competition policies specific to the telecommunications sector.[650]

Does the regulatory system facilitate investment return?

As stated above, operators use tariffs to recover investment and investors would not continue operating or invest where there are no profits prospects. The legal framework must facilitate adequate tariff levels and profitable ventures.[651]

The charges for telecommunications services are subject to approval by the regulator. The Act requires the regulator to ensure that tariffs permit recovery of incremental costs of providing the services plus a reasonable return on investment.[652] This provision indicates that the law guarantees investment return as well as inflation costs.[653] However, the Act does not say what constitutes a 'reasonable return'.

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[649] It is noted that LTA full liberalization of the telecommunications market – no quota for service providers but proposes to leave licensing new operators only after a convergence framework (policy and legislation) is in place, a process that can easily take two years.

[650] Until such time that national policies have been developed, the Authority should assume full responsibility in these policy areas act accordingly.

[651] However, policy makers must always consider affordability and accessibility.

[652] LTA Act section 40 (1).

[653] The service provider may therefore approach the High court on the ground that tariffs imposed by the regulator do not depict reasonable investment return or consider inflation rate.

Recommendations:

a) tariff policy must indicate what constitutes a 'reasonable return' so that any disputes on this issue are minimised.

b) in order to make the investment a success for the country as a whole, the regulatory fees should be minimal.

Does the regulatory system protect investment?

The telecommunications legal framework does not cover investment protection issues; neither does the operating licences. Such matters are dealt with under general investment protection laws.

However, Lesotho does not have comprehensive private investment protection legislation. The country has no history of expropriation and generally has a reputation of treating foreign investors well.[654] However, that record is not enough to provide legal security required by foreign investors who consider clear and enforceable legal rules as the priority factor in deciding whether or not to invest in a particular country.[655]

The ministry of Trade and Industry is working on an Investment Protection Bill with the view to provide legal security in respect of investment, particularly foreign investment and to attract more foreign investment into the country.[656]

Recommendations:

a) The Bill be finalised and enacted as soon as possible;

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[654] WTO Trade Policy Review for Lesotho – WTO Document No. WT/TRP/S/114/LSO, 24 March 2003.

[655] Investors want credible and enforceable legal rules describing their rights and obligations, preventing Government from altering the rules at will; see Lamech note 66 supra.

[656] Discussion with the Ministry of Trade and Industry, Cooperatives and Marketing Legal Division.

b) LTA should take interest in this Bill and advocate for its speedy enactment.

Does the framework separate regulation from service provision?

The 2000 Act defined the roles of major players in the sector very clearly. Policy making is the responsibility of Government while a regulator is mandated to monitor activities in the market. However, to the extend that the Minister can interfere in the operations of the regulator while he remains a Board member for the incumbent operator, regulation is not separate from service provision.

Recommendations: The Government has two options-

a) withdraw from the operations of the incumbent; or

b) give the regulator functional autonomy.

Is the regulatory body independent or subject to Government Interference?

LTA operates in a statutory framework that promotes competition; however the framework fall short of encouraging market-based regulatory policies and practices. LTA does not operate independently of service providers or the Ministry. The leadership of the authority is appointed by the Minister alone; the authority is legally bound to observe directives of the Minister with respect to its activities and decision making; the Minister is also a share holder of the incumbent. Thus, the decisions and directives of the Minister who is also the regulator cannot be easily divorced from the regulated company.

Thus, the status of the Authority does not meet regional or international standard.[657] The Government failed to withdraw from the operations of privatised company or to give the regulator functional autonomy. Consequently the same

[657] See section 2.1.1.1 and 2.1.3.2 above.

Minister has key roles in regulatory issues and in service provision thereby compromising the effectiveness of the regulatory process.

