

**TITLE: TOWARDS EFFECTIVE REGULATION OF THE
TELECOMMUNICATIONS SECTOR IN SWAZILAND**

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(LLM) In International Trade and Investment Law in Africa

Declaration

I declare that this Mini-Dissertation which is hereby submitted for the award of the *Legum Magister* (LLM) in International Trade and Investment Law in Africa at International Development Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed

Bawinile Felicity Shongwe

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List of Acronyms

ASP	Application Service Provider
BCC	Botswana Competition Commission
BOCRA	Botswana Communications Authority
BTA	Botswana Telecommunications Authority
BTC	Botswana Telecommunications Corporation
CCA	Communications Commission Act
CEG	Competition Economists Group
CSP	Content Service Provider
ECA	Electronic Communications Act
EU	European Union
FDI	Foreign Direct Investment
ICT	Information Communications Technology
ICN	International Competition Network
ITU	International Telecommunication Union
JVA	Joint Venture Agreement
MICT	Ministry of Information, Communications and Technology
MoU	Memorandum of Understanding
NFP	Network facility Provider
NGN	Next Generation Networks
NSP	Network Service Provider

OECD	Organisation for Economic Cooperation and Development
SADC	Southern Africa Development Community
SAP	Service and Application Provider
SCA	Swaziland Competition Act
SCC	Swaziland Competition Commission
SCCOM	Swaziland Communication Commission
SPTC	Swaziland Posts and Telecommunications Corporation
STA	Swaziland Television Authority
STVA	Swaziland Television Act
TV	Television
UNCTAD	United Nations on Conference on Trade and Development
USA	United States America
WTO	World Trade Organisation

Directory of Cases

Swazi MTN Limited V Swaziland Posts and Telecommunications Corporation and Another 19/11 [2011] SZSC 6 (31 May 2011)

Swazi MTN and Others v Swaziland Posts and Telecommunications Corporation , International Court of Arbitration, International Chamber of Commerce Case (4 August 2012) No 18000/ARP.

Swazi MTN Limited and Other V SPTC and Another 58/2013 [2013] SZSC 46 (29 November 2013).

Swazi MTN Limited and Other v SPTC and Another 19/11 [2011] SZSC 6 (31 May 2011)

Verizon Communication Inc. v Law Offices of Curtis v Trinko LLP 540 US 398 (2004)

Table of Contents

Declaration.....	i
Acknowledgment.....	ii
List of acronyms.....	iii-iv
Directory of cases.....	v
Table of contents.....	vi - ix

CHAPTER 1

INTRODUCTION

1.1 Background to the study.....	1-2
1.2 Research problem.....	2 - 3
1.3 Research questions.....	3 - 4
1.4 Thesis statement.....	4
1.5 Significance of the study.....	4
1.6 Literature Review.....	5 - 7
1.7 Methodology.....	7 - 8
1.8 Limitations to the study.....	8
1.9 Outline of chapters	8

CHAPTER TWO

TELECOMMUNICATIONS REGULATION IN RELATION WITH COMPETITION REGULATION

2.1 Introduction.....	9
2.2 Defining the term regulation.....	10 -11
2.3 Types of regulators.....	11 -15
2.4 Key elements of independence of regulators.....	15 - 18
2.5 Liberalisation of the telecommunications sector.....	18- 19
2.6 Competition law and regulation.....	19 - 20
2.6.1 Control of abuse and market dominance.....	20 - 21
2.6.2 Control of anti-competitive conduct.....	21
2.7 The interface between competition law and specific sector regulation.....	22 – 23
2.8 The interface between consumer protection and competition law.....	23 - 24
2.9 FDI in the telecommunications sector.....	24 - 25
2.10 Licensing.....	25 - 28
2.11 Convergence Licensing.....	28 – 30
2.12 Regulation of a monopoly.....	30 – 31
2.13 Good governance principles underpinning effective regulation.....	31 - 36
2.13 Conclusion.....	36

CHAPTER THREE

EFFECTIVE REGULATION OF THE TELECOMMUNICATIONS SECTOR IN SWAZILAND

3.1 Introduction	37
3.2 ICT regulation in Swaziland.....	37 - 38
3.2.1 The monopoly period.....	38 - 40
3.2.2 The legal battle between SPTC and Swazi MTN Limited (Pty) Ltd.....	40 - 42
3.2.3 The promulgation of a converged regulator.....	42 - 44
3.3 The Electronic Communications Act.....	44 - 45
3.3.1 Mobile telecommunication licensing.....	45 - 47
3.3.2 Control of dominance by SCCOM.....	47 - 48
3.4 The Electronic Communications (Licensing) Regulations 2015.....	49
3.5 Invoking of exit clauses in the JVA.....	50 - 51
3.6 The short-comings of the system.....	52 - 53
3.7 Conclusion	54

CHAPTER FOUR

THE BOTSWANA EXPERIENCE: ANY LESSONS FOR SWAZILAND?

4.1 Introduction.....	55 - 56
4.2 The telecommunications policy framework of Botswana.....	56 - 57
4.3 The establishment of BTA.....	58 - 60

4.4 Moving to better heights: The establishment of BOCRA.....	60 - 62
4.5 Regulations of competition in the ICT sector in Botswana.....	62 - 63
4.6.1 International best practice on telecommunications licensing.....	63
4.6.2 The unified licensing approach.....	63 - 65
4.6.3 The licensing regime in Botswana.....	65 - 66
4.6.4 The licensing procedure	66
4.6.5 The mapping of old license to current authorisations.....	66 - 67
4.7 Is competition or sector specific regulation the best option for regulating the ICT sector.....	67 - 68
4.8 Is the new ICT policy framework a better approach for effective regulation?.....	68 - 69
4.9 conclusion.....	69 -70

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction	71
5.2 Recap of thesis statement.....	72
5.3 Summary of findings.....	72 - 73
5.4 Conclusion	73 - 74
5.5 Recommendations.....	74 - 77
BIBLIOGRAPHY.....	78 - 84

CHAPTER 1

INTRODUCTION

1.1 Background to the study

In the past decade the most significant contributor to the thriving global economy was the development of cross-border transactions, specifically FDI.¹ Since the early 1990s, FDI has assumed an increasingly important role in the provision of the telecommunications services in developing countries and economies in transition through privatisation.² The telecommunications sector thus plays a vital role in the development of an economy globally.

In light of the revolutionary technological changes in the telecommunication sector and the need for importation of capital technology, in 1998 SPTC entered into a JVA with Mobile Telephone Networks (Pty) Ltd. The purpose of the JVA was the formation of a joint company called Swazi MTN Limited (Pty) Ltd to specifically provide mobile services while SPTC provided fixed line services and related to services. This in effect made Swazi MTN Limited (Pty) Ltd the only player in the mobile telecommunications sub-sector in Swaziland. Swazi MTN Limited (Pty) Ltd was thus awarded Swaziland's sole mobile licence.³

In 2013 Swaziland followed the global trend of liberalising the telecommunications sector with a view of attracting FDI and fostering competition. Prior to the statutory liberalisation of the telecommunications sector, the sector was an absolute monopoly which was controlled by SPTC in terms of the Swaziland Posts and Telecommunications Corporation Act No. 11 of 1983 which endowed SPTC with authority to regulate the telecommunications sector and offer telecommunications services. Swazi MTN Limited

¹ C Hung Lin "Selected International Rules of Foreign Direct Investment in the Telecommunications Sector and Its Influence on Taiwan's Telecommunications Legislation" (2010) 16 *Annual Survey of International and Comparative Law Journal* 27.

² K Kalotay "The Rise of FDI in the Telecommunications Services of Developing Countries" (2004) 811 *World Investment and Trade Journal* 811.

³ Swaziland National Information and Communication Infrastructure Policy, 2007.

(Pty) Ltd continues to be the sole provider of mobile services and as a monopolistic company maximising its profits at the expense of consumers.

This is a grave violation of competition laws and is intensified by the material term of the JVA which contains an anti- competitive clause which states that neither Swazi MTN Limited (Pty) Ltd nor SPTC could be in competition with one another directly nor indirectly with regards to providing services which form part of the JVA. This is an ostensible anti-competitive clause within the JVA which is contradiction with section 31 (1) (a) of the SCA which provides that enterprises shall refrain from behaviour which limits access to markets or otherwise unduly hinder or eliminate competition.⁴ Despite there being an anti-competitive clause in the JVA, the SCC has failed to invoke 31 (1) (a) to regulate the anti- competitive conducts by Swazi MTN Limited (Pty) Ltd.

The JVA continues to be a hindrance to effective regulation of the telecommunications sector predominantly because of political interference which effectively makes it difficult to regulate the industry. This state of affairs advances the argument for effective regulation the telecommunications sector in order to promote competition and enhance the full and operational liberalisation of the telecommunications sector.

1.2 Research problem

Swaziland recently alleged to have liberalised the telecommunications sector which was absolutely monopolistic. This supposed liberalisation has been done through the enactment of the CCA and ECA. The rationale behind the liberalisation of the telecommunications sector is the notion that it would lead to a robust and competitive industry especially the mobile telecommunications sub-sector and thus contribute to economic and social development of the country by attracting FDI.

Unfortunately, ever since the alleged liberalisation of the mobile telecommunications sub-sector, the status quo has not changed as there has been no introduction of a new player into the mobile sub-sector. The sub-sector is still obviously in the hands of the monopoly

⁴ The Competition Act of Swaziland No.8 of 2007.

of the state company Swazi MTN Limited (Pty) Ltd which is a serious obstacle to effective competition law. SCC has not taken any steps towards addressing the issue of the anti-competitive agreement between SPTC and Swazi MTN Limited (Pty) Ltd in terms of section 11 (b) of the SCA which empowers the SCC to initiate its own investigations in relation to any matters that are within the ambit of the SCA.

This makes Swazi MTN Limited (Pty) Ltd the only player in the mobile telecommunications sub-sector thereby making the sub-sector prone to abuse of dominance which includes charging high and predatory prices and thus forcing out new entrants into the market. This is aggravated by the fact that there is no level playing field in the sub-sector as Swazi MTN Limited (Pty) Ltd shareholders' are top government officials and the monarch. This indicates that there is a high probability of political influence in the regulation of the telecommunications sector in the country. This makes effective regulation of the mobile sub-sector sensitive as there are third party forces that have an interest.

1.3 Research question(s)

The broad research question in this study is: what are the anti-competitive gaps in the legal framework underpinning the telecommunications sector?

In answering the above broad research question, the following sub-questions will also be answered:-

- i. What are the basic tenets of telecommunications regulation in relation with competition regulation and the interface between telecommunication law with competition law?
- ii. What is the legal and regulatory framework underpinning the regulation of the telecommunications sector in Swaziland and the inherent gaps in the laws governing the sector?

- iii. What lessons can be drawn by Swaziland from the Botswana jurisdiction as one of the international best practices with regards to effective regulation of the telecommunications sector?

1.4 Thesis statement

This study will argue that ever since the alleged liberalisation of the mobile telecommunications sub-sector, the status quo has not changed as there has been no introduction of a new player into the mobile sub-sector. This is evidenced by the fact that the SCC has not taken any steps towards addressing the issue of the anti-competitive agreement between SPTC and Swazi MTN Limited (Pty) Ltd in terms of section 11 (b) of the SCA which empowers SCC to initiate its own investigations in relation to any matters that are within the ambit of the SCA.

It will thus contend that effective enforcement of competition law in the telecommunications sector will bring about the desired goals of enhancing the liberalisation of the sector as stipulated in the ECA and that the amendment of the ECA to address the research problem of the study will lead to a conducive business environment that will attract FDI and thus contribute towards economic growth and development.

1.5 Significance of the study

This research is of vital importance for the telecommunications sector as a way forward in ensuring that the sector attains the fruits of liberalising the sector which will effectively lead to economic growth, creation of jobs, innovation and vigorous competition which will result in competitive pricing in the sector and thus improving consumer welfare. The study is also significant as it will determine the areas of reforms for regulatory frameworks of the telecommunications sector and areas of co-operation between SCC and SCCOM in ensuring the effective implementation of the ECA.

1.6 Literature review

Notwithstanding the fact that Swaziland has currently liberalised the telecommunications sector, little or no literature has been written to address legal regulatory framework and the liberalisation of the sector from the perspective of Swaziland. Nevertheless, Bulgues and Ray argue that the application of fundamental competition law notions such as market definition and dominance, in an *ex ante* environment represents the best means to ensure a smooth transition towards a fully liberalised electronic communications market.⁵ The rationale behind liberalisation of the sector is to provide affective yardsticks for effective management of the sector and enhance competitiveness of the sector.

According to John Agnew one of the most influential propositions ever put forward which continues to have an enormous effect upon the conduct of economic affairs is Adam's Smith suggestion that forces of competition "the invisible hand" could lead to the reconciliation of private, self-interest behavior with the general social good.⁶ Therefore competition law is the natural tool used for neutralising these interests ensuring that there is competitiveness in the sector and attaining economic development.

There are two different schools on the debate of whether competition law offers economic development. The Harvard school notion of workable competition emphasises the importance of maintaining competition as a way of ensuring a competitive market structure so as to achieve economically beneficial outcomes.⁷ At the basic level Chicago scholars contend that the main purpose behind competition law is to increase the efficiency rather than to protect individuals, small and medium size-competitors against the exercise of market power by large firms.⁸

⁵ PA Bulgues and P Rey " *The Economics of Antitrust and Regulation in the Telecommunications : Perspectives for the New European Regulatory Framework*" (2004) 3.

⁶ JH Agnew *Competition Law* (1985) 25.

⁷ BJ Sweeney *The Internationalization of Competition Rules* (2010) 164.

⁸ MM Dabbah *International and Comparative Competition Law* (2010) 254.

Marcus Ayodeji Araromi argues that the importance of creating competition law is to guard against restrictions and impediments to competitions that are not likely to be naturally corrected by competitive forces.⁹ For the development and sustenance of the economy there should be a liberal market and a regulation of competition activities.¹⁰ The liberalisation of the telecommunications sector and competition regulation is vital for the sustenance of the economy.

Lara Granville and Heather Irvine state that the facilitation of competition in the telecommunications industry is fundamental to decreasing the cost of communication with fundamental knock on impacts on the economy as whole.¹¹ Competition regulatory interventions are meant to address anti-competitive conduct in the markets that would otherwise tend towards effective competition and are applied *ex post*.¹² Competition regulation is to ensure that there are no anti-competitive measures in the sector which will have a negative effect on the regulation of the sector. It also enhances consumer welfare by decreasing the costs of telecommunications transactions.

David Lewis states that certainly as competition policy and law spread to the transition economies where price regulation has been the pillar of economic policy and management, there remains a strong expectation that this scrutiny and regulation will now be assumed by the fledging competition agencies in these economies with concepts like unjustified price movements often central to their approach to abuse of dominance.¹³ The control of abuse of dominance in the sector will ensure that there is a level playing field in the sector and thus encourage new entrants and stimulate investment in the sector.

This view is also supported by John Agnew who argues that the rationale for policy towards competition is based on the argument that an economy performs better if industries within it operate in a competitive way than if they do not.¹⁴ The overarching rationale for

⁹ MA Araromi 'Regulatory Framework of Telecommunication Sector: A comparative Analysis between Nigeria and South Africa' (2015) 23 *African Journal of International and Comparative Law*, 288.

¹⁰ MA Araromi (n9 above) 288.

¹¹ L Granville and H Irvine 'The Impact of Regulation on Competition in Telecommunications and Piped Gas' (2015) 14 *African Journal of Information and Communication* 1.

¹² L Granville and H Irvine (n11 above) 2.

¹³ D Lewis "Enforcing Competition Rules in South Africa: Thieves at the Dinner table" (2013) 164.

¹⁴ JH Agnew (n6 above) 19.

regulating the telecommunications sector is to adequately protect and balance interest of all concerned parties including users, operators, investors and governments.¹⁵ The point of convergence is that the above authors recognise and affirm that effective regulation of any specific sector cannot be recognised without robust and competitive regulator that will ensure that there are no anti-competitive practices in the industry and therefore offer competitive industry.

The point of departure is that the above authors fail to address the issue that in many jurisdiction telecommunications commission were instigated after the appointment of competition commission and how the telecommunication commission will address issues of duplication of their mandates and institutional conflicts with that of the competition commission. They further fail to address legal implications of anti-competitive gaps underpinning the sector regarding the liberalisation of the sector and the implications of having the monarch, government officials being shareholders of companies that are service providers and the influence that such officials have on the execution of duties by these commissions.

The above literature reflects evidence that competition law and the regulation of telecommunications is a fundamental virtue for the country to benefit for liberalising the sector. However there remains a complex issue of determining the measures to be taken to ensure full compliance and enforcement of both competition and telecommunications law. The author agrees that the implementation of both competition and telecommunications policies is the cornerstone of ensuring effective regulation of the telecommunications sector.¹⁶ Thus the sector contributes significantly to economic growth and development in a competitive market.

1.7 Methodology

¹⁵ MK and D Geradin 'Post-Liberalizations Challenges in Telecommunications: Balancing Anti-Trust and Sector-Specific Regulation' (2000) 23 *World Competition; Law And Economics Review*, 30.

