Strengthening of economic and trade related capacities and competences in SADC

The SADC Communications Environment

An Assessment of Communications Policies, Laws and Regulations in SADC Member States

P r e s e n t e d t o

GIZ – Deutsche Gesellschaft für
Internationale Zusammenarbeit GmbH

Germany / Botswana

October, 2013

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The SADC Communications Environment: An Assessment of Communications Policies, Laws and Regulations in SADC Member States

Short-term Report

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Foreword

The services sector makes up half of GDP in most SADC Member States. Policies that tend to improve the efficiency of the service sector are thus highly significant for economic growth. The services sector is also a key contributor to national competitiveness and development. Industries that do not have access to world-class telecommunications, transport and financial services cannot compete internationally; and societies that suffer from poor health and education systems cannot develop.

International trade and investment plays an increasingly important role in the sharing of knowledge and promotion of competition within the service sector. Trade in services has also become an important source of export revenues and investment capital for most countries, including many developing and least developed countries. Service negotiations specifically try to maximise these gains by removing unnecessary barriers to trade and facilitating regulatory cooperation across borders.

SADC Member States are involved in several parallel services negotiations at the multilateral (WTO GATS) and regional (SADC and also COMESA or EAC) levels, as well as through the Economic Partnership Agreement (EPA) negotiations with the EU. Although the overriding objective of these various negotiations is similar – to reduce barriers to trade in services (or at least improve the transparency and certainty of existing regulations) – the focus, timeframe and modalities of each agreement are very different. This presents SADC with a complex and sometimes confusing set of strategic options, which need to be considered, in developing a cohesive and appropriate approach to service negotiations and liberalisation.

GIZ recognises the importance and complexity of these negotiations and has identified the SADC services agreement as a priority area for technical support within the GIZ programme “Strengthening of economic and trade policy capacities and competences in the SADC”. In the first phase of this programme (11/2010 – 12/2012), the Consortium consisting of GFA Consulting Group and DNA Economics has provided targeted assistance to the SADC Secretariat together with GIZ to facilitate the adoption of an appropriate negotiating framework and process. With this support, the SADC Protocol on Trade in Services was signed by Heads of State in August 2012 and negotiations on the liberalisation of six priority sectors were launched in April 2012. Phase I of the programme ended 31 December 2012.

The second phase of the programme runs from January 2013 to December 2015. The key objective of the services proposed by the Consortium in the second phase of the programme is to assist SADC and the Member States in the conclusion of the first round of SADC negotiations on the liberalisation of the six designated priority sectors.

SADC Member States are currently negotiating liberalisation commitments on trade in services in six priority sectors (communication, construction, finance, energy related, tourism and transport services). Member States have agreed to follow the GATS architecture of scheduling which, among other features, requires specific commitments in the four modes of supply. Additionally, Member States have agreed to offer each other better liberalisation commitments than GATS.

Policy makers in the region appear to share a general understanding of the benefits of an open and competitive communications infrastructure. However, while the central role of ICT for economic development is generally accepted, many countries in the SADC have not adopted fully pro-competitive regulations in this area, ignoring the negative multiplier effects that restrictive policies may have on other economic activities.

In the context of the negotiations, the GIZ/GFA Trade in Services Project has commissioned background studies on the six priority sectors.

In August 2012, the LINK Centre at the University of Witwatersrand (South Africa) was contracted by GIZ to produce this study on the SADC communications environment. The purpose of the study is to compile and complement existing information on trade in communication services with a view to assisting SADC Member States' preparations for the forthcoming regional negotiations on the communication sector.

Chapter 2 of the study ('The Making of Regional Digital Economies: Themes and Approaches in Policy and Regulation') was written by Luci Abrahams; Chapter 3 ('The Communications Environment in the SADC Region') was authored by Luci Abrahams and Charley Lewis; and Chapter 4 ('Country Profiles' - one for each of the 15 SADC member states) was researched and written by Charley Lewis.

1 EXECUTIVE SUMMARY

In the period 1996 to 2013, ICT infrastructure, services and content - in particular electronic communications services (telecommunications and broadcasting) - have come to be seen as facilitators of growth, contributing to the improvement of welfare, enabling traditional merchandise trade, as well as offering new trade opportunities.

The benefits of the global telecommunications revolution presents opportunities for economic transformation in the broad services sector, as well as in the agricultural sector, both of which make proportionately large contributions to GDP in the countries of the SADC region. Mobile telecommunications, electronic data communications on the Internet and the shift to a digital broadcast environment make economic services and transactions relatively accessible to low-income users, high-income users, large firms and SMEs alike, although local access and usage prices are still high compared to world prices. The high price for fixed Internet access on the continent has seen a shift to mobile Internet access via smart phones and tablet devices. The experience of the African continent, and global trends, indicate that cycles of innovation in ICT infrastructure, e-commerce and e-services are fostered by competitive markets for infrastructure, services and content.

SADC Member States seek to take advantage of the opportunities offered by ICT-related trade and the benefits this can offer to a country's economy. However, global and regional competition to attract investment for ICT-related trade is fierce. SADC Member States need to take further steps to liberalise and advance their telecomms and broadcast markets, in order to build e-commerce and digital economies. Therefore, along with various institutional, legal and regulatory measures, SADC Member States need to undertake regional and multilateral commitments to make their ICT environments more attractive to investors and to meet consumer demand.

The report is divided into three sections.

1.1 The Making of Regional Digital Economies: Themes and Approaches in Policy and Regulation

The second section of the report, therefore, broadly introduces the theory pertaining to the influence of the sector on development, noting the character of the sector as an ecosystem in which the actions of various stakeholders can provide foundations for advancement; the importance of global trends in privatisation, market liberalisation and competition, as well as in technological and services innovation, with respect to facilitating economic development in both developed and developing countries. Analysis of the emergence of the WTO regime is briefly discussed. The theoretical discussion is supported by reference to country case studies with African relevance including work on e-transformation.

The literature investigating and analysing the relationship between the availability of telecommunications infrastructure and services on the one hand and economic growth on the other hand is considered in some depth. Economic impact studies demonstrate multiple economic impacts, including the causal relationship between liberalisation and the introduction of effective competition in telecomms markets on the one hand and productivity and quality improvements on the other hand. The evidence relating to the appropriate sequencing of ICT sector reform suggests that liberalisation and the introduction of competitive markets produces greater positive impacts than does privatisation. In respect of current technology trends, the literature shows the need for policy and regulatory reforms to encourage advanced telecomms and broadband evolution, including through the development of national broadband strategies and plans in the context of competitive markets.

These contributing factors suggest the need for a broader frame of reference for future development of the broad electronic communications sector than the more narrow historical frame set in the 1994 GATS agreement or the 1996 Reference Paper on Basic Telecommunications. Global trends in electronic communications policy and regulation have inclined towards alignment with the WTO commitments, even where countries have not signed up to the commitments. This is partly because of the ongoing influence of the WTO trade agreements, combined with the progressive application of the ideas contained in the GATS, its annexes and the regulatory reference paper on basic telecommunications, because of the perceived benefits of the broad principles and regulatory approaches.

1.2 The Communications Environment in the SADC Region

The third section of the report presents a regional economic overview and country economic and electronic communications sector profiles, including data on the share of services in the economy, and on Internet and broadband access which represents the future of the communications services sector.

It provides a summary perspective across all SADC Member States in respect of each of the five focus areas for telecommunications, broadcasting and audio-visual services, namely (i) the market structure, (ii) regulatory regime and state of play, (iii) level of competition, (iv) state of liberalisation and (v) international commitments.

Finally, the section provides overall conclusions and recommendations designed to offer ideas as a baseline for the SADC negotiations on the liberalisation of communications services.

It may be argued that a review of the commitments made by countries, compared with actual practice of SADC countries, may reveal that commitments are few, yet policy and regulatory practice has tended towards either partial or open competition. It may be further argued that, while many limitations to full competition still exist amongst countries in the region, most countries have increased the number of firms participating in electronic communications markets compared to a decade ago; have regulated interconnection more or less effectively; have introduced forms of universal service obligation that do not create significant barriers to competition; and have a significant degree of transparency in licensing decisions. Those aspects of the WTO commitments which may be less well advanced in the SADC region are the degree of regulatory independence from suppliers of services; and the regulation of scarce resources such as numbers, rights of way and frequencies. The current phase of negotiations should advance the state of liberalisation and competition, with due attention to advancing modes of supply and limiting restrictions based on legal status, investment and nationality. Such negotiations should advance the participation of local firms in electronic communications markets, not only the participation of globalised firms. Some degree of insight into individual country practices will be gained through this study, though it is important to note that this is a baseline study which requires continuous updates.

1.3 Country Profiles

The fourth section contains 15 detailed country profiles, one for each of the SADC member states.

Each country profile is split into four major sections, viz: telecommunications, broadcasting, the state of liberalisation, and WTO regulatory reference paper readiness.

In respect of each of telecommunications and broadcasting a number of issues are reported on. These include: the licensing framework and its compliance with the WTO W/120 guideline; the market structure, including market share and ownership of the major providers (where such information is available), including foreign entities; the regulatory regime, including restrictions on licensing and market access, and any restrictions applicable to foreign entities; the level of competition, the prevalence of anti-competitive conduct, and the existence and competence of a competition authority.

The degree of liberalisation in relation to WTO commitments is then assessed for each country.

Finally, each country's level of compliance with the WTO Regulatory Reference Paper is assessed, and a regulatory scorecard heat map is produced.

1.4 Recommendations

GATS commitments for WTO Member States include cross-border supply for non-resident service suppliers; consumption abroad; commercial presence; presence of natural persons. GATS commitments are further required to be set out for specific sectors, including limitations on market access; the national treatment obligation; and additional commitments, for example licensing.

In respect of telecommunications, the WTO Reference Paper on Basic Telecommunications requires attention to competitive safeguards, interconnection requirements, universal service provision, public availability of licensing criteria, regulatory independence, allocation and use of scarce resources.

Negotiating objectives include: technology neutrality; encouraging new and improved offers from LDCs; addressing exclusive rights, economic needs tests, restrictions on the types of legal entity and limitations on foreign equity; commitment to provisions of the telecommunications Reference Paper; elimination of exemptions to most-favoured nation treatment.

The country studies demonstrate that many, but not all, SADC Member States have liberalised their telecommunications markets, particularly mobile communications markets, and, to a lesser extent, their broadcasting markets. All countries have at least one state or public broadcaster, with a preponderance of state broadcasters. Many have multiple commercial and community broadcast providers (both TV and radio), while others have limited commercial or community broadcast markets, a distinct weakness for future regional integration of goods and services markets, particularly in terms of the long term social and economic benefits of a transition to digital broadcasting. Digital broadcasting can contribute to stronger social integration across the region encouraging greater cultural exchange, cross-regional advertising and other means of economic facilitation still requiring innovation.

The data shows that, despite limited commitments in terms of GATS, the regional trend is towards liberalisation of communications services markets, and that while restrictions do exist there is allowance for cross-border supply, consumption abroad, commercial presence of non-resident suppliers and presence of natural persons. Competition in services markets is held back to some extent by the high cost of entry into infrastructure markets and by weak regulatory environments where regulators have not developed a medium- to long-term (3 to 5 year) agenda for concerted market liberalisation and ongoing sector reform in order to meet local and regional demand for electronic communications goods and services. This hampers inter-regional trade in communications services, and the rollout of broadband Internet and ICT applications as supporting services to other services markets, and hence greater regional economic integration.

Much of the detailed information about positions on GATS commitments, alignment with the WTO Reference Paper on Basic Telecommunications, and custom and practice on key issues for negotiation such as technology neutrality, are buried deep in legislation and other documents, some of which are not available on the Internet.

Thus, further to the study presented here, an important preparatory activity for the negotiations round 2013 – 2015 would be for each SADC Member State to

(1) document their position clearly with regard to GATS commitments, the Reference Paper and ancillary matters as set out above; and

(2) for the relevant policy maker and regulator for each Member State to consider what legislative and regulatory reforms are required in the short- to medium- term (next 1 to 3 years).

Telecommunications

1.4.1 Market structure: Most Member States need to shift fully from a vertical to a horizontal market structure, leading to a harmonised regional electronic communications market that supports convergence in technologies, markets and services. Such a shift can be supported by amendments to existing legislation, where required. Such a shift can also be supported by regulators applying a horizontal licensing regime that promotes convergence in the broader electronic communications sector over time, eventually promoting convergence in telecommunications, broadcasting and other Internet-based e-services. In particular, attention should be given to encourage the growth of mobile broadband markets across the region as this presents the best possible platform for universal access to Internet. Mobile broadband also presents an excellent platform for communications services to enable economic development and regional integration of agricultural and services markets, through mobile and Internet-enabled e-commerce, e-business and e-government.

1.4.2 **Regulatory regime and state of play:** The key shift required here is towards greater regulatory independence (structural, functional and financial), in order that communications sector regulators can develop a detailed agenda covering all the major elements necessary for sector reform and addressing all the major mandate areas for electronic communications sector regulators, including creating balance between sector development and encouraging greater competition on the one hand, and promoting consumer welfare on the other hand. Particular issues that require serious regulatory attention are: the set of issues raised in the WTO Reference Paper on Basic Telecommunications, promoting competition throughout the key segments of the value chain for electronic communications infrastructure and services, promoting advanced (broadband) communications infrastructure and addressing the associated spectrum and other resource requirements, e-commerce and cybercrime and associated matters, all forms of Internet-enabled social and economic engagement, and regulation of costing and pricing.

1.4..3 **Level of competition:** The SADC Member States should debate the implications and advantages of moving from partial competition to full competition in mobile markets, as well as what if any opportunities exist for competition in backbone infrastructure including broadband infrastructure markets. This is necessary because competition in electronic network infrastructure markets influences competition in communications services markets. Competition authorities should take a more active interest in general competition matters as they relate to the electronic communications sector. The promotion of robust competition authorities in every domain will be important for the future of electronic communications sector reform, as competition commissions and tribunals are designed to address competition issues of broad application that the sector regulator may not be mandated to address in law.

1.4.5 **State of liberalisation:** Requests for market opening and initial offers for market opening should take into account issues of market entry for operators in any country in the region to operate in any other country in the region (which may require a changed regulatory approach to licensing) in the context of market entry for the following market segments: telecoms operators (fixed and mobile), other telecoms firms (offering dark fibre or lit fibre or other infrastructure or value added services), Internet service providers (ISPs), wireless applications services providers (WASPs), and more.

1.4.6 **International commitments:** Most Member States could make commitments without going against practice on the ground, as there is already a considerable degree of alignment with GATS. There is significant opportunity for application of the meaning of the commitments in the mobile and broadband markets. There is also significant opportunity for greater alignment with the WTO Reference Paper on Basic Telecommunications. Many of the issues raised in the report point to the need to meet the terms of the reference paper in the shortest possible time, because communications infrastructure and services markets are moving into a more advanced era of services innovation.

Broadcasting

1.4.7 Market structure: Broadcast markets are generally highly localised with few foreign operators except for DStv. SADC Member States should conduct research on how to open up their broadcast markets in the context of migration to digital broadcast technologies and services, and should aim to understand what effect digital migration will have on current analogue stations and operators, who will not be protected against signal interference from 2015. Too little progress has been made in this respect, with the result that the existing analogue market could be undermined by spectrum interference, while a new digital broadcast market is yet to be formed. CRASA should conduct research on the implications of digital migration for the regional broadcast market.

1.4.8 Regulatory regime and state of play: Broadcasting has been a “Cinderella sector” from the regulatory point of view, neglected with respect to the role of regulators in promoting this very important sector for cultural exchange, democratisation and cross-regional advertising. Attention should be given to issues of cross media ownership and control, considering what advantages can be gained from greater foreign (regional/international) investment in the future digital broadcast sector, both radio and TV, and what legitimate limitations to such ownership and control could be applied. Attention should also be given to pushing forward to successful digital switchover in all Member States before the ITU cut-off date of 2015 for protection of analogue signals. Broadcast spectrum and digital dividend regulation is of significant importance. Regulators should conduct research on the opportunities for cross-border supply presented by digital broadcasting and CRASA could prepare a regional regulatory reference paper on the issue. A shift from state to public broadcasters needs to be encouraged by policy-makers and regulators across the region and by CRASA. Such a move needs to be supported by the integration, where this has not already been implemented, of broadcasting regulation under the broader umbrella of a single communications sector regulator, and the assurance of greater independence in the regulation of broadcasting services.

1.4.9 Level of competition: The commercial radio and TV segments show a reasonable degree of competition in many, but not all, countries of the region, though the number of players in the market may be largely due to language preference and geographic availability. The main concern for the future of competition is the shift to digital broadcast markets across the region and the continued existence of a culturally rich broadcast market in the multiple languages of the region.

1.4.10 State of liberalisation: Policy and regulation with respect to issues of cross-border supply become more feasible, and, thus, important in the context of transition to digital broadcast services. Hence the issues pertaining to liberalisation need to be researched, considered and debated in the negotiations round. Requests for market opening and initial offers for market opening pertain to: market entry for operators in any country in the region to operate in any other country in the region, as well as market entry for the following market segments: commercial TV and radio; community TV and radio.

1.4.11 International commitments: The approach to meeting international commitments requires attention with respect mainly to the future reality of digital broadcast markets as the existence of the current analogue markets is limited.

Broadcasting transmission is country specific due to spectrum issues, but it has become necessary to address policy and regulation to issues of cross-border supply in the converged environment, on the understanding that the broadcast operator is licensed in the country of origin and in the country of transmission.

Other audio-visual

Some data on the other audio-visual sector is available from a search of the WTO services database and from the few published documents available, though information is not available for most countries and the information that is available is not current. Commercial markets for the "other audio-visual" services sector are small or non-existent in most SADC Member States, except South Africa. In the context of the shift to mobile broadband Internet and digital broadcasting, film and music content can be easily accessible via these technologies, opening a new era for the exchange of local content from the SADC region. In the services negotiations, attention should be paid to encouraging market access and cross-border supply, domestic regulation to promote development of this very important sub-sector, GATS commitments, emergency safeguards, government subsidies, and other relevant matters.

2 THE MAKING OF REGIONAL DIGITAL ECONOMIES: THEMES AND APPROACHES IN POLICY AND REGULATION

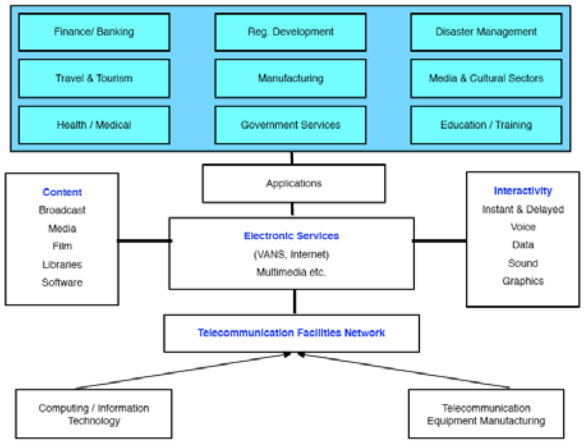
In examining the SADC communications environment and the applicable policy, law and regulation in the context of the WTO commitments, it is important to note that certain policy and legislative choices can lead to outcomes that enhance the influence of the broad electronic communications infrastructure and services sector (telecomms, broadcasting and other audio-visual sector) on economic development. This section of the report therefore broadly introduces the ideas pertaining to the influence of the sector on development, noting the character of the sector as an ecosystem[1] in which the actions of various stakeholders can provide foundations for advancement; the importance of global trends in privatisation, market liberalisation and competition, as well as in technological and services innovation, with respect to facilitating economic development on both developed and developing countries. Analysis of the emergence of the WTO regime is briefly discussed and additional readings are provided. The theoretical discussion is supported by reference to country case studies with African relevance including work on e-transformation.

2.1 Global trends: Transition from agricultural or industrial to digital services economies

The advancement of economies over centuries has been pushed forward by technological innovation of varying kinds. Technological innovation led, in the 20th century, to a highly mechanised global economy, supported by global telecommunications networks[2]. A broad view of the global trends in the changing character of economies in the mid-20th century shows a transition from agri-industrial economies towards services based economies, where the broad services sector contributed 60% to 70% to value added in developed and developing economies, except where agriculture still commanded a significant share of the economy. In the late 20th century, the world experienced the beginning of the transition from services based to information societies, where the proliferation of innovation in electronic communications advanced rapidly at the infrastructure level, at the applications and content level, and therefore at the services level. By the end of the 20th century, technological innovation in the electronic communications sector was capable of supporting business innovation across the broad services sector, influencing efficiency and growth in the global trade and services sectors[3], see Figure 2.1 below.

[1] Fransman, M. (2010). *The new ICT ecosystem: Implications for policy and regulation*, Cambridge University Press, Cambridge.
[2] Vu, 2011 citing Hardy, 1980: Vu, K. (2011). ICT as a source of economic growth in the information age: Empirical evidence from the 1996 – 2005 period, *Telecommunications Policy*, 35, pp 357 – 372.
[3] Melody, W. (2002). The Triumph and Tragedy of Human Capital: Foundation resource for building network knowledge Economies, *Southern African Journal of Information and Communication*, No 3.

Figure 2.1 Infrastructure and services sectors in the digital economy



Source: *Melody, 2002*

In the period from the mid-1990s to 2010, further advances in digital technologies presented opportunities for a shift from analogue to digital communications, revolutionising the services sector and thereby also the sectors it supports, namely manufacturing, construction, mining and agriculture. e-Business, e-commerce and e-government have utilised the digital revolution to expand markets, expand access to citizens, to reduce costs and to introduce forms of economic innovation that are reshaping the power and positioning of individual countries and economic regions within the global economy. Previously small countries, such as Finland and Singapore, have changed from being marginal, agriculturally-based economies to being important economic players in their particular regions of the globe with advanced communications capacities, at some points leading the way in the design of new devices (mobile phone devices, robotics in Finland) and new services (electronic courts and electronic government in Singapore). Notably, innovation in electronic communications is only one amongst many forms of technological innovation (biotechnology, nanotechnology research and applications design, process innovation, other). Nevertheless it is the one area of innovation that touches every economy and where economic regions, including the SADC region, have introduced institutions to promote further advances.

National regulators such as INCM and ZICTA (the Mozambican and Zambian regulators) and regional regulatory associations, such as CRASA (the regulatory association for Southern Africa), have recognised the need for national and regional regulatory bodies to guide and enable rapid development of the telecommunications and broadcasting markets in order for countries to make the shift to digital economies. However, the complexities of regulation at national level, required to leave behind the history of slow evolution of competition and services innovation, have presented regulators with multiple layers of challenges – firstly, to regulate the telecomms and broadcasting sectors in ways that ensure that they are able to offer a wide range of electronic services at competitive prices and secondly, to regulate the telecomms and broadcasting sectors in ways that ensure that the range of digital services and their levels of affordability can promote digital economies across the region. A digital economy is one in which all economic sectors are sufficiently supported by digital services; and where suppliers and consumers of digital services can transact online.

2.2 Role and benefits of ICT in national and regional economies

Observation of the large scale trends emerging in the relationship of telecomms and ICT to economies has led scholars to study specific views of telecomms and ICT as contributors to economic growth based on evidence from several decades. One particular study[4], reviewing the decade 1996 to 2005, summarises several ways in which ICT contributes to economic growth, including (i) ICT as a facilitator of greater access to knowledge for heightened labour productivity[5], (ii) ICT as a facilitator of improved access to information to encourage investment[6], (iii) the impact of investment in computerisation on firm productivity[7], (iv) the impact of ICT on the SME and the informal sector in India in improving both producer and consumer welfare[8], as well as (v) positive impact of ICT investment on growth[9], positive effects of mobile penetration on GDP[10] (), and positive effects of high levels of broadband penetration on growth[11]. He points out, however, that a wide range of other studies produced variable evidence for ICT as a contributing factor in economic development. It would appear that it is important to consider the period of review (since a later period appears to reveal greater evidence of impact), as well as the level of ICT penetration (higher levels of penetration appear to reveal greater evidence of impact). Thus the 2011 published study utilising data from 102 countries for the period 1996 – 2005, reports that the rapid ICT penetration achieved by 2005 (global PC penetration of 6 per 100 inhabitants, mobile phone penetration of 28 per 100 inhabitants and Internet penetration of 16 per 100 inhabitants) "strengthen(s) the hypothesis that ICT was an important source of growth" over this period[12]. The analysis finds that there is a strong causal effect between ICT penetration and economic growth. It draws the conclusion that countries should therefore encourage greater ICT penetration and specific strategies and actions to increase the effects on economic growth. In particular, countries should encourage Internet penetration, investment in broadband infrastructure and e-services as direct inputs to economic growth. It argues that countries with lower ICT penetration (let's say lower than the global average as at 2005) should be highly focused on promoting Internet and mobile access.

[4] Vu, 2011
[5] Vu, 2011 citing Quah, 2002
[6] Vu, 2011 citing Levine, 1997
[7] Vu, 2011 citing Brynjolfsson & Hitt, 2003; and Stiroh, 2002
[8] Vu, 2011 citing Jensen, 2007
[9] Vu, 2011 citing Seo, Lee & Oh, 2009
[10] Vu, 2011 citing Gruber & Koutrompis, 2010
[11] Vu, 2011 citing Koutrompis, 2009
[12] Vu, 2011, p361-370

A 2009 study[13] makes the case for attention to the economic effects of broadband as a particular network infrastructure that encourages more effective utilisation of the Internet for access to services and the conduct of electronic transactions than with dial-up Internet access. The work of a range of scholars is cited to reflect on the multiple values of broadband access, including ease of social and knowledge networking[14], attracting knowledge workers to particular geographic centres[15]; increasing firm efficiency and productivity[16]; and community competitiveness[17]. Broadband is regarded as a "general purpose technology that can fundamentally restructure an economy" due to is capacity (i) to act as a utility to firms and households[18], (ii) to enable R&D and innovation[19] and (iii) to enable developing countries to attract offshoring and outsourcing opportunities[20]. Based on a macro-econometric study of 120 countries, largely developing countries, the authors argue that there is evidence that for each 10 percent increase in broadband penetration, the country experiences a 1.38 percent increase in per capita GDP growth. The authors argue that "Whether this great potential to contribute to growth and competitiveness is realised will depend on whether governments understand the opportunity and ensure that supportive conditions are in place through regulatory and policy reforms …"[21].

A subsequent study on a decade of broadband diffusion in 25 OECD countries concludes that GDP per capita was 2.7 – 3.9% higher on average after the introduction of broadband than before, while "an increase in the broadband penetration rate by 10 percentage points raised annual growth in per capita GDP by 0.9 – 1.5 percentage points"[22]. Hence, several quantitative studies, using annual statistical data for both developed and developing economies for the period from the mid-1990s, demonstrate a statistically significant causal effect between the accessibility of broadband infrastructure and economic growth.

The major ITU 2012 study on the "Impact of broadband on the economy" summarises the historical literature as pointing to five major economic effects, including (i) contribution to economic growth ("positive externalities), (ii) contribution to productivity gains, (iii) contribution to employment and output of broadband deployment ("countercyclical effect"), (iv) creation of consumer surplus, and (v) improvement of firm efficiencies. The summary illustrates that the early research establishing specific effects of ICT penetration on specific aspects of economic growth has matured to understanding broad impacts on national economies and on the global economy as a whole. The 2012 study of OECD countries, Latin

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[13] Qiang, C., Rossotto, C.& Kimura, K. (2009). Economic impacts of broadband, Chapter 3 in *Information and communications for development 2009: Extending reach and increasing impact*, The World Bank, Washington, DC.
[14] Qiang, Rossotto and Kimura, 2009 citing Johnson, Manyika & Yee, 2005
[15] Qiang, Rossotto and Kimura, 2009 citing Dutta & Mia, 2009
[16] Qiang, Rossotto and Kimura, 2009 citing Allaire & Austin, 2005; Clarke & Wallsten, 2006; Heng, 2006; Entner, 2008
[17] Qiang, Rossotto and Kimura, 2009 citing Kelly, 2004; Ford & Koutsky, 2005; Zilber, Schneier & Djwa, 2005
[18] Qiang, Rossotto and Kimura, 2009 citing Saksena & Whisler, 2003
[19] Qiang, Rossotto and Kimura, 2009 citing Carlaw, Lipsey & Webb, 2007; van Welsum & Vickery, 2007
[20] Qiang, Rossotto and Kimura, 2009 citing Abramovsky & Griffith, 2006
[21] Qiang, *et al*, 2010, p45
[22] Czernich, N., Falck, F., Kretschmer, T. & Woessman, L. (2011). Broadband infrastructure and economic growth, *The Economic Journal*, 121, pp 505 – 532

American countries, Arab States and Asia Pacific countries, draws the conclusion that "the higher the penetration of broadband, the more important is its contribution to economic growth"[23].

For the SADC region where no broadband impact studies have thus far been conducted, the question is whether these effects can be extrapolated to the countries of the region. Given the relatively low levels of Internet and broadband penetration across the region as a whole, it may be argued that quantitative studies may yield limited causal results. Since SADC countries already have relatively greater mobile than Internet access, it can therefore be argued that countries should nevertheless assertively promote Internet and broadband access in the next decade, given the very strong causal connection drawn from global trends.

SADC countries building their communications infrastructure and services are confronted with a range of strategic choices. Policy, law and regulation will play an important role in making these choices explicit, so that electronic communications operators and the wide range of Internet and applications service providers can function within a 21st century paradigm of competitive markets, generating opportunities for new technology adoption and innovation in e-services design. Two major themes in the literature of the past two decades are (i) telecomms sector reform (privatisation, liberalisation and competition) and (ii) regulating ICT for a digital economy (regulating for new modes of e-services, e-commerce and e-government). While some SADC countries have introduced limited market liberalisation and competition, fully competitive markets may be needed to foster advancement towards a digital economy in the region. As suggested in the heading to this section, it is most likely that building competitive markets as the foundation for digital economies will be successful if it is a regional endeavour, than if individual countries sought to build digital economies, as the levels of ICT and broadband penetration and usage[24] are too low to support the transition to a digital economy. By the term digital economy is meant an economy in which a significant part of the broad services sector operates using affordable broadband technologies and services.

Telecomms sector reform in the form of privatisation, market liberalisation and the introduction of competition is the main premise of the WTO commitments and the WTO Reference Paper on Basic Telecommunications reform. Theories developed in the period 1989 to 2004 viewed sector reform as including the privatisation of state owned monopoly telcos as a means to increasing their efficiency, attracting investment and making them more adaptive to technology innovation. Side by side with privatisation, governments were encouraged to liberalise their telecomms markets, creating the conditions for licensing new

[23] ITU, 2012, p92

[24] Research ICT Africa (2012). Internet going mobile: Internet access and usage in 11 African countries, RIA Policy Brief No. 2 (September 2012), Research ICT Africa, Cape Town, accessed 25 May 2013 from www.researchictafrica.net/publications/Country_Specific_Policy_Briefs/Internet_going_mobile_-_Internet_access_and_usage_in_11_African_countries.pdf

Research ICT Africa (nd). Telecommunications sector performance in 16 African countries – a supply-side analysis of policy outcomes, Research ICT Africa, Cape Town, accessed 25 May 2013 from www.researchictafrica.net/publications/Research_ICT_Africa_e-Index_Series/Telecommunications Sector Performance in 16 African Countries – a supply-side analysis of policy outcomes.pdf entrants and regulating anti-competitive behaviour of the historical incumbent operators. Privatisation was understood to be beneficial to increasing access to fixed lines[25]; and regulation to promote full competition amongst three or more telecomms network operators depending on the size of the market[26] was regarded as the means to achieve affordable access pricing and consumer welfare through the combined effects of regulation and competition. The existence of partial competition would mean that continuous heavy-handed regulation would be required to maintain affordable communications services, or alternatively the existence of a weak regulator would lead to poorly regulated markets with very expensive services and little network or service innovation.

Research on the sector[27] illustrates that by 2001 the telecomms reform process was visible in many African countries, including privatisation of the monopoly fixed-line operators, competition in basic services (only two countries), establishment of a sector regulatory authority, licensing of mobile telecomms operators and introduction of competition in mobile markets. He notes the acknowledgement of the advantages of competition in mobile markets by governments on the African continent, noting that 30% of markets had three or more operators. It may be argued that in the last decade, levels of competition have not advanced significantly. This may be due, in part, to the effects documented by research[28] as early as 2002, notably the problems of regulatory capture and organisational weakness of the sector regulator. Continued weakness amongst regulators suggests the need for a much stronger push for independent regulation in the remaining part of the decade 2010 to 2020.

Another study[29] suggests that the simultaneous introduction of privatisation and market liberalisation is more advantageous to increasing the levels of telecomms penetration than either (a) the introduction of liberalisation after privatisation, or (b) only partial sector reform. However, their research refers to fixed line penetration, whereas SADC countries have without exception experienced significant mobile substitution in the last decade, both with respect to voice and data access technologies. The conclusions of this particular study are supported by the work of Li and Xu[30] who found, in a study of 177 countries in the decade 1990 – 2001, that “aggressive” reforms introducing simultaneous privatisation and full competition in both fixed line and mobile markets contributed significantly to telecomms sector performance with respect to increasing fixed-line and mobile teledensities, while less aggressive reforms led to weaker outcomes. It is argued that the conclusions of the two

[25] Ros, A. (1999). Does ownership or competition matter? The effects of telecommunications reform on network expansion and efficiency, National Economic Research Associates, Cambridge.

[26] Noll, R. (1999). Telecommunications reform in developing countries, Working Paper 99-10, AEI-Brookings Joint Center for Regulatory Studies, accessed March 2012 from http://papers.ssrn.com/abstract=181030

[27] Gebreab, F. (2002). Getting connected: Competition and diffusion in African mobile telecommunications markets, p7 Policy Research Working Paper 2863, Development Research Group, The World Bank, Washington DC, accessed March 2012 from www.wds-worldbank.org/servlet/WDSContentServer/WDSP/IB/2002/08/02/000094946_02072209183412/Rendered/PDF/multi0page.pdf

[28] ibid, p20

[29] Carsten, Mattoo & Rathindran (2003). An assessment of telecommunications reform in developing countries, *Information Economics and Policy* 15 pp 443 - 466

[30] Li, W. & Xu, L. (2004). The impact of privatization and competition in the telecommunications sector around the world, *Journal of Law and Economics*, 47(2), pp 15 & 32

studies are applicable to mobile communications, as mobile markets are known to attract more entrants with greater growth potential and service innovation capability than the soon to be outmoded fixed line services market.

As the world moves further into the era of mobile communications, smart phones, tablet and other mobile devices, it is reasonable to argue that the attention of SADC policy makers and regulators should be focused towards encouraging greater broadband mobile data access through policy and regulation that aims to attract many players into the broadband supply and value creation chain (operators, infrastructure service providers, communications service providers, e-transactions suppliers and consumers). Such an approach to telecomms regulation would support a subsequent stage to telecomms sector reform, namely emergence of digital economies.

Key ideas for ICT regulation for digital economies are postulated in a regulatory position paper[31] which argues that ex-ante regulation of the electronic communications sector is necessary to promote e-commerce, e-education, e-health, e-government. This means that regulators who desire progress towards a digital economy must consider and take the necessary action to promote such progress through the design of their regulatory regimes, nudging firms to take the necessary actions for introducing new e-services platforms. This is a very different approach to the largely ex-post regulation scenario in which regulators act against the negative behaviours of firms.

2.3 e-Development: varied forms of the digital economy

Much of the literature on the digital economy today emphasises the paths taken by the large industrialised countries such as the US, UK, certain European countries such as France or Germany, and Japan. Less often, the literature considers small, poor countries or countries without an extensive history of industrialisation[32]. In theory, digital economies can be services-based economies utilising information and communications technologies in support of the dominant sectors in that particular economy, so theoretically speaking a digital agriculture-based economy for Mozambique or Tanzania; a digital services and manufacturing-based economy for South Africa or Zambia. Furthermore, it should be noted that particular analysis of historical economic change shows that the presence of sustained ICT innovation and effective policy and stakeholder choices can enable countries to transition from agriculture as a dominant contributor to the economy to digital services and innovation as dominant contributing sectors (Finland)[33].

[31] Hernandez, J., Leza, D. & Ballot-Lena, K. (2010). ICT regulation in the digital economy, ITU GSR 2010 Discussion Paper, International Telecommunication Union, Geneva.

[32] Ona, S., Ulit, E. & Hanna, N. (2012). The Philippines: The quest for genuine e-development. In Hanna, N. & Knight, P. (eds) *National strategies for information technology: Seeking transformation in Singapore, Finland, the Philippines and South Africa*, Springer, New York.

[33] Knight, P. & Routti, J. (2012). Information society and consensus formation in Finland. In Hanna, N. & Knight, P. (eds) *National strategies for information technology: Seeking transformation in Singapore, Finland, the Philippines and South Africa*, Springer, New York, pp 77 – 106

Stages of e-development and its effects on economic transformation can be seen as follows:

(i) telecomms access and usage provides basic levels of voice and data communications at the consumer level and promotes opportunities for information storage and exchange for corporations across the globe;

(ii) rise of IT innovation hubs and clusters in industrialised economies (for example, Silicone Valley in the US from the early 1970s, Bangalore in India from the 1980s; Oulu in Finland from the 1990's; Poblenou in Barcelona, Spain from the 2000s) with production clusters in less industrialised countries (such as Singapore, from the 1990s);

(iii) ubiquitous broadband supporting digital services markets in electronic banking, trade and commerce; electronic government; digital entertainment industry; social media; e-education; e-health and telemedicine (note for example the Ghana e-health, e-government and e-waste strategies);

(iv) ICT services innovation in less industrialised countries (for example, uShahidi software innovation centre in Kenya from 2008, establishment of the National ICT R&D Fund in Pakistan in 2007). While few countries were able to participate in the pioneering and systematic IT innovation in producing infrastructure, devices or computer operating systems taking place between 1980 and 2000, many more countries have been able to enter the software producing sector in the 2000s, as a new generation of people with e-skills emerged.

A few summaries of country studies are presented here as illustration of e-transformation and the transition to digital economies.

Case summary Finland: The transition of Finland from an agriculturally based economy in crisis in the early 1980s to a knowledge based economy in the mid-2000s confirms that at least a few countries can 'leapfrog' development stages[34]. Analysing Finland's information society (digital economy) emergence over the period of three decades (1980s – 2010s), it is noted that Internet use is extensive amongst the population aged 16 to 74 (total population 5.4 million in 2011), with the proportion of Internet users set at 83% in 2008, of which the top forms of usage were online banking, browsing travel and accommodation websites, searching information on education and training courses, ordering or purchasing online, reading blogs, use of browser-based news services, and sale of second-hand goods[35].

A more important observation relates to ICT-enabled industry transformation, where the traditional forestry industry is being transformed through new applications from high technology research including energy and environmental technology (biofuels, energy-saving technologies), biotechnology (rot prevention, gene technology) and information technology (computational simulation, multimedia and telecommunications). These inter-connected innovations with ICT lead to improved quality competitiveness and improved price

[34] Ibid.
[35] Ibid. p89

competitiveness, significantly increasing the GDP and GDP per capita of a historically poor economy[36].

Case summary Singapore: Singapore, effectively a city-state with a population of less than 2 million, overcame its historical economic development challenges by investing in its vision of being an "intelligent island" by 2020[37]. It set its sights on reinventing its historical maritime and trading economy as a 21st century digital trading hub in the South East Asian seas. Side by side with its investment in creating a digital trade port, it re-engineered government through introducing electronic government systems in its housing, policing, social security and justice systems, to mention a few. It engaged in an extensive computerisation of the civil service (1980 – 1985), extending government IT systems to the private sector (1986 – 1991), and embarking on the first stage of creating an intelligent island through laying information and communications networks (1992 – 1999), laying the foundation for the transition to e-government (2000 – 2015) through a series of consecutive plans[38]. This economic transformation is premised on affordability of access to advanced broadband telecomms networks and e-government as promoting high levels of government and citizen usage of ICT services.

The author lists "the pace of telecommunications liberalisation and the importance of competition"[39] as one of seven factors that made Singapore's achievements possible, noting that "One of the underlying drivers of ICT adoption is the cost of telecommunications infrastructure and the extent of Singapore's connectivity to the region"[40]. She notes that, by the year 2000, Singapore's telecommunications market was fully liberalised and foreign ownership of telecomms companies was open and the consequently low cost of communications arising from competition has attracted many companies to establish their regional headquarters in Singapore. Market liberalisation also encouraged the emergence of a strong broadband market and high volumes of broadband subscriptions. This particular case illustrates the importance of regulation with respect to the basics of market liberalisation and competition, not as an end in itself, but as a process to lay the foundation for digital economy formation. The case further demonstrates that e-government can be a facilitator of digital economy emergence, rather than a consequence.

Case summary Spain (Poblenou, Barcelona): 22@ is Barcelona's new technology district, also known as the 22@Barcelona Innovation District, transforming the 19th century industrial hub of Poblenou into an area embedded with industries associated with new technologies including the audiovisual sector (Hangar is a visual arts production centre with more than 15 workshops, a media lab and two film sets), as well as information, communication and

[36] Ibid. pp93-94
[37] Chua, J. (2012). The e-transformation journey of Singapore. In Hanna, N. & Knight, P. (eds) *National strategies for information technology: Seeking transformation in Singapore, Finland, the Philippines and South Africa*, Springer, New York.
[38] Ibid.
[39] Ibid. p61
[40] Ibid. p61

biomedicine[41]. The initiative has many challenges of sustainability and long-term growth of innovation capability, nevertheless, the case of Poblenou shows that it is necessary to have only a relatively small node where economic transformation from an industrial to a digital economy is occurring, in order to participate in the digital economy at its earliest stage of development. Spain was never a global industrial power and this transformation of one small district of Barcelona reflects the ability of countries with even limited research and scientific capacity to undertake economic reforms that lead to forms of digital economy. These capacities are premised on the relative openness of markets, created by economic reforms. In this sense, reforms in the telecomms and broadcasting sectors through liberalisation and competition can create opportunities for innovation in digital content production, as the availability and affordability of infrastructure invites content producers to create for new digital markets.

Case summary Kenya (Ushahidi and M-PESA): The Ushahidi technology company[42] started through the creation of a crowd-sourcing web-enabled mapping site that enables users to contribute information on humanitarian or natural disasters based on eyewitness accounts, using email, text or social media (Twitter). The organisation's focus includes software development, though this is not its only activity. The open source Ushahidi and SwiftRiver open source platforms can be customised to the particular needs of the client or end user group, with or without Internet access, using both Internet and mobile communications networks. This particular form of crowd sourcing involves bringing volunteers from many different countries to apply their knowledge and skills to a local problem, using technology platforms rather than physical presence. The CrowdMap technology enables the user to map anything including gas prices, food shortages, emergencies, civil rights or walking trails.

The M-PESA mobile money transfer service originating in Kenya[43], enables money to move rapidly removing many of the historical barriers to money transfer experienced by people living off remittances in both urban and rural areas. By making money available in virtual form rather than as cash, this e-service provides money for financial transactions and does not require cash to reach the rural areas. Innovations occurring in African countries, such as Ushahidi and M-PESA, arise out of an environment where a reasonable degree of liberalisation in telecomms markets has created opportunities for innovation in e-services.

Looking across the few case studies presented here, each representing economies that are either small in population size and GDP, *or* weak or in crisis in economic development terms, may undertake reforms that change the direction of their economic development and consequently improve their economic strength. Some economies can transform their ailing agricultural sectors (Finland), while others may use government as the medium for transition

[41] Sustainable Cities Collective (2011). Case study: 22@ Barcelona innovation district, accessed on 25 May 2013 from http://sustainablecitiescollective.com/ecpa-urban-planning/27601/case-study-22-barcelona-innovation-district

[42] Ushahidi website, accessed 25 May 2013 from http://www.ushahidi.com/about-us and http://www.ushahidi.com/services

[43] Morawczynski, O. & Pickens, M. (2009). Poor people using mobile financial services: Observations on customer usage and impact from M-PESA, CGAP, World Bank, Washington.

to a digital economy (Singapore). In others (Spain, Ghana, Kenya), e-transformation may occur in certain localities or fields, and may not touch the whole economy, but nevertheless creates the early foundations for a future transition. It has been argued that there appear to be at least a few common enablers of ICT-enabled economic transformation, including advanced communications infrastructure[44]. The authors argue that general purpose technologies (GPTs) such as telecommunications and ICT have been shown to be

> *enabling technologies, opening up new opportunities rather than offering complete solutions. They act as catalysts, including complementary innovations in other sectors. While the steam engine is widely accepted as the GPT of the first industrial revolution, electricity is viewed as the GPT of the second industrial revolution*[45]*.*

It can be argued that the global communication network of the Internet is the GPT of the first knowledge-based revolution, where economies are beginning to see significant productivity benefits from knowledge flows, communications and transactions. Based on four in-depth country studies, the authors argue that

> *the relatively recent adoption and low usage of ICT in many developing countries suggest that this revolution has not yet had a significant impact on economy-wide productivity, except among a few emerging economies. In order to have significant impact on growth, a country needs to have a significant stock of ICT or users in place, and perhaps be more advanced in using that stock for economic transformation*[46]*.*

Thus, countries at an earlier stage of digital economy emergence, such as those in the SADC region, are required to concentrate their policy and regulatory effort towards increasing access to telecomms and broadcasting infrastructure to a level at which a significant proportion of the economy and society is utilising digital technologies for social and economic productivity. The requirements of the WTO Reference Paper on Basic Telecommunications sought to establish the foundations for competition and consumer access in the decade of the 2000s. Having not yet achieved sufficiently high levels of access to see measurable productivity gains, the countries of the SADC region must seek to encourage greater competition and access as one amongst many foundations for moving to a digital economy stage of development. Of course, it is understood that other factors such as investment and skills play a role in the levels of productivity of countries in the region. Nevertheless, it can be argued that SADC member states can build the communications infrastructure and access through (i) fostering levels of competition appropriate in their particular countries; and (ii) that the trajectory of telecomms and broadcasting sector development in many SADC member states has already moved towards the existence of

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[44] Hanna, N. (2012). Why national e-transformation strategies? In Hanna, N. & Knight, P. (eds.) *National strategies to harness information technology: Seeking transformation in Singapore, Finland, the Philippines, and South Africa*, Springer, New York.
[45] Ibid. p15
[46] Ibid. p15

partially competitive markets; (iii) adoption of and compliance with the tenets of the WTO Reference Paper on Basic Telecommunications will be a relatively uncomplicated matter for many member states, given their current level of advancement.

2.4 Levels of e-development and creating foundations for a future digital economy in the SADC region

Very low levels of e-development are observable in the SADC region with respect to the presence and role of telecomms, broadcasting and ICT as enablers in key economic sectors such as agriculture and fishing[47], as well as the finance, tourism and hospitality, and government services sectors[48]. A major inhibitor to e-development is the low levels of telecomms and broadcasting access and the low levels of digital services innovation by firms (e-commerce, e-business) and government (e-government). Policy to promote development of the small-scale film and other audio-visual sectors in the region will be important to creating returns on long-term investment in the telecomms and broadcast sectors.

Countries in the SADC region had experienced very low levels of telecomms and broadcasting access up to the mid-1990s when the mobile communications revolution changed the access and usage behaviour of consumers in the mid-2000s. Thus, SADC countries have had basic levels of communications access for less than a decade. While the levels of access are improving, usage has been limited to mobile voice communications, with social media making a breakthrough around the period 2010. The extensive future use of voice and data communications for economic purposes will require significant advances in getting high-speed broadband infrastructure at affordable prices to consumers in those parts of the SADC region which are remote from the undersea cable landing points. Getting broadband communications infrastructure for increasing productivity to a reasonable percentage of the approximately 277 million people in the region[49] will require significant investment in advanced infrastructure, side by side with innovation in digital services. However, the concern of SADC member states in terms of the particular relevance of the WTO Reference Paper on Basic Telecommunications relates to investment in advanced infrastructure. With limited investment finance available in the region, foreign direct investment in the broad telecomms and broadcasting sectors can be encouraged through introducing basic reforms such as those set out in the reference paper, where they are not already in place.

[47] Abrahams, L. & Akinsanmi, T. (2012). Developing a framework for a community informatics policy network: Agriculture for rural development (ARD) in Southern Africa (CIPN-ARD-SNA), Report prepared for New Partnership for Africa's Development (NEPAD), Johannesburg and the Centre for Agricultural and Rural Cooperation (CTA), Paris.

[48] Abrahams, L. & Goldstuck, A. (2012). A decade of e-development in South Africa: Sufficient for a services (r)evolution? In Hanna, N. & Knight, P. (eds) *National strategies for information technology: Seeking transformation in Singapore, Finland, the Philippines and South Africa*, Springer, New York.

[49] WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva; and World Bank (2011). Africa development indicators 2011, The World Bank, Washington.

SADC member states will, however, have to go well beyond the basics set out in the reference paper, noting crucial areas for regulatory reform such as extensive measures to encourage competition and innovation; regulatory reform with respect to spectrum and other scarce resources; in short, a wide range of measures required to stimulate broadband market development and Internet access and usage. Regulation should encourage unbundling of very large telecomms and broadcast operators and market specialisation by offering licences to firms that will build different parts of the broadband network, including dark fibre, lit fibre, mobile broadband towers, other. This is the form that market liberalisation for the telecomms and broadcast sectors can take in the SADC region in the next decade.

2.5 Contributing factors to the progression towards a digital economy

2.5.1 From telecomms to broadband infrastructure: Benefits of liberalisation for regional economic integration and GDP growth:

Various systematic studies over five decades, for the periods 1947 to 1977[50]; 1970 to 1990[51]; and 1996 to 2005[52], demonstrate that there is a causal relationship between the availability of telecommunications infrastructure and services on the one hand and economic growth on the other hand. Economic impact studies demonstrate multiple economic impacts including the causal relationship between effective competition in telecomms markets on the one hand and productivity and quality improvements on the other hand[53].

Early studies on the effects of broadband on economic growth suggest that the effects are similarly robust for developed and developing economies and note the length of the period of diffusion as a factor in the size of the economic impact, meaning greater impact for developed countries where diffusion effects have had more time to take root[54]. Further studies on diffusion effects[55] argue that evidence from the first decade of broadband diffusion in OECD countries indicates an average 2.7 – 2.9% increase in GDP per capita soon after the introduction of broadband; and a further 0.9 – 1.5% annual increase in GDP per capita for each 10% increase in broadband penetration.

The definitive study on the impact of broadband on the economy[56] documents specific impacts drawing from the applicable literature including contribution to economic growth (it is argued that the effects are significant at broadband penetration levels greater than 30%),

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[50] Gebreab, 2002, p5 citing Norton, 1992
[51] Gebreab, 2002, p5 citing Roller & Waverman, 2001
[52] Vu, 2011
[53] Boylaud, O. & Nicoletti, G. (2000). Regulation, market structure and performance in telecommunications, Economics Department Working Papers No. 237, OECD, Paris, accessed March 2012 from www.oecd.org/eco/eco
[54] Qiang, Rossotto & Kimura, 2009, pp45 – 46
[55] Czernich, Falck, Kretschmer & Woessman, 2011, p530
[56] ITU (2012). The impact of broadband on the economy: Research to date and policy issues, ITU, Geneva, pp 4 – 17, accessed March 2012 from www.itu.int/ITU-D/treg/broadband/ITU-BB-Reports_Impact-of-Broadband-on-the-Economy.pdf pp 4 – 17

productivity impacts (significant impact at around 13% was found for countries with high ICT penetration and developed ICT ecosystems, while zero impact was found for countries with low ICT penetration and poorly developed ICT ecosystems), impacts on job creation even under recessionary conditions, noting counter-cyclical effects (broadband jobs lead to additional job creation in related sectors and in the broader economy) and positive externalities (innovation effects with respect to services such as e-commerce or online education; growth in service industries), creation of consumer surplus (in particular the value gained from mobile broadband substitution) and impact on the efficiency of firms (including business expansion, product innovation and new business creation). The authors of the study argue that "unless emerging economies ...strive to dramatically increase their penetration of broadband, the economic impact of the technology will be quite limited"[57].

Using country studies to assess the economic impact of broadband in developing countries in Latin America, the Arab States and Asia Pacific, the report found a strong correlation between the introduction of broadband and positive economic growth effects, with a reasonable level of reliability of the data[58]. The report argues that in order to effectively stimulate broadband infrastructure investment, competition policies must foster facilities-based and infrastructure-based competition, in addition to services-based competition as the former is more likely than the latter to lead to universal access to broadband[59].

Regional economic integration may become easier as countries achieve similar levels of broadband penetration, making regional trade, information exchange and services cheaper and more accessible.

2.5.2 Market liberalisation, competition and sequencing of telecomms reforms:

An important debate with respect to the "how to" of regulating competition is the appropriate sequencing of regulation, the question of whether regulators should first apply privatisation or competition. Researchers argue[60] that the best approach to achieve high levels of telecomms penetration is to synchronise the introduction of privatisation, competition and the establishment of an independent regulator. Another view[61] favours the establishment of "institutions conducive to promoting competition *before* privatisation"[62], and notes that countries which introduced a regulatory authority that could preside over the transition to competition had drawn greater telecomms investment than countries which had not, because the rules of the game were clear in the former countries[63]. The main argument here is that the aggressive introduction of telecomms sector reforms, notably full privatisation, full competition and the existence of an independent sector regulator are highly beneficial, as this approach to regulation has a more direct impact on sector performance than the sequencing of reforms. While it is not a certainty, it can be argued that competitive markets are likely to attract increased investment in telecomms and specifically in broadband infrastructure, because more players can participate in various

[57] Ibid. p7
[58] Ibid. pp58-60
[59] Ibid. pp73-77

parts of the infrastructure value chain. It can therefore be argued that, where any of these elements are missing in a particular country, they should be introduced with the least possible delay.

2.5.3 The role of policy and regulation for electronic communications markets:

The report on the economic impacts of broadband[64] succinctly presents the views of many authors who argue consistently for policy and regulatory reforms to encourage advanced telecomms and broadband evolution. Specific approaches recommended in the report include national planning to achieve universal broadband coverage including fostering either facilities-based or service-based competition through relevant policy and regulation. Many other recommendations are made in the 2012 report, but these are all additional to competition rather than alternative to competition. At least one country in the SADC region, South Africa, has already embarked on the road to facilities-based competition, resulting in extensive if not universal access to mobile voice communications, with strong indications of the same trend emerging for mobile data communications.

One particular argument linking the approach to policy and regulation with investment in communications infrastructure, notably broadband infrastructure[65] is that the governance framework and governance system for broadband investment must evolve in an adaptive way, taking account of local conditions, rather than simply aim for regulation as 'social engineering'[66]. In other words, more highly evolved governance systems, which exercise a greater degree of freedom and flexibility in the practice of policy design and regulatory decision-making, will likely experience more effective outcomes than those which require regulatory decisions at every point of development of the ecosystem. Adaptive reasoning, knowing when to follow global trends and when to seek local solutions is a capacity which should be acquired by policy-makers and regulators alike.

2.5.4 Challenges of the supranational regulatory regime for SADC countries:

In the 18 years since 1995, when research[67] considered the subject of the rise of new market access models including hybrid models of monopoly in basic services and competition in value added services, telecommunications markets across the world have liberalised extensively. This extensive liberalisation has included a trend away from monopoly markets in virtually every segment of the telecomms infrastructure value chain, from undersea cable to last mile access, with perhaps the one exception being the local loop. The rise of mobile

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[60] Carsten, Mattoo & Rathindran (2003)
[61] Wallsten, S. (2003). Of carts and horses: Regulation and privatization in telecommunications reforms, *Policy Reform*, Volume 6(4), pp217 – 231
[62] Ibid. p217
[63] Ibid. pp229–230
[64] ITU, 2012
[65] Bauer, J. (2010). Regulation, public policy, and investment in communications infrastructure, *Telecommunications Policy*, 34, pp 65 – 79
[66] Ibid. p77
[67] Drahos, P. & Joseph, R. (1995). Telecommunications and investment in the great supranational regulatory game, *Telecommunications Policy* Volume 19 No 8 pp 619–635

communications and wireless access technology has brought significantly higher degrees of penetration of communications services than fixed line access, driven by a combination of investment from local capital and foreign direct investment and the trend towards partial or full competition. Despite these advances, governments may have been reluctant to make commitments in terms of GATS based on their perceptions of benefits or disbenefits to their telecomms markets and the broader economy of the country, or based on the continued existence of historical concerns about the national sovereignty in decision-making[68].

Earlier research[69] had already raised concerns about the relative pace of telecomms reforms in developing countries, noting the need for some degree of caution in telecomms sector reform. This is because one of the important debates regards the role of the supranational regulatory regime, as represented by the GATS and the relevant annexes on telecommunications, and the effects of this regime as making national states "law takers rather than law makers"[70], requiring states to revise their laws in pursuance of becoming signatories to GATS. These concerns of being law takers still resonate in the SADC region in 2013. However, in the intervening period, consumers across the world and in the SADC region have keenly adopted technology and service innovations where these have been recognised to produce benefits or efficiencies, such as Internet banking and financial transfers, innovation typically introduced more readily in competitive markets than in monopolistic markets.

It may be argued that the GATS would have enormous difficulty in balancing "the concerns and interests of developed and developing nations alike"[71]. Local operators would battle to compete with foreign firms that have more advanced technology and greater capital resources at their disposal, while foreign firms may focus their services exclusively on the most profitable segments of the market[72]. These are real, practical concerns, yet developing countries lack the capital resources to themselves promote significant advances in telecomms and electronic communications infrastructure and would therefore have to forego the long term socio-economic benefits of communications infrastructure and value added services where they fail to encourage and regulate market access, anti-competitive behaviour, tariffs and universal access.

The contributing factors discussed in section 2.5 above provides a broader frame of reference for future development of the broad electronic communications sector than the frame set in the 1994 GATS agreement or the 1996 Reference Paper on Basic Telecommunications. At least a few of the key features of this broader frame are to be

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[68] Primo Braga, C. (1997). Liberalizing telecommunications and the role of the World Trade Organisation, Public policy for the private sector Note 120, The World Bank Group, Washington.
[69] Drahos & Joseph, 1995
[70] Ibid. p621
[71] Henderson, A., Gentle, I., & Ball, E. (2005). WTO principles and telecommunications in developing nations: Challenges and consequences of accession, *Telecommunications Policy* Volume 29 p206
[72] Ibid. p207

found in the GATS agreement[73] and in the Reference Paper and it would thus be appropriate to review commitments in terms of these principles.

2.6 Specifics of the GATS, the annexes on telecommunications, the regulatory reference paper on telecommunications and commitments of SADC countries

In summary, the WTO commitments are about promoting access to markets, addressing communications market structure, the state of liberalisation and level of competition in communications markets in all WTO Member States. These international commitments relate to four modes of supply of services (cross-border supply; consumption abroad; commercial presence; presence of natural persons). Any limitations on market access or national treatment must be listed for each of the four modes of supply[74]. The Reference Paper gives guidance with respect to the state of play for the regulatory regime and is intended as "a set of regulatory principles for participants to consider adopting in their schedules of basic telecommunications commitments"[75].

Article I of The General Agreement on Trade in Services (GATS) defines trade in services as

the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member[76].

Article II of the GATS deals with most-favoured-nation treatment, noting that "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country"[77], barring any allowable exemptions, or "advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed"[78].

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[73] WTO (1996a). Fourth protocol to the general agreement on trade in services, World Trade Organisation, Geneva, accessed on 22 October 2012 from http://www.wto.org/english/tratop_e/serv_e/4prote_e.htm

[74] Primo Braga, 1997

[75] WTO (1996b). WTO regulation reference paper, Annex to the Fourth Protocol to the GATS Agreement, the "Agreement on basic telecommunications", accessed on 22 October 2012 from http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm

[76] WTO (1994a). Uruguay Round: General agreement on trade in services, World Trade Organisation, Geneva, accessed on 22 October 2012 from http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm and http://www.wto.org/english/docs_e/legal_e/26-gats.pdf

[77] Ibid.

[78] Ibid.

The Annex on Telecommunications elaborates on the GATS with respect to "access to and use of public telecommunications transport networks and services"[79] and deals with issues of transparency of information on conditions affecting access and use (such as tariffs, specifications of technical interfaces, information on standards bodies, conditions applying to terminal equipment, licensing requirements)[80]. The Annex requires a commitment to access and use of networks and services by service suppliers of another WTO Member

> *on reasonable and non-discriminatory terms and conditions…offered within or across the border of that Member…for the movement of information within and across borders…a Member may take such measures as are necessary to ensure the security and confidentiality of messages…a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule*[81].

Furthermore, it is stated that "Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services"[82]. This is the gist of the Annex on Telecommunications that was relevant to countries of the SADC region in 1994.

The Annex on Negotiations on Basic Telecommunications established the foundations for the subsequent negotiations on country commitments, noting in particular the requirement that a Member would list "any measure inconsistent with most-favoured-nation treatment that a Member will maintain"[83] from a particular date. The Decision on Negotiations on Basic Telecommunications required that "Any commitments resulting from the negotiations, including the date of their entry into force, shall be inscribed in the Schedules annexed to the General Agreement on Trade in Services"[84].

The list of communications services includes postal services; courier services; telecommunication services, including voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, private leased circuit services, electronic mail, voice mail, on-line information and data base retrieval, electronic data interchange (EDI), enhanced/value-added facsimile services (including store and forward, store and retrieve), code and protocol conversion n.a., on-line information and/or data processing (including transaction

[79] WTO (1994b). GATS: Annex on telecommunications, World Trade Organisation, Geneva, accessed on 22 October from http://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#anntel
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] WTO (1994c). GATS: Annex on negotiations on basic telecommunications services, World Trade Organisation, Geneva, accessed on 22 October from http://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#anntel
[84] WTO (1994d). Decision on negotiations on basic telecommunications, World Trade Organisation, Geneva, accessed on 22 October 2012 from http://www.wto.org/english/docs_e/legal_e/50-dstel.pdf

processing); and audiovisual services, including motion picture and video tape production and distribution services, motion picture projection service, radio and television services, radio and television transmission services[85].

South Africa was the only country in the SADC region to make commitments in 1994 in terms of local, long distance, international and resale with respect to public voice telephone services, and to commit to "review the possibility of allowing market access for additional suppliers"[86].

Four countries submitted commitments on telecommunications after 1994 – Lesotho, Mauritius, South Africa included subsequent commitments, and Zimbabwe. Only Lesotho submitted commitments on audiovisual[87].

Examining each of the elements of the Reference Paper on Regulation of Basic Telecommunications[88], which adds dimension to the GATS annexes on telecommunications, the guidance is indeed basic in the sense that they establish only very broad principles, yet they have far-reaching implications for uncompetitive markets or markets in which monopolistic practices are strong.

The items can be understood as follows[89]:

(1) **Anti-competitive practices:** The main objective of the Reference Paper is to promote open competition in markets for basic telecommunications services. The other five commitments all relate to the measures considered necessary at the time (1996 – 1998) to promote competitive markets.

(2) **Interconnection:** Non-discriminatory, timely provision of interconnection at any technically feasible point in the network to enable users of any network to communicate with users of any other network, without which a competitive electronic communications market would not be sustainable.

(3) **Universal service:** This precursor to the concept of digital inclusion simply enables countries to legislate and regulate universal service without this being regarded, *per se*, as inviting anti-competitive practices or creating barriers to market entry and the expectation is set that any obligations should be reasonable.

(4) **Transparency (public availability of information) in licensing criteria:** Licensing criteria, terms and conditions for the award of licenses, and the time in which a decision will be made should be known so that substantive and procedural equity (non-discrimination) in the award of licenses is assured.

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[85] WTO (1991). Services sectoral classification list, World Trade Organisation, Geneva, accessed on 22 October 2012 from www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc
[86] WTO (nda). Overview table of the results of the negotiations, WTO, Geneva, accessed on 22 October 2012 from http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel10_e.htm
[87] WTO (ndb). List of all current telecommunications commitments and exemptions, World Trade Organisation, Geneva, accessed on 22 October 2012 from http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm
[88] WTO, 1996b
[89] Ibid.

(5) **Independent regulators:** The concern here is to ensure that no particular supplier of basic telecommunications services can manipulate the market through regulatory capture.

(6) **Allocation and use of scarce resources:** This commitment relates to ensuring that there are as few as possible limitations to market entry with particular attention to essential facilities and other scarce resources such as radio-frequency spectrum, thus encouraging competitive markets in the sector.

2.7 Perspective on the relevance of the WTO commitments in terms of GATS, the Annex on Basic Telecommunications and the Regulatory Reference Paper

The WTO liberalisation agreement on basic telecommunications has been in operation for almost twenty years from 1994 to 2013. With respect to telecommunications investment and the global regulation of telecomms, researchers[90] observed that the shift from monopoly to competition was fostering a supranational regulatory push for approaches that would encourage market access by new entrants. The authors suggest that the push for telecomms sector reform cannot guarantee investment in all markets. Nevertheless, 18 years on from 1995 it is apparent that the vast majority of telecomms markets have indeed attracted investment in fixed, mobile, Internet and broadband communications. Many SADC markets no longer have a monopoly fixed line operator, mobile competition is present even where there is market concentration with one or two dominant mobile operators, and the Internet services market is relatively open with a few (Zambia) to a few hundred (South Africa) ISPs. Many SADC countries have sought and accepted foreign direct investment in their telecomms markets, leading to mobile substitution and very large regional and continental mobile communications markets. According to a 2008 explanatory document[91]

> *The GATS' contribution to world services trade rests on two main pillars: (a) ensuring increased transparency and predictability of relevant rules and regulations, and (b) promoting progressive liberalization through successive rounds of negotiations. Within the framework of the Agreement, the latter concept is tantamount to improving market access and extending national treatment to foreign services and service suppliers across an increasing range of sectors. It does not, however, entail deregulation. Rather, the Agreement explicitly recognizes governments' right to regulate, and introduce new regulations, to meet national policy objectives and the particular need of developing countries to exercise this right.*

As the telecomms sector came to be seen as an important international services sector supporting and promoting economic globalisation, the need for market access beyond a country's borders became a strong influence on governments and policy-makers to liberalise their telecommunications sectors.

[90] Drahos & Joseph, 1995

[91] WTO (2008). The general agreement on trade in services, An introduction, p3, World Trade Organisation, February 2008, accessed on 22 October 2012 from www.unescap.org/tid/projects/gats10_tis.pdf

Hence, the WTO (GATS Annex on Telecommunications and Annex on Negotiations in Basic Telecommunications) – sets out principles of global policy which inform efforts to design national regulatory systems, local standards and the drafting of national laws and regulations. The key issue confronting governments in complying with WTO principles is the particular economic gains or losses that would derive from the particular application of the principles[92], such as standards for non-discrimination with respect to national treatment of telecomms firms.

> *In the case of telecommunications those players interested in a market access model will, at the supranational regulatory level, support the principles of national treatment… Those players interested in retaining some kind of protectionist model of telecommunications will also support the principles but seek to qualify their operation through some standard of differential application…*[93]

WTO members or GATS signatories need to design their national regulatory arrangements in ways that promote effective international trade in services. As regards the telecomms sector, states would consider whether to open the sector to firms from other states and under what conditions. The GATS is not intended to foster an unconditional opening up of services markets.

In addressing the rationale and consequences of telecomms sector reform, research[94] argued that poor economic performance and poor telecomms sector performance influenced early reform choices, while the results of reform at the time were still of limited visibility. He illustrated the policy and regulatory choices available more than a decade ago (1997 – 1999) as being to privatise the state-owned operator, to facilitate competition, and to foster interconnection, noting the political factors at play. The logic of the argument is broadly similar to the logic of the WTO Reference Paper on Basic Telecommunications. The rationale behind the Reference Paper of 1996 can be seen as a way of inviting political leaders across the globe to introduce additional reforms (beyond GATS) aimed at global harmonisation of the telecomms regime with the specific aim of promoting investment in the broad sector, particularly in advanced infrastructure.

More than a decade later, research[95] brings a longer historical view to the issues of telecomms and IT-driven economic change. This perspective moves from a view of the forms of social and economic transformation occurring in specific developing countries, namely Finland, Singapore, South Africa and The Philippines. The summation of lessons drawn from these country experiences suggests that countries that are small or very small (Singapore), poor (Finland, The Philippines), or politically immature (South Africa), can introduce e-transformation despite their historical legacies. Understanding that each of these countries has experienced limitations to progress, they note the following key themes in e-transformation: integrating ICT into development strategy; creating institutions with the capability of promoting consensus for transformation, ICT sector development, innovation system evolution and excellent educational foundations; balancing decision-making amongst multiple stakeholders; considering both long and short-term objectives; innovation and

[92] Drahos & Joseph, 1995, p622
[93] Ibid.
[94] Noll, 1999
[95] Hanna, 2012

adaptation; seeing ICT as both sector and enabler; focusing on digital inclusion of the population; long-term commitments to e-transformation; building human resources for a fundamentally different, communications-driven society; encouraging experimentation, amongst others.

It should therefore be noted that the WTO Agreement has relevance in the SADC region today, only to the extent that it may lay the foundations for other steps required to promote a future digital economy[96]. SADC policy-makers and regulators are confronted by similar choices in the period 2013 and beyond to the choices which confronted their northern counterparts a decade and more ago, since telecomms market liberalisation (emerging in the third era of telecomms policy) is but a stage towards digital economy formation based on broadband networks and consumer services (the fourth era of telecomms policy)[97].

2.8 Summation of issues pertinent to electronic communications sector reform and sector development in the SADC region

Global trends in electronic communications policy and regulation have inclined towards alignment with the WTO commitments, even where countries have not signed up to the commitments. This alignment may be occurring for at least two reasons, namely (a) that the WTO trade agreements have wide influence whether or not countries are signatories and (b) that policy-makers and regulators have progressively applied the ideas contained in the GATS, its annexes and the regulatory reference paper on basic telecommunications, not through a simplistic compliance approach, but because of the perceived benefits of the broad principles and regulatory approaches.

Many countries have observed that the foundations created by the more open telecomms and communications markets are enabling their economies to move towards digital economies, through savings in the communications, transportation and other costs of production and distribution, while increasing efficiencies in economic transactions. These benefits of advances in digital services markets (electronic commerce, electronic government, digital media to mention a few) are proving to be attractive to corporate users, to consumers and to sectors with high information use such as the education and health sectors.

The reporting on commitments includes reporting on horizontal measures (sectors to which the commitments are applicable include basic telecommunications, broadcasting and the other-audiovisual sector [film, video, music], though the emphasis is on basic telecommunications); limitations on market access (any barriers to entry or obligations limiting market participation); limitations on national treatment (any discriminatory measures against foreign firms as compared with local firms); any additional commitments.

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[96] Ibid. pp195-230

[97] Noll, 1999

In order to understand each of these categories of commitments, it is necessary to also understand each of the following four modes of supply (i) the specifics of cross-border supply of telecomms services (whether consumers can access services from suppliers that have foreign-ownership and any conditions attached to capital remittances or transfer of funds to such suppliers); (ii) consumption of services abroad (international roaming); (iii) commercial presence (any conditions attached to the participation of foreign companies in a local telecomms market, for example registration of foreign firms and licensing of telecomms operators); (iv) presence of natural persons (entry, residence and employment requirements or restrictions on persons employed by foreign firms).