Again, in these five years, Government has been involved in the sector more than the judiciary. For instance, the Government decided the TCL and LTA dispute concerning roll-out obligations and intervened and induced the withdrawal of the case involving breach of exclusivity rights.[658]

In order to retain and attract international investment, Government must acknowledge that in making investment decisions, these investors consider the independence of the regulatory process as crucial.[659]

Recommendations: The LTA Act must be amended so that-

a) The Ministerial powers in the appointment of LTA Governing Board and the CEO are curtailed; a transparent consultative appointment procedure should be introduced.

b) the regulator is granted functional autonomy.

Are the licensing procedures transparent and timely?

The licensing procedure involves publication of licence applications for public comment, public hearings and Ministerial approval. The applicant submits an application to LTA which publishes the application and invites public comments and objections. [660] The Authority may request additional information. The applicant is given time to respond to the comments and objections and supply additional information.[661] Subsequently, a public hearing is held to consider the

[658] *Telecom v LTA and Bethlehem Technologies Lesotho.*

[659] Lamech, note 66 supra.

[660] See LTA Act 2000, schedule 1.

[661] LTA Act, schedule 1 section 5.

application, oral or written submissions may be made.[662] Thereafter, the Minister is requested to approve the issue of the licence.

In 2004, LTA reviewed licensing practices and proposed a new licensing process. The proposal sets time frame for various stages in the licensing procedure. For instance –

- the authority must request additional information within 5 days of receipt of the application;
- if there are any objections, the authority has 10 days to investigate them;
- the applicant has 90 days to accept the licence conditions,
- the authority has 5 days to issue licence fee invoice;
- the applicant has 30 days to pay the licence fee or the offer is withdrawn.[663]

Consequently, the process can run up to 140 days, almost five months. However most of those days involve action by the applicant (a total of 120 days); if the applicant takes prompt action the licence may be issued in less than 60 days.[664] The proposed process is commendable in so far as it appears consultative, transparent and timely.[665]

The licenses issued by the Authority do not contain amendment provisions, neither does the telecommunications law. The licence amendment provisions are critical in regulatory reform as no one wants a licence cast in stone. Investors would probably reject the change of licence conditions at will by the regulator but would accept further policy reform during the tenancy of the licence.

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[662] Ibid section 7.

[663] Proposal for licensing Procedures – LTA Consultative Document April 2004 page 16.

[664] Representing i.e. 20 days requiring action by the authority, 20 days for submission of public comments and objections and the rest of the days used for considering the objections and giving the applicant a few days to consider the licence conditions and arrange licence fee payment.

[665] Lack of timely action by Government agencies can be a deal breaker on whether or not to invest in such a country; see Lamech, supra.

Recommendations:

a) The procedure to amend licences should be prescribed; the procedure must be clear and provide a mechanism to be followed in case of disagreements on amendment terms.

b) Licensing procedures should be reviewed with a view to reduce financial barriers[666] to entry as well as to simplify administrative requirements.[667]

Dispute Settlement procedures – Are they clear, easy and effective?

As stated above, the law contains detailed dispute resolution procedure for consumer disputes and disputes between operators themselves or with service providers. However, disputes between the regulator and the operators are subject of litigation where they encounter delays and high costs.

Investors place a high value on the enforcement of laws and legal rights.[668] They need a dispute resolution mechanism that is quick, efficient and competent. Long awaited judgements can frustrate economic opportunities because the economic opportunity may have been lost by the time the decision is rendered.

Recommendation: Amend the LTA Act and provide for an alternative dispute settlement mechanism, preferably arbitration, for disputes between the regulator and the regulated entities.

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[666] For instance, TCL paid about $1 842 857.00 for the operating licence while the mobile operators paid about $

[667] I.e. The Minister should be removed from the licensing system.

[668] Lamech, note 66 supra.

Other areas of concern

Interception of communication and protection of personal information

Lesotho does not have comprehensive law relating to interception of communication or protection of personal information. The telecommunications law does not contain comprehensive provisions relating to telecommunication privacy except that it is an offence to intercept telecommunication messages without authority of the LTA or other Government authority.[669] Licensees are prohibited from recording, silently monitoring or intruding into transmission of messages unless the parties to the message or live speech telephone call have been informed of the intention to record, monitor or intrude into their message.[670]

The telecommunications law does not address protection of personal information acquired through the use of telecommunications services. Needless to say, concerns about invasion of privacy are not widespread in Lesotho. However, the telecommunications licensees are required upon request by the information subject, to keep personal information confidential. Further, the information provided may not be used for other purposes or provided to third parties without express consent of the person to whom it relates. These are contractual obligations which individuals may not enforce on their own.