¹⁶ M Stayanova *Competition Problems in Liberalized Telecommunications* (2008) 270.

The research methodology of this mini-thesis is desktop and library based research. The approaches to be used in this research will be descriptive, analytical and prescriptive. The descriptive approach will provide an overview of the historical evolution of the telecommunications sector in Swaziland. The analytical approach will evaluate the legal framework underpinning the telecommunications sector and recommendations will be based on the prescriptive approach. The research entails a comparative study with the Botswana jurisdiction to determine international best practices of effectively regulating the telecommunications sector.

1.8 Limitations to the study

The limitation in this study is the challenge of obtaining vital information from the state company operating the mobile telecommunications license because of the alleged political interference in the running of the company. Added to this challenge is the fact that there are diminutive resources available relating to effective regulation of the telecommunications sector in the context of Swaziland.

1.9 Outline of chapters

Chapter one deals with the introduction which raises the relevant legal issues being the background to the study, research problem, thesis statement, research question, justification of the study, literature review and research methodology. Chapter two analyses the tenets of telecommunications regulation in relation with competition regulation. Chapter three examines the legal and regulatory framework underpinning the telecommunications sector in Swaziland and determines the *lacunas* in the legislation. It also examines the anti-competitive agreement between SPTC and Swazi MTN Limited (Pty) Ltd. Chapter four makes a comparative study with the Botswana jurisdiction with regards to the best international practices concerning effective regulation of the telecommunications sector, using the telecommunications as an economic development

tool and the licensing regime in the country. Chapter five makes a synopsis of the summary of findings, conclusion and recommendations.

CHAPTER TWO

TENENTS OF TELECOMMUNICATIONS REGULATION IN RELATION WITH COMPETITION REGULATION

ICT has become the key enabler of business and employment creation and of productivity growth. For these reasons, ICT has a significant potential for supporting inclusive growth. World Economic Forum Report – 2015

2.1 Introduction

The telecommunications sector has undergone extensive changes in recent years. Many state owned operators were privatised and the sector experienced a trend of liberalisation worldwide motivated by the evolution of new technology and services, the growing importance of telecommunications for national economies and the development of international trade in telecommunication services.¹⁷ As a result in most countries the telecommunications sector has experienced a fundamental change in structure of monopoly to competition.¹⁸ In light of the evolution in the telecommunication sector, this chapter examines the basic principles underpinning telecommunications and competition law, characteristics of independent regulators, the importance of licensing, convergence, control of abuse of dominance, the interface between telecommunications regulation and competition law. It also interrogates the interface of competition law and consumer protection, the regulation of a monopoly and the role of liberalisation of the telecommunications sector.

¹⁷ ITU 'ICT Regulation ToolKit: Providing Practical Advice and Concrete Best Practice Guideline to Enable Access to ICT for All' available at <http://www.ictregulationtoolkit.org/3> (accessed on 1 February 2016) .

¹⁸ ITU (n17 above) .

2.2 Defining the term regulation

Regulation can be described as intervention by government in a market in order to adjust the terms on which that market works.¹⁹ When the telecommunications market is liberalised that is when competition is first permitted, regulators need to take active steps to control incumbents and support market entrants, rather than relying on level playing field.²⁰ Telecommunications regulation is in two distinct phases.

The first phase is the liberalisation phase where the main role of the regulator is to promote competition and bring market to the point where competition has become established.²¹ In this phase, regulators actively promote market entry and exercise strong controls over incumbents and other companies with a dominant position in the market.²² The second phase is where competition is generally established, thus the main role of the regulator becomes much more like that of a general competition law authority using competition principles to maintain competition and focusing attention on residual areas of market failure where competition has not yet come into play.²³ Hence the liberalisation of a sector significantly entails opening up the sector for competition which will increase consumer welfare.

In a liberalised market, the regulator is mostly concerned with opening up the market, which often requires regulators to impose such tighter controls on incumbent operators than on markets entrants which is known as asymmetric regulation.²⁴ Once a market becomes competitive, the regulator's role focusses on the maintenance of fair competition

¹⁹ D Souter *et al* *APC ICT Policy Handbook* (2009) 98.

²⁰ D Souter *et al* (n19 above) 98.

²¹ D Souter *et al* (n20 above) 98.

²² D Souter *et al* (n21 above) 98.

²³ D Souter *et al* (n22 above) 98.

²⁴ D Souter *et al* “(n23 above) 98.

as in other business markets.²⁵ Competition plays a crucial role in speeding up the full and functioning of the liberalisation process.

The deregulatory approach of opening up markets in the network industries has been strongly filtered in favour of the supply side.²⁶ This implicates that there must be adequate supply of all telecommunications services than the demand, which in essence means that the cost will be lower, hence promoting consumer welfare. Legislative tools primarily target a competitive market structure by introducing specific regulatory frameworks that complement existing competition rules and institutions.²⁷ It seems that it has been assumed that competition and competition law will be sufficient to prompt consumers to make new choices by lowering and widening the range of products and services.²⁸ The main reason proposed for regulation of the telecommunications sector has been that a desirable competitive outcome could not be achieved by market forces.²⁹ Competition becomes the desired goal in the regulation of the telecommunications sector.

2.3 Types of regulators

In opening up the telecommunications sector, it is trite that the government sets up a regulator that will ensure that it attains the objectives of liberalising the sectors and that its mandate and competency must be clearly stated out in a legal instrument. It is important to determine the regulator's institutional design, as well as its relationship with the government, industry, and the public.³⁰ The institutional design of the regulator affects the structure of the regulator, including its leadership and management organisation and its organisational and administrative structures.³¹

²⁵ D Souter *et al* (n24 above) 99.

²⁶ KJ Cere 'What has Competition Done for Consumers in Liberalized Markets?' (2008) 4 *The Competition Law Review* 79.

²⁷ KJ Cere (n26 above) 79.

²⁸ KJ Cere (n27 above) 79.

²⁹ C Blackman and L Srivastava "*Telecommunications Regulation*" (2011) 51.

³⁰ C Blackman and L Srivastava (n29 above) 17.

³¹ C Blackman and L Srivastava (n30 above) 17.

In designing a regulator for the telecommunication sectors, the regulator must be independent, which is of great importance with regards to transparency and accountability of the regulator.³² Regulators should have the expertise to assess and make sound judgments on both technical and industry-specific issues.³³ The institutional design, internal structure, and administration must be sufficiently flexible to allow the regulator to respond to market.³⁴ Regulators must take into account various viewpoints and interests, including economic, social, and political objectives. This balance should be reflected in the institutional structure and in the system of checks and balances.³⁵ The different types of regulators as espoused by the ITU are the following:-

2.3.1 Single-sector regulator

The sole function of a single-sector regulator is to oversee the telecommunications sector. This type of organisational structure focuses mainly on the telecommunications sector, with other government entities responsible for broadcasting and information technology issues.³⁶ A key advantage of this option relates to staffing, since the staff is specifically dedicated to telecommunications issues. This establishes a core of specialised professionals with a strong set of legal, policy, engineering, and technical skills focused on sector issues covering only telecommunications.³⁷ Another benefit of single-sector regulators relates to the origin of their staffing.³⁸ They therefore have a core of specialised professionals from the start with a thorough understanding of the technical issues and strong engineering skills, which is a key advantage when dealing with complex network issues.³⁹ This regulator is effective in only dealing with telecommunications issues in isolation of other related matter such as broadcasting.

³² C Blackman and L Srivastava (n31 above) 17.

³³ C Blackman and L Srivastava (n32 above) 17.

³⁴ C Blackman and L Srivastava (n33 above) 17.

³⁵ C Blackman and L Srivastava (n34 above) 17.

³⁶ ITU 'The Elements for an Effective Regulator' (2016) available at <http://www.ictregulationstoolkit.org/6.5> (accessed on 20 February 2016).

³⁷ ITU (n36 above).

³⁸ ITU (n37 above).

³⁹ ITU (n38 above).

The disadvantage of having a regulator focused on the telecommunications sector alone (or for any other single sector) is that too many regulators are created for different sectors, thus leading to a higher cost of regulation.⁴⁰ Similarly, and especially with convergence in the ICT sector blurring the boundaries between industries, overlapping responsibilities between sector regulators has also become an issue.⁴¹ This overlap may sometimes lead to duplication of regulations and require authorisations for what are essentially similar services being offered to the public.⁴² The challenges of convergence have led several countries to move away from single-sector regulators and evolve towards a converged regulator, thus merging agencies in charge of the various aspects of the communications sector.⁴³ This is propelled by the fact that there is now a blurring line in the ICT as a consequence of the convergence of technology.

2.3.2 Converged regulator

The regulator is responsible for all communications services, that is, telecommunications, including radio communications, broadcasting and media are under the umbrella of one agency.⁴⁴ The converged regulator, like the single-sector telecommunications regulator, tends to be strong in specialised engineering skills in the communications sector, a critical skill set to deal with complex network issues.⁴⁵ In addition, the converged communications regulator also meets the challenges posed by service convergence, overcoming one of the main disadvantages of a single-sector regulator.⁴⁶ This regulator has a comparative advantage in that it caters for the convergence of technology.

⁴⁰ ITU (n39 above).

⁴¹ C Blackman and L Srivastava (n35 above) 18.

⁴² C Blackman and L Srivastava (n41 above) 18

⁴³ C Blackman and L Srivastava (n42 above) 18.

⁴⁴ C Blackman and L Srivastava (n43 above) 18.

⁴⁵ C Blackman and L Srivastava (n44 above) 18.

⁴⁶ ITU (n40 above).

2.3.3 Multi-sector regulator

This regulator oversees not only the telecommunications sector, but other industry sectors with common economic and legal characteristics, such as, telecommunications, water, energy, and transportation.⁴⁷ One of the main arguments generally raised in favor of a multi-sector regulator is based on the perceived lack of resources and the need for economies of scale to effectively regulate the different infrastructure industries and sectors.⁴⁸ It is often argued that with this type of structural organisation, one set of staff can be used to oversee a variety of industries.

The disadvantage of this model is that often the telecommunications sector is the most liberalised under the auspices of the multi-sector regulator thus it can be negatively affected if it is regulated.⁴⁹ Supporters of this model argue that having a multi-sector regulator can reduce political and other influences regarding the decision-making process as opposed to, for example, the single-sector regulator.⁵⁰ Despite such claims concerning capture, this does not necessarily seem linked to the institutional design option *per se* but is more a product of whether a clear set of checks and balances is incorporated in the design of the regulator.⁵¹

2.3.4 No specific telecommunications regulatory authority

Under this regime there is reliance on the application of competition and antitrust rules rather than on detailed sector specific rules and institutional designs.⁵² This model is inexpensive and simple to implement. Moreover, reliance on economy-wide rules and institutions to regulate the sector promotes a coherent treatment between telecommunications and other sectors. Another advantage is that there is less risk of political capture where the judges are ultimately in charge of enforcing

⁴⁷ C Blackman and L Srivastava (n44 above) 18.

⁴⁸ C Blackman and L Srivastava (n47 above) 19.

⁴⁹ C Blackman and L Srivastava (n48 above) 19.

⁵⁰ C Blackman and L Srivastava (n49 above) 20.

⁵¹ C Blackman and L Srivastava (n50 above) 20.

⁵² ITU (n46 above).

economic regulation in the telecommunications sector.⁵³ Among the disadvantages of this option is that non-specialised judges are ill-equipped to deal with complex telecommunications regulatory issues.

It is judicious that a country must choose the best model that will address the regulatory framework of the country with regards to liberalisation of the telecommunication sectors and further ensuring that there is competition within the sector that will allow also for new entrants to enter the market. A competitive market is pre-determined by a strong regulatory framework which provides for the independence of the regulator of the sector.

2.4 Key elements of independence of regulators

The meaning of the independence of the regulator encompasses a three-tier of independence which is independence from the operators, independence from policy makers and independence from interested parties.⁵⁴ The ITU defines independence as a term that refers to the separation of regulatory and operational functions, neutrality, insulation from external pressure or simply the designation of an official publicly identified as having the regulatory responsibility and not subservient to the rest of the ministry.⁵⁵ An effective regulator is the vehicle to ensure credible market entry, as well as compliance with and enforcement of existing regulations and to achieve these governments must create and maintain an environment conducive to good governance and regulatory success.⁵⁶ Hence an independent regulator adheres to principles of good governance.

Independence is a critical attribute for a regulator to be effective and in a broad sense, an effective regulator is structurally and financially independent, but the real effectiveness of the regulator will depend on how it achieves successful functionality, ideally in an independent and autonomous manner.⁵⁷ In telecommunications it is important to carefully delineate the responsibilities of government and the regulatory agency, which separation

⁵³ C Blackman and L Srivastava (n51 above) 18.

⁵⁴ MA Araromi (n10 above) 282.

⁵⁵ MA Araromi (n54 above) 282.

⁵⁶ C Blackman and L Srivastava (53 above) 14.

⁵⁷ C Blackman and L Srivastava (n56 above) 15.

of functions reduces the possibility of capture.⁵⁸ The independence of a regulator will enhance effective regulation of the telecommunications sector. The independence of a regulator is underpinned by the following attributes:-

2.4.1 Structural Independence

The WTO reference paper, which requires countries to establish a regulator separate from the operator, has prompted many countries to establish a structurally independent regulator that separates the function of regulating the telecommunication market from that of supplying services.⁵⁹ Providing a regulator with structural independence reduces the possibility of political or industry capture which is crucial in exerting its powers.⁶⁰ Regulators must have the freedom to take decisions without the fear of political punishment⁶¹ Any type of capture whether politically or not is a threat and a hindrance to effective regulation of the telecommunications sector. When a regulatory body bows to external pressure from operators or other government entities, it often lacks independence and its decisions are neither objective nor transparent.⁶² A regulator that lacks independence hampers the growth of the sector and waters down consumer welfare. Credibility is a major factor suggesting an improved performance of a regulated sector as a result of the independence of the regulator.⁶³

2.4.2 Financial Independence

Structural independence must go hand in hand with financial independence. The funding sources and budgeting processes of regulatory authorities also have an important impact on their independence, efficiency and the cost of regulation.⁶⁴ The source of a regulatory authority's funds and the process by which these funds

⁵⁸ G Oloveira et al "Aspects of the Independence of regulatory Agencies and Competition Advocacy) 2005 available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc507.pdf> (accessed on the 10 November 2016) 6.

⁵⁹ ITU (n52 above).

⁶⁰ C Blackman and L Srivastava (n57 above) 15

⁶¹ G Oloveira et al (n58 above) 6.

⁶² C Blackman and L Srivastava (n59 above) 15.

⁶³ G Oloveira et (n61 above) 7.

⁶⁴ ITU (n58 above).

become part of the authority's actual budget can directly impact the degree of a regulator's autonomy and competence when carrying out its responsibilities.⁶⁵ The key element is that funding should be free from political and private interest influence.⁶⁶ On the other hand, relying on multiple sources of funding rather than solely on government appropriations allows regulators to have more financial independence and can make them less subject to outside influences.⁶⁷ It is assumed that the existence of own resources reduces the degree of subordination of the agency in relation to direct admin.⁶⁸ A regulator to be effective must have financial autonomy.

2.4.3 Functionality

Despite its best efforts, a government may establish a regulator that is structurally and financially separate from the other branches of government, but yet fails to function in an effective manner.⁶⁹ In contrast, a regulator may not be legally separate from the other government agencies, but may have functional effectiveness.⁷⁰ Functionality is predicated on a combination of elements such as well-defined functions and responsibilities, appropriate decision-making authority and enforcement and dispute-resolution powers, clear rules regarding the appointment, removal and mandate of the regulatory authority; incentives to promote professional expertise of the staff; and adequate provisions to address ethical and conflict of-interest concerns.⁷¹ Regulators must have the freedom to take decision without fear of political punishment or sanction.⁷² The criteria to take into account when appointing regulators is to make sure that some degree of political and industry insulation is achieved.⁷³

⁶⁵ C Blackman and L Srivastava (n60 above) 15.

⁶⁶ C Blackman and L Srivastava (n62 above) 15.

⁶⁷ C Blackman and L Srivastava (n63 above) 15.

⁶⁸ G Oloveira et al (n 62 above) 7.

⁶⁹ C Blackman and L Srivastava (n64 above)16.

⁷⁰ C Blackman and L Srivastava (n65 above)16.

⁷¹ C Blackman and L Srivastava (n66 above) 16.

⁷² G Oloveira et al (n 68 above) 7.

⁷³ MA Montongo and F Trillas "Independent Regulators: Theory, evidence and Reform" 2005 available at <http://ssrn.com/abstract+2398523> (accessed on the 20th April 2016) 6.

Functionality is also predicated on regulations that guarantee the consistency, timeliness and accountability of the regulator's decisions, as well as procedures to ensure transparency and public participation in the regulatory process.⁷⁴ Without functional effectiveness, it is difficult, if not impossible, for a regulator to attain the necessary credibility among participants in the sector and potential investors.⁷⁵ Once an effective regulator has been put in place, the regulator must ensure the full liberalisation of the telecommunications sector by encouraging and promoting competition in the sector which will extensively increase consumer welfare.