It may be argued that a review of the commitments compared with actual practice of SADC countries may reveal that commitments are few, yet policy and regulatory practice has tended towards either partial or open competition. It may be further argued that, while many limitations to full competition still exist amongst countries in the region, most countries have increased the number of firms participating in electronic communications markets compared to a decade ago; have regulated interconnection more or less effectively; have introduced forms of universal service obligation that do not create significant barriers to competition; and have a significant degree of transparency in licensing decisions. Those aspects of the WTO commitments which may be less well advanced in the SADC region are the degree of regulatory independence from suppliers of services; and the regulation of scarce resources such as numbers, rights of way and frequencies. Some degree of insight into individual country practices will be gained through this study, though it is important to note that this is a baseline study which requires continuous updates.

3 THE COMMUNICATIONS ENVIRONMENT IN THE SADC REGION

This section presents a regional economic overview and country economic profiles including data on the share of services in the economy, and on Internet and broadband access which represents the future of the communications services sector. It provides a summary perspective across all SADC Member States in respect of each of the five focus areas for telecommunications, broadcasting and audio-visual services, namely (i) the market structure, (ii) regulatory regime and state of play, (iii) level of competition, (iv) state of liberalisation and (v) international commitments. Finally, the section provides overall conclusions and recommendations designed to offer ideas as a baseline for the SADC negotiations on the liberalisation of communications services.

3.1 INTRODUCTION

The availability of ICT applications and services, and in particular telecommunications services, are universally seen as key infrastructural services and a facilitator of growth, contributing to the improvement of welfare, enabling traditional merchandise trade, as well as offering new trade opportunities. The global telecommunications revolution has reaped particularly high dividends in developed and emerging markets, and many sub-Saharan African countries have also benefitted to varying degrees. Following issuance of more mobile telecommunications licences, and consumer-friendly payment options, mobile telephony has witnessed exponential growth in the SADC region as in most developing countries, making the service relatively accessible to low-income users, although prices are still high compared to world prices.

Under the Protocol on Transport, Communication and Meteorology (TCM[98]), SADC Member States agreed to undertake efforts to provide efficient, market-related universal postal services; to enhance the quality and efficiency of telecommunication services, and to ensure universal access to telecommunication services. Member States agreed to embark on policy reforms in the communications sector, including separation between the regulation and operation of telecommunication and postal services by establishing independent national regulatory bodies and encouraging private investment in the telecommunications sector, in order to enhance access and service quality, and to reduce prices.

SADC Member States seek to take advantage of the opportunities offered by ICT-related trade and the benefits that they can offer to a country's economy. Given the significant gains achieved by countries such as Mauritius and South Africa from business process outsourcing (BPO) services[99], other SADC countries hope to tap into this lucrative market through trade liberalisation. However, competition to attract investment for ICT-related

[98] SADC (1998) 'Protocol on Transport, Communications and Meteorology', Southern African Development Community, Gaborone, available online at http://www.sadc.int/index/browse/page/162

[99] Board of Investment, Mauritius, see http://www.investmauritius.com/ICT1.aspx and BPeSA Western Cape (February 3rd, 2013) BPO sector continuing to create thousands of jobs in South Africa, see http://www.bpesawesterncape.co.za/bpo-sector-continuing-to-create-thousands-of-jobs-in-south-africa/

trade is fierce. Therefore, along with various institutional, legal and regulatory measures, SADC Member States may need to undertake regional and multilateral commitments to make their ICT environments more attractive to investors.

This study is one of a series of sector studies that were commissioned in the context of the SADC negotiations on the liberalisation of trade in services in six priority sectors (communications, construction, energy-related, financial, tourism and transport services).

The negotiations on these priority sectors were launched in April 2012, and are to be concluded within three years. SADC Member States would present each other with requests for market opening in the communications sector in 2013. Initial offers for market opening of their communication services sectors would follow.

In order to be able to formulate negotiating positions, Member States have to undertake some important preparatory work, which requires information such as:

- the structure and competitiveness of the domestic and regional communications sector; the state of liberalisation in communications services, including any existing regulatory restrictions and restrictive business practices;
- sector development and reform policies, both national and regional;
- level of implementation of the commitments under the TCM Protocol, its achievements, the relationship between the TCM and Trade in Services Protocols; and the interests of various stakeholders, including consumers.

WTO, UNCTAD, World Bank, ITU and many development support institutions have been at the forefront in carrying out studies that provide Member States with information, in particular on telecommunication services and ICT infrastructure. Due to the ongoing technological changes and regulatory reforms in the sector, some of this information has become outdated, while information on audio-visual services in particular has not been comprehensively gathered.

Hence, this study builds on existing work by compiling and updating information on the communication sector; in order to facilitate Member States participation in the regional negotiations on communication services. The study covers telecommunication services and audio-visual services in line with the WTO classification of these services contained in W/120"[100], (with some scheduling notes in the case of telecommunications). Postal Services are dealt with in a separate study. The study will need to be available throughout the negotiating process, so that Member States will be able to draw upon the information contained therein for the formulation of requests and offers.

[100] As defined in the GATS and the WTO classification (W/120) (see WTO (1991) 'Services Sectoral Classification List', MTN.GNS/W/120, World Trade Organisation, Geneva, available online at http://tsdb.wto.org/Includes/docs/W120_E.doc). The classification dates from 1988 and does hence not reflect technological advances over the last 20 years. Details of the classification for these sectors in Member States' schedules of commitments will need to be agreed.

The study identifies specific trade restrictions in respect of the communications services sub-sectors, as defined below. In cases in which no legal or regulatory framework exists, any *de facto* restrictions to the extent that their existence can be ascertained, have been recorded.

3.2 SADC REGIONAL ECONOMIC OVERVIEW

The SADC region Member States are a combination of factor-driven economies (basic levels of institutional development, infrastructure, health and primary education and macroeconomic stability), and efficiency-driven economies (small or acceptable market size, reasonable levels of higher education and training, goods and labour market efficiencies, financial market sophistication and technological readiness)[101]. None are innovation-driven economies, given their comparatively low levels of business sophistication and innovation. As indicated in Table 3.1 below, seven countries are factor-driven economies by virtue of satisfying basic requirements for institutions, infrastructure, macro-economic stability and a basic degree of health and primary education, while four countries are characterised as efficiency-driven economies, based on their financial market sophistication, goods and labour market efficiency, as well as the quality of higher education and training, and degree of technological readiness. One country, Botswana, is seen to be in transition from a factor-driven to an efficiency-driven economy[4].

Many Member States (Angola, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Swaziland, Zimbabwe) have fragile public and regulatory institutions, poorly developed services sectors, as well as weak ICT infrastructure and e-services sectors. Many other Member States require significant improvements in institutional capacity for policy and regulation in order to enhance trade in communications services and Internet-based business. Progressive universal access in mobile communications has often emerged despite weak policy and regulation. Increased access and usage has arisen from innovation in mobile services as operators seek to extend their profitability through mobile banking and mobile money transfers. A major stumbling block to greater mobile usage in the SADC region is high mobile roaming charges[102], limiting cross-border communications for a migrating population. The countries in the SADC region need to undertake significant future evolution with respect to their policy-making and regulatory institutions in order to foster future economic development, in particular to liberalise ICT markets in ways that contribute to national and regional economic growth. The next round of negotiations on trade in services can pave the way for a long term research plan for policy-makers and regulators in the region.

The majority of Member States, all except Angola and Zambia, exhibit a negative trade balance (see Table 3.1), meaning that the cost of imports exceeds the revenue from exports. This raises the challenge of how future trade in services could contribute to creating a positive trade balance. Data from the combined sector studies should give valuable information on the contribution of services to the individual country GDP, to regional GDP and to regional trade in services. All fifteen countries in the SADC region can benefit from

[101] WEF, IBRD/World Bank, AfDB, Africa Commission (2013). Africa competitiveness report 2013, WEF, Geneva, and WEF, IBRD/World Bank, AdfB (2009). Africa competitiveness report 2009, WEF, Geneva.
[102] Sutherland, E. (2010/2011). International mobile roaming: progress and challenges in African markets, The African Journal of Information and Communication, Issue 11.

heightened levels of investment in telecommunications, ICT and e-services in order to push forward economic growth and development in all parts of the economy including agriculture, industry and services. This would need to be facilitated by sound policy and regulation in the ICT infrastructure and services domains. Effective ICT policy and regulation will require extensive public and private investment over at least the next ten years to create reasonably well resourced independent regulatory institutions and effective policy-making.

Table 3.1: SADC country profiles and regional dashboard[i]

Country[ii]	Economic Indicators			Trade Indicators		ICT Indicators				
	Population (millions) (2011)	Real GDP (billions USD) (2011)	GDP (PPP) per capita (international USD) (2011)	External trade balance (exports – imports) (2011 report)	GATS Commitments Index[iii]	ICT Development Index (IDI) (2011)[iv]	Mobile Teledensity[v] (2011)[vi]	Fixed Line Teledensity[vii]	Internet Users[viii]	Household TV penetration[ix]
Angola (2009 stats)	18,5	103,9	3 750	6,0	4,4	1,6[x]	43,4%	1,6%	14,8%	36%
Botswana (T)	2,0	17,7	9 537	-11,0	4,4	2,7	142,8%	7,4%	8,0%	10%
DR Congo	66,0 [2009]	15,1 [2009]	160 [2009]	-12,1	11,2	1,3	23,1%	0,1%	1,2%	4%
Lesotho (FD)	2,2	2,5	1 282	-60,5	47,3	1,5[xi]	47,9%	1,8%	4,2%	13%
Madagascar (FD)	21,4	9,9	453	-23,7	0,4	1,4	38,3%	0,7%	1,9%	30%[xii]
Malawi (FD)	15,4	5,6	346	-7,7	14,7	1,4	25,1%	1,1%	3,3%	5%
Mauritius (ED)	1,3	11,3	8 741	-10,6	9,2	4,2	99,0%	28,7%	35,0%	96%
Mozambique(FD)	24,0	12,6	571	-18,7	5,0	1,3	32,8%	0,4%	4,3%	9%
Namibia (ED)	2,3	12,5	5 862	-13,3	3,9	2,5	105,0%	6,8%	12,0%	41%
Seychelles (T)	0,1	1,0	11 204	-8,3		4,4	145,7%	32,1%	43,2%	92%
South Africa (ED)	50,8	408,7	8 078	-0,9	53,4	3,4	126,8%	8,2%	34,0%	74%[xiii]
Swaziland(ED)	1,2	4,0	3 383	-16,7	8,2	2,2	63,7%	6,3%	18,1%	35%
Tanzania (FD)	43,7	23,9	565	-11,9	1,0	1,6	55,5%	0,4%	12,0%	6%
Zambia (FD)	13,5	19,2	1 413	3,4	14,2	1,7	60,6%	0,6%	11,5%	23%
Zimbabwe(FD)	12,8	9,5	752	-29,1	6,9	2,2	72,1%	2,8%	15,7%	31%

Comment on SADC regional economic indicator dashboard

Out of 15 Member States, six have a negative trade balance combined with low GDP (PPP) per capita (below international USD 1 000); four Member States have a negative trade balance combined with reasonable levels of GDP (PPP) per capita (between international USD 1 000 and international USD 6 000); and only a few Member States have either a positive or low negative trade balance (South Africa, Zambia), or high GDP (PPP) per capita (Seychelles)[103]. Many Member States have agriculturally-based economies, including DRC, Madagascar, Malawi and Mozambique, as well as Tanzania, Zambia and Zimbabwe. Hence, ICT needs to play a major enabling role to the agricultural and agro-processing sectors in these economies. Furthermore, eight are services-based economies (Lesotho, Madagascar, Mauritius, Mozambique, Namibia, South Africa, Zambia and Zimbabwe)[104]. A few economies have a reasonable industrial base though these may be medium technology (like South Africa) or low technology (like Botswana and Lesotho)[105].

All economies in the region face structural constraints, meaning that the economic structure cannot easily shift from factor-driven to efficiency-driven economies, because of macroeconomic instability, lack of institutional development, small market size, poorly developed human resources and other factors. Similarly, countries at the efficiency-driven stage invest too little in innovation and business development to easily shift into the innovation-driven stage, while these economies typically also experience high unemployment and underemployment.

Trade in services is important across the region, particularly trade and financial flows between South Africa and other Member States. Trade and financial flows across other countries in the region can be encouraged by greater openness in the communications sector, noting that such flows will tend to follow economic exchange in agriculture, banking and tourism. ICT in the banking and financial sector is most advanced in promoting trade, less advanced in other parts of the commercial and services sectors, hence there is significant room for improvement in building ICT infrastructure, in promoting ICT access and usage and in introducing and fostering e-services.

3.3 COUNTRY ECONOMIC AND COMMUNICATIONS PROFILES

The region's economies are generally at a fairly basic level of development with respect to their broad services sectors, with South Africa a dominant actor in trade in services in the region, but unable to encourage significantly greater ICT facilitation of regional trade in services. In the period since 2010, the provision of mobile money transfer services has become popular in a few Member States in the region, but these remittances are more commonly financial flows from outside the region than financial flows within the region. Furthermore, historical liberalisation of communications markets benefits only a few players. There are no fixed operators who are active in Member States other than in their country of origin; only two mobile operators (Vodacom and MTN) are active in Member States other

103 The World Bank (2011). Africa development indicators 2011, The World Bank, Washington.
104 WEF, IBRD/World Bank, AfDB (2009). Africa competitiveness report 2009, WEF, Geneva.
105 WEF, IBRD/World Bank, AfDB (2009). Africa competitiveness report 2009, WEF, Geneva.

than their country of origin; and some mobile operators (Tigo, Airtel, Orange) are local subsidiaries of global firms.

The Africa Competitiveness Report 2013 highlights the importance of regional integration "as a stepping stone for building economies of scale, increasing competition and fostering economic diversification"[106]. In emphasising the nature of the economic challenge, the report states "A recent World Bank report shows that countries are losing out on billions of dollars of potential trade very year because of the region's fragmented regional market, and because cross-border production networks that have spurred economic dynamism in other regions, especially East Asia, have yet to materialize in Africa"[107]. The theme of regional integration is particularly important to underline this study on the broad communications sector, because electronic communications and Internet-based communications and transactions have a major role to play in building regional economic integration. Internet-based communication can encourage greater knowledge of regional markets, knowledge of what to produce and where to trade, and can support the rapid and secure flow of trade and finance across borders that is necessary for regional economic development. The majority of countries in the SADC region have very small populations and thus very small markets, but the region has a market base of 277 million producers and consumers noting recent population statistics[108].

The competitiveness report also refers to a "deep and persistent infrastructure deficit"[109] which from the perspective of this report includes ICT infrastructure, notably telecommunications and broadcast networks, and access to international high speed bandwidth.

Key economic indicators reveal the following economic profiles:

Angola economic and communications profile[110]: Angola has a very large geographic territory, small population size and medium gross national income (GNI) per capita, making the availability of communications infrastructure a challenge in terms of level of investment required and return on investment. Because of its mineral wealth and extractive capacity, it earns a reasonable GDP despite its low level of industry and services sophistication, with industry and mining showing a 59% combined share of GDP. Net FDI is higher than most countries on the continent, except for Nigeria, South Africa, Sudan and Egypt. Few economic indicators are available for Angola, but it appears to be experiencing a reasonable level of macroeconomic stability, though its financial services sophistication and business sophistication levels are low. ICT sector development will need to attract investment in the medium to long-term in order to sustain and enhance efficiencies in this economy.

[106] WEF (2013) 'Africa Competitiveness Report 2013', World Economic Forum, Coligny, p.xi, available at www.weforum.org/docs/WEF_Africa_Competitiveness_Report_2013.pdf.
[107] WEF (2013) 'Africa Competitiveness Report 2013', World Economic Forum, Coligny, p.xiii, available at www.weforum.org/docs/WEF_Africa_Competitiveness_Report_2013.pdf.
[108] WEF, IBRD/World Bank, AfDB (2013). Africa competitiveness report, WEF, available at www.weforum.org/docs/WEF_Africa_Competitiveness_Report_2013.pdf.
[109] WEF (2013) 'Africa Competitiveness Report 2013', World Economic Forum, Coligny, p.xiii, available at www.weforum.org/docs/WEF_Africa_Competitiveness_Report_2013.pdf.
[110] The World Bank (2011). Africa development indicators 2011, The World Bank, Washington, p62.

Botswana economic and communications profile[111]: Botswana has a large geographic territory, with a very small population, hence low population density in its capital city, towns and rural areas. Its mining sector is a significant contributor to its industrial base, which contributes 55% to GDP. Since industry and services constitutes a significant contribution to GDP (98%) and its financial market sophistication is an efficiency enhancer, Botswana is regarded as being in transition from a factor-driven economy to an efficiency-driven economy. The economy grew rapidly between 1990 and 2011 showing a fair increase in GDP (PPP[112]) per capita relative to the rather flat line of continental improvement in GDP per capita. Botswana's global competitiveness ranked 79 out of 144 countries for 2012-2013, with its comparative strengths lying in its institutions and level of financial markets development. Its weaknesses lie in its low levels of infrastructure, small market size and low levels of goods and labour market efficiency, as well as weaknesses in primary education, higher education and technological readiness. The contribution of telecommunications, ICT and other electronic communications services (e-services) to the industry and services sectors could make a significant contribution to increasing Botswana's financial market sophistication, education and technological readiness in the next two decades, if this contribution was addressed as an economic policy priority. In 2013, firm level technology absorption is low, only 7% of individuals use the Internet and only 1,5% of individuals have mobile broadband subscriptions.

Democratic Republic of Congo economic and communications profile[113]: The Democratic Republic of Congo (DRC) has the largest population in the SADC region and the lowest GNI per capita. Its position as a core fragile state reduces it capacity to build institutions and infrastructure or to enhance its macroeconomic stability. Nevertheless, households and micro-business are keen adopters of mobile communications. The DRC is primarily a low value-added services-based economy, but the low levels of manufacturing and industry development mean that the foundation for contributions from the services sector is weak. A weak economy is unlikely to be able to maximise the benefits of telecommunications and ICT, while digital broadcasting would appear to be a service that only high income households would gain access to. Nevertheless, efforts to increase ICT access and usage through appropriate policy and regulation would not be wasted, as they would contribute to building the necessary institutional and infrastructure base for leaving the 'cohort of fragile states'[114]. Greater ICT access and affordability could also enhance usage, including enhancing trade in services and financial flows from the DRC to the SADC region and to the Central and East African regions.

Lesotho economic and communications profile[115]: Lesotho has a very small geographic territory, a small population and thus a small market size. It is a factor-driven economy with a low level of macro-economic stability, and insufficient strength in its institutions, infrastructure, market efficiency, financial market sophistication, education or technological readiness to support economic growth or attract foreign direct investment. Its sectoral value added to GDP is derived from low-tech, small scale industry and services (92%). GDP (PPP) per capita has more than tripled between 1990 and 2011, but remains significantly

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[111] WEF, IBRD/World Bank, AfDB (2013). Africa competitiveness report 2013, WEF, Geneva, pp128-9.
[112] PPP = purchasing power parity
[113] The World Bank (2011). Africa development indicators 2011, The World Bank, Washington, p62.
[114] The World Bank (2011). Africa development indicators 2011, The World Bank, Washington, p175.
[115] WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva, pp156-157.

lower than the average for sub-Saharan Africa. Firm-level technology absorption is low, only 4,2% of individuals use the Internet and only 1,7% of individuals have mobile broadband subscriptions. Thus, the contribution of telecommunications, ICT and e-services to Lesotho's economy could assist in building market efficiency and technological readiness, but is unlikely to make a significant change in important development indicators such as the quality of institutions and access to financing. Nevertheless, ICT infrastructure investment and services innovation is vital for participation in the regional economy, for regional integration. A strong and independent regulator can improve the profile of the quality of institutions.

Madagascar economic and communications profile[116]: Madagascar is a small island state with a sizeable population of 21,4 million. It has shown reasonable GDP (PPP) per capita growth over the three decades 1980 to 2013, though its GDP is lower than other states of similar population size, and similar to states of much smaller population size. This is a factor-driven economy, highly insulated from the global and regional economies, and showing weakness in its macroeconomic stability and financial market sophistication, largely due to political instability over an extended period. Madagascar is mainly a services-based economy (55% of GDP), with agriculture adding 29% of GDP and a very low manufacturing base. Only 1,9% of individuals use the Internet and mobile broadband subscriptions are almost non-existent. Thus, investment in telecommunications, ICT and e-services can contribute to social development and economic growth, especially by increasing Madagascar's participation in regional trade, possibly improving its positioning as a tourist destination or as a contributor to agricultural trade.

Malawi economic and communications profile[117]: Malawi's population of 14 million produce a low level of GDP per capita, falling under the curve for African households. A factor-driven economy, Malawi does poorly on macroeconomic stability, market size, education and technological readiness, but has a basic level of performance with regard to institutions and financial market sophistication. Its economy can benefit from investment in telecommunications and from the introduction of ICT and e-services in all sectors of the economy – but notably in the largest sectors agriculture (contributes 30% to GDP), and services (contributes 53% to GDP). Agriculture and services are sectors in which trade can be significantly enhanced through Internet-based information flows and electronic transactions, noting advances in global integration for countries like South Africa and regional integration for agriculturally-based countries in East Asia. As at 2013, only 3,3% of individuals in Malawi use the Internet and only 3,1% have mobile broadband subscriptions.

Mauritius economic and communications profile[118]: Mauritius, another small island state, has a strong services-based economy where the services sector contributes nearly 70% to GDP, notably from tourism and public services; while industry adds 26% to GDP. It is an efficiency-driven economy which is doing well on key indicators including institutions, infrastructure, health and primary education and financial market sophistication, but which needs to do more to enhance its macroeconomic stability. Improvements in higher

[116] WEF, IBRD/World Bank, AfDB (2013). Africa competitiveness report 2013, WEF, Geneva, pp162-3 & AfDB, AUC, UNECA (2009). African statistical yearbook 2009, African Development Bank (AfDB), Tunis, pp 41 & 44.
[117] WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva, pp164-5.
[118] WEF, IBRD/World Bank, AdfB (2009). Africa competitiveness report 2009, WEF, Geneva, pp170-171.

education and training, market efficiency, technological readiness, business sophistication and innovation can set it on a path towards becoming an innovation-driven economy. Policy statements in 2013 indicate that it is striving towards this goal. Mauritius envisions its economic future as a regional knowledge hub, but requires significant advances in its electronic communications infrastructure and services to realise this objective, as only 35% of individuals use the Internet and statistics reflect 12.4% mobile broadband subscriptions. Mauritius needs stronger integration into the regional and global economies, though this will prove difficult for this small economy, unless it can become a regional hub for trade and/or knowledge, linking Africa and South-East Asia, spurred by advanced ICTs and e-services.

Mozambique economic and communications profile[119]: Mozambique, characterised in previous African competitiveness reports as a marginal fragile state, has emerged to exhibit a very basic level of macroeconomic stability though still ranked low at 125 out of 144 countries. This medium sized country has a population of 24 million located mainly in rural provinces and small towns. Hence, its consumer market has a low level of development, while its health and education systems, financial market sophistication and technological readiness require significant investment. The challenge for Mozambique, which hosts one of the undersea cable landing stations for Southern Africa, bringing potential for access to high bandwidth, is building national telecommunications infrastructure as a foundation for Internet-based small business and agriculture access in the rural north of the country. In theory, Mozambique could also contribute to enhanced regional economic trade by building connecting backbone networks for landlocked countries such as Zambia and Zimbabwe and charging for the capacity. However, these opportunities are limited by the economic risk situation for Zimbabwe and the limited infrastructure cost recovery opportunities from Zambia. Mozambique’s sizeable agriculture (contributes 32% to GDP), small-scale industry (24%) and large services sector (43%) can all benefit from investment in telecommunications and ICT infrastructure, while greater access to information can be fostered by moving steadily towards universal digital broadcasting and Internet services.

Namibia economic and communications profile[120]: Namibia occupies a vast land mass with very low population density and very small market size. Nevertheless, its economy is assessed to be at the efficiency-driven stage of development, with basic macroeconomic stability, and strengths in the level of development of public and corporate institutions, economic infrastructure, market efficiencies and financial market sophistication. Its services sector is relatively well developed and contributes 73% to GDP, while industry including mining contributes 20%. Agriculture is important, though not dominant in the economy. Improvements in education and technological readiness can increase the economic capacities of the country significantly, but there is only marginal room for domestic investment and limitations on foreign direct investment due to market size. Individual Internet usage is 12% and mobile broadband subscriptions are low at 3,6%. Namibia adopted a universal access and service policy for telecommunications in 2012 and will need to increase the pace of regulation to achieve the goals of universal access and lower the cost of communications. It will be no mean feat for Namibia to effectively integrate into the regional and continental markets for trade and tourism, in order to boost its revenue

[119] The World Bank (2011). Africa development indicators 2011, The World Bank, Washington & WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva, pp174-5.
[120] WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva, pp176-7.

earnings. Given its limited economic potential, Namibia will need to enhance its economic capacities through ICT investments aimed at sustaining an efficiency-driven economy.

Seychelles economic and communications profile[121]: The Seychelles are a collection of small islands with GDP of similar magnitude to other small island states such as The Comoros, and Sao Tome and Principe. With a population of approximately 0,1 million, its GDP and GNI per capita are relatively high among SADC Member States. Despite its very small market size, it performs well on a number of indicators including institutions, infrastructure, health and primary education, higher education and training. It is the only SADC Member State to be characterised as being in transition from an efficiency-driven to an innovation-driven economy. On technological readiness, it is ranked 66 out of 144 countries, with 43% of individuals using the Internet, but low mobile broadband subscriptions at 4,7%. Such small island states face significant challenges in reforming their telecommunications sectors, introducing competition and keeping prices low[122] (Sutherland, 2010), due to the high costs of infrastructure investment and technology adoption relative to household and firm income. Yet, electronic communications is vital, precisely given the relative economic isolation of Seychelles and the foundation already created for transition to an innovation-driven economy.

South Africa economic and communications profile[123]: The size and diversity of South Africa's economy obscures its low HDI at 0,67, ranking just lower than Namibia at 123 out of 187 countries. Its economic composition is 67% services, 30% industry and 2% agriculture. As an efficiency-driven economy, it is weak in labour market efficiency, health and primary education, as well as higher education and training. Its market size, financial market sophistication, business sophistication and innovation indicators suggest that it could transition to an innovation-driven economy. However, it is struggling to increase its gross domestic expenditure on R&D to 1% of GDP and its level of technological readiness is low with respect to universal access to ICT goods and services. Individual Internet usage is comparatively low at 21-27% (depending on the source of statistics) and mobile broadband subscriptions are around 20% of the population. South Africa has experienced almost two decades of weak policy direction and political interference in ICT sector regulation, leading to a very slow pace of ICT sector and e-services development. This has limited its capacity to utilise ICT to enhance its positioning in regional and global trade in services, and to address economic and social inhibitors such as lack of education and skills for small business development. While mobile access is high, mobile and Internet usage is low for a country where household income levels can bear the costs of communication better than many other Member States.

Swaziland economic and communications profile[124]: Swaziland's population of just over a million produce an estimated GDP of roughly USD 4 million. GNI per capita is in the middle tier on the regional economic indicator dashboard (see Table 3.1). Economic composition is

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[121] WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva, pp184-5.
[122] Sutherland, E. (2010). Telecommunications in the African small island developing states, Available at SSRN: http://ssrn.com/abstract=1583441 or http://dx.doi.org/10.2139/ssrn.1583441
[123] WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva, pp188-9.
[124] AfDB, AUC, UNECA (2009). African statistical yearbook 2009, African Development Bank (AfDB), Tunis, pp 41 & 62; and WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva, pp190-1.

mainly in small-scale industry and services (92% of GDP). Historically, Swaziland has not had an ICT sector regulator and a government department has regulated the sector. This is one of the reasons why the telecommunications and broadcasting sectors have been slow to develop and to attract either local or foreign investment. The most important step for Swaziland is to establish an independent sector regulator and to commence promotion of competition in the telecoms and broadcasting sectors, which it has now embarked on. This process should be completed with sufficient diligence to enable sector growth, as well as infrastructure and technological advancement.

Tanzania economic and communications profile[125]: Tanzania has a large population and geographic size, but its relatively high agricultural (27% of GDP) and low industrial base (26% of GDP) means that it remains a factor-driven economy. It has a sizeable services sector (46% of GDP), but its GDP (PPP) per capita is well below the continental curve. Furthermore, its institutions, its financial market development, health and primary education, and its higher education and training sector reflect significant weakness. Its technological readiness and financial market sophistication need to improve radically in order to move forward to an efficiency-driven stage of development. Only 12% of individuals use the Internet and only 1,2% of the population have mobile broadband subscriptions. Telecommunications, broadcasting and ICT are key technologies in enhancing economic efficiency and business sophistication, hence Tanzania's political and regulatory institutions will need a clear and determined agenda for ICT sector policy and regulatory reform for the next decade in order to push forward economic development.

Zambia economic and communications profile[126]: Zambia's old copperbelt has declined and a new copperbelt has emerged in the area of Solwezi in the North West Province. However, the country is aware that it cannot prosper on a resource-based economy and is seeking opportunities to enhance its economic potential through investment in ICT infrastructure as a platform for future growth. However, it has limited the opportunities for competition in the telecommunications sector for so long that its mobile and Internet service provision markets remain highly concentrated and uncompetitive, resulting in low levels of mobile and Internet access and usage[127]. Individual Internet usage is 11,5% and mobile broadband subscriptions are 0,4%. ICT services can increase the value created in Zambia's factor-driven economy in all sectors including agriculture (20% of GDP), industry (38% of GDP) and services (42% of GDP). However, its sluggish policy and regulatory environment need revitalisation and its ICT sector needs urgent reform.

Zimbabwe economic and communications profile[128]: Zimbabwe's services sector (64%) makes only a limited contribution to its low GDP. Rampant inflation has minimised the opportunities for economic investment and growth, agriculture (13%) is stagnant and industry (30%) is in long-term decline. Nevertheless, remittances and money transfers form an important component of economic flows to Zimbabwe, facilitated by mobile communications. 15,7% of individuals use the Internet and mobile broadband subscriptions are marginally higher than some countries in the region at 14,9%. ICT policy and regulation

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[125] WEF, IBRD/World Bank, AfDB (2013). Africa competitiveness report 2013, WEF, Geneva, pp192-3.
[126] WEF, IBRD/World Bank, AfDB (2013). Africa competitiveness report 2013, WEF, Geneva, pp196-7.
[127] Kaira, T (2010/2011) 'State of Competition in Zambia's Telecommunications Sector'', The African Journal of Information and Communication, Issue 11, LINK Centre, University of the Witwatersrand, Johannesburg.
[128] WEF, IBRD/World Bank, AfDB (2013). Africa competitiveness report 2013, WEF, Geneva, pp198-9.

appears to be dormant. Zimbabwe's economy is weak on all competitiveness indicators, but especially weak on macroeconomic stability and ranked exceptionally low in terms of market size.

3.4 TELECOMMUNICATIONS SERVICES

For Telecommunication Services, the classification contained in W/120 with the scheduling notes (referring to technological neutrality, services for both public and non-public use) will be the starting point for the analysis[129]. The services covered in W/120 and included in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

The analysis in Table 3.2 below includes the classification of telecommunications services adopted in each SADC member country, together with a comparison of how the classifications adopted in SADC compare to those in W/120.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120[130]?

Table 3.2: Telecoms licence classification

	W/120 alignment?	Vertical licensing framework[131]	Horizontal licensing framework (infrastructure & services)[132]
Angola	No	Partially	
Botswana	No		Partially
DRC	No	Yes	
Lesotho			Yes (excluding spectrum)
Madagascar	Unclear	Not apparent	Not apparent

[129] Under W/120 (WTO (1991) 'Services Sectoral Classification List', MTN.GNS/W/120, World Trade Organisation, Geneva) telecommunication services include: voice telephone services; packet-switched data transmission services; circuit-switched data transmission services; telex services; telegraph services; facsimile services; private leased circuit services; electronic mail; voice mail; on-line information and data base retrieval; electronic data interchange (EDI); enhanced / value-added facsimile services, incl. store and forward, store and retrieve.

[130] W/120 sets out the following framework for the classification of telecommunications services: "Voice telephone services; Packet-switched data transmission services; Circuit-switched data transmission services; Telex services; Telegraph services; Facsimile services; Private leased circuit services; Electronic mail; Voice mail; On-line information and data base retrieval; Electronic data interchange (EDI); Enhanced/value-added facsimile services, incl store and forward, store and retrieve; Code and protocol conversion; On-line information and/or data processing (incl transaction processing)". (cf WTO 1991) 'Services Sectoral Classification List', MTN.GNS/W/120, World Trade Organisation, Geneva, available online at http://www.wto.org%2Fenglish%2Ftratop_e%2Fserv_e%2Fmtn_gns_w_120_e.doc.

[131] A vertical licensing framework is one categorised according to technology (eg fixed-line vs mobile cellular vs Internet service provision vs television broadcasting etc). W/120 follows a vertical categorisation. . . . .

[132] A horizontal licensing framework (sometimes referred to as unified, or service-neutral, or technology neutral) is usually one derived from the phenomenon known as convergence and is frequently categorised into infrastructure vs services vs applications vs content. A horizontal licensing framework is preferable in the current era.

Malawi	Partly	Yes	
Mauritius	No	Yes	Partially
Mozambique	No	Yes, currently	
Namibia	No		Yes
Seychelles	No	Yes	
Swaziland	Unclear	Apparently	Reportedly moving towards horizontal
Tanzania	No		Yes
South Africa	No		Yes
Zambia	No		Yes, with some vertical sub-categories
Zimbabwe	No	Yes	

As can be seen from the table above, most of the countries in SADC have either moved towards or are moving towards a horizontal licensing framework. Horizontal licensing is sometimes referred to as unified, or service-neutral, or technology neutral, and derives from the phenomenon known as convergence. It is frequently categorised into infrastructure vs services vs applications vs content. Such an approach is currently considered to constitute international best practice[133], and should be encouraged across the region. Consideration should also be given to revising the existing W/120 framework in the light of ongoing technological developments and the growing emergence of a converged ICT ecosystem[134] in accordance with international best practice.

3.5 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120)[135]. The services covered in W/120 and included in the analysis presented here are: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution). The analysis includes the classification of broadcasting services adopted in each SADC Member State, together with a comparison of how the classifications adopted in SADC compare to those in W/120 and in other possible comparator classifications (such as that proposed / adopted by the EU).

3.6 OTHER AUDIO-VISUAL SERVICES

The other audio-visual services sub-sectors under W/120[136] and included in the analysis presented here are: motion picture and video tape production and distribution services; motion picture projection; music and sound recording. It is recommended that this is an appropriate classification of other audio-visual services in the context of the SADC negotiations on the liberalisation of trade in services in the broad communications sector.

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[133] ITU (2010) 'SADC ICT Policy and Regulatory Framework Review and Update', Support for Harmonisation of ICT Policies in Sub-Sahara Africa (HIPSSA) Project, International Telecommunication Union, Geneva, available online at https://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/Activities/SA/docs/Assessmentweb.doc.

[134] Fransman, M (2010) The New ICT Ecosystem: Implications for Policy and Regulation, Cambridge University Press, New York.

[135] W/120 provides for the following broadcasting services: radio and television services; radio and television transmission services.

[136] W/120 further provides for the following under Audio-visual Services: motion picture and video tape production and distribution services; motion picture projection service; music and sound recording.

With respect to requests for market opening and initial offers for market opening, it is noted that the other audio-visual sector is a marginal sector in all Member States except South Africa, where it is already a set of fully or partially competitive sub-sectors. Nevertheless, there should be encouragement by way of requests and offers for market entry for firms from any country in the region to operate in any other country in the region.

3.7 FOCUS AREA 1: COMMUNICATIONS MARKET STRUCTURE

The assessment of each of the sub-sectors, as set out in the individual reports for Member States, considers the following four aspects:

Market Structure: Number of telecoms and/or electronic communications and VANS[137] operators in the market and the structure of ownership i.e. private or public, foreign, local and/or joint venture; existence of a state-owned broadcaster and the extent to which it is a public broadcaster rather than a state broadcaster.

Range of Services: Type of services offered by foreign entities.

Market Share: Market share between foreign and local suppliers[138].

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

This section provides general comments on the communications market structure relevant to the SADC negotiations.

Telecoms market structure: In some Member States, the market is characterised in law as an electronic communications market which includes network operators and communications service providers or VANS (notably in South Africa), while in other Member States the market is characterised as a telecommunications market. Most markets have a monopoly or at best a duopoly in the fixed line segment; and two or more dominant operators in the mobile segment (Table 3.3 below). In most markets, the single fixed incumbent has a very small subscriber base, mobile teledensity exceeds fixed teledensity by several magnitudes of scale and mobile substitution has occurred with respect to both the voice and data markets.

[137] VANS is value added network services
[138] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Table 3.3: Regional overview of telecoms market structure[139]

Country	Number of fixed and mobile operators	Firms and market share[140] [Foreign-controlled suppliers in bold/ Major operators' market share in bold]	Year
Angola	3 fixed line operators 2 mobile operators	Angola Telecom + MSTelcom + Mundo Startel (market shares not known) Movicel + Unitel (market shares not known)	N/A
Botswana	1 fixed line operator 3 mobile operators	BTC (5%) **Mascom Wireless (48%)** + **Orange Botswana** (32%) + beMobile (subsidiary of BTC) (16%)	2011
Democratic Republic of Congo	3 fixed line operators 4 main mobile operators [16 mobile licences issued since 2001, but some consolidation]	Office of Congolais des Postes et des Télécommunications (OCPT) (0%) + Megapass/Standard Telecom + Sogetel (market shares not known) **Airtel Congo (38%)** + **Vodacom Congo (37%)** + **Tigo Congo** (16%) + **Congo-Chine Telecom** (?) + small players (includes Africell, HITS Telecom, Supercell)	2009
Lesotho	1 fixed line operator 2 mobile operators	**Econet Telecom Lesotho** (4%) **Vodacom Lesotho (82%)** + **Econet Telecom Lesotho** (mobile) (14%)	2011
Madagascar	1 fixed operator 3 mobile operators	**Telecom Malagasy** (fixed) (2%) **Telecom Malagasy** (mobile) **(39%)** + **Orange (36%)** + **Bharti Airtel** (25%)	2009
Malawi	2 fixed line operators 2 mobile operators	MTL (5%) + ACL (market share no known) **Airtel (65%)** + TNM (31%)	2009
Mauritius	2 fixed line operators 3 mobile operators	Mauritius Telecom (20%) + **MTML** (fixed) (6%) Orange **(43%)** + **Emtel** (30%) + **MTML** (mobile) (1%)	2012
Mozambique	1 fixed line operator 3 mobile operators	TDM (2%) **Vodacom Mozambique** (28%) + mCel (TDM subsidiary) **(71%)** + **Movitel** (?)	2010
Namibia	1 fixed line operator 2 mobile operators	Telecom Namibia (8%) Leo (12%) + MTC **(80%)**	2010
Seychelles	1 fixed line operator 2 mobile operators	**Cable and Wireless (Seychelles)** (market share not known) **Cable and Wireless (Seychelles)** (mobile) + **Airtel Seychelles** (market shares not known)	N/A
South Africa	2 fixed line operators 4 mobile operators[141] [many licensees]	**Neotel** (0%) + Telkom (6%) **Cell C** (16%) + MTN **(35%)** + **Vodacom (41%)** + 8ta/Telkom Mobile (2%)	2013

[139] For sources, see individual country sections, which are summarised here.
[140] Fixed and mobile telecommunications are treated as a single market for the basis of this analysis. Operators with a market share of less than 0,5% are rounded down to 0%. Where market share is unknown this is indicated.

Swaziland	1 fixed line operator 1 mobile operator	Swaziland Posts & Telecommunications Corporation (6%) MTN **(94%)**	2012
Tanzania	2 fixed line operators 4 main mobile operators [12 licensed network operators]	Tanzania Telecommunications Company (TTCL) (1%) + **Zanzibar Telecommunications Corporation (Zantel)** (0%) **Bharti Airtel** (27%) + **Tigo** (20%) + **Vodacom (44%)** + **Zantel** (8%)	2012
Zambia	1 fixed line operator 3 mobile operators	Zamtel (1%) **Airtel (45%)** + **MTN Zambia (39%)** + Zamtel (16%)	2012
Zimbabwe	1 fixed line operator 3 mobile operators	TelOne (3%) Econet **(61%)** + NetOne (16%) + **Telecel Zimbabwe** (20%)	2012

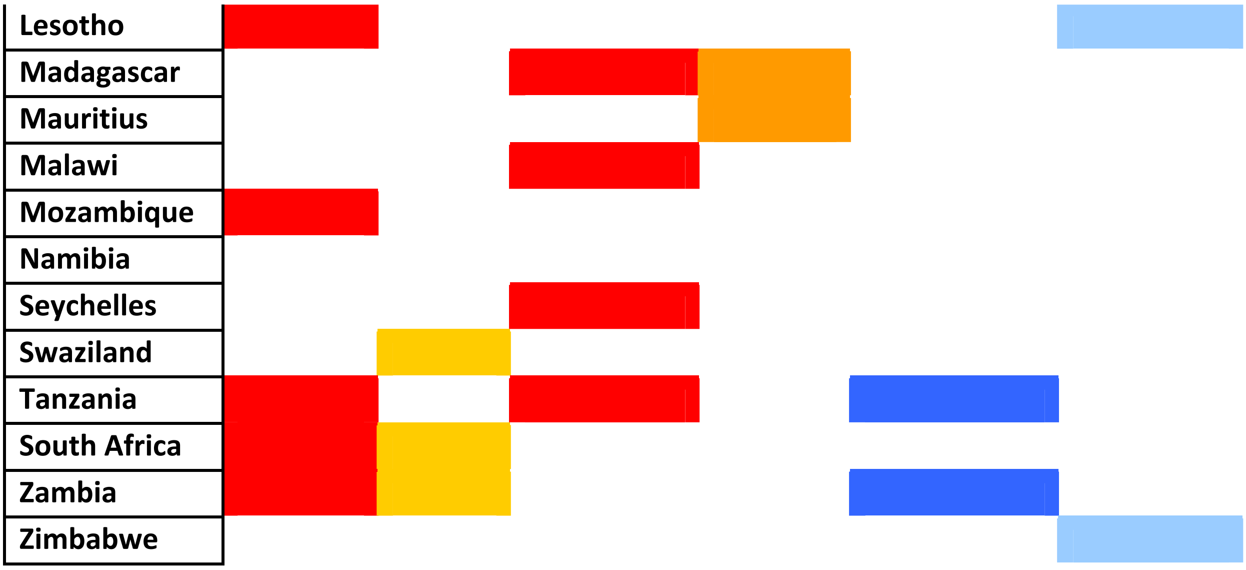
There is a reasonable commercial presence of regional telecoms operators with foreign ownership and shareholding, notably in the mobile sector. Foreign entities are operating largely in the mobile space and where they do operate they are often dominant. As shown in Table 3.4 below, Airtel has a strong regional presence, while Vodacom and MTN have a more limited regional presence. Vodacom, which is now partly owned by UK-based Vodafone, has had significant challenges in extending its commercial presence in the region. This is partly due to licensing models, but more particularly due to the size and scope of demand in the region and to the effectiveness of selected business strategies. Other players in cross-border supply are Econet, Orange and Tigo. Operators across the region offer either fixed ADSL broadband, or 3G/4G mobile broadband services, and some fixed operators offer a combination of fixed and mobile broadband. A few operators are establishing wireless hotspots for Internet access, in addition to hotspots offered by local businesses (hotels, restaurants, coffee shops) but data on wireless hotspots this did not form part of the study.

Market size is very small for six Member States in the region each of which have relatively low GDP per capita (Botswana, Lesotho, Mauritius, Namibia, Seychelles, Swaziland), hence their level of market development is constrained by these factors.

Table 3.4: Regional Telecoms Operators: Presence in Multiple SADC Countries

	Vodacom (6)	MTN (4)	Bharti Airtel (5)	Orange (4)	Tigo/ Millicom (3)	Econet Wireless (2)
Angola						
Botswana						
DRC						

[141] It is worth noting that South Africa's horizontal licensing framework and relatively advanced level of liberalisation - especially following the key Altech court judgement which resulted in the awarding of individual infrastructure (electronic communications network services) licences to over 400 companies, most of which were ISPs - comprises hundreds of companies with individual infrastructure and services licences. A number of these companies are beginning to offer VoIP and other telecommunications services, but their subscriber numbers appear currently still very low.

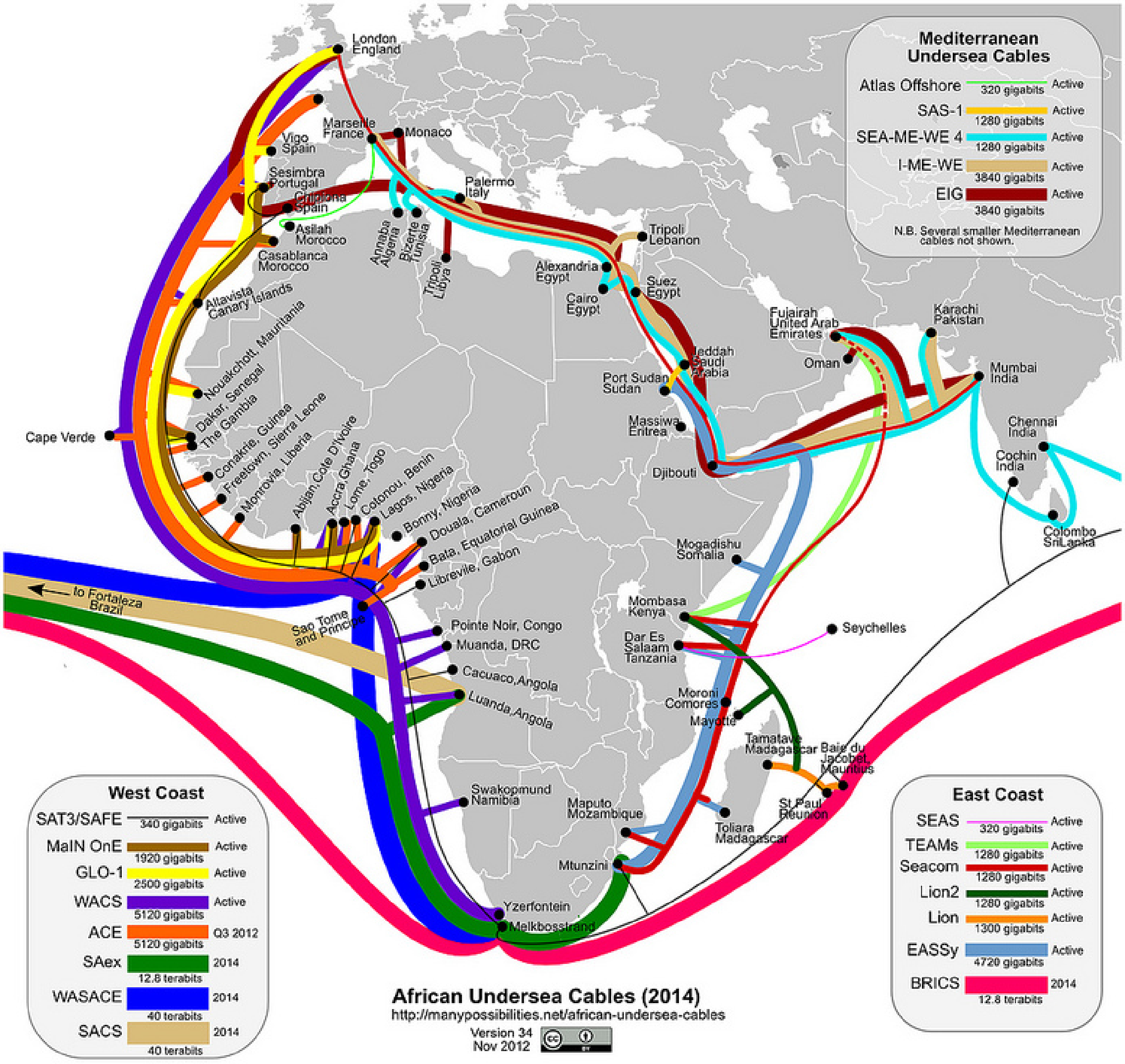


The telecommunications market has evolved into a more technologically advanced and commercially sophisticated converged network infrastructure and services market over the period 1998 to 2013, thus it is important to also understand the market structure for the Internet service provider (ISP) market. However, limited data is published on the value added services (VAS) sector, except for Zambia[142]. Some regulators produce regular reports on market structure with detailed information on market players eg Tanzania produces detailed quarterly reports and the Internet Service Providers Association of South Africa (ISPA) provides valuable information on its website. Other than this, access to information is poor, it is difficult to get a list of ISPs for a particular country and there is no information on market share. It appears that most markets have only local ISPs, except for Namibia where South African ISPs have a commercial presence.

Other important issues for the future development of the regional telecoms market is availability of national broadband infrastructure and linkages to undersea cable infrastructure for access to high-speed international bandwidth, see Figure 3.1. While not part of the terms of reference for this study, it will be important in future studies to understand the market structure for broadband (3G/4G), for spectrum and for ownership of undersea cable and landing stations. This would offer a more complete picture of the infrastructure requirements necessary for promoting e-services and a strong digital economy in the SADC region, which enables greater economic integration with global services markets. Undersea cable landing points are present in Angola, DRC, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa and Tanzania, but not to the landlocked countries of Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe, meaning that the quality of broadband service will be poor and the cost will be high for the latter six Member States. Access to broadband is necessary to derive value from investments in fixed and mobile telecommunications infrastructure and the efforts to link landlocked countries to high-speed international bandwidth should form part of a future study.

[142] Kaira, T. (2010/2011). State of competition in Zambia's telecommunications sector. The African Journal of Information and Communication, Issue 11, LINK Centre, University of the Witwatersrand.

Figure 3.1: Emerging undersea cable system for Africa (SADC region) [143]



General guidance: Member States who sign up to the WTO commitments and the telecoms regulatory Reference Paper may be able to utilise the opportunity to more carefully address the crucial issues for telecoms market development including competition, interconnection and universal access through a process of careful assessment of the appropriate measures to be adopted. A number of scenarios are possible for the telecoms sector, hence the proviso that the country positions should be carefully assessed:

Scenario A Open competition is encouraged in all markets, while regulatory measures enable small players to continue participating in local markets through addressing barriers to entry and other anti-competitive behaviour.

Scenario B Limited competition is pursued in all markets, and small players remain.

143 Song, S (2012) 'African undersea cables 2014', version 34, November 2012, available online at http://manypossibilities.net/african-undersea-cables/.

Scenario C Large players dominate, buy up small players and reduce the number of players in countries and the region overall, leading to greater market concentration and reduced competition.

Scenario D Innovation is encouraged through licensing electronic communications providers who can address specific needs, eg MSTelcom in rural Angola.

Broadcasting market structure: Table 3.5 below sets out the broadcasting market structure for the SADC region including state broadcasters, public broadcasters, commercial radio and TV, community TV; and whether the Member States have closed or open markets. It is noted that Luanda and Maputo also have cable TV, while Seychelles has high household penetration for digital cable TV. Most Member States have only local broadcasters of which the state or public broadcaster is dominant. MultiChoice (DStv) has a commercial presence across the region, while broadcasters such as TV Monde and other foreign channels broadcast to the hospitality industry. Digital migration offers potential for new players and has implications for better and more local content to be shared across the SADC region.

Table 3.5: Regional Broadcasting Market Structure

Country	Broadcasting market structure							State / Public Broad-caster?	Foreign invest-ment legal posit-ion	Regulatory / licensing system
	Television Stations				Radio Stations					
	State / Public	Commercial	Community	Satellite / Cable[144]	State / Public	Commercial	Community			
Angola	2	2[145]		2	22	5		State	No clear position	The National Media Council (NMC) is not perceived as an independent broadcast regulator, with its staffing consisting of parliamentarians and civil society, and is believed effectively to be dormant. Licensing is under the control of a variety of Ministries, via a complex application process.
Botswana	1	1		1	2	4		State	No legal restrictions	National Broadcasting Board (NBB), the independence of which was open to question, has been replaced in 2013 by Botswana Communications Regulatory Authority, with much greater degree of independence. Implementation of the change is still ongoing.
DRC	3	52	28	2		91	237	State	No legal restrictions	No Independent regulator. Licensing requires approval from several ministries (Press & Communication / Posts, Telephones & Telecommunications) with fee paid to a 3rd entity (National Agency for Information)
Lesotho	1		1	1	1	10	2	Planned shift from state to public	No legal restrictions	The Lesotho Communications Authority is an independent convergent regulator with jurisdiction over broadcasting under the 2012 Communications Act.
Madagascar	1	11 (?)	?	1	1	206 (?)	?	State	No legal	Separate broadcasting regulator (Conseil Supérieur à la Communication Audiovisuelle (High Council for Audiovisual

[144] Note that a satellite or cable broadcaster may carry many channels, which are not reflected in the count here.
[145] One of these is a cable television broadcaster.

									restrictions	Communication (CSCA)). Not independent. Convoluted licensing process, with several steps, involving both CSCA & telecoms regulator OMERT.
Malawi	1	1	1	1	2	8	13	Formally public, but more state in the past	Max. foreign ownership of 40% (except community broadcasters). No other legal restrictions.	Relatively independent. Malawi Communications Regulatory Authority is responsible for licensing & regulation. The history of political interference is changing.
Mauritius	1	1 (?)	0	4	1	3	0	Formally public	Max foreign ownership restriction of 20%	Separate broadcast service regulator (Independent Broadcast Authority) with some degree of independence. Licensing involves approval by both IBA and ICT sector regulator (ICTA).
Mozambique	1	5	25	1	25	8	"dozens"	Formally public, but with some limitations	Maximum foreign ownership of 20% set out in law.	No independent regulatory body for the broadcasting sector. The Council of Ministers (Cabinet) controls licensing - approves the application and issues the licence. The Government Information Bureau (GABINFO) and the National Communications Institute (INCM) only play an advisory role to government. Foreign investment in broadcasting is subject to shareholding regulations.
Namibia	1	3	1	1	10	9	6	State, but with public service mandate	Max foreign ownership restriction of 49%; no other known restrictions	Communications Regulatory Authority of Namibia (CRAN) is the licensing authority. Licensing is an open application process.. Minister may override foreign ownership restriction.
Seychelles	1	0	0	2	2	0	0	State, with some public service features	Licensees must be incorporated locally or in the hands of Seychellois.	No separate, independent regulator. Sector regulation undertaken by the Minister of ICT. Licensing done by the Seychelles Licensing Authority. Broadcast content and conduct of broadcasters regulated by the Seychelles Media Commission.
South Africa	3	2	5	2	15	18	180+	Public, subject to minor	Maximum foreign ownership of 20%	Regulation and licensing undertaken by converged regulator, ICASA, with independence guaranteed in

								limitations / controversies	set out in law. Cross-media ownership and control restrictions.	Constitution. Broadcasting content subject to largely self-regulated codes governing advertising and content / conduct.
Swaziland	1	1	0	1	3	0	1	State	No known legal restrictions	Complex television licensing regime. Swaziland Television Authority licences television broadcasters. Swaziland Posts and Telecommunications Corporation licences radio and television stations. No licences issued in recent years. Converged regulator (Swaziland Communications Commission) being introduced.
Tanzania	1	25	?	1	3	50	?	Formally public, but with some limitations	Maximum foreign ownership of 49% set out in law. No cross-media ownership /control restrictions.	Broadcasting licences issued by independent converged regulator - Tanzanian Communications Regulatory Authority (TCRA). Facilities licences are required by signal distributors, content licences by broadcast service providers.
Zambia	1	6	1	2	3	21	35	State, with some public service features	Maximum foreign ownership of 25% set out in law. No cross-media ownership and control restrictions.	Separate regulator (Independent Broadcasting Authority) created by law in 2002, but never established. Licensing undertaken by Ministry.
Zimbabwe	2	0	0	1	5	0	0	State	No foreign shareholding permitted.	Regulation of broadcasting undertaken by Broadcasting Authority of Zimbabwe (BAZ) which is considered to lack independence.

Other audio-visual market structure: There is a limited market for production of local content, and a long history of buying in content from outside the region. Even South Africa can benefit from market development. The South African market structure is constituted by a relatively large number of firms including local and foreign firms, offering a wide range of services in the motion picture and videotape production and distribution sub-sector and in the music and sound recording sub-sector. There are two dominant firms in the movie projection sub-sector. The remaining Member States have a few small or very small players, or no commercial "other audio-visual" sector. The most important actions to be taken with respect to these sub-sectors are sector development and promotion policies and strategies, including incentive schemes for film and videotape production; and attention to the collection and distribution of fees to performers in the music industry.

3.8 FOCUS AREA 2: REGULATORY REGIME AND STATE OF PLAY

The following trade restrictions were assessed under this theme of the report, the details of which are set out in the individual country studies:

Market Entry: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Technology Neutrality: If licences for telecoms service providers are technology-neutral (eg convergence /unified/service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

Licensing: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

Legal Status: Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch, ie without legal incorporation requirements).

Investment: Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital.

Discrimination: Discriminatory measures among operators based on nationality (i.e. favouring local operators, or operators from other countries) such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

Technology restrictions: Are operators permitted to route their international calls using VoIP; Are foreign suppliers permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecoms Services[146], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management. Is regulation of broadcasting undertaken by a separate regulator? A few key issues are highlighted in the section below.

Regulatory regime and state of play in the telecoms sector: In general, markets would seem to be more liberalised than appears in legislation and other documentation, though greater commitment is required to legislating and regulating market access to encourage market entry and the promotion of competitive markets. Zimbabwe insists no company may be foreign owned. A slight majority of Member States have licensing arrangements that specify technological neutrality, while some have promoted a technologically specific focus eg Mauritius. There are converged sector regulators in most Member States including Angola, Malawi, Mozambique, Namibia, South Africa, Tanzania and Zambia. Sector investment is a major challenge as many Member States have struggled to attract and utilise investment to rapidly advance the reach of infrastructure beyond the main urban areas, to ensure high quality of service and to introduce high-speed bandwidth infrastructure, applications and services.

Most Member States do not comply with the regulatory Reference Paper on telecoms. As regards regulatory independence, most Member States have nominally independent regulators, except for Swaziland and Seychelles which do not have independent regulators. In many Member States, there are conflicting sets of responsibilities between the responsible Minister and the regulatory authority, for example where the regulator requires approval on a decision from the Ministry. The quality of telecoms regulation is generally weak across the region, without exception. Independent regulation can play a much greater role in sector development and thus also in economic development.

Regulatory regime and state of play in the broadcast sector

Market entry is extremely limited in the SADC region, largely due to the dominance of state and public broadcasters. Most countries have restrictions on broadcast and cross-media ownership, but the percentage differs across countries. South Africa has licensed a few pay-TV channels in addition to DStv, but only Top TV has a notable market share, while others failed to launch. The licensing regime in most countries is not open or transparent, for example, on paper Zimbabwe liberalised its broadcasting sector in 2001 in terms of the Broadcasting Services Act, but the regulatory authority has never advertised for applications for broadcast licenses. It is not yet clear how the broadcast market structure will change with digital migration which is on the cards for 2015 – 2016. It appears to be a general trend that governments may impede market liberalisation in the broadcasting sector.

Technology neutrality is difficult to ascertain across the region and countries should report and clarify their country positions on this matter. Technology neutrality is generally applied with respect to terrestrial broadcasting. However, with migration to digital TV, technology

[146] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

standards have been debated and adopted across the region, with a significant number of countries opting for DVBT-2. A better understanding needs to be gained of the issues of technology neutrality in the broadcasting sector, noting that regional harmonisation of standards for digital TV is considered necessary, one of the reasons being that the cost of the digital decoder would be lower per unit if manufactured for the whole SADC regional market.

Regulatory agencies

Some Member States have separate telecoms and broadcast regulators, while others have converged regulators (Table 3.6 below). Regulators are not independent in countries where there is strong state control of the media, and broadcasting authorities are not only accountable to the relevant Minister, but Ministers also strongly influence or control regulatory decision-making. Two countries do not have regulators. Thus, establishing a long term trend of independent regulation would be an important initiative in the immediate future.

Table 3.6: List of Telecoms and Broadcast Regulators

ANGOLA	Instituto Angolano das Comunicações (INACOM) – Luanda National Media Council – Luanda
BOTSWANA	Botswana Communications Regulatory Authority (BOCRA)[147] – Gaborone
DRC	Autorité de Régulation de la Poste et des Télécommunications du Congo (ARPTC) – Kinshasa Conseil Supérieur de l'Audiovisuel (CSAC) – Kinshasa
LESOTHO	Lesotho Communications Authority (LCA) – Maseru
MADAGASCAR	Office Malagasy d'Etudes et de Régulation des Télécommunication (OMERT) – Antananarivo Conseil Supérieur à la Communication Audiovisuelle (CSCA) – Antananarivo *[l'Autorite de Regulation des Technologies de Communication de Madagascar (ARTEC)[148]]*
MALAWI	Malawi Communications Regulatory Authority (MACRA) – Blantyre
MAURITIUS	Information and Communication Technologies Authority (ICTA) – Port Louis Independent Broadcasting Authority (IBA) – Port Louis

[147] Replaces Botswana Telecommunications Authority (BTA) and the National Broadcasting Board (NBB) from 1 April 2013.
[148] ARTEC was formally created by decree in 2006, but has not yet been operationalised - see section on Madagascar below.

MOZAMBIQUE	Instituto Nacional das Comunicações de Moçambique (INCM) – Maputo Conselho Superior da Communicacao Social (CSCS) – Maputo
NAMIBIA	Communications Regulatory Authority of Namibia (CRAN) – Windhoek
SEYCHELLES	No separate, independent regulator Ministry of Information Technology and Communication (MITC) – in Victoria, Mahé Seychelles Licensing Authority (SLA) – Victoria, Mahé Seychelles Media Commission (SMC) – Victoria, Mahé
SOUTH AFRICA	Independent Communications Authority of South Africa (ICASA) – Johannesburg
SWAZILAND	No separate regulator Swaziland Posts & Telecommunications Corporation (SPTC) Swaziland Television Authority (STA)
TANZANIA	Tanzania Communications Regulatory Authority (TCRA) – Dar es Salaam
ZAMBIA	Zambia Information and Communication Technology Authority (ZICTA) – Lusaka Independent Broadcasting Authority (IBA) – created by law in 2002, not yet established
ZIMBABWE	Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) – Harare

Other audio-visual sector: As previously indicated, this sector is faced with a different set of issues from that of telecoms and broadcasting, as minimalist or light touch regulation is required for encouraging sector development. There appear to be no quantitative limitations on the numbers of suppliers or the value of transactions or assets. There are no sector specific prohibitions on market access and no discrimination in national treatment, though there are requirements for equity investments or establishment of local offices in terms of commercial presence and basic requirements for the presence of natural persons that apply to all persons entering the country and are not specific to the component parts of the "other audio-visual" sector. Other audio-visual services firms are not subject to licensing. Motion picture distribution and music distribution firms sell their services through multiple channels, including through the motion picture projection industry, the broadcast sector, and the telecoms sector. Advances in the telecoms and broadcasting sectors can encourage content flows to these sectors from the "other audio-visual" sub-sectors.

3.9 FOCUS AREA 3: LEVEL OF COMPETITION IN COMMUNICATIONS MARKETS

The assessment of each of the sub-sectors has sought to address the following:

Dominant providers: Identifying dominant providers[149] of certain services in the sub-sector(s) or market(s) and their market share, and whether they are locally or foreign or state owned.

Pricing: The ranking of individual countries in respect of the various categories of telecommunications services is given. A more detailed regional pricing study is recommended.

Competition Regulation: Identifying the existence of a competition authority, and its jurisdiction in the sub-sector.

Level of competition in telecoms markets: The telecoms markets in the SADC region are highly concentrated, as set out in Table 3.3 above. The fixed line markets in all Member States are highly concentrated markets, while the mobile markets in all but a few countries have three or fewer operators. Most Member States have two dominant providers in the voice market and these are mobile operators, often with substantial foreign ownership/investment.

There are 41 mobile operators and 23 fixed operators (Angola and DRC appear to have oligopoly fixed line markets though the market share of each fixed line operator is low or not known; Malawi, Mauritius, South Africa and Tanzania have duopolies) across the 15 Member States in the region. The mobile operators with a regional presence (operating in more than one country) are Airtel, Econet, MTN, Orange, Tigo, and Vodacom. While these six players

[149] There are a number of differing definitions as to what constitutes market dominance. This report does not attempt a complex analysis of individual market structures, but uses a simple rule-of-thumb criterion, considering any provider with greater than 35% market share to be dominant.

could benefit from a new round of regional liberalisation efforts in communications markets and contribute to strengthening ICT facilitation of the regional economy, cognisance needs to be taken with respect to the possibilities this may have for weakening those operators which operate only at country level. Trade liberalisation in communications services should encourage both the large and smaller players to operate within the region, thus effective regulatory action would need to be taken to ensure that smaller players are not excluded from participation in communications network and services markets.

Regulation of costing and pricing of telecoms services is a complex matter that requires enhanced capacity across all regulators in order to bring prices, including mobile roaming prices, within more affordable levels, while at the same time retaining a sufficient profit margin for firms to promote reinvestment in the sector and technological advancement. A regional market analysis and pricing study should be conducted to better understand the strengths and weaknesses in building competitive markets, understanding predatory pricing and significant market power (SMP), and how market regulation contributes to achieving universal access. A few Member States, notably Namibia and South Africa have had regulatory interventions on interconnect and interconnection pricing, though research needs to establish whether these interventions achieved the objectives set.

Competition authorities have been established in many Member States[150], except for Angola, the DRC, Lesotho and Mozambique. All are relatively young, the first agencies being established in terms of national competition laws in Malawi, South Africa, Zambia and Zimbabwe in the 1990s. Tanzania's competition agency became operational in 2007, those for Mauritius, Namibia and the Seychelles in 2009, and those for Swaziland and Botswana in 2010. The status of the competition authorities is set out in Table 3.7 below, though concurrent jurisdiction with the ICT sector regulator is not covered in the Table.

Table 3.7: Competition Authority Status

	Competition authority	**Investigative powers**	**Enforcement Powers**	**Abuse of Dominance**	**Sanctions**
Angola	In progress				
Botswana	Functional	Botswana Competition Commission	High Court of Botswana	Present	Directions
DRC	Not established				
Lesotho	Not established				
Madagascar	Not fully functional	Conseil de la Concurrence (Competition Council)	Competition Council?	Present	Fines up to USD 22 000 + prison terms
Malawi	Functional	Competition and Fair Trading	Unclear	Present	Fines + Compensation

150 Sakata, N (2011) 'Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?', Fifth Annual Competition Law, Economics & Policy in South Africa Conference, Competition Commission, South Africa, 4-5 October 2011, available online at http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/African-Regional-cooperation-PaperFinal-27-Sept-11-.pdf

		Commission			orders
Mauritius	Functional	Competition Commission	Competition Commission?	Present	Fines < USD 25000
Mozambique	Not established				
Namibia	Functional	Namibian Competition Commission	High Court of Namibia	Present	Fines up to 10% of turnover
Seychelles	Functional	Fair Trading Commission	Fair Trading Commission	Present	Compliance orders + Undertakings + Fines up to 10% of turnover
South Africa	Functional	Competition Commission	Competition Tribunal / Competition Appeal Court	Present	Compliance orders + Fines up to 10% of turnover
Swaziland	Functional	Swaziland Competition Commission	Swaziland Competition Commission	Present	Orders and directives + Criminal sanctions
Tanzania	Functional	Fair Competition Commission	Fair Competition Tribunal / Court of Appeal	Present	Compliance orders
Zambia	Functional	Competition and Consumer Protection Commission	Competition and Consumer Protection Tribunal	Present	Fines up to 10% of turnover
Zimbabwe	Functional	Competition and Tariffs Commission	Unclear	Unclear	Wide remedial discretion

In order to encourage a greater understanding of the competition dynamics in each country and across the region, annual reporting of subscriber numbers and other important data to the sector regulator should become mandatory, publication of company annual reports should be encouraged, and publication of country annual regulatory reports on the level of competition should be encouraged.

There is little documented evidence of anti-competitive behaviour except for South Africa (eg. Telkom fined for discriminatory pricing). Control mechanisms for anti-competitive behaviour do exist in legislation, in some Member States, for example in South Africa and Zambia. More detailed studies of competition and anti-competitive behaviour should be conducted by regulators and considered by the regional regulatory association, the Communications Regulatory Authority of Southern Africa (CRASA) to obtain insight on issues pertinent to regional harmonisation of competition regulation in the telecoms sector.

Level of competition in the broadcast sector: The region exhibits concentrated markets with state and public sector dominance and lack of competition. The sector uses license fees as a revenue model, rather than pricing of services. Some countries have established restrictions on cross-media ownership in the relevant broadcast legislation. However there are examples of extensive cross-media ownership for Angola, Namibia and Tanzania.

Information on cases reviewed by the competition authorities was not readily available and a more thorough research of law reports would need to be conducted.

Other audio-visual sector: The discussion of competition applies mainly to South Africa where there is a reasonably well developed commercial market for other audio-visual services. There is no specific evidence of anti-competitive behaviour in what is either a relatively competitive market (South Africa) or an undeveloped market (other SADC countries).

In South Africa, there are no dominant providers in the motion picture and videotape production and distribution sectors. However, in the movie projection services industry, there are two dominant providers, local firms Ster Kinekor and NuMetro. Services are reasonably priced, though the services are offered mainly in large conurbations and a few large towns. Videos, DVDs and CDs have a very wide price range, though access to music recordings is mainly via broadcast media and increasingly via Internet-based media. The Competition Commission is an independent competition regulatory authority and has jurisdiction over all sectors.

3.10 FOCUS AREA 4: STATE OF LIBERALISATION

This focus area aimed to assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC[151] for Tanzania), concessions and other bilateral agreements.

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

MFN Barriers: If Member States offer any preferential access / interconnection to other Member States or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

Liberalisation of telecoms markets: The state of market liberalisation is a complex area with a history of slow liberalisation of telecoms markets during the decade 2001–2010. Nevertheless, there are six telecoms firms offering services in multiple countries in the region, including Orange, Tigo and Vodacom. Stakeholders that could undermine liberalisation include governments and regulators who may seek to maximise returns for historical state monopolies and who may be under pressure from operators to restrict market entry to existing players. Most Member States have made formal legislated commitments to have competitive markets, except Swaziland. The wording "objective competitive market" is used in most legislation and most Member States have liberalised in the mobile space. For the future, there is opportunity for investment and revenue in the broadband market and this should be given due attention in the negotiations round.