Recommendation:

The Authority may facilitate the enactment of a comprehensive law relating to interception of messages and protection of personal information.

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[669] Section 37 (1) (f); The Act is silent on who may request to intercept telecom messages or under what conditions.

[670] VCL licence condition 18, TCL licence condition 21.

Conclusion

The 2005 ICT Policy for Lesotho aspires to use ICT to improve the standard of living of all Basotho. The telecommunication sector can facilitate economic growth and assist in the realisation of that goal. But successful investment and improved sector performance requires an appropriate legal framework which protects investors and facilitates easy and profitable operations.

The telecommunications legal framework in Lesotho needs improvement. The current framework fails to provide a clear and enforceable legal framework as shown in chapters four and five above. In particular a law protecting foreign investment has to be enacted as most investors consider this the most important factor in decisions to invest in a developing country like Lesotho.

Secondly, the current regulatory framework allows government interference in the regulatory process; making the regulatory process uncertain and unpredictable. Investors, particularly foreign investors, consider this a deal breaker. Lesotho Government has to acknowledge this and give the regulator functional independence. Thus, the regulator must be functionally independent, equipped with powers and ability to induce firms to reveal private information and to operate efficiently. The regulator should be obliged to respond to the needs and time frames of investors without compromising national goals or operating principles.

To attract and retain investment, the Government must ensure that the legal framework in place protects investment, allows realisation of investment returns, and protects consumers. The Legal framework plays a crucial role in attracting investment, especially foreign investment and unless the legal rules are clear and simple, predictable and enforceable, it is unlikely that investors will locate in Lesotho. To attract new investment into the sector, Lesotho needs to improve the legal framework first.

However, in developing policies and legal rules for this sector, the Government must be guided by the need to enable all people in Lesotho to receive and make emergency calls. To achieve this objective Lesotho can draw from the experience of countries with similar topography, like Norway. Nearly 70 per cent of Norway is uninhabitable and covered by rugged mountains, glaciers and fjords; yet in 1996 it was possibly the country with the greatest concentration of mobile telephones in the world; with satisfactory coverage in the mountain areas, including in isolated mountain *'hytte'* or holiday cottages/cabins in the mountain areas.

In particular, the Lesotho Government can facilitate increased telecommunications access by promoting countrywide mobile coverage and reduce infrastructural costs. The Government can require mobile operators to use inexpensive but reliable mobile systems and technology that provide adequate coverage to communities in rural mountain areas. Providers may also be required to maintain service packages that allow communities in the mountain areas to receive and make emergency calls at all times.