2.5 Liberalisation of the telecommunication sector

Promoting competition in the telecommunications sector is the cornerstone of the liberalisation process. Liberalisation is defined in terms of market access for service suppliers and focuses on establishing competition in a conducive business environment.⁷⁶ Scholars in varied traditions have suggested that liberalisation often involves a change not a decrease in the nature of regulation and therefore state involvement in the markets must be regulated to function efficiently.⁷⁷

Liberal foreign investment policy on telecommunications promote more economic gains including new and improved telecommunications products and services with lower prices and additional investment on the industrial sectors.⁷⁸ The implementation of liberal telecommunications investment policy should produce significant benefits not only within the country's telecommunications sector but also for the national economy as a whole.⁷⁹ Liberalisation thus is a vehicle that drives efficiency, competition and promotes consumer welfare. Deregulation and liberalisation have the potential to increase competition and benefit consumers, but this assumption will only hold when consumers have the legal and

⁷⁴ C Blackman and L Srivastava (n67 above) 16.

⁷⁵ C Blackman and L Srivastava (n69 above)16.

⁷⁶ C Blackman and L Srivastava (n70 above) 16.

⁷⁷ Telecommunications for All : Does Liberalization Help? Available at <http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP29.pdf> (accessed on 1 February 2016).

⁷⁸ C Hung Lin 'Role of Foreign Direct Investment in Telecommunications Industries: A Developing Countries' Perspective' (2008) 4 *Contemporary Management Research* 34.

⁷⁹C Hung Lin (n72 above) 37.

economic competence, the capacity, opportunity and motivation to take on the responsibilities shifted from the state to private individuals in the course of liberalisation.⁸⁰ Hence all parties must be abreast with the advancement of technology regulation to address all issues concerned.

It is without doubt that the role of the regulatory body cannot be underestimated in the liberalisation of the communications sector.⁸¹ The regulatory body plays the role of a referee in enforcing rules between market players in a competitive market.⁸² The enforcement of competition law is a desirable compliment to trade and investment liberalisation and will help to protect competition where liberalisation cannot as it also compliments trade liberalisation by reducing the likelihood of certain types of anti-competitive conducts and the harm that such conducts might cause.⁸³

Competition law is also complimentary to FDI as it can improve the benefits of investment to the host country.⁸⁴ As countries exhaust the potential for trade and investment liberalisation to contribute to greater contestability of their markets, the relative importance of competition law and policy as a tool to further increase and maintain contestability rules.⁸⁵ The liberalisation of the sector is of significant importance as an economic development tool.

Liberalisation of the telecommunications sector brings competition into the sector, which in turn brings new entrants and players into the sector. A firm application of competition laws in the sector is vital for the maintenance and growth of the sector and as well as attracting FDI to propel economic growth and development.

2.6 Competition law and regulation

⁸⁰ KJ Cere (n28 above).

⁸¹ MA Araromi (n55 above) 288.

⁸² MA Araromi (n75 above) 288.

⁸³ C Noonan *The Emerging Principles of International Competition Law* (2008) 144.

⁸⁴ C Noonan (n77 above) 145.

⁸⁵ C Noonan (n78 above) 145.

The liberalisation of a sector entails opening up the sector for competition and hence it must be regulated. Competitive laws are meant to provide level playing field and adequate legal protection for competition among businesses. Competition laws also seek to enhance access to products, reduce costs, improve quality and increase varieties and choices.⁸⁶ Without regulation, business may enter into anti-competitive agreements and take conduct that constitute abuse of market power or create monopolistic market conduct and market structure.⁸⁷ The purpose of creating competition law is to guard against restrictions and impediments to competitions that are not likely to be naturally corrected by competitive forces.⁸⁸

This means that for the development and sustenance of the economy, there should be a liberal market and regulation of competition activities.⁸⁹ These activities include control of abuse and market dominance and regulating anti-competitive agreement which are discussed below:-

2.6.1 Control of abuse and market dominance

An abuse of market power takes place where one of the market suppliers possesses enough power to undercut the other suppliers and so make it difficult for the latter to operate in the market.⁹⁰ Further the powerful supplier may rightly force others to go out of business and following this it may take control of the entire market and so exact exorbitant prices on the consumers.⁹¹ This when unregulated will be of significant detriment to consumers as such supplier will have the sole power to control prices without fear of losing customers to a competitor and in essence be create a monopoly.

⁸⁶ OK Obayeni 'Competition in the Nigerian Telecommunications Industry' (2014) 5 *Beijing Law Review* 286.

⁸⁷ OK Obayeni (n80 above) 286.

⁸⁸ OK Obayeni (n81 above) 286

⁸⁹ MA Araromi (n76 above) 288.

⁹⁰ OK Obayeni (n82 above) 287.

⁹¹ OK Obayeni (n84 above) 287.

A key concept in deciding whether competition has become established is that of market dominance or strategic market power. A company is considered to have dominance in a market if it is able to determine the outcome of competition irrespective of how its competitors behave.⁹² A company in this position is able to play the market to its own advantage and to put its competitors out of business, unless regulated to prevent it doing so.⁹³

Regulators have two main approaches in dealing with market dominance. In general they have stronger powers when dealing with dominant companies than with their competitors.⁹⁴ In particular they use what is known as *ex-ante* powers which is powers to prevent dominant companies in advance from behaving in particular way (as opposed to *ex-post* powers which punish companies for infringements after the event).⁹⁵ *Ex-ante* powers are necessary where companies are dominant because are able act in ways which can quickly destroy their competitor's businesses.⁹⁶ Regulators must thus use their powers to ensure they maintain competition where there is a market failure or where there needs to be regulation of that market.

2.6.2 Control of anti-competitive conduct

Further the creation of highly concentrated markets in the hands of a few, induces anti-competitive behavior because of the possibility of new businesses entering the market would be nil.⁹⁷ An anti-competitive conduct pushes out other players in the market. The concern is high with regards to JVAs as sometimes there are grounds for suspicion that the venture is a cover for a cartel, however the questions that arise is whether the venture enhances the market and whether it entails overly restrictive conduct.⁹⁸ Thus a regulator that is endowed with competition jurisdiction must

⁹² D Souter et al (n25 above)100.

⁹³ D Souter et al (n87 above) 100.

⁹⁴ D Souter et al (n88 above) 100.

⁹⁵ D Souter et al (n89 above) 100.

⁹⁶ D Souter et al (n90 above) 101.

⁹⁷ OK Obayeni (n85 above) 287.

⁹⁸ OK Obayeni (n91 above) 287.

ensure the control of anti-competitive conduct especially JVAs that suppress the natural forces of competition to the detriment of consumers.

2.7 The interface between competition law and specific sector regulation

Consequence to the advent of liberalisation and major regulatory reforms in many countries around the world, the issue of sectoral regulation has increased in its significance⁹⁹. However, sectoral regulation has a particular resonance in respect of competition law and policy because of the adoption of non-generic competition regulatory instruments in some sectors which has been considered essential for the regulatory framework for these sectors for several reasons being the history of state of control and planning, the existence of natural monopolies and the desire to move towards introducing and promoting competition.¹⁰⁰ The relation between competition law and sector-specific regulation is of paramount importance in the advancement of technological change.

Sectoral regulation embraces goals beyond those recognised within the framework of competition law as competition law largely relies on *ex-post* whereas sectoral regulation is basically *ex-ante* in its operation and therefore competition is mostly reactive while sectoral is pro-active.¹⁰¹ Competition law aims at protecting competition through preventing anti-competitive situations whereas sectoral regulation aims at structuring the market in order to facilitate and establish competition.¹⁰²

The most prominent challenge with the interface of competition law and sector specific regulation challenge is that jurisdictional and substantive conflicts are likely to arise more frequently.¹⁰³ The first problem is that two different types of rules being competition and sector-specific regulations can be applied to the same matter.¹⁰⁴ A second complicating

⁹⁹D Geradin and R O Doboghue 'The Application of Competition Law and Regulation :The Case of Margin Squeeze Abuses in the Telecommunications Sector' (2004) *Global Competition Law Centre* 51.

¹⁰⁰ MM Dabbah 'The Relationship Between Competition Authorities and Sector Regulators' (2011) 70 *The Cambridge Law Journal* 113.

¹⁰¹ MM Dabbah (n94 above) 113.

¹⁰² D Geradin and R O Doboghue (n93 above) 51.

¹⁰³ D Geradin and R O Doboghue (n96 above) 51.

¹⁰⁴ D Geradin and R O Doboghue (n97 above) 51.

factor is that the competencies of the different authorities can vary certain degree as the different authorities are competent to apply their core law either being competition rules or only sector-specific rules.¹⁰⁵ These factors create an environment in which jurisdictional and substantive conflicts are likely to occur. It is crucial therefore in a country where both authorities are in place and there is duplication of their mandate that they arrange for co-ordination to eradicate duplication and conflict to the detriment of the public at large.

2.8 The interface between consumer protection policy and competition law

Competition law through the promotion and preservation of competition in markets enhances consumer welfare.¹⁰⁶ Consumer protection policy aims at protecting consumers from defective, dangerous, other unfair selling practices and to ensure quality and safety, fair pricing and advertising, availability of credit.¹⁰⁷ It is generally accepted that anti-competitive practices are costly to consumers, largely in terms of the increase in prices faced by them.¹⁰⁸ Anti-competitive practices have implications for the economic growth and development of nations and such practices restrict competition and deteriorate consumer welfare by creating entry barriers and price increases which lead to efficiency and innovation concerns.¹⁰⁹ It is therefore vital in the enforcement of telecommunication regulation to ensure the full protection of consumer welfare.

Putting the consumers at heart of the regulator's decision making maintains the focus on competition for delivering consumer benefit and helps to address areas where the market does not fully deliver.¹¹⁰ The ultimate goal of competition law should be to prevent increases in consumer prices due to the exercise of market power by dominant firms hence promoting consumer protection to arbitrary pricing.¹¹¹

¹⁰⁵ D Geradin and R O Doboghue (n98 above) 51.

¹⁰⁶ H Qaqaya and G Lipimile *The Effects of Anti –competitive business practices on developing countries and their development prospects* (2008) 11.

¹⁰⁷ H Qaqaya and G Lipimile (n100 above) 47.

¹⁰⁸ H Qaqaya and G Lipimile (n101 above) 56.

¹⁰⁹ H Qaqaya and G Lipimile (n102 above) 4.

¹¹⁰ ITU 'Regulation and Consumer Protection in a Converging Environment' (2013) available at https://www.itu.int/ITU-D/finance/Studies/consumer_protection.pdf (accessed on 20 May 2016).

¹¹¹ KJ Cseres "Competition Law and Consumer Protection" (2005) 20.

A key indicator of successful consumer protection practices is the time taken to resolve consumer complaints which help demonstrate the level and cost of resource required and identifies which agency is best placed to handle complaints.¹¹² Protecting the privacy of consumers data and ensuring data is used for the purposes intended are essential safeguards in a converged environment.¹¹³ Access to a fair and transparent complaint process is an essential part of an effective consumer protection framework.¹¹⁴ The enforcement of consumer policy is critical in the attainment of a competitive market. This is heightened by the fact that internet access rates are unaffordable to the majority of the Swazi people and taking into considering that 66% of Swazis live below the poverty *datum* line at E71.00 per month.¹¹⁵

2.9 FDI in the telecommunications sector

The telecommunication industry is one of the most strategic industries of national economic development that contributes to the attraction of FDI. Even though foreign investment on telecommunications will bring advanced technological skills, large amount of funds, as well as development, many countries control FDI to correspond to their economic and development demands.¹¹⁶ Telecommunications have a substantial and important influence on national security, social stability and economic development as well as many industrial sectors.¹¹⁷ The telecommunications sector thus is used by many countries as an economic development tool.

For most developing and developed countries the attraction of FDI in the telecommunications sector is not merely a provider for improvement of local telecommunication equipment but also a driving force behind telecommunication market competition and transformation.¹¹⁸ By deregulating domestic telecommunications regimes,

¹¹² ITU (n104 above).

¹¹³ ITU (n106 above).

¹¹⁴ ITU (n107 above).

¹¹⁵ Swaziland National Information and Communication Infrastructure Policy 2007.

¹¹⁶ C Hung Lin (n73 above) 30.

¹¹⁷ C Hung Lin (n110 above) 30.

¹¹⁸ C Hung Lin (n111 above) 34.

it is expected that local telecommunication markets will be more efficient and attractive to foreign firms.¹¹⁹ Creating an enabling legal and regulatory framework in the telecommunications sector is vital for the attraction of FDI and increasing efficiency.

The benefits of FDI include promoting economic growth, technology transfer and job creation in the local economies.¹²⁰ The benefits of FDI will be enhanced in a democratic trade and investment regime, active competition policies, macro-economic stability, privatisation and deregulation.¹²¹ A stable, transparent and non-discriminatory regulatory system is the best way to attract more FDI.¹²² In order to attract FDI there must be a comprehensive and transparent licensing mechanism in the sector.

2.10 Licensing

The development and implementation of authorisation policies is one of the most important steps in reforming the ICT sector. Authorisation policies determine the structure and level of competition in telecommunications markets and costs and regulators typically have a variety of reasons or objectives for licensing telecommunications and ICT service providers.¹²³ There are two types of authorisation being the general licence and individual license. The individual licence is used primarily where the number of license in the particular market is limited, where there is likely to be market dominance or where specific resources need to be allocated.¹²⁴

The other type of authorisation is general licence which authorises the incumbent to venture into different types of business within the specific sector, for example, in telecommunication the incumbent will be authorised to provide mobile, fixed and internet services. There is now an international trend in favour of replacing individual operator license with general licences wherever possible as this simplifies regulation, helps to ensure

¹¹⁹ C Hung Lin (n112 above) 34.

¹²⁰ C Hung Lin (n113 above) 31.

¹²¹ C Hung Lin (n114 above) 31.

¹²² C Hung Lin (n115 above) 37.

¹²³ C Blackman and L Srivastava (n70 above) 64.

¹²⁴ D Souter *et al* (n90 above) 101.

a level playing field and is more flexible in handling technology and market change.¹²⁵ This process is competitive in the manner that it is generally used to issue an individual license to a single service provider or a limited number of them. The regulator or other licensing authority typically describes the business opportunity and invites interested parties to submit applications for the license to enter the business.¹²⁶ The successful applicant is normally selected through a form of competitive evaluation such as a comparative evaluation process, an auction or combination of the two.¹²⁷

In most cases, the guide to the licensing process includes a schedule for the process. Publishing a schedule for the licensing process facilitates compliance with one of the requirements set out in the WTO regulation reference paper. The paper requires that certain information about licensing including the period of time normally required to reach a decision concerning an application for a licensing be made publicly available.¹²⁸ The heart of the licensing process is the selection process wherein two approaches are normally used, which are the comparative evaluation approach and auction. These are discussed below:-

2.10.1 Comparative evaluation approach

In this process, the award of license is determined on the basis of a merit based assessment of competitive applications. Each Application is evaluated on the basis of a pre-list of selection criteria or on the basis of the applicant's ability to fulfill certain more general requirements.¹²⁹ This approach allows the regulator to award the license to the service provider that is best placed to meet the specific objectives of the licensing process.¹³⁰ This process thus allows for transparency and increasing confidence in the regulator.

¹²⁵ D Souter *et al* (n118 above) 101.

¹²⁶ C Blackman and L Srivastava (n117 above) 66.

¹²⁷ C Blackman and L Srivastava (n120 above) 66.

¹²⁸ C Blackman and L Srivastava (n121 above) 66.

¹²⁹ C Blackman and L Srivastava (n122 above) 66.

¹³⁰ C Blackman and L Srivastava (n123 above) 72.

2.10.2 Auctions

In this process, selection is based on a single evaluative criterion namely the amount of bid by qualified applicants. The most common approach involves selection of the qualified applicant who submits the highest bid for the right to hold a license.¹³¹

In a least closely auction applicants bid on the basis of the subsidies they would require to provide the authorised service. The applicant that bids the lowest subsidy is awarded the license along with the right to subsidy it has proposed.¹³²

2.10.3 Hybrid Approach

This approach is a variation of the two main selection approaches mentioned above, which is a blend of elements of a comparative evaluation with the elements of an auction.¹³³ The authorisation process must be underpinned significantly by both procedural transparency and public consultations in order to ensure confidence into investors in the sector. Procedural transparency is one of the hallmarks of a good authorisation process as it increases the confidence of service providers, investors and other stakeholders in the authorisation process.¹³⁴ Accordingly, transparency reduces investment risk and increases the attractiveness of investment in national ICT markets. This in turn stimulates the expansion of ICT infrastructure and services.¹³⁵

It is good practice to engage in public consultation before and during an authorisation process as consultations also provide the regulator with valuable feedback directly from industry members and other stakeholders on proposed authorisation initiative.¹³⁶ Receiving input from these stakeholders helps the regulator make fully informed decisions about the proposed authorisation terms and

¹³¹ C Blackman and L Srivastava (n124 above) 72.

¹³² C Blackman and L Srivastava (n125 above) 72.

¹³³ C Blackman and L Srivastava (n126 above) 72.

¹³⁴ C Blackman and L Srivastava (n127 above) 72.