[151] EAC is East African Community

Table 3.8: Telecoms market liberalisation and commitments

Modes of supply (cross-border supply; consumption abroad; commercial presence; presence of natural persons) and record of limitations (market access and national treatment)

	WTO Accession	Commitments: Communications Services	Modes of supply	Restrictions based on Legal Status, Investment, Nationality
Angola	1996	No	Partially liberalised market with foreign investment - further entry status unclear.	Majority foreign ownership prohibited
Botswana	1995	Yes	Partially liberalised market with foreign investment – restricted to current 3 PTO licensees	No restrictions on foreign ownership
DRC	1997	Yes	Liberalised market with foreign investment - further entry status unclear	Foreign ownership provisions unclear, but several 100% foreign-owned licensees
Lesotho	1995	Yes	Liberalised mobile market with foreign investment - commitment to full liberalisation	No restrictions on foreign ownership
Madagascar	1995	No	Liberalised market with foreign investment - further entry status unclear	No known restrictions on foreign ownership
Mauritius	1995	Yes	Fully liberalised market with foreign investment	No restrictions on foreign ownership
Malawi	1995	No	Partially liberalised market with some foreign investment - further entry restricted	No known restrictions on foreign ownership
Mozambique	1995	No	Partially liberalised mobile market with some foreign investment - no information on further entry status	No information on foreign ownership restrictions
Namibia	1995	No	Compromised liberalisation - mostly state-owned with limited foreign investment following buyout of second mobile operator	Majority foreign ownership (>49%) prohibited
Seychelles	No	N/A	Liberalised telecomms market - fully foreign-owned	No restrictions on foreign ownership
Swaziland	1995	No	No liberalisation - fixed and mobile monopolies with some foreign investment	No formal restrictions on foreign ownership, but limitation in practice
Tanzania	1995	No	Fully liberalised telecomms market with extensive foreign investment and open entry	No apparent restrictions on foreign ownership

South Africa	1995	Yes	Effectively fully liberalised telecomms market, with foreign investment - nominal limitations on entry in one segment	No restrictions on foreign ownership
Zambia	1995	No	Liberalised mobile market with extensive foreign investment - market entry recently relaxed	No restrictions on foreign ownership
Zimbabwe	1995	Yes	Liberalised mobile market with some foreign investment - entry nominally open	Indigenisation policy requires majority ownership by "indigenous" Zimbabweans

Liberalisation in the broadcast sector: Only DStv is engaged in cross-border supply, it is not possible to consume subscription services abroad, commercial presence of service providers is not prohibited and presence of natural persons is addressed in general laws. Until two years ago, DStv carried SABC channels, eTV, Botswana and Swaziland channels on its bouquet available to the region. But in circa 2010, SABC removed its services from the DStv bouquet on the grounds that households outside South Africa were not paying license fees. In its rebranding process, eTV is offering two African services across the region/continent through DStv, one focusing on general programming and the other an exclusively news channel, eNCA broadcasting to Africa and to Europe via BSkyB.

Liberalisation in the other audio-visual sector: Markets are relatively open for audiovisual services, as much as could be expected given the lack of market development in most countries. However, making offers on WTO commitments for the "other audio-visual" sector should be very carefully considered, as market entry by foreign players should be effectively balanced by promotion of commercial markets for the relevant sub-sectors.

According to the GATS commitments index listed in Table 3.9 and Figure 3.2 below for each Member State, South Africa and Lesotho are the only countries that reflect a high degree of commitment to liberalisation. The remaining countries show a relatively low degree of commitment to liberalisation, however, the levels of actual liberalisation are greater than suggested by the listed indexes.

Table 3.9: GATS Commitments Index by Country[152]

Rank / 41	Country	GATS Commitments Index
1	South Africa	53,4
3	Lesotho	47,3
8	Malawi	14,7
9	Zambia	14,2

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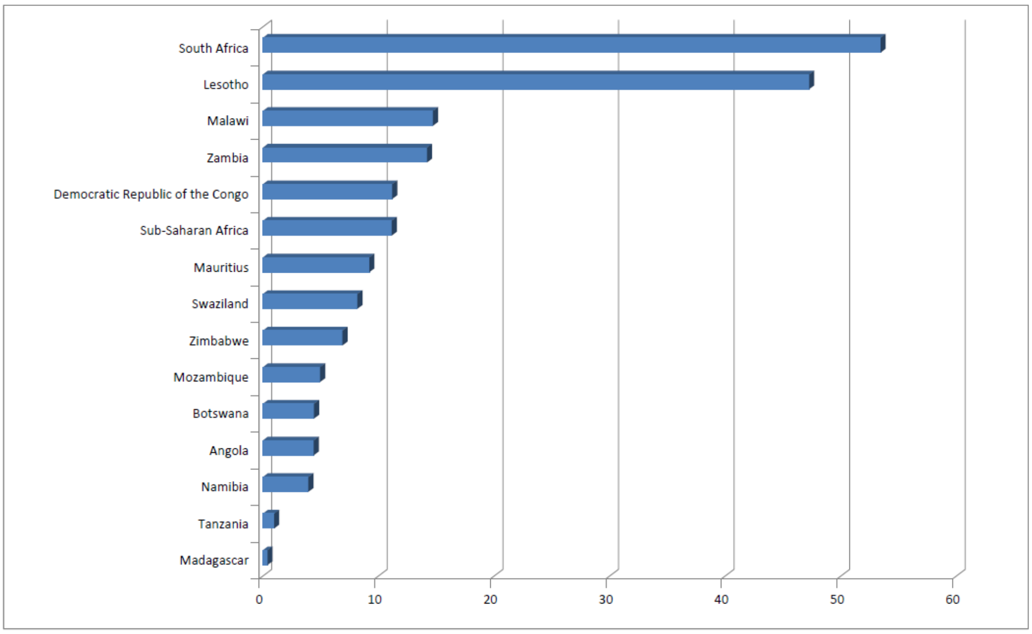
[152] Encyclopaedia of the Nations (nd) 'General Agreement on Trade in Services (GATS) Commitments Index (0-100, most liberal) - Trade - Development outcomes - African Development Indicators', Advameg Inc, Illinois, available online at http://www.nationsencyclopedia.com/WorldStats/ADI-general-agreement-services-liberal.html.

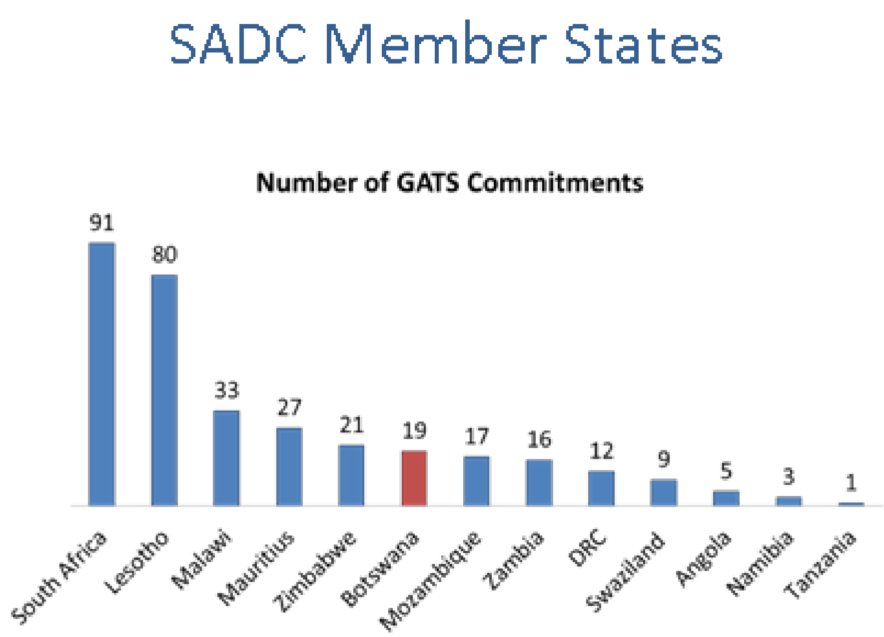
11	Democratic Republic of the Congo	11,2
	Sub-Saharan Africa	**11,1**
15	Mauritius	9,2
16	Swaziland	8,2
17	Zimbabwe	6,9
22	Mozambique	5,0
25	Botswana	4,4
26	Angola	4,4
28	Namibia	3,9
40	Tanzania	1,0
41	Madagascar	0,4

Figure 3.2: GATS Commitments Index Ranking



All Member States except Madagascar and Swaziland have made GATS commitments as shown in Figure 3.3 below, though the list of commitments is low for most Member States. This suggests a need for individual Member States to review their commitments in the context of the kinds of policy and regulatory actions required to push forward advancement in digital electronic communications markets. This is not a numbers game, but rather, the low level of commitments suggests the need for a comprehensive review across the SADC region.

Figure 3.3: GATS Commitments by SADC Member States



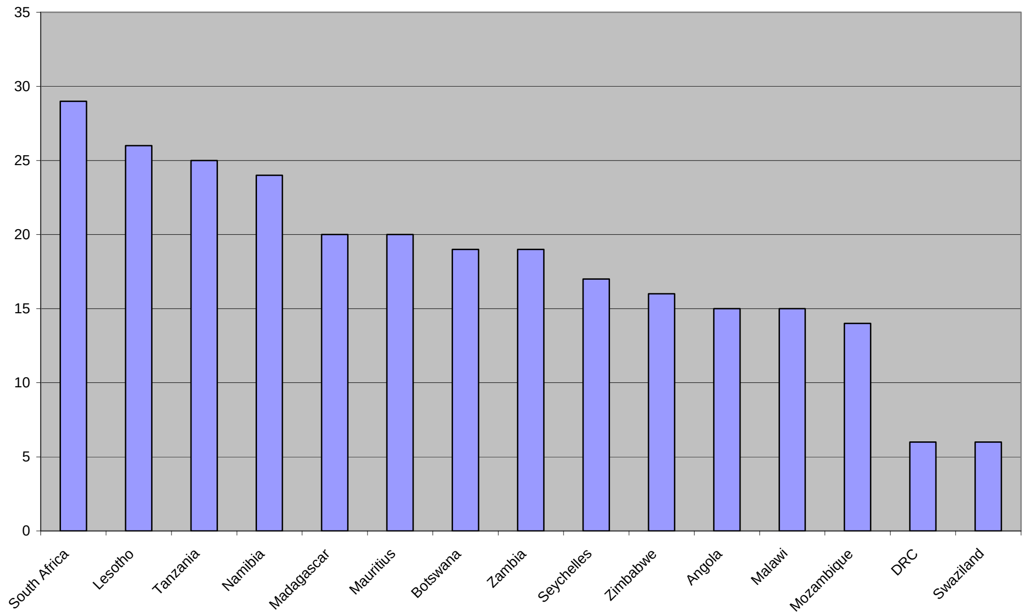
3.11 FOCUS AREA 5: INTERNATIONAL COMMITMENTS

This focus area assesses the readiness of Member States to undertake commitments in terms of the WTO Reference Paper on Telecoms Services. The WTO Reference Paper on Telecoms Services[153] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference Paper commitments. Analysing existing regulatory systems in SADC Member States, the study aimed to assess the Reference-Paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Telecoms sector: W/120 commitments are limited, particularly with respect to telecoms and broadcasting. W/120 commitments (telecoms, broadcasting, audio-visual) are vertical and outdated, as they do not provide for a converged networks and services framework, which is where most electronic communications development is occurring currently. It would appear that the frameworks are lagging somewhat behind technological and market development. A number of Member States still use vertical licensing frameworks (possibly as many as 7), but some are in process of moving to a horizontal licensing framework, though such frameworks are not uniform across all countries eg ECS, ECNS (RSA, Namibia). W/120 needs to be updated. The next steps for the SADC region are not simply about making offers, but about formulating a new regional regulatory framework that can guide transition from vertical to horizontal licensing. Since licensing has been effected differently in each country, the current situation requires SADC regional harmonisation which will assist those countries who have not yet moved from vertical licensing arrangements. A clear framework will enable better negotiating positions to be developed. The telecoms regulatory reference paper presents a good starting point for Member States to consider such next steps, see Figure 3.4 below.

153 WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

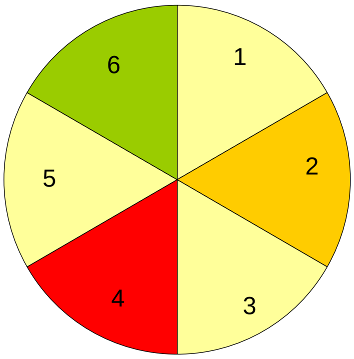
Figure 3.4: Regulatory Scorecard: Compliance with the WTO Reference Paper on Telecomms Services (Overall Scores)



This final section (Table 3.10 below) presents a regulatory scorecard for each Member State, derived from the individual country studies, with the scores out of a total of 30 possible points. Member States fall into three broad groups: those in the range 20 points and above which must give attention to significant advancement in their communications infrastructure and services markets with particular attention to broadband (Lesotho, Madagascar, Mauritius, South Africa, Tanzania), those in the range 10 – 19 points which must give attention to improving the state of market liberalisation and competition in order to prepare for the broadband era (Angola, Botswana, Malawi, Mozambique, Seychelles, Zambia, Zimbabwe) and those Member States in the range 0 – 9 (DRC and Swaziland) which must address the serious weaknesses listed in the scorecards in Table 3.10 below.

Table 3.10 Regulatory Scorecard: Compliance with the WTO Reference Paper on Telecoms Services (Scores by Criterion)

<table>
<tr><th></th><th>Compliance Scorecard</th><th>Details</th></tr>
<tr><td>Angola</td><td>



</td><td>

1. Competitive safeguards: Partially Compliant (3/5).

2. Interconnection: Somewhat Compliant (2/5).

3. Universal service: Partially Compliant (3/5).

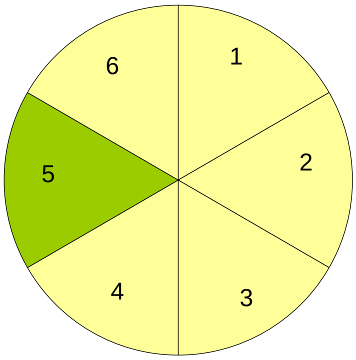
4. Public availability of licensing criteria: Not Compliant (0/5).

5. Independent regulators: Partially Compliant (3/5).

6. Allocation and use of scarce resources: Largely Compliant (4/5).

TOTAL: 15/30

</td></tr>
<tr><td>Botswana</td><td>



</td><td>

1. Competitive safeguards: Partially compliant (3/5).

2. Interconnection: Partially compliant (3/5).

3. Universal service: Partially compliant (3/5).

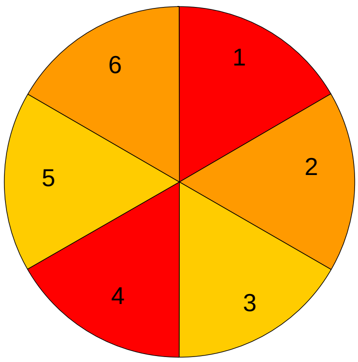
4. Public availability of licensing criteria: Partially Compliant (3/5).

5. Independent regulators: Largely compliant (4/5).

6. Allocation and use of scarce resources: Partially compliant (3/5).

TOTAL: 19/30

</td></tr>
<tr><td>DRC</td><td>



</td><td>

1. Competitive safeguards: Not compliant (0/5).

2. Interconnection: Minimally Compliant (1/5).

3. Universal service: Somewhat Compliant (2/5).

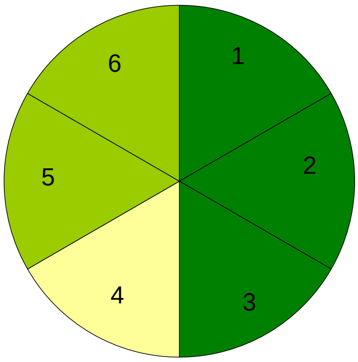
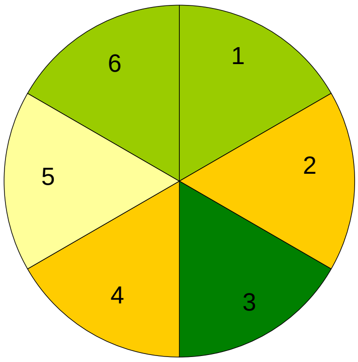
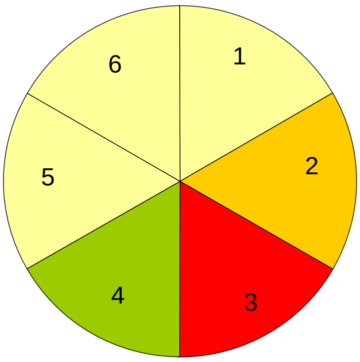
4. Public availability of licensing criteria: Not Compliant (0/5).

5. Independent regulators: Somewhat Compliant (2/5).

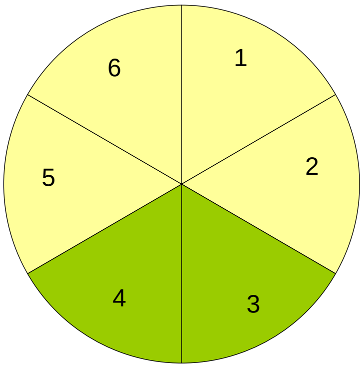
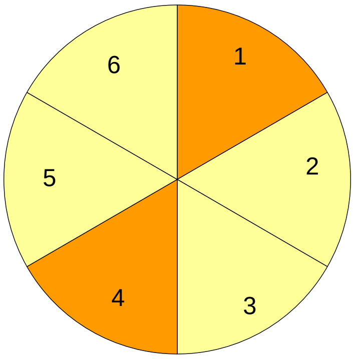
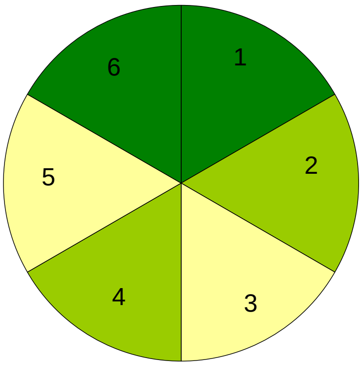
6. Allocation and use of scarce resources: Minimally Compliant (1/5).

TOTAL: 6/30

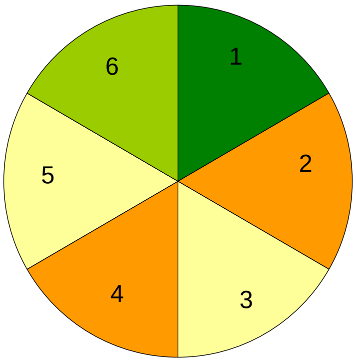
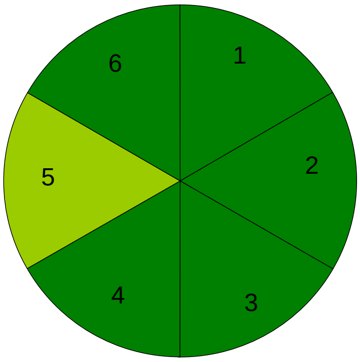
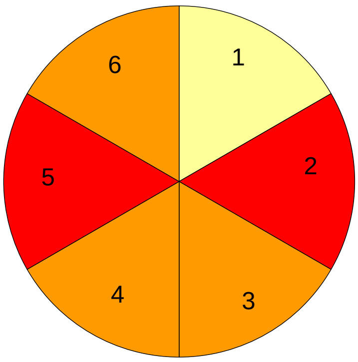
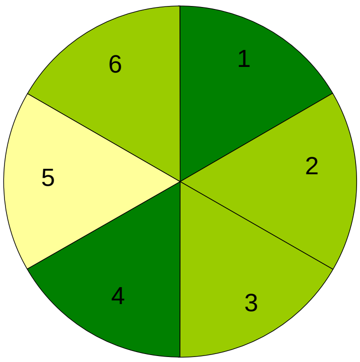
</td></tr>
</table>

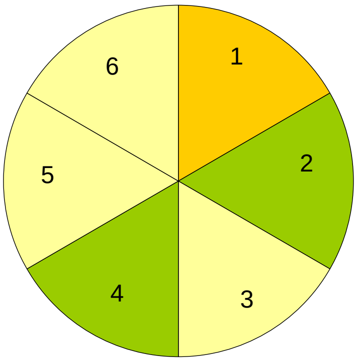
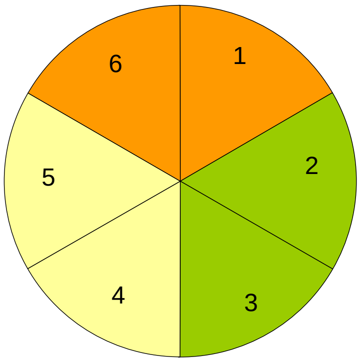
Lesotho		1. Competitive safeguards: Compliant (5/5). 2. Interconnection: Compliant (5/5). 3. Universal service: Compliant (5/5). 4. Public availability of licensing criteria: Partially Compliant (3/5). 5. Independent regulators: Largely Compliant (4/5). 6. Allocation and use of scarce resources: Largely Compliant (4/5). **TOTAL: 26/30**
Madagascar		1. Competitive safeguards: Largely compliant (4/5). 2. Interconnection: Somewhat compliant (2/5). 3. Universal service: Compliant (5/5). 4. Public availability of licensing criteria: Somewhat Compliant (2/5). 5. Independent regulators: Partially Compliant (3/5). 6. Allocation and use of scarce resources: Largely compliant (4/5. **TOTAL: 20/30**
Malawi		1. Competitive safeguards: Partially compliant (3/5). 2. Interconnection: Somewhat compliant (2/5). 3. Universal Service: Not Compliant (0/5). 4. Public availability of licensing criteria: Largely Compliant (4/5). 5. Independent regulators: Partially Compliant (3/5). 6. Allocation and use of scarce resources: Partially Compliant (3/5). **TOTAL: 15/30**

<table>
<tr>
<td>Mozambique[154]</td>
</tr>
</table>

<table>
<tr>
<td>Mauritius</td>
<td>
</td>
<td>1. Competitive safeguards: Partially compliant (3/5).
2. Interconnection: Partially compliant (3/5).
3. Universal service: Largely compliant (4/5).
4. Public availability of licensing criteria: Largely compliant (4/5).
5. Independent regulators: Partially Compliant (3/5).
6. Allocation and use of scarce resources: Partially compliant (3/5).
TOTAL: 20/30</td>
</tr>
<tr>
<td>Mozambique[154]</td>
<td>
</td>
<td>1. Competitive safeguards: Minimally Compliant (1/5).
2. Interconnection: Partially Compliant (3/5).
3. Universal service: Partially Compliant (3/5).
4. Public availability of licensing criteria: Minimally Compliant (1/5).
5. Independent regulators: Partially Compliant (3/5).
6. Allocation and use of scarce resources: Partially Compliant (3/5).
TOTAL: 14/30</td>
</tr>
<tr>
<td>Namibia</td>
<td>
</td>
<td>1. Competitive safeguards: Compliant (5/5).
2. Interconnection: Largely Compliant (4/5).
3. Universal service: Partially Compliant (3/5).
4. Public availability of licensing criteria: Largely Compliant (4/5).
5. Independent regulators: Partially Compliant (3/5).
6. Allocation and use of scarce resources: Compliant (5/5).
TOTAL: 24/30</td>
</tr>
</table>

[154] The scores for Mozambique are tentative, based on very limited availability of primary documentation, and even more limited availability of documentation not in Portuguese.

Seychelles		1. Competitive safeguards: Fully compliant (5/5). 2. Interconnection: Minimally compliant (1/5). 3. Universal service: Partially compliant (3/5). 4. Public availability of licensing criteria: Minimally Compliant (1/5). 5. Independent regulators: Partially Compliant (3/5). 6. Allocation and use of scarce resources: Largely Compliant (4/5). **TOTAL: 17/30**
South Africa		1. Competitive safeguards: Fully Compliant (5/5). 2. Interconnection: Fully Compliant (5/5). 3. Universal service: Fully Compliant (5/5). 4. Public availability of licensing criteria: Fully Compliant (5/5). 5. Independent regulators: Largely Compliant (4/5). 6. Allocation and use of scarce resources: Fully Compliant (5/5). **TOTAL: 29/30**
Swaziland		1. Competitive safeguards: Partially Compliant (3/5). 2. Interconnection: Not Compliant (0/5). 3. Universal service: Minimally Compliant (1/5). 4. Public availability of licensing criteria: Minimally Compliant (1/5). 5. Independent regulators: Not Compliant (0/5). 6. Allocation and use of scarce resources: Minimally Compliant (1/5). **TOTAL: 6/30**
Tanzania		1. Competitive safeguards: Fully Compliant (5/5). 2. Interconnection: Largely Compliant (4/5). 3. Universal service: Largely compliant (4/5). 4. Public availability of licensing criteria: Fully Compliant (5/5). 5. Independent regulators: Partially Compliant (3/5). 6. Allocation and use of scarce resources: Largely Compliant (4/5). **TOTAL: 25/30**

Zambia		1. Competitive safeguards: Somewhat Compliant (2/5). 2. Interconnection: Largely Compliant (4/5). 3. Universal service: Partially Compliant (3/5). 4. Public availability of licensing criteria: Largely Compliant (4/5). 5. Independent regulators: Partially Compliant (3/5). 6. Allocation and use of scarce resources: Partially Compliant (3/5). **TOTAL: 19/30**
Zimbabwe		1. Competitive safeguards: Minimally Compliant (1/5). 2. Interconnection: Largely Compliant (4/5). 3. Universal service: Largely compliant (4/5). 4. Public availability of licensing criteria: Partially Compliant (3/5). 5. Independent regulators: Partially Compliant (3/5). 6. Allocation and use of scarce resources: Minimally Compliant (1/5). **TOTAL: 16/30**

Broadcasting: The issues that are addressed in the WTO Telecoms Reference Paper are mainly relevant to telecoms in the region, though key items such as universal access and service are also applicable to broadcasting. However, there appear to have been no attempts to address universal access and service in the broadcasting sector and this would be an important initiative in the immediate future. Other issues, such as interconnection do not apply.

Other audio-visual services: The Reference Paper issues are largely not applicable to this sector.

3.12 CONCLUSION AND RECOMMENDATIONS

This overarching conclusion makes an overall assessment of the current state of play in relation to the liberalisation of the broad communications sector in the SADC region. The report concludes with recommendations for future action required to promote trade in services with respect to the electronic communications sector, including: identification of any areas where immediate interventions are likely to produce results that are quick and relatively easy to achieve; and any areas/issues that are either urgent and more substantial, or that require sustained, long-term intervention.

It is necessary to briefly summarise a few clear points on how to understand the WTO Commitments in terms of GATS and in terms of the WTO Reference Paper on Basic Telecommunications[155], in order to consider how these issues apply separately to the telecommunications or electronic communications sector, the broadcasting sector and the "other audio-visual" sector. Firstly, GATS commitments for WTO Member States include cross-border supply for non-resident service suppliers; consumption abroad; commercial presence; presence of natural persons. Secondly, commitments are required to be set out for specific sectors including limitations on market access; the national treatment obligation; and additional commitments, for example licensing. Thirdly, the WTO Reference Paper on Basic Telecommunications requires attention to competitive safeguards, interconnection to be ensured, universal service provision, public availability of licensing criteria, independent regulators, allocation and use of scarce resources. Fourthly, negotiating objectives include technology neutrality; encouraging new and improved offers from LDCs; addressing exclusive rights, economic needs tests, restrictions on the types of legal entity and limitations on foreign equity; commitment to provisions of the telecommunications Reference Paper; elimination of exemptions to most-favoured nation treatment[156].

The country studies demonstrate that many, but not all, SADC Member States have liberalised their telecommunications markets, particularly mobile communications markets, as well as their broadcasting markets. All countries have at least one state or public broadcaster, with a preponderance of state broadcasters. Many have multiple commercial and community broadcast providers (both TV and radio), while others have limited commercial or community broadcast markets, a distinct weakness for future regional integration of goods and services markets, particularly in terms of the long term social and economic benefits of a transition to digital broadcasting. Digital broadcasting can contribute to stronger social integration across the region encouraging greater cultural exchange, cross-regional advertising and other means of economic facilitation still requiring innovation.

The data shows that, despite limited commitments in terms of GATS, the regional trend is towards liberalisation of communications services markets, and that while restrictions do exist there is allowance for cross-border supply, consumption abroad, commercial presence of non-resident suppliers and presence of natural persons. Competition in services markets is held back to some extent by the high cost of entry into infrastructure markets and by weak regulatory environments where regulators have not developed a medium- to long-term (3 to 5 year) agenda for concerted market liberalisation and continuous sector reform in order to meet local and regional demand for electronic communications goods and services. This hampers inter-regional trade in communications services, broadband Internet and ICT applications as supporting services to other services markets, and greater regional economic integration.

Much of the detailed information about positions on GATS commitments, alignment with the WTO Reference Paper on Basic Telecommunications, and custom and practice on key issues for negotiation such as technology neutrality, are buried deep in legislation and other documents, some of which are not available on the Internet. Thus, further to the study presented here, an important preparatory activity for the negotiations round 2013 – 2015 would be for each SADC Member State to (1) document their position clearly with regard to GATS commitments, the Reference Paper and ancillary matters as set out above; and (2) for the relevant policy maker and regulator for each

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[155] WTO (no date). Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions, available 18 November 2012 from http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm

[156] WTO (no date). Telecommunications services. Available 18 November 2012 from http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm.

Member State to consider what legislative and regulatory reforms are required in the short- to medium- term (next 1 to 3 years).

Recommendations: Telecommunications/electronic communications sector

3.12.1 Market structure: Most Member States need to shift fully from a vertical to a horizontal market structure, leading to a harmonised regional electronic communications market that supports convergence in technologies, markets and services. Such a shift can be supported by amendments to existing legislation, where required. Such a shift can also be supported by regulators applying a horizontal licensing regime that promotes convergence in the broader electronic communications sector over time, eventually promoting convergence in telecommunications, broadcasting and other Internet-based e-services. In particular, attention should be given to encourage the growth of mobile broadband markets across the region as this presents the best possible platform for universal access to Internet. Mobile broadband also presents an excellent platform for communications services to enable economic development and regional integration of agricultural and services markets, through mobile and Internet-enabled e-commerce, e-business and e-government.

3.12.2 Regulatory regime and state of play: The key shift required here is towards greater regulatory independence (structural, functional and financial), in order that communications sector regulators can develop a detailed agenda covering all the major elements necessary for sector reform and addressing all the major mandate areas for electronic communications sector regulators, including creating balance between sector development and encouraging greater competition on the one hand, and promoting consumer welfare on the other hand. Particular issues that require serious regulatory attention are: the set of issues raised in the WTO Reference Paper on Basic Telecommunications, promoting competition throughout the key segments of the value chain for electronic communications infrastructure and services, promoting advanced (broadband) communications infrastructure and addressing the associated spectrum and other resource requirements, e-commerce and cybercrime and associated matters, all forms of Internet-enabled social and economic engagement, and regulation of costing and pricing.

3.12.3 Level of competition: The SADC Member States should debate the implications and advantages of moving from partial competition to full competition in mobile markets, as well as what if any opportunities exist for competition in backbone infrastructure including broadband infrastructure markets. This is necessary because competition in electronic network infrastructure markets influences competition in communications services markets. Competition authorities should take a more active interest in general competition matters as they relate to the electronic communications sector. The promotion of robust competition authorities in every domain will be important for the future of electronic communications sector reform, as competition commissions and tribunals are designed to address competition issues of broad application that the sector regulator may not be mandated to address in law.

3.12.5 State of liberalisation: Requests for market opening and initial offers for market opening should take into account issues of market entry for operators in any country in the region to operate in any other country in the region (which may require a changed regulatory approach to licensing) in the context of market entry for the following market segments: telecoms operators (fixed and mobile), other telecoms firms (offering dark fibre or lit fibre or other infrastructure or value added services), Internet service providers (ISPs), wireless applications services providers (WASPs), and more.

3.12.6 International commitments: Most Member States could make commitments without going against practice on the ground, as there is already a considerable degree of alignment with GATS. There is significant opportunity for application of the meaning of the commitments in the mobile and broadband markets. There is also significant opportunity for greater alignment with the WTO Reference Paper on Basic Telecommunications. Many of the issues raised in the individual country studies and in this summative section point to the need to meet the terms of the reference paper in the shortest possible time, because communications infrastructure and services markets are moving into a more advanced era of services innovation.

Recommendations: Broadcasting sector – radio and TV

3.12.7 Market structure: Broadcast markets are generally highly localised with few foreign operators except for DStv. SADC Member States should conduct research on how to open up their broadcast markets in the context of migration to digital broadcast technologies and services and aim to understand what effect digital migration will have on current analogue stations and operators, who will not be protected against signal interference from 2015. Too little progress has been made in this respect and the existing analogue market could be undermined by spectrum interference, while a new digital broadcast market is yet to be formed. CRASA should conduct research on the implications of digital migration for the regional broadcast market.

3.12.8 Regulatory regime and state of play: Broadcasting has been a "Cinderella sector" from the regulatory point of view, neglected with respect to the role of regulators in promoting this very important sector for cultural exchange, democratisation and cross-regional advertising. Attention should be given to issues of cross media ownership and control, considering what advantages can be gained from greater foreign (regional/international) investment in the future digital broadcast sector, both radio and TV, and what legitimate limitations to such ownership and control could be applied. Attention should also be given to pushing forward to successful digital switchover in all Member States before the ITU cut-off date of 2015 for protection of analogue signals. Broadcast spectrum and digital dividend regulation is of significant importance. Regulators should conduct research on the opportunities for cross-border supply presented by digital broadcasting and CRASA could prepare a regional regulatory reference paper on the issue. A shift from state to public broadcasters needs to be encouraged by policy-makers and regulators across the region and by CRASA. Such a move needs to be supported by the integration, where this has not already been implemented, of broadcasting regulation under the broader umbrella of a single communications sector regulator, and the assurance of greater independence in the regulation of broadcasting services.

3.12.9 Level of competition: The commercial radio and TV segments show a reasonable degree of competition in many, but not all countries of the region, though the number of players in the market may be largely due to language preference and geographic availability. The main concern for the future of competition is the shift to digital broadcast markets across the region and the continued existence of a culturally rich broadcast market in the multiple languages of the region.

3.12.10 State of liberalisation: Policy and regulation with respect to issues of cross-border supply become more feasible and thus important in the context of transition to digital broadcast services and hence the issues pertaining to liberalisation need to be researched, considered and debated in the negotiations round. Requests for market opening and initial offers for market opening pertain to: market entry for operators in any country in the region to operate in any other country in the region; as well as market entry for the following market segments: commercial TV and radio; community TV and radio.

3.12.11 International commitments: The approach to meeting international commitments requires attention with respect mainly to the future reality of digital broadcast markets as the existence of the current analogue markets is limited.

Broadcasting transmission is country specific due to spectrum issues, but it has become necessary to address policy and regulation to issues of cross-border supply in the converged environment, on the understanding that the broadcast operator is licensed in the country of origin and in the country of transmission.

Recommendations other audio-visual sector – film and music industries:

Some data on the other audio-visual sector is available from a search of the WTO services database[157] and from the few published documents available, though information is not available for most countries and the information that is available is not current. Commercial markets for the "other audio-visual" services sector are small or non-existent in most SADC Member States except South Africa. In the context of the shift to mobile broadband Internet and digital broadcasting, film and music content can be easily accessible via these technologies, opening a new era for the exchange of local content from the SADC region. In the services negotiations, attention should be paid to encouraging market access and cross-border supply, domestic regulation to promote development of this very important sub-sector, GATS commitments, emergency safeguards, government subsidies, and other relevant matters.

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[157] WTO (no date). WTO services database country and commitments search tsdb.wto.org/default.aspx

4 COUNTRY PROFILES

4.1 ANGOLA

4.1.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120[158]?

Angola's 2001 Basic Telecommunications Law distinguishes principally between "public telecommunications" services and "private telecommunications" services[159], although it also recognises "value added telecommunication services"[160].

Its "authorizations" framework refers to "the following types of infrastructure and public services: mobile landline services… transmission infra-structure supporting public networks… deployment of international access to the public service"[161].

[158] W/120 sets out the following framework for the classification of telecommunications services: "Voice telephone services; Packet-switched data transmission services; Circuit-switched data transmission services; Telex services; Telegraph services; Facsimile services; Private leased circuit services; Electronic mail; Voice mail; On-line information and data base retrieval; Electronic data interchange (EDI); Enhanced/value-added facsimile services, incl store and forward, store and retrieve; Code and protocol conversion; On-line information and/or data processing (incl transaction processing)". (cf WTO (1991 'Services Sectoral Classification List', MTN.GNS/W/120, World Trade Organisation, Geneva, available online at http://www.wto.org%2Fenglish%2Ftratop_e%2Fserv_e%2Fmtn_gns_w_120_e.doc.

[159] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 2.

[160] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 16.

[161] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 19.3. "Mobile landline services" presumably refers to mobile cellular licensing, and "deployment of international access" presumably refers to international gateway licences.

Radio frequency licences are treated separately[162].

Whilst this is not a narrowly technology-specific vertical licensing framework, it is also not a converged (or horizontal or unified or multi-service) licensing framework. Neither is it in accordance with the vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

Limited information is available on market share within Angola's telecommunications sector. According to Australian research and consultancy company, BuddeComm, there are three players in Angola's fixed-line telecommunications market, the incumbent Angola Telecom, as well as Mercury Telecom (MSTelcom) and new entrant, Mundo Startel[163]. A somewhat less recent market overview additionally lists Nexus and Wezacom as fixed-line operators[164], although another earlier report suggests that Wezacom is defunct[165]. Mercury Telecom acquired Nexus in 2005 to form MSTelcom[166].

The mobile market is a duopoly, with Unitel and Movicel as players[167].

The market for Internet Service Providers (ISPs) includes: Angola Communication Systems (ACS), Snet, Multitel, Maxnet and Cabo TV (which also provides cable

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[162] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 34

[163] BuddeComm (2012) 'Angola - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Angola-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

[164] Espírito Santo Research (2010) 'Angola 2nd Quarter 2010', Banco Espírito Santo, Lisbon, available online at http://www.bes.pt/sitebes/cms.aspx?plg=053559bd-0237-4219-b88e-cb237a26f091.

[165] Southwood, R (2008) 'The Case for "Open Access" Communications Infrastructure in Africa: The SAT-3/WASC cable: Angola case study', Association for Progressive Communications, Johannesburg, available online at http://www.apc.org/en/system/files/APC_SAT3Angola_20080523.pdf.

[166] MSTelcom (nd) 'Company profile', MSTelcom, Luanda, available online at http://www.mstelcom.co.ao/wps/portal/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hDl5AQUzN_QwMDC28TA08fY2dHY9MAQ3dvU6B8JJK8u7-_m4GRsUWQv4-zuYGBkzkB3eEg-_CoMMErb-BmhiaPxX6QvAEO4Gig7-eRn5uqX5AbYZDpqesIAO7ISbo!/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfMURUVDU2TzEwMDhLNDBJTDNDQTM1UDFHMTU!/

[167167] BuddeComm (2012) 'Angola - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Angola-Telecoms-Mobile-Broadband-and-Forecasts.html.

TV) as players[168]. Another recent sector analysis lists "some 20 Internet operators in Angola, the main ones being Nexus, ACS, Movinet (Movicel) and TV Cabo"[169]. No market share breakdown is available.

No definitive market share breakdown for voice telephony providers is available, although one press report gives the respective market shares in the mobile sector as Unitel 70% and Movicel 30%[170].

According to the ITU, Angola in 2011 had 303 221 fixed-line subscribers and 9 491 000 mobile subscribers, giving the country a per capita market penetration rate in telecommunications sector of 1,6% for fixed-line, 48,4% for mobile and 14,8% for the Internet (compared to 1,6%, 46,7% and 10,0% respectively in 2010)[171].

Angola Telecom remains 100% government-owned.

MS Telcom (Mercury Telecom and Nexus) is a subsidiary of Sonangol, the state oil company[172], and is hence 100% government owned.

Mundo Startel is 44% owned by Telecom Namibia, but the latter is attempting to offload this shareholding[173]. The remaining shareholding is held by "local Angolan shareholders"[174].

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[168] BuddeComm (2012) 'Angola - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Angola-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

[169] Espírito Santo (2010) ‚Angola 2nd Quarter 2010', Espírito Santo Research, Lisbon, available online at http://www.bes.pt/sitebes/cms.aspx?plg=053559bd-0237-4219-b88e-cb237a26f091.

[170] Pinto, A & Jover, E (2010) 'Angola a lucrative market for telecoms operators', *How We Made It In Africa*, Maritz Publishing, Cape Town, 15 September 2010, available online at http://www.howwemadeitinafrica.com/angola-a-lucrative-market-for-telecoms-operators/3463/.

[171] ITU (nd) 'Time Series by Country (2000-2011)', International Telecommunication Union, Geneva, spreadsheets covering 'Fixed-telephone subscriptions', 'Mobile-cellular subscriptions' and 'Percentage of individuals using the Internet' available for download via http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

[172] MSTelcom (nd) 'Company profile', MSTelcom, Luanda, available online at http://www.mstelcom.co.ao/wps/portal/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hDl5AQUzN_QwMDC28TA08fY2dHY9MAQ3dvU6B8JJK8u7-_m4GRsUWQv4-zuYGBkzkB3eEg-_CoMMErb-BmhiaPxX6QvAEO4Gig7-eRn5uqX5AbYZDpqesIAO7ISbo!/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfMURUVDU2TzEwMDhLNDBJTDNDQTM1UDFHMTU!/

[173] Confidénte (2012) 'Telecom Namibia sigh of relief after N$100 million 'divorce'', The Confidénte, 2 August 2012, available online at http://www.confidente.com.na/2012/08/02/telecom-namibia-sigh-of-relief-after-n100million-divorce/.

[174] Southwood, R (2008) 'The Case for "Open Access" Communications Infrastructure in Africa: The SAT-3/WASC cable: Angola case study', Association for Progressive Communications, Johannesburg, available online at http://www.apc.org/en/system/files/APC_SAT3Angola_20080523.pdf.

A majority stake in the mobile subsidiary of Angola Telecom, Movicel, has been sold to private investors[175], with the following resultant shareholding:

- 40% - Porturil - Investimentos (Angola);
- 19% - Modus Comicare - Comunicacoes e Imagem, Lda (Angola);
- 18% - Angola Telecom (government-owned);
- 10% - Ipang - Industria de Papel e Derivados (Angola);
- 6% - Lambda - Investment (Angola);
- 5% - Novatel SA;
- 2% - Correios Telegrafos de Angola (government-owned)[176].

Unitel's shareholding is as follows:

- 25% - Mercury (a subsidiary of Sonangol [government-owned]);
- 25% - Group GENI (Angola);
- 25% - Vidatel (Angola);
- 25% - Portugal Telecom[177].

No information on ISPs and VANS licensees is available.

International telecommunications access is provided via two undersea cables, the South Atlantic 3/West Africa Submarine Cable (SAT-3/WASC - with a capacity of 340 Gbit/s and a landing station at Cacuaco) and the West Africa Cable System (WACS - which went live in 2012, with a capacity of 5,12 Tbit/s and a landing station at Luanda)[178]. Access to WACS is via Angola Cables, a consortium formed in 2009 with the following shareholding:

- Angola Telecom - 51%;
- Unitel - 31%;
- MSTelcom - 9%;
- Movicel - 6%;

175 BuddeComm (2012) 'Angola - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Angola-Telecoms-Mobile-Broadband-and-Forecasts.html.

176 Pinto, A & Jover, E (2010) 'Angola a lucrative market for telecoms operators', *How We Made It In Africa*, Maritz Publishing, Cape Town, 15 September 2010, available online at http://www.howwemadeitinafrica.com/angola-a-lucrative-market-for-telecoms-operators/3463/.

177 Pinto, A & Jover, E (2010) 'Angola a lucrative market for telecoms operators', *How We Made It In Africa*, Maritz Publishing, Cape Town, 15 September 2010, available online at http://www.howwemadeitinafrica.com/angola-a-lucrative-market-for-telecoms-operators/3463/.

178 Many Possibilities (2012) 'African Undersea Cables', Many Possibilities, Cape Town, available online at http://manypossibilities.net/african-undersea-cables/.

- Mundo Startel - 3%[179].

Range of Services: Type of services offered by foreign entities.

As can be seen from the breakdown above, despite substantial state involvement in the provision of telecommunications services, there is also substantial involvement of private sector investors, some of whom, like Portugal Telecom and Namibia Telecom are foreign-owned. Despite such partial foreign shareholding, there appear to be no Angolan service providers that are foreign-controlled.

Market Share: market share between foreign and local suppliers[180].

From the above, it is clear that there are no foreign suppliers in the telecommunications market.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There are allegations of the involvement of high-profile political figures and state officials in Angola in the domestic companies investing in the sector[181]. Such figures may resist further liberalisation.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY[182]

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

Although Angola's 2001 Basic Telecommunications Law appears to be technology-neutral, referring only to public, private and value added telecommunication services[183] the licensing framework appears rather more

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179 Telegeography (2012) 'Angola Cables picks crack SACS, WACS team', Telegeography, 14 November 2012, available online at http://www.telegeography.com/products/commsupdate/articles/2012/11/14/angola-cables-picks-crack-sacs-wacs-team/.

180 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

181 de Morais, R (2010) 'The Angolan presidency: The epicentre of corruption', Pambazuka News, Issue 493, 5 August 2010, available online at http://www.pambazuka.org/en/category/features/66476.

182 Angola appears to have a decree governing the sector ("Decree No. 44/02 defining a regime for establishment, management, and exploitation of telecommunications for public use" - cf WTO (2006) 'Trade Policy Review: Angola', Report by the Secretariat, WT/TPR/S/158/Rev.1, World Bank, Washington DC, p18) - but this decree was not available to the research team.

183 Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 16.

technology-specific, distinguishing between mobile and (presumably fixed) "public networks"[184].

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

In the absence of GATS commitments in respect of communications services on the part of Angola,[185] limited information on restrictions applying to foreign investment in the sector is available.

The 2001 Basic Telecommunications Law prohibits majority ownership by foreign entities of companies operating in the sector, along with a 10% limitation on cross-ownership in the same market segment[186]. The World Bank thus describes Angola as a country that "limits foreign equity participation in its economy more so than most countries in Sub-Saharan Africa" and claims - incorrectly - that "private capital participation (domestic or foreign) in the fixed-line telecommunications infrastructure sector is prohibited", giving the country a score of 75 out of 100 for foreign equity participation in the telecommunications sector overall[187].

Foreign companies investing in Angola are required to "obtain an investment project approval from the National Agency for Private Investment (ANIP) and the

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[184] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 19.3.

[185] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/AGO, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/2113/2628/9200/Angola_GATS_Schedule.pdf.

[186] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Articles 18 & 17.

[187] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p84.

Council of Ministers (Conselho de Ministros)"[188] and to "open a foreign currency bank account in a local bank domiciled in Angola". In addition the "law requires foreign companies to contract local accountants, audit companies, and legal counsel"[189]. However, investments in the telecommunications sector appear to qualify for tax concessions[190].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

In the absence of either general GATS commitments, or any in respect of communications services, on the part of Angola,[191] no further information on any discriminatory measures applicable to foreign companies is available.

Restrictions in respect of the repatriation of profits and dividends apply to amounts in excess of USD 100 000[192].

Angola is ranked 172nd out of 183 countries in terms of ease of doing business by the World Bank[193].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

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[188] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p84.

[189] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p37.

[190] WTO (2006) 'Trade Policy Review: Angola', Report by the Secretariat, WT/TPR/S/158/Rev.1, World Bank, Washington DC, p27.

[191] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/AGO, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/2113/2628/9200/Angola_GATS_Schedule.pdf.

[192] WTO (2006) 'Trade Policy Review: Angola', Report by the Secretariat, WT/TPR/S/158/Rev.1, World Bank, Washington DC, p5.

[193] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

No information on licensing procedures is available. Biggs suggests VoIP is "tolerated"[194] and the VoIP Catalog lists 4 VoIP providers in Angola[195].

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The legislative provisions of licences for the "deployment of international access to the public service"[196] suggests that international gateway licences exist, but no information on who holds these, or whether they are limited in number, is available. The legislation provides for interconnection "subject to free negotiation among the carriers" with the regulator empowered to request Ministerial intervention in cases of "unjustified refusal of requested interconnection"[197], but, in the absence of interconnection guidelines or readily available interconnection agreements[198], discriminatory or anti-competitive factors cannot be ruled out.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

With limited information on market share, this cannot be determined at this time.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Angola in 2008 was 5,5% of monthly gross national income per capita - well below the average for sub-Saharan Africa of 23%, making Angola the 6th cheapest out of 32 African countries surveyed. The

[194] Biggs, P (2010) ,Voice Over Internet Protocol: Enemy Or Ally?, Chapter 8 in ITU (2010) *Trends in Telecommunication Reform 2009: Hands-on or hands-off? Stimulating growth through effective ICT regulation*, International Telecommunication Union, Geneva, pp180,1.
[195] VoIP Catalog (nd) 'VoIP Providers in Angola', VoIP Catalog, available online at http://www.voip-catalog.com/voip_countries_angola_1.html.
[196] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 19.3.
[197] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Articles 20.3 and 22.1 (f).
[198] Angola appears to have a decree governing the sector ("Decree No. 13/04 relating to interconnection" - cf WTO (2006) 'Trade Policy Review: Angola', Report by the Secretariat, WT/TPR/S/158/Rev.1, World Bank, Washington DC, p18) but this is was not available to the research team.

corresponding percentages for fixed and broadband were 9,5% and 76,7% (10th cheapest of 32 African countries)[199].

BuddeComm attributes the high cost of international bandwidth to "Angola Telecom's monopolisation of the SAT-3/WASC international fibre optic submarine cable"[200]. With the landing of the West African Cable System and the Africa Coast to Europe cable in 2012, and with the South Atlantic Express cable expected to land in 2014[201], this is likely to change.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

Angola does not currently appear to have a competition policy and law in place, although the government appears to be working on the approval of a Competition Law drafted in 2009[202]. This would imply that there is not yet a separate Competition Authority[203].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence of anti-competitive behaviour in the sector. The 2001 Basic Telecommunications Law does list the promotion of "sound competition" as an objective and does contain anti-competitive provisions, stating that "any practice that distorts competition conditions or constitutes an abuse of the dominant position shall be banned"[204].

4.1.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

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199 ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

200 BuddeComm (2012) 'Angola - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Angola-Telecoms-Mobile-Broadband-and-Forecasts.html.

201 Many Possibilities (2012) 'African Undersea Cables', Many Possibilities, Cape Town, updated 17 April 2012, available online at http://manypossibilities.net/african-undersea-cables/.

202 AllAfrica (2010) 'Angola: Government Drafts Competition Law to Secure Consumer's Relation', AllAfrica.com, 29 May 2010, available online at http://allafrica.com/stories/201005310181.html.

203 KluwerCompetitionLaw (nd) 'Angola', Kluwer Law International, Alphen aan den Rijn, available online at http://www.kluwercompetitionlaw.com/organizations.aspx?jurisdiction=Angola.

204 Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Articles 1,3 (a) and 13.6.

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120[205]?

Broadcasting in Angola is regulated under the 2006 Press Law[206]. The law distinguishes between radio and television broadcasting, but makes no provision for 'transmission services' (signal distribution). The law provides for both "public service broadcasting" and broadcasting by private entities, and caters for broadcasting coverage this is either national, or local or community in scope[207].

Radio frequency licences are treated separately under the 2001 Basic Telecommunications Law[208].

Despite the omission of provisions for broadcasting 'transmission services', Angola's classification of broadcasting services is largely in accordance with W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

Smith and Mendes list 22 state-owned radio stations (of which two have a national footprint) and 5 privately-owned radio stations, none of which has a national footprint[209].

State-owned radio stations include Rádio Nacional de Angola (RNA), with 4 stations in the capital, and an FM Portuguese-language service available nationally throughout the country on FM. Another RNA station, Radio Ngola Yetu, broadcasts in five national languages and has a mixed FM / short wave

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205 W/120 sets out the following framework for the classification of broadcasting services: "Radio and television services... Radio and television transmission services". (cf WTO (1991 'Services Sectoral Classification List', MTN.GNS/W/120, World Trade Organisation, Geneva, available online at http://www.wto.org%2Fenglish%2Ftratop_e%2Fserv_e%2Fmtn_gns_w_120_e.doc. . . . .

206 Angola (2006) 'The Press Law, Law No. 7/06 of May 15', Republic of Angola, Luanda, available online at http://www.wipo.int/wipolex/en/details.jsp?id=5729.

207 Angola (2006) 'The Press Law, Law No. 7/06 of May 15', Republic of Angola, Luanda, available online at http://www.wipo.int/wipolex/en/details.jsp?id=5729, Articles 48 & 50.

208 Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Article 34

209 Mendes, C and Smith, B (2006) *African Media Development Initiative - Angola Research Findings and Conclusions*. BBC Trust, London available online at http://www.radiopeaceafrica.org/assets/texts/pdf/ANG_AMDI_Report_pp4%201.pdf, p 16.

national footprint. Other RNA services include Rádio Cinco (focusing on sports) and Radio FM 96.5 (focusing on music), both of which broadcast in FM to the capital, along with 18 provincial radio stations[210].

Four of the 5 privately-owned radio stations are partially funded by the ruling party, MPLA[211]. The fifth is the Luanda-based Rádio Ecclésia[212].

There appear to be five television broadcasters in Angola. Smith and Mendes list 2 state-owned free-to-air television broadcasters, of which one, Televisão Popular de Angola, has a national footprint, while the other is available only in the capital.

There are also two private-sector satellite-based subscription television broadcasters, available: DStv MultiChoice Africa[213] and the largely Portuguese Zap TV[214]. Zap TV owned by Upstar Comunicações, which in turn is a joint venture between Portuguese media group ZON Multimedia (which has a 30% shareholding[215]), and a locally-based group, SOCIP[216]. The balance of shareholding in the consortium is unknown.

FesMedia identifies a further recent private television licensee, TV Zimbo[217], which is owned by Angolan media publisher Medianova[218].

Angola has one cable television broadcaster – TV Cabo, a 50/50 joint venture of Angola Telecom and Portugal's Visabeira Group.[219]

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[210] Mendes, C & Smith, B (2006) *African Media Development Initiative - Angola Research Findings and Conclusions*. BBC Trust, London available online at http://www.radiopeaceafrica.org/assets/texts/pdf/ANG_AMDI_Report_pp4%201.pdf, p15.

[211] This would appear to be in contravention of the law, which states that "broadcasting activity can not be carried out or financed by political parties or associations" (Angola (2006) 'The Press Law, Law No. 7/06 of May 15', Republic of Angola, Luanda, available online at http://www.wipo.int/wipolex/en/details.jsp?id=5729, Article 49.

[212] Mendes, C and Smith, B (2006) *African Media Development Initiative - Angola Research Findings and Conclusions*. BBC Trust, London available online at http://www.radiopeaceafrica.org/assets/texts/pdf/ANG_AMDI_Report_pp4%201.pdf, p15.

[213] Mendes, C and Smith, B (2006) *African Media Development Initiative - Angola Research Findings and Conclusions*. BBC Trust, London available online at http://www.radiopeaceafrica.org/assets/texts/pdf/ANG_AMDI_Report_pp4%201.pdf, p 19.

[214] Wikipedia (2013) 'ZAP (satellite television)', Wikipedia, available online at http://en.wikipedia.org/wiki/ZAP_(satellite_television).

[215] ZON (2012) 'FY 2012 Earnings Announcement', ZON Multimedia, Lisbon, available online at http://www.zon.pt/institucional/Documents/Reportes%20Financeiros/ZONFY12ENGLISH.pdf, p12

[216] Briel, R (2010) 'New Angolan DTH platform for Eutelsat', weblog, Satellite Universe, 2 March 2010, available online at http://www.sat-universe.com/archive/index.php/t-163699.html.

[217] FES (2010) *African Media Barometer- Angola*, p. 106, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Angola_2010.pdf,

[218] Wikipedia (2012) 'TV Zimbo', Wikipedia, available online at http://en.wikipedia.org/wiki/TV_Zimbo.

[219] TVCabo- Angola, available online athttp://www.ipoque.com/sites/default/files/mediafiles/documents/case-study-tvcabo.pdf.

There are no listenership / viewership figures available for the various broadcasters.

OMD puts television penetration in Angola at 13% of households[220].

Despite several references to "public service broadcasting" in the 2006 Press Law, this is made the exclusive provision of the state, and is never defined. Smith and Mendes therefore conclude that there are "currently no laws in place to impose any public broadcasting remit" [221].

Similarly, FesMedia gives Angola a score of 1,0 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[222], indicating non-compliance. They further state:

> *Public broadcasting in Angola functions, essentially, under a state-owned model. The minister in charge of the media portfolio appoints the managers of both the Public Television of Angola (TPA) and Angola National Radio (RNA)... There is serious resistance in Angola against the adoption of the governance model prescribed in the African Charter on Broadcasting and in the Declaration of Principles on Freedom of Expression in Africa.* [223]

Range of Services: Type of services offered by foreign entities.

The DStv MultiChoice Africa service, based in South Africa, is available throughout the country, but only on a satellite pay-TV basis. The Portuguese company Visabeira owns 50% of the cable television company TV Cabo.

Market Share: market share between foreign and local suppliers[224].

The government, through Rádio Nacional de Angola and Televisão Popular de Angola, has the biggest market share in the broadcasting sector.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

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[220] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p25.

[221] Mendes, C & Smith, B (2006) *African Media Development Initiative - Angola Research Findings and Conclusions*. BBC Trust, London available online at http://www.radiopeaceafrica.org/assets/texts/pdf/ANG_AMDI_Report_pp4%201.pdf, p 9.

[222] FES (2010) *African Media Barometer- Angola*, p. 106, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Angola_2010.pdf,

[223] FES (2010) *African Media Barometer- Angola*, p. 107, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Angola_2010.pdf,

[224] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

The government has entrenched interests in the broadcasting sector and may be seen as threat to broadcasting liberalisation.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There do not appear to be any specific restrictions on the number of broadcasting licences, with the exception of public service broadcasting, which, as noted above, is the exclusive purview of the state.

With regards to the press, the 2006 Press Law restricts foreign entities to 30% ownership in the media sector[225]. The law is silent on broadcasting foreign ownership restrictions.

BTI notes that, while Angola "officially open to foreign investment" and has undertaken some moves to promote foreign investment (including the adoption of a 2003 Law on Private Investment and the creation of a National Private Investment Agency (ANIP)), its "regulatory and legal infrastructure is not developed enough to facilitate or provide sufficient protection for investments" and subject to "restrictive laws and business practices"[226].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory

[225] Angola (2006) 'The Press Law, Law No. 7/06 of May 15', Republic of Angola, Luanda, available online at http://www.wipo.int/wipolex/en/details.jsp?id=5729, Articles 48 & 50, Article 24.2

[226] BTI (2012) ''BTI 2012 Angola Country Report', Bertelsmann Stiftung, Gütersloh, p5, available online at http://www.bti-project.de/fileadmin/Inhalte/reports/2012/pdf/BTI%202012%20Angola.pdf.

requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

There do not appear to be any discriminatory measures based on nationality.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

The licensing regime for broadcasting is, however, complex, lacking in transparency and under the control of government rather than an independent regulator. Broadcast licences are subject to "public tender" through the "Council of Ministers, on a proposal from the Ministries of Media and Post and Telecommunications", with the actual licence itself "granted by the Minister of Social Communication, after technical licensing and assent of the Ministry of Posts and Telecommunications"[227].

As FesMedia notes, in relation to the recent licensing of private television station TV Zimbo, "It is not clear under what circumstances the license was issued. Its owners are not known, despite the law being clear in that shareholders in media companies have to be clearly identified. There was no transparency in this process"[228]

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate independent regulator?

FesMedia notes that "there is no independent regulator for either radio or television [in Angola]. These functions are currently exercised by the National Media Council" (NMC), and gives Angola a score of 1,3 out of 5 in terms of the indicator that "broadcasting [be] regulated by an independent body adequately protected by law against interference whose board is appointed - in an open way – involving civil society and not dominated by any particular political party" [229].

Mendes and Smith note that the NMC is "staffed by parliamentarians and civil society... [and] has effectively remained dormant since its foundation and is seen by many as a mouthpiece for the government"[230].

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[227] Angola (2006) 'The Press Law, Law No. 7/06 of May 15', Republic of Angola, Luanda, available online at http://www.wipo.int/wipolex/en/details.jsp?id=5729, Articles 45 & 47.

[228] FES (2010) *African Media Barometer* – Angola, p. 106, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Angola_2010.pdf.

[229] FesMedia (2010) African Media Barometer – Angola, p. 105, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia,, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Angola_2010.pdf.

[230] Mendes, C and Smith, B (2006) *African Media Development Initiative - Angola Research Findings and Conclusions.* BBC Trust, London available online at http://www.radiopeaceafrica.org/assets/texts/pdf/ANG_AMDI_Report_pp4%201.pdf, p 16

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As noted above, the state broadcaster has the biggest market share in the broadcasting sector.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As noted above, despite some progress, Angola does not currently appear to have a competition policy and law in place.

The 2006 Press Law, however, does include anti-monopoly provisions, viz:

> *Concentration of companies or media organisations in one single entity in order to build a monopoly, posing a threat to objectivity and pluralism as well as to healthy competition is prohibited[231].*

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no specific evidence of anti-competitive behaviour in the broadcasting sector.

4.1.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Angola joined the WTO in November 1995[232], but has made no overall horizontal commitments, and no specific commitments in relation to communications services[233].

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[231] Angola (2006) 'The Press Law, Law No. 7/06 of May 15', Republic of Angola, Luanda, available online at http://www.wipo.int/wipolex/en/details.jsp?id=5729, Article 25.

[232] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

[233] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/AGO, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/2113/2628/9200/Angola_GATS_Schedule.pdf. Commitments have been made in relation to Financial Services, Tourism and Travel-Related Services, and Recreational, Cultural and Sporting Services.

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

The World Bank notes a considerable degree of trade liberalisation on the part of Angola since 2002, but points out that its "commitments under the GATS remain sparse" and ranks the country 126th out of 148 countries on its GATS Commitments Index[234].

The previously noted prohibition of majority foreign ownership of telecommunications licensees creates substantial restrictions in respect of commercial presence under both market access and national treatment. No clear information is available in respect of presence of natural persons.

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in the communications sector[235].

4.1.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[236] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

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[234] World Bank (2010) 'Angola Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Angola_brief.pdf.

[235] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

[236] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[237], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Angola is a not signatory to the WTO Reference Paper on Telecomms Services [238].

1. Competitive safeguards: ***Partially Compliant (3/5).*** As pointed out above, the 2001 Basic Telecommunications Law contains provisions outlawing abuse of dominance and behaviour that distorts competition. However, the country does not yet have a competition authority.

2. Interconnection: ***Somewhat Compliant (2/5).*** As pointed out above, the 2001 Basic Telecommunications Law contains provisions requiring interconnection, but these do not specifically require non-discriminatory terms or timeliness, and do not specifically deal with points of interconnection. In the apparent absence of interconnection guidelines the public availability of procedures is unclear. In the absence of publicly available interconnection agreements or reference interconnect offers, adherence to the transparency provision is likewise unclear. There is a dispute settlement provision, but this falls short of the independence requirement, requiring as it does the intervention of the Minister[239].

3. Universal service: ***Partially Compliant (3/5).*** The 2001 Basic Telecommunications Law does deal with Universal Access and Service, specifically under Articles 14 ("Basic service and universal service") and 15 ("Planning the universal service"), which deal respectively with the imposition of universal service obligations on the "incumbent carrier" and "public utility carriers" and the establishment of a Universal Service Fund, financed by contributions from "public network carriers and... service providers for public use" [240]. The extent of the implementation of these is, however, unclear.

4. Public availability of licensing criteria: ***Not Compliant (0/5).*** As indicated above, there is little information on telecommunications or broadcast

[237] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[238] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/AGO, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/2113/2628/9200/Angola_GATS_Schedule.pdf.

[239] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Articles 20 & 22.

[240] Angola (2001) 'Basic Telecommunication Law', Republic of Angola, adopted by the National Assembly, Luanda, 23 January 2001, available online at.http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004730.pdf, Articles 14 & 15.

licensing criteria, terms, conditions and procedures, other than that contained in the 2001 Basic Telecommunications Law, which sets out labyrinthine licensing procedures, whose implementation is unclear and lacking in transparency.

5. Independent regulators: *Partially Compliant (3/5).* The 2001 Basic Telecommunications Law establishes INACOM (Instituto Angolano das Comunicações) as the regulatory body, separate from suppliers of services. However, a number of important regulatory competencies are retained in the hand of the state (which also has shareholdings in several operators) via the Department of Telecommunications, thereby creating structural conflicts of interest. In addition, the appointments process for the regulator is not specified, and it would appear effectively to be an extension of the Ministry.

6. Allocation and use of scarce resources: *Largely Compliant (4/5).* The 2001 Basic Telecommunications Law deals with frequencies, rights of way and numbering. Frequency is co-regulated by the Department of Telecommunications and the regulator; rights of way are enforced by the Department of Telecommunications; numbering is the province of the regulator, INACOM. The band plan does not appear to be publicly available.

Angola is currently not a signatory to the Regulatory Reference Paper. Some changes to legislation and regulatory practice would be required to ensure compliance and enable signature.

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4.2 BOTSWANA

4.2.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The 2012 Communications Regulatory Authority Act distinguishes only between "service" licences (which include "cellular telephony services, packet switched data services, paging services and voice over internet services") and "system" or infrastructure licences, thus laying the basis for service-neutral and technology-neutral licensing of telecommunications[241].

The legislation also makes certain services licence-exempt, viz:

> *(a) the provision of telecommunication services on a private telecommunication system within a single area of a person's property, if such system is independent of the public system and does not cause damage, injury or interference to such public system;*
>
> *(b) the provision of fax services, provided that no separate network is established;*
>
> *(c) the operation of a public call box service[242].*

According to the regulator, based on the above, they operate a "three tier licensing framework comprising Public Telecommunications Operator (PTOs), Value Added Network Service providers (VANS) and Private Telecommunications Network Operators (PTNOs)"[243].

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[241] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 39 & 40.
[242] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 39.
[243] BTA (2012) 'BTA Annual Report 2011', Botswana Telecommunications Authority, Gaborone, p27, available online at http://www.bta.org.bw/docs/documents/BTA_2011_Annual_Report.pdf,. It is unclear how the regulator's definition of PTNOs differs from the licence-exempt category specified in the legislation. . . . .

In addition, the regulator is currently engaged in a consultation process to introduce a new system (infrastructure) licence category, that of "facilities based operator"[244].

Radio frequency licences are treated separately from telecommunications licences[245].

The website of the regulator provides for separate licence applications in respect of the following categories of licence: "Aircraft Radio… Amateur Radio… Broadcasting… Cellular… Citizen Band Radio… Frequency… Point-to-Multipoint… Point-to-point… Radio Dealers… Radio… Satellite Service… Type Approval… VANS"[246].

The licensing regime in Botswana is thus a partially converged (or horizontal or unified or multi-service) framework, distinguishing between infrastructure and services, but retaining a categorisation distinguishing between types of services / infrastructure. As such, it goes beyond the vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists the incumbent Botswana Telecommunications Corporation (BTC) as the sole fixed-line telecommunications operator, with three mobile operators, viz Mascom Wireless (affiliated to South Africa's MTN), Orange Botswana and beMobile (a subsidiary of BTC) market. The Internet Service Provider market is home to a "large number of ISPs", including Botsnet, MTN Business, InfoBotswana (IBIS), Broadband Botswana Internet (BBI), OPQ Net, Mega Internet, Global Broadband Solution (GBS, Tsagae Communications, Virtual Business Network Services (VBN), Bytes Technology, Fourth Dimension, Hi-Performance Systems, Microteck Enterprises, Tharinet, Netspread and First National Bank[247].

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[244] BTA (2012) 'Consultation Paper on the Creation of Facilities Based Operator (FBO) Licence', Botswana Telecommunications Authority, Gaborone, December 2012, available online at http://www.bta.org.bw/sites/default/files/documents/Consultation%20Paper%20on%20the%20Creation%20of%20FBO%20Licence.pdf.

[245] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 45 - 49.

[246] BOCRA (nd) 'Welcome to Botswana Communications Regulatory Authority', Botswana Communications Regulatory Authority, Gaborone, http://www.bta.org.bw/. . . . .

[247] BuddeComm (2012) 'Botswana - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at

The most recent comparative figures for telecomms market share date from the third quarter of 2011.

Botswana: Fixed & Mobile Subscribers		
	2011 (Sep)[248]	
	Subscribers	**Market Share**
Botswana Telecommunications Corporation (fixed)	149 108	4,8%
Mascom Wireless (mobile)	1 509 225	48,1%
Orange Botswana (mobile)	988 388	31,5%
BTC beMobile (mobile)	491 942	15,7%
Total	3 138 661	

According to the ITU, Botswana in 2011 had 149 578 fixed-line subscribers and 2 900 263 mobile subscribers, giving the country a per capita market penetration rate in telecommunications sector of 7,4% for fixed-line, 142,8% for mobile and 7,0% for the Internet (compared to 6,9%, 117,8% and 6,0% respectively in 2010)[249].

Botswana Telecommunications Corporation is currently 100% owned by the Government of Botswana. Plans for its privatisation were announced in late 2010[250], but have yet to be completed. It now seems likely this privatisation will be via an Initial Public Offering (with the Government of Botswana retaining 51%[251]) as initially reported, rather than by means of the sale of a strategic

http://www.budde.com.au/Research/Botswana-Telecoms-Mobile-and-Broadband.html . The full report is available on a for sale basis.

248 BOCRA (nd) 'Active_Subscribers_in_the_Botswana_Networks (revised)', Botswana Communications Regulatory Authority, Gaborone, available online at http://www.bta.org.bw/sites/default/files/documents/Active_Subscribers_in_the_Botswana_Networks%20%28revised%29.pdf.

249 ITU (nd) 'Time Series by Country (2000-2011)', International Telecommunication Union, Geneva, spreadsheets covering 'Fixed-telephone subscriptions', 'Mobile-cellular subscriptions' and 'Percentage of individuals using the Internet' available for download via http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

250 Bloomberg Businessweek (2010) 'Botswana To Sell BTC Shares In February 2011', Bloomberg Businessweek,, New York, available online at http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=13775542.

251 Nkani, T (2012) 'BTC shares are for all – BOCCIM', The Botswana Gazette, Gaborone, 26 September 2012, available online at http://www.gazettebw.com/index.php?option=com_content&view=article&id=14935:btc-shares-are-for-all-boccim&catid=13:business&Itemid=2.

equity stake[252]. In 2012, BTC was converted into a public company under the name BTC Limited, still 100% government-owned, preparatory to the structural divestiture of its infrastructure by "registering and establishing the new telecommunications infrastructure company, Botswana Fibre Networks (Pty) Ltd or "BoFiNet"" and the later "issuing of allotted shares to citizens"[253]. The establishment of a privatisation entity, a Special Purpose Vehicle (SPV), is nearing completion[254].