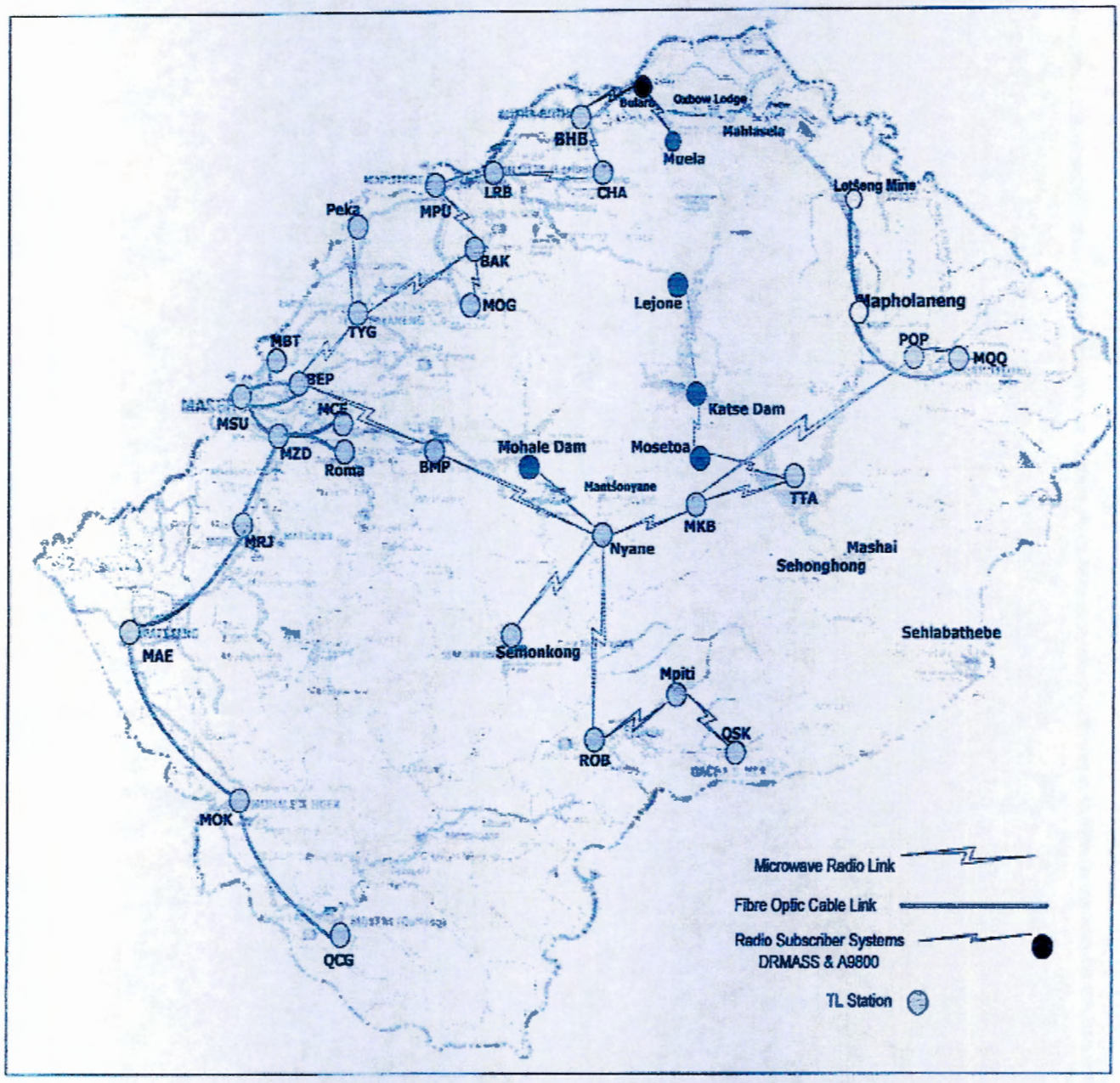
Further, the operators may be encouraged or obliged, as regards access in mountain areas to reduce involved costs by sharing infrastructure; the universal Service Fund could be used for this purpose.

To ensure that the benefits reach all communities, the Government needs to ensure the availability of inexpensive mobile phones. Thus, the Government may develop and maintain social programmes that encourage involvement of the public in extending access to the poor and the rural areas; for instance by encouraging the sale of inexpensive cell phones and donation of old mobile phones for the benefit of the poor and destitute. Already, the Government purchases mobile phones for top officials and these phones are replaced every two years; the replaced phones could be used in the old phones donation programme.