¹³⁵ C Blackman and L Srivastava (n128 above) 72.

¹³⁶ C Blackman and L Srivastava (n129 above) 77.

conditions in order to maximise the prospects for a successful authorisation process. Indeed consultation is often the least expensive form of research.¹³⁷

Telecommunications authorisation should balance regulatory certainty with flexibility necessary to address future changes in technology, market structure and government policy. Recent technological development means that there has been a good deal of convergence and that different technology platforms can now deliver a wider range of services.¹³⁸ As a result some regulators have moved towards technology and service licensing-neutral licensing.¹³⁹ Technology-neutral licenses for example may permit a company to provide a telephone service without specifying that it has to use a fixed network or to use a particular wireless technology to do so, that choice is left up to the company.¹⁴⁰

In cases where the number of licenses is limited for example, in the mobile sector-they are usually awarded through a competitive tendering process.¹⁴¹ This may take account of both the amount of money that bidders offer and their investment plans.¹⁴² The convergence of technology has variated licensing procedures and as a result a number of counties are pursuing convergence licensing or sector- neutral licensing.

2.11 Convergence licensing

Convergence is one of the most important recent trends in the ICT sector. It has changed how services are delivered and has blurred the line between fixed and mobile services.¹⁴³ The NGN is the most recent step in the convergence –driven evolution of the ICT sectors and regulators must balance the need for regulatory certainty with the need for a regulatory

¹³⁷ C Blackman and L Srivastava (n130 above) 77.

¹³⁸ D Souter *et al* (n119 above) 101

¹³⁹ D Souter *et al* (n132 above) 101.

¹⁴⁰ D Souter *et al* (n133 above) 101.

¹⁴¹ D Souter *et al* (n134 above)101.

¹⁴² D Souter *et al* (n135 above) 101.

¹⁴³ C Blackman and L Srivastava (n131 above) 84.

framework that is sufficiently flexible to allow efficiency gains and new services.¹⁴⁴ Regulators are thus propelled to adapt to the convergence of technology.

Sector-specific regulation is highly desirable from the point of view of administrative competence particularly in light of the convergence.¹⁴⁵ Furthermore competition law as an *ex-post* remedy is weaker than precautionary *ex ante* regulation because it tends to involve not the prior approval of business conduct that already occurred. Competition law may be ineffective in sectors characterised by the fast pace of change in both technology and industry organisation.¹⁴⁶ This makes sector specific regulation of the telecommunications sector vital.

The process of convergence is occurring between the formerly separate broadcasting, information and telecommunication sectors which is due to two central factors which are technological advances in transmission techniques and liberalisation of the sector.¹⁴⁷ The mechanism for sorting out convergence licensing is through the legislative approach which consists of developing legislation that responds to convergence either in the immediate term or in anticipation of convergence trends. Legislative solutions define new regulatory framework to respond to convergence and guide future policy direction which can be done by developing and implementing a reform of the entire legal framework or by amendments to existing laws.¹⁴⁸ Adopting a regulatory framework that will adapt to the convergence of technology is of paramount importance.

An advantage of the legislative approach is that it allows the introduction of a new framework to deal with convergence without constraints imposed by other regulations or by the existing telecommunication law that may contain categories in which converged services do not fit.¹⁴⁹ It can be done through amendment of existing laws and self-regulation process which consists of developing and designing convergence policy through

¹⁴⁴ C Blackman and L Srivastava (n137 above) 84.

¹⁴⁵ A Gates 'Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector' (2000) 58 (2) *University of Toronto Faculty of Law Review* 94.

¹⁴⁶ A Gates (n139 above) 94.

¹⁴⁷ A McKenna 'Emerging Issues Surrounding the Convergence of Telecommunications, Broadcasting and Information Technology Sector' (2000) 2 *Information and Communication Technology Law* 93.

¹⁴⁸ ITU '*ICT Regulation Toolkit: Providing Practical Advice and Concrete Best Practice Guideline to Enable Access to ICT for All*' available at <http://www.ictregulationtoolkit.org/3> (accessed on 1 February 2016).

¹⁴⁹ ITU (n142 above) 7.

an *ad hoc* or existing consultative body.¹⁵⁰ This body is normally composed of several government agencies, industry representatives and other interested parties.¹⁵¹

The roles and functions of these consultative bodies varies but they generally issue recommendations to the government addressing the need for changes in convergence.¹⁵² With regards to licensing, modifications to regulations have focused mainly on reducing market entry requirements for new technology by introducing a simpler and technology neutral licensing regime.¹⁵³ The easier way of adopting technological changes enhances the effectiveness of a regulator especially when given the legislative mandate of developing regulation or making binding recommendations to the consultative bodies or party responsible for legislation.

2.12 Regulation of a monopoly

Every country that is serious about introducing competition finds that the transition from monopoly to competition is both economically rewarding and laden with policy dilemmas.¹⁵⁴ A number of empirical studies have found that investment in telecommunications infrastructure is a strong economic growth which suggests that in order to accelerate economic development, countries need to create policy environments conducive to a high level of investments in the telecommunications sector.¹⁵⁵ An enabling legal environment is vital for the transition from a monopoly to an competitive market.

The regulation of a monopoly is imperfect and costly, even a high minimum efficient scale of operation for major network facilities does not necessarily justify monopoly on a national scale.¹⁵⁶ Some argue that refusals to operate can be used to further or maintain monopoly power by keeping rivals out of the market by depriving them of something that

¹⁵⁰ ITU (n143 above) 7.

¹⁵¹ ITU (n144 above) 9.

¹⁵² ITU (n145 above) 9.

¹⁵³ ITU (n146 above) 13.

¹⁵⁴ P Cowhey and Mikhail M Klimento 'The WTO Agreement and Telecommunications Policy Reform' (2001) available at' <http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2601> (accessed on 22 February 2016).

¹⁵⁵ P Cowhey and Mikhail M Klimento (n148 above).

¹⁵⁶ P Cowhey and Mikhail M Klimento (n149 above).

they need to compete effectively with the monopolist, impeding investment in the sector.¹⁵⁷ Investment is fundamental to economic growth and to the provision of needed goods and services in any society.¹⁵⁸

A monopoly provider whether state owned or private, takes fewer incentives to improve service and lower prices than do firms operating in a competitive environment.¹⁵⁹ Empirical research finds that competition drives the biggest improvements in the telecommunications sector.¹⁶⁰ The introduction of competition in the telecommunications sector is vital to spur innovation and provide good quality services. This has a rippling effect as it will also improve consumer welfare. This is maximised by the fact that consumer benefits are expected to flow from competition in the market place.¹⁶¹ Consumer welfare is enhanced where good governance principles are upheld and thus promoting effective regulation.

2.13 Good governance principles underpinning effective regulation

Strengthening governance can contribute to improved regulatory outcomes. In particular, better administration, more effective compliance programmes and targeted enforcement of regulation can help to achieve the desired outcomes most efficiently, while maintaining the burden on regulated entities.¹⁶² Strong governance strengthens the legitimacy and integrity of the regulator, supporting the high level policy objectives of the regulatory scheme and will lead to better outcomes.¹⁶³ A positive government is very important for the effectiveness of the regulator.¹⁶⁴ Regulation is a key tool for achieving the social, economic and environmental policy objectives of government and regulations is an important factor

¹⁵⁷ J Gregory Sidak 'A Consumer Welfare approach to Network Regulation of the Internet' (2006) 2 (3) *Journal of Competition Law and Economics* 354.

¹⁵⁸ JW Salacuse *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (2013) 3.

¹⁵⁹ J Buckley *Telecommunication Regulation* (2009) 40.

¹⁶⁰ E Markova *Liberalization and Regulation of the Telecommunications Sector in Transition Countries: The Case of Russia* (2009) 83.

¹⁶¹ J Buckley (n153 above) 40.

¹⁶² OECD, 'Best Practices Principles for Regulatory Policy: The Governance of Regulators' (2014)17 available at <http://www.oecd.org/gov/regulatory-policy/governance-of-regulators.htm> (accessed on 20 May 2016).

¹⁶³ OECD (n206 above) 17.

¹⁶⁴ LC Reif *The Ombudman, Good Governance and International Human Rights System* 2004, 404.

creating a well-functioning society and trust in government.¹⁶⁵ Good governance is a prerequisite for effective regulation of the telecommunications sector.

The manner in which the regulator was established, its design, structure, decision making and accountability structures, are all important factors in how effective it will be in delivering the objectives it was intended to deliver.¹⁶⁶ The judiciary plays an important role particularly for independent regulators but moreover in maintaining accountability and trust in the regulator.¹⁶⁷ An independent judicial system is also a prerequisite for effective regulation as it assists in the enforcement of regulatory decisions and judgements. Effective governance structures encourage regulators to improve outcomes for the community honestly, fairly and efficiently, within the boundaries of their legal framework and the objectives outlined by the government.¹⁶⁸ Appropriate governance structures support the following overarching principles of good governance mentioned below:-

2.13.1 Role clarity

An effective regulator must have clear objectives, with clear and linked functions and the mechanisms to co-ordinate with other relevant bodies to achieve the desired regulatory outcomes.¹⁶⁹ Regulators should not be assigned conflicting or competing functions or goals. The assignment of potentially conflicting functions to any regulator should only occur if there is a clear public benefit in combining these functions and the risks of conflict can be managed effectively.¹⁷⁰ Where a regulator is given potentially conflicting or competing functions, there should be a mandatory mechanism whereby conflicts arising are made transparent and processes for resolving such conflicts are specified.¹⁷¹ Such a mechanism will eradicate any conflicting interest or duplication of mandate.

¹⁶⁵ OECD *Best Practice Principles for Regulatory Policy: Regulatory Enforcements and Inspections* (2014) 9.

¹⁶⁶ OECD (n157 above) 17.

¹⁶⁷ OECD (n160 above) 18.

¹⁶⁸ OECD (n161 above) 23.

¹⁶⁹ OECD (n162 above) 30.

¹⁷⁰ OECD (n163 above) 30.

¹⁷¹ OECD (n164 above) 30

There should also be legal ground for co-operation and protocols between relevant regulators or bodies.¹⁷² The effectiveness and efficiency of a regulatory system depends in part on the extent to which potential duplication and gaps between regulators are anticipated and avoided. Targeted co-ordination of activities can provide opportunities to reduce burdens on the regulated while improving compliance. However, there needs to be clear authority for co-ordination to remove uncertainty about the legality of any arrangements.¹⁷³

2.13.2 Decision making and governing body structure for independent regulators

A threshold issue is the question of whether particular regulatory decisions are best made by an independent regulator or by the minister or an officer of the ministry¹⁷⁴. According to the OECD 2012 Recommendation of the Council on Regulatory Policy and Governance, independent regulatory agencies should be considered in situations where:

- there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions¹⁷⁵;
- both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required¹⁷⁶;

The rationale for establishing independent, often sector-specific, regulatory institutions is based on ensuring non-discriminatory treatment of all players in the liberalised market.¹⁷⁷

Three broad imperatives guide the process of ensuring that the regulator is seen as independent namely;-

¹⁷² OECD (n165 above) 30.

¹⁷³ OECD (n166 above) 39.

¹⁷⁴ OECD (n167 above) 30.

¹⁷⁵ OECD (n168 above) 30.

¹⁷⁶ OECD (n169 above) 30.

¹⁷⁷ World Bank *'A Review of the ICT Regulatory Framework in Botswana'* (2014) 14.

- Cooperation enables in a competitive environment to ensure that a level playing field exists between unequal entities in the market;¹⁷⁸
- All equipment suppliers are treated equally where the market is dominated by a single buyer with strong pre-existing relationships with suppliers;¹⁷⁹
- All new entrants and investors in the telecommunications service sector are treated equally by the dominant competitor who will be a suppliers of inputs to the businesses of the new entrants;¹⁸⁰

The independence of the regulators is essential in relation to such issues as the credibility of the regulator, enforceability of its decisions and investor confidence in the regulatory system.¹⁸¹ Regulatory independence provides transparency professionalism and accountability, which encourages investment and stability.¹⁸² An independent regulator upholds good governance principles without any interference from any party.

2.13.3 Accountability and transparency

Comprehensive accountability and transparency measures actively support good behavior and performance by the regulator, as they allow the regulator's performance to be assessed by the legislature or responsible other authority.¹⁸³ Transparency implies openness to the views of different stakeholder groups and participation by stakeholders is one way regulators can be held accountable for their actions.¹⁸⁴ In particular by encouraging firms

¹⁷⁸ World Bank (n171 above) 14.

¹⁷⁹ World Bank (n172 above)14.

¹⁸⁰ World Bank (n173 above) 14.

¹⁸¹ L Mokgosi 'The Telecommunications Regulators' available at <https://www.wits.ac.za/media/migration/files/telelaw6.pdf> (accessed on 23 May 2016).

¹⁸² ME Price et al *Handbook of Media Law* (2013) 48.

¹⁸³ OECD (n170 above) 83.

¹⁸⁴ S Berg 'Developments in Best Practice Regulation: Principles, Processes and Performance (2001) available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwidufri8oHNAhVoBcAKHdKjBTwQFggdMAA&url=http%3A%2F%2Fwarrington.ufl.edu%2Fcenters%2Fpurcdo cs%2Fpapers%2F0005_berg_developments_in_best-practice.pdf&usg=AFQjCNFcvAFMTpT3v7RIMu7gLF0tmvGF5w&sig2=1vd3u4WpKTCJvqmv3ZUlrw (accessed on 15 February 2016).

to create value regulators, it can enhance industry performance.¹⁸⁵ An accountable and transparent regulator enhances effective regulation of the telecommunications sector.

2.13.4 Engagement

One objective of good regulator governance is to enhance public and stakeholder confidence in the regulator, its decisions and its actions. Effective engagement with regulated parties and other stakeholders helps achieve this.¹⁸⁶ In principle, the agency balances all the interests of all stakeholders in a way that promotes legitimacy to customers, credibility for investors and efficiency for the general economy.¹⁸⁷ By engaging independently with all stakeholders a regulator maximises its effectiveness.

2.13.5 Funding

Clarity about regulator's sources and levels of funding is necessary to protect their independence and objectivity.¹⁸⁸ Transparency about the basis of funding can also enhance confidence that regulator is efficient, as well as effective.¹⁸⁹ Funding resources may include budget funding from consolidated revenue, cost recovery fees from regulated entities, monies from penalties and fines and interest earned on investments and trust funds.¹⁹⁰ This mix of funding sources should be appropriate for the particular circumstances of the regulator. To promote efficiency and equity, it should be made clear who pays for the regulator's operations, how much and why.¹⁹¹

2.13.6 Performance evaluation

¹⁸⁵ S Berg (178 above) 6.

¹⁸⁶ OECD (n177 above) 91.

¹⁸⁷ S Berg (n179 above) 6.

¹⁸⁸ S Berg (n179 above) 6.

¹⁸⁹ S Berg (n179 above) 6.

¹⁹⁰ AC Brown "The Funding of Independent Regulatory Agencies" available at <http://www.harvard.edu/hepg/Papers/AnguillaPUC.pdf> (accessed on 29 April 2016).

¹⁹¹ OECD (n180 above) 100.

It is important that regulators are aware of the impacts of their regulatory actions and decisions as this helps drive improvements and enhances systems and processes internally.¹⁹² It also demonstrates the effectiveness of the regulator to those it is accountable to and helps to build confidence in the regulatory system.¹⁹³ The regulatory decisions, actions and interventions of the regulator should be evaluated through performance indicators.¹⁹⁴ This creates awareness and understanding of the impact of the regulators' own actions and helps to communicate and demonstrate to stakeholders the added value of the regulation.¹⁹⁵ Monitoring and evaluating performance of a regulator is crucial in order to determine as to whether the regulator is achieving the goals it was established to accomplish.

2.14 Conclusion

This chapter defined the concept of regulation and discussed the different types of regulators a country can implement depending on the socio-economic space of that particular country. Of particular interest in this study is the role that is played by an independent regulator in fostering competition within a sector that has been liberalised which increases consumer welfare. It is evident from the discussions that state control of assets in the telecommunications sector is no longer the best mechanism, hence the opening up of the market for new entrants.

The trend is that with technological advancement issuing of general licenses is preferred as the gap between the different sectors of ICT has been bridged to an extent that an incumbent can now provide broadcasting, telecommunications services under the one general license. From the foregoing, it can be concluded that neutral-licensing or general authorisations in the telecommunications sector is the best alternative for issuance of licenses and attracting FDI because it gives investors assurance that should technology change, they can move on with time and continue to grow their businesses. In light of this view, it is appropriate for

¹⁹² OECD (n185 above) 100.

¹⁹³ OECD (n186 above) 100.

¹⁹⁴ OECD (n187 above) 100.

¹⁹⁵ OECD (n188 above) 100.

the country's regulator to consider issuing neutral licenses for new entrants or the incumbents already in the market that have individual licenses.