Partial information on the ownership structure of Mascom Wireless is available:

- 53% - MTN Group (South Africa)[255];
- 47% - unclear[256].

Similarly, there is limited information on the ownership of Orange Botswana:

- 73,7% - France Telecom-Orange[257];
- 26,3% - unclear.

BTC beMobile is the mobile arm of Botswana Telecommunications Corporation, and is hence 100% owned by the Government of Botswana.

According to the regulator, there are 53 VANS licensees and 29 private telecommunications licensees[258]. No market share breakdown is available.

Botswana has several points of international telecommunications access via undersea cable. BTC, in partnership with Telecom Namibia, is an investor in the West Africa Cable System (WACS - with a capacity of 5,12 Tbit/s), with its

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[252] BTC (2010) 'Botswana Telecommunications Corporation Annual Report 2009', Botswana Telecommunications Corporation, Gaborone, available online at http://www.btc.bw/docs/BTC_AnnualREPORT.pdf.

[253] PEEPA (nd) 'Current Privatization Projects: Botswana Telecommunication Corporation (BTC)', Public Enterprises Evaluation and Privatisation Agency, Gaborone, available online at http://www.peepa.co.bw/node/35.

[254] Mguni, M (2012) 'BTC privatisation reaches midpoint', *Mmegi*, Gaborone, available online at http://www.mmegi.bw/index.php?sid=4&aid=578&dir=2012/August/Friday17.

[255] MTN (2012) 'Integrated Business Report – for the year ended 31 December 2011', MTN Group Limited, Johannesburg, available online at http://www.mtn.com/Investors/Financials/Documents/ar_integrated_report2011.pdf, p8.

[256] It was reported in 2005 that 40% of Mascom Wireless was held by Econet Wireless Group (see Engineering News (2005) 'Botswana telecoms deal implemented', Engineering News, Johannesburg, 27 January 2005, available online at http://www.engineeringnews.co.za/article/botswana-telecoms-deal-implemented-2005-01-27. Other reports put the Econet Wireless shareholding at 14%. Still others suggest that Portugal Telecom held a stake.

[257] Orange (2012) 'Group's activities in Botswana', France Telecom-orange, Paris, last updated 18 June 2012, available online at http://www.orange.com/en/group/global-footprint/countries/Group-s-activities-in-Botswana.

[258] BTA (2012) 'BTA Annual Report 2011', Botswana Telecommunications Authority, Gaborone, available online at http://www.bta.org.bw/docs/documents/BTA_2011_Annual_Report.pdf, p27.

landing point in Swakopmund, Namibia[259]. BTC is also a direct investor in the Eastern Africa Submarine Cable System (EASSy - with a capacity of 4,72 Tbit/s)[260]. These linkages are supplemented by BTC's 2 000 km Trans-Kalahari Fibre Optic Project, with linkages to both WACS and EASSy[261].

Range of Services: Type of services offered by foreign entities.

As can be seen above, the provision of mobile voice communications is dominated by companies under majority foreign ownership and control. No information is available in respect of VANS and private telecommunications services.

Market Share: market share between foreign and local suppliers[262].

Foreign suppliers, as defined here, have 84,4% market share in the voice telephony market. No information is available in respect of the VANS and private telecommunications services markets.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There do not appear to be any such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As noted previously, the 2007 BTA licensing framework is primarily technology neutral, providing for "service neutrality in the type of services offered and the technology deployed"[263]. For example, Public Telecommunications Operators

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259 Okutoyi, E (2013) 'Botswana's US$37.5 million undersea cable to be live in May', HumanIPO, Tallinn, 28 March 2013, available online at http://www.humanipo.com/news/4936/Botswanas-US375-million-undersea-cable-to-be-live-in-May.

260 Wikipedia (nd) 'EASSy (cable system)', Wikipedia, available online at https://en.wikipedia.org/wiki/EASSy_(cable_system).

261 Botswana (2008) 'Remarks by His Honour the Vice President of the Republic of Botswana, Lt General Mompati S. Merafhe, MP, at the Ceremony to Mark the Completion of the Trans Kalahari Fibre Optic Project at Komana Village', 29 September 2008, Press Release, Republic of Botswana, Gaborone, available online at http://prgovbw.blogspot.com/2008/09/vice-president-of-republic-of-botswana.html.

262 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

263 BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007, Section 7.5, available online at www.ictregulationtoolkit.org/Documents/Document/Document/3397.

may deploy networks that are "fixed or mobile, wire line or wireless… using any available technology"[264].

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

The 1995 Telecommunications Policy committed Botswana to a liberalisation programme based on four core principles, viz: "competition as a means to increase efficiency and diversify supply of services; participation of the private sector… transparency in decision making to promote confidence… participation of users.. and protection of consumers"[265].

As pointed out previously, Botswana's licensing regime is a service-neutral one that provides authorisation across three broad multi-service categories, viz Public Telecommunications Operators, Value-Added Network Services, and Private Network Services. The latter two categories are "fully liberalised and any locally registered company is eligible to apply", with the regulator assessing "applications in accordance with the Act and based on the minimum licensing requirements" and with the number of licensees only "limited by service demand and/or scarcity of resources such as spectrum and numbers"[266]. The market for public telecommunications is, however, explicitly restricted to the three "existing mobile and fixed line operators" with this "market segment… only… considered for further liberalisation by the end of 2009"[267].

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[264] BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007, Section 8.1.1, available online at www.ictregulationtoolkit.org/Documents/Document/Document/3397.

[265] Botswana (1995) 'Telecommunications Policy for Botswana', Ministry of Works, Transport and Communications, Gaborone, December 1995, p3, copy available online at http://www.researchictafrica.net/countries/botswana/Botswana%20Telecommunications%20Policy%201995.pdf.

[266] BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007, Section 13, available online at www.ictregulationtoolkit.org/Documents/Document/Document/3397..

[267] BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007, Section 12, available online at www.ictregulationtoolkit.org/Documents/Document/Document/3397..

There is no evidence of the promised further review of the licensing framework having taken place, although, as noted above, the introduction of a "facilities based operator" licence is under consideration[268].

Other than the requirement for local registration for licensees in the liberalised market segments, there are no restrictions on foreign suppliers.

The World Bank describes Botswana's foreign investment regime as "open", pointing out that the country's "model Bilateral Investment Treaty (BIT) provides for non-discriminatory treatment of foreign investors" and noting that "foreign investors are encouraged, but not compelled, to establish joint ventures"[269].

In terms of Botswana's general GATS commitments, "foreign investors are encouraged to enter into joint ventures with local investors" and are required to notify the Ministry of Commerce and Industry of "all sale of business interests, mergers and take-overs" and to give local companies "priority to purchase" in the sale of business interests.[270]

In terms of Botswana's general GATS commitments, foreign-owned enterprises need to be "registered with the Registrar of Companies" as well as to have the necessary operating licences.[271]

Other than that, there are no known restrictions on the legal status of telecommunications licensees, either in law or in the current licensing framework.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

In terms of Botswana's general GATS commitments some restrictions apply to foreign personnel. For example, they are required to obtain residence and work permits and to "register with the appropriate professional body", and may only

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[268] BTA (2012) 'Consultation Paper on the Creation of Facilities Based Operator (FBO) Licence', Botswana Telecommunications Authority, Gaborone, December 2012, available online at http://www.bta.org.bw/sites/default/files/documents/Consultation%20Paper%20on%20the%20Creation%20of%20FBO%20Licence.pdf.

[269] WTO (2009) 'Trade Policy Review: Southern African Customs Union - Annex 1: Botswana', Report by the Secretariat, WT/TPR/S/222/BWA, World Bank, Washington DC, p77.

[270] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/BWA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2634/9110/Botswana_GATS_Schedule.pdf, p2.

[271] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/BWA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2634/9110/Botswana_GATS_Schedule.pdf, p2.

be employed at a senior level "as managers, executives, special technicians and highly qualified professionals". Further, "investors are required to conform to the requirements of the localization policy" and to "train citizens in order to enable them to assume senior management positions over time"[272].

Botswana also restricts the repatriation of earnings, which requires the "approval of the Bank of Botswana (Central Bank)" and which is subject to "fees payable the Bank of Botswana"[273].

Foreign or external companies are subject to certain registration and audit requirements in terms of the 2003 Companies Act[274], but these are not unduly onerous.

Botswana is ranked 54th out of 183 countries in terms of ease of doing business by the World Bank[275].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

The 2012 Communications Authority Act places the licensing of telecommunications services and systems, where required, largely in the hands of the regulator[276]. The Minister does, however, have the discretion unilaterally to override the regulator in respect of telecommunications services by ruling any entity licence-exempt[277]. In respect of telecommunications systems (ie infrastructure) licences, the regulator may make a similar exemption following a

[272] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/BWA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2634/9110/Botswana_GATS_Schedule.pdf, p3.

[273] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/BWA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2634/9110/Botswana_GATS_Schedule.pdf, p2.

[274] Botswana (2004) 'Companies Act 2003, No 32 of 2004', Republic of Botswana, Gaborone, available online at http://www.osall.org.za/docs/Botswana%20-%20Companies%20Act%2032%20of%202004.pdf, Part XXIV.

[275] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

[276] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 39, 40 & 41.

[277] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 39(3).

recommendation of the Minister[278]. The regulator also has the power to restrict the numbers of licences awarded by adopting a "tendering… or any other competitive process"[279].

The involvement of the Minister under the now repealed 1996 Telecommunications Act in respect of prescribing the application form and fee[280] and the approval of fixed and mobile licences[281], is now removed.

The regulator has sole discretion in determining when to limit the number of licences to be issued, in deciding when to require a comparative, competitive "tendering process", in undertaking the assessment of licence applications, in determining the imposition of licence terms and conditions, in undertaking the approval of transfers and changes in ownership, and in determining the revocation, suspension, endorsement of licences[282]. The regulator, however, requires Ministerial permission when issuing "exclusive" licences[283].

In practice, licences for Value-Added Network Services and Private Telecommunications Networks operate on a first-come-first-served basis[284]. Those for Public Telecommunications Operators have yet to be implemented under the new licensing framework, which simply offered only existing fixed and mobile licensees the opportunity to migrate to the new framework.

As pointed out above, the 2007 BTA licensing framework is explicitly technology neutral, allowing Public Telecommunications Operators (PTOs) to deploy networks "using any available technology"[285]. Further, Value-Added Network Services (VANS) licensees are able to offer "all forms of value-added telecommunications service provision, including VoIP or Internet telephony at

[278] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 40(2). It is not clear why the regulator should enjoy greater discretion with respect to system (infrastructure) licensing than in the case of service licensing. . . . .

[279] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 41.

[280] Botswana (1996) 'Chapter 72:03 Telecommunications' Republic of Botswana, Gaborone, Section 29.

[281] Botswana (1996) 'Chapter 72:03 Telecommunications' Republic of Botswana, Gaborone, Section 30(2).

[282] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Part VII A.

[283] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 46.

[284] BTA (2012) 'BTA Annual Report 2011', Botswana telecommunications Authority, Gaborone, p27.

[285] BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007, Section 8.1.1.

national and international level"[286]. VoIP is thus clearly liberalised, with the regulator reporting that 33 000 VoIP numbers have been allocated[287].

The licensing framework explicitly grants all three PTOs a licence that includes the provision of an international gateway[288]. VANS are, however, effectively able to do likewise, utilising VoIP / Internet telephony via the international bandwidth that they either lease or own.

All operators and service providers are subject to interconnection requirements in terms of the 1995 Act and the 2003 Interconnection Guidelines, the latter of which establish transparency, non-discrimination and "cost orientation" as guiding principles, and which set out the parameters for concluding interconnection agreements, including the publication of reference interconnection offers[289].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

The dominant provider of voice telephony services is Mascom Wireless with a market share in 2011 of 48% (see above). There is no information in respect of Internet and data services.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Botswana in 2008 was 1,7% of monthly gross national income per capita - well below the average for sub-Saharan Africa of 23%, making Botswana the 2nd cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 3,5% and 6,1% (also 2nd cheapest of 32 African countries)[290].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

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286 BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007, Section 8.2.1.

287 BTA (2012) 'BTA Annual Report 2011', Botswana Telecommunications Authority, Gaborone, available online at http://www.bta.org.bw/docs/documents/BTA_2011_Annual_Report.pdf, p17.

288 BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007, Section 8.1.1.

289 BTA (2003) 'Guidelines on Interconnection for Botswana Telecommunications Sector', Botswana Telecommunications Authority, Gaborone.

290 ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

Botswana has a statutory competition authority, governed by the Botswana Competition Commission, established in 2009, in order to ensure the "prevention of, and redress for, anti competitive practices in the economy, and the removal of constraints on the free play of competition in the market"[291]. The Competition Authority is required to consult with the ICT sector regulator in carrying out its responsibilities, but has the final decision-making authority[292]. Enforcement is through the High Court of Botswana[293].

The Competition Act does deal with dominance, which is defined as a "situation in which one or more enterprises possesses such economic strength in a market so as to allow the enterprise to adjust prices or output without effective constraint from competitors or potential competitors", and is considered to exist where a single firm enjoys a market share exceeding 25%, or up to three firms enjoy a market share exceeding 50%[294]. Abuse of dominance does not appear to be more precisely defined, and is considered to be mitigated in cases where exports result, or jobs are created, or the strategic, national interest is advanced[295]. The Act does not prescribe penalties for abuse of dominance, allowing the Commission instead to issue "directions" aimed at "remedying, mitigating or preventing the detrimental effects" [296].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

The ICT sector regulator dealt effectively with a well-publicised 2003 dispute between Botswana Telecommunications Corporation Mascom Wireless over

[291] Botswana (2009) 'Competition Act, 2009', No 17 of 2009, Republic of Botswana, Gaborone, available online at http://competitionauthority.co.bw.cws11.my-hosting-panel.com/images/stories/PDF/CompetitionAct2009.pdf Section 5(1).

[292] Botswana (2009) 'Competition Act, 2009', No 17 of 2009, Republic of Botswana, Gaborone, available online at http://competitionauthority.co.bw.cws11.my-hosting-panel.com/images/stories/PDF/CompetitionAct2009.pdf Section 73.

[293] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p7.

[294] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p8.

[295] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p8.

[296] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p8.

interconnection pricing, handing down and imposing termination rates based on international benchmarks[297].

4.2.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Broadcasting in Botswana was regulated by the Broadcasting Act of 1998 which provided for the issuing of licences for "private [ie commercial], community and public broadcasting services[298] and which is now "effectively repealed"[299]. These categories are carried through into the subsidiary regulations, which remain in force, and which also provide for cable and special event licences, and which elide broadcasting transmission and broadcasting services under the single definition of "broadcaster"[300]. The new Communications Regulatory Authority Act drops the category of community broadcasting, and replaces public broadcasting with "state" broadcasting undertaken by a designated "Government department" to which it issues a deemed licence[301]. The new Act appears to distinguish between broadcasting transmission services which it defines under the term "broadcasting" as "the process whereby the output signal of a broadcasting organisation is taken from the point of origin… and is conveyed to any broadcast target area by means of electronic communications" and a "broadcasting service", which is separately defined[302].

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[297] ITU (2003) 'Botswana Mini-Case Study 2003: Recent Experience in Interconnection Disputes', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/treg/Case_Studies/Disp-Resolution/Botswana.pdf.

[298] Botswana (1998) 'Broadcasting Act: Chapter 72:04 Broadcasting ', Republic of Botswana, Gaborone, available inline at http://www.bta.org.bw/sites/default/files/documents/BROADCASTING%20ACT.pdf, Section 10.2.

[299] BiztechAfrica (2012) 'Botswana Broadcasting Act repealed', BiztechAfrica, Johannesburg, 22 August 2012, available online at http://www.biztechafrica.com/article/botswana-broadcasting-act-repealed/3935/. There is no specific clause in the 2012 Communications Regulatory Authority Act, however, dealing with such a repeal.

[300] Botswana (2004) 'Broadcasting Regulations', Chapter 72:04 - Broadcasting: Subsidiary Legislation, Republic of Botswana, Gaborone, 29th October, 2004, available online at http://www.bta.org.bw/sites/default/files/documents/BROADCASTING%20REGULATIONS.pdf, Sections 31, 32, 33, 24 & 30.

[301] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Definitions & Sections 31.

[302] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Definitions.

As noted above, radio frequency licences are treated separately[303].

Botswana's classification of broadcasting services is, therefore, largely in accordance with W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

The state broadcaster runs two radio stations – Radio Botswana 1 (RB1) and Radio Botswana 2 (RB2). There are three privately-owned commercial radio stations - viz *Duma FM*, *Gabz FM*, *Yarona FM* - and a major *Voice of America* relay station at Selebi-Phikwe. Terrestrial free-to-air television is provided by the state broadcaster, Botswana TV (BTV), which broadcasts nationally in English and seTswana, and the privately-owned eBotswana, which broadcasts to the area around Gaborone in English and seTswana. Digital satellite television is provided via DStv / MultiChoice[304].

Radio Botswana 1, Radio Botswana 2, and Botswana TV are 100% government-owned.

The Voice of America is 100% owned and operated by the US Government.

eBotswana is privately majority-owned by a local investor, Mike Klinck, with a minority shareholder by Sabido Investments (South Africa) who also own South Africa's eTV, with which eBotswana has a partnership[305].

DStv is 100% owned by MultiChoice (South Africa).

OMD puts television penetration in Botswana at 10% of households[306].

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[303] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 45 - 49.

[304] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p23..

[305] Botswana (2010) Speech by the Minister of Presidential Affairs and Public Affairs at the launch of eBotswana TV on World Press Freedom Day, 8 June 2010, Republic of Botswana, Gaborone, available online at http://prgovbw.blogspot.com/2010/06/minister-motsumi-at-launch-of-ebotswana.html.

[306] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p23.

There are no listenership / viewership figures available for the various broadcasters.

Radio Botswana and Botswana TV are operated as state broadcasters. They have no board and are "run as government organs within the Office of the President, with staff hired by the Directorate of Public Service Management, as is the case with all government employees"[307]. FesMedia gives Botswana a score of 1,9 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[308], indicating limited compliance.

Range of Services: Type of services offered by foreign entities.

The relay station for the *Voice of America* and the South African satellite subscription service, DStv, through Multi-Choice Botswana, are offered by foreign entities.

Market Share: market share between foreign and local suppliers[309].

The state broadcaster, through RB1, RB2 and Botswana TV, has the biggest market share in the broadcasting sector. The three stations cover at least 85% of the country.[310]

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

The dominance of the state in the regulation of the broadcasting sector may be seen as a threat to liberalisation. Cross-border spillage from South African broadcasters may be a threat to the viability of future entrants into a liberalised market: eBotswana has been involved in successful litigation against South African signal distributor, Sentech.[311]

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

[307] FES (2011) *African Media Barometer – Botswana*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p42, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Botswana_2011.pdf.

[308] FES (2011) *African Media Barometer – Botswana*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Botswana_2011.pdf., p42,

[309] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[310] FesMedia (2011) African Media Barometer- Botswana, p. 46, . Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Botswana_2011.pdf.

[311] Chunu, J (2012) 'Sentech appeals eBotswana case', BiztechAfrica, Johannesburg, 8 June 2012, available online at http://www.biztechafrica.com/article/sentech-appeals-ebotswana-case/3153/.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

The legislation does not place any quantitative limitations on number of broadcasting licences. There is a cross-ownership restriction in the Broadcasting Regulations, which prohibits a single person from owning a television station and a radio station which serve the "same local market".[312]

The position as regards foreign ownership and control of broadcasters is somewhat unclear. Legislation neither disqualifies foreigners from operating broadcasting services nor imposes shareholding limitations. Further, the Botswana Export Development and Investment Authority suggests that foreign investors are not obliged to enter into partnership with local parties unless they so wish, and that 100% foreign-ownership of projects is allowed.[313] However, government utterances suggest otherwise, that it is the "policy of Government and of the National Broadcasting Board to promote majority citizen ownership among our emerging private sector broadcasters"[314].

As noted above, Botswana has a relatively attractive investment climate and the government has made it easy for foreign entities to do business in the country.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

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[312] Botswana (2004) 'Broadcasting Regulations', Chapter 72:04 - Broadcasting: Subsidiary Legislation, Republic of Botswana, Gaborone, 29th October, 2004, available online at http://www.bta.org.bw/sites/default/files/documents/BROADCASTING%20REGULATIONS.pdf, Sections 3.

[313] BEDIA (nd) "Botswana Export Development and Investment Authority', Botswana Export Development and Investment Authority, Gaborone, http://www.bedia.co.bw/.

[314] Botswana (2010) Speech by the Minister of Presidential Affairs and Public Affairs at the launch of eBotswana TV on World Press Freedom Day, 8 June 2010, Republic of Botswana, Gaborone, available online at http://prgovbw.blogspot.com/2010/06/minister-motsumi-at-launch-of-ebotswana.html

Botswana's model Bilateral Investment Treaty (BIT) provides for non-discriminatory treatment of foreign investors[315]. There appears to be no discrimination or nationality requirement in the practical allocation of broadcasting licences.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

Broadcasting licences were historically issued by the National Broadcasting Board (NBB), which, however, had the power to license commercial broadcasters only. State broadcasting is operated as an organ of government, and thus is not under the jurisdiction of the NBB. Potential licensees applied to the NBB:

> *(1) Subject to the availability of frequencies, and subject to the provisions of subsection (2), the Board may, on receipt of an application for a broadcasting or re-broadcasting licence, if it is satisfied that the applicant has fulfilled all the requirements for a grant of licence, issue a licence to the applicant.*[316]

Under the 2012 Communications Regulatory Authority Act, this function is taken over by the Botswana Communications Regulatory Authority[317].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Broadcasting regulation was historically undertaken by a separate regulator, the National Broadcasting Board (NBB), established under the 1998 Broadcasting Act, to "issue broadcasting licences"; "exercise control over and to supervise broadcasting activities..."; "allocate available spectrum resources..."[318]., The appointments to the NBB were initially done via a transparent process under the aegis of the Minister of Communications, Science and Technology, but have subsequently allegedly been "secretive" following the transfer of responsibility for media issues to the Office of the President[319].

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[315] WTO (nd) Trade Policy Review – Botswana, available at

[316] Botswana (1998) 'Broadcasting Act: Chapter 72:04 Broadcasting ', Republic of Botswana, Gaborone, available inline at http://www.bta.org.bw/sites/default/files/documents/BROADCASTING%20ACT.pdf, Section 13.

[317] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Part VI.

[318] Botswana (1998) 'Broadcasting Act: Chapter 72:04 Broadcasting ', Republic of Botswana, Gaborone, available inline at http://www.bta.org.bw/sites/default/files/documents/BROADCASTING%20ACT.pdf, Section 10.

[319] FesMedia (2011) African Media Barometer – Botswana, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia,, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Botswana_2011.pdf.

The 2012 Communications Regulatory Authority Act appears to hand most of these functions over to the Botswana Communications Regulatory Authority, but does not appear specifically to repeal the Broadcasting Act, and leaves the Broadcasting Regulations, which give effect to the NBB, still in place[320]. It is, therefore, unclear how the transition to a single regulator will be managed.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As we saw above, state broadcasting services cover 85% of the market, thus making them dominant providers in terms of free-to-air coverage.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As we saw above, Botswana has a competition authority responsible for the prevention of, and redress for, anti-competitive practices in the economy, and the removal of constraints on the free play of competition in the market[321]. The 1998 Broadcasting Act does not contain clauses on anti-monopoly and anti-competitive behaviour, nor do the subsidiary Broadcasting Regulations.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

Mmegi, one of the largest media entities in Botswana, has multiple interests in the broadcasting, print, publishing and distribution. However, there have been no legal cases dealing with media cross-ownership and anti-competitive behaviour in the country[322].

4.2.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

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[320] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone.

[321] Bowman, Gilfillan (2011) New competition regime launched in Botswana, available at http://www.polity.org.za/article/new-competition-regime-launched-in-botswana-2011-05-25.

[322] FesMedia (2011) African Media Barometer – Botswana, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Botswana_2011.pdf.

Botswana has been a member of the WTO since 31 May 1995, but, aside from its overall horizontal commitments referred to above, has made no specific commitments in relation to communications services, other than in respect of courier services[323].

Botswana is also a member of the Cotonou Agreement and SACU, and in 2009 signed, together with Lesotho, Mozambique and Swaziland, an interim Economic Partnership Agreement with the European Union, which includes liberalisation of trade in services.[324] Botswana is also a beneficiary of the US African Growth and Opportunity Act (AGOA).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

The formulation and implementation of trade policy fall under the Ministry of Trade and Industry. The government is committed to implementing its WTO agreements, but faces capacity constraints, with the co-ordinating ministry having several internal capacity constraints related to lack of skills[325].

In practice, no attempt appears to have been made specifically to limit either cross-border trade or consumption abroad (in respect of both market access and national treatment) of any communications services. The limitation of international gateway licences to the existing fixed and mobile telephony operators may, however, be viewed as constituting such a restriction.

In addition, the limitation of the Public Telecommunication Operators' market to only three licensees constitutes a specific restriction in relation to commercial presence (in addition to the general restrictions in respect of commercial presence and presence of natural persons referred to above). With foreign-owned entities operating relatively freely in the telecommunications market, indeed enjoying market dominance, Botswana could readily remove the quantitative restriction on the number of market entrants.

Should this be done on terms that include the provision of an international gateway, there would no longer be barriers to Botswana making specific commitments in respect of communications services.

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[323] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/BWA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2634/9110/Botswana_GATS_Schedule.pdf.

[324] SADC EPA Group (2010) 'Fact sheet on the interim Economic Partnership Agreements', Southern African Development Community, Gaborone, available online at http://www.eusa.org.za/en/PDFdownload/Trade%20&%20Economic/EPA_Interim_Agreement_SADC_EPA_Group_Sept_2010.pdf.

[325] Mbekeani, K (2005) Managing the Challenges of WTO Participation: Inter-Agency Policy Co-ordination in Botswana, available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case6_e.htm.

Despite the above, the World Bank ranks Botswana 125th out of 148 countries on its GATS Commitments Index[326].

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in the telecommunications sector[327]. In respect of telecommunications, Botswana neither offers preferential access nor imposes specific requirements to other countries. There are thus no barriers to the implementation of regional MFN in telecommunications. In respect of its MFN Tariff Trade Restrictiveness Index, World Bank ranks Botswana 90th out of 125 countries, better than the average for sub-Saharan Africa[328].

4.2.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[329] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[330], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

[326] World Bank (2010) 'Botswana Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Botswana_brief.pdf.

[327] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

[328] World Bank (2010) 'Botswana Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Botswana_brief.pdf.

[329] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[330] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

Botswana is not a signatory to the WTO Reference Paper on Telecomms Services[331].

1. Competitive safeguards: *Partially compliant (3/5).* The 2012 Communications Regulatory Authority Act makes no provision for differential regulation in case of market dominance and has no provisions that specifically address the competitive safeguards provided for in the WTO Regulatory Reference Paper[332]. All competitive issues are now deferred to the Competition Commission[333], whose governing legislation has provisions restricting horizontal and vertical agreements and for dealing with abuse of market dominance[334].

2. Interconnection: *Partially compliant (3/5).* The 2012 Communications Regulatory Authority Act makes very limited provisions in respect of interconnection, placing the onus in respect of interconnection agreements on the interconnection seeker, making no provision for the issuing of interconnection guidelines, for the publishing of interconnection agreements or reference interconnect offer, and providing limited grounds for the declaration of disputes[335]. The existing 2007 Interconnection guidelines, however, go rather further, requiring "each telecommunications network operator to interconnect with all other networks", laying procedures, terms and guidelines for interconnection, requiring operators offering interconnection to publish a Reference Interconnection Offer, dealing with the pricing of interconnection, and setting out a process for resolving interconnection disputes[336].

3. Universal service: *Partially compliant (3/5)*. Botswana's universal access and service policy remains largely embryonic. Although the 1995 Telecommunications Policy makes "Universal Service" the first of its three prime goals[337], subsequent legislation has given little effect to this. The now repealed 1996 Botswana Telecommunications Act made no mention of UAS other than the mandate to "take all reasonable steps to promote the provision, throughout Botswana, of such telecommunication services as will satisfy all reasonable

[331] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/BWA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2634/9110/Botswana_GATS_Schedule.pdf.

[332] The 2012 Communications Regulatory Authority Act repeals the 1996 Telecommunications Act, and hence the anti-competitve provisions set out in Section 48 therein.

[333] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 89.

[334] Botswana (2009) 'Competition Act, 2009', No 17 of 2009, Republic of Botswana, Gaborone, available online at http://competitionauthority.co.bw.cws11.my-hosting-panel.com/images/stories/PDF/CompetitionAct2009.pdf Part V.

[335] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 51.

[336] BTA (2003) 'Guidelines on Interconnection for Botswana Telecommunications Sector', Botswana Telecommunications Authority, Gaborone.

[337] Botswana (1995) 'Telecommunications Policy for Botswana', Ministry of Works, Transport and Communications, Gaborone, December 1995.

demands for them"[338]. Its replacement, the 2012 Communications Regulatory Authority Act, likewise has no clauses specifically dealing with UAS, other than the general mandate to the regulator to "promote and ensure universal access with respect to provision of communications services" and to "ensure that the needs of low-income, rural or disadvantaged groups of persons are taken into account by regulated suppliers"[339] - this despite the recognition by the 2004 Maitlamo policy review of the need for "more vigorous promotion of Universal Service"[340]. A subsequent draft Universal Access and Service (UAS) Policy claims to be animated by a vision "that all Batswana will have Universal service with affordable voice communications and access to internet and ICT services, regardless of their location within the country)" and is set to establish a Universal Service Fund[341], which is now specifically provided for in the legislation[342]. The regulator is already making contributions to such a fund[343], but there is no available evidence of expenditure from the fund.

4. Public availability of licensing criteria: ***Partially Compliant (3/5).*** The 2007 Licensing Framework sets out broadly the criteria and applications procures, terms and conditions of the three main categories of service-neutral licences, but this is not publicly available on the website of the regulator. In addition, individual licences are not readily publicly available[344], and the Licensing Framework makes no mention of the period of time required to reach a decision, nor does it specify how reasons for the denial of a licence will be dealt with[345].

5. Independent regulators: ***Largely Compliant (4/5).*** The 2012 Communications Regulatory Authority Act prohibits the appointment to the board of any person who "holds any controlling interest in any regulated supplier, or is the holder of a licence… [or has] a direct or indirect financial; interest in the industries regulated by the Authority", and has clauses mandating disclosure of interest in respect of issues under deliberation by the Board[346]. In

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[338] Botswana (1996) 'Chapter 72:03 Telecommunications' Republic of Botswana, Gaborone, Article 17 (2) (a).

[339] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 5(1)(b) & 6(2)(p).

[340] Botswana (2004) 'Maitlamo: Botswana's National ICT Policy – Legislative Framework & Change Report, Republic of Botswana, Gaborone, December 2004, p8.

[341] Botswana (nd) 'Universal Access and Service (USA) Policy', Republic of Botswana – Government Portal, available online at www.gov.bw/en/Ministries‐‐Authorities/Ministries/Ministry‐of‐Communications‐Science‐‐Technology/Departments/Telecommunications/

[342] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 5(1)(c).

[343] BTA (2012) 'BTA Annual Report 2011', Botswana Telecommunications Authority, Gaborone, available online at http://www.bta.org.bw/docs/documents/BTA_2011_Annual_Report.pdf, p46.

[344] The requirement of the 1996 Telecommunications Act that they be published in hard-copy in the Gazette has now fallen away.

[345] BTA (2007) 'Service-neutral Licensing Framework in the Era of Convergence', Botswana Telecommunications Authority, Gaborone, 13 March 2007.

[346] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 10 & 18.

terms of international best practice, however, the regulator is not fully independent, being appointed by the Minister without involvement of Parliament, having Ministerial involvement in the appointment of its CEO, and being accountable to the Minister in terms of its strategic and annual plans, and its annual reporting and audit requirements[347]. The Minister has limited ability to intervene directly in the decisions of the Board, being empowered to set these aside only if the "security of Botswana or relations with a foreign government may be adversely affected" [348].

6. Allocation and use of scarce resources: ***Partially Compliant (3/5).*** The 2012 Communications Regulatory Authority Act grants the regulator authority to manage the allocation of key scarce resources, specifically frequency spectrum and numbers[349] - but makes no direct mention of rights of way, and makes no provision in respect of the procedures to be followed or in respect of the publication of the frequency band plan, a copy of which is, nonetheless, available on the website of the regulator[350].

Botswana is already partially compliant with the WTO Reference Paper on Telecomms Services. There is nothing in the legislation or in current regulatory practice that would conflict with a formal commitment by Botswana to adhere to its principles, although some strengthening of the legislative and regulatory regime would be necessary to ensure full compliance.

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[347] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 4, 5(2)(h), 5(3), 21 & 29.
[348] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Section 91.
[349] Botswana (2012) 'Communications Regulatory Authority Act 2012' No 19 of 2012, Republic of Botswana, Gaborone, Sections 37 & 48.
[350] BTA (2004) 'Botswana Radio Frequency Plan, 2004', Botswana Telecommunications Authority, Gaborone, available online at http://www.bta.org.bw/sites/default/files/documents/National_Frequency_plan.pdf.

4.3 DEMOCRATIC REPUBLIC OF THE CONGO

4.3.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The 2002 Law on Telecommunications governs the categorisation and licensing of telecommunications concessions in the DRC[351]. Unfortunately, no translation of this law, which appears to differentiate between concessions, authorisations and notifications[352], into English is available. Concessions are applicable to fixed telephony and telex services, to public cellular telephony and to other public telecommunications networks[353].

Frequency spectrum licensing is dealt with separately[354].

The licensing regime in the DRC is thus a vertical, technology specific one. However, it is not in alignment with the vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

There is limited information available on the telecommunications market in the DRC.

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[351] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo.

[352] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 17

[353] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 19, translation by GoogleTrans.

[354] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 8, translation GoogleTrans.

The fixed line market is almost non-existent, with the former state-owned monopoly, Office Congolais des Postes et des Télécommunications (OCPT) reported by one source to have as few as a mere 9 700 fixed lines in operation[355]. Other fixed-line operators appear to include: Megapass / Standard Telecom Congo SARL[356] and Sogetel (La Société Générale des Télécommunications)[357].

The mobile sector is, however, both considerably more substantial and highly liberalised, with 16 mobile licences having been issued by 2001. However, problems with spectrum management within an exponentially growing market have led to some consolidation and to the emergence of four main players: Vodacom Congo, Airtel Congo (formerly Zain DRC), Millicom (Tigo) and Congo-Chine Telecom[358]. Other operational mobile providers include Supercell, HITS Telecom[359], and Africell[360].

Internet Service Providers appear to include: Microcom, iBurst, Vodacom, Standard Telecom[361] and Sogetel[362].

The DRC has committed to securing direct international telecommunications access via the West Africa Cable System (WACS - which went live in 2012)[363]. However, access remains stalled following a financial and procurement scandal

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[355] Focus Africa (nd) 'Sector Profile : DRC (Democratic Republic of Congo)', Focus Africa, Department of Commerce, New Delhi, available online at http://focusafrica.gov.in/Sector_Profile_DRC.html.

[356] BusinessWeek (nd) 'Diversified Telecommunication Services: Company Overview of Standard Telecom Congo S.A.R.L.', Bloomberg BusinessWeek, New York, available online at http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=99622391.

[357] The website of Sogetel (Sogetel (nd) 'Sogetel.cd Opérateur télécoms et ISP', La Société Générale des Télécommunications, Kinshasa, available online at http://www.sogetel.cd/websgt/index_cd.php) suggests the company is still active despite having its Wikipedia entry forecast bankruptcy (Wikipedia (2012) 'Sogetel (RDC)', Wikipedia, available online at http://fr.wikipedia.org/wiki/Sogetel_%28RDC%29).

[358] BuddeComm (2012) 'Democratic Republic of the Congo - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Democratic-Republic-of-Congo-Telecoms-Mobile-and-Broadband.html. The full report is available on a for sale basis..

[359] TeleGeography (2008) 'MTN seeking DRC presence?', *TeleGeography*, Washington DC, 22 Sep 2008, available online at http://www.telegeography.com/products/commsupdate/articles/2008/09/22/mtn-seeking-drc-presence/.

[360] Target (2012) 'An analysis of DR Congo mobile market with AFRICEL launching', Friday 26 October 2012, Target Research and Consulting, Kinshasa, available online at http://www.target-sprl.cd/Website%20Target/PAGES/An%20analysis%20of%20DR%20Congo%20mobile%20market%20with%20AFRICEL%20launchy.html.

[361] Anicka & John (2010) 'Internet service provider review for Kinshasa, DR Congo', Weblog, 14 May, 2010, available online at http://clarkefast.wordpress.com/2010/05/14/internet-service-provider-review-for-kinshasa-dr-congo/.

[362] According to its website: Sogetel (nd) 'Sogetel.cd Opérateur télécoms et ISP', La Société Générale des Télécommunications, Kinshasa, available online at http://www.sogetel.cd/websgt/index_cd.php.

[363] Many Possibilities (2012) 'African Undersea Cables', Many Possibilities, Cape Town, available online at http://manypossibilities.net/african-undersea-cables/.

at OCPT (the local investor) and the consequent failure to construct the planned landing station at Muanda[364].

The most recent comparative figures for telecomms market share date from December 2009, but are from multiple sources, contain gaps, and are inconsistent.

DRC: Fixed & Mobile Subscribers		
	2009 (Dec)	
	Subscribers	**Market Share**
Office Congolais des Postes et des Télécommunications (OCPT) (fixed)	42 300[365]	0,4%
Airtel Congo (mobile)	3 567 000[366]	38%
Vodacom Congo (mobile)	3 522 000[367]	37%
Tigo Congo (mobile)	1 500 000[368]	16%
Congo-Chine Telecom (mobile)	n/a	
Others (mobile)	n/a	
Total	9 500 900[369]	

364 TeleGeography (2013) 'DRC misses latest WACS connectivity deadline', *TeleGeography*, Washington DC, 24 Apr 2013, available online at http://www.telegeography.com/products/commsupdate/articles/2013/04/24/drc-misses-latest-wacs-connectivity-deadline/.

365 ITU (nd) 'Fixed Telephone Lines', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2009&RP_intLanguageID=1&RP_bitLiveData=False

366 Zain (nd) 'Financial Highlights', Zain, Bahrain, available online at http://www.zain.com/investor-relations/facts-figures/.

367 Vodacom (2010) 'Trading Statement for the Quarter ended 31 December 2009', News release, Vodacom Pty Ltd, Johannesburg, 2 February 2010, available online at http://www.vodacom.com/pdf/quarterly_results/qr_31122009.pdf, p3.

368 Millicom (2010) 'Q4 2009 Investor Presentation', Millicom International Cellular SA, Luxembourg, available online at http://files.shareholder.com/downloads/MICC/2140191511x0x350129/1E93C0E3-D941-4652-BF2E-9FD09DFDD40D/Q409_Investor_Presentation.pdf, p3. This figure should be treated with some caution as it represents a dramatic spike from the 1,4 million subscribers that Millicom was claiming a mere three months earlier and the 2,4 million subscribers they were claiming at the end of 2011.

369 Derived from ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&Repo

According to the ITU, the DRC in 2011 had 56 970 fixed-line subscribers and 15 644 877 mobile subscribers, giving the country a per capita market penetration rate in telecommunications sector of 0,1% for fixed-line, 23,1% for mobile and 1,2% for the Internet (compared to 0,1%, 17,9% and 0,7% respectively in 2010)[370].

Office Congolais des Postes et des Télécommunications (OCPT), the fixed line incumbent, is 100% state owned.

Mobile operator Tigo Congo is 100% owned by Millicom International Cellular of Luxembourg.

Mobile operator Airtel Congo is 100% owned by Bharti Airtel, based in India.

The ownership of mobile operator, Vodacom Congo, is made up as follows:

- 51,0% - Vodacom (South Africa)[371];
- 49,0% - Congolese Wireless Network SPRL.

Congo-Chine Telecom is 100% owned by France Telecom / Orange, which recently bought out both the 51% shareholding of Zhongxing Telecommunication Equipment Corporation (ZTE) of China, and the 49% held by the state-owned incumbent, Office Congolais des Postes et des Télécommunications (OCPT) (DRC government) [372].

There is no information about other licensees, such as VANS licensees or ISPs. No market share breakdown is thus available.

Range of Services: Type of services offered by foreign entities.

The provision of mobile voice communications, which makes up over 99% of the telephony market in the DRC, is heavily dominated by companies under majority foreign ownership and control. No information is available in respect of VANS services or ISPs.

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rtFormat=HTML4.0&RP_intYear=2009&RP_intLanguageID=1&RP_bitLiveData=False & ITU (nd) 'Fixed telephone lines', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2009&RP_intLanguageID=1&RP_bitLiveData=False.

[370] ITU (nd) 'Time Series by Country (2000-2011)', International Telecommunication Union, Geneva, spreadsheets covering 'Fixed-telephone subscriptions', 'Mobile-cellular subscriptions' and 'Percentage of individuals using the Internet' available for download via http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

[371] Vodacom (2011) 'Integrated Report for the year ended 31 March 2011', Vodacom Pty Ltd, Johannesburg, available online http://www.vodacom.com/pdf/annual_reports/ar_2011.pdf, p203. Vodacom is currently in dispute with Congolese Wireless Network.

[372] Telecom Engine (2011) 'Orange acquires Congo Chine Telecom', Telecommunications Media Group, Danbury, 21 October 201, available online at http://www.telecomengine.com/article/orange-acquires-congo-chine-telecom.

Market Share: market share between foreign and local suppliers[373].

In the absence of data on the smaller players, no definitive conclusion can be drawn. The three major foreign suppliers, as defined here, would appear, however, to enjoy a combined market share of approximately 91% in the voice telephony market. No information is available in respect of the VANS, ISPs and other telecommunications services markets.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There do not appear to be any such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

The licensing categorisation set out above suggests that telecommunications licences in the DRC are not technology-neutral, but in the absence of the availability of the licences themselves, this is not definitive.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

The DRC has established a National Investment Promotion Agency (ANAPI) "under Law No 004/2002 of 21 February 2002" in order to "encourage domestic and foreign investment in activities which are key to the country's economic development"[374].

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[373] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[374] WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p23.

No specific information on the legal status of foreign enterprises is available.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

The 2002 Telecommunications law requires that at least 30% of any concession licensee (eg fixed or mobile operators) must be held by Congolese legal or natural persons (including 5% by employees)[375]. The operation, however, of the two major mobile licensees, Tigo and Airtel, both 100% foreign-owned, appears to contradict this provision.

There are some limitations imposed on the entry of "senior executives" and "specialists with knowledge essential to the provision of the service concerned"[376]. There are no restrictions applicable to the repatriation of earnings[377].

The DRC is ranked 178th out of 183 countries in terms of ease of doing business by the World Bank[378].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

There is little information available on licensing procedures in the DRC. Although the 2002 law establishing the regulator puts it in charge of licensing[379], recent 3G licences appear to have been awarded directly by the telecommunications Minister[380]. The 2002 Law on Telecommunications suggests that international

[375] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Article 19.
[376] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/COD, World Trade Organisation, Geneva, 24 January 2003. Translation via GoogleTrans.
[377] WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p25.
[378] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.
[379] DRC (2002) 'Loi N° 014/2002 du 1.6 Octobre 2002 portant Creation de l'Autorite de Regulation de la Poste et des Telecommunications', Democratic Republic of the Congo, Kinshasa.
[380] TeleGeography (2012) 'Four cellcos acquire 3G licences in the DRC for USD15m apiece', TeleGeography, 11 July 2012, available online at

gateway licensing is the prerogative of the Minister, and will only happen under exceptional circumstances[381]. It is not clear if any such licences have been granted, although anecdotal evidence suggests each licensee operates its own international gateway[382]. There is no information available on the status quo regarding VoIP, or on restrictions pertaining to interconnection.

The WTO suggests that there is some confusion regarding the extent of the legal monopoly status afforded to OCPT, the fixed-line incumbent, in respect of transmission infrastructure, and warns that this "could prove highly detrimental to future investors"[383],

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

Vodacom Congo and Airtel Congo, with 37% and 38% of the voice telephony market respectively (see above), would appear to be dominant.

Pricing: How do the prices of services compare to international benchmarks.

The International Telecommunication Union has no data on the pricing of services for the DRC[384].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

The DRC does not appear to have a competition authority[385], although one source suggests the country is "in the process of adopting competition laws and policies"[386]. The WTO makes reference to an incipient Competition Commission[387] but its legal foundation and mandate remain unclear.

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http://www.telegeography.com/products/commsupdate/articles/2012/07/11/four-cellcos-acquire-3g-licences-in-the-drc-for-usd15m-apiece/.

[381] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 38.

[382] Kissangou, Philemon, personal communication 15 January 2013

[383] WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p86.

[384] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[385] KluwerCompetitionLaw (nd) 'Angola', Kluwer Law International, Alphen aan den Rijn, available online at http://www.kluwercompetitionlaw.com/organizations.aspx?jurisdiction=Democratic+Republic+of+the+Congo.

[386] Sakata, N (2011) 'Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?', Fifth Annual Competition Law, Economics &

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive conduct.

4.3.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The broadcasting sector in the DRC is regulated in terms of Articles 50 – 72 of the 1996 Press Law.[388] This law appears to distinguish between radio and television broadcasting but not to cater for signal distribution[389].

Radio frequency licences are treated separately under the 2002 Law on Telecommunications[390].

Despite the omission of provisions for broadcasting 'transmission services', the DRC's classification of broadcasting services is largely in accordance with W/120.

Policy in South Africa Conference, Competition Commission, South Africa, 4-5 October 2011, available online at http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/African-Regional-cooperation-PaperFinal-27-Sept-11-.pdf.

[387] WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p47.

[388] FES (2012) African Media Barometer- DRC, http://www.fesmedia-africa.org/uploads/media/AMB_DRC__2012_French_and_English.pdf p100.

[389] DRC (1996) La loi 96/002 du 22 juin 1996, Fixant Les Modalités de L'exercice de Liberté de Presse, Democratic Republic of Congo, Kinshasa, available online at http://www.droitcongolais.info/files/7375_loi_du_22_juin_1996_liberte_de_presse_moda.pdf. No English or machine-readable version of the document appears to be available.

[390] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 33

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

The DRC is characterised by a plethora of radio and television broadcasters. The state-owned broadcaster is the *Radio Télévision Nationale Congolaise* [Congolese National Radio Television - RTNC], which manages three channels (*RTNC1*, *RTNC2* and *RTNC3*)[391]. One source lists an additional 80 private TV channels (of which 52 are commercial, 24 religious channels and 4 community) and 341 private radio broadcasters (of which 91 are commercial stations, 133 community radio stations and 104 religious denominational radio stations)[392]. Another puts the number slightly lower, at 68 television channels and 216 radio stations[393].

There is at least one satellite broadcaster, *CanalSat Horizon*[394]. MultiChoice (South Africa) also appears to offer their DStv satellite pay-TV service in the DRC[395].

There are no listenership / viewership figures available for the various broadcasters.

OMD puts television penetration in the DRC at 4% of households[396].

The government-owned broadcaster *RTNC* is viewed as a state broadcaster, reflecting government views and failing to meet its public service mandate. *Radio Okapi*, established by the United Nations in 2002, fulfils this public service broadcasting role at the national level. *Radio Okapi* is currently the only radio station that covers almost the whole of the DRC, partly through a network of 51

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391 Frere, M (2010) *The Media Map Project: DRC-Case Study on Donor Support to Independent Media, 1990-2010*, Media Map Project, Rhode Island, available online at http://www.mediamapresource.org/wp-content/uploads/2011/04/DRC2.pdf .

392 Frere, M (2010) *The Media Map Project: DRC-Case Study on Donor Support to Independent Media, 1990-2010*, Media Map Project, Rhode Island, available online at http://www.mediamapresource.org/wp-content/uploads/2011/04/DRC2.pdf, *pp11,2.*

393 FES (2012) African Media Barometer- DRC, http://www.fesmedia-africa.org/uploads/media/AMB_DRC__2012_French_and_English.pdf p88.

394 Mweze, D (2006) 'Democratic Republic of Congo: Research findings and conclusions';, African Media Development Initiative BBC World Service Trust London, available online at http://africanmediainitiative.org/wp-content/uploads/2013/01/AMDI-Report-DR-Congo.pdf, p20.

395 MultiChoice (nd) 'Contact MultiChoice DRC', http://care.drc.dstv.com/main.aspx?ID=1424.

396 Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p24.

partner stations in the provinces, which rebroadcast their programmes[397]. Board members of RTNC are appointed, relieved of their functions or dismissed by the resident of the Republic, upon recommendation of the government.[398]

Similarly, FesMedia gives the DRC a score of 1,0 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[399], indicating non-compliance.

Range of Services: Type of services offered by foreign entities.

Two international television channels broadcast free-to-air in Kinshasa, viz *TV5 Monde* and *Euronews*[400].

Market Share: market share between foreign and local suppliers[401].

There is no specific information on the market share in the broadcasting sector.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There is no evidence of any organisation that seeks to impede liberalisation in the broadcasting sector.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

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397 Frere, M (2010) *The Media Map Project: DRC-Case Study on Donor Support to Independent Media, 1990-2010*, Media Map Project, Rhode Island, available online at http://www.mediamapresource.org/wp-content/uploads/2011/04/DRC2.pdf, *p14.*

398 FES (2012) African Media Barometer- DRC, http://www.fesmedia-africa.org/uploads/media/AMB_DRC__2012_French_and_English.pdf p103.

399 FES (2012) African Media Barometer- DRC, http://www.fesmedia-africa.org/uploads/media/AMB_DRC__2012_French_and_English.pdf 103,

400 Mweze, D (2006) 'Democratic Republic of Congo: Research findings and conclusions';, African Media Development Initiative BBC World Service Trust London, available online at http://africanmediainitiative.org/wp-content/uploads/2013/01/AMDI-Report-DR-Congo.pdf, p20.

401 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There do not seem to be any restrictions on the number of broadcasting licences. Although the broadcasting sector has public, commercial, community and religious broadcasting services, these are not specified in any law. The law does not recognise the local and community broadcasting sectors.[402]

There do not appear to be any anti-monopoly policies which might seek to limit concentrated media ownership of the media.

Legislation dealing with investment in the DRC, including the broadcasting sector, reportedly does not differentiate between foreign and domestic enterprises[403]. However, the country remains a challenging environment in which to conduct business.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

There do not appear to be any discriminatory measures based on nationality, other than those noted above in respect of senior staff.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

The licensing regime for broadcasting is complex, challenging - authorisation from a number of different statutory bodies - and costly. Licence approvals fall under the Ministry of Press and Communication, while the licence to operate is issued by the Ministry of Posts, Telephones and Telecommunications, and the

[402] FES (2012) African Media Barometer- DRC, http://www.fesmedia-africa.org/uploads/media/AMB_DRC__2012_French_and_English.pdf 109.

[403] African Resources (nd) 'Investment Guide: DR Congo', African Resources, Johannesburg, available online at http://www.african-resources.co.za/drc.pdf.

licence fees must be paid to a third entity, the National Agency for Information[404].

There is suggestions that there is "no systematic mapping of frequency allocation for radio or for television".[405] Further, although frequency allocation requires the approval of the media regulator, the Council for Broadcasting and Communication (CSAC), its administration in practice is undertaken by the Ministry of Communication[406].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

In 2011 the original regulator overseeing content issues in the media (including broadcast media), the Haut Autorité des Medias (HAM - High Authority of the Media) was replaced by the Conseil Supérieur de l'Audiovisuel (CSAC - High Council for Broadcasting and Communications). CSAC consists of a 15 member stakeholder-based council. FesMedia, however suggests that there has been political interference in both the appointment and functioning of CSAC, and therefore that it is not an independent regulator[407].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As is apparent from the market structure analysis above, the broadcasting sector in the DRC is relatively diversified and competitive, with no dominant content provider, although the state broadcaster, RTNC and the UN-sponsored Radio Okapi would seem to have the widest reach throughout the country.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

DRC does not have a competition law. There are no safeguards against monopolies and cartels.

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[404] Mweze, D (2006) 'Democratic Republic of Congo: Research findings and conclusions';, African Media Development Initiative BBC World Service Trust London, available online at http://africanmediainitiative.org/wp-content/uploads/2013/01/AMDI-Report-DR-Congo.pdf, p17.

[405] Frere, M (2010) *The Media Map Project: DRC-Case Study on Donor Support to Independent Media, 1990-2010*, Media Map Project, Rhode Island, available online at http://www.mediamapresource.org/wp-content/uploads/2011/04/DRC2.pdf, p13.

[406] Frere, M (2010) *The Media Map Project: DRC-Case Study on Donor Support to Independent Media, 1990-2010*, Media Map Project, Rhode Island, available online at http://www.mediamapresource.org/wp-content/uploads/2011/04/DRC2.pdf, p13.

[407] FES (2012) African Media Barometer- DRC, http://www.fesmedia-africa.org/uploads/media/AMB_DRC__2012_French_and_English.pdf 101,2.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence of anti-competitive behaviour in the broadcast market.

4.3.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

The DRC joined the WTO in January 1997[408], and has made both overall horizontal commitments in relation to both commercial presence (mode 3 – making the acquisition of property by foreigners subject to authorisation) and the presence of natural persons (mode 4), and specific commitments in relation to communications services[409].

Full commitments have been made in respect of communications services covering both Limitations on Market Access and Limitations on National Treatment. A limitation is, however, provided for in respect of the "entry and temporary stay for a period of one year, extendable, without requirement of economic needs test" for "senior executives" and "specialists with knowledge essential to the provision of the service concerned"[410].

The DRC is a member of the Common Market for Eastern and Southern Africa (COMESA), in addition to its membership of the Southern African Development Community (SADC).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

Although the WTO notes that the DRC's "participation in the multilateral trading system remains limited"[411], there is no evidence of the application of any limitations contrary to the commitments set out above in the communications sector. The implementation of reforms in the telecommunications sector has improved the regulatory framework for telecommunication services by, for

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[408] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm
[409] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/COD, World Trade Organisation, Geneva, 24 January 2003. The document on the SADC website incorrectly reflects the position in respect of Congo (Brazzaville).
[410] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/COD, World Trade Organisation, Geneva, 24 January 2003. Translation via GoogleTrans.
[411] WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p viii.

example, separating operational and regulatory functions, defining the responsibilities of the minister in charge of telecommunications, creating a regulatory authority, establishing a universal service and telecommunications development fund, and defining the different operator systems applying to services. The same degree of reform has, however, not taken place in the broadcasting and audio-visual sectors, where the implementation of WTO/GATS principles has been slow.

The World Bank ranks the DRC 88th out of 148 countries on its GATS Commitments Index[412].

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There do not appear to be any MFN agreements in place for the DRC. The WTO notes that the DRC "grants at least [MFN] treatment to all its trading partners"[413].

4.3.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[414] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

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[412] World Bank (2010) 'Democratic Republic of Congo Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Congo,%20Dem.%20Rep._brief.pdf.

[413] WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p viii.

[414] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[415], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

The DRC did not participate in the negotiations leading to Agreement on basic Telecommunications[416]. Nor is it a signatory to the WTO Reference Paper on Telecomms Services[417].

1. **Competitive safeguards:** ***Not compliant (0/5).*** Although the 2002 Law on Telecommunications, speaks of the need to ensure the "development of telecommunications in a fair, competitive environment"[418], it has no specific provisions safeguarding competition. There appear to be no laws that deal with abuse of dominance, restrict anti-competitive practices, and limit cross-ownership and control of media.

2. **Interconnection:** ***Minimally Compliant (1/5).*** The 2002 Law on Telecommunications does provide for interconnection, but as a bifurcated responsibility between the regulator, which defines the "principles of interconnection", and the Minister, who "lays down special rules on interconnection networks"[419]. There is no evidence available of interconnection rights and obligations in as much detail as that contained in the Reference Paper.

3. **Universal service:** ***Somewhat Compliant (2/5).*** The 2002 Law on Telecommunications does include universal service as a policy goal, but is very short on specifics. For example, it does not mention the imposition of universal service obligations, and the universal service fund is only briefly dealt with, and that as a Ministerial function under the section dealing with the temporary exclusivity of the incumbent[420].

4. **Public availability of licensing criteria:** ***Not Compliant (0/5).*** The 2002 Law on Telecommunications sets out some responsibilities in respect of licensing, with the regulator determining the availability of concessions (major licences)

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415 WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

416 WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p16.

417 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/COG, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9913/2634/9151/Congo_DR_GATS_Schedule.pdf.

418 DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 1, translation by GoogleTrans.

419 DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Articles 8 & 41, translation by GoogleTrans.

420 DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 39

and their terms and conditions, but with approval and awarding at the hands of the Minister[421]. The regulatory system for broadcasting in the DRC is not clear, with only the allocation of frequencies and the setting of standards dealt with in the Act[422]. None of the detail required in terms of this section of the Reference Paper appears to be publicly available.

5. Independent regulators: ***Somewhat Compliant (2/5).*** The Autorité de Régulation de la Poste et des Télécommunications du Congo (ARPTC) was created in 2002 as an independent entity under the Presidency to regulate telecommunications, broadcasting and postal services, noting that the "risk of interference by stakeholders require attribution to the regulator of an autonomous status" and requiring councillors not to have any interests in the sector[423]. As noted above, there is some bifurcation of authority between the regulator and the Minister, and, as suggested below, the Ministry exercises effective control of regulation in the sector, in contradiction to international best practice.

6. Allocation and use of scarce resources: ***Minimally Compliant (1/5).*** Although the regulator is assigned the responsibility to "manage and control the spectrum frequencies" and with "developing and managing the national numbering plan"[424], no mention is made of rights of way, and there does not appear to be a requirement to publish the band plan. According to the WTO the assignment of spectrum is "random"[425], suggesting an important failure in a critical scarce resource.

The DRC is not a signatory to the WTO Reference Paper on Telecomms Services. Its compliance with most of the principles in the Reference Paper is lacking. Becoming a signatory would align the country with international best practice, but would entail both legislative amendment and improved regulatory practice to ensure compliance.

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[421] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 39

[422] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Chapter 4.

[423] DRC (2002) 'Loi N° 014/2002 du 1.6 Octobre 2002 portant Creation de l'Autorite de Regulation de la Poste et des Telecommunications', Democratic Republic of the Congo, Kinshasa.

[424] DRC (2002) Loi-cadre n° 013/2002 du 16 Octobre 2002 sur les Télécommunications en Republique Democratique du Congo, Democratic Republic of the Congo, Kinshasa, Article 8, translation GoogleTrans.

[425] WTO (2010) 'Trade Policy Review: Democratic Republic of the Congo', report by the Secretariat, WT/TPR/S/240, World Trade Organisation, Washington DC, 20 October 2010, p86.

4.4 LESOTHO

4.4.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Under the 2000 Communications Authority Act, the classification of telecomms services is left in the hands of the regulator, which is authorised to "prescribe classes of telecommunication services which may be offered on domestic or international basis and [which] shall include public telecommunication and private telecommunication services[426]".

The 2008 classification adopted by the regulator required individual licences for fixed and mobile service providers, covering both services and infrastructure, class licences for Internet Service Providers, who were not permitted to deploy their own infrastructure, and licence exemption in respect of private telecommunications networks[427].

The recently adopted Communications Act, which came into force on 27 April 2012, likewise provides for individual and, preferably, class licences, in respect of communications services, under the broad umbrella of which fall all broadcasting, postal and telecommunications services[428].

The regulator has recently issued a substantial revamp of the licensing classification[429] in terms of the Communications Act, which sets out to adopt a

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[426] Lesotho (2000) 'Lesotho Communications Authority Act 2000', Kingdom of Lesotho, Maseru, Section 26, available online at http://www.lca.org.ls/docs/LTA-ACT-2000.pdf

[427] LCA (nd) 'Classification of Telecommunications Services Licences', Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/index.php?option=com_content&view=article&id=15:classification-of-telecommunications-services-licences&catid=1:static&Itemid=13

[428] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Sections 2 & 19, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

[429] LCA (2013) 'Lesotho Communications Authority (Licensing Classification and Fees) Rules, 2013', Lesotho Government Gazette, Vol 58 No 11, 1 March, 2013, Lesotho Communications Authority, Maseru, last seen at http://www.lca.org.ls/images/stories/licensing_fees_and_classification_1_march_2013.pdf. This document has subsequently been removed from the website, for reasons that are unknown, leaving the 2008 classification and procedures still in place.

horizontal framework, albeit an unusually complex one. The new licence categories are as follows: broadcasting content (which includes the right to "self-provision" but not to resell); applications (only applicable to providers seeking to use numbering resources); "network services"; "network infrastructure" (ie facilities); a "unified licence" (ie covering both services and infrastructure); "radio spectrum" (which in turn is broke down into "Land mobile services… Satellite Services… Radiodetermination / Aeronautical Services… Fixed Links… Access Spectrum… Fixed Links for Broadband Access… Telemetry / Telecommand… Broadcasting Services… Amateur Radio"); "numbering resources"; "private networks" and "short-term activities permits." All are individual licences, except for the "applications" category, which is a class licence, and permit for short-term activities[430].

The new licensing regime in Lesotho is thus primarily a horizontal one, but with spectrum largely and anomalously subject to a vertical categorisation. As such, it goes beyond the narrowly service-specific vertical framework as set out in W/120, firmly in the direction of a converged (or horizontal or unified or multi-service) framework.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

The most recent comparative figures for telecomms market share are from 2008., although more recent figures can be derived from multiple sources.

Lesotho: Fixed & Mobile Subscribers				
	2008 (Mar)[431]		**2011 (Mar)**	
	Subscribers	**Market Share**	**Subscribers**	**Market Share**
Econet Telecom Lesotho	48 582	9,2%	37 656[432]	3,6%

[430] LCA (2013) 'Lesotho Communications Authority (Licensing Classification and Fees) Rules, 2013', Lesotho Government Gazette, Vol 58 No 11, 1 March, 2013, Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/images/stories/licensing_fees_and_classification_1_march_2013.pdf. The changes have not yet been reflected on their website.

[431] Sources: LCA (2009) 'The State of Communications Sector and ICT Indicators: Lesotho', Lesotho Communications Authority, Maseru, p7, available online at http://www.lca.org.ls/images/stories/state_of_communications.pdf and Vodacom (2010) 'Group Annual Report for the year ended 31 March 2010', Vodacom, Johannesburg, available online at http://www.vodacom.com/pdf/annual_reports/ar_2010.pdf.

(fixed)				
Econet Telecom Lesotho (mobile)	87 455	16,5%	151 373[433]	14,4%
Vodacom Lesotho (mobile)	395 000	74,4%	859 000[434]	82,0%
Total	531 037		1 048 029[435]	

By December 2012 the subscriber base of Vodacom Lesotho had grown to 1 071 000[436], indicating continued if rather less exponential growth in the mobile telephony sub-sector. No comparative figures as at March 2012 for either fixed or mobile subscribers of Econet Telecom Lesotho are available.

According to the ITU, Lesotho in 2011 had 38 579 fixed-line subscribers and 1 232 354 mobile subscribers, giving the country a per capita market penetration rate in telecommunications sector of 1,8% for fixed-line, 56,2% for mobile and 4,2% for the Internet (compared to 1,8%, 45,5% and 3,9% respectively in 2010)[437].

The ownership of Vodacom Lesotho is broken down as follows[438]:

- 80% - Vodacom Group (South Africa / United Kingdom);
- 20% - Sekha-Metsi Consortium, a group of Lesotho business people & public figures[439].

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432 LCA (2011) 'Lesotho Communications Authority: Annual Report 2010/11', Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/images/stories/lca_annual_report_2010-11.pdf, p20..

433 By extrapolation from the other figures for mobile subscribers given by Vodacom and the LCA, respectively.

434 Vodacom (2012) 'Integrated report for the year ended 31 March 2012', Vodacom, Johannesburg, available online at http://www.vodacom.com/pdf/annual_reports/ar_2012.pdf.

435 LCA (2011) 'Lesotho Communications Authority: Annual Report 2010/11', Lesotho Communications Authority, Maseru, p20, available online at http://www.lca.org.ls/images/stories/lca_annual_report_2010-11.pdf.

436 Vodacom (2013) 'Vodacom Group Limited trading statement for the quarter ended 31 December 2012', News Release, Vodacom, Johannesburg, available online at http://www.vodacom.co.za/cs/groups/public/documents/document/pocm01-591726.pdf.

437 ITU (nd) 'Time Series by Country (2000-2011)', International Telecommunication Union, Geneva, spreadsheets covering 'Fixed-telephone subscriptions', 'Mobile-cellular subscriptions' and 'Percentage of individuals using the Internet' available for download via http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

438 Vodacom (2012) 'Vodacom Integrated report For the year ended 31 March 2012', Vodacom, Johannesburg, August 2011, available online at http://www.vodacom.com/pdf/annual_reports/ar_2012.pdf, p22. Vodacom, in turn, is 65% owned by Vodafone Plc of the United Kingdom.

439 The shareholding of the Sekha-Metsi Group has increased since 2010, when it was 11,7%. Cf Vodacom (2010) 'Group Annual Report for the year ended 31 March 2010', Vodacom, Johannesburg, available online at http://www.vodacom.com/pdf/annual_reports/ar_2010.pdf.

The ownership of Econet Telecom Lesotho (both fixed and mobile), is broken down as follows:

- 30% - Government of Lesotho;
- 70% - Econet Wireless (Zimbabwe)[440].

According to the regulator, there is one satellite data communications provider (Bethlehem Technologies Lesotho), one DSL licensee, one leased line licensee, one fixed wireless broadband licensee, and a total of 5 ISPs registered in Lesotho (which include Econet Telecom Lesotho's ISP, Ecoweb, as well as LEO Internet Services (http://www.leo.co.ls) and Comnet (http://www.comnet.co.ls)[441]. The regulator puts the market at 26 312 subscribers[442], although no market share breakdown is available.

International communications access is currently provided via the Eastern Africa Submarine Cable System (EASSy - with a capacity of 4,72 Tbits/s) with plans to connect to the West Africa Cable System (WACS - with a capacity of 5,12 Tbit/s) to ensure redundancy. It is the regulator itself, the Lesotho Communications Authority) that is the shareholder on behalf of the country in the West Indian Ocean Cable Company (WIOCC), which has a shareholding of 30% in EASSy. The service providers have now all signed agreements with WIOCC to secure international connectivity[443]. It is not clear who is the provider of the terrestrial fibre links across South Africa to the EASSy landing station at Mtunzini, South Africa. International interconnection is specifically allowed for "holders of infrastructure licences, unified licences, and network service providers "[444].

Range of Services: Type of services offered by foreign entities.

[440] In 2008, Eskom Enterprises sold the 49,7% stake it had acquired in Telecom Lesotho at the 2001 privatisation of the latter, to Econet Wireless, giving Econet Wireless 100% control of the joint investment vehicle, Mountain Kingdom Communications, and 70% of Telecom Lesotho. Telecom Lesotho and Econet Esi-Cel Lesotho were merged to form Econet Telecom Lesotho. See: WIOCC (2012) 'Improved international connectivity from WIOCC reduces bandwidth prices in Lesotho by 67%', press release, WIOCC, Nairobi, available online at http://wiocc.net/downloads/Lesotho%20press%20release%20.pdf.

[441] LCA (2011) 'Annual Report 2010/11', Lesotho Communications Authority, Maseru, p16, available online at http://www.lca.org.ls/images/stories/lca_annual_report_2010-11.pdf. Econet Telecom Lesotho also offers Internet access (1 360 dial-up and 401 leased line subscribers), but does not appear to need a separate ISP licence.

[442] LCA (2011) 'Annual Report 2010/11', Lesotho Communications Authority, Maseru, p16, available online at http://www.lca.org.ls/images/stories/lca_annual_report_2010-11.pdf p14.

[443] LCA (2012) 'Lesotho Communications Authority - Annual Report 2011/12', Lesotho Communications Authority, Maseru, p34.

[444] LCA (2013) 'Lesotho Communications Authority (Licensing Classification and Fees) Rules, 2013', Lesotho Government Gazette, Vol 58 No 11, 1 March, 2013, Lesotho Communications Authority, Maseru, Clause D(vii), available online at http://www.lca.org.ls/images/stories/licensing_fees_and_classification_1_march_2013.pdf.

The provision of both fixed and mobile voice communications is dominated by foreign-owned or external entities. No information is available in respect of Internet service provision or satellite data communications.

Market Share: market share between foreign and local suppliers[445].

Foreign suppliers, as defined here, have 100% market share in the voice telephony market. No information is available in respect of the Internet and data markets.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There do not appear to be any such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As noted above, the current licensing framework is technology-neutral in respect of telecommunications, distinguishing "network services", "network infrastructure" and providing for a "unified licence", covering both. Radio spectrum licences, on the other hand, as we saw, are far more usage-specific[446].

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified. Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements. Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

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[445] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[446] LCA (2013) 'Lesotho Communications Authority (Licensing Classification and Fees) Rules, 2013', Lesotho Government Gazette, Vol 58 No 11, 1 March, 2013, Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/images/stories/licensing_fees_and_classification_1_march_2013.pdf. The changes have not yet been reflected on their website.

In 1999 Lesotho adopted a Telecommunications Policy that ushered in liberalisation of the ICT sector and aims to "introduce and promote competition"[447]. The mandate given to the regulator in terms of the 2000 Communications Authority Act empowers it to regulate the communications sector in Lesotho, and promote competition[448]. The regulator itself states that it aims to promote "full competition in the communications market[449]".

The new Communications Act goes considerably further, requiring the regulator to "facilitate new entry into the Lesotho communications market and the provision of new communications services, including converged communications services", and to "promote and preserve competition[450]". Whilst the Act is silent on what discretionary conditions and requirements the regulator may impose on licensees, or on licensing procedures, its overall pro-competitive thrust (for example, it prohibits licensees from engaging in "anti-competitive agreements" and "unfair trade practices" and enables the imposition of "competitive safeguards" on dominant licensees) would seem to presuppose the new licensing framework will be pro-competitive and non-discriminatory.

There are no restrictions on the legal status of licensees, either in law or in the current licensing framework.

In terms of Lesotho's general GATS commitments, foreign-owned enterprises including joint-venture enterprises with Lesotho, must satisfy minimum capital outlay and foreign equity requirements as follows: wholly foreign-owned companies require a minimum equity capital outlay of USD 200 000; joint-venture companies should have a minimum foreign-equity capital outlay of USD 50 000. Agency establishments must have authority to negotiate and conclude contracts on behalf of foreign parent company[451]. Recent legislation has removed the previous prohibition[452] of foreign investors from freehold access to land, provided baSotho have a 20% share in such landholding[453].

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[447] Lesotho (1999) 'The Lesotho Telecommunications Policy', Ministry of Communications, Kingdom of Lesotho, Maseru, February 1999, 3.1.1.

[448] Lesotho (2000) 'Lesotho Communications Authority Act 2000', Kingdom of Lesotho, Maseru, Section 15(2)(f), available online at http://www.lca.org.ls/docs/LTA-ACT-2000.pdf.