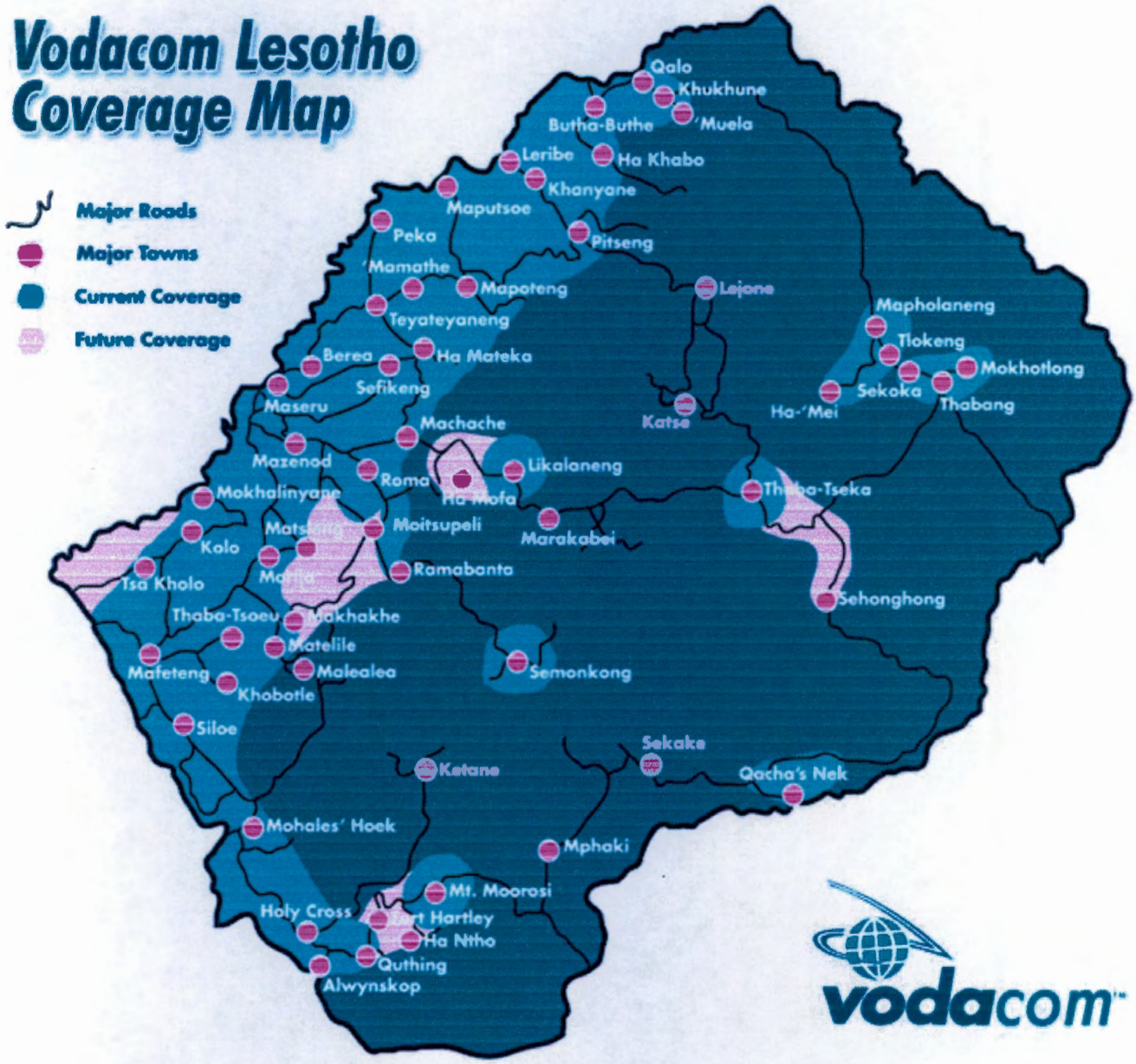
A conducive legal framework is a necessity, but universal access requires commitment and collaboration of all players: the Government, the private sector and the public. Lesotho will achieve universal access only if all these players work together towards one goal; the goal to enable every Mosotho to receive and make emergency calls.