CHAPTER THREE

EFFECTIVE REGULATION OF THE TELECOMMUNICATIONS SECTOR IN SWAZILAND

“For ICT to serve as an engine for development, it is absolutely critical that an effective policy framework is in place” - Jose Maria Figueres – World Economic Forum

3.1 Introduction

Pursuant to the conclusions made in the previous chapter to the effect that the abolishing of a monopoly is a pre-requisite in fostering competition in the telecommunications sector and that a converged and independent regulator, is vital for effective regulation, this chapter focuses on examining whether SCCOM which acts as the regulator of the ICT sector in Swaziland is an independent regulator, using best international practice principles as a yardstick.

It examines the legal and regulatory framework underpinning the ICT sector in Swaziland and attempts to identify shortcomings in these legal instruments that have hindered the effective liberalisation of the mobile sector and bringing in new entrants to foster competition. It assesses the impact of the JVA between SPTC and Swazi MTN Limited (Pty) Ltd on the exclusive provision of mobile services by Swazi MTN Limited (Pty) Ltd. This chapter ends with an assessment of the alternatives available in the JVA in invoking exit clauses which can foster competition amongst the current telecommunication operators.

3.2 ICT regulation in Swaziland

The regulation of the ICT sector in the country is rooted in the government policy on ICT infrastructure development and is underpinned by six pillars which are aimed at accelerating economic growth, fair distribution of growth through fiscal policy, micro-economic stability, empowering the poor to generate income and improve good governance.¹⁹⁶ This must be achieved by creating an enabling legal and regulatory environment for ICT service provision. The key objectives of the institutional framework will be to promote an investor-friendly environment whilst creating a level playing field, introduce and promote competition and promote market growth.¹⁹⁷ It is critical to evaluate the historical evolution of the ICT sector in order to be able to appreciate the pivotal role played by the sector in enhancing economic growth and promoting consumer welfare.

3.2.1 The Monopoly period

The regulation of ICT in Swaziland was bestowed on SPTC through the enactment of the Swaziland Posts and Telecommunications Corporation Act No 11 of 1983 which granted SPTC the exclusive rights to offer postal, telephone, telegraph, radio communication and savings bank services. In offering all these services, SPTC was the sole service provider of ICT services in the country.

SPTC was also granted the role of being a regulator for the ICT sector. Section 13 (2) (g) grants SPTC with powers to prohibit, control or regulate the use by any person of any of the services performed or facilities provided by SPTC.¹⁹⁸ This was peculiar in the circumstance as SPTC could not effectively execute both duties as a service provider and a regulator for the industry. The general concern was that the monopolist will exploit its powers over the market and act anti-competitively.¹⁹⁹ To that extent an effective competition commission will thus regulate the market to manage the anti-competitive conduct.

¹⁹⁶ Swaziland National Information and Communication Infrastructure Policy, 2007.

¹⁹⁷ Swaziland National Information and Communication Infrastructure Policy, 2007.

¹⁹⁸ Section 13 (2) (g) of the Swaziland Posts and Telecommunications Act No.11 of 1983.

¹⁹⁹ R Barry and M Angus *Competition Law and Policy in the EU and UK* (2014) 37.

All concerns relating to competition law stem from the neo-classical economic model of monopoly which indicates that monopolists can exploit its position to earn a supra-competitive profit at the expense of the consumer²⁰⁰. A monopolist hence disregards consumer welfare by charging high prices to earn supra-competitive profits. This means that there is no efficiency and the quality of service is low as the monopolist has no competitor that will force such monopolists to compete for customers. This is evident by the fact that SPTC was granted power to impose and levy rates, charges or fees for any services performed by SPTC or for the use by any person of the facilities provided by SPTC or for the grant to any person of any licence, permit or certificate under this Act.²⁰¹ SPTC had no concern for consumers but to make profits. This is supported by Section 100 (3) which provides that SPTC shall endeavour to ensure that the tariffs charged for its services shall be so fixed as to enable it to operate at a profit.²⁰² This provision supports the fact that SPTC was only driven to maximise its profits at the expense of consumers.

The independence of SPTC as a regulator for the ICT sector was compromised as indicated by the SPTC Act, for example, SPTC had no authority to sell or lease any land or building that had been bestowed to it by the government without first obtaining the consent of the government.²⁰³ SPTC acted as an agent for any services of the government in the performance of any agreed functions.²⁰⁴ This is contrary to the view that national telecommunications should be in the hands of an independent agency that is unconnected with government, the purpose being to build confidence in the process showing that the agency is politically accountable but substantially insulated from everyday politics.²⁰⁵ Hence SPTC as a regulator of the ICT sector as well as a service provider was contrary to international best practice that regulator should be independent.

²⁰⁰ R Barry and M Angus (n2 above) 37.

²⁰¹ Section 13 (2) (f) .

²⁰² Section 100 (3).

²⁰³ Section 13 (2) (h).

²⁰⁴ Section 13 (2) (j).

²⁰⁵ Peter Cowhey and Mikhail M Klimento (n150 above).

Pursuant to technological advancement in the ICT sector and with the introduction of the mobile cellphones, SPTC negotiated a JVA with MTN International (Pty) Ltd for the provision of exclusive mobile telephone network in the Kingdom of Swaziland by jointly forming a company called Swazi MTN Limited (Pty) Ltd. This was done exercising the powers endowed by Section 13 (2) (a) which states that SPTC shall have powers to enter into such contacts as maybe necessary for the purposes of SPTC or otherwise for carrying into effect the provisions of the SPTC Act.²⁰⁶ Hence Swazi MTN Limited (Pty) Ltd was granted the sole mobile licence to operate mobile services in the country.

The license was issued to Swazi MTN Limited in terms of Article 59 (1) (a) (b) which provides that SPTC shall have the power to grant a license to any person to construct, maintain and operate a telephone apparatus for the purposes of his private or business affairs or for the purpose of telephone communication by members of the public between any place in Swaziland and any foreign country.²⁰⁷ This made Swazi MTN Limited (Pty) Ltd the sole service provider of the mobile communications services in the industry in the country.

3.2.2 The legal battle between SPTC and MTN

In 2011 a legal battle ensued between SPTC and Swazi MTN Limited (Pty) Ltd, the bone of contention was that SPTC had launched mobile services which were exclusively reserved for Swazi MTN Limited in terms of the JVA. The launch of the mobile services by SPTC was in contravention of clause 21 of the JVA.²⁰⁸ The conduct of SPTC constituted a grave breach of the JVA.

²⁰⁶ Section 13 (2) (a).

²⁰⁷ Section 59 (ii) (a)(b).

²⁰⁸ Clause 21 of the JVA provides for the following:-

- 21.1 The shareholders shall at all times during the subsistence of this agreement and their relationship to the company bear to each other the outmost good faith as is required by law to be borne by partners the one to the other.

In the case of *Swazi MTN Limited V Swaziland Posts and Telecommunications Corporation and Another*,²⁰⁹ Swazi MTN Limited (Pty) Ltd instituted an urgent application on the 20th May 2010 under case number 1896 of 2010 where Swazi MTN Limited (Pty) Ltd sought an interim order interdicting SPTC herein from providing or rolling out any fixed wireless and or mobile network services using its NGN and or fixed wireless solution in competition with Swazi MTN Limited (Pty) Ltd.

In this proceeding, Swazi MTN Limited (Pty) Ltd firstly contended SPTC's role of being both the regulator and commercial operator created a conflict of interest to the detriment of other ICT operators. The second issue contended by SPTC was that the JVA required SPTC to act with the utmost good faith and not to compete against Swazi MTN Limited (Pty) Ltd. The Court ordered SPTC to forthwith ceased and desist from marketing and advertising the fixed wireless component of the NGN network and connecting customers to the fixed wireless component of its NGN Network.

Swazi MTN Limited thereafter instituted proceedings at the International Court of Arbitration. In *Swazi MTN and Others v Swaziland Posts and Telecommunications Corporation*,²¹⁰ Swazi MTN Limited and others submitted a claim for the payment of damages in the amount of E17 218 572 00 (Seventeen Million Two Hundred and Eighteen Thousand Five Hundred and Seventy Two Emalangeni) as at 11 June 2011 and thereafter in further estimated monthly sum of E4 313 642 50 (Four Million Three Hundred and Thirteen Six Hundred and Forty Two Emalangeni and Fifty Cents) and a final interdict ordering SPTC to terminate forthwith its mobile services, to cease advertising or in any other way promoting them and to cease canvassing subscribers and other potential users, for as long as SPTC remains a shareholder or the JVA exists between the parties.

21.2 Without derogating from the foregoing or clause 12.5 no shareholder shall either directly or indirectly be associated with any business or concern in such association will not or might result in a conflict of interest arising.

²⁰⁹ *Swazi MTN Limited V Swaziland Posts and Telecommunications Corporation and Another* 19/11 [2011] SZSC 6 (31 May 2011).

²¹⁰ *Swazi MTN and Others v Swaziland Posts and Telecommunications Corporation*, International Court of Arbitration, International Chamber of Commerce Case (4 August 2012) No 18000/ARP.

The sole Arbitrator ordered SPTC to terminate forthwith the mobile component of any telephony network and service operated by it (be it mobile data or function) in competition with Swazi MTN limited (Pty) Ltd or any text messaging services. SPTC was also ordered to cease advertising or in any way promoting its mobile services and to desist from canvassing subscribers and other to potential users in respect thereof for so long as the SPTC is a shareholder of the JVA or the JVA subsist between the parties.²¹¹ The International Court of Arbitration further declared that SPTC is liable to pay damages to Swazi MTN Limited (Pty) Ltd in such an amount as maybe determined in another arbitration hearing.

In the case of *Swazi MTN Limited and Other V SPTC and Another*,²¹² Swazi MTN Limited (Pty) Ltd brought contempt of Court proceedings against SPTC for having failed to honour the court order made under case no 19/11 [2011] SZSC 6 (31 May 2011). Swazi MTN Limited contended that SPTC is prohibited by clause 21 from launching or re-provisioning any products as long as they are supported by the mobile network which admittedly operates through radio access.

The court re-iterated the stance taken by the International Court of Arbitration that SPTC should forthwith cease to provide services that are related to mobile telephony as it in breach of the JVA. The end result is that effectively the attempt by SPTC to give Swazi MTN Limited (Pty) Ltd competition in the mobile sub-sector was thwarted and hence to date Swazi MTN Limited (Pty) Ltd remains the only sole provider of mobile services in the country to the detriment of consumers. This is clear violation of competition laws in the country. It is inquisitive to note during this whole debacle between SPTC and Swazi MTN Limited (Pty) Ltd, the SCC failed to launch an investigation into the alleged violation of competition laws. The SCC failed to launch investigations as empowered by Section 31 (1) (a) of the Competition Act.

3.2.3 The promulgation of a converged regulator

²¹¹ *Swazi MTN and Others v Swaziland Posts and Telecommunications Corporation*, International Court of Arbitration, International Chamber of Commerce Case (4 August 2012) No 18000/ARP.

²¹² *Swazi MTN Limited and Other V SPTC and Another* 58/2013 [2013] SZSC 46 (29 November 2013).

The legal battle between the two giants in the ICT industry and the contention by Swazi MTN Limited (Pty) Ltd that SPTC could not be a service provider and be a regulator was as positive step towards the promulgation of converged regulator. In 2013 a converged regulator was established in terms of the CCA which establishes SCCOM²¹³ and whose core function is to provide regulatory functions in the ICT sector.²¹⁴

The CCA obligates SCCOM to act in an objective transparent, proportionate and non-discriminatory manner.²¹⁵ SCCOM has to ensure that all communications services are provided in a manner that will best promote economic and social development, determine issues concerning monopoly and discriminatory practices and establish a pricing system to protect end user from excessive price increase, avoid unfair pricing and promote competition.

In promoting competition in the ICT industry SCCOM is mandated to consult with various competent authorities responsible for competition issues, fair trading and consumer's affairs and for such other areas as may impact the sectors regulated by the SCCOM.²¹⁶ Consultation is a crucial in ensuring that SCCOM integrates with the concerns and submissions of all stakeholders.

The independence of SCCOM is guaranteed in so far as it related to structural independence is concerned as the duties of SCCOM are expressly stated in the CCA and SCCOM granted the right to hire its own staff for the effective discharge of its functions.²¹⁷ SCCOM is however granted limited financial independence because SCCOM cannot raise any monies by way of loan without the approval of the minister.²¹⁸ SCCOM is further limited in its independence in that it cannot invest any surplus monies that it does not need for executing its mandate without the approval of the Minister of Finance.²¹⁹

²¹³ The Communication Commission Act 10 Of 2013.

²¹⁴ The Communication Commission Act 10 of 2013.

²¹⁵ Section 5.

²¹⁶ Section 31.

²¹⁷ Section 34.

²¹⁸ Section 49 (2)(b).

²¹⁹ Section 49 (4).

A further implication for SCCOM is that it has no authority to make regulations as the Minister of ICT has the right to make regulations by notice in the Gazette.²²⁰ Since its inception SCCOM has no operative regulations. The existence of an independent regulator is a prerequisite for the creation of a truly competitive market and formerly monopolised sectors.²²¹ The limitations on the independence of the regulator can negatively affect the execution of the mandate of SCCOM and effectively the regulation of the ICT industry in the country.

Lastly, the continued existence of STA is clouded with controversy especially because all the regulatory functions of STA to regulate the broadcasting networks have been transferred to SCCOM. It is critical to note that the MICT in 2013 tabled the Swaziland Broadcasting Corporation Bill no 4 of 2013 which seeks to transfer the core objective of STA to the new corporation that will be responsible for establishing and operating television broadcasting stations in Swaziland as enumerated in Section 4 (1) (a) of the mentioned Bill.

Despite the prevalent polemics, it is trite to holistically interrogate the current legislative framework underpinning electronic communications. The ICT industry is regulated by the ECA, which governs the regulation of electronic communications and matters related to electronic communications. In addition SCCOM has to enforce the Competition Act 2007, the Fair Trading Act 2001 and the Standards and Quality Act in so far as they relate to the regulation of electronic communications.

3.4 The Electronic Communications Act

The ECA was promulgated to encourage competition in the industry and transfer the regulatory powers of SPTC and STA to SCCOM with a view of establishing an independent regulator for the sector that will foster confidence and promote competition in the industry. The legal battle between SPTC and Swazi MTN Limited (Pty) Ltd positively

²²⁰ Section 54.

²²¹ AKF Forlaget “Regulatory independence in Theory and Practice – A survey of Independent Regulators in Eight Countries (2003) available at http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Johannsen_Regulatory_Independence_in.pdf (accessed on 29 February 2016).

necessitated the promulgation of the ECA to address the contention by Swazi MTN Limited (Pty) Ltd that SPTC could not be a regulator and a service provider in the field.²²² As such a conduct was a breach of conflict of interest and comparative advantage to SPTC to the detriment of other ICT operators, negatively impeding the regulation of the ICT sector in the country.

The ECA provides for the threshold requirements for operation of public and private electronic communications networks and services. This is in respect of the categories of the electronic communications licenses, application process, rights and obligations of licenses and lastly the rights of licensees holding a dominant position in the market.²²³ The central principles underpinning the ECA are the competition law principle of eradication of monopoly, promotion of competition, control of abuse of dominance and the attraction of domestic and FDI to assist in the development of the ICT sector and economic growth.²²⁴

An effective licensing framework is essential for the successful deployment of value maximising technologies, the promotion of effective competition between operators and for the facilitation of investment in the communication sector.²²⁵ A stable regulatory framework can in turn encourage new entrants as well as giving confidence to the existing operator to undertake substantial investment in developing their networks and deploying new services.²²⁶ An enabling regulatory framework is a necessity in the regulation of the ICT sector to allow for competition and attraction of FDI.

3.4.1 Mobile telecommunication licensing

Licensing is one the core elements in any communication markets regulatory framework.²²⁷ SCCOM is authorised by the ECA to issue electronic licences in two

²²² *Swazi MTN Limited and Other v SPTC and Another* 19/11 [2011] SZSC 6 (31 May 2011).

²²³ The Electronic Communications Act No 9/2013.

²²⁴ The Electronic Communications Act No 9/ 2013.

²²⁵ Windsor Place Consulting “ What, Who and How to Regulate Best Practice Licensing Frameworks in Asia and Globally available at https://www.itu.int/en/ITU-D/Regional-Presence/AsiaPacific/Documents/Events/2015/March-DigitalEconomy/Session1-1_Scott_Minehane.pdf (accessed on 23 March 2016).

²²⁶ CEG “ Licensing to Support the Mobile Broadband Revolution available at www.gsma.com/publicpolicy/wp.../03/gsma_licensing_report.pdf (accessed on 22 February 2016)

²²⁷ Windsor Place Consulting (n218 above).

different categories which are general and individual licenses. This is despite the fact that the trend is now the issuance of converged licenses that allow operators to provide both fixed and mobile networks service. This follows the fact that technological progression has blurred the line between fixed and mobile network services.