[449] LTA (2007) 'Communications Sector Liberalisation Framework', Lesotho Telecommunications Authority, Maseru, December 2002, available online at http://www.lca.org.ls/docs/2007_02_07_lib_approved.pdf

[450] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 4, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

[451] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF

[452] WTO (2009) 'Trade Policy Review: Report by the Secretariat - Southern African Customs Union, WT/TPR/S/222, World Bank, Washington DC, p157

[453] Lesotho (2010) 'Land Act 2010 ', Act No 8 of 2010, Lesotho Government Gazette Extraordinary, Vol LV No 42, Government Lesotho, Maseru, 14 June 2010, Section 6(1)(c), available online at http://www.lesotholii.org/files/node/12161/land_act_2010_pdf_31029.pdf.

Other than that, there are no restrictions on the legal status of telecommunications licensees, either in law or in the current licensing framework.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

There are no discriminatory measures imposed on external companies, either in ICT legislation or in the practice of the regulator. External companies are, however, subject to the provisions of the 'External Companies' section of the Companies Act[454]. According to legal firm Webber Newdigate, "A foreign company may register as an external company in terms of section 11 of the Companies Act of 2011, and must do so with within 10 days of opening a place of business in Lesotho. It will require the nomination of a person who is either resident or maintains a full-time office within Lesotho, upon whom notices and processes can be served, and further the nomination of the principal place of business of the company in Lesotho[455]".

Lesotho is ranked 143rd out of 183 countries in terms of ease of doing business by the World Bank[456].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

Licensing is under full control of the regulator in terms of both the 2000 Lesotho Communications Authority Act and the 2012 Communications Act[457]. Licences are issued on application, without requiring an Invitation to Apply, subject only

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454 We were unable to obtain a copy of this legislation, which was promulgated in 2011.

455 Webber Newdigate (nd) 'Business", Webber Newdigate, Lesotho, available online at http://www.webbernew.com/lesotho.php.

456 World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

457 Lesotho (2000) 'Lesotho Communications Authority Act 2000', Kingdom of Lesotho, Maseru, Part VI, available online at http://www.lca.org.ls/docs/LTA-ACT-2000.pdf, and Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 19, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

to submission of the prescribed application form, adherence to prescribed licence conditions, and payment of the prescribed fee[458].

Although Biggs suggests VoIP is "not yet legalized"[459] in Lesotho, there are no restrictions specific to VoIP, in either the legislation or the operator licences, or by means of specific regulation.

International gateway licences are held by both the fixed-line incumbent and its mobile arm, as well as by Vodacom Lesotho following the end of the incumbent's exclusivity period in 2007,[460]. The new licensing framework specifically provides international gateway rights for "holders of infrastructure licences, unified licences, and network service providers "[461].

All public telecomms service licensees are subject to general interconnection requirements on "reasonable and non-discriminatory terms" under previous legislation[462], and in more detail via their licences[463]. Some of the problems identified with the interconnection regime[464] may be addressed under the new 2012 Communications Act, which is rather stronger, with specific provisions prohibiting anti-competitive agreements, abuse of dominance and unfair trade practices[465] that would also apply to interconnection agreements. Interconnection agreements are subject to approval by the regulator, but none are publicly available. The regulator is currently engaged with the operators in a process to reduce interconnection prices, preparatory to a full review of the interconnection regime[466].

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458 LCA (nd) 'Applying for a Licence', Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/index.php?option=com_content&view=article&id=3&Itemid=3.

459 Biggs, P (2010) ,Voice Over Internet Protocol: Enemy Or Ally?, Chapter 8 in ITU (2010) *Trends in Telecommunication Reform 2009: Hands-on or hands-off? Stimulating growth through effective ICT regulation*, International Telecommunication Union, Geneva, pp180.

460 LCA (2009) 'The State of Communications Sector and ICT Indicators: Lesotho', Lesotho Communications Authority, Maseru, p7, available online at http://www.lca.org.ls/images/stories/state_of_communications.pdf.

461 LCA (2013) 'Lesotho Communications Authority (Licensing Classification and Fees) Rules, 2013', Lesotho Government Gazette, Vol 58 No 11, 1 March, 2013, Lesotho Communications Authority, Maseru, Clause D(vii), available online at http://www.lca.org.ls/images/stories/licensing_fees_and_classification_1_march_2013.pdf.

462 See: Lesotho (2000) 'Lesotho Communications Authority Act 2000', Kingdom of Lesotho, Maseru, Sections 36, 37 & 38, available online at http://www.lca.org.ls/docs/LTA-ACT-2000.pdf.

463 See, for example, LTA (2000) 'Licence Granted by the Lesotho Telecommunications Authority to Vodacom Lesotho (Pty) Ltd for the Operation of Mobile Systems and the Provision of Mobile Services on 2001-10-11', Lesotho Telecommunications Authority, Maseru, Section 15.

464 WTO (2009) 'Trade Policy Review: Report by the Secretariat - Southern African Customs Union, WT/TPR/S/222, World Bank, Washington DC, p188

465 Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Part VI, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf

466 LCA (2011) 'Annual Report 2010/11', Lesotho Communications Authority, Maseru, p24, available online at http://www.lca.org.ls/images/stories/lca_annual_report_2010-11.pdf.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

The dominant provider of voice telephony services is Vodacom Lesotho with a market share in 2011 of 82% (see above). There is no information in respect of Internet and data services.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Lesotho in 2008 was 15,1% of monthly gross national income per capita - below the average for Africa of 23%, making Lesotho the 13th cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 15,0% and 58,7% (8th cheapest of 32 African countries)[467].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

Lesotho has no competition regulator. There is also no competition policy, although a draft Competition Bill has been prepared. Currently, under the industrial and trading licences system, a business can apply for protection from competition for up to 10 years.[468] Nonetheless, under the Privatisation Act of 1995[469] it is envisaged that the Government may use privatisation to introduce competition in all areas of the economy and reduce monopolistic behaviour.[470]

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[467] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[468] UNCTAD (200# 'Investment Policy Review Lesotho', United Nations Conference on Trade and Development, Geneva, available online at http://unctad.org/en/Docs/iteipc20034_en.pdf.

[469] Touray describes the Privatisation Act 1995 of Lesotho as containing "elaborate provisions, from the establishment of the Privatisation Unit (the Unit), which is charged with overseeing the privatisation process, to the methods of privatisation. The functions of the Unit include deciding, in consultation with the relevant Ministry concerned, the most appropriate method of privatisation, setting tender rules and procedures for public and restricted tenders, negotiating bids, contracts for sale and lease agreements, and approving any prospectus prepared in relation to a public offering of shares" (Touray, S (2008) 'Privatisation in Sub-Saharan Africa: New Opportunities Await', Cadwalader, Wickersham & Taft LLP, New York, available online at http://corporate.findlaw.com/law-library/privatization-in-sub-saharan-africa-new-opportunities-await.html.

[470] WTO (nd) 'Trade Policy Review: Southern African Customs Union - Annex 2: Kingdom of Lesotho', WT/TPR/S/222/LSO, World Trade Organisation, Geneva, available online at http://www.wto.org/english/tratop_e/tpr_e/s222-02_e.doc.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence of anti-competitive behaviour in the telecommunications sector in Lesotho.

4.4.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Lesotho's 2012 Communications Act distinguishes between "public broadcasting services", "private broadcasting services", "commercial broadcasting services" and "community broadcasting services" [471].

The new converged licensing classification, however, is considerably simpler, eschewing the above categories in favour of an entirely horizontal approach. Broadcasters would be required to apply for licences under each of the necessary horizontal categories: primarily a broadcasting content licence (which would include the right to "self-provision" in terms of signal distribution infrastructure) and a "radio spectrum" licence in the relevant category[472]. It is not clear whether they would also need to apply for licences in one or more of the following categories: "network services", "network infrastructure" or a "unified licence" (ie covering both services and infrastructure)[473] - although a stand-alone signal distributor would clearly need to do so.

Lesotho's licensing framework for broadcasting is thus not in accordance with W/120, and has moved substantially towards a converged, horizontal licensing framework.

[471] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 38, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

[472] LCA (2013) 'Lesotho Communications Authority (Licensing Classification and Fees) Rules, 2013', Lesotho Government Gazette, Vol 58 No 11, 1 March, 2013, Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/images/stories/licensing_fees_and_classification_1_march_2013.pdf. The changes have not yet been reflected on their website.

[473] LCA (2013) 'Lesotho Communications Authority (Licensing Classification and Fees) Rules, 2013', Lesotho Government Gazette, Vol 58 No 11, 1 March, 2013, Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/images/stories/licensing_fees_and_classification_1_march_2013.pdf. The changes have not yet been reflected on their website.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

The exact number of broadcasters in Lesotho is somewhat uncertain, with numbers from different sources varying between 9 and 15. In its most recent annual report, the regulator lists 15 licensed broadcasters, two of which (viz *Lesotho Television* and *Trinity Broadcasting Network*) are television broadcasters. For radio broadcasters, it lists 9 private radio stations (viz: *Peoples' Choice FM, Moafrika FM, Catholic Radio FM, Joy FM, Khotso FM, Harvest FM, Thaha-Khube FM, Jesu ke Karabo FM, KEL Radio FM*), two community radio stations (viz: *DOPE FM* and *Mafeteng Community Radio*) and one commercial radio station (*Ultimate FM*)[474].

OMD puts the number of broadcasters somewhat smaller, at 1 terrestrial television station (*Lesotho Television*) and 8 radio stations, and additionally notes the provision of a subscription digital satellite television broadcast service by DStv / MultiChoice[475]. The website of the regulator makes available the licences of the 2 television stations, along with those for a total of 11 radio stations (including two previously unmentioned entities: *Fill the Gap Ministries* and *the Lesotho Evangelical Church*)[476].

There is no information on market share of the various broadcasters. However, *Ultimate FM, Peoples' Choice FM, Moafrika FM* and *Catholic Radio FM are reported to* broadcast countrywide via Radio Lesotho's transmitter network, while *Joy FM*, *Harvest FM* and *Jesu ke Karabo* broadcast in and around Maseru[477].

There is limited information on the ownership structure in the broadcasting sector.

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[474] LCA (2012) 'Lesotho Communications Authority - Annual Report 2011/12', Lesotho Communications Authority, Maseru, p20.

[475] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p25, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

[476] LCA (nd) 'List of Licensed Broadcastsers [sic] in Lesotho', Lesotho Communications Authority, Maseru, http://www.lca.org.ls/index.php?option=com_content&view=article&id=8:broadcasting&catid=1:static&Itemid=8.

[477] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p28, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.

Lesotho Television, Radio Lesotho and *Ultimate FM* are state-owned[478].

At least three radio stations (presumably including *Catholic Radio FM)* belong to "church organisations" [479].

Khotso FM is operated by the National University of Lesotho[480].

At least four radio stations (*Harvest FM*, *Joy FM*, *MoAfrica FM* and *Peoples' Choice FM*) would appear to be owned by locally-based commercial interests.[481]

OMD puts television penetration in Lesotho at 36% of households[482].

Public broadcasting is provided by *Lesotho Television* and *Radio Lesotho*[483].

Similarly, FesMedia gives Lesotho a score of 2,0 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[484], indicating limited compliance. They further state:

> *The 2008 Communications Policy, however, envisages the transformation of the Lesotho National Broadcasting Service (LNBS) "into a public service broadcaster" through the "corporatizing" of the LNBS. The new "corporatized" broadcaster will be "accountable to an independent board with the goal of serving the public interest". However, details of this "corporatization" process are not spelled out further in the policy. The 2008 Communications Policy does not go into detail with regards to how the LNBS's "independent" board will be*

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[478] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p28, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.
[479] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p28, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.
[480] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p28, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.
[481] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p28, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.
[482] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p22, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.
[483] LCA (2012) 'Lesotho Communications Authority - Annual Report 2011/12', Lesotho Communications Authority, Maseru, p20.
[484] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p 42, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.

appointed, nor does it bear any indication of how its independence will be guaranteed. [485]

Range of Services: Type of services offered by foreign entities.

The subscription-based digital satellite television service offered by South African broadcaster, DStv / MultiChoice, is the only such service[486].

It should also be noted that there is cross-border spillage from South African radio stations, in particular the seSotho language *Radio Lesedi*[487].

Market Share: market share between foreign and local suppliers[488].

With the exception of DStv, as noted above, all broadcasting providers in Lesotho are currently local.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

Government is a major player in the broadcasting market, with control of the signal distribution infrastructure, and, seemingly, limited interest in stimulating or further opening up the broadcasting sector[489].

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

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[485] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p 43, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.

[486] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p25, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

[487] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p28, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.

[488] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[489] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p32, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

The 2012 Communications Act gives the regulator broad discretion to grant broadcasting licences in order to ensure that the public has access to "a diverse range of broadcasting services" and "a diverse range of broadcast content"[490]. There do not appear to be any restrictions on the number of broadcasting licences, with the processing of licence applications ongoing[491].

Neither the 2012 Communication Act nor the 2013 Licensing Classification impose any restrictions on foreign ownership of licensees. As noted above, foreign-owned companies have to satisfy very minimal investment and legal requirements. The WTO describes Lesotho's foreign investment regime as "generally liberal and non-discriminatory" and notes "no foreign investment restrictions in law"[492].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

As noted above, the 2012 Communications Act is silent on issues of nationality. There is no known discrimination in the issuing and allocation of licences based on nationality.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

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[490] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Sections 19, 38.1 (a) and (b). available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

[491] Cf LCA (2013) 'Public Consultation notice for Motjoli FM Community Radio application', Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/index.php?option=com_content&view=article&id=99%3Apublic-consultation-notice-for-motjoli-fm-community-radio-application&catid=2%3Alatest-news&Itemid=3.

[492] WTO (nd) 'Trade Policy Review: Southern African Customs Union - Annex 2: Kingdom of Lesotho', WT/TPR/S/222/LSO, World Trade Organisation, Geneva, available online at http://www.wto.org/english/tratop_e/tpr_e/s222-02_e.doc.

Licensing is under full control of the regulator in terms of both the 2000 Lesotho Communications Authority Act and the 2012 Communications Act[493]. Licences are issued on application, without requiring an Invitation to Apply, subject only to submission of the prescribed application form, adherence to prescribed licence conditions, and payment of the prescribed fee[494].

This differs from the previous regime where the regulator dealt with the applications and terms and conditions for broadcast licences, but required approval from the Communications Minister before being able to award a broadcast licence[495].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

The ICT Policy for Lesotho commits the country to a harmonised legal and regulatory framework[496]. Lesotho has a convergent regulator in the Lesotho Communications Authority, whose jurisdiction in respect of broadcasting is continued under the 2012 Communications Act, which integrates the regulation of telecommunications, broadcasting, and the postal sector[497].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

The government and the Church would appear to dominate the broadcasting sector. No breakdown of viewership and listenership numbers is available from which formally to determine dominance.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

The situation in respect of broadcasting is the same as for telecommunications (see above).

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[493] Lesotho (2000) 'Lesotho Communications Authority Act 2000', Kingdom of Lesotho, Maseru, Part VI, available online at http://www.lca.org.ls/docs/LTA-ACT-2000.pdf, and Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 19, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

[494] LCA (nd) 'Applying for a Licence', Lesotho Communications Authority, Maseru, available online at http://www.lca.org.ls/index.php?option=com_content&view=article&id=3&Itemid=3.

[495] FesMedia (2011) 'African Media Barometer: Lesotho 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p40, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Lesotho_2010_web.pdf.

[496] Lesotho (2005) 'ICT Policy for Lesotho', Kingdom of Lesotho, Maseru, available online at http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan033873.pdf.

[497] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 2, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

The 2012 Communications Act 2012 empowers the regulator to classify licensees as dominant "after conducting a market entry and impact assessment" and thence to "adopt competitive safeguards designed to deter a dominant licensee from using its significant market power in one market to impede the development of competition in another"[498].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

Panellists to the 2010 Media Barometer Lesotho survey claimed that, while government rarely openly states it is withholding advertising to exert pressure and influence editorial content on certain media, it has done so in the past. [499]

4.4.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Lesotho has been a member of the WTO since 31 May 1995, and has made a number of general commitments as well as specific commitments in respect of communication services[500].

In respect of market access across all services sectors, Lesotho has committed to imposing no restrictions on cross-border supply of services. In respect of commercial presence, Lesotho has imposed on foreign-owned firms and joint-venture enterprises certain "minimum capital outlay and foreign equity requirements", viz:

> *Wholly foreign-owned company required a minimum equity capital outlay of US$ 200 000. Joint-venture company should have a*

[498] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 19, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf, Section 22.

[499] The African Media Barometer (AMB) is a joint project of FesMedia and the Media Institute of Southern Africa and describes itself as "an in-depth and comprehensive description and measurement system for national media environments on the African continent", pointing out that it is a "self-assessment exercise based on home-grown criteria derived from African Protocols and Declarations like the "Declaration of Principles on Freedom of Expression in Africa" (2002) by the "African Commission for Human and Peoples' Rights"." (FesMedia (nd) 'The African Media Barometer', FesMedia Africa & Media Institute of Southern, Windhoek, http://www.fesmedia-africa.org/home/what-we-do/africa-media-barometer-amb/.

[500] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF

> *minimum foreign-equity capital outlay of US$ 50 000 in cash or in kind.*
>
> *Agency establishment must have authority to negotiate and conclude contracts on behalf of foreign parent company*[501]*.*

Further, in respect of the presence of natural persons across all services sectors, Lesotho has imposed limitations on the number of expatriates permitted, along with local skills development requirements:

> *Automatic entry and work permit is granted for up to 4 expatriate senior executives and specialized skill personnel in accordance with relevant provisions in the Laws of Lesotho. Approval is required for any additional expatriate workers beyond the automatic level. Enterprises must also provide for training in higher skills for the locals to enable them to assume specialized roles.*[502]

In respect of national treatment across all services sectors, Lesotho made a full commitment[503] not to impose "discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers"[504].

As regards market access for communications services, Lesotho has reserved the right to impose restrictions on cross-border consumption of communications services[505]. For telecommunications services, Lesotho is committed to imposing no restrictions on commercial presence, whilst the presence of natural person is only subject to the general limitation imposed above[506]. In respect of motion picture and video tape production and distribution services, Lesotho has

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[501] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[502] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[503] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[504] WTO (2008) 'The General Agreement on Trade in Services: An Introduction', World Trade Organisation, Geneva, available online at http://www.unescap.org/tid/projects/gats10_tis.pdf.

[505] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[506] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p3, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

reserved the right to impose restrictions on commercial presence. In respect of motion picture projection services, both commercial presence and the presence of natural persons are only subject to the general limitation imposed above[507]. In respect of radio and television services and transmission, Lesotho has reserved the right to impose restrictions on consumption abroad, whilst commercial presence and the presence of natural persons is only subject to the general limitation imposed above[508].

As regards national treatment, Lesotho has reserved the right to impose restrictions on consumption abroad for all communications services, whilst commercial presence and the presence of natural persons are only subject to the general limitation imposed above[509].

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

The World Bank 'Trade at a Glance' report does not provide a global ranking for Lesotho on the GATS Commitments Index. The Nations Encyclopaedia, however, ranks the country 3rd out of 41 sub-Saharan African countries, behind South Africa and Gambia[510].

In practice, no attempt appears to have been made to limit consumption abroad (in respect of both market access and national treatment) of any communications services. There is therefore no reason why Lesotho should not commit to imposing no restrictions on consumption abroad.

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

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[507] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[508] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[509] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[510] Encyclopaedia of the Nations (nd) 'General Agreement on Trade in Services (GATS) Commitments Index (0-100, most liberal) - Trade - Development outcomes - African Development Indicators', Advameg Inc, Illinois, available online at http://www.nationsencyclopedia.com/WorldStats/ADI-general-agreement-services-liberal.html.

There is no evidence of MFN inconsistent measures in the telecommunications sector[511]. In respect of telecommunications, Lesotho neither offers preferential access nor imposes specific requirements to other countries. There are thus no barriers to the implementation of regional MFN in telecommunications.

Lesotho is a signatory to the WIPO There is no evidence of MFN inconsistent measures in the telecommunications sector[512].

n; the Paris Convention on Industrial Property; the Berne Convention on Literary and Artistic Works; the Rome Convention on Protection of Performers; and Patent Cooperation Treaty. Lesotho is also a member of the African Regional Industrial Property Organisation (ARIPO).[513]

Lesotho like many countries in Southern Africa struggles in implementing the above conventions in relation to intellectual property rights (IPR) violations in the film, video, sound and recording industries. The country has fragmented laws dealing with enforcement of IPR and lacks well-trained law enforcement officials[514].

4.4.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[515] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

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[511] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

[512] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

[513] WTO (nd) 'Trade Policy Review: Southern African Customs Union - Annex 2: Kingdom of Lesotho', WT/TPR/S/222/LSO, World Trade Organisation, Geneva, available online at http://www.wto.org/english/tratop_e/tpr_e/s222-02_e.doc.

[514] SADC (nd) 'Lesotho- Southern African Development Community', available online at www.sadc.int/index.php/download_file/view/76/270.

[515] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[516], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Lesotho is not a signatory to the WTO Reference Paper on Telecomms Services[517].

1. Competitive safeguards: ***Compliant (5/5)***. As discussed above, the 2012 Communications Act has clear criteria for determining market dominance, and makes clear provision for the regulator to limit a range of anti-competitive practices. For example, it prohibits licensees from entering into "anti-competitive agreements" and engaging in "unfair trade practices" and provides for the imposition of "competitive safeguards" on dominant licensees[518].

2. Interconnection: ***Compliant (5/5).*** In terms of the 2012 Communications Act: all operators are required to interconnect upon request; procedures for interconnection requests are laid down; interconnection agreements with dominant operators are required to be made public, with provision for the imposition of a reference interconnect offer; dispute settlement procedures are laid down[519].

3. Universal service: ***Compliant (5/5).*** The provisions of the 2012 Communications Act are in accordance with both international best practice and the Reference Paper[520]. The Act provides for the establishment of a Universal Service Fund, covering telecommunications, broadcasting and postal service. The fund is largely sourced from contributions levied on licensees, and expenditure overseen by a committee to support a variety of universal access and service interventions through a competitive tender process. The Act does not, however, make provision for the imposition of universal service obligations.

4. Public availability of licensing criteria: ***Partially Compliant (3/5).*** The 2012 Communications Act makes no specific stipulations in respect of licensing criteria and procedures. The website of the regulator contains an open invitation to

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[516] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[517] WTO (1995) 'Communication from Lesotho: Schedule of Specific Commitments under the General Agreement on Trade in Services', GATS/SC/114, World Trade Organisation, Geneva, 30 August 1995, available online at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/SCHD/GATS-SC/SC114.WPF.

[518] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 4, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

[519] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Part VII, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

[520] Lesotho (2000) 'Lesotho Communications Authority Act 2000', Kingdom of Lesotho, Maseru, Part VIII, available online at http://www.lca.org.ls/docs/LTA-ACT-2000.pdf. Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

apply for a licence, but is not fully clear on the criteria of assessment. Apart from standard business information, these appear to include evidence of "financial capability", "previous experience" and "compliance" with ITU-T stipulations[521].

5. Independent regulators: Largely *Compliant (4/5).* The 2012 Communications Act prohibits the appointment to the Board of the regulator of any person with a "direct interest" in a licensee[522]. The only lack of impartiality specifically permitted by the Act is that in respect of licensees found to be "dominant", and any such measures have specific pro-competitive objectives[523]. However, appointment to the Board remains the sole prerogative of the Minister, albeit after a public nominations process - given the existence of government shareholding in the sector, this does create the possibility of structural conflicts of interest.

6. Allocation and use of scarce resources: *Largely Compliant (4/5).* The 2012 Communications Act grants the regulator authority to manage the allocation of scarce resources, including frequency spectrum[524], but makes no provision in respect of the procedures to be followed or in respect of the publication of the frequency band plan.

Lesotho is already largely compliant with the WTO Reference Paper on Telecomms Services. There is nothing in the legislation or in current regulatory practice that would conflict with a formal commitment by Lesotho to adhere to its principles.

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[521] LCA (nd) 'Applying for a Licence', Lesotho Communications Authority, Maseru, http://www.lca.org.ls/index.php/applying-for-a-licence.
[522] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Section 6(7)(d)., available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.
[523] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, Part VI, available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.
[524] Lesotho (2012) 'Communications Act, 2012', Act No 4 of 2012, Kingdom of Lesotho, Maseru, , Section 5(1)(e), available online at http://www.lca.org.ls/images/stories/communications_act_2012.pdf.

4.5 MADAGASCAR

4.5.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The 2005 Telecommunications Law sets out the licensing framework for Madagascar[525]. This sets out no specific classification of licences, providing merely that "operators establishing and operating a telecommunications network open to the public using scarce resources such as frequencies… and telephone numbers [require] a licence issued by the Regulatory Agency"[526].

The degree of compliance with the W/120 framework is thus unclear.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

The telecommunications market in Madagascar comprises the following players: Telecom Malagasy (Telma), the incumbent fixed-line operator, three GSM mobile operators (Orange, Bharti Airtel and Telma). A fourth mobile operator, the CDMA-based, Madamobil, entered the market in 2010, but had its licence revoked in 2012 for failure to pay licence fees or taxes[527]. Internet Service Providers include: Gulfsat Madagascar, Blueline, Datacom and Data Telecom Services (DTS).[528].

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[525] Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo.

[526] Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 8 (translation Google Translate).

[527] Telecompaper (2012) 'Madagascar revokes Madamobil's operating licence', Telecompaper, Houten, The Netherlands, 14 May 2012, available online at http://www.telecompaper.com/news/madagascar-revokes-madamobils-operating-licence--873030.

[528] BuddeComm (2012) 'Madagascar - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at

The most recent comparative figures for telecomms market share date from 2009. Note that the figures are from disparate sources, and are incomplete, and must hence be treated with caution.

Madagascar: Fixed & Mobile Subscribers		
	2009	
	Subscribers	**Market Share**[529]
Telecom Malagasy (fixed)	138 100[530]	2%
Telecom Malagasy (mobile)	2 460 000[531]	39%
Bharti Airtel (mobile)	1 569 000[532]	25%
Orange (mobile)	2 254 000[533]	36%
Total	6 283 600[534]	

According to the ITU, Madagascar in 2011 had 138 322 fixed-line subscribers and 8 665 156 mobile subscribers, giving the country a per capita market penetration rate in telecommunications sector of 0,7% for fixed-line, 40,7% for mobile and 1,9% for the Internet (compared to 0,7%, 37,2% and 1,7% respectively in 2010)[535].

http://www.budde.com.au/Research/Madagascar-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

529 Percentages are given as approximate because of difficulties with the comparability of the data.

530 ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

531 Approximate figure, calculated from the others.

532 Zain (nd) 'Financial Highlights', Zain, Bahrain, available online at http://www.zain.com/investor-relations/facts-figures/.

533 France Telecom (2010) '2009 Registration document: Annual Financial Report', France Telecom-Orange, Paris, p9, available online at http://www.orange.com/en/content/download/2909/36632/version/2/file/2009RegistrationdocumentFranceTelecomGroup.pdf. France Telecom's own estimate of their market share is 51,6%, and places them ahead of Bharti Airtel (then Zain) and newcomer Telma Mobile.

534 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

535 ITU (nd) 'Time Series by Country (2000-2011)', International Telecommunication Union, Geneva, spreadsheets covering 'Fixed-telephone subscriptions', 'Mobile-cellular subscriptions' and 'Percentage of individuals using the Internet' available for download via http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

Partial information on the ownership structure Telecom Malagasy (Telma), is available:

- 68% - Distacom Communications (Hong Kong)[536];
- 32% - government-owned.

Bharti Airtel is 100% owned by Bharti Airtel, India.

There is also limited information on the ownership of Orange:

- 71,8% - France Telecom / Orange[537];
- 28,2% - unclear.

International telecommunications access is provided via two undersea cables. On the west coast this is through the Eastern Africa Submarine Cable System (EASSy – with a capacity of 4,72 Tbit/s) landing station at Toliary, in which Bharti Airtel and Telma Madagascar are the local investors[538]. On the east coast access is via Orange's Lower Indian Ocean Network (LION - with a capacity of 1,28 Tbit/s) landing station at Toamasina, which connects Madagascar to Réunion and Mauritius[539].

Range of Services: Type of services offered by foreign entities.

As can be seen above, despite the limited information available, the provision of telephony services is entirely in the hands of companies under majority foreign ownership and control. No information is available in respect of VANS services and private telecommunications services.

Market Share: market share between foreign and local suppliers[540].

Foreign suppliers, as defined here, have 100% market share in the voice telephony market. No information is available in respect of the VANS and private telecommunications services markets.

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536 Balancing Act (nd) 'Madagascar Government Sells Stake in Fixed-Line Incumbent', *Balancing Act*, Issue 211, Balancing Act, London, available online at http://www.balancingact-africa.com/news/en/issue-no-211/telecoms/madagascar-governmen/en. . . . .

537 France Telecom (2012) '2011 registration document: Annual Financial Report', France Telecom-Orange, Paris, p6, available online at www.orange.com/en/content/download/4820/67983/version/2/file/DDR+2011_VA_CL.pdf.

538 Wikipedia (nd) 'EASSY Cable System', Wikipedia, https://en.wikipedia.org/wiki/EASSy_(cable_system).

539 Orange (2009) 'Orange inaugurates the new submarine cable LION in Reunion and continues its strategy to develop broadband internet in the Indian Ocean', Press release, Orange, Paris, 11 December 2009, available online at http://lion.orange.com/media/lion_en/UPL821562760047316088_CP_cableLION_VA_.pdf.

540 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

The degree of political instability in Madagascar, in particular the tensions between President Rajoelina and ousted President Ravalomanana, may undermine commitment to and execution of further liberalisation of the ICT sector.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

According to Lewis & Maddens, in Madagascar "licences are technology neutral"[541]. No further or more specific information on the scope of the licensing regime is available.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

In the absence of either general GATS commitments, or any in respect of communications services, on the part of Madagascar[542], limited information on restrictions applying to foreign investment, and on the legal status of foreign enterprises, is available.

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[541] Lewis, C & Maddens, S (2011) 'Update of SADC Guidelines on Universal Access and Service and Assessment Report', Harmonization of ICT Policies in Sub-Sahara Africa project, International Telecommunication Union, Geneva, p112, available online at http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/Activities/SA/CRASA/UAS%20Final%20Draft%20Report.pdf.

[542] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MDG, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9247/Madagascar_GATS_Schedule.pdf. . . . .

A restriction on the number of licensees is only legally permitted "where such limitation is justified by the scarcity of resources, including frequencies". Further, licensing is required to promote a competitive market through "[respecting] the principle of ensuring the possibility of competition in each market segment in all geographical areas"[543].

According to the World Bank, in Madagascar a "locally incorporated entity is considered a domestic entity regardless of its foreign ownership or control"[544]. Nevertheless, it is a requirement that "at least one of the directors must be a resident"[545]. Further, "foreign companies must have authorization from the Economic Development Board of Madagascar before buying land" [546].

According to the World Bank, in Madagascar "foreign ownership in the telecommunications infrastructure (both fixed-line and mobile / wireless)... is limited to a maximum of 66%", and they give the country a score of 74,5 out of 100 for foreign equity participation in the telecommunications sector overall[547]. This appears to be incorrect, given that the known foreign equity status of all three mobile operators is in excess of this threshold.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

In the absence of either general GATS commitments, or any in respect of communications services, on the part of Madagascar[548], no further information on discriminatory measures applicable to foreign companies is available.

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[543] Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 11(1), (translation Google Translate).

[544] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p58, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[545] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p37, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf,.

[546] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p127, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[547] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p127, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf. All of the foreign shareholdings noted previously above would seem to contradict this.

[548] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MDG, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9247/Madagascar_GATS_Schedule.pdf. . . . .

Madagascar is ranked 137th out of 183 countries in terms of ease of doing business by the World Bank[549].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

The law sets out an open licensing regime under the sole control of the regulator. In terms of this, the regulator awards licences "on its own initiative or at the request of the ministry, [or] at the request of an applicant"[550]. The role of the Minister in licensing is thus limited to the power to "ask the Regulatory Agency to prepare a tender for the granting of a licence"[551].

This bears out the summary of Lewis & Maddens that "Madagascar law has established public and non-discriminatory licensing procedures, and requires the regulator to act upon licence applications in a reasonable time frame…. There are clear criteria for limiting the number of licensees"[552]. The website of the regulator reflects such an open application licensing regime, but neither gives specific detail nor offers application forms for download[553].

From the previous information on undersea cables, it would appear that foreign suppliers are permitted international gateway access. Specific confirmation of this is not, however, available.

Madagascar's Interconnection Decree obliges all operators to interconnect, on a commercial contractual basis. Further, it requires non-discriminatory pricing and authorises the regulator to impose a default interconnection agreement should a

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549 World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

550 Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 11(1), (translation Google Translate).

551 Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 24(2), (translation Google Translate).

552 Lewis, C & Maddens, S (2011) 'Update of SADC Guidelines on Universal Access and Service and Assessment Report', Harmonization of ICT Policies in Sub-Sahara Africa project, International Telecommunication Union, Geneva, p112, available online at http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/Activities/SA/CRASA/UAS%20Final%20Draft%20Report.pdf.

553 OMERT (2012) 'Régime de la licence', posted on 20 April 2012, Office Malagasy d'Etudes et de Régulation des Télécommunications, Antananarivo, http://www.omert.org/octroi-de-licence/.

dispute arise[554]. There, therefore, do not appear to be any discriminatory or anti-competitive interconnection provisions.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

Dominant providers of voice telephony services would appear to be Telecom Malagasy (mobile) with a market share of approximately 39% and Orange with a market share of 36%, both of which are foreign owned.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Madagascar in 2008 was 46,6% of monthly gross national income per capita - well above the average for sub-Saharan Africa of 23%, making Madagascar the 2nd most expensive out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 68,5% and 450,2% (9th most expensive of 32 African countries)[555].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

According to Bowman Gilfillan, there is a competition authority in Madagascar, the Conseil de la Concurrence ('Competition Council'), but it is "not yet fully functional" [556]. The structure was created in 2008 in terms of Competition Law No 2005-020 of 2005 through its implementing Decree, No 2008-771 of 28 July 2008[557]. It would appear that the Competition Council is intended to have economy-wide jurisdiction.

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[554] Madagascar (1998) 'Decree No 98-658 On interconnection in the telecommunications sector', Republic of Madagascar, Antananarivo, available online at http://www.omert.org/wp-content/uploads/2012/04/decret_99_228.zip.

[555] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[556] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p25, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[557] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p25, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

Further, Bowman Gilfillan notes that, while there is "no specific threshold for dominance but the Competition Council determines if the transaction may create or strengthen a dominant position in the domestic market or can eliminate competition or reduce it significantly" [558]. In addition, the Competition Council may impose fines (of between USD 2 200 and USD 22 000) and prison terms for the "abuse of a dominant position" [559].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence of anti-competitive behaviour.

4.5.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Licensing for broadcasting services in Madagascar is under the control of the Conseil Supérieur à la Communication Audiovisuelle (CSCA or High Council for Audiovisual Communication). The classification of broadcasting licences is somewhat unclear, but appears to follow W/120, providing for television, FM radio and radio broadcasting[560]. There does not , however, appear to be any category covering broadcasting transmission services.

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[558] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p26, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[559] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p25, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[560] See: OMERT (2012) 'Granting authorization to operate FM radio stations and TV', Office Malagasy d'Etudes et de Régulation des Télécommunications, Antananarivo, available online at http://www.omert.org/category/procedures/octroi-dautorisation/octroi-dautorisation-dexploitation-de-stations-de-radiodiffusion-fm-et-tv/, and OMERT (2012) 'Granting authorization to operate radio stations', Office Malagasy d'Etudes et de Régulation des Télécommunications, Antananarivo, available online at http://www.omert.org/octroi-dautorisation-dexploitation-de-stations-radioelectrique/.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

Legally recognised categories of broadcasting in the country comprise public and private commercial broadcasting, with no legal provision for community broadcasting, although it exists in practice[561].

There are approximately 200 radio and television broadcasters in Madagascar. FesMedia describes "hundreds of mostly commercial, community and evangelical FM radio stations... competing for airwaves with the national broadcaster, which asserts its presence by establishing new regional stations and upgrading existing stations" [562]. Toulou reports that Madagascar has 256 radio stations and approximately 12 television stations[563]. However, about 50 radio stations were subsequently closed in 2010 for "alleged non-compliance with the law"[564].

Radio stations include the following: Alliance M92, Antsiva Tana, Feon'Imerina, Free FM, Radio Don Bosco, Radio Fahazavana, Radio MagnevaMenabe, Radio Mahajanga, Radio Manakara, Radio MBS, Radio Miara-manompo, Radio Nationale Malagasy (RNM), Radio Platine, Radio Soleil and Taratra[565].

Television stations include the following: Malagasy Broadcasting System (MBS), MA-TV, Radio Télévision Ravinala, RTA, Télévision Malagasy (TVM) and TVPlus[566].

Radio Nationale Malagasy (RNM) is state-owned, with a national footprint[567].

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[561] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, pp92 & 101, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.
[562] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p64, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.
[563] Toulou, L (2009) 'Chapter 6: Madagascar', in Kadima, D & Booysen, S (eds) (2009) Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy, Electoral Institute for Sustainable Democracy in Africa, Johannesburg, pp199-201.
[564] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p70, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.
[565] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.
[566] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.

Télévision Malagasy (TVM) is state-owned, and dominates the market, with a national footprint. There are eight private television channels that broadcast only in Antananarivo (including RTA, MA-TV, TV Plus and Radio Télévision Ravinala), with two to three channels in other large cities[568].

Subscription satellite broadcaster DStv, which is 100% owned by MultiChoice (South Africa), is also available in Madagascar.

There are no listenership / viewership figures available for the various broadcasters.

FesMedia reports household television penetration as being close to 30%[569].

Public broadcasting in Madagascar is viewed as operating like a "state broadcaster" with the radio and television arms of l'Office de la Radio et Television Malagasy (ORTM - RNM and TVM) controlled by government. FesMedia gives Madagascar a score of 1,8 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large" [570], indicating limited compliance.

Range of Services: Type of services offered by foreign entities.

Although the broadcast media in Madagascar is very plural and diverse, evidence of the presence of foreign broadcasters in the country - other than DStv / MultiChoice - was not available at the time of writing.

Market Share: market share between foreign and local suppliers[571].

State television, Télévision Malagasy (TVM) and state radio Radio Nationale Malagasy (RNM) would appear to dominate the market, as they are the only ones that broadcast nationally. Apart from the privately owned Radio Don Bosco, a Catholic station, all the other radio and TV stations broadcast locally or regionally.[572]

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[567] Toulou, L (2009) 'Chapter 6: Madagascar', in Kadima, D & Booysen, S (eds) (2009) Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy, Electoral Institute for Sustainable Democracy in Africa, Johannesburg, pp199-201.

[568] Friedrick-Ebert-Stiftung (FES) FesMedia (2010), African Media Barometer: MADAGASCAR.

[569] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p80, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.

[570] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p9, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.

[571] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[572] Toulou, L (2009) 'Chapter 6: Madagascar', in Kadima, D & Booysen, S (eds) (2009) Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy, Electoral Institute for Sustainable Democracy in Africa, Johannesburg.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

Broadcasting in Madagascan appears to reflect an entrenchment of political interests, with a swathe of closures of stations aligned to former president Marc Ravalomanana following his ouster, and the failure to license new stations since 2009. The entrenchment of polarised political interests would therefore seem to present a potential threat to ongoing liberalisation in the sub sector[573].

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

As noted above, there do not appear to be any restrictions on the number of broadcast licensees, albeit that no licences at all have been issued since 2010.

There is no information additional to that previously mentioned affecting market access in respect of foreign entities.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

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[573] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p94, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.

No information on other discriminatory measures is available. However, given the restrictive broadcast environment[574], the ruling party and government seem likely to favour the state broadcaster and their privately owned stations, while making conditions difficult for other players.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

Broadcast licence applications in Madagascar follow a convoluted process. An application needs first to be submitted for approval to the President of the broadcasting regulator, the Conseil Supérieur à la Communication Audiovisuelle (High Council for Audiovisual Communication (CSCA)). The telecommunications regulator, OMERT then needs to grant the necessary frequency spectrum and perform equipment testing. Final approval then reverts to the CSCA[575].

FesMedia list the following information as required in the broadcast licence application:

- *the aim and general purpose of the business,*
- *technical characteristics of programmes,*
- *provisional five-year budget forecast*
- *amount of anticipated investments*
- *all accompanied by information on the statutes, the list of directors, the organizational structure as well as share ownership structure[576].*

FesMedia notes that this means that the "Minister of Communications, in effect, takes on the role of the broadcasting regulator and licences regulating body" and suggests that the licensing criteria are "discriminatory and lack transparency"[577].

[574] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.

[575] OMERT (nd) 'Granting authorization to operate FM radio stations and TV Office', Malagasy d'Etudes et de Régulation des Télécommunications, Antananarivo, translation by GoogleTrans, available online at http://www.omert.org/category/procedures/octroi-dautorisation/octroi-dautorisation-dexploitation-de-stations-de-radiodiffusion-fm-et-tv/.

[576] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p94, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf

[577] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p94, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Broadcasting is regulated by the Conseil Supérieur à la Communication Audiovisuelle (High Council for Audiovisual Communication (CSCA)). This was established in terms of Article 11 Ordinance 92-039, but lacks independence, being “based in the Ministry of Communication” with its members “nominated” by the Minister[578].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

The state-owned radio and television broadcasters, RNM and TVM, are the dominant players in the broadcast industry mainly based on geographic coverage. The two also depend on state funding, advertising, and sponsorships. They are also very popular with advertisers because they enjoy national coverage[579].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As noted previously, despite competition legislation being in place, Madagascar does not yet have a fully functional competition authority.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

The law appears to discriminate against private broadcasters by restricting them to the use of FM frequencies only and limiting their transmission power to 500 watts, thereby restricting their broadcast footprint to a radius of approximately 150 km[580]. The law does, however prescribe penalties for the “abuse of a dominant position” including substantial fines and terms of imprisonment.[581]

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[578] FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p93, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf.

[579] Toulou, L (2009) ‘Chapter 6: Madagascar’, in Kadima, D & Booysen, S (eds) (2009) Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy, Electoral Institute for Sustainable Democracy in Africa, Johannesburg, pp199-201.

[580] Andrew Lees Trust (2008) ‘Communication for Empowerment in Madagascar: An assessment of communication and media needs at the community level’, United Nations Development Programme, New York, p16, available online at http://www.andrewleestrust.org/PDFs/Communication%20for%20Empowerment%20in%20Madagascar-EN.pdf.

[581] Bowman Gilfillan (nd) ‘Madagascar’, Bowman Gilfillan, Johannesburg, available online at http://www.bgafricagroup.com/Competition-Law-Africa/madagascar.asp.

4.5.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Madagascar joined the WTO in November 1995[582], but has made no overall horizontal commitments, and no specific commitments in relation to communications services[583].

Madagascar is a member of the Common Market for Eastern and Southern Africa (COMESA), in addition to its membership of the Southern African Development Community (SADC).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

There are no WTO commitments currently in place. However, as we can see above, the practice in the telecommunications sector suggests little restriction in respect of market access, with existing commercial presence of foreign suppliers, and with locally incorporated suppliers considered to be domestic. There is no information in respect of presence of natural persons. In respect of national treatment of foreign companies, there are some restrictions on the acquisition of land, and a local directorship requirement. Together, this places Madagascar in a situation where WTO commitments could be made with only a few changes to the legal framework for telecommunications. The difficulties noted above in respect of the licensing framework for broadcasting suggest some limitations on commercial presence.

The World Bank ranks Madagascar 148th out of 148 countries on its GATS Commitments Index[584].

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[582] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

[583] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MDG, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9247/Madagascar_GATS_Schedule.pdf. Commitments have been made in relation to Business Services.

[584] World Bank (2010) 'Madagascar Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Madagascar_brief.pdf. . . . .

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in either the telecommunications or the broadcasting sectors.

Madagascar has a high MFN Tariff Trade Restrictiveness Index score of 13,6%, ranking the country 115th out of 125 countries[585].

4.5.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[586] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[587], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Madagascar is not a signatory to the WTO Reference Paper on Telecomms Services [588.]

1. Competitive safeguards: ***Largely Compliant (4/5).*** The duties and responsibilities assigned to the regulator in the 2005 Telecommunications Law make "ensuring non-discriminatory treatment and transparency between competitors" a requirement in a number of instances, and require the regulator to address unfair competition, abuse of dominance, anti-competitive pricing,

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[585] World Bank (2010) 'Madagascar Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Madagascar_brief.pdf.

[586] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[587] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[588] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MDG, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9247/Madagascar_GATS_Schedule.pdf. . . . .

restrictive agreements and margin squeeze[589]. The incipient competition regime would appear to further strengthen this.

2. Interconnection: *Somewhat compliant (2/5).* The 2005 Telecommunications Law contains an extensive section dealing with interconnection, but this does not require the regulator to issue interconnection guidelines, or require major operators to publish reference interconnect offers (RIOs), or make public interconnection agreements filed with the regulator[590].

3. Universal service: *Compliant (5/5).* The 2005 Telecommunications Law contains several provisions addressing universal access and service. For example, the regulator is required to develop a plan for subsidised rollout of services to needy communities, and, In addition, a universal service fund is provided for[591]. Universal service obligations (USOs) are provided for in terms of the 2006 Universal Access Decree[592], and a universal service fund, the Telecommunications Development Fund, was created in 1999[593] to extend telephony service to unserved zones where such extension cannot be achieved without subsidies, and is reportedly operational[594].

4. Public availability of licensing criteria: *Somewhat Compliant (2/5).* The licensing procedure is clearly and publicly available on the website of the

[589] Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Articles 21 & 34, translation by Googletrans.
[590] Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 21, translation by Googletrans.
[591] Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 7, translation by Googletrans.
[592] Madagascar (2006) 'Decret N° 2006-616 Portant Modalites de Mise en Oeuvre et de Financement de l'Acces aux Services de Telecommunication et TIC', Ministere des Telecommunications, des Postes et de la Communications, Antananarivo, Article 4, available online at http://www.omert.org/wp-content/uploads/2012/04/decret_2006_6161.pdf.

[593] Madagascar (1999) 'Décret No. 99-191 Portant Modalités de Mise en Oeuvre et de Financement de l'Accès aux Services de Télécommunication, Ministere des Telecommunications, des Postes et de la Communications, Antananarivo, Article 7(1).
[594] Hudson, H (2010) 'Defining Universal Service Funds', Intermedia, March 2010 Volume 38 Issue 1, available online at http://www.iicom.org/intermedia/IM_March_2010_USF.pdf and Intelecon (2010) 'Universal Access And Service Funds 2009 : Update From Intelecon', Intelecon Research & Consultancy Limited, Vancouver, p 10, available online at http://www.inteleconresearch.com/pages/documents/UASFFunds2009update-Oct2009.pdf.

regulator[595]. However, neither licensing criteria nor individual licences are publicly available.

5. Independent regulators: ***Partially Compliant (3/5).*** The regulator, Office Malagasy d'Etudes et de Régulation des Télécommunication (OMERT) was created in 1997, but there was originally no stipulation that it should be independent of the operators, and 6 of its 7 Directors are appointed by government ministries[596]. The later Telecommunications Law does, however, stipulate such structural independence, stating the appointment to the Board of Directors is "incompatible with any economic or financial interest in any business licence holder or network or data transmission or audiovisual service provider" [597]. The degree to which the regulator is accountable to the Minister - who retains the "functions of national strategic direction and coordination in regional and international telecommunications"[598] - further, does not give it sufficient independence in accordance with international best practice, given that the government retains a sizeable shareholding in one of the operators. A new regulator was created by a 2006 decree[599], but has not yet been established, creating a degree of regulatory uncertainty[600].

6. Allocation and use of scarce resources: ***Largely compliant (4/5).*** The 2005 Telecommunications Law changes the regulator with planning, management and assignment of numbers and frequency spectrum[601]. Rights of way, however, do not appear to be dealt with. The band plan is available on the website of the regulator[602].

Madagascar is partially compliant with the WTO Reference Paper on Telecomms Services. Some changes in respect of policy, legislation and current regulatory

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595 OMERT (2012) 'Régime de la licence', Office Malagasy d'Etudes et de Régulation des Télécommunication, Antananarivo, available online at http://www.omert.mg/.
596 Madagascar (1999) 'Decret N°97-1077 Instituant l'Office Malagasy d'Etudes et de Regulation des Telecommunications (OMERT)', Ministere des Telecommunications, des Postes et de la Communications, Antananarivo.
597 Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 26, translation by Googletrans.
598 Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Article 23(2), translation by Googletrans.
599 Madagascar (2006) 'Decret N°2006-213 Instituant l'Autorite de Regulation des Technologies de Communication de Madagascar (ARTEC)', Ministere des Telecommunications, des Postes et de la Communications, Antananarivo
600 Edmond, R (2011) 'Madagascar: Télécommunication - L'ARTEC toujours pas en place', *AllAfrica.com*, 18 July 2011, available online at http://fr.allafrica.com/stories/201107190999.html.
601 Madagascar (2005) 'Loi N° 2005-023 Portant refonte de la loi n°96-034 du 27 janvier 1997 portant Réforme institutionnelle du secteur des Télécommunications', Government of Madagascar, Antananarivo, Chapter VII & Article 34, translation by Googletrans.
602 OMERT (2012) Plan National de Frequence de la Republique de Madagascar (PNF)', Office Malagasy d'Etudes et de Régulation des Télécommunication, Antananarivo, available online at http://www.omert.org/wp-content/uploads/2012/04/PLAN-NATIONAL-DE-FREQUENCE-DE-LA-REPUBLIQUE-DE-MADAGASCAR1.docx.

practice would be required to enable the country to make a formal commitment to adhere to its principles.

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4.6 MALAWI

4.6.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The 1998 Communications Act of Malawi appears to foresee a horizontal licensing framework, distinguishing only between "telecommunications networks and services"[603]. The legislation also provides for the issuance of both "general" (ie class) and "individual" licences, and requires that the "provision of voice telephony" and the "operation of a cable television network"[604] may only be done via the acquisition of the latter.

However, the licensing framework applied by the regulator remains an explicitly vertical one, providing for "Fixed, Cellular, Internet Service Providers (ISP), Satellite and Data" and "paging"[605].

The licensing of frequency spectrum is treated separately in the legislation[606], and is regulated under 13 service-specific categories by the regulator[607].

Currently still in draft, the 2010 [sic] Information and Communications Act of Malawi appears to retain the horizontal categorisation of "electronic communications networks" versus "electronic communication services" in its licensing framework[608]. It remains to be seen whether the legislative change

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603 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Part III, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

604 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 18, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

605 MACRA (nd) 'Information', Malawi Communications Regulatory Authority, Lilongwe, online at http://www.macra.org.mw/index.php?page=pages&pid=32. There are, presumably, official regulations in which this framework is set out, but these are not readily available to the public.

606 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Part IV, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf

607 MACRA (nd) 'Information', Malawi Communications Regulatory Authority, Lilongwe, online at http://www.macra.org.mw/index.php?page=pages&pid=32.

608 Malawi (2010) 'Malawi Communications Amendment Act 2010', Republic of Malawi, Lilongwe, Part III, last seen at http://www.macra.org.mw/downloads/Communications_Act.pdf. The new legislation remains in draft format.

when the new law is finally enacted, will alter the regulator's current vertical categorisation.

The licensing regime in Malawi is thus a vertical one along the lines of the technology and service specific framework as set out in W/120, albeit with a differing categorisation.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists the market as comprising two fixed-line operators, Malawi Telecommunications (MTL) and Access Communications (ACL), and two mobile licensees, Airtel (formerly Zain) and Telecom Networks Malawi (TNM). Two other mobile licences were awarded to G-Mobile (which has yet to roll out, despite being licensed in 2008), and, in 2011, to Celcom. BuddeComm further notes that 15 ISPs have been licensed, including MalawiNet, MTL Online, Skyband, Globe Internet, Broadmax and Burco[609].

The most recent comparative figures for telecomms market share date from December 2009.

Malawi: Fixed & Mobile Subscribers		
	2009 (Dec)	
	Subscribers	**Market Share[610]**
Malawi Telecommunications (MTL) (fixed)	125 000[611]	5%
Access Communications (ACL)[612] (fixed)		

[609] BuddeComm (2012) 'Malawi - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Malawi-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

[610] The Market share figures are very approximate because the combined subscriber figures given by the two mobile operators in their respective annual reports are about 100 000 in excess of the total number of mobile subscribers given by the ITU. . . . .

[611] Figures from an undated report, circa 2010 - TNM (nd) 'Telecommunications in Malawi', Telekom Networks Malawi Limited, Blantyre, available online at http://www.tnminvestor.com/TelecomsInMalawi.aspx. . . . .

[612] No accurate data from circa 2009 is available. The company appears to have just under 30 000 active subscribers in mid-2012. See: Gondwe, G (2012) 'Data services offer ACL opportunity to

Airtel (mobile)	1 735 000[613]	65%
Telecom Networks Malawi (TNM) (mobile)	828 000[614]	31%
Total	2 660 600[615]	

According to the ITU, the market in Malawi as at 2011 was broken down as follows: 173 500 fixed-line subscribers[616]; 3 855 800 mobile subscribers[617]. This translates to a per capita market penetration rate in the telecommunications sector for Malawi as at 2011 of 1,1% for fixed-line, 25,1% for mobile and 3,3% for the Internet (from 1,0%, 20,9% and 2,3% respectively in 2010[618].

Malawi Telecommunications Limited (MTL) is essentially 100% state-owned, with the "Government of Malawi [having] 99% share ownership and the office of the Chief Executive Officer [holding] 1% in trust"[619].

Access Communications (ACL) has the following ownership structure[620]:

- 27,0% - Fags Investments (Malawi)[621];

grow', BizCommunity, Cape Town, available online at http://m.bizcommunity.com/Article/129/16/79581.html. . . . .

613 Zain (nd) 'Financial Highlights', Zain, Bahrain, available online at http://www.zain.com/investor-relations/facts-figures/.

614 TNM (2010) 'TNM Annual Report for the year ended 31 December 2009', Telecom Networks Malawi, Blantyre, available online at http://b2icontent.irpass.cc/1701%2F110917.pdf.

615 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False & ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/ MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

616 ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/ MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

617 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

618 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

619 MIPA (nd) 'Communication Networks: Malawi Telecommunications Limited (MTL)", Malawi Investment Promotion Agency, Lilongwe, available online at http://www.malawi-invest.net/business_opp_costs_cell.html.

620 Gondwe, G (2012) 'Data services offer ACL opportunity to grow', BizCommunity, Cape Town, available online at http://m.bizcommunity.com/Article/129/16/79581.html.

- 26,0% - Dynamic Communications (South Africa);
- 24,0% - VoiceCom Investments;
- 23,0% - Gestetner Malawi;

Airtel is 100% owned by Bharti Airtel of India.

Telekom Networks Malawi (TNM) prides itself on being 100% Malawian-owned, with the following shareholder structure[622]:

- 44, 4% - Malawi Telecommunications Limited (MTL);
- 21,7% - Public and other;
- 12,9% - Livingstone Holdings Telecom;
- 10,5% - Press Corporation Limited;
- 10,5% - Old Mutual.

No detailed information is currently available on the licensed ISPs, nor on their market share.

International communications access is provided by Gateway Communications of South Africa via the Eastern Africa Submarine Cable System (EASSy - with a capacity of 4,72 Tbits/s) and Seacom (with a capacity of 640 Gbits/s)[623].

Range of Services: Type of services offered by foreign entities.

As can be seen above, the majority of companies active in the provision of voice communications are domestically owned, with only Airtel, albeit the dominant company, foreign-owned by Bharti Airtel of India. No information is available in respect of ISPs and VANS services.

Market Share: market share between foreign and local suppliers[624].

Foreign suppliers (viz, Airtel), as defined here, have dominance in the voice telephony market, with a market share of approximately 65%. No information is available in respect of ISP and VANS services markets.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

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621 Unaccountably, the ACL website omits Fags Investment. It also gives no shareholding breakdown. See: ACL (nd) 'About us', Access Communications, Blantyre, available online at http://www.access.mw/about-us/. ,

622 TNM (nd) 'Corporate profile', Telecom Networks Malawi, Blantyre, available online at http://www.tnminvestor.com/About.aspx.

623 CommsMEA (2011) 'Malawi connects to subsea cable systems', ITP Publishing Group, Dubai, 23 May 2011, available online t http://www.commsmea.com/11180-malawi-connects-to-subsea-cable-systems/#.UdM_VTssXwY.

624 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

There do not appear to be any such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As noted above, the licensing framework adopted by the regulator (viz "Fixed, Cellular, Internet Service Providers (ISP), Satellite and Data" and "paging"[625]) is technology specific. Spectrum licensing, as noted previously, is equally technology specific[626].

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

Entry into both the fixed and mobile telephony markets is restricted, but on a non-discriminatory basis.

The regulator restricts "the number of players" in respect of the individual licences which are required for "fixed telephone services and cellular service", which markets it characterises as "currently non-competitive". Details of this limitation (ie "the number of licences to be issued and the grounds for the limitation to the number") are required to be gazetted[627], but this gazette is not readily publicly available.

[625] MACRA (nd) 'Information', Malawi Communications Regulatory Authority, Lilongwe, online at http://www.macra.org.mw/index.php?page=pages&pid=32.
[626] MACRA (nd) 'Information', Malawi Communications Regulatory Authority, Lilongwe, online at http://www.macra.org.mw/index.php?page=pages&pid=32.
[627] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 20(5), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf

Entry into the ISP and VANs markets is not restricted, save on very exceptional grounds: applicants for such class licences may only be denied "registration… if so directed by the President in the interest of national security"[628].

There do not appear to be any restrictions on foreign investment or foreign shareholding in respect of telecommunications licensees. None are specified in the legislation[629].

In respect of limitations on national treatment of foreign companies, Malawi has imposed the following general GATS restriction: "with permission from the Reserve Bank of Malawi, a foreign-controlled company can obtain loans or overdrafts of up to one third of the value of its paid up capital"[630]. No further information on the legal status of foreign enterprises is available.

In respect of commercial presence of foreign companies, Malawi has made no general GATS commitments, nor any in respect of communications services[631]. No further information on the legal status of foreign enterprises is available.

Foreign entities are required to register foreign investment capital, but can readily lease or purchase land[632].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

In terms of Malawi's general GATS commitments, foreign personnel where the "entry and temporary stay of natural persons employed in management and

[628] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 19(2), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.
[629] Foreign ownership restrictions do apply in the case of broadcasting licensees, as set out below.
[630] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf.
[631] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf. Malawi has made specific commitments in respect of: Business Services, Construction and Related Engineering Services, Health Related and Social Services, Tourism and Travel Related Services, and Banking Services. . . . .
[632] WTO (2010) 'Trade Policy Review - Report by the Secretariat: Malawi', WT/TPR/S/231, 5 May 2010, p14, World Trade Organisation, Geneva.

expert jobs for the implementation of foreign investment… shall be agreed upon by the contracting parties and approved by the Ministry of Home Affairs"[633].

Other than that, there do not appear to be any discriminatory measures applied to foreign telecommunications operators on the basis of their nationality.

Malawi is ranked 145th out of 183 countries in terms of ease of doing business by the World Bank[634].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

The 1998 Communications Act places licensing firmly under the control of the regulator. Although the Minister may exempt certain operators from licensing requirements, this may only be done "on the advice of the Authority"[635].

In respect of licence allocations for fixed and mobile operators, the regulator states only that it "will determine the licensing procedure on a case by case in future"[636]. The legislation, however, does require that any such individual licensing procedure be "objective, transparent and non-discriminatory"[637].

As noted above, licences for ISPs and VANS providers are issued on an open entry, registration basis.

There are no restrictions on the use of VoIP in the legislation.

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[633] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf, p2.

[634] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

[635] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 17(2), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

[636] MACRA (nd) 'Information', Malawi Communications Regulatory Authority, Lilongwe, online at http://www.macra.org.mw/index.php?page=pages&pid=32.

[637] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 20(2), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

Foreign operators are permitted to own and operate an international gateway, this infrastructure being subject to same conditions that apply to other telecommunications networks and services[638].

There do not appear to any anti-competitive or discriminatory interconnection provisions. The legislation requires licensees to interconnect in accordance with regulations issued by the regulator and to file interconnection agreements with the regulator where they "shall be open to inspection by the public"[639]. These interconnection guidelines are not currently publicly available on the Internet, nor are any interconnection agreements[640]. The regulator has recently moved to a Bill-and-Keep / Sender-Keeps-All interconnection regime - in the face of an unsuccessful court challenge by the two largest mobile operators[641].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

Airtel is the only firm with dominance in the voice telephony market, having a market share of approximately 65%.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Malawi in 2008 was 57,4% of monthly gross national income per capita - well above the average for sub-Saharan Africa of 23%, making Malawi the 3rd most expensive out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 16,1% and 4 320% (also 3rd most expensive of 32 African countries)[642].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

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[638] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 17(1), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

[639] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, available online at http://www.macra.org.mw/downloads/Communications_Act.pdf, Section 20.

[640] The website of the regulator is currently offline.

[641] TeleGeography (2011) 'Court rules in favour of MACRA in interconnection dispute', TeleGeorgraphy, Washington DC, 11 January 2011, online at http://www.telegeography.com/products/commsupdate/articles/2011/01/11/court-rules-in-favour-of-macra-in-interconnection-dispute/. . . . . Bill-and-Keep disadvantages larger operators. . . . .

[642] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

According to Bowman Gilfillan, there is a competition authority in Malawi, the Competition and Fair Trading Commission, which was established by the Competition and Fair Trading Act, No 43 of 1998[643]. It would appear the Commission has economy-wide jurisdiction.

Further, the Act does prohibit abuse of dominance, which includes "eliminating or damaging a competitor... preventing the entry of a person into [the] market... [and] deterring or preventing a person from engaging in competitive conduct in [the] market", and provides for fines and compensation in cases where guilt is proven[644].

The 1998 Communications Act also empowers the Regulator to act against individual licensees in cases of either "abuse of a dominant position" or actions placing other operators "at a competitive disadvantage" by issuing cease and desist orders[645].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour.

4.6.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Malawi's 1998 Communications Act in 1998 distinguishes between "broadcasting services", which are defined so as to include both radio and television - "the diffusion of sound or television programmes for general reception by the public" and a "radio station" which is defined so as to cover transmission services for

643 Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p27.

644 Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p28.

645 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 25, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf. Unfortunately, the Act defines neither term.

both radio and television[646]. Cable television is treated as a separate category, requiring an individual licence[647].

Within the above classification, the Act further distinguishes between the following three types of broadcast service:

a) public broadcasting services;

b) private broadcasting services; and

c) community broadcasting services[648].

Together these cross-cutting criteria produce a rather complex matrix of broadcast licence categories, depending on whether a licensee provides television or radio broadcasting, on whether it is public or private or based on either a geographical community or a community of interest, and on whether it operates at either a national or a regional level.

Malawi's licensing framework for broadcasting is thus largely in alignment with W/120's classification of 'radio and television services' and 'radio and television transmission services', albeit considerably more fine-grained.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

The website of the regulator list 5 television and 21 radio broadcasters of various categories amongst the list of numbers and categories of operational broadcasting licensees[649]:

→ 1 x Public National Television Broadcaster (*Malawi Broadcasting Corporation Television*);

→ 2 x Public National Sound Broadcaster (*Malawi Broadcasting Corporation Radio 1, Malawi Broadcasting Corporation Radio 2*);

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646 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 2, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

647 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 18(3), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

648 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 47, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

649 MACRA (nd) 'List of Broadcasting Licensees', Malawi Communications Regulatory Authority, Lilongwe, available online at http://www.macra.org.mw/downloads/Licenses/Broadcasting.pdf.

- → 1 x Private National Television (*AFJ Television*);
- → 1 x National Community of Interest Television (*Television Luntha*);
- → 8 x Private National Sound (*Capital Radio, FM 101 Power, Galaxy Radio , Joy Radio Station, Malawi Institute of Journalism, , Mudziwathu Community Radio Star FM1, Zodiak Broadcasting Station*);
- → 3 x Regional Community of Interest Sound (*Calvary Family Radio , Radio Alinafe, Radio Tigabane*);
- → 6 x National Community of Interest Sound (*Chanel* [sic] *for All Nations, Living Waters Radio, Radio Islam , Radio Maria, Seventh Day Adventist , Transworld Radio*);
- → 4 x Geographical Community Sound Broadcaster (*Dzimwe Community Radio, Mudziwathu Community Radio, Mzimba Community Radio, Nkhotakota Community Radio*).

In addition, a further 11 television and 10 radio broadcasters across various categories are listed as "not operational"[650]. Many of these would appear amongst the 23 successful applicants for broadcasting licences, amongst whom the final 15 were issued their licences by MACRA in July 2012[651].

OMD and FesMedia have rather smaller numbers for radio and television broadcasters, with OMD[652] appearing to omit most of the television stations and all 14 community radio stations from its count, and FesMedia[653] appearing to omit several television broadcasters.

OMD additionally names one satellite television broadcaster, DStv[654].

No figures for market share are available. However, OMD lists the following as "important stations": *Malawi Broadcasting Corporation 1* (MBC1, broadcasting in Chichewa), *Malawi Broadcasting Corporation 2* (MBC2, broadcasting in English and Chichewa), *Capital FM* (broadcasting in English) and *FM101* (broadcasting in

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[650] MACRA (nd) 'List of Broadcasting Licensees', Malawi Communications Regulatory Authority, Lilongwe, available online at http://www.macra.org.mw/downloads/Licenses/Broadcasting.pdf.

[651] *The Zimbabwean* - Regulatory authority awards 15 more broadcasting licences, available at http://www.thezimbabwean.co.uk/news/africa/59753/regulatory-authority-awards-15-more.html.

[652] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p26.

[653] Fesmedia (2012) *African Media Barometer: Malaw 2012*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p25 3, available online at http://library.fes.de/pdf-files/bueros/africa-media/09541.pdf.

[654] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p26.

English and Chichewa) [655]. Additionally, FesMedia describes private radio stations *Capital Radio* and *Zodiak* as "giving MBC a run for its money", and community radio station *Radio Maria* as having the "second biggest reach after MBC and [with a] listenership [that] is very wide" [656].

The public broadcasters, *Malawi Broadcasting Corporation 1, Malawi Broadcasting Corporation 2*, and *Television Malawi* are state-owned.

Capital Radio is privately owned by veteran Malawi journalist Alaudin Osman[657].

Zodiak is privately owned by millionaire Malawi broadcaster Gospel Kazako[658].

Radio Maria describes itself as an "ecclesial broadcasting initiative" originally established by a "group of Catholics, both the clergy and laity as a parish radio station in 1983, in Arcellasco d'Erba", but now with a footprint in 50 different countries. Its ownership is Italian[659].

The legislation does limit cross-media ownership and control, specifying that :

> *No person shall directly or indirectly exercise control over more than one licence for a national private broadcasting service or be a director of a company or other body which directly or in concert with one or more other companies or bodies exercises such control.*[660]

The law further states:

> *No person shall directly or indirectly exercise control over more than two licences for local private broadcasting services or be a director of a company or other body which directly or in concert with one or more other companies or bodies exercise such control*[661].

[655] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p26.

[656] Fesmedia (2012) *African Media Barometer: Malawi 2012*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p23, available online at http://library.fes.de/pdf-files/bueros/africa-media/09541.pdf.

[657] Capital FM (nd) 'Background', Capital FM Malawi, Lilongwe, available online at http://www.capitalradiomalawi.com/index.php/about-capital.

[658] ZBS (nd) 'About Us', Zodiak Broadcasting Station, Lilongwe, available online at http://zodiakmalawi.com/index.php?option=com_content&view=article&id=123&Itemid=119.

[659] Radio Maria (nd) 'About us', Radio Maria, Lilongwe, available online at http://www.radiomaria.mw/about-us.aspx.

[660] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 50, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf

[661] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 50, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf

OMD puts television penetration in Malawi at 5% of households[662].

The Malawi Broadcasting Corporation has an explicit and clear public service broadcasting mandate in terms of the law, which requires it, inter alia, to "function without any political bias and independently"[663].

Despite this, and largely on the basis of past practice, FesMedia gives Malawi a score of 2,0 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[664], indicating limited compliance. The 1998 Communications Act makes the appointment of the Board of the MBC largely the prerogative of the president[665], calling its public service orientation into question. Indeed, FesMedia notes that "during the past regime, the content on the MBC was 95 percent ruling party propaganda" [666].

Range of Services: Type of services offered by foreign entities.

The subscription-based digital satellite television service offered by South African broadcaster, DStv / MultiChoice[667] and the Italian-owned religious station, Radio Maria[668], would appear to be two such entities. There may be others, but additional information is not available..

Market Share: market share between foreign and local suppliers[669].

In the absence of viewership and listenership figures, no reliable conclusions in this regard can be drawn. From the above, *Radio Maria* would appear to be the only foreign supplier with any substantial market share.

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[662] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p26.

[663] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 87, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

[664] FesMedia (2012) *African Media Barometer: Malawi 2012*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p40, available online at http://library.fes.de/pdf-files/bueros/africa-media/09541.pdf.

[665] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Sections 89 & 90, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

[666] FesMedia (2012) *African Media Barometer: Malawi 2012*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p40, available online at http://library.fes.de/pdf-files/bueros/africa-media/09541.pdf.

[667] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p26, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

[668] Radio Maria (nd) 'About us', Radio Maria, Lilongwe, available online at http://www.radiomaria.mw/about-us.aspx.

[669] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

Gondwe suggests that the contrary may be the case, with new President Joyce Banda seemingly "committed to the liberalisation of the broadcasting sector[670].

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

Restrictions on foreign ownership apply in the broadcasting sector, with the regulator having the power to restrict foreign ownership to 40%, except in the case of community broadcasters[671].

As previously noted, in respect of limitations on national treatment of foreign companies, Malawi has imposed the following general GATS restriction: "with permission from the Reserve Bank of Malawi, a foreign-controlled company can obtain loans or overdrafts of up to one third of the value of its paid up capital"[672]. No further information on the legal status of foreign enterprises is available.

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[670] Gondwe, G (2012) MACRA issues 15 broadcasting licences, available at http://www.bizcommunity.com/Article/410/15/79034.html

[671] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 51(3), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf

[672] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf.

In respect of commercial presence of foreign companies, Malawi has made no general GATS commitments, nor any in respect of communications services[673]. No further information on the legal status of foreign enterprises is available.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

The 1998 Communications Act requires members of the Board of the public broadcaster to be resident Malawi citizens[674].

In terms of Malawi's general GATS commitments, foreign personnel where the "entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment… shall be agreed upon by the contracting parties and approved by the Ministry of Home Affairs"[675].