ANNEXURE A-

TELECOM LESOTHO COVERAGE MAP AS OF DECEMBER 2006.
SOURCE: TELECOM LESOTHO



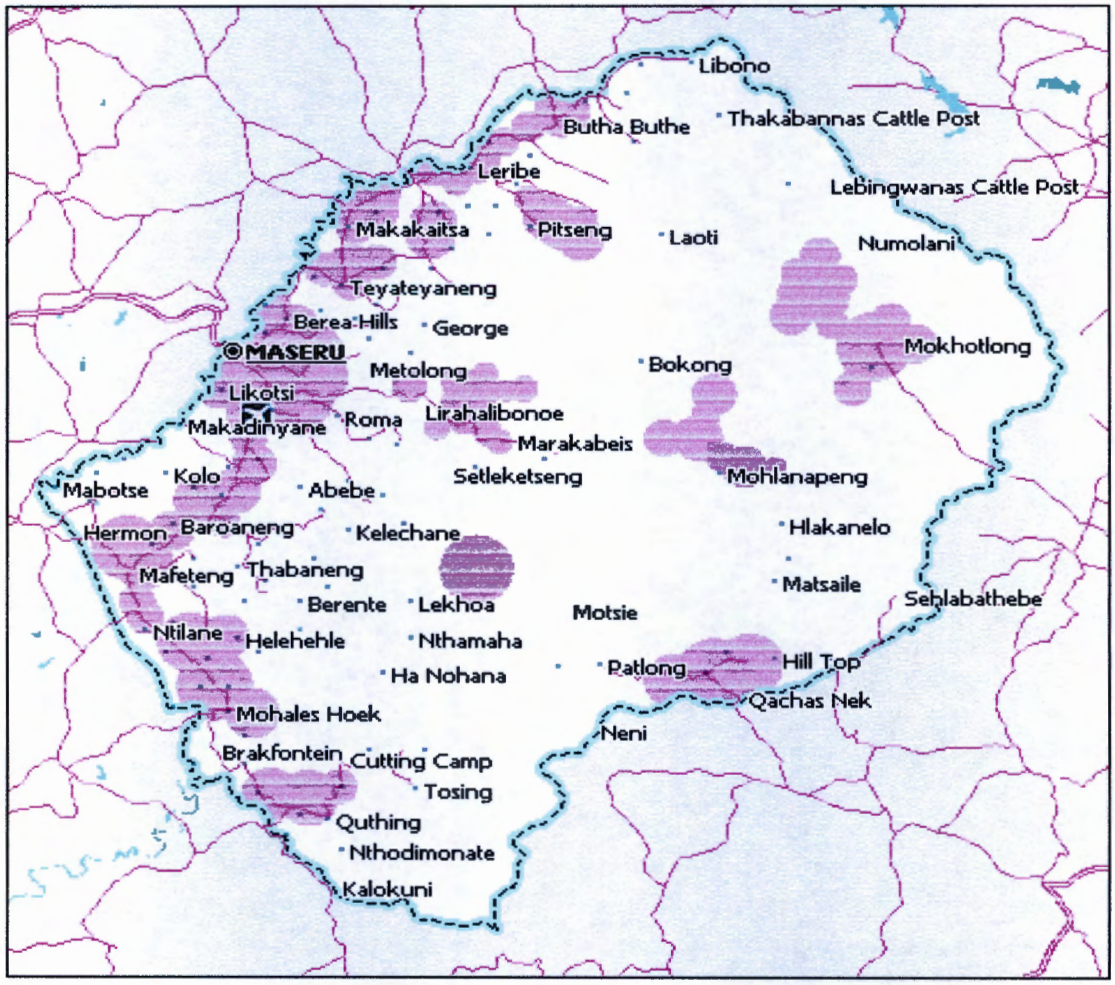
Annexure B



Coverage map available at http://www.vodacom.co.ls/ls/packages/coverage.jsp accessed on 7 November 2006.

Annexure C

Econet Ezi- Cel Lesotho (Pty) - Interactive Coverage Map



Maps: © 2006 GSM Association, Europa Technologies Ltd.

Coverage map available at
http://www.gsmworld.com/cgi-bin/ni_map.pl?x=0&y=0&z=0&cc=ls&net=tc
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