A converged or unified licensing regime allows licensed operators to offer multimedia services, adapt to technological developments and track changing consumer preferences without having to overcome administrative barriers imposed by the now obsolete technology services specifying specific licensing regimes²²⁸. This allows for fixed – mobile convergence which refers to the coming together of the previously distinct fixed and mobile services.²²⁹ The advent of these technologies has thus obliterated the distinction between mobile and fixed services.²³⁰ A sustainable response to this seemingly disruptive development has always been a review of the licensing regimes to allow for flexibility and integration on the part of operators.²³¹

The provision of a public voice telephony service and the operation of a television network may only be authorised under an individual license.²³² Licensing determines the degree of competition between operators and revenue earned by governments from fees and the conditions under which market participants can operate and supply service in the market.²³³ Increased access to mobile communication in a country has been found to significantly increase overall economic growth and productivity.²³⁴ In a drive to increase economic growth, the government has liberalised the sector and seeks to attract investment into the sector. Effective regulation of the mobile sub-sector is crucial for investors for determine

²²⁸ Postal and Telecommunication Regulatory Authority of Zimbabwe available at https://www.potraz.gov.zw/images/documents/CONSULTATION_PAPER_CONVERGED_FRAMEWORK_2015_pdf (accessed on 17 February 2016) .

²²⁹ Postal and Telecommunication Regulatory Authority of Zimbabwe (n222 above).

²³⁰ Postal and Telecommunication Regulatory Authority of Zimbabwe (n223 above).

²³¹ Postal and Telecommunication Regulatory Authority of Zimbabwe (n224 above).

²³² Section 9 (2).

²³³ Windsor Place Consulting (n221 above) .

²³⁴ CEG (n220 above).

whether to invest in the sector and the individual license application process enlightens the decision on whether to invest in the mobile sub-sector.

SCCOM is given the authority to amend an electronic communications license whether by written agreement of the parties or where there the occurrence of an event that cannot be controlled, national security considerations, changes in national legislation or the implementation of international obligations.²³⁵ It is unclear as to what mechanisms are put in place in order to ensure that the amending of a license does not amount to appropriation of the investment. The fact that the SCCOM can amend the terms of license in relations to the *provisio* on events that cannot be controlled, opens floodgates for the assumption that there could be instances where the terms of an individual license can be changed to the detriment of the investor.

Pursuant to Section 12 (1) (a)(b)(c) of the ECA, SCCOM granted Swazi MTN Limited (Pty) Ltd with a 4G licence.²³⁶ This has been challenged by parliamentarians envisaging that the issuance of such licence is not proper as the regulations have not been passed in parliament.²³⁷ This is an obvious interference of the work of SCCOM by parliamentarians. SCCOM however, clarified the issue contending that in terms of the ECA it is mandated to issue such licence to an operating license holder. This bestowed confidence to the public showing that SCCOM is to that extent not susceptible to political interference.

3.4.2 Control of dominance by SCCOM

The issuance of individual licenses is in most instances limited in order to allow for the implementation of government policy and with limitation of this license type there is risk of abuse of dominance in the industry.²³⁸ A dominant position means a position of economic strength enjoyed by a licensee either individually or jointly

²³⁵ Section 12 (1) (a)(b)(c).

²³⁶ SCCOM: 4G Licence to MTN Granted Legally Times of Swaziland 2016 27.

²³⁷ SCCOM: 4G Licence to MTN Granted Legally Times of Swaziland 2016 27.

²³⁸ R Barry and M Angus (n231 above) 130.

with others affording the licensee the power to behave to an appreciable extent independently of competitors, customers and ultimately the consumers.²³⁹ In the ICT arena the issuance of an individual licence is limited to ensure the implementation of government policy. The dominance test has two main elements:- firstly, the allusion of the ability to act independently refers to an economic view of market power to the extent that the undertaking actions are not constrained by effective competition.²⁴⁰ Secondly, the reference to the prevention of effective competition refers to a dominant undertaking's ability to prevent potential competitors from entering the market.²⁴¹ This is referred to as exclusionary conduct and it enable an undertaking to protect its dominant position.²⁴² The abuse of dominant operators in the industry must be controlled to ensure effective regulation and protection of consumer rights.

SCCOM is empowered to periodically define relevant markets appropriate to national circumstances in order to analyse the markets.²⁴³ In the event that SCCOM determines that a relevant market is not effectively competitive, SCCOM shall identify and designate licenses with a dominant position in that market and shall impose an obligation which shall be bases on the problem identified, objective, transparent, proportionate and non-discriminatory manner.²⁴⁴ This is to ensure that there is no abuse of dominance to the detriment of consumers. A remedial action where there is abuse of dominance is that SCCOM has an obligation to set the prices for the services by taking into account comparable competitive markets for the effective determination of competitive prices.²⁴⁵ This is a mechanism to ensure that that there is no abuse of consumer rights and in that regard promoting and protecting consumer welfare.

²³⁹ Section 3.

²⁴⁰ R Barry and M Angus (n232 above) 130.

²⁴¹ R Barry and M Angus (n234 above).

²⁴² R Barry and M Angus (235 above).

²⁴³ Section 23 (1).

²⁴⁴ Section 23 (4) (a) (b).

²⁴⁵ Section 28 (3).

3.5 Electronic Communications (Licensing) Regulations 2015

In 2015, the Minister of ICT tabled in parliament eight (8) Bills for promulgation in terms of the ECA that effectively liberalise the ICT sector of which the Electronic Communications (Licensing) Regulations 2015 are the cornerstone of this study.²⁴⁶ The Regulations provide that two types of licenses are to be issued which are the general and individual licenses. The anomaly is that the draft regulations do not state the requirements an incumbent must satisfy to be granted with a general or individual license.²⁴⁷ This has a negative bearing as investors in the sector will not be aware of the requirements they must meet in order to be able to apply for such licences.

The regulations recognise that individual licenses should be issued on technology neutral basis.²⁴⁸ The regulations provide for transparent public consultation and evaluation process and in particular that the public should be consulted prior to granting of any individual license.²⁴⁹ The regulations provide for renewal of license however the regulations are silent on the requirements that an incumbent should meet for a license to be renewed.²⁵⁰ Offering a converged license will enhance the development of the sector to the benefit of the consumer and the economy at large, which must be supported by an enabling regulatory framework that supports converged licenses.

It is crucial that the terms and conditions an incumbent must meet when applying for an electronic communication license and the terms and conditions for renewal of such license are expressly stated. SCCOM has validated its stance that it will issue neutral licenses to the existing operators subject to the approval of the Electronic Communications Licensing Regulations.²⁵¹ The contentious issue, however remains the fact that SPTC and Swazi

²⁴⁶ Electronic Communications Act No 9 of 2013.

²⁴⁷ Section 4 (4) of the Electronic Communications (Licensing) Regulations, 2015.

²⁴⁸ Section 5 (9).

²⁴⁹ Section 8 (3).

²⁵⁰ Section 11 (1).

²⁵¹ SCCOM: 4G Licence to MTN Granted Legally *Times of Swaziland* 2016 27.

MTN Limited (Pty) Ltd are still bound by the terms of the JVA which has and continues to hinder competition in the sector to the detriment of consumers.

3.6 Invoking of exit clauses in the JVA

The peculiar concern about the JVA is that it is a purely anti-competitive agreement which is supported by a number of articles in the agreement in particular clause 21.1 under the heading *bona fides* that states the following:-

“the shareholders shall at all times during the subsistence of this agreement and their relationship to the company bear to each other the utmost good faith as is required by law to be borne by partners, the one to the other and no shareholder shall either directly or indirectly be associated with any business of concern if such association will or might result in a conflict of interest arising²⁵²”

The foregoing clause is an anti-competitive and such agreement should have been pursued by SCC exercising its powers which vests it with the power to investigate anti-competitive agreements.²⁵³ In light of the fact that SCC has not pursued this matter it creates the assumption that there are third parties interfering with the execution of its duties.

In an effort to foster competition in the telecommunications sector, in particular the mobile sub-sector, the JVA offers a number of exit clauses of which either of the parties can invoke. Clause 11.2.2 of the JVA states that after three years of coming into force of the agreement if any of the parties want to sell or transfer its shares, first preference shall be given to the other shareholders in the company pro rata to their respective holdings of ordinary shares.

SPTC is not precluded from selling at any time up to 21% of the shareholding in the company held by SPTC to a third party provided that such third party is not a MTN

²⁵² Each of the parties and MTNH reciprocally agrees and undertakes to the other parties that for as long as it directly or indirectly controls a shareholder of the company and during the restraint period not to:-

Directly or indirectly carry on or be engaged, interested or concerned in any business or activity which operates a GSM service provider, dealer or agent in the territory.

²⁵³ Section 11 (2)(a) of the Competition Commission Act, 2007.

competitor.²⁵⁴ In the event that the government of Swaziland decides to sell the shares in part or in whole it shall ensure that no information that relates to this agreement is passed to a third party²⁵⁵ and that appropriate structures are put in place within SPTC and the company to protect such information as well as confidential information of MTNH or its subsidiaries from being made available to or disclosed to a MTN competitor.²⁵⁶

In effort to end this debacle and foster competition, it will be in the interest of SPTC to invoke the exit clauses in order to foster competition in the sector and in particular to introduce mobile services. This is in the light of the fact that once the Electronic Communication Licensing Regulations have been passed in parliament SCCOM will issue neutral license, blurring the line between fixed and mobile services currently held by both companies. The first option is that SPTC must set up a company that will be wholly owned by SPTC and transfer all the shares of SPTC to this new company. This is in line with clause 11.3.11 of the JVA which provides that the entirety and not a part only of controlling shareholders shares in the company shall be freely transferable on 14 days' notice to the other controlling shareholders to any company which is wholly owned directly or indirectly by that controlling shareholder.²⁵⁷

The second option is to invoke Clause 11.3.2.3 and sell the shares provided that SPTC ensures that privacy of information is kept. SPTC should however take cognisance of the fact that both options should only be exercised after twelve months of ceasing being shareholders in Swazi MTN Limited (Pty) Ltd²⁵⁸ and within which period SPTC shall not be directly or indirectly engaged, interested or concerned in any business which operates a GSM network, GSM service provider, dealer or agent in the country.²⁵⁹ The deadlock is that JVA places a restraint of trade on either of the party that ceases to be a shareholders or controlling members of Swazi MTN Limited (Pty) Ltd which holds the only mobile service license for a period of 12 months.

²⁵⁴ Clause 11.2.8.

²⁵⁵ Clause 11.3.2.3.

²⁵⁶ Clause 11.3.2.3.2.

²⁵⁷ Clause 11.3.11.

²⁵⁸ Clause 18.1.

²⁵⁹ Clause 18.2.1.

3.7 The short-comings of the system

The prevalent short-coming of the legal and regulatory framework underpinning the ICT sector in Swaziland is that SCCOM has no legal authority to issue binding recommendation on regulations. The power to issue regulations is bestowed on the Minister of ICT.²⁶⁰ The challenge in this regard is that the Minister is a political figure and has no real and substantial connection with effective regulation of the sector. As such SCCOM only makes recommendations to the Minister and thus cannot effectively take a decision on how to effectively regulate the sector.

This raises fear that SCCOM is an agent of the Minister and thus will enforce policies that are issued by the Minister. This anomaly affects the independence of SCCOM, mainly its financial independence, as it cannot raise funds without approval of the Minister and further seek consent from the Minister to invest funds. This in turn means that SCCOM cannot take some decision without the consent of the Minister. A huge challenge is that it only makes recommendations to the Minister on policy issues of which the Minister may or may not take into consideration.

Another issue with the system is that there is no licensing framework for allowing new entrants into the market in light of the liberalisation of the sector which is to open up to competition especially the mobile sub-sector.²⁶¹ A further implication in the system is the fact that the ECA²⁶² states that application for the issuance of a license should be made to SCCOM and the commission may impose such terms and conditions it deems fit for that particular license. This is contrary to international best practice which dictates that the terms and conditions should be expressly stated to enhance transparency and investor confidence.

²⁶⁰ Section 49.

²⁶¹ SPTC Can Operate Cellphones from April 1 *Observer on Swaziland* 2016 3.

²⁶² The Electronic Communications Act No 09 of 2013.

The mentioned failure of expressly stating the terms and conditions to be met by a potential investor, does not enhance the ease of doing business, as investors may not have confidence in the system as they are not aware of the terms and conditions to be met for one to be issued with a license. This issue is aggravated by the fact that there should be an appeals board, however such board is not in existence.

The biggest issue is that the CCA recognises that there should be an appeal board for parties to be allowed to lodge their grievances with and such board has not been constituted ever since SCCOM came into force in 2013. An aggravating fact is that SPTC cannot be providing the infrastructure and at the same time set the prices for such infrastructure. The ECA recognises this anomaly by taking cognisance of the fact that there should be a company that should be formed to provide for pricing of electronic infrastructure ²⁶³. However such company is not in existence and as such, SPTC practically sets the infrastructure prices.²⁶⁴

The biggest challenge is that the ECA does not provide for a converged license which is in conflict with the international best practice of shifting to converged licensing that will allow operators to be issued with neutral licenses. Hence, the JVA would not have an effect as it will be in conflict with a law that allows for neutral licensing. SCCOM has come out to state that it will issue neutral licenses to both existing telecommunications operators in the country²⁶⁵. In the interim, SCCOM has issued a 4G license to Swazi MTN Limited (Pty) Ltd which is variation of the 3G licence the company had.²⁶⁶

The short-comings of the legal and regulatory framework should be addressed by first amending the ECA to allow for the issuance of converged licenses.²⁶⁷ It should state the terms and conditions operators must comply with in order to be granted with a licence. SCCOM should be given the mandate to make binding recommendations to the Minister on policies, draft laws and regulations on all matter relating to electronic

²⁶³ The Electronic Communications Act No 09/2013.

²⁶⁴ Section 53 (4).

²⁶⁵ SPTC Can Operate Cellphones from April 1 *Observer on Swaziland* 2016 3.

²⁶⁶ SPTC Could Unfairly Compete with MTN if... *Times of Swaziland* 2016 28.

²⁶⁷ Section 9 (1) of the Electronic Communication Act No.09 of 2013.

communications.²⁶⁸ SCCOM must also comply with the provisions of the ECA to the extent that it establishes company that will set the rates for the infrastructure and the Minister of ICT must appoint the appeals board that will hear review applications from aggrieved individuals.

3.8 Conclusion

In conclusion, this chapter evaluated the legal and regulatory framework governing the ICT in Swaziland. It has shown how the telecommunications sector was regulated when SPTC was vested with the regulatory mandate as well as with a mandate to provide electronic communication services. It has portrayed the role played by the JVA in stifling competition in the mobile sub-sector and how the SCC has failed to challenge the legality of the contract fueling the suspicion that this might be due to political interference.

Of particular interest in this chapter, is Electronic Communications (Licensing) Regulations 2015 that have been tabled before Cabinet, which if approved by the parliament will allow for the issuance of licenses to new entrants in the mobile sub-sector. The key concern, however, is that the regulations are vague in that they do not provide for the terms and conditions incumbent must meet to be issued with license and for renewal. The major issue is that the SCCOM cannot make binding recommendations to the Minister and that the independence of SCCOM particularly financial independence is limited.

²⁶⁸ Section 49.

CHAPTER FOUR

THE BOTSWANA EXPERIENCE: ANY LESSONS FOR SWAZILAND?

“Regulating the ever changing ICT sector requires skills, foresight and innovation. Developing and using best practice is the best way to fast-track our efforts to adapt to change and embrace new technologies to foster development and business²⁶⁹”

4.1 Introduction

After interrogating the legal and regulatory framework underpinning the ICT sector in Swaziland and discovering a plethora of short-comings in the system which hinders effective regulation of the sector, this chapter interrogates the legal and regulatory framework underpinning the ICT sector in Botswana. The choice of Botswana as a case study is motivated by the fact that Botswana has rich history of effective regulation of telecommunications in Africa, as a decade ago, Botswana witnessed dramatic development in telecommunications which allowed self-provisions by mobile operators and neutral service license regime.²⁷⁰ Secondly, the reason is that Botswana was one of the leaders in

²⁶⁹ ITU ‘*Best Practice Guidelines to Facilitate the Widespread of Adoption And Use of Mobile Applications And Services Through Targeted Regulation*’ (2015) available at https://www.itu.int/en/ITU-D/Conferences/GSR/Documents/GSR2015/Consultation/BPG_2015_E.pdf (assessed on 15 May 2016).

²⁷⁰ Research ICT Africa ‘*Botswana Telecommunications Sector Performance Review: A supply Side Analysis of Policy Outcomes*’ (2007) available at http://www.researchictafrica.net/publications/Telecommunications_Sector_Performance_Reviews_2007/Botswana%20Telecommunications%20Sector%20Performance%20Review%20%20A%20Supply%20Side%20Analysis%20of%20Policy%20Outcomes%202007.pdf (assessed on 15 May 2016).

the introduction of what was then telecommunication regulation in the mid-1990s, in the 14 member states of SADC.²⁷¹

It is further supported by the view that the BCC is given ultimate power to regulate competition matters and BOCRA has no power to regulate competition matters in the telecommunications sector. Lastly, the case study is necessitated by the fact that it is supported by similar views as the USA concurs with the view of Botswana that competition matters should only be regulated by competition commissions and no derogations should be made for sector-specific regulation.²⁷² The EU also shares comparable sentiments that bestowing sector-specific regulators with powers to also regulate competition where *ex-ante* regulation applies reduces the overall effectiveness of regulation.²⁷³

4.2 The telecommunications policy framework of Botswana

In 1995, the government of the Republic of Botswana issued a policy to govern the regulation of telecommunications in the country. The policy formulation was informed by the sweeping technological advancement in the world that in turn necessitated the reconsideration of regulation of the telecommunications industry in order to benefit from economic advancement by exploiting new technologies.²⁷⁴

The drive behind the formulation of the policy was that monopolies are no longer regarded as efficient providers of telecommunications services.²⁷⁵ Hence, the policy abolished the

²⁷¹ ITU ‘*The Creation of the Botswana Communications Regulatory Authority*’ (2014) available at <https://www.itu.int/en/ITU-D/Conferences/GSR/Documents/GSR2014/Discussion%20papers%20and%20presentations%20-%20GSR14/Case%20Study%20GSR14%20-%20BOCRA.pdf> (assessed on 15 May 2016).