Other than that, and the 40% foreign ownership limitation set out above, there do not appear to be any discriminatory measures applied to foreign broadcasters on the basis of their nationality.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

The licensing of radio and television broadcasting services is firmly under the direct control of the sector regulator subject to the requirement that it "issue broadcasting licences in sufficient numbers to meet the public demand for broadcasting services" [676]. Licensing is via a public tender process, which includes the publication of a "notice in the Gazette and in at least two issues of a newspaper in general circulation". The notice must specify "the kind of broadcasting service" to be licensed, the "coverage area", the "radio frequencies

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[673] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf. Malawi has made specific commitments in respect of: Business Services, Construction and Related Engineering Services, Health Related and Social Services, Tourism and Travel Related Services, and Banking Services. . . . .

[674] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 90, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf

[675] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf, p2.

[676] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Part V, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

that will be made available" and the "procedure by which an application can be made"[677].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

The regulation of broadcasting in Malawi is undertaken by the same regulator that is responsible also for telecommunications and posts - the Malawi Communications Regulatory Authority (MACRA).

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

In the absence of detailed viewership and listenership figures, it would nonetheless appear that the broadcasting sector in Malawi is relatively diversified, with no dominant content provider, although the public broadcasters MBC and MTV would appear to have the widest reach throughout the country.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As noted above, Malawi has a Competition and Fair Trading Commission, which appears to enjoy economy-wide jurisdiction, and is able to intervene in cases of abuse of dominance.

The anti-competitive provisions of the 1998 Communications Act do not extend to broadcasting licensees.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

No evidence of any anti-competitive behaviour in the sector**.**

4.6.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

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[677] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 48(2), available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

Malawi joined the WTO in May 1995[678], but, aside from its overall horizontal commitments referred to above, has made no specific commitments in relation to communications services[679].

Malawi is a member of the Common Market for Eastern and Southern Africa (COMESA), in addition to its membership of the Southern African Development Community (SADC).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

The WTO notes that in the 33 out of a possible 160 service sectors in which Malawi has made commitments there are "no limitations on market access or national treatment in modes 1 to 3, while measures affecting the presence of natural persons are unbound"[680] - and indeed the subject of some restrictions as noted above. Nonetheless, the WTO describes the country as "open to foreign investment [with] foreign investors are generally granted national treatment", although bureaucratic delays are experienced in acquiring temporary employment permits and business residency permits[681].

The previously noted restriction on the number of fixed and mobile licensees does constitute a restriction in relation to commercial presence. With foreign-owned entity (Airtel) enjoying dominance in the voice telephony market, Malawi could consider removing the quantitative restriction on the number of entrants in this market.

The World Bank ranks Malawi 79th out of 148 countries on its GATS Commitments Index[682].

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

678 WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

679 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf. Malawi has made specific commitments in respect of: Business Services, Construction and Related Engineering Services, Health Related and Social Services, Tourism and Travel Related Services, and Banking Services. . . . .

680 WTO (2010) 'Trade Policy Review - Report by the Secretariat: Malawi', WT/TPR/S/231, 5 May 2010, pviii, World Trade Organisation, Geneva.

681 WTO (2010) 'Trade Policy Review - Report by the Secretariat: Malawi', WT/TPR/S/231, 5 May 2010, pp13,14, World Trade Organisation, Geneva.

682 World Bank (2010) 'Malawi Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Malawi_brief.pdf.

There is no evidence of MFN inconsistent measures in the telecommunications sector

Malawi has a high MFN Tariff Trade Restrictiveness Index score of 20,5%, ranking the country 124th out of 125 countries[683].

4.6.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[684] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[685], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Malawi is not a signatory to the WTO Reference Paper on Telecomms Services[686].

1. Competitive safeguards: ***Partially compliant (3/5).*** The 2010 Information and Communications Act does deal with competition issues. It enjoins the regulator to create "conditions to prevent the abuse of market power by operators", and authorises it to issue compliance orders to operators guilty of the "abuse of a dominant position" - which is never defined - or of engaging in conduct with the "effect of placing another operator engaged in ICT activities at a competitive disadvantage" [687]. The Act also does not deal with cross-media ownership and control. This, however, falls short of the detail set out in the Reference Paper.

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683 World Bank (2010) 'Malawi Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Malawi_brief.pdf.

684 WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

685 WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

686 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MWI, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/5013/2634/9286/Malawi_GATS_Schedule.pdf.

687 Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, available online at http://www.macra.org.mw/downloads/Communications_Act.pdf, Section 20.

2. Interconnection: *Somewhat compliant (2/5).* The Act requires licensees to interconnect in accordance with regulations issued by the regulator and to file interconnection agreements with the regulator where they "shall be open to inspection by the public" [688]. These interconnection guidelines are not currently publicly available, nor are interconnection agreements[689], making the degree of compliance with the detail of the Reference Paper impossible to gauge accurately.

3. Universal Service: *Not Compliant (0/5).* The 1998 Communications Act makes no mention of universal access and service. The amended legislation, currently in preparation, does, however, comply, authorising the regulator to impose universal service obligations on operators, creating a "Universal Access Consultative Committee" with representation from telecommunications, broadcasting and postal licensees, and providing for a "Universal Access Fund"[690].

4. Public availability of licensing criteria: *Largely Compliant (4/5).* The 1998 Communications Act requires the regulator to publish both licensing procedures and licences in the official Malawi Gazette[691]. It is unclear whether the regulator has given effect to this requirement, or whether licences themselves are readily publicly accessible.

5. Independent regulators: *Partially Compliant (3/5).* The 1998 Communications Act establishes the Malawi Communications Regulatory Authority (MACRA) as the regulator. Although the Act contains provisions dealing with conflicts of interest, it does not specifically require Board members to be formally independent from service providers[692]. In addition, the appointment process is entirely at the hands of the President, and lacks the checks and balances considered to be international best practice. Further, the Minister retains some power to influence the operation of the regulator.

6. Allocation and use of scarce resources: *Partially Compliant (3/5).* The Act assigns the regulator responsibility for "Radio Spectrum Management" and "National Numbering Plans" and[693], but does not deal with rights of way. Despite the legislated requirement that frequency allocations and assignments

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[688] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, available online at http://www.macra.org.mw/downloads/Communications_Act.pdf, Section 20.

[689] The website of the regulator is currently offline.

[690] Malawi (2010) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, last seen online at http://www.macra.org.mw/downloads/Communications_Act.pdf, Section 29.

[691] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Sections 18, 19, 20, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf..

[692] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Section 11, available online http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf.

[693] Malawi (1998) 'The Malawi Communications Act', Republic of Malawi, Lilongwe, Part IV and Section 27, available online at http://www.macra.org.mw/downloads/Communications%20Act%201998.pdf..

be made available to the public, this is not available on the website of the regulator.

Malawi is already partially compliant with the WTO Reference Paper on Telecomms Services. Once the updated Communications Act is finalised and adopted, there appears to be nothing in the legislation or in current regulatory practice that would conflict with a formal commitment by Malawi to adhere to its principles.

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4.7 MAURITIUS

4.7.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The 2001 Information and Communication Technologies Act distinguishes between two major classes of licence, those for an "information and communication network" and those for an "information and communication service", but goes on to specify an elaborate classification comprising upwards of 50 distinct categories[694]. This has subsequently been revised, but by no means simplified, to include 19 categories of "commercial" licence, 1 category of "private network" licence, 46 categories of "engineering" licence, 4 categories of "network spectrum" licence and 39 categories of "fixed radio spectrum" licence[695]. Some of the licensees in these categories are listed on the website of the regulator[696].

The licensing regime in Mauritius is thus only a partially converged (or horizontal or unified or multi-service) framework, distinguishing primarily between infrastructure and services, but retaining a complex classification largely based on vertical technology-specific categories. In neither respect does it match the much simpler vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

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[694] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf, Sections 2 & 24 & First Schedule.

[695] Mauritius (2003) 'The Information and Communication Technologies Act 2001, Regulations made by the Minister, after consultation with the Board of the Authority, under section 48 of the Information and Communication Technologies Act 2001, Government Notice No 96 of 2003, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/goc/ncb/file/ictact.pdf.

[696] ICTA (nd) 'Licence Holders', Information and Communication Technologies Authority, Pert Louis, available online at http://www.icta.mu/telecommunications/licences.htm.

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists Mauritius Telecom and Mahanagar (using CDMA2000) as fixed-line operators, and, as GSM mobile providers, lists Orange (formerly Cellplus), Emtel and Mahanagar. Internet Service Providers include: Bharat Telecom, Network Plus, DCL Internet and Outremer Telecom[697].

The most recent comparative figures for telecomms market share date from December 2012.

Mauritius: Fixed & Mobile Subscribers		
	2012 (Dec)	
	Subscribers	**Market Share**
Mauritius Telecom (fixed)	345 000[698]	20%
Mahanagar Telephone Mauritius Limited (MTML) (fixed)	106 000[699]	6%
Orange (mobile)	752 000[700]	43%
Emtel (mobile)	529 000[701]	30%
Mahanagar Telephone Mauritius Limited (MTML) (mobile)[702]	18 000[703]	1%

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697 BuddeComm (2012) 'Mauritius - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Mauritius-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

698 Mauritius Telecom (2013) 'Annual Report 2012', Mauritius Telecom, Port Louis, available online at http://www.mauritiustelecom.com/pdf/MT%20annual%20report%202012.pdf, p16. . . . .

699 MTML (2012) 'Director's Report', Mahanagar Telephone Nigam Ltd, New Delhi, available online at http://economictimes.indiatimes.com/mahanagar-telephone-nigam-ltd/directorsreport/companyid-12462.cms. The available figures are as at March 2012.

700 Mauritius Telecom (2013) 'Annual Report 2012', Mauritius Telecom, Port Louis, available online at http://www.mauritiustelecom.com/pdf/MT%20annual%20report%202012.pdf, p16. . . . .

701 Millicom (2013) 'Q4 2012 Results Presentation', Millicom International Cellular SA, Luxembourg, available online at http://www.millicom.com/sites/default/files/Q4%202012%20results%20presentation.pdf, p49.

702 The company was only launched in November 2011, and had 25 000 subscribers by mid 2012. See: Travel Mauritius Guide (2012) 'Mahanagar Telephone Mauritius Ltd target 30,000 suscribers [sic]', Travel Mauritius Guide, Port Louis, 27 August 2012, available online at http://www.m-a-u-r-i-t-i-u-s.com/news/mahanagar-telephone-mauritius-target-30000-suscribers.html.

Total	1 750 000[704]	

According to the ITU, the market in Mauritius as at 2011 was broken down as follows: 374 600 fixed-line subscribers[705]; 1 294 100 mobile subscribers[706]. This translates to a per capita market penetration rates in the telecommunications sector for Mauritius as at 2011 of 28,7% for fixed-line, 99,0% for mobile and 35,0% for the Internet (from 29,8%, 91,7% and 28,3% respectively in 2010[707].

The major shareholding of both Mauritius Telecom and its mobile subsidiary, Orange, is broken down as follows[708]:

- 40% - France Telecom (Rimcom Ltd);
- 33,5% - Government of Mauritius;
- 19% - State Bank of Mauritius;
- 6,6% National Pensions Fund (Mauritius).

Emtel has the following shareholding structure[709]:

- 50% - Currimjee Jeewanjee Group (Mauritius);

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[703] MTML (2012) 'Director's Report', Mahanagar Telephone Nigam Ltd, New Delhi, available online at http://economictimes.indiatimes.com/mahanagar-telephone-nigam-ltd/directorsreport/companyid-12462.cms. The available figures are as at March 2012.

[704] Percentages for market share are approximated because this total is somewhat less than but not dramatically different from than the 1 835 000 reported by the ITU. See ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2012&RP_intLanguageID=1&RP_bitLiveData=False & ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2012&RP_intLanguageID=1&RP_bitLiveData=False.

[705] ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

[706] ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

[707] ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

[708] Mauritius Telecom (2012) 'Annual Report 2011', Mauritius Telecom, Port Louis, available online at http://www.mauritiustelecom.com/pdf/MT%20annual%20report%202011.pdf, pp11 & 27. . . . .

[709] Wikinvest (2009) 'MICC 20-F' (excerpt), 31 March 2009, Wikinvest, available online at http://www.wikinvest.com/stock/Millicom_International_Cellular_S.A._%28MICC%29/Mauritius

- 50% - Millicom International Cellular (MIC) (Luxembourg).

Mahanagar Telephone Mauritius Limited (MTML) is 100% owned by Mahanagar Telephone Nigam Limited (MTNL) of India[710].

The website of the regulator lists 18 Internet Service Provider (ISP) licensees (viz: Africa Digital Bridges Networks Ltd, Anglo African Telecommunications, Bharat Telecom, Cellplus Mobile Communications, City Call, Data Communications, Enterprise Data Services, Enterprise Information Solutions, Emtel, I-Telecom, Hot Link, Kaldera, Mahanagar Telephone (Mauritius), Mauripost Net, Mauritius Computing Services, MFDC, Telecom Plus, W Media International), along with 11 VANS licensees (Bharat Telecom, CIM Finance, Clineker Consulting, Egallys, LMP Technology, Mauritel Services, Mauritius Telecom, PlaySMS, Telecom Plus, The Mauritius Civil Service Mutual Aid Association, W Media International)[711].

Whist the Annual Report of Mauritius Telecom lists 139 000 broadband subscribers[712], there is insufficient data from other providers to attempt a market share breakdown.

International telecommunications access is provided via Orange's Lower Indian Ocean Network (LION - with a capacity of 1,28 Tbit/s) landing stations at Jacotet Bay and Terre Rouge, which connects Mauritius to Madagascar and Réunion[713], and via LION2 to Kenya[714]. Partners in LION include: Orange, Mauritius Telecom and Emtel. Mauritius is also connected to the South Africa-Far East undersea cable (SAFE - with a capacity of 440 Gbit/s) with a landing station at Jacotet Bay[715]. submarine fibre optic cable in 2002. Mauritius Telecom is also a member of the Eastern Africa Submarine Cable System (EASSy - with a capacity of 4,72 Tbit/s)[716].

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710 MTML (2012) 'Director's Report', Mahanagar Telephone Nigam Ltd, New Delhi, available online at http://economictimes.indiatimes.com/mahanagar-telephone-nigam-ltd/directorsreport/companyid-12462.cms

711 ICTA (nd) 'Licence Holders', Information and Communication Technologies Authority, Pert Louis, available online at http://www.icta.mu/telecommunications/licences.htm.

712 Mauritius Telecom (2013) 'Annual Report 2012', Mauritius Telecom, Port Louis, available online at http://www.mauritiustelecom.com/pdf/MT%20annual%20report%202012.pdf, p16. . . . .

713 Orange (2009) 'Orange inaugurates the new submarine cable LION in Reunion and continues its strategy to develop broadband internet in the Indian Ocean', Press release, Orange, Paris, 11 December 2009, available online at http://lion.orange.com/media/lion_en/UPL821562760047316088_CP_cableLION_VA_.pdf.

714 TeleGeography (2012) 'FT-Orange announces the launch of commercial services on LION2 submarine cable', TeleGeography, Washington DC, 13 Apr 2012, available online at http://www.telegeography.com/products/commsupdate/articles/2012/04/13/ft-orange-announces-the-launch-of-commercial-services-on-lion2-submarine-cable/.

715 Wikipedia (nd) 'SAFE (cable system)', *Wikipedia*, online at http://en.wikipedia.org/wiki/SAFE_%28cable_system%29.

716 Wikipedia (nd) 'EASSy (cable system)', *Wikipedia*, online at http://en.wikipedia.org/wiki/Eassy.

Range of Services: Type of services offered by foreign entities.

As can be seen from the above, there are a number of foreign companies are involved in the provision of telephony services, with substantial investments from France Telecom / Orange (France), Millicom International Cellular (Luxembourg) and Mahanagar Telephone Nigam Limited (India). No information is available in respect of VANS services and private telecommunications services.

Market Share: market share between foreign and local suppliers[717].

Whilst all the providers with substantial market shares in the telecommunications market have foreign investors, none is a foreign entity as defined above. The only foreign company is the new entrant with a total market share of 7%. Emtel, on the threshold of 50% foreign ownership, has a market share of 30%.

No information is available in respect of the ISP and VANS markets.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There do not appear to be any such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As pointed out above, the licensing framework set out in the 2001 Information and Communication Technologies Act, and as applied by the regulator utilises an elaborate technology-specific classification.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

[717] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

The 2001 Information and Communication Technologies Act implies that there is no limitation on the numbers of suppliers, specifying that "any person who wishes to obtain... a licence for the operation of an information and communication network or service... shall make a written application to the Authority in the prescribed form"[718]. Licence application forms are available on the website of the regulator[719].

The World Bank rates Mauritius as "among the world's most open economies to foreign ownership [which has] consistently been among the largest recipients of FDI per capita"[720]. The same report notes that foreign ownership in local companies is unrestricted[721], with a "locally incorporated entity is considered a domestic entity regardless of its foreign ownership or control" [722], with Mauritius scoring 100 out of 100 in respect of ease of foreign equity ownership in the telecommunications sector[723].

In terms of the horizontal GATS commitments made by Mauritius, the commercial presence of foreign-owned enterprises is "governed by the provisions of" a number of specific pieces of legislation, viz: the "Companies Act (1984), Non-Citizens Property Restrictions Act (1975), Non-Citizens Employment Restriction Act (1970), Income Tax Act (1974)... Banking Act (1988) [and the] Exchange Control Act"[724].

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[718] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 24(2), available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.

[719] ICTA (nd) 'Application Forms', Information and Communication Technologies Authority of Mauritius, Port Louis, http://www.icta.mu/radiocommunication/appli.htm#comm.

[720] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p17, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[721] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p130, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[722] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p58, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[723] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p130, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf,.

[724] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MUS, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/8913/2634/9341/Mauritius_GATS_Schedule.pdf, p2.

Some of these pieces of legislation have been repealed and superseded[725]; others are not directly applicable to the legal status of foreign companies. The 1984 Companies Act imposes certain not unduly onerous requirements on foreign companies operating in Mauritius when it comes to registration [telecommunications companies are required to have a "registered office in Mauritius"[726]], establishment of premises, and financial reporting[727]. Conversely, the 2007 Financial Services Act permits the incorporation within Mauritius of companies that do business abroad[728].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

The World Bank notes that "at least one of the directors [of a foreign company] must be a resident" of Mauritius[729].

The "entry and temporary stay of highly qualified [foreign] natural persons" is governed by the following pieces of legislation: the 1969 Passport Act, the 1973 Immigration Act, the Income Tax Act and the 1970 Non-Citizens Employment Restrictions Act[730]. Copies of these pieces of legislation are not readily publicly available.

Mauritius is ranked 23rd out of 183 countries in terms of ease of doing business by the World Bank[731].

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725 For an overview, see, for example: Lowtax (nd) 'Mauritius: Offshore Legal and Tax Regime', Lowtax Global Tax and Business Portal, Virgin Islands, available online at http://www.lowtax.net/lowtax/html/jmuoltr.html.

726 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MUS, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/8913/2634/9341/Mauritius_GATS_Schedule.pdf, p3.

727 Mauritius (1984) The Companies Act, 1984', Act No 57 of 1984, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/goc/compdiv/file/act84.doc.

728 Mauritius (2007) 'Financial Services Act 2007', Act No 14 of 2007, *Government Gazette of Mauritius*, No 76, 22 August 2007, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/sites/icac/download/FINANCIAL%20SERVICES%20ACT%202007.pdf.

729 World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p37.

730 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MUS, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/8913/2634/9341/Mauritius_GATS_Schedule.pdf, p2.

731 World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

The 2001 Information and Communication Technologies Act places licensing fully under the control of the regulator, assigning ICTA the power to "exercise licensing and regulatory functions in respect of information and communication services in Mauritius including the determination of types and classes of licensees and the approval of prices, tariffs and alterations"[732]. Although the Minister has some power to direct the activities of the regulator, this is limited to "such directions of a general character... in the public interest" [733] and is unlikely to influence the specifics of licensing.

Biggs suggests VoIP is "permitted... in various degrees"[734] but does not elaborate. The VoIP Catalog lists 1 VoIP provider in Mauritius[735].

The 2001 Information and Communication Technologies Act does have a section requiring the provision of interconnection, and dealing with the resolution of interconnection disputes[736]. However, it does not address issues pertaining to points of interconnection, public availability of interconnection procedures, reference interconnect offers or transparency of interconnection arrangements. There do not seem to be interconnection guidelines issued by the regulator, not are interconnection agreements readily publicly available.

Restrictions giving Mauritius Telecom exclusivity in the provision of international gateway services were removed with effect from December 2002[737].

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[732] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 18(1)(f), available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.
[733] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 19, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.
[734] Biggs, P (2010) ,Voice Over Internet Protocol: Enemy Or Ally?, Chapter 8 in ITU (2010) *Trends in Telecommunication Reform 2009: Hands-on or hands-off? Stimulating growth through effective ICT regulation*, International Telecommunication Union, Geneva, pp180.
[735] VoIP Catalog (nd) 'VoIP Providers in Mauritius', VoIP Catalog, available online at http://www.voip-catalog.com/voip_countries_mauritius_1.html.
[736] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 30, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf,
[737] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 51(4), available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

If voice telephony is treated as a single market, Orange, with a market share of 43% (see above), would appear to be the only dominant provider.

If fixed and mobile are treated separately, Mauritius Telecom (fixed line market share = 76%) and both Orange (mobile market share = 58%) and Emtel (mobile market share = 41%) can be classified as dominant providers.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Mauritius in 2008 was 1,0% of monthly gross national income per capita - well below the average for sub-Saharan Africa of 23%, making for Mauritius the cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 1,2% and 11,1% (4th cheapest of 32 African countries)[738].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

According to Bowman Gilfillan, there is a competition authority in Mauritius, the Competition Commission, which was established by the Competition Act of 2007, with both investigative and enforcement powers[739]. It would appear the Commission has economy-wide jurisdiction.

Further, the Competition Act empowers the Commission to investigate and impose remedial actions in cases of a "monopoly situation", which is defined as more than 30% market share by a single firm, or 70% market share by up to three firms. Penalties may includes fines of up to USD 16 000[740].

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738 ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

739 Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p29.

740 Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p31.

The 2001 Information and Communication Technologies Act gives the ICT sector regulator some concurrent jurisdiction, requiring it to "promote and maintain effective competition, fair and efficient market conduct… [and to] prevent any unfair or anti-competitive practices by licensees"[741]. The regulator is further empowered to carry out a market analysis and to impose specific conditions on operators with significant market power - although it is required to consult the Competition Commission first[742].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour.

4.7.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The licensing of broadcasting in Mauritius is dealt with in two broad categories, by two different regulators, in terms of two different pieces of legislation. The 2001 Information and Communication Technologies Act requires providers of wholesale "facilities for broadcasting distributions [sic]" - ie signal distributors or providers of broadcasting transmission services - to hold a "Network Infrastructure Provider" licence along with the appropriate terrestrial or satellite radio apparatus and spectrum licences [743]. The 2000 Independent Broadcasting Authority Act requires all providers of broadcasting services to be licensed by the Independent Broadcasting Authority[744]. The Act further establishes MultiCarrier (Mauritius) as a monopoly provider of terrestrial broadcasting transmission services[745].

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[741] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 18(1)(c), available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf,

[742] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 30, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf,

[743] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, First Schedule, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf,

[744] Mauritius (2000) 'The Independent Broadcasting Authority Act 2000', Act No 29 of 2000, Republic of Mauritius, Port Louis, Section 18, available online at, http://www.iba.mu/documents/ibact.pdf.

[745] Mauritius (2000) 'The Independent Broadcasting Authority Act 2000', Act No 29 of 2000, Republic of Mauritius, Port Louis, Section 28, available online at, http://www.iba.mu/documents/ibact.pdf

The 2000 Independent Broadcasting Authority Act goes on to set out a broadcasting licensing framework, based on both technology (television versus radio, and terrestrial versus satellite versus cable) and broadcasting typology (public versus commercial versus community, and free to air versus subscription). Accordingly, it sets out the following licence categories:

> *Public Radio Medium Wave Broadcasting;*
>
> *Public Radio FM Broadcasting;*
>
> *Private Commercial Free to Air Medium Wave Radio Broadcasting;*
>
> *Private Commercial Free to Air FM Radio Broadcasting;*
>
> *Community Free to Air Radio Broadcasting;*
>
> *Narrowcasting Radio;*
>
> *Public Television Broadcasting Licence;*
>
> *Private Commercial Television Broadcasting;*
>
> *Subscription Television Rebroadcasting;*
>
> *Subscription Television Direct to Home Satellite Broadcasting Provider;*
>
> *Subscription Television Direct to Home Satellite Broadcasting Services Provider;*
>
> *Subscription Cable Television Broadcasting Provider;*
>
> *Community Television Free to Air Broadcasting;*
>
> *Narrowcasting Television*[746]*.*

The licensing framework for broadcasting in Mauritius is thus primarily in accordance with the framework set out in W/120, albeit with a far more detailed categorisation.

[746] Mauritius (2000) 'The Independent Broadcasting Authority Act 2000', Act No 29 of 2000, Republic of Mauritius, Port Louis, First Schedule, available online at, http://www.iba.mu/documents/ibact.pdf

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

The Independent Broadcasting Authority lists 4 radio and 6 television licensees. There is 1 public radio licensee (*Mauritius Broadcasting Corporation*) alongside 3 commercial radio licensees (*Viva Voce Ltée (Radio One), Radio Plus, Top FM*). Television licensees comprise: 1 Public Television Broadcasting Licensee (*Mauritius Broadcasting Corporation*), 1 Subscription Television Rebroadcasting Licensee (*London Satellite Systems*), 3 Subscription Television Direct to Home Satellite Broadcasting Service Providers Licensees (*Mc Vision, Mediacom, Vitiro*), and 1 Narrowcasting Television Licensee (*Mauritius Turf Club*)[747].

OMD claims rather higher numbers - viz 11 television stations and 16 radio stations, but appears to be counting the various MBC (Mauritius Broadcasting Corporation) television channels as separate stations. OMD does, however, add DStv, which does not appear on the IBA's listing[748].

FesMedia lists a number of radio channels run by MBC, viz MBC Kool FM, MBC Taal FM, MBC World Hit Radio, MBC Best FM, MBC Radio Maurice and MBC Radio Mauritius, It also lists a goodly number of MBC television channels: MBC 1, MBC 2, MBC 3, the Knowledge Channel, MBC Movies Channel, a Mandarin Channel, a Marathi Channel, a Tamil Channel, a Telugu Channel, an Urdu Channel and the Tourism and Culture Channel[749].

There are no viewership or listenership figures available, and so market share cannot be determined.

The Mauritius Broadcasting Corporation is owned by the state.

Subscription satellite television provider DStv is owned by MultiChoice (South Africa).

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[747] IBA (nd) 'Licence holders', Independent Broadcasting Authority, Port Louis, http://www.iba.mu/lic_holders.htm.

[748] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p27, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf,

[749] FesMedia (2012) *African Media Barometer: Mauritius 2010*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, pp25,6, available online at http://library.fes.de/pdf-files/bueros/africa-media/08032.pdf.

MC Vision is majority owned by the Currimjee Jeewanjee Group (51%) (Mauritius), with a minority shareholding by Canal Plus (34%) (France)[750]. It is not clear who owns the remaining 15%.

Mediacom appears to be owned by Scangroup, which is listed on the Nairobi Stock Exchange (Kenya)[751].

No information on the ownership of any of the other broadcasters is available.

OMD puts television penetration in Mauritius at 96% of households[752].

The Mauritius Broadcasting Corporation operates under the Prime Minister's Office, which describes MBC's public service mandate as follows:

> *provide independent and impartial broadcasting services of information, education, culture and entertainment in the different languages taught or spoken in the country and ensure that the broadcasting services cater for the aspirations, needs and tastes of the population in the matters of information, education, culture and entertainment[753].*

FesMedia gives Mauritius a score of 2,2 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[754], indicating limited compliance.

Range of Services: Type of services offered by foreign entities.

Two of the subscription satellite TV companies, DStv (MultiChoice, South Africa) and Mediacom (Scangroup, Kenya) appear to be foreign-owned.

Market Share: market share between foreign and local suppliers[755].

In the absence of viewership and listenership data, this cannot be ascertained.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

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[750] Africa Intelligence (nd) 'Mauritius: Stiff Competition in Television', *The Indian Ocean Newsletter* , No 861, 12 June 1999, Africa Intelligence, Paris, available online at http://www.africaintelligence.com/ION/economics-projects/business-intelligence/1999/06/12/stiff-competition-in-television,56107-ART

[751] Wikipedia (nd) 'Scangroup', Wikipedia, online at http://en.wikipedia.org/wiki/Scangroup.

[752] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p27.

[753] Mauritius (nd) 'Mauritius Broadcasting Corporation', Prime Minister's Office, Republic of Mauritius, Port Louis, available online at http://prb.pmo.gov.mu/English/Documents/PRB%20Reports/mbc.pdf.

[754] FES (2010) *African Media Barometer- Angola*, p. 106, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Angola_2010.pdf,

[755] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

There do not appear to be any such groupings in Mauritius.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There do not appear to be any limitations on the number of licensees. The 2000 Independent Broadcasting Authority Act requires the broadcast regulator to "promote the provision of a diverse range of radio and television broadcasting services throughout Mauritius"[756].

The Act does, however, place very firm restrictions on foreign ownership of broadcasting licensees. The broadcasting regulator is enjoined to "ensure that broadcasting services are not controlled by foreign nationals". Further - except in the specific case of a "Subscription Television Direct to Home Satellite Broadcasting Services Provider Licence (For companies operating only elsewhere than in Mauritius)" - licences may not be awarded to foreign entities. This excludes anyone who is "not a citizen of Mauritius or is not ordinarily resident in Mauritius" or to companies "formed, registered or incorporated in a foreign country" or with a foreign shareholding of "20 percent or more" or where the director ship is made up of 20% or more of foreign nationals[757].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory

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[756] Mauritius (2000) 'The Independent Broadcasting Authority Act 2000', Act No 29 of 2000, Republic of Mauritius, Port Louis, Section 4(a), available online at http://www.iba.mu/documents/ibact.pdf

[757] Mauritius (2000) 'The Independent Broadcasting Authority Act 2000', Act No 29 of 2000, Republic of Mauritius, Port Louis, Sections 4(e) and 19(3)(d) and First Schedule, available online at http://www.iba.mu/documents/ibact.pdf

requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

The restrictions on foreign ownership are set out above.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

As noted above the acquisition of a broadcasting licence is a relatively complex process, involving approval one the one hand of the broadcast service licence by the Independent Broadcasting Authority, and on the other of the spectrum licence and, if applicable, the signal distribution licence by the Information and Communication Technologies Authority. Nevertheless, licensing appears to be entirely at the discretion of these two regulators.

FesMedia has, however, suggested that the "process of granting licences is not considered transparent", and expressed concern that, "since each radio station has been awarded three frequencies", the resultant shortage of available spectrum may hinder the entry of new players[758].

The 2000 Independent Broadcasting Authority Act also imposes cross media ownership and control limitations. Licences may not be awarded to a company in which

> *20 percent or more of the shares of which are owned or controlled, directly or indirectly, by an individual who, or by another company or body corporate which, owns or controls, directly or indirectly, any newspaper or magazine, or any printing press publishing such newspaper or magazine*[759].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Broadcasting services are regulated in terms of licensing, content, codes of conduct and complaints by the Independent Broadcasting Authority.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

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758 FesMedia (2012) *African Media Barometer: Mauritius 2010*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p40, available online at http://library.fes.de/pdf-files/bueros/africa-media/08032.pdf.

759 Mauritius (2000) 'The Independent Broadcasting Authority Act 2000', Act No 29 of 2000, Republic of Mauritius, Port Louis, Section 19(3)(d)(iv), available online at http://www.iba.mu/documents/ibact.pdf

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

In the absence of market share figures, the state-owned public broadcaster, Mauritius Broadcasting Corporation, would nonetheless appear to be the dominant provider of terrestrial radio and television broadcast services. In respect of satellite broadcasting there is no information on market share.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As noted previously the Competition Commission enjoys economy wide powers to address anti-competitive conduct on the part of broadcasting licensees.

Despite the enjoinder in the 2000 Independent Broadcasting Authority Act for the regulator to "ensure fair competition between broadcasting licensees", the Act makes no specific provisions to give effect to this[760].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence of anti-competitive behaviour in the broadcasting sector.

4.7.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Mauritius has been a member of the WTO since January 1995, and has specified a number of specific limitations in relation to communications services[761]. For example, in respect of cross-border supply of "voice telephone services… packet switched data transmission services… circuit switched data transmission services… telex services… telegraph services.. [and] private leased circuit services" 'alternative calling practices such as Call-Back and refile are not permitted [and] 'Country Direct' calling card service is possible under the auspices of agreements concluded between operators"[762]. In respect of commercial presence, Mauritius has committed as follows: "the provision of

[760] Mauritius (2000) 'The Independent Broadcasting Authority Act 2000', Act No 29 of 2000, Republic of Mauritius, Port Louis, Section 4(g), available online at http://www.iba.mu/documents/ibact.pdf

[761] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

[762] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MUS, World Trade Organisation, Geneva, 30 August 1995, p3, available online at http://www.sadc.int/files/8913/2634/9341/Mauritius_GATS_Schedule.pdf.

these services is at present reserved on a de-facto basis, to monopoly or exclusive supplier; resale is not permitted. A second cellular telephone operator is operational as from 5 September 1996. Monopoly and exclusive rights in domestic and international services will end by 2004"[763]. Consumption abroad in respect of these services is unlimited.

No restrictions, apart from the limitations on the presence of natural persons noted previously apply to any other telecommunications services (specifically: "Facsimile services… Paging… Private Mobile Radio Equipment rental services… Equipment sales services… Equipment maintenance services… [and] Mobile services (satellite-based)")[764].

Mauritius is a member of the Common Market for Eastern and Southern Africa (COMESA), in addition to its membership of the Southern African Development Community (SADC).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

Most of the restrictions and limitations provided for above have since lapsed (see preceding sections for details). This is in accordance with the government's 2004 commitment "to promoting global trade in services particularly telecommunications services in line with its obligations towards the World Trade Organisation"[765].

The WTO notes that the "regime applied to services in Mauritius is in general more liberal than its commitments made under the GATS… [such as] limitations on market access and national treatment regarding commercial presence"[766].

The World Bank ranks Mauritius 97th out of 148 countries on its GATS Commitments Index[767].

[763] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MUS, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/8913/2634/9341/Mauritius_GATS_Schedule.pdf, p3.
[764] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MUS, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/8913/2634/9341/Mauritius_GATS_Schedule.pdf, p3.
[765] MITT (2004) 'National Telecommunications Policy 2004 (NTP – 2004)', Ministry of Information Technology and Telecommunications, Port Louis, January 2004, available online at mict.gov.mu/English/Documents/finalntp.doc. . . . .
[766] WTO (2008) 'Trade Policy Review - Report by the Secretariat: Mauritius', WT/TPR/S/198, World Trade Organisation, Geneva, 19 March 2008, p96.
[767] World Bank (2010) 'Mauritius Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Mauritius_brief.pdf.

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

The World Bank reports the MFN Tariff Trade Restrictiveness Index for Mauritius to be 3,1 percent, noting that its "trade regime [is] substantially less restrictive than that of an average Sub-Saharan Africa" country. It ranks Mauritius 13th out of 125 countries in lack of restrictiveness[768]. The WTO notes that Mauritius "grants at least MFN treatment to all its trading partners"[769]. There is no evidence of MFN inconsistent measures specific to the telecommunications sector.

4.7.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[770] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[771], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Mauritius is not a signatory to the WTO Reference Paper on Telecomms Services, although it did undertake to incorporate the reference paper into legislation[772].

1. Competitive safeguards: ***Partially compliant (3/5).*** The 2001 Information and Communication Technologies Act has some competitive safeguards, but, aside from provisions against price fixing and actions that have the "effect of significantly lessening competition", these are aimed only at "dominant

[768] World Bank (2010) 'Mauritius Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Mauritius_brief.pdf.
[769] WTO (2008) 'Trade Policy Review - Report by the Secretariat: Mauritius', WT/TPR/S/198, World Trade Organisation, Geneva, 19 March 2008, pviii.
[770] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.
[771] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.
[772] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MUS, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/8913/2634/9341/Mauritius_GATS_Schedule.pdf.

operators"[773]. There are no provisions dealing with cross-subsidisation or misuse of or withholding of information.

2. Interconnection: *Partially compliant (3/5).* The 2001 Information and Communication Technologies Act does have a section requiring the provision of interconnection, and dealing with the resolution of interconnection disputes[774]. However, it does not address issues pertaining to points of interconnection, public availability of interconnection procedures, reference interconnect offers or transparency of interconnection arrangements. There do not seem to be interconnection guidelines issued by the regulator, but a Reference Interconnect Model is publicly available on the website of the regulator[775].

3. Universal service: *Largely compliant (4/5).* The 2001 Information and Communication Technologies Act provides for the establishment of a universal service fund[776]. This was duly given effect in 2008 with the promulgation of regulations establishing the fund and providing for the designation of "one or more universal service providers"[777]. Intelecon lists the telecomms USF as being in operation[778]. The Act does not, however, make any provision for the imposition of universal service obligations on licensees, and, despite a firm 2004 policy commitment to do so[779], none appear to be in place.

4. Public availability of licensing criteria: *Largely compliant (4/5).* The 2001 Information and Communication Technologies Act contains general provisions relating to licensing criteria and procedures[780], but these do not appear to have been supplemented by more detail, despite licensing fee regulations having been

[773] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf, Section 30.

[774] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf, Section 30.

[775] ICTA (nd) 'Reference Interconnect Model', Information and Communication Technologies Authority, Port Louis, available online at http://www.icta.mu/documents/inter.pdf.

[776] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf, Section 21.

[777] Mauritius (2008) 'Information and Communication Technologies (Universal Service Fund) Regulations 2008', *Government Gazette of Mauritius*, No 97, 2 October 2008, Republic of Mauritius, Port Louis, available online at http://www.icta.mu/documents/laws/usf.pdf, Section 7.

[778] Intelecon (2010) 'Universal Access And Service Funds 2009 : Update From Intelecon', Intelecon Research & Consultancy Limited, Vancouver, p10, available online at http://www.inteleconresearch.com/pages/documents/UASFFunds2009update - Oct2009.pdf.

[779] MITT (2004) 'National Telecommunications Policy 2004 (NTP – 2004)', Ministry of Information Technology and Telecommunications, Port Louis, January 2004, p18, available online at mict.gov.mu/English/Documents/finalntp.doc. . . . .

[780] Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf, Section 24.

issued by the regulator[781]. Licence application forms are available on the website of the regulator[782].

5. Independent regulators: ***Partially Compliant (3/5).*** The regulator, the Information and Communication Technologies Authority of Mauritius, was established by the 2001 Information and Communication Technologies Act, which sets out criteria and procedures for appointment to and governance of its Board. However, full independence from the market is not enforced, with Board members only required not to be a "shareholder or director or employee of a public operator"[783] and to recuse themselves from proceedings in which they have an interest. In relation to international best practice, it must further be noted that the regulator is not fully independent from the Ministry, and is required to "comply" with any "directives" issued by the Minister, who also issues all regulations, albeit "after consultation with the Board"[784]. The appointments process for the Board of the regulator contains some transparency, but only requires limited consultation outside government[785].

6. Allocation and use of scarce resources*:* ***Partially compliant (3/5).*** The 2001 Information and Communication Technologies Act assigns the regulator responsibility for numbering and frequency spectrum, but does not deal with rights of way[786]. Only a very high level band plan in chart form is publicly available[787].

Given the commitments previously noted in respect of Mauritius's WTO commitments, and in the light of the limited number of areas in respect of which regulatory practice in Mauritius falls short of the Regulatory Reference Paper guidelines, there appears to be no reason why Mauritius should not become a signatory and engage in the limited number of additional reforms required.

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781 Mauritius (2008) 'Information and Communication Technologies (Licensing and Fees) Regulations 2003', Republic of Mauritius, Port Louis, available online at http://www.icta.mu/documents/laws/Licensing&fees.pdf.

782 ICTA (nd) 'Application Forms', Information and Communication Technologies Authority of Mauritius, Port Louis, available online at http://www.icta.mu/radiocommunication/appli.htm.

783 Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Sections 7 & 8, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.

784 Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Sections 19 & 48, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.

785 Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 5(1), available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.

786 Mauritius (2001) 'Information and Communication Technologies Act 2001', Act No 44 of 2001, Republic of Mauritius, Port Louis, Section 18, available online at http://www.gov.mu/portal/goc/telecomit/file/GN-96-2003.pdf.

787 ICTA (nd) 'Spectrum Allocation Plan', Information and Communication Technologies Authority of Mauritius, Port Louis, available online at http://www.icta.mu/radiocommunication/frequencyplan.htm.

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4.8 MOZAMBIQUE

4.8.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The ICT sector in Mozambique is governed by the 2004 Telecommunications Act which set out the licensing requirements for the provision of: fixed telephony services, mobile telephony services, the "establishment of public telecommunications networks", and telecomms networks and services utilising radio frequencies[788]. The list of licensees on the website of the regulator, groups licences under the following categories: fixed telephony; mobile cellular telephony; data transmission and Internet; and Internet access service (ISP)[789].

A "converged licensing" approach is apparently provided for in terms of forthcoming legislation, on the cards since 2010[790] but not yet listed on the website of the regulator.

The current licensing framework in Mozambique is thus a vertical one. It is, however, not in alignment with that set out in W/120. It is as yet unclear whether the forthcoming legislation will allow Mozambique to move to a converged (or horizontal or unified or multi-service) framework.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

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788 Mozambique (2004) 'Lei Base das Telecomunicações, Lei n° 8/2004, de 21 de Julho', Republic of Mozambique, Maputo, available online at http://www.incm.gov.mz/legislacao/pdf/Lei%20de%20Telecomunicacoes.pdf, Chapter III (translation by Google Translate).

789 INCM (2012) 'Lista de Operadores', Instituto Nacional das Comunicações de Moçambique, Maputo, available online at http://www.incm.gov.mz/sector%20de%20telecomunicacoes/pdf/listaempresas.pdf.

790 Mabila, F, Mário, J, Mboane, N & Mondlane, A (2010) 'Mozambique ICT Sector Performance Review 2009/2010', Research ICT Africa, Cape Town, available online at http://www.researchictafrica.net%2Fpublications%2FPolicy_Paper_Series_Towards_Evidence-based_ICT_Policy_and_Regulation_-_Volume_2%2FVol%25202%2520Paper%252016%2520-%2520Mozambique%2520ICT%2520Sector%2520Performance%2520Review%25202010.pdf, pp8,9.

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists the market as comprising one fixed-line operator, TDM, and two main mobile licensees, Vodacom Mozambique and mCel (a subsidiary of TDM), with a third, Movitel, having been launched early in 2012. Internet Service Providers include: Teledata (TDM), TV Cabo, Intra and Tropical Web[791].

The most recent comparative figures for telecomms market share date from 2010.

Mozambique: Fixed & Mobile Subscribers		
	2010	
	Subscribers	Market Share
Telecomunicações de Moçambique (TDM) (fixed)	88 100[792]	2%
Mozambique Cellular (mCel) (mobile)	4 000 000[793]	71%
Vodacom Mozambique (mobile)	1 570 000[794]	28%
Total	5 658 100	

According to the ITU, the market in Mozambique as at 2011 was broken down as follows: 88 100 fixed-line subscribers[795]; 7 855 300 mobile subscribers[796]. This

[791] BuddeComm (2012) 'Mozambique - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Mozambique-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

[792] ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2010&RP_intLanguageID=1&RP_bitLiveData=False.

[793] TeleGeography (2010) 'Government plans partial privatisation of mCel', TeleGeography, Washington DC, 26 August 2010, available online at http://www.telegeography.com/products/commsupdate/articles/2010/08/26/government-plans-partial-privatisation-of-mcel/

[794] TeleGeography (2010) 'Government plans partial privatisation of mCel', TeleGeography, Washington DC, 26 August 2010, available online at http://www.telegeography.com/products/commsupdate/articles/2010/08/26/government-plans-partial-privatisation-of-mcel/

[795] ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/

translates to a per capita market penetration rates in the telecommunications sector for Mozambique as at 2011 of 0,4% for fixed-line, 32,8% for mobile and 4,3% for the Internet (from 0,4%, 30,9% and 4,2% respectively in 2010[797].

Vodacom Mozambique reports 2,8 million subscribers as at 31 March 2012[798].

The regulator identifies a total of 27 holders of licences for data transmission and Internet and Internet access service (ISP)[799]. No market share breakdown is available, however.

Telecomunicações de Moçambique (TDM) is 100% owned by the Government of Mozambique.

Mozambique Cellular (mCel) is essentially state-owned with the following shareholder breakdown[800]:

- 74,0% - Telecomunicações de Moçambique (TDM);
- 26,0% - Institute for the Management of State Holdings (IGEPE).

The shareholding of Vodacom is broken down as follows:

- 85,0% - Vodacom (South Africa / United Kingdom)[801];
- 5,0% - EMOTEL - Mozambique Telecommunications Company, SARL;
- 5,0% - Intelec Holdings Limited;
- 5,0% - Whatana Investments Limited[802].

MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

796 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

797 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

798 Vodacom (2012) 'Vodacom Integrated report For the year ended 31 March 2012', Vodacom, Johannesburg, August 2011, available online at http://www.vodacom.com/pdf/annual_reports/ar_2012.pdf, p22.

799 INCM (2012) 'Lista de Operadores', Instituto Nacional das Comunicações de Moçambique, Maputo, available online at http://www.incm.gov.mz/sector%20de%20telecomunicacoes/pdf/listaempresas.pdf.

800 AllAfrica (2011) 'Mozambique: Government No Longer Wants to Privatise mCel', AllAfrica.com, 12 December 2011, available online at http://allafrica.com/stories/201112122321.html.

801 Vodacom (2012) 'Vodacom Integrated report For the year ended 31 March 2012', Vodacom, Johannesburg, August 2011, available online at http://www.vodacom.com/pdf/annual_reports/ar_2012.pdf, p22. Vodacom, in turn, is 65% owned by Vodafone Plc of the United Kingdom.

802 MCLI (nd) 'Vodacom Mozambique: Company Profile', Maputo Corridor Logistics Initiative, Maputo, available online at http://www.mcli.co.za/mcli-web/members/vodacom-mz.htm.

Movitel, which was launched in 2012, has the following shareholder breakdown[803]:

- 70,0% - Viettel (Vietnam);
- 30,0% - SPI (Frelimo).

Range of Services: Type of services offered by foreign entities.

Foreign entities (Vodacom (South Africa) and Viettel (Vietnam)) are active in the provision of mobile cellular telephony services.

Market Share: market share between foreign and local suppliers[804].

From the information available above it appears that foreign suppliers have only 28% of the voice telephony market.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There do not appear to be any such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

The vertical licensing framework adopted by Mozambique employs a technology-specific categorisation for licensing.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign

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[803] AllAfrica (2011) 'Mozambique: Third Mobile Phone Operator Starts Up in January', AllAfrica.com, 2 December 2011, available online at http://allafrica.com/stories/201112070366.html.

[804] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

In the absence of either general GATS commitments, or any in respect of communications services, on the part of Mozambique,[805] limited information on restrictions applying to foreign investment is available.

The World Bank notes that Mozambique "[does] not allow freehold land title of any form" for foreign investors[806]. However, "foreign companies may lease land provided they have an authorized investment project as provided by Mozambique's investment law and the company is established or registered in Mozambique"[807]. The World Bank also notes that "fixed-line telecommunications is… reserved for public investment" where a monopoly is held by "Telecommunications of Mozambique SARL, which is a joint stock / public limited company… [whose] current license expires in 2028 and is renewable", and giving the country a score of 75 out of 100 for foreign equity participation in the telecommunications sector overall[808].

Mozambique has made neither general GATS commitments, nor any in respect of communications services[809]. No further information on the legal status of foreign enterprises is available.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

In the absence of either general GATS commitments, or any in respect of communications services, on the part of Mozambique,[810] no information on restrictions applying to the presence of foreign personnel is available.

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805 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MOZ, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/4213/2634/9389/Mozambique_GATS_Schedule.pdf.

806 World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p44.

807 World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p135.

808 World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p135.

809 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MOZ, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/4213/2634/9389/Mozambique_GATS_Schedule.pdf.

Mozambique is ranked 139th out of 183 countries in terms of ease of doing business by the World Bank[811].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

Licences for fixed and mobile services are subject to the issuing of an invitation to apply by the government[812], with the regulator processing applications and awarding the licence. Although widely used, VoIP remains illegal in Mozambique, although the regulator is in the process of re-examining the issue[813]. The status in respect of international gateways is unknown. There do not appear to be any anti-competitive or discriminatory provisions in respect of the regulation of interconnection.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

Mozambique Cellular (mCel) is dominant in the voice telephony market, with a market share of 71%. TDM (Telecomunicações de Moçambique) holds a monopoly in the miniscule fixed-line sub-market.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Mozambique in 2008 was 37,9% of monthly gross national income per capita - well above the average for sub-Saharan Africa of

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810 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/MOZ, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/4213/2634/9389/Mozambique_GATS_Schedule.pdf.

811 World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

812 Cellular-News (2010) 'Mozambique Announces Tender for 3rd Mobile License', Cellular-News, 6 April 2010, available online at http://www.cellular-news.com/story/42719.php.

813 Mabila, F, Mário, J, Mboane, N, & Mondlane, A (2010) 'Mozambique ICT Sector Performance Review 2009/2010', Research ICT Africa, Cape Town, p4, available online at http://www.researchictafrica.net/new/images/uploads/SPR20092010/Mozambique-SPR-layout-final-english-v02.pdf.

23%, making Mozambique the 7th most expensive out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 66,2% and 375,3% (12th most expensive of 32 African countries)[814].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

Mozambique does not appear to have a competition authority[815], although one source suggests the country is "in the process of adopting competition laws and policies"[816].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There have been several disputes between the licensed operators in respect of interconnection agreements and the fees applicable[817]. There is no other evidence available of anti-competitive conduct.

4.8.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Mozambique does not have broadcasting legislation. Broadcasting issues are covered in the 1991 Press Law, which was amended in 2007. The initial Press Law covered the entire media sector, whether public or private, print or broadcast, as well as the cinema and any other forms of audiovisual communication disseminated in the country. However, the 2007 revised Press Law matters pertaining to regulation of broadcasting, cinema were removed,

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814 ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

815 KluwerCompetitionLaw (nd) 'Angola', Kluwer Law International, Alphen aan den Rijn, available online at http://www.kluwercompetitionlaw.com/organizations.aspx?jurisdiction=Mozambique.

816 Sakata, N (2011) 'Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?', Fifth Annual Competition Law, Economics & Policy in South Africa Conference, Competition Commission, South Africa, 4-5 October 2011, available online at http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/African-Regional-cooperation-PaperFinal-27-Sept-11-.pdf.

817 Mabila, F, Mário, J, Mboane, N, & Mondlane, A (2010) 'Mozambique ICT Sector Performance Review 2009/2010', Research ICT Africa, Cape Town, pp16,17, available online at http://www.researchictafrica.net/new/images/uploads/SPR20092010/Mozambique-SPR-layout-final-english-v02.pdf.

with a suggestion for the government to prepare specific legislation for each these areas to the general public.[818] On the basis of the Press Law, a three tier broadcasting system comprising public, commercial and community broadcasting is supported, although the law does not provide clear classification of broadcasting. A new Broadcasting Law is in the process of being drafted, even though not much progress appears to have been made. The absence of a specific broadcasting legal framework means that the broadcasting sector continues to be governed by the Press Law.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

The state/public broadcaster is issued with two licences, one for Radio Mozambique (RM) and Television Mozambique (TVM). Also included in this sub-sector is the Institute for Social Communication (ICS) which operates a network of 24 local radio stations for the promotion of rural development. A total of five commercial TV stations and eight commercial radio stations are presently on air in the country. TVM is the only Mozambican channel with national coverage. The TV environment is more diversified at regional and local level, where TVM operates our regional stations, all linked to TVM's Maputo national studios. Apart from these regional stations, there are more 30 private commercial and community TV stations at regional and local levels.[819]

OMD puts television penetration in Mozambique at 9% of households[820].

Both the Constitution and the Press Law guarantee the editorial independence of state/public broadcasting. Paragraph 5 of Article 48 of the Constitution establishes that "the State guarantees the impartiality of the public media, as well as the independence of journalists from Government, Management and other political powers". In addition, paragraph 4 of Article 11 of the Press Law states that "public sector information bodies fulfil their obligations free of interference from any interest or outside influence that might compromise their

[818] OSI (2010) 'Public Broadcasting Africa Series – Mozambique Report', Open Society Institute, p. 35, available at http://www.afrimap.org/english/images/report/Moz%20Broadcasting%20Survey%20Eng%20Web.pdf.

[819] Andre, F (2009) African Media Development: Mozambique- Research Findings and Conclusion – BBC World Service. p. 20, available at http://www.radiopeaceafrica.org/assets/texts/pdf/MOZ_AMDI_Report_pp4%201.pdf.

[820] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p28.

independence, and in their work they are guided by high technical and professional standards".[821] Statutory Instrument 18 of 16 June 1994 turned Radio Mozambique (RM) from a state-owned entity into a public-service broadcaster, funded partly from the state budget.[822] As public companies they are constituted and managed in the same way as any other public utilities.[823] Despite these commitments towards moving RM and TVM to public service broadcasting, there are no legal mechanisms in place to ensure that the public interest is represented in the process of policy formulation for public service broadcasting. At TVM, for instance, broadcast content still has to be edited and approved by people in positions of authority within the broadcaster. The Boards for both Radio Mozambique and TVM are appointed at the discretion of the Cabinet, without any public involvement.

Range of Services: Type of services offered by foreign entities.

All broadcasting suppliers in Mozambique are currently local, save for TV Miramar, which is owned by the Brazilian Universal Church of God and Portuguese channel called RTP Africa, which has offices in and broadcasts from Mozambique. The Portuguese government owns RTP Africa. TV Miramar broadcast mainly telenovelas and programmes sourced from Portugal.

Two subscription television services are available - TvCabo, a cable subscription television service based in Maputo and DStv, a satellite subscription television service based in South Africa.[824]

International radio stations operating in Mozambique include a Portuguese channel RTP, and the British Broadcaster, BBC.

Market Share: market share between foreign and local suppliers[825].

RM has the biggest market share in the broadcasting sector. It broadcasts in 21 different languages daily: Portuguese as the country's official language, 19 national languages and English. RM broadcasts on 14 channels:

- Nine provincial/ regional channels

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[821] FesMedia (2011) *African Media Barometer – Mozambique*, p. 108, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Mozambique_2011.pdf.

[822]. Andre, F (2009) African Media Development: Mozambique- Research Findings and Conclusion – BBC World Service. p. 10, available at http://www.radiopeaceafrica.org/assets/texts/pdf/MOZ_AMDI_Report_pp4%201.pdf.

[823] OSI (2010) 'Public Service Broadcasting Africa Series – Mozambique', Open Society Institute, p. 81, available at http://www.afrimap.org/english/images/report/Moz%20Broadcasting%20Survey%20Eng%20Web.pdf.

[824] Andre, F (2009) African Media Development: Mozambique- Research Findings and Conclusion – BBC World Service. p. 20, available at http://www.radiopeaceafrica.org/assets/texts/pdf/MOZ_AMDI_Report_pp4%201.pdf.

[825] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

- The National Channel
- Maputo City Radio
- Beira City Radio
- Maputo Corridor Radio (English)
- RM Sports

TVM enjoys the widest coverage in the country as it broadcasts in every province, followed by RTP. STV and TV Miramar now reach more than half of the provinces[826].

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

Rent-seeking behaviour, rigidity of non-tariff barriers, the emergence of protectionism and other forms of state interference in the economy threaten to impede Mozambican liberalisation.[827]

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

The Press Law contains clauses on cross-ownership. Article 6, sub-paragraph 8 of the Press Law says: 'In order to ensure the right of citizens to information, the

[826] FesMedia (2011) *African Media Barometer – Mozambique*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Mozambique_2011.pdf.

[827] Rodrigues, A. E (2004) Final Report: *Competition Policy in Mozambique: An assessment and Recommendations.* Submitted by Nathan Associates to USAID/Mozambique, available online at http://www.tipmoz.com/library/resources/tipmoz_media/cat3_link_1115656854.pdf.

state shall follow an anti-monopolistic policy, avoiding concentrated ownership of the mass media.' However, no regulatory measures are put in place to monitor anti-monopolistic behaviour. Media in Mozambique are generally weak, save for the SOICO Group (Independent Communications Group) which owns and runs a number of different media organisations in the television, radio and print media sector.[828] The company Mediacoop, which previously owned newspapers, has added radio to its media stable.[829] Foreign ownership in media enterprises is only allowed up to a maximum of 20%.

The Mozambican Law on Investment, Law No. 3/93 of 24 June, article 1, defines Foreign Direct Investment (FDI) as:

> *any form of foreign capital contribution valuable in monetary terms which constitutes own equity capital or resources at the own account and risk of the foreign investor, brought from external sources and to be used in an investment project for carrying out an economic activity, through a company registered in Mozambique and operating from Mozambican territory.*[830]

Article 4 of this law guarantees equal treatment of foreign investors, employers and workers in terms of rights, obligations in accordance with Mozambican legislation. Private investors are free to invest in any economic activity, with the exception of media and telecommunications. As stated earlier, foreign ownership in media enterprises is only allowed up to a maximum of 20%.[831]

Article 6 of the Regulations of the Investment Law, 2009 sets the minimum value for FDI at USD 90 000) for eligibility for external remittance of profits and re-export of invested capital.[832]

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory

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[828] OSI (2011) 'Public Broadcasting Africa Series – Mozambique Report', Open Society Institute, pp 37-38, available at http://www.afrimap.org/english/images/report/Moz%20Broadcasting%20Survey%20Eng%20Web.pdf.

[829] FesMedia (2011) *African Media Barometer - Mozambique*, p. 96. Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Mozambique_2011.pdf.

[830] WTO (nd) 'Mozambique: Policy, Plans and Priorities', available online at www.sadc.int/index.php/download_file/view/79/270/.

[831] OSI (2010) 'Public Broadcasting Africa Series – Mozambique Report', Open Society Institute , available at http://www.afrimap.org/english/images/report/Moz%20Broadcasting%20Survey%20Eng%20Web.pdf

[832] WTO (nd) 'Mozambique: Policy, Plans and Priorities', available online at www.sadc.int/index.php/download_file/view/79/270/.

requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

The Press Law puts limitations on foreign ownership. Section 5, article 6 of the Press Law states: 'Only Mozambican institutions and associations, as well as Mozambican citizens who are resident in the country and in full enjoyment of their civil and political rights, may be owners of information organs and journalistic enterprises.' Although there has been debate in the country concerning foreign ownership and market entry in the media sector, the draft revised Press Law has maintained the foreign ownership clause.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

Mozambique does not have an independent regulatory body for the broadcasting sector, broadcasting is regulated through a variety of legal provisions by three institutions, the Government Information Bureau (GABINFO),[833] the National Communications Institute (INCM) and the Council of Ministers.[834] Licensing of broadcasting organisations is handled at three levels. First, there is the GABINFO, which ensures that applicants for licences are proper, legally established entities in terms of the country's Company Law and that they meet all the requirements set in the law. The second level is the INCM, which ensures that applicants meet the national technical requirements and allocates frequencies. The third level is Council of Ministers (Cabinet), which approves the application and issues the licence..[835] The Supreme Council for the Media (SCSC) established by the Constitution[836] also plays an advisory role in the issuing of broadcast licences and participates in the appointment of directors-general to the two state broadcasters.[837] Sections 3 and 4 of article 50 of the Constitution give the SCSCS the following functions in respect of broadcasting regulation:

> *a) The Supreme Council for the Media shall issue opinions prior to Government*

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[833] GABINFO was created by Presidential Decree in October 1995 and reports directly to the prime minister. The prime minister appoints the director of GABINFO based on nominations by the Council of Ministers. (ibid.)

[834] FesMedia (2011) *African Media Barometer*,-*Mozambique* 2011 p. 105, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia.

[835] FesMedia (2011) *African Media Barometer-Mozambique*, p. 105, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Mozambique_2011.pdf.

[836] The SCSC is an independent statutory media council that regulates the professional conduct of the media and adjudicate complaints against them.

[837] OSI (2011) 'Public Broadcasting Africa Series – Mozambique Report', Open Society Institute, available at http://www.afrimap.org/english/images/report/Moz%20Broadcasting%20Survey%20Eng%20Web.pdf.

decisions on the licensing of private television and radio stations;

b) The Supreme Council for the Media shall participate in the appointment and discharge of directors-general of public sector media organisations, in terms of

the law.

With four institutions involved in the issuing of licences, the regulatory system for broadcasting in Mozambique is therefore fragmented.[838]

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Mozambique's broadcasting regulatory environment cannot be considered to be independent as it is entirely controlled by the government. Although technological convergence is already underway in the country, there is no regulatory regime to implement convergence. In addition, frequency allocation and assignments do not meet international best practice. Section 5 of the Decree No 9/93 of 22 June 1993 which provides for the participation of private and cooperative sectors in broadcasting gives the Ministry of Transport and Communications (the Minister) the responsibility to assign radio frequencies to the relevant licensed entities, a role that ought to be taken by an independent regulator.[839]

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

Radio signals in Mozambique cover between 70-90% of the country. Mozambique held its last national population census in 2007. Data collected at the time indicated a total population of 20.2 million, with women representing 52% of the total population.[840] The census also indicated that 43% of Mozambican households have a radio or a television set. However, increasingly rural poverty threaten to further reduce access to radio, due to loss of purchasing power for radio batteries.[841] Television access is limited to urban centres and some district capitals due to a range of issues - lack of electricity,

[838] In reality however, the CSCS has not really played any role providing opinions on pending licence decisions as well as participating in the appointment of broadcasting directors. In practice, it has not been involved in or consulted about a broadcasting licence.
[839] KAS (2006) SADC Media Law Handbook: Mozambique. Konrad Adenauer Foundation: Johannesburg
[840] African Economic Outlook – Mozambique 2011, www.africaeconomicoutlook.org
[841] FesMedia (2011) *African Media Barometer-Mozambique*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Mozambique_2011.pdf.

limited range of public signals and high the cost of television sets. In relation to electricity, only 30% of the Mozambican population have access to electricity. This percentage is largely concentrated to major cities with only 1% of the rural population enjoying access to electricity.[842]

Name	Owner	Location	Year of Start[843]
STV	SOICO Group	Maputo	2002
TV -Miramar	Universal Church of God	Maputo	1998
SIRTV	SIRTV	Tete Province	2002
TIM	Media Group	Maputo	2006
KTV	RTK	Maputo	1991
SFM	SOICO Group	Maputo	2002
Radio Miramar	Universal Church of God	Maputo	1998
99.3 FM	Communications Group	Maputo	2007
KFM	RK Group	Maputo	1991
SIRT	SIRT	Tete	2002
Radio Progresso	Progresso Co.	Inhambane Province	2002
Radio Capital	2002	Maputo	2002
Radio Savana	Mediacoop		2009

Pricing: How do the prices of services compare to international benchmarks.

Decree No 9/93 of 22 June 1993, which provides for the participation of private and cooperative sectors in broadcasting, does not indicate how much licence fees for broadcasters will cost, but section 26(4) provides that such amount shall be fixed by a joint decision of the Minister of Information, the Minister of Transport and Communications and the Minister of Finances.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

Mozambique does not have a competition law, but processes of implementing it are underway. A Competition policy has been drafted and is the process of being reviewed[844].

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842 Mozambique Country Situation, available at https://energypedia.info/index.php/Mozambique_Country_Situation

843 OSI (2009) 'Public Broadcasting in Africa Series: Mozambique', Open Society Institute, p53, available online at http://www.afrimap.org/english/images/report/Moz%20Broadcasting%20Survey%20Eng%20Web.pdf.

844 Goncalves, F (2012) *ICT Policy and New Media Cultures in Southern Africa – Mozambique Report*, Internal report for the Department of Media Studies, University of the Witwatersrand, South Africa.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

The provision in the Press Law that limits foreign investment to 20% can be seen as anti-competitive. As a result of this provision, no significant foreign investment in the media industry has taken place.

4.8.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Mozambique joined the WTO in August 1995[845], but has made no overall horizontal commitments, and no specific commitments in relation to communications services[846].

Mozambique is a signatory of the TRIPS Agreement. The country is a signatory of the following preferential trade agreements: the Trade Protocol of SADC, the Cotonou Agreement, the African Growth and Opportunity Act (AGOA) and the European Business Assistance Scheme (EBAS).[847]

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

Mozambique could readily make commitments in respect of communications services .

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in the telecommunications sector[848].

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845 WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm

846 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/AGO, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/2113/2628/9200/Angola_GATS_Schedule.pdf. Commitments have been made in relation to Financial Services.

847 UNCTAD (2011) Strengthening the Creative Industries for Development in Mozambique, available http://archive.unctad.org/en/docs/ditctab20092_en.pdf.

848 Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

4.8.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[849] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[850], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

1. **Competitive safeguards:** ***Minimally Compliant (1/5).*** The extent to which the 2004 Telecommunications Act provides effective competitive safeguards is unclear. The Press Law has no clear criteria for the regulator to limit a range of anti-competitive practices. There are no clauses on cross-ownership and anti-monopoly practices.

2. **Interconnection:** ***Partially Compliant (3/5).*** The extent to which the 2004 Telecommunications Act deals specifically with interconnection, which it defines as a regulatory function, is unclear. Interconnection regulations have, however, been in place since 2001.

3. **Universal service:** ***Partially Compliant (3/5).*** Mozambique has adopted the Universal Access Service Act. Following the adoption of the Act, in 2006, through a Decree, the government of Mozambique established the Universal Access Service Fund. No USOs appear to have been imposed. The ITU reports limited activity and no financial reports.

4. **Public availability of licensing criteria:** ***Minimally Compliant (1/5).*** The regulatory system for the licensing of telecommunications in Mozambique is not clear. As noted above, it appears the there is a bifurcation of responsibility between the government and the regulator in respect of licensing. Licensing

[849] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[850] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

regulations were issued by the regulator in 2001[851], but those are not available in English.

5. **Independent regulators:** ***Partially Compliant (3/5).*** The Instituto Nacional das Comunicações de Moçambique (INCM) regulates communications in Mozambique. The regulator is "administratively and financially autonomous" but reports to the Ministry of Transport and Communications, and is subject to direct and indirect influence from government. Its governing structures are also appointed by the Minister[852]. This is not in accordance with international best practice, and, given the extent of state ownership in the sector, creates a structural conflict of interest.

6. **Allocation and use of scarce resources:** ***Partially Compliant (3/5).*** Spectrum management and number planning is conducted by the telecommunications regulator, but its jurisdiction over rights of way is unclear. The national band plan does not appear to be publicly available. .

As pointed out above, Mozambique is not compliant with some of the principles of the WTO Reference Paper on Telecomms Services, but based on the country's commitment to liberalisation, the country seems ready to commit to adherence to its principles.

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[851] INCM (2001) 'Regulamento sobre o regime de licenciamento e registo para a prestacao de servicos de telecomunicacoes de uso publico e estabelecimento e utilizacao de redes publlcas de telecomunicacoes', Instituto Nacional das Comunicações de Moçambique, Maputo, available online at http://www.incm.gov.mz/documents/10157/9aee37ad-9409-41bf-92c6-2bfd84cc7ad5.

[852] Mabila, F, Mário, J, Mboane, N, & Mondlane, A (2010) 'Mozambique ICT Sector Performance Review 2009/2010', Research ICT Africa, Cape Town, p4, available online at http://www.researchictafrica.net/new/images/uploads/SPR20092010/Mozambique-SPR-layout-final-english-v02.pdf

4.9 NAMIBIA

4.9.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Namibia's 2009 Communications Act provides for the awarding of individual or class licences. The former category covers principally "service and technology neutral licences to a limited number of applicants who intend to render a comprehensive telecommunications service (including a mobile or fixed line telephony service)"[853].

Class licences are principally applicable for "private" telecommunications services and those "which entail the routing or other processing of information, but in respect of which the provider of those services uses the facilities of another licensee to transport the information concerned"[854].

The regulations issued in terms of the legislation essentially adopt the same approach, with unified individual licences "that are service and technology neutral", although they do distinguish between infrastructure ("Electronic Communications Network") and services ("Electronic Communications Network Services") for the purpose of class licences[855].

The licensing regime in Namibia is thus fully converged (or horizontal / unified / multi-service) in respect of individual licences, and partially converged in respect of class licences, where the distinction between infrastructure and services is retained. As such, it goes well beyond the vertical framework as set out in W/120.

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[853] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 38(1).

[854] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 38(2).

[855] CRAN (2011) 'Regulations Setting out Broadcasting and Telecommunications Service Licence Categories', Government Gazette, Communications Regulatory Authority of Namibia, 18 May 2011 http://www.cran.na/downloads/4714-Gen%20N124.pdf.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists the telephony market as comprising one fixed-line operator, Telecom Namibia (TN), and two main mobile licensees, Mobile Telecommunications Ltd (MTC) (managed by Portugal Telecom) and Leo (formerly Cell One before being renamed by its new owner, Orascom). The Internet Service Provider (ISP) market is listed as having 5 licensees, viz PowerCom, MTN Business Namibia, Africa Online Namibia / MWeb Namibia, Internet Technologies Namibia and iWay[856]. Telecom Namibia also provides 3G mobile broadband services[857].

The most recent comparative figures for telecomms market share date from 2010.

Namibia: Fixed & Mobile Subscribers		
	2010	
	Subscribers	**Market Share**
Telecom Namibia (TN) (fixed)	157 083[858]	8,2%
Mobile Telecommunications Ltd (MTC) (mobile)	1 535 000[859]	80,1%
Leo (mobile)	225 000 (est)[860]	11,7%
Total	**1 917 083**	

856 BuddeComm (2012) 'Namibia - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Namibia-Telecoms-Mobile-and-Broadband.html. The full report is available on a for sale basis.

857 Telecom Namibia (nd) 'Broadband', Telecom Namibia, Windhoek, available online at http://www.telecom.na/index.php/products/broadband.

858 Stork, C (2011) 'Universal Service Baseline Study', internal research report, GIZ, Eschborn, p11.

859 Stork, C (2011) 'Universal Service Baseline Study', internal research report, GIZ, Eschborn, p17.

860 Stork, C (2011) 'Universal Service Baseline Study', internal research report, GIZ, Eschborn, p17.

According to the ITU, the market in Namibia as at 2011 was broken down as follows: 140 000 fixed-line subscribers[861]; 2 439 300 mobile subscribers[862]. This translates to a per capita market penetration rates in the telecommunications sector for Namibia as at 2011 of 6,0% for fixed-line, 105,0% for mobile and 11,6% for the Internet (from 6,9%, 67,2% and 12,0% respectively in 2010[863].

Telecom Namibia (TN) is 100% state-owned, through Namibia Post and Telecommunications Holdings.

The ownership structure of Mobile Telecommunications Ltd (MTC) is as follows[864]:

- 66% - Namibia Post and Telecommunications Holdings (Government of Namibia;
- 34% - Portugal Telecom (Portugal).

Ownership of the financially troubled Leo (formally Powercom (Pty) Ltd) was recently transferred from Telecel Globe / Orascom / Vimpelcom (Egypt, Russia) to a local consortium, Guinea Fowl Investment Ltd, established by its creditors, Nedbank Capital and Investec Bank[865]. The operator is in financial trouble and is subject to a proposed but troubled acquisition at the hands of Telecom Namibia[866].

No market share breakdown is available in respect of Internet services.

ISP iWay is 100% owned by Telecom Namibia (and hence the government) [867].

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861 ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

862 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

863 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

864 MTC (2010) 'Annual Report 2010', Mobile Telecommunications Ltd, Windhoek, p16, available online at http://www.mtc.com.na/flipper/AnnualReport2010/MTCAnnualReport2010.pdf. .

865 Namibian Sun (2011) 'Leo still to find network operator', Namibian Sun, Windhoek, 2 September 2011, available online at http://www.namibiansun.com/content/local-news/leo-still-find-network-operator.

866 TeleGeography (2012) 'Leo makes last ditch court appeal to save merger and avoid liquidation', TeleGeography, 23 August 2012, available online at http://www.telegeography.com/products/commsupdate/articles/2012/08/23/leo-makes-last-ditch-court-appeal-to-save-merger-and-avoid-liquidation/.

867 SSKH (2013) 'Namibian Mediascape', presentation, Swedish School of Social Science, Helsinki, available online at http://sockom.helsinki.fi/newmedia/AbbyNamibia Presentation1.pptx.

ISP MTN Business Solutions Namibia Proprietary Limited is 100% owned by the MTN Group (South Africa)[868].

ISP Africa Online Namibia (formerly MWeb Namibia) has the following shareholding[869]:

- 75% - Telkom (South Africa)
- 25% - Kalahari Holdings / SWAPO.

International communications access for Namibia was historically dependent on its terrestrial fibre links to South Africa. This has now been dramatically upgraded with the recent landing in Swakopmund of the West Africa Cable System (WACS - with a design capacity of 5,12 Tbit/s), in which Telekom Namibia is a partner[870]. This provides Telecom Namibia, via NewTelco South Africa, with international Points of Presence in Cape Town, Johannesburg, Frankfurt and London for wider international connectivity[871]. A future international link via the African Coast to Europe (ACE - with a design capacity of 5,12 Tbit/s), in which MTC investor Portugal Telecom is a partner, is also planned[872].

Range of Services: Type of services offered by foreign entities.

With the sale of Leo, there are no longer any foreign entities offering voice telecommunications services - although Portugal Telecom retains a substantial shareholding in the dominant operator, MTC. At least two foreign entities (MTN Business Solutions Namibia & Africa Online Namibia) offer Internet services.

Market Share: Market share between foreign and local suppliers[873].

The voice telephony market is 100% controlled by local suppliers. The market share of foreign suppliers in the ISP market is unknown

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868 MTN (2011) ‘Interests in Subsidiary Companies and Joint Ventures’, MTN Group, South Africa, available online at http://mtn-investor.com/mtn_ar2011/afs_annex1.php.

869 AfricaOnline (nd) ‘About us’, Africa Online Namibia, Windhoek, available online at http://www.africaonline.com.na/index.php/about-us.html.

870 MyBroadband (nd) 'WACS turned on in Namibia, Botswana', MyBroadband, Johannesburg, 27 June 2012, available online at http://mybroadband.co.za/news/broadband/53603-wacs-turned-on-in-namibia-botswana.html.

871 TeleGeography (2013) ‘Telecom Namibia establishes European presence via WACS’, TeleGeography, Washington DC, 20 February 2013, available online at http://www.telegeography.com/products/commsupdate/articles/2013/02/20/telecom-namibia-establishes-european-presence-via-wacs/.

872 Orange (2013) ‘Commissioning of the ACE submarine cable in the first 13 countries’, press release, Orange, Paris, available online at http://www.orange.com/en/news/2012/decembre/commissioning-of-the-ACE-submarine-cable-in-the-first-13-countries.

873 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

The Government of Namibia has substantial interests in the telecommunications sector, and therefore is likely to exert a powerful influence on its liberalisation. There do not appear to be any other such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As indicated above, Namibia's licensing regime in Namibia is "service and technology neutral"[874] with respect to 'telecommunications' licences, which nevertheless remain distinct from broadcasting licences.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

Namibia's 2009 Communications Act does permit some restrictions the number of entrants in the telecommunications market, permitting the number of individual licences issued to "applicants who intend to render a comprehensive telecommunications service (including a mobile or fixed line telephony service" to be "limited" subject to the "concurrence" of the Minister[875]. Whilst fees for all classes of licences have been gazetted[876]. application procedures[877] and forms[878]

[874] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 38(1).
[875] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 38.
[876] CRAN (2012) 'Regulations Regarding Administrative and Licence Fees for Service Licences', *Government Gazette of the Republic of Namibia*, No 5037, Communications Regulatory Authority

have only been gazetted for Class Telecommunications Service Licences, Broadcasting Service Licences, and Spectrum Use Licences. There do not, however, appear to be application forms or other information available for prospective individual telecommunications licence applicants.

Although the WTO notes that "foreign investors generally receive full national treatment in Namibia, where almost all economic activities are open to foreign investors"[879], the legislation explicitly prevents any foreign entity from acquiring control of a telecommunications licensee. The 2009 Communications Act stipulates that "no more than 49% of the stock in any licensee may be owned by persons that are not Namibian citizens or Namibian companies that are controlled by Namibian citizens". This provision may be overridden by prior permission of the Minister, who has the discretion "beforehand [to] authorise the acquisition of control", or where pre-existing foreign control predates the legislation[880].

In terms of Namibia's general GATS commitments, "commercial presence requires that foreign service providers incorporate or establish the business locally in accordance with the provision of Namibian laws (Companies Act 61 of 1973). Enterprises with foreign investment in Namibia have the same rights and responsibilities as domestic enterprises"[881]. No further information on the legal status of foreign enterprises is available.

In the absence of either general GATS foreign investment commitments, or any in respect of communications services, on the part of Namibia[882], no further information on restrictions applying to foreign investment is available.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other

of Namibia, Windhoek, 13 September 2012, available online at http://thornton.co.za/resources/311%20of%205037.pdf.

[877] CRAN (2012) 'Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences', *Government Gazette of the Republic of Namibia*, No 4785, Communications Regulatory Authority of Namibia, Windhoek, 29 August 2011, available online at http://thornton.co.za/resources/AmendedRegulations.pdf.

[878] CRAN (2012) 'Publication of Forms Referred to in the Regulations regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences', *Government Gazette of the Republic of Namibia*, No 4714, Communications Regulatory Authority of Namibia, Windhoek, 18 May 2011, available online at http://thornton.co.za/resources/4714-Gen%20N131.pdf.

[879] WTO (2009) 'Trade Policy Review: Southern African Customs Union - Annex 3: Namibia', Report by the Secretariat, WT/TPR/S/222/NAM, World Bank, Washington DC, p219.

[880] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 46.

[881] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/NAM, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=37063.

[882] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/NAM, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=37063.

countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

In terms of Namibia's general GATS commitments, the "entry and residence of foreign natural persons (service providers) are subject to Namibia's Immigrations Control Act of 1993 and labour laws. In accordance with Namibian legislation, the employment of foreign natural persons for implementation of the foreign investment shall be agreed upon by the contracting parties and be subject to approval by the Namibian Government, and such personnel shall be employed in management and expert jobs only."[883]. No further information on the presence of natural persons is available.

Namibia is ranked 78th out of 183 countries in terms of ease of doing business by the World Bank[884].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

The 2009 Communications Act places licensing fully in the hands of the regulator, with no role for the Minister other than those noted above in respect of limitations on the number of individual licensees and foreign ownership restrictions.

The service and technology-neutral nature of the licensing regime implies that there are no restrictions on VoIP (although, according to Biggs, it was still explicitly prohibited as recently as 2004[885]) or international gateways.

The interconnection provisions of the legislation empower the regulator to intervene in respect of any interconnection agreement, whether domestic or

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[883] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/NAM, World Trade Organisation, Geneva, 30 August 1995, p2, available online at http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=37063. . . . .

[884] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

[885] Biggs, P (2007) The Status of Voice over Internet Protocol (VoIP) Worldwide, 2006', The Future of Voice, International Telecommunication Union, Geneva, p40, available online at http://www.itu.int/osg/spu/ni/voice/papers/FoV-VoIP-Biggs-Draft.pdf.

international that "has the effect of impairing competition or the interoperability of the networks"[886].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

The dominant provider of voice telephony services is MTC with 80% of the market, as noted above. If one considers fixed-line and mobile telephony as separate market sectors, then Telecom Namibia holds a monopoly in fixed line and MTC's market share in mobile goes up to 87%. No information is available in respect of ISPs and VANS.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Namibia in 2008 was 4,1% of monthly gross national income per capita - well below the average for sub-Saharan Africa of 23%, making Namibia the 5th cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 5,2% and 16,5% (also 5th cheapest of 32 African countries)[887].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

According to Bowman Gilfillan, there is a competition authority in Namibia, the Namibian Competition Commission, which was established by the Competition Act of 2003, and which, together with the High Court of Namibia, enjoys investigative and enforcement powers[888]. It would appear the Commission has economy-wide jurisdiction.

Further, the Act deals extensively with abuse of dominance. Dominance exists for firms with greater than 45% market share, is presumed to exist for firms of between 35% and 45% market share (unless the firm can prove otherwise), and

[886] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 49(17).

[887] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[888] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p32, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

does not exist for firms with less than 35% market share (unless the contrary can be proven). Abuse of a dominant position includes: "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions... limiting or restricting production, market outlets or market access, investment, technical development or technological progress... applying dissimilar conditions to equivalent transactions with other trading parties... [and] making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts" [889]. Penalties may include fines of up to 10% of turnover[890].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour.

4.9.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Namibia's 2009 Communications Act places the categorisation of broadcasting licences in the hands of the regulator[891]. The licensing framework adopted by the regulator is technology-neutral in that it does not distinguish between television and radio broadcasting. It does, however, differentiate between broadcasting services that are "commercial... community [defined as "either geographic or a group of persons having a common interest"]... and public" in nature. It also provides for "signal distribution" (ie broadcasting transmission services) as a separate licence category[892]. Interestingly, what is defined as

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[889] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p34, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[890] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p34, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf. For more on competition policy in Namibia, see also: WTO (2009) 'Trade Policy Review: Southern African Customs Union - Annex 3: Namibia', Report by the Secretariat, WT/TPR/S/222/NAM, World Bank, Washington DC, p236.

[891] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 84.

[892] CRAN (2011) 'Regulations Setting out Broadcasting and Telecommunications Service Licence Categories', Government Gazette, Communications Regulatory Authority of Namibia, 18 May 2011 http://www.cran.na/downloads/4714-Gen%20N124.pdf.

"broadcasting back-haul system service", is included under telecommunications licensing, implying that a signal distributor would either have to acquire an additional telecommunications licence or lease backhaul capacity from a telecommunications licensee.

Namibia's licensing framework for broadcasting is thus only partly in alignment with W/120's classification of 'radio and television services' and 'radio and television transmission services'.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

The regulator in 2011 issued a list of 19 holders of broadcasting services licences in terms of the licence categories mentioned above[893]. These include: 12 commercial broadcasting service licensees (*99 FM, Cosmos Digital Namibia, Downlink Namibia, Fresh FM, Kalahari Holdings, MultiChoice Namibia, Omulunga Radio, One Africa Television, Radio 100* [*Radio 100 FM Energy*], *Radio Kudu, Radio Wave, West Coast FM*) and 7 community broadcasting service licensees (*Katutura Community Radio, Live FM, Media for Christ, Ohangwena Regional Community Radio, Radio Ecclessia Namibia, Trinity Broadcasting Namibia, University of Namibia*). This list does not include the government-owned Namibian Broadcasting Corporation, which the regulator is required to license following a ministerial determination in terms of the Act[894].

OMD puts the numbers slightly higher, tallying 3 television stations, "20 plus" radio stations and several international satellite services[895]. In addition to the Namibian Broadcasting Corporation, it adds *DETV* and *Radio Energy* [*Radio 100 FM Energy*] not included in the CRAN listing cited above.

The Namibian Broadcasting Corporation (NBC) is described by SSKH as the "biggest player in both the radio and television broadcast sectors [having] the widest coverage, with the radio signal reaching 96 % and the television signal 66

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[893] CRAN (2011) 'Notice in terms of the Regulations Regarding Transitional Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences', *Government Gazette of the Republic of Namibi*a, No 4839, Communications Regulatory Authority of Namibia, Windhoek, 25 November 2011, available online at http://thornton.co.za/resources/4839_No393_Broadcasting.PDF.

[894] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 93.

[895] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p29, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

% of the country's population", and is 100 % state-owned[896]. It operates some 9 channels in languages other than English - Afrikaans, Damara-Nama, German, Lozi, OshiWambo, OtjiHerero, RukWangali, Setswana and San.

DETV (Desert Express Television) is privately owned by Nam Capital (Namibia)[897].

One Africa TV broadcasts in 90% of Namibia's urban areas (ie 28 urban areas) and has the following shareholding:

- 51% - Aantu Investments, Consulting and Stimulus Investments, One Africa senior management;
- 36,75% - Schenzen Communications (China)
- 12,25% - Telkom Media (South Africa)[898].

MultiChoice Namibia has 96 000 subscribers and the following shareholding:

- 51% - Kalahari Holdings / SWAPO (Namibia)
- 49% - MultiChoice (South Africa) [899].

99 FM is owned by Democratic Media Trust Investments (Namibia)[900].

In addition to the above, the regulator lists the following broadcasters as having foreign shareholdings: *Cosmos Digital Namibia, Downlink Namibia, Fresh FM, Omulunga Radio, Radio Kudu, Radio Wave*[901]. All other broadcasters are 100% Namibian owned.

OMD puts television penetration in Namibia at 41% of households[902].

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[896] SSKH (2013) 'Namibian Mediascape', presentation, Swedish School of Social Science, Helsinki, available online at http://sockom.helsinki.fi/newmedia/AbbyNamibia Presentation1.pptx.

[897] AccessMyLibrary (2002) 'Namibia: Privately-owned Desert Express TV to extend coverage area', AccessMyLibrary, Farmington Hills, 13 March 2002, available online at http://www.accessmylibrary.com/article-1G1-85571022/namibia-privately-owned-desert.html.

[898] SSKH (2013) 'Namibian Mediascape', presentation, Swedish School of Social Science, Helsinki, available online at http://sockom.helsinki.fi/newmedia/AbbyNamibia Presentation1.pptx.

[899] SSKH (2013) 'Namibian Mediascape', presentation, Swedish School of Social Science, Helsinki, available online at http://sockom.helsinki.fi/newmedia/AbbyNamibia Presentation1.pptx.

[900] Afrimap (2010) 'Public Broadcasting in Africa Series: Namibia', Open Society Foundation, Johannesburg, p9, available online at http://www.afrimap.org%2Fenglish%2Fimages%2Freport%2FNamibia_Broadcasting_Survey_Web.pdf.

[901] CRAN (2011) 'Notice in terms of the Regulations Regarding Transitional Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences', *Government Gazette of the Republic of Namibi*a, No 4839, Communications Regulatory Authority of Namibia, Windhoek, 25 November 2011, available online at http://thornton.co.za/resources/4839_No393_Broadcasting.PDF. As is noted below, the law prohibits foreign shareholding in excess of 49%.

[902] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p29, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

The Namibian Broadcasting Corporation (NBC) is primarily governed by the 1991 Namibian Broadcasting Act. Whilst its mandate is not explicitly a public broadcasting one, it does contain some public service features, requiring the NBC to:

> *(a) inform and entertain the public of Namibia;*
>
> *(b) to contribute to the education and unity of the nation, and to peace in Namibia;*
>
> *(c) to provide and disseminate information relevant to the socio-economic development of Namibia;*
>
> *(d) to promote the use and understanding of the English language*[903]*.*

The 2009 Communications Act goes somewhat further, envisaging that the regulator will "issue a broadcasting licence to the [NBC] that is appropriate for a public broadcaster"[904], but this is subject to a Ministerial determination that does not yet appear to have been issued.

FesMedia suggests that the NBC does not operate as a public broadcaster. It notes that the board is appointed by the Minister and that a "number of board members have ties with the ruling SWAPO party". FesMedia further notes that editorial independence of the NBC is not legally guaranteed, and suggests "indirect interference" from government on news and programming[905].

FesMedia gives Namibia a score of 2,8 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large" [906], indicating partial compliance.

Range of Services: Type of services offered by foreign entities.

All broadcasting licensees in Namibia are currently local.

Market Share: market share between foreign and local suppliers[907].

As noted above, the government-owned NBC appears to have the biggest market share in the broadcasting sector. There are no foreign suppliers in the market.

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[903] Namibia (1991) 'Namibian Broadcasting Act, 1991', Act No 9 of 1991, *Government Gazette of the Republic of Namibia*, No. 223, Republic of Namibia, Windhoek, 19 June 1991.

[904] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 93.

[905] FesMedia (2011) *African Media Barometer: Namibia 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, pp42-46, available online at http://library.fes.de/pdf-files/bueros/ africa-media/08721.pdf.

[906] FesMedia (2011) *African Media Barometer: Namibia 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, pp42-46, available online at http://library.fes.de/pdf-files/bueros/ africa-media/08721.pdf. . . . .

[907] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There is no evidence of any such stakeholder groupings.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

Although the regulator in 2011 denied broadcast licences to 5 of the 24 applicants it processed, this was because they are "alleged not have complied with the relevant regulations and the Communications Act", with CRAN noting that they "may apply for licences anew"[908]. This indicates that there are no quantitative restrictions on the number of licensees.

There is, however, a key and specific restriction on foreign suppliers and the legal form in which they may operate set out in the 2009 Communications Act, which restricts broadcasting service licensees to entities controlled by Namibian citizens, except with prior permission from the Minister. The Act states that the regulator

> *may issue a broadcasting licence only to –*
>
> *(a) a Namibian citizen; and*
>
> *(b) a juristic person of which at least 51 percent of the shareholding is beneficially owned by Namibian citizens and which is not controlled directly or indirectly by persons who*

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[908] CRAN (2011) 'Notice in terms of the Regulations Regarding Transitional Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences', *Government Gazette of the Republic of Namibi*a, No 4839, Communications Regulatory Authority of Namibia, Windhoek, 25 November 2011, available online at http://thornton.co.za/resources/4839_No393_Broadcasting.PDF.

> *are not Namibian citizens and which has its principal place of business or registered office in Namibia.* [909]

This is despite the fact that the 2009 Broadcasting Policy for Namibia states

> *the Namibia Government encourages foreign participation in the broadcasting sector. The Strategic ICT Advisory Council and / or Advisor on ICT Policy related matters will advise the Minister of ICT on minimum local shareholding participation in the sector.*[910]

Further, although the Minister "may beforehand authorise the issue of a broadcasting licence to a juristic person other than a [Namibian] juristic person"[911], this prerogative has in practice not been exercised.

Foreign investment is largely governed by the 1990 Foreign Investment Act (as amended in 1993). This provides for tax incentives including the "possibility of negotiation of special tax packages through the Ministry of Trade and Industry"[912]. There is no evidence, however, of any implementation of these measures in the broadcasting sector.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

Apart from the restriction on foreign ownership in the broadcasting sector, there do not appear to be other discriminatory measures based on nationality. In fact the 2009 Broadcasting Policy clearly states that the "Namibian broadcasting market is open to entry…and foreign interests are encouraged to enter and assist in building and developing broadcasting and content services in Namibia"[913].

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[909] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 85(2).

[910] Namibia (2009) 'Broadcasting Policy for the Republic of Namibia', Ministry of Communications and ICTs, Windhoek p13, available online at http://www.amarc.org/documents/articles/Broadcasting_Policy_Final_draft.pdf. There is some question as to the status of this policy (and some others in the sector) as it does not appear to have been gazetted.

[911] Namibia (2009) Communications Act, available online at http://www.parliament.gov.na/acts_documents/120_4378gov_n226act_82009.pdf, Section 85(3).

[912] WTO (2012) Trade Policy Review, World Trade Organisation, Geneva, pp219, 220, available online at http://www.wto.org/english/tratop_e/tpr_e/tp322_e.htm, .

[913] Namibia (2009) 'Broadcasting Policy for the Republic of Namibia', Ministry of Communications and ICTs, Windhoek p13, available online at http://www.amarc.org/documents/articles/Broadcasting_Policy_Final_draft.pdf.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

As previously noted, apart from the foreign ownership limitations set out in the law, and the potential role of the Minister in issuing exemptions to this limitation and in determining the licensing of the public broadcaster, licensing for broadcasting licences is entirely in the hands of the regulator. The Act sets out some general parameters governing the licensing of broadcasting services[914] which have subsequently been amplified by the regulator. As noted previously, the number of licences does not appear to be restricted, and the procedure appears to be an open on-application process requiring applicants to " inform the Authority in writing of its intentions to provide both radio and/or television broadcasting services sixty (60) days prior to providing such services"[915].

Radio broadcasting services licences are issued for a period of five years, with television broadcasting services licences valid for ten years[916]. Both licences are coupled by the regulator with signal distribution licences[917].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

The regulation of broadcasting is undertaken by the ICT sector regulator, the Communications Regulatory Authority of Namibia[918], whose jurisdiction also includes telecommunication and postal services.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As stated above, the state broadcaster has the biggest market share in the broadcasting sector, with 56 transmitter sites around the country. NBC FM radio stations reach an estimated 96 per cent of the population, while NBC TV can

[914] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 85.
[915] CRAN (2012) 'Regulations regarding Licence Conditions for Broadcasting Service Licences', *Government Gazette of the Republic of Namibia*, No 309, Communications Regulatory Authority Namibia, Windhoek, 13 September 2012.
[916] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 85.
[917] CRAN (2012) 'Regulations regarding Licence Conditions for Broadcasting Service Licences', *Government Gazette of the Republic of Namibia*, No 309, Communications Regulatory Authority Namibia, Windhoek, 13 September 2012.
[918] Namibia (2009) Communications Act- Chapter VI, available online at http://www.parliament.gov.na/acts_documents/120_4378gov_n226act_82009.

reach an estimated viewership of 66 per cent of the population through normal analogue aerials.[919]

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As noted previously, following the passage of the 2003 Competition Act in 2003, a Competition Commission, responsible for investigating complaints relating to anti-competitive business practices and approving proposed mergers and acquisitions, was established in 2009.[920]

The Communications Act also includes provisions for the promotion of competition, viz:

> *Any practice or activity that has the object or effect of preventing, restricting or distorting competition in a market for the supply of telecommunications or broadcasting services or any product or service used in connection with these services is prohibited*[921]*.*

Further:

> *Any abuse of individual or collective dominant position by one or more persons in a market for the supply of telecommunications or broadcasting services or any product used in connection with these services is prohibited*[922]*.*

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

Although both the 2003 Competition Act and the 2009 Communications Act contain anti-monopoly provisions, FesMedia notes long-standing concentrations of media ownership in practice. In this regard, it points to Democratic Media Holdings (DMH) and Kalahari Holdings as examples. The former "owns several newspapers [including *Allgemeine Zeitung* and the *Republikein*], a radio station [*99 FM*], and the country's main newspaper printing press [*Newsprint Namibia*]", and is partly owned by South Africa's Media24, itself a subsidiary of Naspers. Kalahari Holdings, which is the investment arm of SWAPO, the ruling party, "publishes and owns a majority shareholding in a newspaper [*New Era*], the digital satellite TV provider MultiChoice Namibia (broadcasters of DStv), a radio

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919 OSI (2010) 'Public Broadcasting Africa Series- Namibia', Open Society Institute , p51, available at http://www.afrimap.org/english/images/report/Namibia_Broadcasting_Survey_Web.pdf.

920 BTI (2012) Namibia Report, p18, available online at http://www.bti-project.de/fileadmin/Inhalte/reports/2012/pdf/BTI%202012%20Namibia.pdf.

921 Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 33(1).

922 Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 33(2).

station [*Radio 100 FM Energy*], a printing press [*NamPrint*] and an Internet service provider [*Africa Online Namibia*].[923]

4.9.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Namibia joined the WTO in January 1995[924], and has made overall horizontal commitments relating to market access, covering commercial presence and the presence of natural persons, but has made no specific commitments in relation to communications services[925].

The country is also a signatory of the following preferential trade agreements: Southern African Customs Union, Multilateral Investment Guarantee Agency (MIGA), African Growth and Opportunity Act.

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

Namibia faces several constraints the implementation of WTO agreements due to human and institutional capacity limitations. Its National WTO inter-ministerial committee lacks capacity, but the Ministry of Trade and Industry has been restructured and is dealing with these institutional weaknesses [926].

Under Mode 3 (Commercial Presence) Namibia's requirement of majority Namibian ownership of both telecommunications providers and broadcasters constitutes a considerable obstacle in relation to both market access and national treatment. Under Mode 4 (Presence of Natural Persons) there are also limitations, as previously noted, on foreign personnel. Changes in respect of both of these would be necessary were Namibia to consider a full commitment.

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923 FesMedia (2011) *African Media Barometer-Namibia*, p. 34, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Namibia_2011_01.pdf.

924 WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

925 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/AGO, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/2113/2628/9200/Angola_GATS_Schedule.pdf. Commitments have been made in relation to Business Services and Tourism and Travel-Related Services.

926 WTO (2012) Trade Policy Review - http://www.wto.org/english/tratop_e/tpr_e/tp322_e.htm, p. 220

The World Bank ranks Namibia 129th out of 148 countries on its GATS Commitments Index[927].

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in the telecommunications sector[928]. In respect of the World Bank's MFN Tariff Trade Restrictive Index (TTRI), Namibia is ranked 94th out of 125 countries[929].

4.9.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[930] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[931], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

1. **Competitive safeguards:** ***Compliant (5/5).*** The 2009 Communications Act has clear criteria for the regulator to limit a range of anti-competitive practices including abuse of dominance and acquisitions that lead to a "reduction in competitive markets[932]. The Act also has clauses on cross-ownership and anti-monopoly practices. As noted previously, the Competition Commission also enjoys extensive powers to deal with similar issues under the 2003 Competition

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927 World Bank (2010) 'Malawi Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Namibia_brief.pdf.

928 Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

929 World Bank (2010) 'Namibia Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Namibia_brief.pdf.

930 WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

931 WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

932 Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 33.

Act. There does not yet appear to exist, however, a memorandum of agreement between to two regulators to manage co-jurisdiction.

2. **Interconnection:** ***Largely Compliant (4/5).*** The 2009 Communications Act requires the regulator to regulate interconnection, and deals with points of interconnection, timeframes, lodging of agreements and the settlement of disputes. Reference Interconnect Offers are, however, not mandatory on dominant operators, and interconnection agreements are not published.

3. **Universal service:** ***Partially Compliant (3/5).*** The sections of the 2009 Communications Act dealing with Universal Access and Service are still in abeyance, and do not entirely correspond with international best practice. However, a more comprehensive national universal access and service policy has recently been adopted[933], and the Ministry and the regulator are believed to be moving forwards in its implementation.

4. **Public availability of licensing criteria**: ***Largely Compliant (4/5).*** As noted above, licensing procedures provided for in the 2009 Communications Act, and, with the exception of individual telecommunications licences, have been gazetted and published by the regulator (and are available on its website, even if somewhat hard to identify).

5. **Independent regulators:** ***Partially Compliant (3/5).*** The 2009 Communications Act establishes the Communications Regulatory Authority of Namibia as an independent regulator. It is separate from the industry with no-one who "manages, is employed by or has any financial interest in any provider of telecommunications services or any business having a financial interest in any product or industry that is or may be regulated by the Authority"[934] eligible for appointment to the board. However, appointments to the Board lack the checks and balances prescribed by international best practice. As FesMedia points out, it is "appointed by the Minister of Information and Communication Technology in line with the State Owned Enterprises Act and, therefore, is not independent"[935]. The Minister, however, retains considerable influence over the work of the regulator, which is accountable to him rather than to Parliament, and to which he may issue general guidelines and policy directives.

6. **Allocation and use of scarce resources:** ***Compliant (5/5).*** The 2009 Communications Act deals extensively and in depth with rights of way,

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933 MICT (2013) 'General policy guidelines on universal access and service in communications: Communications Act', Government Notice No 82, *Government Gazette of the Republic of Namibia*, No 5169, Ministry of ICT, Windhoek, 8 April 2013, available online at http://thornton.co.za/resources/5169-Gov%20N82%20copy.pdf.

934 Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Section 10(d).

935 FesMedia (2011) *African Media Barometer: Namibia 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p10, available online at http://library.fes.de/pdf-files/bueros/ africa-media/08721.pdf. . . . .

numbering and the management of frequency spectrum, ensuring that the regulator oversees these areas of competency following due process[936]. Further, the mandatory publication of the frequency band plan has been effected[937].

Namibia is already largely compliant with the WTO Reference Paper on Telecomms Services. There is nothing in the legislation or in current regulatory practice that would conflict with a formal commitment by Namibia to adhere to its principles. Changes required to make the country fully compliant are relatively limited in scope.

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[936] Namibia (2009) 'Communications Act, 2009', Act No 8 of 2009, *Government Gazette of the Republic of Namibia*, No. 4378, Republic of Namibia, Windhoek, 16 November 2009, Chapter V Part 5, Section 81 and Chapter VIII respectively.

[937] CRAN (2013) 'Regulations setting out the frequency band plan for the Republic of Namibia', General Notice No 191, Government Gazette of the Republic of Namibia, No 5214, Communications Regulatory Authority of Namibia, Windhoek, 31 May 2013, available online at http://www.cran.na/dloads/Public%20Notices%20and%20Hearings/5214-Gen%20N191-192%2031%20may%202013.pdf.

4.10 SEYCHELLES

4.10.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The 2000 Broadcasting and Telecommunication Act appears to distinguish between telecommunications infrastructure and services, stating that "no person shall provide a... telecommunication service, except under, and in accordance with, a licence granted under the Licences Act" and that a licence "may authorise the licensee to operate a telecommunication facility for the purpose of providing the service for which the licence is granted"[938]. Spectrum provisions are inclusive of the licence.

Licences are thus dealt with by the Seychelles Licensing Authority, which categorises telecommunications as follows: "fixed telephone line service/ Public Switched Telephone Network (PSTN); Public Land Mobile Networks... [including GSM & 3G]; Internet Access Service; Internet Resale Service; International Submarine Cable System"[939].

The licensing regime in the Seychelles is thus a vertical, technology-specific framework rather than a converged (or horizontal or unified or multi-service) one. But it is also not in accordance with the vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

[938] Seychelles (2000) 'Broadcasting and Telecommunication Act', Chapter 19, Act 2 of 2000, Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

[939] SLA (nd) 'Guidelines for Submission of Project Memorandum (Telecommunications)', Seychelles Licensing Authority, Victoria, available online at http://www.sib.gov.sc/Resources/SIB%20Guidelines/SIB%20General%20Application%20Form%20for%20Telecommunications%20Licence.pdf.

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BK Consultants suggest that the telephony market in the Seychelles comprises one fixed-line operator, Cable and Wireless (Seychelles) Ltd, currently a subsidiary of Cable and Wireless Olc, UK, and two mobile operators, Cable and Wireless (Seychelles) Ltd, and AirTel Seychelles[940]. VoIP telephony is offered by at least one provider, Intelvision[941]. Wikipedia's similarly dated entry lists three Internet Service Providers, viz Atlas, Intelvision and Kokonet[942].

Comparative figures for the telecomms market in the Seychelles are not available[943].

Seychelles: Fixed & Mobile Subscribers		
	20	
	Subscribers	**Market Share**
Cable and Wireless (fixed)		
Cable and Wireless (mobile)		
AirTel Seychelles (mobile)[944]		
Total		

According to the ITU, the market in the Seychelles as at 2011 was broken down as follows: 27 900 fixed-line subscribers[945]; 126 600 mobile subscribers[946]. This

[940] BK (2008) 'Country Profile: Seychelles, BK Consultants SA, Paris, available online at http://www.bk-conseil.com/espaceinformation/documentation/ict/Seychelles_Country_Profile.pdf. Used for the Seychelles because there is no corresponding BuddeComm report.
[941] Intelvision (nd) 'Telephony', Intelvision, Victoria, http://www.intelvision.net/index.php?option=com_content&task=view&id=14&Itemid=33.
[942] Wikipedia (nd) 'Telecommunications in Seychelles', Wikipedia, available online at http://en.wikipedia.org/wiki/Telecommunications_in_Seychelles.
[943] Neither Cable & Wireless nor Bharti Airtel provide subscriber figures for the Seychelles in their annual reports.
[944] AirTel Seychelles claims to enjoy 57% market share in the mobile communications sub-sector. See: Economic Times (2012) 'Bharti Airtel to buy Telecom Seychelles for Rs 288 crore', The Economic Times, Mumbai, 11 August 2010, available online at http://articles.economictimes.indiatimes.com/2010-08-11/news/27623658_1_airtel-brand-telecom-seychelles-bharti-airtel-ceo.
[945] ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

translates to a per capita market penetration rates in the telecommunications sector for the Seychelles as at 2011 of 32,1% for fixed-line, 145,7% for mobile and 43,2% for the Internet (from 25,5%, 135,9% and 41,0% respectively in 2010[947].

AirTel Seychelles (formerly Telecom Seychelles) is 100% owned by Bharti AirTel of India, following its acquisition in 2010[948].

Cable & Wireless is 100% owned by Cable & Wireless (United Kingdom), which is in the process of selling its Monaco and Islands operation (under which Cable & Wireless Seychelles falls) to the Batelco Group (Bahrain)[949].

There is no market share breakdown and limited ownership information available in respect of Internet service providers.

Atlas Seychelles is owned by Cable & Wireless Seychelles[950].

Intelvision is apparently South African-owned[951].

International telecommunications access has been provided since 2012 by the Seychelles East Africa Submarine (SEAS - with a capacity of 320 Gbit/s and a landing station at Beau Vallon, Victoria, which links Mahé to Dar es Salaam, Tanzania, and hence to other cables such as Seacom and EASSy[952].

Range of Services: Type of services offered by foreign entities.

All voice telephony services are offered by foreign entities.

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946 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

947 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

948 Bharti Airtel (2012) 'Bharti Airtel Limited - Annual Report 2011-12', Bharti Airtel, New Delhi, p179, available online at http://www.airtel.in/wps/wcm/connect/da0af4004c35ea9f8f428f8e9700a476/Bharti-Airtel-Annual-Report-2012.pdf?MOD=AJPERES&CACHEID=da0af4004c35ea9f8f428f8e9700a476.

949 CWC (2013) 'Transforming our business: Annual report 2012/13', Cable & Wireless Communications, London, p127, available online at http://www.cwc.com/assets/uploads/files/Publications/CWC_Annual_Report_2013_interactive.pdf.

950 CWC (nd) 'What Is Xnet', Cable & Wireless (Seychelles), Victoria, available online at http://www.seychelles.net/xnet.php.

951 Balancing Act (nd) 'SA's Intelvision launches itself as Seychelles' Third Telecoms Operator, *Balancing Act*, Issue No 302, Balancing Act, London, available online at http://www.balancingact-africa.com/news/en/issue-no-302/telecoms/sa-s-intelvision-lau/en.

952 eTN (2012) 'Seychelles now connected by fiber optic underwater cable from Tanzania', eTurboNews, Hawaii, 5 May 2012, available online at http://www.eturbonews.com/29123/seychelles-now-connected-fiber-optic-underwater-cable-tanzania.

Market Share: Market share between foreign and local suppliers[953].

100% of the voice telephony market is controlled by foreign suppliers.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

No such stakeholder grouping appears to exist. The government has established a 13 person National ICT Consultative Committee, with representation from government and operators[954].

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As indicated previously licences are categorised according to technology, viz: "fixed telephone line service/ Public Switched Telephone Network (PSTN); Public Land Mobile Networks… [including GSM & 3G]; Internet Access Service; Internet Resale Service; International Submarine Cable System"[955]. They are therefore not technology neutral.

No copies of individual licences are available to verify this, however.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

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[953] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.
[954] DICT (nd) 'National ICT Consultative Committee', Department of ICT, Republic of the Seychelles, Victoria, available online at http://www.ict.gov.sc/homecnt/nictc.aspx,
[955] SLA (nd) 'Guidelines for Submission of Project Memorandum (Telecommunications)', Seychelles Licensing Authority, Victoria, available online at http://www.sib.gov.sc/Resources/SIB%20Guidelines/SIB%20General%20Application%20Form%20for%20Telecommunications%20Licence.pdf.

Although the legislation allows the Minister to restrict the number of suppliers[956]., there do not appear to be any such restrictions currently in place.

The Seychelles Investment Board was established in 2004 to "promote, attract and retain investment"[957] in a range of sectors, including ICT.

Neither the 2000 Broadcasting and Telecommunication Act nor the 1986 Licences Act make any references to nationality.

The Seychelles holds only observer status at the WTO and thus has made no GATS commitments whatever.

No further information on restrictions applicable to either foreign investment or the commercial presence of foreign companies is available.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

There do not appear to be limitations on the presence of natural persons other than the requirement to acquire either a Gainful Occupation Permit (GOP) or a Residence Permit[958].

No further information on discriminatory measures based in nationality is available.

The Seychelles is ranked 103rd out of 183 countries in terms of ease of doing business by the World Bank[959].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international

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[956] Seychelles (2000) 'Broadcasting and Telecommunication Act', Act 2 of 2000, Republic of the Seychelles, Victoria, Section 11, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

[957] SIB (nd) 'About SIB', Seychelles Investment Board, Victoria, http://www.sib.gov.sc/index.php?option=com_content&view=article&id=389&Itemid=779,

[958] SIB (nd) 'Prior to Arrival in Seychelles', Seychelles Investment Board, Victoria, http://www.sib.gov.sc/index.php?option=com_content&view=article&id=388&Itemid=709

[959] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

No detailed information on telecommunications licensing procedures is readily available. The 2000 Broadcasting and Telecommunication Act assigns the responsibility for licensing to the Seychelles Licensing Authority[960] but no further information is available on the latter's website. In terms of the 1986 Licences Act, which covers a wide range of activities from plumbing to keeping a guest house, all licence applications are dealt with by the Seychelles Licensing Authority, although the Minister may exempt any entity from the requirement to hold a licence[961].

A telecommunications licence application form is available via the website of the Seychelles Investment Bureau, suggesting relatively open entry[962].

VoIP is now legal in the Seychelles (it was still prohibited in 2004[963]), but is subject to the acquisition of a VoIP-specific licence, which prohibits the holder from providing "mobile VoIP services or any other services unless authorised to do so by the Minister"[964].

No information on any international gateway restrictions is available, although clearly foreign ownership of such a facility is allowed.

The telecommunications legislation does have a relatively weak anti-competitive interconnection provision, allowing an operator to withhold interconnection "if the proposed interconnection would materially restrict his ability to exploit the network capacity at his disposal in his own operations" [965]. No evidence of any such instances is, however, available.

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[960] Seychelles (2000) 'Broadcasting and Telecommunication Act', Chapter 19, Act 2 of 2000, Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/consolidated-act/19, Sections 7 & 8.

[961] Seychelles (1986) 'Licences Act: Chapter 113', Act 3 of 1986, Government of Seychelles, Victoria, available online via http://www.seylii.org/sc/legislation/consolidated-act/113.

[962] SLA (nd) 'Guidelines for Submission of Project Memorandum (Telecommunications)', Seychelles Licensing Authority, Victoria, available online at http://www.sib.gov.sc/Resources/SIB%20Guidelines/SIB%20General%20Application%20Form%20for%20Telecommunications%20Licence.pdf.

[963] Biggs, P (2007) The Status of Voice over Internet Protocol (VoIP) Worldwide, 2006', The Future of Voice, International Telecommunication Union, Geneva, p40, available online at http://www.itu.int/osg/spu/ni/voice/papers/FoV-VoIP-Biggs-Draft.pdf.

[964] Seychelles (2005) 'Broadcasting and Telecommunication (VOIP Services) Regulations, 2005', Supplement to Official Gazette, Republic of the Seychelles, Victoria, 19 August 2005, Section 4, available online at http://www.seymediacom.org/uploads/2/8/2/1/2821898/voip_services_regulations.pdf.

[965] Seychelles (2000) 'Broadcasting and Telecommunication Act', Chapter 19, Act 2 of 2000, Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/consolidated-act/19, Section 30(2).

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

If the estimate of AirTel Seychelles that puts its market share at 57% is correct, both it and Cable and Wireless would appear to be dominant.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for the Seychelles in 2008 was 1,5% of monthly gross national income per capita - well below the average for sub-Saharan Africa of 23%, making the Seychelles the cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 1,6% and 6,8% (3rd cheapest of 32 African countries)[966].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

According to Bowman Gilfillan, there is a competition authority in the Seychelles, the Fair Trading Commission, which was established by the Fair Trading Commission Act of 2009[967]. The Fair Trading Commission applies the 2009 Fair Competition Act and the 2010 Consumer Protection Act[968]. The Commission has economy-wide jurisdiction.

The 2009 Fair Competition Act deals with abuse of dominance, which is defined to occur if a firm "holds such a position of economic strength so as to enable it to operate in a market independently without effective competition from clients, competitors or potential competitors"[969]. Abuse of a dominant position includes a wide range of conduct, including: restricting market entry, "preventing or deterring... competitive conduct", imposing prices that are "unfair... excessive, unreasonable, discriminatory or predatory", "applying dissimilar conditions to

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[966] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[967] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p40.

[968] FTC (nd) 'Legislation', Fair Trading Commission, Victoria, available online at http://www.ftc.sc/index.php?option=com_content&view=article&id=20&Itemid=93.

[969] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p41, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

equivalent transactions with other trading parties", and "exclusive dealing, market restriction or tied selling" [970]. The Act also provides for a defence against abuse of dominance in cases where, inter alia, the behaviour was intended to benefit both the economy and consumers, or where it was the result of the firm's "superior competitive performance" [971]. The Commission may impose orders on offending firms, or accept undertakings from them, or impose fines of up to 10% of turnover[972].

In the exercise of its powers the Fair Trading Commission has issued a series of guidelines dealing with the definition of relevant markets, assessing abuse of dominance, and determining collusive agreements[973].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour in the telecommunications sector.

4.10.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Broadcasting licences in Seychelles are granted under the 2000 Broadcasting and Telecommunications Act, which refers to "broadcasting service" and [broadcasting] "transmission facility" licences[974]. As noted previously, these radio frequency provision is inclusive to such licences.

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[970] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p42, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[971] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p42, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[972] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p42, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[973] FTC (nd) 'FCA Guidelines & Procedures', Fair Trading Commission, Victoria, available online at http://www.ftc.sc/index.php?option=com_content&view=article&id=24&Itemid=103.

[974] Seychelles (2000) 'Broadcasting and Telecommunication Act', Chapter 19, Act 2 of 2000, Republic of the Seychelles, Victoria, Section 3, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

There is no provision in the legislation for any distinction between public, commercial or community broadcasting. However, recent regulations distinguish between television and radio broadcasting, and provide for international, public, commercial, and, in the case of television, satellite and subscription sub categories[975].

The classification of broadcasting licences in the Seychelles is, nonetheless, in accordance with the provisions of W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

OMD lists one national television station, several satellite television broadcasters, including DStv / MultiChoice, and two radio stations (*AM Radio Seychelles* and *Paradise FM*). The terrestrial broadcasters provide services in a mix of French, English and Creole[976].

Freedom House notes that all three broadcasters are operated by the state-owned and controlled Seychelles Broadcasting Corporation, and points to pro-government bias in programming content despite some moves towards greater independence under the new 20111 Seychelles Broadcasting Corporation Act[977].

The BBC further suggests that BBC World Service and Radio France Internationale are available on FM[978].

There also appears to be a South African-owned cable television provider, Intelvision[979].

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[975] Seychelles (2011) 'Licences (Broadcasting and Telecommunication) (Amendment) Regulations, 2011', Supplement to Official Gazette, 10 October 2011, Government of the Seychelles, available online at http://www.seymediacom.org/uploads/2/8/2/1/2821898/licences_broadcasting_and_telecommunications_amendment_regulation_2011.pdf.

[976] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p30, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

[977] Freedom House (2012) 'Seychelles: Freedom of the Press 2012', Freedom House, New York, available online at http://www.freedomhouse.org/report/freedom-press/2012/seychelles.

[978] BBC (2012) 'Seychelles Profile', British Broadcasting Corporation, London, available online at http://www.bbc.co.uk/news/world-africa-14094089.

[979] Balancing Act (nd) 'SA's Intelvision launches itself as Seychelles' Third Telecoms Operator, *Balancing Act*, Issue No 302, Balancing Act, London, available online at http://www.balancingact-africa.com/news/en/issue-no-302/telecoms/sa-s-intelvision-lau/en.

OMD puts television penetration in the Seychelles at 92% of households[980].

FesMedia doers not have a report for the Seychelles.

Notwithstanding the pro-government bias noted above, the 2011 Seychelles Broadcasting Corporation Act does make extensive provisions for broadcasting to be in the 'public interest', and does provide for oversight of the SBC by a Board whose composition includes for checks and balances[981].

Range of Services: Type of services offered by foreign entities.

According to the BBC "multi-channel cable and satellite TV are widely available", along with BBC World Service and Radio France Internationale on FM[982].

Market Share: market share between foreign and local suppliers[983].

There is no information on market share.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

Despite recent moves towards a more independent broadcasting environment, the government has previously acted to quell a diversity on views, legislating in 2006 an "amendment to the Broadcasting and Telecommunications Act prohibiting politically affiliated groups from obtaining a license"[984] following opposition party attempts to raise funds to apply for one.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

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[980] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p30, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

[981] Seychelles (2011) 'Seychelles Broadcasting Corporation Act, 2011, Act 2 of 2011, Republic of the Seychelles, Victoria, available online at Seychelles Broadcasting Corporation Act, 2011.

[982] BBC News: Africa, (2012) 'Seychelles Profile'< http://www.bbc.co.uk/news/world-africa-14094089> last accessed on 2 December 2012.

[983] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[984] Freedom House (2012) 'Seychelles: Freedom of the Press 2012', Freedom House, New York, available online at http://www.freedomhouse.org/report/freedom-press/2012/seychelles.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There do not appear to be formal limitations on the number of broadcasting suppliers. However, Freedom House cites excessive licensing fees as making the private broadcasting market "slow to develop" [985].

As noted previously, there are no nationality provisions in the 2000 Broadcasting and Telecommunications Act.

The 1994 regulations governing broadcasting licences do, however, contain some restrictive provisions that prevent foreign nationals from acquiring broadcast licences and require foreign broadcasters to incorporate locally. They also restrict cross media ownership and control. Licence applications are to be considered in the light of, amongst other things:

> *(1) (a) the orderly development of sound broadcasting services;*
>
> *(c) the character of the applicant and where the applicant is a body corporate, the character of its directors or members of the board of management, as the case may be;*
>
> *(h) desirability of allowing control or to have a substantial interest in an undue amount of communications media in Seychelles;*
>
> *(2) Where the service area specified in an application is wholly within Seychelles, a licence shall only be granted to a citizen of Seychelles or to a body corporate incorporated or established by or under the laws of Seychelles.*[986]*.*

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

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[985] Freedom House (2012) 'Seychelles: Freedom of the Press 2012', Freedom House, New York, available online at http://www.freedomhouse.org/report/freedom-press/2012/seychelles.

[986] Seychelles (1994) 'Broadcasting and Telecommunication (Sound Broadcasting Services) Regulations', Republic of the Seychelles, Victoria, Section 4, available online at http://www.seylii.org/sc/legislation/statutory-instrument/1994/21.

There do not appear to be any other discriminatory measures based on nationality. However, the high licensing fees referred to above may act as a deterrent to applicants.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

The situation for broadcasting licences is the same as that described above for telecommunication licences. The primary responsibility for licensing rests with the Seychelles Licensing Authority[987], with the appropriate application form available on their website in this case[988]. The regulations governing broadcasting deal with the particulars required with the application, the criteria by which it will be assessed, and the code of conduct to which the licensee will be bound, but make no mention of the process and procedure[989].

As noted previously, the Minister has the discretion to bypass the licensing process[990]. The Minister is also involved in determining and policing some aspects of the code of conduct[991].

It thus appears that licence allocation is on an open application basis, with most of the responsibility resting on the Seychelles Licensing Authority, but with some Ministerial involvement.

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

The 2000 Broadcasting and Telecommunications Act vests primary responsibility for the regulation of broadcasting with the Minister, but with some regulatory

[987] Seychelles (2000) 'Broadcasting and Telecommunication Act', Chapter 19, Act 2 of 2000, Republic of the Seychelles, Victoria, Sections 7 & 8, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

[988] SLA (nd) 'Application for a Licence in Broadcasting or to Install / Establish any Broadcasting Services in accordance with the Licence (Broadcasting And Telecommunication) Regulations 1988', Seychelles Licensing Authority, Victoria, available online at http://www.sla.sc/forms/Application%20for%20licence%20in%20broadcasting.pdf. . . . . Curiously, the form refers to regulations that appear to have been superseded, and contains some licensing categories that appear to refer to telecommunications licensing. . . . .

[989] Seychelles (1994) 'Broadcasting and Telecommunication (Sound Broadcasting Services) Regulations', Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/statutory-instrument/1994/21.

[990] Seychelles (1986) 'Licences Act: Chapter 113', Act 3 of 1986, Government of Seychelles, Victoria, available online via http://www.seylii.org/sc/legislation/consolidated-act/113.

[991] Seychelles (1994) 'Broadcasting and Telecommunication (Sound Broadcasting Services) Regulations', Republic of the Seychelles, Victoria, Section 5, available online at http://www.seylii.org/sc/legislation/statutory-instrument/1994/21.

functions assigned to separate regulatory bodies[992]. For example, as previously noted, licensing is the responsibility of the Seychelles Licensing Authority. More recently a media regulator, the Seychelles Media Commission (SMC), has been established.

The ambit of the SMC extends across both print and broadcast media. Its object to "preserve the freedom of the media and to improve and main high journalism standards in Seychelles"[993]. Its responsibilities largely deal with content and the conduct of the media (it has recently published a Code of Conduct for the media[994]), but it also has an advisory function in respect of licence applications inter alia[995].

The structure and appointment process of the Seychelles Media Commission makes it relatively independent. Although all 7 members and the chairperson are appointed by the President, five of those appointees are from candidates put forward by a range of bodies including the Seychelles Media Association, the National Assembly, the judiciary, the Department of Information and the NGO sector[996].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

There is no information on market share.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

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[992] Seychelles (2000) 'Broadcasting and Telecommunication Act', Chapter 19, Act 2 of 2000, Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

[993] Seychelles (2010) 'Seychelles Media Commission Act, 2010', Republic of the Seychelles, Victoria, available online at http://www.seymediacom.org/uploads/2/8/2/1/2821898/smc_act_2010.pdf.

[994] SMC (2013) 'Code of Conduct for the Media in Seychelles', Seychelles Media Commission, Victoria, 3 May 2013, available online at http://www.seymediacom.org/uploads/2/8/2/1/2821898/smc_code_of_conduct.pdf.

[995] Seychelles (2010) 'Seychelles Media Commission Act, 2010', Republic of the Seychelles, Victoria, Section 13(2), available online at http://www.seymediacom.org/uploads/2/8/2/1/2821898/smc_act_2010.pdf. Interestingly, advice on licence applications is directed to the government and not to the Seychelles Media Commission.

[996] Seychelles (2000) 'Broadcasting and Telecommunication Act', Chapter 19, Act 2 of 2000, Republic of the Seychelles, Victoria, Section 4, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

As noted previously a Fair Competition Commission with economy-wide jurisdiction has been established, which acts against any agreements, business practices and conduct which has a damaging effect on competition.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is some limited evidence of anti-competitive behaviour in the broadcasting sector. The Fair Trading Commission has made a preliminary prima facie finding of monopolistic behaviour against cable television provider, Intelvision[997].

4.10.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

The Seychelles has held observer status at the WTO since July 1995. Accession negotiations subsequently stalled, but were restarted in 2010. "Updated initial market access offers on goods and services"[998] have apparently been made, but these are not publicly available.

The Seychelles is a member of the Common Market for Eastern and Southern Africa, in addition to its membership of the Southern African Development Community (SADC).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

As noted above, the Seychelles has not yet made any commitments. On the basis of the information available, it would appear that there is no reason why the Seychelles should not be able to make full commitments in respect of cross-border supply and consumption abroad. In respect of commercial presence, there are some limitations affecting market access and national treatment that would need to be made in relation to the broadcasting sector. Similarly, in respect of the presence of natural persons, some general limitations would need to be noted.

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997 FTC (2013) 'The Commission Initial Report: Monopolistic Behaviour and Possible Abuse of Dominance by Intelvision Ltd', Case No FCA14, Fair Trading Commission, Victoria, 26 March 2013, available online via http://www.ftc.sc/index.php?option=com_remository&Itemid=47&func=fileinfo&id=134.

998 WTO (nd) 'Accessions: Seychelles, Trade Organisation, Geneva, available online at http://www.wto.org/English/thewto_e/acc_e/a1_seychelles_e.htm.

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in the telecommunications sector. In respect of the World Bank's MFN Tariff Trade Restrictive Index (TTRI), Seychelles is ranked 89th out of 181 countries[999].

4.10.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[1000] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[1001], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

The Seychelles is currently not a WTO member.

1. Competitive safeguards: ***Fully compliant (5/5).*** The 2000 Broadcasting and Telecommunications Act contains provisions empowering the Minister to act against any operators engaging in collusion, discriminatory access and abuse of dominance[1002]. As noted above, the Fair Trading Commission is also empowered to act against collusive practices and abuse of dominance, and has done so. There do not, however, appear to be any provisions for dealing with concurrent jurisdiction between the Minister and the FTC.

2. Interconnection: ***Minimally compliant (1/5).*** As noted previously, the Act has very weak interconnection provisions. There is no requirement for the

[999] World Bank (2010) 'Seychelles Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Seychelles_brief.pdf.

[1000] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1001] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1002] Seychelles (2000) 'Broadcasting and Telecommunication Act', Section 33, Act 2 of 2000, Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

establishment and publication of interconnection guidelines and procedures, or for the publication of interconnection agreements or reference interconnect offers. The Act does provide for interconnection arrangements and pricing to be "fair and reasonable" [1003], but does not deal with non-discrimination, timeliness or points of interconnection.

3. Universal service: ***Partially compliant (3/5).*** Whilst the Act does include 'universal service' as a concept, there are no specific provisions covering the imposition of universal service obligations upon licensees. Nor are such obligations covered under the 1986 Licences Act. The 2000 Broadcasting and Telecommunications Act does provide for the establishment of a universal service fund under the control of the Minister[1004]. However, the fund does not appear to be in operation[1005].

4. Public availability of licensing criteria: Minimally Compliant (1/5). Despite the public availability of a telecommunications licence application form noted above, there are no specific provisions in either the law nor in publicly available regulation governing criteria, timeframes, terms and conditions or the furnishing of reasons for denial of licence applications.

5. Independent regulators: ***Partially Compliant (3/5).*** There is no independent regulator in the Seychelles, with all regulation undertaken by the Minister. Whilst this arrangement does not accord with international best practice, however, since there is no ownership by the state of any of the operators, the Ministry is effectively separate from and not accountable to any supplier of telecommunication services. There is no information available on the market impartiality of decisions and procedures.

6. Allocation and use of scarce resources: ***Largely Compliant (4/5).*** The 2000 Broadcasting and Telecommunications Act does contain provisions dealing with

[1003] Seychelles (2000) 'Broadcasting and Telecommunication Act', Section 30(5), Act 2 of 2000, Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

[1004] Seychelles (2000) 'Broadcasting and Telecommunication Act', Section 28, Act 2 of 2000, Republic of the Seychelles, Victoria, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

[1005] Seychelles is listed by neither Hudson nor Intelecon. See: Hudson, H (2010) 'Defining Universal Service Funds', Intermedia, March 2010 Volume 38 Issue 1, available online at http://www.iicom.org/intermedia/IM March 2010 USF.pdf and Intelecon (2010) 'Universal Access And Service Funds 2009 : Update From Intelecon', Intelecon Research & Consultancy Limited, Vancouver, p 10, available online at

http://www.inteleconresearch.com/pages/documents/UASFFunds2009update-Oct2009.pdf.

scarce resources, including frequency spectrum, numbers and rights of way[1006]. However, there is no information available on procedures for the allocation and use of these. The national band plan is publicly available on the website of the Ministry[1007].

Although the Seychelles is not yet a member of the WTO, there is not a great deal by way of policy and regulation in the telecommunications sector - despite some areas where improvements to compliance can be made - that would directly conflict with it becoming a signatory to the Regulatory Reference Paper.

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[1006] Seychelles (2000) 'Broadcasting and Telecommunication Act', Act 2 of 2000, Republic of the Seychelles, Victoria, Sections 32, 13 and 18 respectively, available online at http://www.seylii.org/sc/legislation/consolidated-act/19.

[1007] Seychelles (nd) 'Seychelles National Frequency Band Plan (NFBP): 20 MHz to 3 GHz', Department of ICT, Republic of the Seychelles, Victoria, available online at http://www.ict.gov.sc/Documents/National%20Frequency%20Band%20Plan%20-%2020%20-%203100%20MHz.pdf

4.11 SOUTH AFRICA

4.11.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

South Africa's 2005 Electronic Communications Act distinguishes between telecommunications licences in respect of:

- infrastructure ("electronic communications network service" (ECNS) licences, which are required in respect of "satellite systems... fixed systems (circuit- and packet-switched)... mobile systems... fibre optic cables (undersea and land-based)... electricity cable systems (to the extent used for electronic communications services)... [and] other transmission systems, used for conveyance of electronic communications"), and in respect of
- services ("electronic communications service" (ECS) licences for "any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network... [excluding] broadcasting services"[1008].

The Act further distinguishes between individual and class licences in both of these two categories[1009].

Spectrum licensing is dealt with separately[1010].

[1008] RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 1, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.
[1009] RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Chapter 3, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.
[1010] RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Chapter 5, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.

The licensing regime in South Africa is a converged one (horizontal or unified or multi-service), distinguishing only between infrastructure and services. As such, it goes well beyond the vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists South Africa's telephony market as comprising two fixed-line operators, the incumbent, Telkom, and second national operator, Neotel, along with four mobile operators, Vodacom, MTN, Cell C and 8ta (a subsidiary of Telkom, now rebranded as Telkom Mobile), along with "hundreds of alternative service providers are pushing into the market with converged services"[1011].

Following the landmark 2008 Altech judgement, over 400 VANS and ISPs now have licences to build their own networks[1012], allowing them to offer a wide range of such services, including VoIP.

Goldstuck pegs the ISP market in South Africa at 726 Internet Service Providers as at 2009, mostly corporate internal ISPs[1013]. South Africa's Internet Service Providers' Association (ISPA) currently provides a full listing of its 166 members, ranging from 16 "large" members, through 30 "medium" members, down to 5 "honorary" members[1014].

The most recent relatively comparative figures for telecomms market share date from 2013[1015].

South Africa: Fixed & Mobile Subscribers[1016]

[1011] BuddeComm (2012) 'South Africa - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/South-Africa-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

[1012] Jones, C & Kayle, A (2009) 'VANS flock for licences', *ITWeb*, Johannesburg, 16 January 2009, available online at http://www.itweb.co.za/sections/quickprint/print.asp?StoryID=192858.

[1013] Goldstuck, A (2013) 'Internet Access in South Africa 2012', World Wide Worx, Johannesburg.

[1014] ISPA (2012) 'List of Members', Internet Service Providers' Association, Johannesburg, retrieved from http://ispa.org.za/membership/list-of-members/ on 2013-08-22.

[1015] The listed operators issue subscriber numbers on a quarterly basis, as indicated in the respective footnotes. Data for Cell C and Neotel is derived from press statements and news reports, as they are not required to issue formal annual reports, and is hence considerably less accurate.

[1016] It is worth noting that South Africa's horizontal licensing framework and relatively advanced level of liberalisation - especially following the key Altech court judgement which resulted in the awarding of individual infrastructure (electronic communications network services) licences to

	2013	
	Subscribers	**Market Share**
Telkom (fixed)	3 995 000[1017]	5,6%
Neotel (fixed)	155 000[1018]	0,2%
Vodacom (mobile)	29 190 000[1019]	40,9%
MTN (mobile)	24 950 000[1020]	35,0%
Cell C (mobile)	11 500 000[1021]	16,1%
Telkom Mobile / 8ta (mobile)	1 534 000[1022]	2,2%
Total	71 324 000	

over 400 companies, most of which were ISPs - comprises hundreds of companies with individual infrastructure and services licences. A number of these companies are beginning to offer VoIP and other telecommunications services, but their subscriber numbers appear currently still very low.

1017 As at 31 March 2013. See: Telkom (2013) 'Telkom SA SOC Limited Group Annual Results for the year ended 31 March 2013', Telkom, Pretoria, p5, available online at https://secure1.telkom.co.za/apps_static/ir/pdf/financial/pdf/Annual_Telkom_2013.pdf.

1018 As at 31 March 2013. See: Tubbs, B (2013) 'Neotel hits profitability milestone', ITWeb, Johannesburg, 29 May 2013, available online at http://www.itweb.co.za/index.php?option=com_content&view=article&id=64468. The figure for business "customers", numbering 3 000 and included here, probably equates to a much larger number of business lines.

1019 As at 31 March 2013. See: Vodacom (2013) 'Vodacom Group Limited trading statement for the quarter ended 30 June 2013', Press release, Vodacom, Johannesburg, 18 July 2013, available online at http://www.vodacom.co.za/cs/groups/public/documents/vodacom.co.za_portal_webassets/tradingstatementq12014_final.pdf.

1020 As at 31 March 2013. See: MTN (2013) 'Quarterly update for the period ended 31 March 2013', MTN Group, Johannesburg, p4, available online at http://www.mtn.com/Investors/Financials/QuaterlyResults/MTN%20Quartely%20March%202013%20Final.pdf.

1021 Date unclear, probably early to mid 2013. See: Tarrant, H (2013) 'Is Cell C taking market share?', MoneyWeb, Johannesburg, 24 July 2013, available online at http://www.moneyweb.co.za/moneyweb-broadband/is-cell-c-taking-market-share. . . . .

1022 As at 31 March 2013. See: Telkom (2013) 'Telkom SA SOC Limited Group Annual Results for the year ended 31 March 2013', Telkom, Pretoria, p5, available online at https://secure1.telkom.co.za/apps_static/ir/pdf/financial/pdf/Annual_Telkom_2013.pdf.

According to the ITU, the market in South Africa as at 2011 was broken down as follows: 4 127 000 fixed-line subscribers[1023]; 64 000 000 mobile subscribers[1024]. This translates to a per capita market penetration rates in the telecommunications sector for South Africa as at 2011 of 8,2% for fixed-line, 126,8% for mobile and 21,0% for the Internet (from 8,4%, 100,5% and 18,0% respectively in 2010)[1025].

Goldstuck estimates 11 303 000 Internet subscriptions in South Africa as at the end of 2012, with growing proportions of broadband (6 543 000 – ie 58%) and cellular (2 900 000 – ie 26%) subscriptions[1026].

Because of the plethora of smaller ISPs, market segmentation will only be provided in respect of the much more measurable broadband market.

South Africa: Broadband Subscribers		
	2012[1027]	
	Subscribers	**Market Share[1028]**
Telkom (ADSL)	875 000	11%
Neotel (CDMA)	150 000	2%
iBurst	50 000	1%

1023 ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

1024 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

1025 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

1026 Goldstuck, A (2013) 'Internet Access in South Africa 2012', World Wide Worx, Johannesburg, p 140. Goldstuck makes a distinction between subscriptions and users, because many users have multiple access paths (eg ADSL at home, 3G at work and cellular in between). Elsewhere in the same report (p115), Goldstuck estimates the total number of unique broadband users to be 6 704 000. The discrepancy between this figure and the one cited above is not explained.

1027 Goldstuck, A (2013) 'Internet Access in South Africa 2012', World Wide Worx, Johannesburg, p113. Some of the figures are projections, extrapolated from earlier figures.

1028 Figures are given to the nearest percent because some of the data are estimates.

MTN (3G)	2 000 000	24%
Vodacom (3G)	5 000 000	61%
CellC (3G)	170 000	2%
Total	8 245 000	

Most recent figures, as at 31 March 2013, have 870 505 ADSL subscribers for Telkom[1029], and 14 386 000 "active data customers" for Vodacom[1030]. MTN reports 7,7 million "3G devices" on their network as at 31 December 2012[1031].

There are also a number of companies active in the wholesale provision of terrestrial fibre. Telkom has the largest terrestrial fibre network, which it states as comprising 147 000 km, claiming this to make up 80% of the total terrestrial fibre network in South Africa[1032]. Other providers of terrestrial fibre include:

- Neotel - 23 000 km[1033] (Tata Communications / Nexus Connection / CommuniTel);
- Broadband Infraco – 12 800 km[1034] (100% state-owned);
- Dark Fibre Africa – 7 300 km[1035] (DFA) (Community Investment Ventures (CIV) / Venfin);

[1029] Telkom (2013) 'Telkom SA SOC Limited Group Annual Results for the year ended 31 March 2013', Telkom, Pretoria, p2, available online at https://secure1.telkom.co.za/apps_static/ir/pdf/financial/pdf/Annual_Telkom_2013.pdf

[1030] Vodacom (2013) 'Vodacom Integrated report for the year ended 31 March 2013', Vodacom, Johannesburg, available online at http://www.vodacom.co.za/cs/groups/public/documents/vodacom.co.za_portal_webassets/vodacomir2013.pdf. This figure includes all users of data services (excluding SMS and MMS), and clearly dramatically overstates the number of 3G subscribers.

[1031] MTN (2013) 'MTN Group Limited Integrated Report for the year ended 31 December 2012', MTN Group, Johannesburg, p49, available online at http://www.mtn.com/Investors/Financials/Documents/ar_integrated_report2012.pdf. What is meant by a '3G device' is not defined, but this presumably includes smartphones and tablets, whether or not they actively consume data.

[1032] MyBroadband (2013) 'Telkom's unrivalled fixed line network', 16 June 2013, *MyBroadband*, Johannesbuirg, available online at http://mybroadband.co.za/news/telecoms/80239-telkoms-unrivalled-fixed-line-network.html. Whilst the 147 000 is correct according to the Telkom Annual Report, the estimate of 80% of the market is clearly an overestimate as the ensuing figures suggest. Telkom allegedly counts the length of the raw fibre rather than the length of the network (BMI-Tech, personal communication, 2013-09-25). BMI-Tech puts its national long distance network at 30 040 km.

[1033] MyBroadband (2013) 'Telkom's unrivalled fixed line network', 16 June 2013, *MyBroadband*, Johannesbuirg, available online at http://mybroadband.co.za/news/telecoms/80239-telkoms-unrivalled-fixed-line-network.html.

[1034] Vorster, G (2013) 'Broadband Infraco posts another loss', *MyBroadband*, Johannesburg, 8 August 2013, available online at http://mybroadband.co.za/news/broadband/83857-broadband-infraco-posts-another-loss.html.

[1035] IT News Africa (2013) 'Dark Fibre Africa appoints Reshaad Sha as Chief Strategy Officer', IT News Africa, Johannesburg, 31 May 2013, available online at

- Fibreco – 800 km[1036] (CellC, Internet Solutions and Convergence Partners – 12 000 km planned);
- NLD Consortium – 680 km[1037] (Neotel / MTN / Vodacom / SA National Roads Agency (SANRAL));
- BWired – 940 km[1038] (Ericsson South Africa / City of Johannesburg);
- Metrofibre Networx (provides fibre to the premises (FTTX), principally in Gauteng);
- Liquid Telecom - 15 000 km (Southern Africa, incl South Africa, Botswana, DRC, Kenya, Lesotho, Rwanda, Tanzania, Zambia, Zimbabwe)[1039] (Econet Wireless International).

The shareholding of Telkom (and likewise, of its mobile subsidiary, Telkom Mobile / 8ta) is broken down as follows:

- 42,3% - Free float / stock exchange;
- 39,8% - South African government;
- 10,5% - Public Investment Corporation (government);
- 5,4% - Allan Gray (South Africa);
- 2% - Telkom treasury stock[1040].

The shareholding of Neotel is broken down as follows:

- 68,5% - Tata Communications (India)[1041];

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http://www.itnewsafrica.com/2013/05/dark-fibre-africa-appoints-reshaad-sha-as-chief-strategy-officer/.

[1036] MyBroadband (2012) 'FibreCo completes 800km of first fibre route', *MyBroadband*, Johannesburg, 8 November 2012, available online at http://mybroadband.co.za/news/telecoms/64262-fibreco-completes-800km-of-first-fibre-route.html.

[1037] Cutcher, R (2013) '680km stretch of National Long Distance cable goes live in SA', HumanIPO, Cape Town, 6 February, 2013, available online at http://www.humanipo.com/news/3781/680km-stretch-of-national-long-distance-cable-goes-live-in-sa/.

[1038] BWired (nd) 'What we do', BWired, Johannesburg, available online at http://www.bwired.co.za/AboutUs/Whatwedo.aspx.

[1039] Mwangi, M (2013) 'Liquid Telecom continues with quest to be Africa's largest network', Internet Society, Reston VA, 27 August 2013, available online at http://www.internetsociety.org/blog/2013/08/liquid-telecom-continues-quest-be-africas-largest-network. It is unclear what proportion of this network is in South Africa.

[1040] Telkom (2012) 'Telkom Group Integrated Annual Report 2012', Telkom, Pretoria, p6, available online at https://secure1.telkom.co.za/apps_static/ir/pdf/financial/pdf/Group%20Review%20of%20the%20Integrated%20report.pdf.

- 19% - Nexus Connection (South Africa)[1042];
- 12,5% - CommuniTel (partially Namibia)[1043].

The shareholding of Vodacom is broken down as follows[1044]:

- 65,0% - Vodafone Group Plc (United Kingdom);
- 13,9% - Government of South Africa;
- 3,2% - Public Investment Corporation (government);
- 17,9% - Miscellaneous.

The shareholding of MTN is broken down as follows[1045]:

- 68,0% - Public / stock exchange;
- 16,9% - Government Employees Pension Fund;
- 9,7% - Lombard Odier Darier Hentsch & Cie (Switzerland);
- 4,1% - Empowerment (South Africa);
- 1,3% - Miscellaneous.

The shareholding of Cell C is broken down as follows[1046]:

- 75,0% - Oger Telecom (Saudi Arabia);

[1041] ZeeNews (2012) 'Tata-led Neotel expanding operations in South Africa', Zee News, Noida, 9 November 2012, available online at http://zeenews.india.com/business/news/companies/tata-led-neotel-expanding-operations-insouth-africa_64122.html.

[1042] Neotel (nd) 'Nexus Connection', Neotel, Johannesburg, available online at https://www.neotel.co.za/wps/portal/neotel_nexus_connexion. Nexus comprises 134 SMMEs, NGOs, business groups, trade union business arms and business persons.