²⁷² *Verizon Communication Inc. v Law Offices of Curtis v Trinko LLP* 540 US 398 (2004).

²⁷³ R Klots ‘The Application of EC Competition Law (Articles 81 and 82 EC) in the Telecommunications Sectors’ in C Koenig, A Bartsch, J D Braun & M Romes (1st Edition) *EC Competition and Telecommunication Law* (2009) 28.

²⁷⁴ Section (4) Telecommunications Policy for Botswana (1995).

²⁷⁵ Section (4).

monopoly in the telecommunications sector in Botswana. The policy is underpinned by the following principles:-

(a) Competition

Competition in the industry was inevitable as one operator could not satisfy the growing demand for telecommunications services and generate innovative services in the sector while improving services for the consumers.²⁷⁶

(b) The private sector involvement

The involvement of the private sector was seen as crucial as it would provide the much need expertise and as well as bring investment into the sector through the liberalisation of the sector.²⁷⁷

(c) Transparency

Transparency was perceived to be vital in the promotion of confidence in potential investors and being a prerequisite for private sector participation in the industry. A transparent regulatory authority was deemed to be a mechanism for effective regulation of the industry.²⁷⁸

(d) Regulation

The establishment of an independent authority to regulate the industry was deemed fundamental in creating a conducive business environment for long terms investment and effective regulation of the sector.²⁷⁹

(e) Consumer protection

²⁷⁶ Section 6.1.

²⁷⁷ Section 6.2.

²⁷⁸ Section 6.3.

²⁷⁹ Section 6.4.

The introduction of competition in the industry was crucial in ensuring consumer protection as it would prevent monopoly abuse by one player in the industry and ensure fair prices.²⁸⁰

The cornerstone of the policy for the government of Botswana rests on the abolition of monopoly, controlled liberalisation which includes the introduction of competition and participation of the private sector which mechanisms are viewed as catalysts in the restructuring of the telecommunications services and enforcing effective regulation.

4.3 The establishment of BTA

In line with the policy paper, the Telecommunications Act established BTA whose powers and functions were exercised by a board appointed by the minister.²⁸¹ The powers and functions of the BTA were exercised and performed by a five member board which enjoyed a great deal of autonomy that agreed with the Ministry's policy paper that suggested that an independent regulatory authority should be created to ensure the successful liberalisation of the sector.²⁸² The ITU emphasises that the establishment of BTA in effect kick-started the liberalisation of the sector in Botswana.²⁸³

The Authority had powers to supervise and promote the provision of telecommunications services in Botswana.²⁸⁴ It also had powers to ensure the provision of universal services throughout Botswana and promote the provision of quality and variety of such services and equipment or terminal equipment supplied. It was also mandated to promote the interest of consumers, purchasers and other users of telecommunication services, promote and

²⁸⁰ Section 6.5.

²⁸¹ Section 4 (1) The Telecommunications Act of Botswana No 15 of 1996.

²⁸² P L McCormick "Telecommunications Reform in Botswana: A policy Model for African States" (2001) 25 *Telecommunications Policy* 413.

²⁸³ ITU (2014) (n265 above) 3.

²⁸⁴ Section 17 (1) The Telecommunications Act of Botswana No 15 of 1996.

maintain competition among persons engaged in commercial activities for or in connection with the provision of telecommunication services and promote efficiency and the economy.²⁸⁵

The authority also had powers to settle any disputes that may arise between licensees and other service providers or members of the general public.²⁸⁶ The authority was given a mandate to monitor competition in the telecommunications sector and report any contravention of the rules of competition to the Attorney General who had the power to deal with any such contravention as he considers appropriate.²⁸⁷

The BTA was authorised to grant telecommunications licenses and had discretion on whether to grant licenses through the tendering process.²⁸⁸ In 1997 BTA issued an invitation to tender for *Licenses to Provide Mobile Telecommunications Service in Botswana* and required the tenderer to provide proof of commitment to incorporate a company in Botswana and specify what minimum paid up share capital would be and what proportion would be held by Botswana owners.²⁸⁹ Furthermore conditions to be satisfied included the company's local employment policy, training policy and transfer of technology were also to be considered in the evaluation process.²⁹⁰ Five proposals were received including one from BTC and it is indeed noteworthy that the stated owned service provider, the BTC, was not awarded a license as is generally the case in most African countries.²⁹¹ This is an indication to the effect that a decade ago, Botswana had a regulator that was independent and not subject to political interference.

The Telecommunications Act laid foundation of the principles underpinning the assessing of applications for any license and making a decision of whether to grant or renew a license which principles were:-

²⁸⁵ Section 12 (2) (a) (b) (c).

²⁸⁶ Section 19 .

²⁸⁷ Section 20 (1) (2) .

²⁸⁸ Section 31.

²⁸⁹ P L McCormick (n276 above) 416.

²⁹⁰ P L McCormick (n283 above) 416.

²⁹¹ P L McCormick (n284 above) 16.

- The grant or renewal of the license must facilitate the performance of the general functions of the authority;²⁹²
- The grant or renewal of the license must bring any benefits to the national economy and to the consumers of telecommunications services in Botswana;²⁹³
- The applicant must provide the services in respect of which the license application or renewal application is made in a safe and sustainable manner.²⁹⁴

The Botswana Telecommunications Corporation Amendment Act No 16 of 1996 created an enabling regulatory framework for the telecommunications sector.²⁹⁵ This was done by giving BTC the duty to conduct its affairs on sound commercial lines.²⁹⁶ BTC had a mandate to operate telecommunications networks and to provide telecommunications services in Botswana.²⁹⁷ It also had power to establish subsidiaries and enter into joint ventures, partnerships or other associations with private investors as it may consider necessary to enable it to conduct its affairs.²⁹⁸

The Botswana Telecommunications Corporation Amendment Act commercialised BTC so as to enable it to operate competitively with other operators. This is a clear indication that Swaziland should fast-track the passage of the Swaziland Broadcasting Corporation Bill to fully allow competition in the sector and eradicate the controversy linked to the continued existence of STA whose regulatory function has been transferred to SCCOM.

4.4 Moving to better heights: the establishment of BOCRA

Taking cognisance of the fact that the BTA only regulated the telecommunications sector, it became apparent that a converged regulator was a prerequisite for effective regulation of the ICT sectors in Botswana hence the establishment of BOCRA.²⁹⁹ It is clear that its

²⁹² Section 30 (a) .

²⁹³ Section 30 (b) .

²⁹⁴ Section 30 (c) .

²⁹⁵ P L McCormick (n285 above) 413.

²⁹⁶ Section 3 (1) Telecommunications Corporation (Amendment) No 16 of 1996.

²⁹⁷ Section 2 (1) .

²⁹⁸ Section 5 (17A) .

²⁹⁹ ITU (n277 above) 2.

establishment was driven primarily by events in the telecommunications sector and convergence.³⁰⁰ Emphasis was placed on technology neutrality in all services and this policy shift paved way for the converged regulator.³⁰¹ BOCRA as a converged regulator regulates all matters relating to ICT in Botswana.

BOCRA's mandate covers the regulation of telecoms, internet and ICT, commercial radio and television communications, broadcasting, postal services and related matters.³⁰² BOCRA is appointed by the Minister and has a duty, amongst other things, to monitor and seek ways to improve the efficiency of the communications sector and services provided by the Authority both for the benefit of consumers and licensed operators in the regulated sectors.³⁰³ BOCRA shall ensure that so far as is practicable, all the ICT services are provided throughout Botswana in a safe, reliable, efficient and affordable manner.³⁰⁴

BOCRA has a mandate to carry out such research to establish and update itself on the state of public opinion and consumer experiences with respect to the services provided by the regulated suppliers.³⁰⁵ It is mandated to establish and maintain effective arrangements for consultation about the carrying out of its functions with the consumers and users of regulated services.³⁰⁶ To crystallise the effectiveness of BOCRA it is obligated to establish advisory panels that give opinions in the interest of the Botswana people, government and all other persons including disabled, elderly youth or women.³⁰⁷

A key requirement in carrying out these responsibilities is the need to take regulatory decisions in an open, transparent, accountable, proportionate and objective manner and not show undue preference to any person or organisation.³⁰⁸ BOCRA is also entrusted with a responsibility of ensuring the convergence of technologies.³⁰⁹ BOCRA enables service and technology neutral license by providing only for service license and system or

³⁰⁰ ITU (n277 above) 3.

³⁰¹ ITU (n277 above) 5.

³⁰² ITU (n295 above) 6.

³⁰³ Section 5 (1) (d) The Communications Regulatory Authority Act No 19 of 2012.

³⁰⁴ Section 6 (1) .

³⁰⁵ Section 80 (1) .

³⁰⁶ Section 80 (1) (d) .

³⁰⁷ Section 81 (1) (4) .

³⁰⁸ Section 6 (2) .

³⁰⁹ Section 6 (2) (x) .

infrastructure licenses.³¹⁰ BOCRA has sole discretion to determine when to limit the number of licenses to be issued and when to require a competitive tendering process.³¹¹

BOCRA may limit the number of licenses which may be issued for any particular type of telecommunications services and has an obligation to publish in the Gazette its reasons for doing so.³¹² A license issued may only be revoked where the licensee breaches the Act or does not comply with any of the conditions of the license.³¹³ The revocation can only be effected once the licensee has been requested in writing to rectify such breach.³¹⁴ The establishment of BOCRA has created an enabling environment which supports convergence in particular across the telecommunications, broadcasting and postal sectors.³¹⁵

4.5 Regulation of competition in the ICT sector in Botswana

In the wake of globalisation, FDI has come to be recognised as one of the key factors in promoting economic growth and development. As part of the neo-liberal agenda many countries have also enacted competition laws in an attempt to be more attractive to FDI.³¹⁶ Competition laws aim at limiting unnecessary intervention or abuses of power in the marketplace by the state or private sector enterprises that adversely affect economic efficiency and consumer welfare.³¹⁷

In 2005, the government of Botswana passed a national competition policy whose main objective was to create an enabling environment for government to address anti-competitive practices and to enhance its capability to deal with domestic, regional and international competition law and related institutional framework.³¹⁸ The policy was

³¹⁰ ITU (n296 above) 7.

³¹¹ ITU (n304 above) 7.

³¹² Section 44 (1) .

³¹³ Section 86 (1) .

³¹⁴ Section 86 (2) .

³¹⁵ ITU (n305 above) 14.

³¹⁶ Z Kebonang 'A commentary on the new Botswana's Competition Act' 2011 (27) *University of Botswana Law Journal* 28.

³¹⁷ Z Kebonang (n310 above) 28.

³¹⁸ Z Kebonang (n311 above) 27.

deemed a prerequisite because it provides, through competitive markets, the best means of ensuring that the economic resources are put to their best use by encouraging enterprise efficiency and widening choice.³¹⁹

The policy recognised the role played by sector or industry specific regulator such as the BTA and it was envisaged that all sector specific regulatory bodies fall under the ambit of the competition law.³²⁰ In 2009, the BCC was created to deal with all competition matters within Botswana.³²¹ BOCRA is obligated to refer all matters that may arise in the discharge of its functions under the Communication Regulatory Authority Act to the BCC.³²² BOCRA has developed a MoU with the BCC to ensure that they deal appropriately with issues that may impact both their jurisdictions.³²³ This enhances effective regulation of the telecommunications sector.

The MoU recognises the separate areas of primacy of expertise and seeks to ensure that the two organisations collaborate appropriately in the best interests of the Botswana economy.³²⁴ BOCRA and the BCC have established a mechanism through which they can maintain regular contact regarding the exercise of their respective responsibilities.³²⁵ It is prudent that where the BCC proposes to investigate a matter which involves an enterprise which is in other respects subject to the jurisdiction of a BOCRA, the Competition Authority shall notify BOCRA of the proposed investigation.³²⁶

4.6 International best practice on telecommunications licensing

Evidence suggests that technological advancement necessitated the need for revising the regulation of the communications industry and aligning with international best practice for effective regulation of the industry. Convergence is one of the most important recent trends

³¹⁹ Section 4 (1) National Competition Policy for Botswana, 2005.

³²⁰ Section 8 (1) (d) .

³²¹ ITU (n309 above) 6.

³²² Section 89 The Communications Regulatory Authority Act No 19 of 2012.

³²³ ITU (n315 above) 14.

³²⁴ ITU (n317 above) 14.

³²⁵ Section 73 (3) The Competition Act No 19 of 2009.

³²⁶ Section 73 (4) .

in the ICT sector and it has changed how services are delivered and blurred the lines between fixed and mobile services.³²⁷ This is because convergence and NGN have eroded traditional marked boundaries and have heightened the importance of neutrality and flexibility in authorisation regimes.³²⁸

4.6.1 The unified licensing approach

Regulators around the world consider the migration to the unified licensing framework as the best mechanism to not only address the regulatory challenges associated with convergence but also as a means of harnessing the new opportunities and realities created by broadband.³²⁹ To ensure that the transition to a converged licensing regime fosters a level playing field among all competitors, countries have introduced new licensing approaches and opted for different models. The main models of a unified licensing framework are usually categorised as follows³³⁰:-

i. NFP

It relates to the provision of any element or combination of physical infrastructure used principally for or in connection with the provision of content services and other application services but not including customer premise equipment;³³¹

ii. NSP

This licensing approach entails the provision of a service for carrying information in the form of speech or other sound, data, text or images by means of guided or unguided electromagnetic energy but not including services provided solely on the customer side of the network boundary;³³²

³²⁷ ITU “Licensing for Convergence and Next Generation Networks” available at <http://www.ictregulationtoolkit.org/3.8> (accessed on the 3rd April 2016) .

³²⁸ ITU (n321 above) .

³²⁹ World Bank (2014) ‘A Review of the ICT Regulatory Framework in Botswana’ available at <http://www.bocra.org.bw/sites/default/files/documents/A%20Review%20of%20the%20Regulatory%20Framework%20in%20Botswana.pdf> (accessed on 27 May 2016).

³³⁰ World Bank (n323 above) 27.

³³¹ World Bank (n324 above) 27.

³³² World Bank (n325 above) 27.

iii. ASP

This license approach allows for the reselling of electronic communication services to end users.

iv. CSP

This licensing approach allows for the provision of service offered for sound, data, text or images whether still or moving except where transmitted on private communication.

These efforts generally have three key elements which include the introduction of the principles of technology and service neutrality and open access, the establishment of greater flexibility in key aspects of licensing and authorisation, particularly the authorisation of a wide range of networks and services under a single license and lastly greater reliance on broad competition law and regulation.³³³ These authorisations are technology and service neutral and they allow licensees to provide all forms of services under the umbrella of a single authorisation, using any type of communications infrastructure and technology capable of delivering the desired service.³³⁴

4.6.2 The licensing regime in Botswana

In line with international best practice, the licensing regime in Botswana was reviewed to cater for technological convergence in telecommunications and broadcasting networks and the main objective being to provide a more conducive environment for market growth and improvement by achieving efficiency of convergence, technology neutrality, ease of market entry and increased competition, consumer choice, diversification, economic inclusion and open access.³³⁵ The unified licensing framework stems from the vigorous research done by World Bank on economic diversification and competitiveness with specific reference to reviewing the ICT Regulatory Framework.³³⁶ Pursuant to international

³³³ World Bank (n326 above) 27.

³³⁴ World Bank (n327 above) 28.

³³⁵ Article 2 ICT Licensing Framework of Botswana 2015.

³³⁶ BOCRA ‘Consultation Paper on the Unified Licensing Framework (ULF) for Botswana (2014) available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjYIdeMkYTNAhVhF8AKHcIDC7IQFggdMAA&url=http%3A%2F%2Fwww.bocra.org.bw%2Fsites%2Fdefault%2Ffiles>

trends, the Botswana Licensing Framework provides for three major licensing categories which are the following:-

(a) NFP

These are licensees who shall own, operate or provide any form of physical infrastructure used principally for carrying service and applications and content.³³⁷

(b) SAP

These are non-infrastructure based service providers and they will provide all forms of services and applications to end users using infrastructure of the Network Facilities Provider.³³⁸

(c) CSP

The Licensee will provide content material in the form of speech or other sound, text, data, images whether still or moving solely for broadcasting (TV and radio).

4.6.3 The licensing procedure

The key principle that is adhered to in the implementation of the revised licensing framework is that the market demand must determine the number of licenses to be granted in all the license categories except in areas where there is limitation of resources such as radio spectrum.³³⁹ The procedure that is followed in the implementation of the licensing framework is that any operator is allowed to choose to be in more than one category but is expected to obtain applicable licenses of all the categories they choose to operate in.³⁴⁰ There is no distinction between mobile or fixed services; instead licensees are categorised based on whether they provide for instance whether a NFP,SAP or CSP.

[%2Fdocuments%2FCONSULTATION%2520PAPER%2520ON%2520THE%2520UNIFIED%2520LICENSING%2520FRAMEWORK%2520\(ULF\)%2520FOR%2520BOTSWANA.pdf&usg=AFQjCNH_7giyAqDOwBrpzciaeK0rHVcmKw&sig2=wECNVRemDua0LSsyFD-9IA](#) (accessed on 25 April 2016).

³³⁷ Article 4.1 .

³³⁸ Article 2 .

³³⁹ Article 6 .

³⁴⁰ Article 6.

4.6.4 Mapping of old license to current authorisations

The migration of old licensees to current framework is guided by the principle that the old licensees must remain on the same or more favourable terms and conditions.³⁴¹ The conditions of the current licenses are discussed and negotiated with each licensee in the market to ensure that all aspects are covered.³⁴² The licensing framework also indicates the requirements to be met when applying for a particular licensee which is provided for in details in the guidelines.³⁴³ Existing licenses are given the option to migrate to the new authorisation or to continue to offer services under their existing authorisations until their terms expire.³⁴⁴

4.7 Is competition or sector- specific regulation the best option for regulating the telecommunications sector?

The ICN provides that sector-specific regulation should not be imposed when market forces and competition law remedies are sufficient to address the problem at hand.³⁴⁵ Additionally, even when sector-specific regulation is in place, competition authorities have an essential role to play not only in enforcing competition rules, where they are violated but also providing valuable advice concerning and advocating for , the most effective means for initiating and sustaining competition in the sector.³⁴⁶

³⁴¹ ITU 'Licensing for Convergence and Next Generations Networks' available at <http://www.ictregulationtoolkit.org/3.8> (accessed on 3 April 2016).

³⁴² Article 7 .

³⁴³ The Guidelines for Submission of Application for License under the ICT Licensing Framework of 2015 for Botswana.

³⁴⁴ ITU (n335 above) .

³⁴⁵ ICN 'Report of the Working Group on Telecommunications services' (2006) available at https://www.google.com/search?newwindow=1&safe=active&biw=1266&bih=608&q=10.%09International+Competition+Network+%282006%29+%E2%80%98Report+of+the+Working+Group+on+Telecommunications+services+%26+oq=10.%09International+Competition+Network+%282006%29+%E2%80%98Report+of+the+Working+Group+on+Telecommunications+services+%26+gs_l=serp.3...13593.16933.0.17980.2.2.0.0.0.1635.1635.8-1.1.0...0...1c.1.64.serp..1.0.0.0.x6Suk03Im-0# (accessed on 10 May 2016) 10.

³⁴⁶ ICN (n339 above) 24.

Sector-specific regulation in telecommunications generally takes the form of proportionate asymmetrical regulation whereby the bulk of regulatory burdens are imposed on incumbent operators.³⁴⁷ Such regulatory burdens tends to be *ex ante* in nature, which is often an effective way to promote competition in sectors in which it does not currently exist or is not yet sustainable.³⁴⁸ Depending on specific circumstances and institutions, jurisdictions should promote competition in the telecommunications sector³⁴⁹.

Competition is enhanced by promoting co-ordination between the regulator and the competition authority to avoid conflict involving any overlapping jurisdiction. This is done by entering into co-operation agreements and assigning agency responsibility. This has been achieved in Botswana as BOCRA signed a MoU with the BCC. It is the prerogative of competition authorities when exercising their enforcement role to ensure that they protect competition in the telecommunications sector by taking appropriate enforcement action against anti-competitive conducts and build effective relationships with the regulatory agencies and co-ordinate their efforts in the review of particular matters, including with respect to emerging services based on new technology and innovation.³⁵⁰ Hence, effective regulation of the telecommunications sector needs the utmost co-ordination of both authorities which will provide the desired result and promoting consumer interests. The co-ordination of BOCRA with the competition authority is vital for effective regulation of the ICT sector in Botswana.

4.8 Is the new ICT policy framework a better approach for effective regulation?

In light of the regulatory issues that flow from convergence, it is prudent for BOCRA to adapt to technological advancement and pursue the unified licensing approach. Information and communication technologies in ICTs have been widely recognised to empower people

³⁴⁷ ICN (n340 above) 24.

³⁴⁸ ICN (n341 above) 24.

³⁴⁹ ICN 'The Role for Competition in the Telecommunications Services Sector' available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc320.pdf> (accessed on 15 May 2016) 1.

³⁵⁰ ICN (n343 above) 1.

and stimulate socio-economic development in developing countries.³⁵¹ A number of empirical studies have found that investment in telecommunications infrastructure is a strong weapon of economic growth. This finding suggests that in order to accelerate economic development, countries need to create policy environments conducive to a high level of investments in the telecommunications sector.³⁵²

Policy and regulations are important channels through which the state can influence economic activity and implement effective regulation.³⁵³ In line with its mandate BOCRA seeks to create a conducive environment for ICT development in Botswana by reviewing the licensing framework to allow for investment and competition. Effective regulation rests on the development of a regulatory governance structure that constraints arbitrary administrative action and thereby encourages private investment and regulatory incentives that promote efficiency as well as investment.³⁵⁴

Therefore, service providers should be able to meet demands by users and this is primarily facilitated by regulatory environment that allows service providers to innovate, expand the reach of networks and offer value propositions on use of their products services.³⁵⁵ This is aggregated by the fact that previous framework could not accommodate emerging players, hence the need to usher in a framework that creates ease of entry by interested investors and players while at the same time creating value for the consumers, the market and entire economy. The New Licensing Framework is a great step in aligning with international best practice, encouraging investment, fostering economic growth and creating a conducive environment for doing business.

4.9 Conclusion

³⁵¹ Unpublished A Van Gorp 'Increasing Regulatory Capacity of the Region in Shaping National ICT Policy in Southern Africa' Unpublished Doctorate Thesis, The Pennsylvania State University : College of Information Science and Technology , 2008 1.

³⁵² P Cowhey and M M Klimento (n199 above) 16.

³⁵³ Unpublished A Van Gor (n345 above) 1.

³⁵⁴ S Shanapinda 'Regulatory Effectiveness: Stakeholders perceptions of Namibia's Communications Regulatory Framework' (2015) 14 *The African Journal of Information and Communication* 9.

³⁵⁵ The ICT Licensing Framework for Botswana (2015).

This chapter interrogated the Botswana telecommunications framework in order to draw lessons for Swaziland on effective regulations. This is propelled by the fact that Swaziland recently liberalised the telecommunications sector and established SCCOM to regulate the sector. The overarching lesson drawn is that there is a need for a robust ICT policy framework in place that addresses issues of liberalisation, abolishing monopoly and other government policy concerns such as using the telecommunications sector to enhance economic growth and diversification. The policy must cater for technological changes in the sector.

Another lesson is that in order to allow new entrants into the market there must be a comprehensive licensing framework that firstly addresses the mapping of old licenses to new licensing categories that adhere to best international practice on convergence licensing. It must also state the types of licenses to be provided and the requirements for submission of an application for a license to enhance certainty and encourage investment in the sector. The success of policy interventions and the extent of the regulator's independence is crucial in improving sector performance through investment in the sector.³⁵⁶ Good governance contributes to regulatory outcomes which effectively enhances government's policy. Any governance mechanism to be effective, regulatory commitment is the key, through stimulating private sector investment and enhancing sector performance.³⁵⁷

³⁵⁶ World Bank (n328 above) 15.

³⁵⁷ Unpublished A Van Gorp (n313 above) 10.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The study has revealed that an independent regulator is a prerequisite for effective regulation of the telecommunications sector as it enhances transparency, predictability and monitors convergence and technological evolution to adapt to evolving regulatory frameworks.³⁵⁸ The independence of the regulator is essential in relation to issues such as the credibility of the regulator, the enforceability of its decision and investor confidence in the regulatory system.³⁵⁹

³⁵⁸ World Bank 'Mobile License Renewal : What are the Issues ? What is at Stake?' available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiJy7iKqvDMAhVrAsAKHSLbDH4QFggdMAA&url=http%3A%2F%2Flibrary.worldbank.org%2Fdoi%2Fabs%2F10.1596%2F1813-9450-3729&usq=AFQjCNGKSc-f57Af-kd03y7FdJm3FrIWZQ&sig2=Sx-WbIX4YEuryYenFH-Ukw> (accessed on 23 May 2016).

³⁵⁹ L Mokgosi ' The Telecommunications Regulators' available at <https://www.wits.ac.za/media/migration/files/telelaw6.pdf> (accessed on 23 May 2016).

It is undisputable that FDI has assumed an increasingly important role in the provision of telecommunications services.³⁶⁰ Effective regulation of the telecommunications sector is vital for Swaziland as it could lead to the inflow of FDI and investment contributing to economic growth and development, fostering competition and strengthening consumer welfare. Allowing new entrants will lead to significant benefits for the sector and improve performance. Regulation of a monopoly once a government has liberalised the sector is not an option, as liberalisation is a catalyst of competition. Hence it is vital that SPTC and Swazi MTN Ltd (Pty) Ltd must be in competition and the monopoly of the mobile sub-sector be abolished. The issuance of converged licences to the current operators is vital as is the introduction of a new competitor that will enhance competition, innovation, improve service delivery and maximise consumer welfare.

5.2 Recap of the thesis statement

The research is premised on the assumption that the liberalisation of the ICT sector in Swaziland has not achieved the desired goals of enhancing competition and allowing new entrants into the sector. This is evinced by the fact that the SCC has failed to address the JVA to the detriment of consumer welfare. The monopoly of Swazi MTN Limited (Pty) Ltd is a hindrance to competition.

5.3 Summary of findings

The first chapter of this study provided a brief introduction of the regulation of the telecommunications sector in Swaziland. It exposed the anti-competitive environment created by the JVA which restrains competition and stifles consumer welfare. It further questioned the independence of the SCC as exhibited by its failure to conduct investigations on the anti-competitive JVA. Consequently, the second chapter examined

³⁶⁰ K Kalotay 'The Rise of FDI in Telecommunications Services of Developing Countries' (2004) 5 *World Investment and Trade Journal* 811.

the tenets of telecommunications regulation and juxtapose with regulation of competition. The second chapter found that an independent regulator is critical in sector-specific regulation in order to foster competition, enrich consumer welfare and adapting to technological advancement. This set the basis for chapter three, which evaluated the legal and regulatory framework governing telecommunications regulation in Swaziland.

A number of challenges were raised in examining the current legislative and regulatory system underpinning the telecommunications sector in Swaziland. The first challenge is that the SCCOM does not have power to issue binding recommendations concerning effective regulation. Consequently no regulations are in place to address critical issues such as issuing of licenses to new entrants. The market is still in the hands of the monopoly company – Swazi MTN Limited (Pty) Ltd to the detriment of consumers. The shortcomings of the legislative and regulatory system set the basis for chapter four which interrogates the legislative framework underpinning the ICT sector in Botswana.

To enhance consumer welfare and drive economic growth the Botswana government liberalised the ICT sector. The Botswana government identified the ICT sector as a tool to drive economic growth in the SADC region. The BCC is endowed with jurisdiction in respect of competition matters, eradicating *forum* shopping wherein sector specific regulation is also endowed with concurrent jurisdiction. It was also found that it is vital that the abolishing of the monopoly in the ICT sector be expressly stated in the ICT framework. A comprehensive licensing framework is a pre-requisite in the ICT and that it is crucial for government corporations to be established and that be regulator be independent as was witnessed in Botswana when BTA did not give the government of Botswana the licence for the provision of mobile licence. For the ICT sector to thrive, it is vital for the sector to move with time and implement international best practice as has been witnessed in Botswana with the adoption of the new licensing framework which adopts the converged licensing regime.

5.4 Conclusion

Vigorous competition between firms is the lifeblood of strong and effective markets.³⁶¹ The effective implementation of competition law ensures a level playing field for all competing firms in order to stimulate efficiency and protect consumers.³⁶² An enabling legal and regulatory framework addressing the challenges faced by the ICT in the country is vital for the country to benefit from liberalising the sector. The development of the ICT has a socio-economic effect that can help accelerate the transformation of the country and improve its competitiveness. It is imperative that parliament passes the regulations that have been tabled before Cabinet to facilitate the full liberalisation of the ICT sector in the country. The passage of the regulations with the recommended amendments is vital as it will encourage competition by allowing for new entrants.

The introduction of competition will encourage innovation, investment, efficiency and the provision of quality goods and services to the benefit of consumers. It will thus lower internet rates making ICT services affordable to the Swazi nation. Adopting a regulatory framework that eliminates barriers to new entrants, stimulates competition and innovation in a converged environment is a prerequisite in a liberalised market.³⁶³ The general approach is to ensure fair competition in the supply of services.³⁶⁴ Co-operation between SCCOM and SCC is of vital importance to eradicate *forum* shopping and avoid conflict of jurisdiction. It is crucial for the authorities and the government to uphold good governance principles as strengthen governance contributes to improved regulatory outcomes.

5.5 Recommendations

Pursuant to the findings of this study, suggestions are hereby made to different stakeholders in addressing the challenges that are currently faced by SCCOM that hamper the effective regulation of the ICT sector.

³⁶¹ H Qaqaya and G Lipimile (n103 above) 79.

³⁶² H Qaqaya and G Lipimile (n355 above) 80 .

³⁶³ H Qaqaya and G Lipimile (n 156 above) 3.

³⁶⁴ H Qaqaya and G Lipimile (n357 above) 7.

(i) Repeal of the SPTC Act by Parliament

In light of the submissions and conclusion made in this study, it is apparent that the SPTC is stifling the effective regulation of the ICT sector and gives SPTC a comparative advantage to the detriment of any operator which in essence does not support thriving competition in the market. It is recommended that the Minister of ICT must submit to parliament through the legislative route a Bill and the Bill must include the following provisions:

- Abolishing the monopoly of the mobile telecommunications sector and to promote competition within the sector.
- A provision that separates the telecommunications, posts and courier services from SPTC in order to facilitate a vibrant competitive market.
- A provision that provides for the creation of three different companies, first a telecommunications company, secondly courier and postal services and lastly a company that will deal exclusively with the pricing of telecommunications or communications services and infrastructure. This will remove the function from SPTC and provide for a competitive environment for doing business.

The consequence of the above is that it will lead to the automatic termination of the JVA, giving the new company power to compete with Swazi MTN Limited (Pty) Ltd and in that way fostering, competition and maximising consumer welfare.

(ii) Amendment of the ECA

It is recommended that the ECA should be amended and it should provide for the followings provisions:-

- A provision compelling the Minister to take into account the recommendation made by SCCOM when issuing regulations;

- A provision that endows SCCOM with power to make binding regulatory frameworks (such as licensing framework) on issuing of licenses that are directly linked to effective operations of the ICT sector in the country;
- A provision that will establish the advisory panels which will give opinions in the interest of all stakeholders in the sector.
- The removal of the sections that limits the financial independence of SCCOM that require SCCOM to request for consent from the Minister to procure a loan or invest its revenue.

(iii) Re-consideration of the Draft Electronic Communications Licensing Regulations 2015

It is submitted that the Draft Electronic Licensing Regulation 2015 that have been tabled before the House of Assembly should be re- considered and take into account international best practices that it is of vital importance to state, the terms and conditions for the issuance of a licence that an operator must meet for consideration of the application.

(iv) Action by SCCOM

It is also recommended that SCCOM should act in concurrence with the principles of good governance to effectively regulate the ICT sector in the country. Furthermore, SCCOM must ensure the following;-

- Submit all its recommendations to the Ministry of ICT, concerning its challenges and recommendations for passing of regulations. This will in turn promote the efficiency of SCCOM

- Foster co-operation between SCC and itself. This can be attained by signing of a MoU that will delineate the jurisdiction of each authority, avoid *forum shopping* and enhance co-ordination amongst the authorities;
- Issue converged licenses to operating companies in the telecommunications sector that are providing phone or data services which are SPTC and Swazi MTN Limited (Pty) Ltd;
- Once the licensing regulations are passed, allow for new entrants subject to spectrum availability, to allow for competition and investment in the sector. The issuance of a converged licence to a new player, should be done through an open tendering system that will improve transparency in the process.
- Where the number of licences is to be limited , SCCOM must publicise in the Gazette its reasons for doing so;
- Ensure that its acts independently without political interference;
- SCCOM must also comply with the provisions of the ECA to the extent that it establishes company that will set the rates for the infrastructure.

(v) Action by Minister

The Minister of ICT must appoint the appeals board that will hear review applications from aggrieved individuals.

(vi) Action by the civic community

It is submitted that the civic community should take cognisance of the education and information programmes provided by SCCOM that help to develop and strengthen consumer protection in the ICT sector. This will enable the public to know their rights and the procedures to follow on pursuing any complains or challenges they have with an incumbent operator thus enhancing effective regulation.

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THESIS

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