[1043] Neotel (nd) 'CommuniTel', Neotel, Johannesburg, online at https://www.neotel.co.za/wps/portal/neotel_communitel. CommuniTel is jointly owned by the MKhonto we Sizwe Military Veterans Association and Telecom Namibia Limited.

[1044] Vodacom (2013) 'Vodacom Integrated report For the year ended 31 March 2013', Vodacom, Johannesburg, August 2011, p100, available online at http://www.vodacom.co.za/cs/groups/public/documents/vodacom.co.za_portal_webassets/vodacomir2013.pdf.

[1045] MTN (2013) 'MTN Group Limited Integrated Report for the year ended 31 December 2012', MTN Group, Johannesburg, p211, available online at http://www.mtn.com/Investors/Financials/Documents/ar_integrated_report2012.pdf.

[1046] Tubbs, B (2012) 'Cell C gets R1.5bn boost', ITWeb, Johannesburg, 25 May 2012, available online at http://www.itweb.co.za/index.php?option=com_content&view=article&id=55162. Saudi Oger is primarily a construction company wholly owned by the family of assassinated Lebanese Prime Minister of Rafic Hariri, but with links to the Saudi royal family, and rumoured to have funded South Africa's ruling party (See: Brümmer, S (2001) 'Cell Tender Wrangle : Arms Deal and Party Donations to Blame?', Sunday Independent, Johannesburg, 21 January 2001, copy available online at http://www.armsdeal-vpo.co.za/articles00/cell_tender.html.

- 25,0% - CellSAf (South Africa).

Limited information is available on the shareholding of most of the other large ISPS.

According to TechCentral, ISP iBurst is wholly owned by Wireless Business Solutions, whose shareholders include "CEO Thami Mtshali (the largest), Investec, the Development Bank of Southern Africa and a consortium led by Blue Label Telecoms co-CEO Brett Levy"[1047].

Internet Solutions, one of South Africa's founding ISPs, is now a subsidiary of Dimension Data, which in turn is owned by Nippon Telegraph and Telephone (Japan)[1048].

ISP MWeb is 100% owned by Naspers[1049], which in turn is listed on the Johannesburg Stock Exchange.

South Africa's international telecommunications access is provided by a plethora of undersea cables, including:

- SAT-3 (South Atlantic 3 / West Africa Submarine Cable) with a capacity of 340 Gbit/s, linking South Africa's landing station at Melkbosstrand with Sesimbra, Portugal, along with 10 other offshore landing stations, of which 8 are in Africa, and in which Telkom is a major investor[1050];
- SAFE (South Africa Far East) with a capacity of 440 Gbit/s, linking South Africa's landing stations at Melkbosstrand and Mtunzini with Penang, Malaysia and Cochin, India, and in which Telkom is a major investor[1051];
- WACS (West Africa Cable System) with a capacity of 5,12 Tbit/s, linking South Africa's landing station at Yzerfontein with Sesimbra, Portugal and Brean, United Kingdom, along with 11 other offshore landing stations, of which 10 are in Africa, and in which shareholders include MTN, Angola Cables, Broadband Infraco, Cable & Wireless, Congo Telecom, Office Congolais des Postes et Telecommunications (OCPT), PT Comunicações, Togo Telecom, Tata Communications, Telecom Namibia, Telkom and Vodacom[1052];

[1047] TechCentral (2012) 'Corporate action looming at iBurst', TechCentral, Johannesburg, 1 March 2012, available online at http://www.techcentral.co.za/corporate-action-looming-at-iburst/.
[1048] Wikipedia (nd) 'Dimension Data Holdings', *Wikipedia*, available online at http://en.wikipedia.org/wiki/Dimension_Data_Holdings.
[1049] Naspers (nd) 'Company History', Naspers, Cape Town, available online at http://www.naspers.com/company-history.php.
[1050] Wikipedia (nd) 'SAT-3/WASC', *Wikipedia*, available online at http://en.wikipedia.org/wiki/SAT-3/WAS.C
[1051] Wikipedia (nd) 'SAFE (cable system)', *Wikipedia*, available online at http://en.wikipedia.org/wiki/SAFE_(cable_system).
[1052] Wikipedia (nd) 'WACS (cable system)', *Wikipedia*, available online at http://en.wikipedia.org/wiki/WACS_(cable_system).

- Seacom with a capacity of 2,6 Tbit/s, linking South Africa's landing station at Mtunzini with Marseille, France and Mumbai, India, along with 4 other offshore landing stations elsewhere in Africa[1053], and in which shareholders include Industrial Promotion Services (Kenya - 25%), VenFin Limited (South Africa - 25%), Herakles Telecom (USA - 25%), Convergence Partners (South Africa - 12,5%) and the Shanduka Group (South Africa - 12.5%)[1054];
- EASSy (Eastern Africa Submarine Cable System) with a capacity of 2,72 Tbit/s, linking South Africa's landing station at Mtunzini with Port Sudan, Sudan, along with 7 additional landing stations elsewhere in Africa, and with a diverse shareholding comprising the West Indian Ocean Cable Company (WIOCC, made up of Botswana Telecommunications Corporation, DALKOM Somalia, Djibouti Telecom, Gilat Satcom Nigeria, Government of Seychelles, Lesotho Communications Authority, Onatel Burundi, TDM Mozambique, Telkom Kenya, UCOM Burundi, Uganda Telecom, Zantel Tanzania, TelOne Zimbabwe) MTN, Sudatel Sudan, Vodacom, Telkom, Botswana Telecommunications Corporation, BT Group, Global Marine Systems, Comores Telecom, Telma Madagascar, Etisalat, FT, Mauritius Telecom, STC Saudi Arabia, Bharti Airtel, Neotel, Tanzania Telecommunications Company Limited[1055].

Range of Services: Type of services offered by foreign entities.

As can be seen from the above, there is considerable foreign investment in a number of the operators providing services in the market, mostly in the mobile and mobile broadband sub-sectors.

Market Share: market share between foreign and local suppliers[1056].

Vodacom (controlled by Vodafone Plc, United Kingdom) is the dominant player in both voice telephony and broadband markets, in which it holds 41% and 61% market share respectively. Cell C (controlled by Saudi Oger, Saudi Arabia) is a small player (16% market share) in the telephony market, on the back of rapid growth possibly attributable to recent price cuts. Neotel (controlled by Tata Communications, India) is still very much a bit player in both markets.

Domestic companies together account for 43% and 36% of the telephony and broadband markets respectively.

[1053] Wikipedia (nd) 'SAFE (cable system)', *Wikipedia*, available online at http://en.wikipedia.org/wiki/SAFE_(cable_system).

[1054] ManyPossibilities (2012) 'African Undersea Cables', ManyPossibilities, Cape Town, available online at http://manypossibilities.net/african-undersea-cables/.

[1055] Wikipedia (nd) 'EASSy (cable system)', *Wikipedia*, available online at https://en.wikipedia.org/wiki/EASSy_(cable_system).

[1056] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There are a number of stakeholder groups active in the sector, that may be expected to lobby for or against ongoing liberalisation. The Congress of South African Trade Unions (COSATU), and its affiliate, the Communications Workers Union (CWU), frequently intervene on policy as well as labour relations and salary issues[1057]. COSATU, for instance teamed up with elements within the sector regulator, ICASA, in a last-minute court bid to stop the stock exchange listing of Vodacom[1058].

Other unions active in the sector include the right-wing Solidarity and the sweetheart South African Communications Union (SACU)[1059].

There are also a number of business-oriented groupings active in the sector, although these are unlikely, however, to oppose further liberalisation. They include: the South African Communications Forum (SACF); the Internet Service Providers' Association (ISPA); Business Process enabling South Africa (BPeSA), the FTTH Council Africa, the IT Association, the Black IT Forum[1060], and the possibly defunct Communications Users Association of South Africa (CUASA).

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

Licences on South Africa are technology-neutral, distinguishing only between those for infrastructure ("electronic communications network service") and services "electronic communications service"[1061].

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or

[1057] See their websites - http://cosatu.org.za and http://cwu.org.za - for more information.
[1058] Muller, R (2009) 'Cosatu and ICASA try to stop Vodacom listing', *MyBroadband*, Johannesburg, 16 May 2009, available online at http://mybroadband.co.za/news/business/8073-cosatu-and-icasa-try-to-stop-vodacom-listing.html.
[1059] See Solidarity's website at http://english.solidariteitbeweging.co.za/. SACU does not appear to have a website.
[1060] See their respective websites: http://www.sacomforum.org.za/, http://ispa.org.za/, http://www.bpesa.org.za/, http://www.ftthcouncilafrica.com/, http://www.ita.org.za/ and http://www.bitf.org.za/.
[1061]RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf, Section 1.

prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There is still a formal limitation on the availability of individual infrastructure licences, with the Minister acting as gatekeeper, despite the Altech judgement which bestowed such licences on previously licensed ISPs and VANS providers[1062]. The 2005 Electronic Communications Act still notes that "in consideration of the implementation of the managed liberalisation policies, the [regulator] may only accept and consider applications for individual electronic communications network services licences in terms of a policy direction issued by the Minister"[1063] - thereby creating a lucrative market in the resale of such licences[1064].

South Africa's GATS commitments covering communications services imposed numerous restrictions on market entry, but almost all of these have now been superseded. They included the limitation that "cross-border supply" of most telecommunications services could take place "only through the network of Telkom monopoly [sic] or subsequent duopoly on international traffic"[1065].

A number of commitments with respect to liberalisation were also made.

South Africa's horizontal GATS commitments relating to national treatment note that "local borrowing by South African registered companies with a non-resident

[1062] Thornton, L (2008) 'High Court Ruling Paves the Way for Competition from Alternative Communications Providers in South Africa', Lisa Thornton Inc, Johannesburg, 1 September 2008, available online at http://thornton.co.za/resources/lti-bna-altech%20court%20ruling.pdf.

[1063] RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf, Section 5 (6).

[1064] Cf: MyBroadband (nd) 'what to do with my - IECNS & IECS License [sic]', weblog, MyBroadband, Johannesburg, online at http://mybroadband.co.za/vb/showthread.php/201665-what-to-do-with-my-IECNS-amp-IECS-License and Adoos (nd) 'ICASA ECNS & ECS Licence FOR SALE - R500,000', advertisement, Adoos Classifieds, SL, Madrid, online at http://www.adoos.co.za/post/7046095/icasa_ecns_amp_ecs_licence_for_sale.

[1065] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, pp 12-14, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf.

shareholding of 25 per cent or more is limited"[1066]. This appears to have been somewhat relaxed since then with restrictions only applicable to "businesses with non-resident ownership or control equal to or greater than 75%"[1067].

Other than that there are no restrictions on local incorporation. As the WTO note: "with the exception of financial institutions, any foreign company may establish a place of business in South Africa, and conduct its activities without having to incorporate as a local entity" subject to obtaining the necessary "business permit"[1068].

In terms of the country's numerous GATS commitments covering communications services, "foreign investment in suppliers…. [of] Paging services, Personal radio communication services, Trunked radio system services [and] Mobile Cellular, including mobile data… [is] permitted up to a cumulative maximum of 30 per cent"[1069].

The World Bank makes the same - but incorrect - point that "share of foreign capital in companies owning or operating telecommunications infrastructure or providing telecommunications services must not exceed 30% in order to obtain the required operating licenses"[1070]. However, Vodafone Plc originally held 35% of Vodacom, and acquired an additional 15% in early 2006[1071], and a further 15% in 2008[1072], bringing its total shareholding up to 65%.

However, the World Bank gives South Africa a score of 70 out of 100 for foreign equity participation in the telecommunications sector overall[1073].

[1066] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf, p2.

[1067] WTO (nd) 'Trade Policy Review: Southern African Customs Union - Annex 4: South Africa', WT/TPR/S/222/ZAF, World Trade Organisation, Geneva, p293,

[1068] WTO (nd) 'Trade Policy Review: Southern African Customs Union - Annex 4: South Africa', WT/TPR/S/222/ZAF, World Trade Organisation, Geneva, pp294,5,

[1069] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, p13, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf.

[1070] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p153.

[1071] Franz, L (2006) 'Vodafone-VenFin deal gets go-ahead', *iWeek*, Johannesburg, 19 January 2006, available online at http://www.iweek.co.za/in-the-know/vodafone-venfin-deal-gets-go-ahead.

[1072] Vodafone (2008) 'Vodafone to Acquire an Additional 15% Stake in Vodacom Group', press release, Vodafone Plc, London, 6 December 2008, available online at http://www.vodafone.com/content/index/media/group_press_releases/2008/vodafone_to_acquire0.html.

[1073] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p153.

South Africa has made no general horizontal GATS commitments limiting the commercial presence of foreign-owned enterprises, and none of its various communications services commitments affect the legal status of foreign companies[1074].

The World Bank notes that access to land is readily available for foreign companies investing in South Africa[1075].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

Whist South Africa has indicated it is not bound to any general horizontal GATS commitment relating to foreign personnel, it states that it will permit "the temporary presence for a period of up to three years, unless otherwise specified, without requiring compliance with an economic needs test, of the following categories of natural persons providing services: Services Salespersons…. Intra-corporate Transferees…. Executives…. Managers…. Specialists…. Professionals… Personnel Engaged in Establishment"[1076]. Despite high growth rates and skills shortages in the ICT sector, securing the necessary work permit is notoriously difficult[1077].

The World Bank notes that South Africa's "Broad-Based Black Economic Empowerment Act urges companies to have meaningful representation of previously disadvantaged groups"[1078]. The recently promulgated ICT Sector Code, developed in accordance with the Act, for example, commits companies in the ICT sector to a "black ownership target of 30%" and to setting aside "5% net profit after tax to be spent on enterprise development initiatives that are aimed

[1074] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf.
[1075] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p44.
[1076] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf, pp 2-4. Lengthy definitions of each of the categories are included. . . . .
[1077] Cf: Prospects (2011) 'South Africa: Job market - What are my chances of getting a job?', Graduate Prospects Ltd, Manchester, available online at http://www.prospects.ac.uk/south_africa_job_market.htm.
[1078] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p37.

at growing and developing black owned ICT enterprises"[1079]. In addition, as noted by one legal expert, "Black Economic Empowerment... [has been used] as a guiding factor in determining who is awarded licences, etc"[1080].

South Africa is ranked 35th out of 183 countries in terms of ease of doing business by the World Bank[1081].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

Licensing is almost entirely under the control of the regulator. Individual licensing follows an application and evaluation process, although, as noted above, requires Ministerial intervention in the case of individual infrastructure licences. Class licences follow a much simpler registration process[1082].

Regulations issued under the now repealed 1996 Telecommunications Act enforce diversity of "ownership interest or control interest... in any telecommunication service category [according to the vertical licence classification then in force] in a concentrated market" (which is defined as having less than five licensees, unless otherwise stipulated by the regulator)[1083].

There have been no restrictions on the use of VoIP since February 2005[1084]; and there are no restrictions discriminating against foreigners in respect of gateway licences (which would require an individual infrastructure (ECNS) licence). The VoIP Catalog lists 39 VoIP providers in South Africa[1085].

[1079] MyBroadband (2012) 'ICT sector code for BEE gazetted', MyBroadband, Johannesburg, 13 June 2012, available online at http://mybroadband.co.za/news/business/52565-ict-sector-code-for-bee-gazetted.html. . . . .

[1080] Limpitlaw, J (2012) 'South Africa', Chapter 30 in Long, C (ed) (2012) *Global Telecommunications Law and Practice*, Sweet & Maxwell, London, p5256.

[1081] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

[1082] Limpitlaw, J (2012) 'South Africa', Chapter 30 in Long, C (ed) (2012) *Global Telecommunications Law and Practice*, Sweet & Maxwell, London, pp 5228-5233.

[1083] ICASA (2003) 'Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services in terms of Section 52', Notice No R 105, *Government Gazette*, No 24288 16 January 2003, Independent Communications Authority of South Africa, Johannesburg, available online at http://thornton.co.za/resources/24288.pdf.

[1084] DoC (2004) 'Policy Announcement by the Minister of Communications, Dr Ivy Matsepe-Casaburri', Department of Communications, Pretoria, 2 September 2004, available online at http://www.info.gov.za/speeches/2004/04090310151004.htm.

[1085] VoIP Catalog (nd) 'VoIP Providers in South Africa', VoIP Catalog, available online at http://www.voip-catalog.com/voip_countries_south-africa_1.html.

There are no anti-competitive or discriminatory provisions in respect of interconnection, save those that apply to dominant operators. For example, The regulator's interconnection guidelines specifically require non-discrimination and transparency[1086]. Further, the regulator's Call Termination Regulations, 2010/11 found Vodacom, MTN and Telkom to enjoy significant market power in the mobile and fixed voice markets respectively, and imposed on them lower interconnection pricing and other pro-competitive conditions such as the publication of a reference interconnect offer[1087].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As noted above, the regulator found Vodacom and MTN to be dominant in the mobile voice sector, and Telkom to be dominant in the fixed voice sector. Based on the figures provided above, Telkom has a near monopoly market share of 96% of the fixed telephony market, while Vodacom and MTN have market shares respectively of 43% and 37% in the mobile telephony market.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for South Africa in 2008 was 2,6% of monthly gross national income per capita - well below the average for sub-Saharan Africa of 23%, making South Africa the 4th cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 4,7% and 5,5% (cheapest of 32 African countries)[1088].

A number of studies over the years have consistently pointed to the unjustifiably high price of telecommunications services in South Africa[1089]. There are

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1086 ICASA (2010) 'Interconnection Regulations 2010', Regulation Gazette No 9263, *Government Gazette* Vol 538 No 33101, 9 April 2010, Independent Communications Authority of South Africa, Johannesburg.

1087 ICASA (2010) ''Call Termination Regulations' Pursuant to Section 67(4) of the Electronic Communications Act No 36 of 2005', Notice 314 of 2010, Government Gazette Vol 538 No 33121, 16 April 2010, Independent Communications Authority of South Africa, Johannesburg.

1088 ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

1089 See, for example: Genesis Analytics (2007) 'South African telecommunications prices – An updated international price comparison, with regulatory recommendations', Occasional paper no 3, prepared for Business Leadership South Africa, Genesis Analytics, Johannesburg, available online at http://www.businessleadership.org.za/documents/BLSA%20OP%203%20Telcom%20Prices-20071126.pdf, and Smit, D, Neilson, B & Roetter, M (2008) 'International peer benchmarking study on the cost to communicate in South Africa', Vols 1 & 2, November 2008, Department of currently several interventions afoot, driven by civil society, the regulator and the Minister variously, all asserting that the cost of communications remains too high and needs to be reduced[1090].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

South Africa's 1998 Competition Act regulates competition across the entire economy, establishing bodies with investigative and enforcement powers, viz the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Act also deals with concurrent jurisdiction in respect of regulators of other sectors, such as telecommunications[1091]. The latter issue is dealt with in terms of a memorandum of understanding between the two regulatory bodies[1092].

The Competition Act has extensive sections dealing with "restrictive horizontal practices" between firms, with "restrictive vertical practices", with "abuse of dominance", and with "price discrimination" by dominant firms[1093]. The Competition Commission and Tribunal enjoy extensive powers of search and summons. Complaints are referred to the Competition Tribunal, which may issue interim orders, confirm consent orders, impose orders, divestiture orders and administrative penalties of up to 10% of company turnover[1094].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

The telecommunications sector in South Africa is highly litigious. There have been numerous allegations and charges over the years relating to alleged anti-competitive conduct in the sector. The most prominent of these have related to the fixed-line incumbent, Telkom, which recently, on the one hand, received a

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Communications, Pretoria, and researchICTafrica (2012) 'Africa Prepaid Mobile Price Index 2012: South Africa', RIA Policy Brief SA No 1 2012, researchICTafrica, Cape Town, available online at http://www.researchictafrica.net/docs/SA_Mobile_Prepaid_policy_brief.pdf.

1090 See, inter alia: Isaacs, L (2013) 'R2K to protest communication rates', *Eyewitness News*, Johannesburg, 12 June 2013, available online at http://ewn.co.za/2013/06/12/R2K-to-protest-expensive-communication-rates; Wilson, C (2013) 'Carrim takes aim at call costs', *TechCentral*, Johannesburg, 23 August 2013, available online at http://www.techcentral.co.za/carrim-takes-aim-at-call-costs/43084/; Wilson, C (2013) 'Mobile rates could fall further', *TechCentral*, Johannesburg,, 7 June 2013, available online at http://www.techcentral.co.za/mobile-rates-could-fall-further/40913/.

1091 RSA (1998) Competition Act, No 89 of 1998 (as amended), Republic of South Africa, Pretoria, Section 3, available online at http://www.compcom.co.za/thelaw/ConsolidatedAct.doc.

1092 Competition Commission (2002) 'Memorandum of Agreement Entered into between the Competition Commission and the Independent Communications Authority of South Africa', Competition Commission, Pretoria.

1093 RSA (1998) Competition Act, No 89 of 1998 (as amended), Republic of South Africa, Pretoria, Chapter 2, available online at http://www.compcom.co.za/thelaw/ConsolidatedAct.doc.

1094 RSA (1998) Competition Act, No 89 of 1998 (as amended), Republic of South Africa, Pretoria, Sections 46 – 60, available online at http://www.compcom.co.za/thelaw/ConsolidatedAct.doc.

hefty fine from the Competition Tribunal[1095] and, on the other, was the subject of a consent order regarding the functional separation of its wholesale and retail operations[1096].

4.11.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

South Africa's 2005 Electronic Communications Act treats the licensing of "broadcasting services" as distinct from infrastructure ("electronic communications network service" (ECNS)) and services ("electronic communications service" (ECS)) licences[1097].

Signal distributors are not separately licensed, requiring an infrastructure ("electronic communications network service" (ECNS)) licence.

As noted previously, spectrum licensing is dealt with separately[1098].

The licensing regime for broadcasting in South Africa is thus in alignment with the vertical framework as set out in W/120, despite the fact that the overall framework is a converged one (horizontal or unified or multi-service).

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of

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[1095] Mawson, N (2012) 'Tribunal fines Telkom R449m for 'bullying'', *ITWeb*, Johannesburg, 7 August 2012, available online at http://www.itweb.co.za/index.php?option=com_content&view=article&id=57520:tribunalfines-telkom-r449m-for-bullying&catid=260.

[1096] McLeod, D (2013) 'Tribunal nod to Telkom abuse settlement', *TechCentral*, Johannesburg, 18 July 2013, available online at http://www.techcentral.co.za/tribunal-nod-to-telkom-abuse-settlement/41996/

[1097] RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 1, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.

[1098] RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf, Chapter 5.

a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

South Africa has a 3 tier system of public, private commercial, and community broadcasting, covering both radio and television broadcasting platforms. Individual broadcast service licensing in South Africa falls under a complex series of categorisations, including commercial sound broadcasting, subscription broadcasting, free to air commercial television, public broadcasting[1099], while class broadcast service licensing includes geographic and community of interest broadcasters[1100].

Public television broadcasting is provided by the South African Broadcasting Corporation (three channels, viz SABC1, SABC2 and SABC3).

Commercial television licensees include e.tv (free-to-air, terrestrial, analogue), M-Net (subscription, terrestrial, analogue), DStv (subscription, satellite, digital with 120+ channels) and Top TV / On Digital Media (subscription, satellite, digital with 60+ channels) free-to-air). ICASA additionally lists E.Sat (e.tv) and Telkom Media as subscription broadcasting licensees[1101]. A number of new satellite TV broadcasters are expected to enter the market shortly[1102].

Community television licensees are all free-to-air, analogue and include Soweto TV, Cape Town TV, ASTV (Afrikaanse Satelliet Televisie, carried on TopTV) and Nongoma TV[1103] as well as Trinity Broadcasting Network (carried on DStv), the latter two being community of interest as opposed to geographical community television broadcasters.

The market share in the television market for the main broadcasters is as follows:

1099 ICASA (2009) 'List of Individual Public & Commercial Broadcasting Licensees Database', Independent Communications Authority of South Africa, Johannesburg, available online at https://www.icasa.org.za/Portals/0/Regulations/Licensees/Individual/I-Broadcasting%20Service_010409.pdf.

1100 ICASA (2006) 'List of Community, Commercial and Public Broadcasters Licensed by ICASA Broadcasting Division, Independent Communications Authority of South Africa, Johannesburg.

1101 ICASA (2009) 'List of Individual Public & Commercial Broadcasting Licensees Database', Independent Communications Authority of South Africa, Johannesburg, available online at https://www.icasa.org.za/Portals/0/Regulations/Licensees/Individual/I-Broadcasting%20Service_010409.pdf.

1102 Gedye, L (2013 'SA's satellite TV explosion', City Press, Johannesburg, 4 August 2013, available online at http://www.citypress.co.za/business/sas-satellite-tv-explosion/.

1103 Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p10, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf and Wikipedia (nd) 'List of television stations in Africa, *Wikipedia*, available online at http://en.wikipedia.org/wiki/List_of_television_stations_in_Africa#South_Africa.

South Africa: Television Viewership		
	July 2011 – June 2012[1104]	
	Viewers	Market Share[1105]
SABC1	27 867 000	26%
SABC2	25 007 000	23%
SABC3	20 389 000	19%
e.tv	23 981 000	22%
DStv	9 598 000	9%
Top TV	513 000	0%

The following list of individual broadcast service radio licensees is compiled from somewhat dated licensing data from ICASA[1106], cross-referenced against market data from OMD[1107].

- 2 national public service radio stations, all provided by the SABC, viz: SAFM & RSG (Radiosondergrense);
- 3 national commercial radio stations, all provided by the SABC, viz: 5fm, Metro FM, Radio 2000;
- 10 regional public service / commercial radio stations, mostly in indigenous languages, again all provided by SABC, viz: Ikwekwezi FM, Lesedi FM, Ligwalagwala FM, Motsweding FM, Munghana-Lonene FM, Phalaphala FM, Thobela FM, Umhlobo Wenene FM, Ukhozi FM, Y-K FM;
- 18 commercial radio stations, all regional in scope, viz: 567 Capetalk, 702 Talk Radio, 94,5 Kfm, 94.7 Highveld Stereo, 99.2 YFM, Algoa FM,

1104 Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p12, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf. Koenderman's figures come from the All Media and Products Survey, market research conducted on an ongoing basis by the South African Audience Research Foundation (SAARF), Totals are not provided because figures are not mutually exclusive.

1105 Figures are given to the nearest percent.

1106 ICASA (2009) 'List of Individual Public & Commercial Broadcasting Licensees Database', Independent Communications Authority of South Africa, Johannesburg, available online at https://www.icasa.org.za/Portals/0/Regulations/Licensees/Individual/I-Broadcasting%20Service_010409.pdf.

1107 Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, pp15,6, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

Capricorn FM, Classic FM 102.7, East Coast Radio, Gagasi 99.5, Good Hope FM, Heart, Jacaranda FM, Kaya FM 95.9, Lotus FM, M-Power FM, North West FM, OFM (Oranje), Tru FM.

The numbers of class geographical community and community of interest radio stations fluctuates continually, numbering over 180[1108], only one of which (Radio Pulpit / Kansel) has a national footprint.

The market share breakdown for the main radio broadcasters is as follows:

South Africa: Radio Listenership		
	July 2011 – June 2012[1109]	
	Listeners	**Market Share**[1110]
Other community radio stations (180+)	9 016 000	13%
Ukhozi FM (isiZulu)	6 980 000	10%
Metro FM (English)	6 219 000	9%
Umhlobo Wenene FM (isXhosa)	4 257 000	6%
Lesedi FM (seSotho)	3 819 000	6%
Motsweding FM (seTswana)	3 321 000	5%
Thobela FM (sePedi)	3 056 000	4%
5fm (English)	3 050 000	4%
Gagasi 99.5 (English / isiZulu)	2 121 000	3%
RSG (Radiosondergrense) (Afrikaans)	2 090 000	3%
Jacaranda FM (English / Afrikaans)	2 037 000	3%

[1108] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p16, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.
[1109] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, pp15,6, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.
Koenderman's figures come from the All Media and Products Survey, market research conducted on an ongoing basis by the South African Audience Research Foundation (SAARF), Totals are not provided because figures are not mutually exclusive.
[1110] Figures are given to the nearest percent.

East Coast Radio (English)	2 015 000	3%
Kaya FM 95.9 (English)	1 901 000	3%
94.7 Highveld Stereo (English)	1 683 000	2%
Ikwekwezi FM (siNdebele)	1 605 000	2%
99.2 YFM (English)	1 602 000	2%
94,5 Kfm (English / Afrikaans)	1 361 000	2%
Ligwalagwala FM (siSwati)	1 317 000	2%
Capricorn FM (mainly English)	1 310 000	2%
Munghana-Lonene FM (xiTsonga)	1 142 000	2%
Radio 2000 (English / Afrikaans)	1 020 000	2%
Phalaphala FM (chiVenda)	930 000	1%
Good Hope FM (English / Afrikaans)	892 000	1%
Algoa FM (English / Afrikaans)	846 000	1%
702 Talk Radio (English)	794 000	1%
Heart (English)	677 000	1%
SAfm (English)	602 000	1%
North West FM (seTswana / English)	512 000	1%
OFM (Oranje) (English / Afrikaans)	512 000	1%
Lotus FM (English)	442 000	1%
Tru FM (English / isiXhosa)	253 000	0%
Classic FM 102.7 (English)	186 000	0%
Radio Pulpit/Kansel (English / Afrikaans)	180 000	0%
567 Capetalk (English)	137 000	0%
M-Power FM (mainly English)	56 000	0%

Due to the plethora of broadcasters in South Africa, only the ownership breakdown of the largest will be provided.

The SABC is a public company with the South African government as 100% shareholder.

e.tv was South Africa's first commercial free-to-air television station. It (and E.Sat TV) is 100% owned by Sabido Investments, which in turn has the following ownership structure:

- 63% - Hosken Consolidated Investments (listed black empowerment investment company, South Africa)[1111];
- 32% - Remgro (listed, South Africa)[1112];
- 5% - Unknown.

DStv and M-Net are 100% owned by MultiChoice, which is 100% owned by Naspers[1113], which in turn is listed on the Johannesburg Stock Exchange.

Top TV has struggled to break into the satellite subscriber TV market, and has filed for business rescue. It has the following shareholding[1114]:

- 28% - First National Media Investments Holdings (South Africa);
- 20% - Red Gold Investments/ Kopano ke Maatla (South Africa);
- 20% - SES Global Africa SA (Luxembourg);
- 11% - Industrial Development Corporation (South Africa);
- 10% - First AOne Trade and Invest (South Africa);
- 10% - National Empowerment Fund (South Africa);
- 1% - A N Moodley (South Africa).

There is significant ownership of radio stations by several media conglomerates.

For example, listed media group Kagiso Media owns East Coast Radio (100%), has a controlling stake in Jacaranda FM (80%), as well as smaller shareholdings in

[1111] HCI (nd) 'Business Segments', Hosken Consolidated Investments, Cape Town, available online at http://www.hci.co.za/corporate-info/business-segments/.
[1112] Remgro (nd) 'Investment Reviews: Media Interests', Remgro, Stellenbosch, available online at http://www.remgro.com/financials/ar_2011_eng/reports_shareholders/investment/media_interests.asp.
[1113] Naspers (nd) 'Company History', Naspers, Cape Town, available online at http://www.naspers.com/company-history.php.
[1114] ODM (nd) 'Shareholders', On Digital Media, Johannesburg, available online at http://www.ondigitalmedia.co.za/index.php?option=com_content&view=article&id=236&Itemid=351.

Kaya FM (48%), OFM (25%), Gagasi 99.5 (20%) and Heart (20%)[1115]. Kagiso Media has the following shareholding[1116]:

- 51% - Kagiso Tiso Holdings (black empowerment, South Africa);
- 18% - Sanlam Asset Management (South Africa);
- 14% - Investec Asset Management (South Africa);
- 12% - Kagiso Asset Management (South Africa);
- 5% - Other / free float.

Unlisted media group Primedia owns three radio stations: Talk Radio 702, 94.7 Highveld Stereo and KFM. It has the following shareholding[1117]:

- 49% - Mineworkers Investment Company (South Africa);
- 19% - Brait;
- 32% - Kirsch Consortium / management.

OMD does not give a figure for household television penetration in South Africa, but according to Statistics South Africa the figure is 74% of households[1118]. OMD does, however, report that of South African aged 15 and over 92% have watched TV in the last week, while 93% have listened to the radio[1119].

The South African Broadcasting Corporation (SABC) is the country's public broadcaster, with an explicit public service mandate to "[operate] in the public interest" and to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa".

The SABC provides 3 national television channels and 15 radio stations, covering all 11 official languages, as well as the Khoisan languages !Xu and Khwe (Y-K FM) and a service targeting South Africa's Indian community.

[1115] KM (2012) 'Kagiso Media Integrated Annual Report for the year ended 30 June 2012' Kagiso Media, Johannesburg, p8, available online at http://www.kagisomedia.co.za/kagisomedia/action/media/downloadFile%3Fmedia_fileid=432.pdf.
[1116] KM (2012) 'Kagiso Media Integrated Annual Report for the year ended 30 June 2012' Kagiso Media, Johannesburg, p3, available online at http://www.kagisomedia.co.za/kagisomedia/action/media/downloadFile%3Fmedia_fileid=432.pdf.
[1117] See: Moneyweb (2008) 'Mineworkers Investment Company takes control of Primedia', *Moneyweb*, Johannesburg, 13 November 2008, available online at http://www.moneyweb.co.za/moneyweb-south-africa/mineworkers-investment-company-takes-control-of-pr and Wikipedia (nd) 'Primedia Broadcasting', *Wikipedia*, available online at http://en.wikipedia.org/wiki/Primedia_Broadcasting.
[1118] Calculated from: StatsSA (2012) 'Census 2011: Census in Brief', Statistics South Africa, Pretoria, available online at http://www.statssa.gov.za/Census2011/Products/Census_2011_Census_in_brief.pdf..
[1119] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p10, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

The SABC is run by an independent Board appointed by Parliament, and is funded primarily through licence fees and advertising revenues. There have been controversies around the editorial independence of the SABC (cf its blacklisting of commentators seen as too critical of the ANC and government[1120]). Further, the SABC has been plagued by controversies surrounding its governance and the resignation of two Boards[1121].

FesMedia gives South Africa a score of 2,6 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[1122], indicating limited compliance. They point to the failure of the regulator in monitoring and "enforcement of licence conditions for broadcasters, among them those regarding local content", noting that the public broadcaster (SABC) "submits regular compliance reports but ICASA does not keep tabs on them" [1123].

Broadcast signal distribution is provided almost entirely by the 100% state-owned Sentech which "currently provides FM broadcasting services to 17 SABC Public Radio Stations, 20 Commercial Radio Stations and more than 65 Community Radio Stations throughout South Africa, reaching over 10 million listeners", along with "[medium wave] broadcasting services to 4 MW radio stations" and "[short wave] broadcasting services to 17 SW Stations to various parts of Africa, including BBC World, Radio France International and Trans World Radio"[1124].

The other signal distributor, Orbicom, provides services to MultiChoice (DStv and M-Net).

Range of Services: Type of services offered by foreign entities.

There are no commercial broadcast services offered by foreign entities, since foreign control of broadcast service licensees is prohibited, as is foreign

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1120 de Waal, M (2011) 'SABC, Icasa disgraced by court ruling', *Daily Maverick*, Johannesburg, 27 January 2011, available online at http://www.dailymaverick.co.za/article/2011-01-27-sabc-icasa-disgraced-by-court-ruling/.

1121 Davis, R (2013) 'SABC shambles: And then there were none', *Daily Maverick*, Johannesburg,, 20 March 2013, available online at http://www.dailymaverick.co.za/article/2013-03-20-sabc-shambles-and-then-therewere-none/.

1122 FesMedia (2011) 'African Media Barometer: South Africa 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p 45, available online at http://www.fesmedia-africa.org/uploads/media/2010_AMB_RSA_web_version.pdf.

1123 FesMedia (2011) 'African Media Barometer: South Africa 2010', Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p 45, available online at http://www.fesmedia-africa.org/uploads/media/2010_AMB_RSA_web_version.pdf.

1124 Sentech (nd) 'Radio Signal Distribution', Sentech, Johannesburg, available online at http://www.sentech.co.za/content/radio-signal-distribution.

ownership or directorship in excess of 20%[1125]. As a result, television and radio broadcasters in South Africa are all locally owned with only limited percentages of foreign shareholding.

Market Share: market share between foreign and local suppliers[1126].

There are no foreign suppliers in the market.

Both radio and television markets are heavily dominated by stations provided by the state-owned public broadcaster, the SABC. Private players have tended to concentrate on more lucrative urban niche markets, avoiding rural markets, which are seen as not profitable.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There are a number of stakeholder groupings with vested interests in the sector.

These include the National Association of Broadcasters, boasting over 80 members (including 8 television broadcasters, 35 commercial and public broadcasters and 25 community broadcasters), aims "regularly [to] engage with policy makers on behalf of our members in order to promote an industry grounded in the principles of democracy, diversity and freedom of expression"[1127].

Other industry bodies include:

- The Southern African Digital Broadcasting Association (SADIBA, with 36, mostly South African members, including broadcasters, signal distributors, and some engineering and manufacturing companies), which sees its role as "promoting the co-ordinated market driven introduction of digital broadcasting technologies in the Southern African region"[1128].
- The National Community Radio Forum (NCRF, with unknown membership), which sees its objective as the "forging of greater unity of purpose amongst South Africa's community radio stations as well as strengthening the sectors' natural partnership with civil society in deepening democracy"[1129].

[1125]RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 64, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.
[1126] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.
[1127] NAB (nd) 'Home', National Association of Broadcasters, Johannesburg, http://www.nab.org.za/.
[1128] SADIBA (nd) 'Welcome to the Southern African Digital Broadcasting Association (SADIBA)', Southern African Digital Broadcasting Association, Johannesburg, http://www.sadiba.org/.
[1129] NCRF (nd) 'Mission and Vision ', National Community Radio Forum, Johannesburg, available online at http://www.ncrf.org.za/about-us/mission-and-vision.

There are also a number of trade unions active in the broadcasting sector, including the Communications Workers Union (CWU), the Broadcast, Electronic, Media & Allied Workers Union (BEMAWU), and the Media Workers Association of South Africa (MWASA), who frequently intervene in respect of policy as well as on labour relations and salary issues[1130].

In addition, there are a number of civil society stakeholders active in the sector, including the vocal SOS: Support Public Broadcasting coalition, which is committed to "create a public broadcasting system dedicated to the broadcasting of quality, diverse, citizen-orientated public programming committed to deepening South Africa's Constitution"[1131], the activist Freedom of Expression Institute, and the Media Institute of Southern Africa[1132].

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There are no limitations on the number of broadcasting service licences available. However, as noted previously, no foreign person or entity may own or control more than 20 per cent of any broadcasting licence[1133]. Licences for signal

1130 See their websites - http://cwu.org.za, http://bemawu.blogspot.com/ and http://www.mwasa.org.za/ - for more information.

1131 SOS (nd) 'Support Public Broadcasting', SOS: Support Public Broadcasting Coalition, Johannesburg, available online at http://www.supportpublicbroadcasting.co.za/.

1132 See their respective websites for more information: http://www.fxi.org.za/ and http://www.misa.org/.

1133 RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 64, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.

distribution are not similarly restricted, but would require a ministerial determination before invitations to apply could be issued[1134].

There are also limitations on control and cross-media ownership and control set out in the law, although the regulator may, "on good cause shown" exempt their application in individual cases. These restrict a single entity from owning more than one commercial television channel, or more than one FM or AM commercial radio station in a single coverage area, or more than two such stations overall[1135].

Further, there are complicated provisions restricting any entity that controls a newspaper from acquiring a majority stake in or control of (defined as more than 20%) of any sound or television broadcasting licensee in an area in which there is "substantial overlap" of circulation. Again the regulator has the power to deviate from the law "on good cause shown"[1136].

Finally, no "party-political entities" may acquire broadcasting service licences[1137].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

As noted previously, all individual licensees, including broadcasting service licensees, are required to have a minimum of 30% "historically disadvantaged" ownership. Further discriminatory measures apply to broadcasting service licences, where, as pointed out above, no foreign person or entity may own or control more than 20%.

The limitations on the presence of natural persons noted previously also apply.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid).

1134 RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 5(6), available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.

1135 RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 65, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf. ICASA has recommended subscription broadcasters be exempted from this requirement.

1136 RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 66, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.

1137 RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Section 52, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.

Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

The licensing of broadcasting services in South Africa is entirely in the hands of the regulator, ICASA, without any role for or intervention by the Minister.

Individual broadcasting service licences are allocated through a competitive process, with ICASA issuing periodic invitations to apply[1138] and making decisions based on which applicant/s best meet the objectives of the legislation and any criteria stipulated in the invitation to apply. Community broadcasters require class licences in terms of which they apply for registration, rather than go through an application process.

All broadcasters are required to adhere to certain requirements set out in the legislation and regulation, such as maintaining a record of programmes broadcast, adherence to a code of conduct and a code of advertising practice, restrictions and requirements in respect of party political broadcasts and political advertising, and local content stipulations[1139].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

The regulation of broadcasting is not undertaken by a separate regulator: ICASA is responsible for telecommunications, broadcasting and postal services. There is some co-regulation in respect of the required broadcasting code of conduct, where licensees have the option of either adhering to a code developed by ICASA and adjudicated by the Complaints and Compliance Committee (CCC) of ICASA[1140], or of abiding by their own code administered by the Broadcasting Complaints Commission of South Africa (BCCSA) and recognised by ICASA[1141]. Advertising content is regulated by the Advertising Standards Authority of South

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[1138] ICASA (2012) 'ICASA issues invitations to apply for Commercial Sound & Subsccription [sic] Broadcasting Services Licences', Independent Communications Authority of South Africa, Johannesburg, 16 February 2012, available online at https://www.icasa.org.za/AboutUs/ICASANews/tabid/630/post/icasa-issues-invitations-to-apply-for-commercial-sound-and-subscription-broadcasting-services-licences/Default.aspx.

[1139] RSA (2005) 'Electronic Communications Act', No 36 of 2005, Republic of South Africa, Pretoria, Sections 53 – 59 & 61, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf.

[1140] ICASA (2009) 'Regulations regarding the Code of Conduct for Broadcasting Service Licensees issued in terms of Section 54', General Notice No 958, *Government Gazette*, No 32381, 6 July 2009, Independent Communications Authority of South Africa, Johannesburg, available online at https://www.icasa.org.za/Portals/0/Regulations/Regulations/Code%20of%20Conduct/Regulations%20Regarding%20the%20Code%20of%20Conduct%20for%20Broadcastering%20Service%20Licensees%2032381.pdf.

[1141] BCCSA (nd) 'Codes of Conduct', Broadcasting Complaints Commission of South Africa, Johannesburg, available online at http://www.bccsa.co.za/index.php?option=com_content&view=article&id=547&Itemid=35. The two codes have a total of 69 signatories..

Africa (ASA) an independent body established and financed by members of the marketing communications industry, with an enforceable code of conduct[1142].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

No single station is dominant in either the television or the radio broadcast sub-sectors. However, the combined market share of the public broadcaster, SABC, is 68% in the television market and 57% in the radio market.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As noted previously, South Africa's 1998 Competition Act regulates competition across the entire economy, establishing the Competition Commission with investigative powers and the Competition Tribunal with enforcement powers, along with the Competition Appeal Court. Concurrent jurisdiction between the ICT sector regulator and the Competition Commission is dealt with in terms of a memorandum of understanding between the two regulatory bodies[1143].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

Although South Africa's competition authorities have been involved in a number of merger and acquisition cases in the broadcasting sector, sometimes leading to rulings at odds with those from the sector regulator[1144], there have yet to be rulings from the Competition Tribunal on anti-competitive conduct despite some "concerns about the abuse of a dominant position in subscription television broadcasting faced in on-going investigations"[1145].

4.11.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

[1142] See: http://www.asasa.org.za/.

[1143] Competition Commission (2002) 'Memorandum of Agreement Entered into between the Competition Commission and the Independent Communications Authority of South Africa', Competition Commission, Pretoria.

[1144] Makunike, S (2202) 'Nail and Primedia still keen to woo Kagiso', City Press, Johannesburg, 6 January 2002, available online at http://152.111.1.87/argief/berigte/citypress/2002/01/06/15/3.html.

[1145] South Africa (2013) 'Competition Issues in Television and Broadcasting: Contribution from South Africa', submission by South Africa to the Global Forum on Competition, 28 February - 1 March 2013, Organisation for Economic Co-operation and Development, Paris, available online at http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD%282013%2955&docLanguage=En.

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

South Africa has been a member of the WTO since January 1995[1146], and made a number of commitments to liberalise communications services. In respect of "facilities based and public switched telecommunications services" South Africa undertook that Telkom's monopoly would "terminate not later than 31.12.2003" with the introduction of a second operator and that the "authorities [would] consider by 31/12/2003 the feasibility of suppliers additional to the duopoly", and that the "liberalization of resale services [would] take place between 2000 and 2003"[1147]. With regard to mobile cellular services, whilst these were then "supplied on a duopoly basis… one additional mobile cellular licence [would] be granted within two years", with the "authorities to examine [the] feasibility of additional suppliers by 31/12/1998"[1148]. Finally, in the category of "satellite-based services", the "Telkom monopoly [would] terminate not later than 31.12.2003", after which a duopoly would prevail, with the "authorities to examine [the] feasibility of additional suppliers by 31/12/1998"[1149].

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

South Africa is one of the leading countries in Africa in terms of a liberalised economy in goods and services. South Africa was a member of the GATT and participated in the Uruguay Round of negotiations. The country ratified the Marrakesh Agreement in December 1994 and thus became a founding member of the WTO when the Organisation was established[1150].

The World Bank 'Trade at a Glance' report does not provide a global ranking for South Africa on the GATS Commitments Index. The Nations Encyclopaedia, however, ranks the country 1st out of 41 sub-Saharan African countries[1151].

[1146] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

[1147] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, p12, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf.

[1148] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, p13, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf.

[1149] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, p14, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf.

[1150] Department of International Relations and Cooperation: Republic of South Africa, http://www.dfa.gov.za/foreign/Multilateral/inter/wto.htm.

[1151] Encyclopaedia of the Nations (nd) 'General Agreement on Trade in Services (GATS) Commitments Index (0-100, most liberal) - Trade - Development outcomes - African Development Indicators', Advameg Inc, Illinois, available online at http://www.nationsencyclopedia.com/WorldStats/ADI-general-agreement-services-liberal.html.

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

South Africa is a member of the 'Common Monetary Area' (together with Lesotho and Swaziland, and, formerly, Namibia). Members "enjoy preferential access to [each others'] capital and money markets and the transfer of funds, to or from the area of any other member of the Common Monetary Area, is exempt from exchange controls"[1152]. South Africa maintains MFN exemptions in respect of financial services in relation to the other members of the Southern African Customs Union, viz, Botswana, Lesotho, Swaziland[1153].

In respect of the World Bank's MFN Tariff Trade Restrictive Index (TTRI), South Africa is ranked 73rd out of 125 countries[1154].

4.11.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[1155] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

[1152] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, p25, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf.

[1153] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

[1154] World Bank (2010) 'South Africa Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/South Africa _brief.pdf.

[1155] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[1156], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

South Africa is a signatory to the WTO Reference Paper on Telecomms Services [1157].

1. Competitive safeguards: ***Fully Compliant (5/5).*** The 2005 Electronic Communications Act empowers the regulator both to act against conduct "likely to substantially prevent or lessen competition, and to impose "pro-competitive conditions… upon licensees having significant market power where [it] determines such markets or market segments have ineffective competition"[1158]. That being said, however, it must be noted that the regulator has an "extremely poor track [record] of dealing effectively with complaints regarding anti-competitive conduct"[1159]. As noted above, the Competition Tribunal, which has concurrent powers in the sector, has been rather more effective, recently imposing a hefty fine on the fixed line incumbent[1160] and ordering the functional separation of its wholesale and retail operations[1161].

2. Interconnection: ***Fully Compliant (5/5).*** All of the issues covered in the reference paper are addressed in the Interconnection Guidelines issued by the regulator[1162]. Interconnection agreements are public, even if not readily available, and Reference Interconnect Offers of the dominant mobile operators are publicly available[1163].

1156 WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

1157 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZAF, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/3713/2634/9546/South_Africa_GATS_Schedule.pdf, pp 22,3.

1158 RSA (2005) Electronic Communications Act, No 36 of 2005 (as amended), Republic of South Africa, Pretoria, Section 67, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf,.

1159 Limpitlaw, J (2012) 'South Africa', Chapter 30 in Long, C (ed) (2012) *Global Telecommunications Law and Practice*, Sweet & Maxwell, London, pp 5254.

1160 Mawson, N (2012) 'Tribunal fines Telkom R449m for 'bullying'', *ITWeb*, Johannesburg, 7 August 2012, available online at http://www.itweb.co.za/index.php?option=com_content&view=article&id=57520:tribunalfines-telkom-r449m-for-bullying&catid=260.

1161 McLeod, D (2013) 'Tribunal nod to Telkom abuse settlement', *TechCentral*, Johannesburg, 18 July 2013, available online at http://www.techcentral.co.za/tribunal-nod-to-telkom-abuse-settlement/41996/

1162 ICASA (2010) 'Interconnection Regulations 2010', Regulation Gazette No 9263, *Government Gazette* Vol 538 No 33101, 9 April 2010, Independent Communications Authority of South Africa, Johannesburg.

1163 See: MTN (nd) 'Mobile Telephone Networks Reference Interconnect Offer', MTN Group, Johannesburg, available online at http://www.mtn.co.za/MTNServices/CarrierServices/LocalOffering/Documents/MTN%20RIO%20_Primary%20Document_updated.pdf, and Vodacom (nd) 'Vodacom (Pty) Limited Reference Interconnection Offer ("RIO") (As required by the Call Termination Regulations published in

3. Universal service: *Fully Compliant (5/5).* Universal Access and Service has been at the forefront of South Africa's sector policy over the years, including in respect of broadcast media. This includes the establishment of a dedicated Universal Service regulatory body, along with a Universal Service Fund, along with a range of other interventions of varying degrees of success[1164].

4. Public availability of licensing criteria: *Fully Compliant (5/5).* The 2005 Electronic Communications Act deals extensively and clearly with licensing of both telecommunications and broadcasting[1165]. In addition, the regulator has issued a number of regulations covering licensing procedures and the content of the various types of licences[1166]. Actual individual licences are not, however, available on the website of the regulator.

5. Independent regulators: *Largely Compliant (4/5).* The ICT sector regulator is separate from and not accountable to suppliers of goods and services. The procedures for its appointment and governance are transparent and contain appropriate checks and balances[1167], despite misgivings expressed in some quarters[1168]. Having said that, there is a degree of structural conflict of interest in the governance of the sector, with the Minister both responsible for the performance of operators like the fixed-line incumbent, Telkom, and for the issuing of policy directions to the regulator, although the regulator is not bound to implement these, only to "consider" them[1169].

Government Gazette No. 33698 dated 29 October 2010 (the "Regulations")), Vodacom, Johannesburg, available online at http://www.vodacom.co.za/cs/groups/public/documents/vodacom.co.za_portal_webassets/pocm01-001304.pdf. No reference interconnect offer from Telkom appears to be available.

[1164] Lewis (2010) 'Achieving Universal Service in South Africa: What Next for Regulation?', paper presented to International Telecommunications Society Conference on Telecommunications: Ubiquity and equity in a broadband environment, 26 - 28 April, Wellington, NZ, available online at http://link.wits.ac.za/papers/Lewis-2010-USA-RSA-regulation-ITS-paper.pdf. . . . .
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[1165] RSA (2005) Electronic Communications Act, No 36 of 2005 (as amended), Republic of South Africa, Pretoria, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf, Chapters 3 & 9.

[1166] See, for example: ICASA (2007) 'Regulations Regarding Standard Terms and Conditions for Individual Licences under Chapter 3 of the Electronic Communications Act, 2005 (No 36 of 2005)', Regulation Gazette No 8788, *Government Gazette* Vol 509, No 30530, Independent Communications Authority of South Africa, Johannesburg, and ICASA (2009) 'General Licence Fees Regulations', Government Gazette Vol 526, No 32084, Independent Communications Authority of South Africa, Johannesburg.

[1167] RSA (2000) Independent Communications Authority of South Africa Act, No 13 of 2000 (as amended), Republic of South Africa, Pretoria, available online at http://www.internet.org.za/icasa-act.html.

[1168] Parliament (2007) 'Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa', Parliament of the Republic of South Africa, Cape Town, South Africa

[1169] RSA (2005) Electronic Communications Act, No 36 of 2005 (as amended), Republic of South Africa, Pretoria, Section 3(4), available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf,.

6. Allocation and use of scarce resources: ***Fully Compliant (5/5).*** The 2005 Electronic Communications Act deals extensively and clearly with the allocation and control of scarce resources, including frequencies, numbers and rights of way[1170]. The band plan is publicly available[1171].

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[1170] RSA (2005) Electronic Communications Act, No 36 of 2005 (as amended), Republic of South Africa, Pretoria, available online at http://www.icasa.org.za/Manager/ClientFiles/Documents/EComsAct_2005_No_36.pdf, Chapters 4, 5, 8, 11.

[1171] ICASA (2008) 'Final Terrestrial Broadcasting Frequency Plan 2008', *Government Gazette* No 32728, 18 November 2008, Independent Communications Authority of South Africa, Johannesburg.

4.12 SWAZILAND

4.12.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The current classification of telecommunications services in Swaziland is unclear. Up until now the sector has been governed by the 1983 Swaziland Posts and Telecommunications Corporation Act. This legislation distinguishes only between telephone and telegraph services[1172]. Although it deals with the licensing of "radiocommunication" stations and apparatus, there is no provision dealing with frequency spectrum.

Currently the market consists of one licensed fixed-line incumbent, one licensed mobile operator, and four licensed ISPs.

Legislation to amend the governance and regulation of the sector is currently in process, with the Swaziland Communications Commission Act, and the Electronic Communications Act, both dating from 2010, having been adopted by Parliament but awaiting the assent of the King[1173].

The new legislation is not yet publicly available, but a copy sourced by the project team[1174] distinguishes between licences for electronic communications networks and electronic communications services, and provides for individual and class / general licences. Frequency spectrum is now covered, and spectrum licences are dealt with separately[1175].

[1172] Swaziland (1983) 'Swaziland Posts and Telecommunications Corporation Act', Act No 11 of 1983, Kingdom of Swaziland, Mbabane, Parts V and VI, available online at http://www.sptc.co.sz/regulator/PostandTelecommunicationsCorporationAct1983.pdf.

[1173] Tshabalala, N & Sukati, S (2013) 'Parly gives the nod to Communications Act ',Times of Swaziland , 25 June 2013, available online at http://www.times.co.sz/news/88752-parly-gives-the-nod-to-communications-act.html. .

[1174] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

[1175]Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013), Part VII.

Swaziland appears, therefore, to be moving from a vertical licensing framework (whose compliance or otherwise with W/120 cannot be assessed) to a horizontal licensing framework.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists the telephony market as comprising one fixed-line operator, the government-owned Swaziland Posts & Telecommunications Corporation (SPTC), and one partially government-owned mobile operator, Swazi MTN. Its 4 Internet Service Provider (ISP) licensees include Africa Online, Posix and Real Image[1176].

SPTC has been embroiled in an on and off dispute with MTN over attempts by SPTC to introduce mobile and quasi-mobile services[1177].

The most recent comparative figures for telecomms market share date from 2012.

Swaziland: Fixed & Mobile Subscribers		
	2012 (Dec)	
	Subscribers	**Market Share**
Swaziland Posts & Telecommunications Corporation (SPTC) (fixed)	48 645[1178]	5,7%
MTN (mobile)	805 000[1179]	94,3%

[1176] BuddeComm (2012) 'Swaziland - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Swaziland-Telecoms-Mobile-and-Broadband.html. The full report is available on a for sale basis.
[1177] Dlamini, W (2013) 'ICT minister summons MTN Swaziland, SPTC', *Times of Swaziland*, Mbabane, 20 June 2013, available online at http://www.times.co.sz/news/88590-ict-minister-summons-mtn-swaziland-sptc.html.
[1178] ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/en/ITU-D/Statistics/Documents/statistics/2013/Fixed_tel_2000-2012.xls.
[1179] ITU (nd) 'Mobile-cellular subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/en/ITU-D/Statistics/Documents/statistics/2013/Mobile_cellular_2000-2012.xls. MTN itself reports 806 000 subscribers as at 31 December 2012, and 817 000 subscribers as at 31 March 2013 (See MTN (2013) 'Quarterly update for the period ended 31 March 2013', MTN Group, Johannesburg,

Total	**853 645**	

According to the ITU, the market in Swaziland as at 2011 was broken down as follows: 52 900 fixed-line subscribers[1180]; 766 500 mobile subscribers[1181]. This translates to a per capita market penetration rates in the telecommunications sector for Swaziland as at 2011 of 4,4% for fixed-line, 63,7% for mobile and 18,1% for the Internet (from 4,5%, 61,2% and 11,0% respectively in 2010[1182].

There is no information available on the market structure in respect of ISPs.

Swaziland Posts & Telecommunications Corporation (SPTC) is 100% owned by the Kingdom of Swaziland.

The shareholding of MTN Swaziland Ltd is not entirely clear, apart from MTN's own shareholding as given in its audited annual reports, but appears to be as follows:

- 30% - MTN Group (South Africa) [1183];
- 19% - Swaziland Empowerment Limited[1184];
- 10% - King Mswati III[1185];
- 41% - Swaziland Posts & Telecommunications Corporation[1186].

Africa Online appears to be 100% owned by Telkom, South Africa[1187].

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available online at http://www.mtn.com/Investors/Financials/QuaterlyResults/MTN%20Quartely%20March%202013%20Final.pdf.

1180 ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

1181 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False

1182 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

1183 MTN (2012) 'MTN Group Limited Integrated Business Report for the year ended 31 December 2011', MTN Group, Johannesburg, available online at http://mtn-investor.com/mtn_ar2011/pdf/full.pdf, p207.

1184 Masimula, S (2012) 'Swazi MTN, SPTC conflict concerns SEL shareholders', *Times of Swaziland*, Mbabane, 3 November 2012, available online at http://www.times.co.sz/News/81349.html.

1185 M&G (2012) 'Crossed lines and a king's tantrum', Mail & Guardian, Johannesburg, 13 April 2012, available online at http://mg.co.za/article/2012-04-13-crossed-lines-and-a-kings-tantrum.

1186 M&G (2012) 'Crossed lines and a king's tantrum', Mail & Guardian, Johannesburg, 13 April 2012, available online at http://mg.co.za/article/2012-04-13-crossed-lines-and-a-kings-tantrum. The Mail & Guardian also attributes a 4% shareholding to Prime Minister Barnabas Dlamini, but the arithmetic cannot be correct.

No ownership breakdown in respect of other ISPs is available.

International communications access is provided by the SPTC monopoly via a "620 megabytes" [sic – probably 620 Mbit/s] link to Seacom (with a capacity of 640 Gbit/s), with another "160 megabytes" [sic again] of pre-exiting capacity[1188].

Range of Services: Type of services offered by foreign entities.

There are no foreign-controlled entities in the voice telephony market. Africa Online (South Africa) is active in the ISP market, but its market share is unknown.

Market Share: market share between foreign and local suppliers[1189].

Foreign suppliers have no share in the voice telephony market, and an unknown share in the Internet market.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

According to newspaper reports, the King of Swaziland and the fixed line incumbent, Swaziland Posts & Telecommunications Corporation (SPTC), are currently stalling liberalisation of the telecommunications market[1190].

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As noted above, the current licensing regime appears to be technology specific, differentiating between fixed, mobile and ISP licences. The new legislation appears to be largely technology neutral, dealing primarily with networks and services, but retains some technology specific features. For example, fixed and

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1187 Africa Online (nd) 'Our History', Africa Online, Windhoek, available online at http://www.africaonline.com/countries/na/index.php?option=com_content&view=article&id=54&Itemid=57.

1188 Swazi Observer (2011) 'SPTC invests E41.4m to improve internet capacity', Swazi Observer, Mbabane, 11 August 2011, last seen at http://www.observer.org.sz/index.php?news=28465.

1189 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

1190 See: Masimula, S (2012) 'Swazi MTN, SPTC conflict concerns SEL shareholders', Times of Swaziland, Mbabane, 3 November 2012, available online at http://www.times.co.sz/News/81349.html, and M&G (2012) 'Crossed lines and a king's tantrum', Mail & Guardian, Johannesburg, 13 April 2012, available online at http://mg.co.za/article/2012-04-13-crossed-lines-and-a-kings-tantrum.

mobile networks are referred to at several points, and local loop unbundling and universal service are dealt with only in relation to the fixed network[1191].

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

Currently, the telecommunications market in Swaziland is a closed one, with monopolies respectively in both fixed and mobile services enshrined in a 1997 Joint Venture Agreement between SPTC and MTN Swaziland[1192], although there have been repeated recent attempts by SPTC to circumvent this[1193].

According to the WTO, the 1998 Swaziland Investment Promotion Act "provides for non-discriminatory treatment of investors and investments, thus affording them national treatment" including access to "incentives available equally to local and foreign investors". The WTO further notes that "there are no formal policies or practices that discriminate against foreign investment, and companies can be 100% foreign-owned". However, the Constitution does bar foreign ownership of land [1194].

There are no explicit restrictions on foreign ownership in either the 1983 Swaziland Posts and Telecommunications Corporation Act or the forthcoming Electronic Communications Act.

In the absence of either general GATS commitments, or any in respect of communications services, on the part of Swaziland, [1195] no further information on

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[1191] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo.
[1192] Dlamini, W (2013) 'SPTC offered to withdraw ONE, Fixedfone', *Times of Swaziland*, Mbabane, 22 March 2012, available online at http://www.times.co.sz/News/73843.html.
[1193] Dlamini, W (2013) 'ICT minister summons MTN Swaziland, SPTC', *Times of Swaziland*, Mbabane, 20 June 2013, available online at http://www.times.co.sz/news/88590-ict-minister-summons-mtn-swaziland-sptc.html.
[1194] WTO (nd) 'Trade Policy Review: Southern African Customs Union - Annex 5: Swaziland', WT/TPR/S/222/SWZ, World Trade Organisation, Geneva, p421,
[1195] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/SWZ, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9575/Swaziland_GATS_Schedule.pdf.

restrictions applying to foreign investment or on the legal status of foreign enterprises is available.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

The WTO points out that a Swaziland Investment Promotion Authority has been established, which has facilitated the "centralization of business processes (e.g. registration, trading licences, work permits, and factory shells identification)"[1196]. The presence of natural persons requires a work permit.

Internet service provider licensees are required to be Swazi companies registered under the 1912 Swaziland Companies Act[1197].

In the absence of either general GATS commitments, or any in respect of communications services, on the part of Swaziland, [1198] no further information on discriminatory restrictions based on nationality is available.

Swaziland is ranked 124th out of 183 countries in terms of ease of doing business by the World Bank[1199].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

Telecommunications licensing is formally under the aegis of the Swaziland Posts and Telecommunications Corporation, which has apparently "delegated" this function to the Director of Communications, in the Ministry of Information

[1196] WTO (nd) 'Trade Policy Review: Southern African Customs Union - Annex 5: Swaziland', WT/TPR/S/222/SWZ, World Trade Organisation, Geneva, p411,

[1197] SPTC (2008) 'Guidelines and General Information for the Granting of Licences for Operating Internet Services', Swaziland Posts and Telecommunications Corporation, Mbabane, available online at http://www.sptc.co.sz/regulator/LicencesGuidelines.pdf.

[1198] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/SWZ, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9575/Swaziland_GATS_Schedule.pdf.

[1199] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

Communications and Technology[1200]. There is no clarity on licensing procedures, with a recent 3G licence having apparently been awarded without due process[1201].

Licences for Internet service provision are processed and issued by the SPTC on a "non-exclusive basis"[1202].

The forthcoming Electronic Communication Act appears to vest control of licensing fully with the new regulator without any direct role from the Minister[1203].

There is nothing in either the current or forthcoming legislation that deals with VoIP. According to Biggs, VoIP was still explicitly prohibited in Swaziland as recently as 2004[1204], although no primary documentation is available to corroborate this.

There is no provision for the licensing of international gateway in the current legislation, and SPTC continues to hold a monopoly in this area, despite protests from MTN[1205] and allegations that MTN is engaged in illegal bypass of the SPTC network[1206]. Although the forthcoming Electronic Communication Act does, however, provide for "international gateway operator" as a specific category of licensee, it perpetuates the SPTC's backbone and gateway monopoly by guaranteeing it exclusive rights in the provision of "national telecommunications backbone infrastructure" for a period of five years[1207].

There is likewise no provision for interconnection in the current legislation, although there is an interconnect agreement in place between MTN and

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1200 Sutherland, E (2012) 'A short note on telecommunications in the Kingdom of Swaziland', Social Sciences Research Network, p6, available online via http://ssrn.com/abstract=1981752.

1201 Sutherland, E (2012) 'A short note on telecommunications in the Kingdom of Swaziland', Social Sciences Research Network, p6, available online at http://ssrn.com/abstract=1981752.

1202 SPTC (2008) 'Guidelines and General Information for the Granting of Licences for Operating Internet Services', Swaziland Posts and Telecommunications Corporation, Mbabane, available online at http://www.sptc.co.sz/regulator/LicencesGuidelines.pdf.

1203 Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

1204 Biggs, P (2007) The Status of Voice over Internet Protocol (VoIP) Worldwide, 2006', The Future of Voice, International Telecommunication Union, Geneva, p40, available online at http://www.itu.int/osg/spu/ni/voice/papers/FoV-VoIP-Biggs-Draft.pdf.

1205 M&G (2012) 'Crossed lines and a king's tantrum', Mail and *Guardian*, Johannesburg, 13 April 2012, available online at http://mg.co.za/article/2012-04-13-crossed-lines-and-a-kings-tantrum. . . . . See also: Sutherland, E (2012) 'A short note on telecommunications in the Kingdom of Swaziland', Social Sciences Research Network, available online via http://ssrn.com/abstract=1981752.

1206 Dlamini, W (2013) 'MTN using illegal network for 3G – SPTC', Times of Swaziland, Mbabane, 4 August 2013, available online at http://www.times.co.sz/news/90376-mtn-using-illegal-network-for-3g-sptc.html.

1207 Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

SPTC[1208]. The forthcoming Electronic Communication Act does, however, contain a number of provisions dealing with interconnection, including the requirements of non-discrimination and transparency[1209].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As noted previously, MTN is the dominant provider of telephony services, with a market share approaching 95%.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Swaziland in 2008 was 5,6% of monthly gross national income per capita - well below the average for sub-Saharan Africa of 23%, making Swaziland the 7th cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 2,2% and 873,2% (8th most expensive of 32 African countries)[1210]. Other, more recent press reports have suggested that telecommunications tariffs, especially those for data, are abnormally high[1211].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

There is a competition authority in Swaziland, the Swaziland Competition Commission, which was established by the 2007 Competition Act and the Competition Commission Regulations of 2010[1212]. The Commission enjoys

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[1208] Mali, A (2006) 'Swaziland - SPTC pays over E53m to MTN', Siemens Belgium, Brussels, 27 October 2006, available online at https://www.siemens.be/cmc/newsletters/index.aspx?id=13-598-17419.

[1209] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

[1210] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[1211] Mzekandaba, S (2013) 'Swaziland's data prices 'sky-high' amid lack of competition', *ITWeb*, Johannesburg, 8 August 2013, available online at http://www.itwebafrica.com/ict-and-governance/397-swaziland/231450-swazilands-data-prices-sky-high-amid-lack-of-competition.

[1212] Swaziland (2007) 'The Competition Act, 2007', Act No 8 of 2007, supplement to *The Swaziland Government Gazette*, Vol XLV, No 125, Kingdom of Swaziland, Mbabane, 7 December 2007, available online at http://www.compco.co.sz/documents/Competition%20Act%202007%20scanned18%20Februry%202010.pdf and Swaziland (2010) 'The Competition Commission Regulations Notice, 2010', Legal Notice No 92· 2010, Swaziland Government Gazette Extraordinary, Vol. XLVIII, No 62, investigative and enforcement powers, and appears to have economy-wide jurisdiction.

Further, the Act defines dominance to occur if a firm "either alone or together with any interconnected body corporate, is in a position to act independently of competitors and consumers over the production, acquisition, supply or price of goods or services"[1213]. The Act further prohibits any firm from "engaging in specific acts if they limit access to markets or otherwise unduly restrain competition, or have or are likely to have, adverse effects on trade or the economy in general" [1214]. Such acts include, inter alia: "predatory behaviour towards competitors... discriminatory pricing and discrimination in the supply or purchase of goods.. resale price maintenance", along with price fixing and various forms of restrictive agreements[1215]. The Commission may impose "orders and directives"[1216], with penalties for non-compliance including the "imposition of criminal sanctions" on firms and their directors[1217].

The forthcoming Electronic Communication Act provides for the imposition of "specific regulatory obligations" on licensees enjoying a dominant position in the market[1218].

Kingdom of Swaziland, Mbabane, 10 June 2010, available online at http://www.compco.co.sz/documents/Competition%20Commission%20Regulations%20Notice%202010.pdf.

[1213] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p47, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[1214] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p47, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[1215] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p47, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf

[1216] Swaziland (2007) 'The Competition Act, 2007', Act No 8 of 2007, supplement to *The Swaziland Government*
Gazette, Vol XLV, No 125, Kingdom of Swaziland, Mbabane, 7 December 2007, Section 40, available online at http://www.compco.co.sz/documents/Competition%20Act%202007%20scanned18%20Februry%202010.pdf

[1217] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p48, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[1218] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

The long-running dispute between MTN and SPTC over the latter's entry into the mobile market, has seen allegations of anti-competitive behaviour levelled against MTN by SPTC[1219]. The matter may well go before the courts yet again.

4.12.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Radio and television broadcasting are licensed under separate pieces of legislation in Swaziland.

The 1983 Swaziland Television Authority Act deals with licensing for the provision of a "television service", which, on the one hand, it defines as being provided by the state-owned television broadcaster, now the Swaziland Television Authority (STA), but, for which, on the other, it makes provision for the STA to issue additional licences[1220].

The 1983 Swaziland Posts and Telecommunications Corporation Act anyone operating a "radio station" (which is defined as "emitting... electro-magnetic energy of a frequency not exceeding three million megahertz") requires a licence issued by the Managing Director of the incumbent fixed-line operator, the SPTC[1221]. This implies that television broadcasters also need a radio station licence, as is borne out in the 1992 Swaziland Radio Regulations, which provide for 6 categories of radio station, viz: amateur radio stations, portable or mobile stations; experimental radio stations; aeronautical, fixed and aeromobile radio stations; private radio communication stations and broadcasting stations[1222].

[1219] RIA (2013) 'JVA Illegal - SPTC Tells MTN, Regional Investment Agency COMESA, Cairo, 22 June 2013, available online at http://www.comesaria.org/site/en/news_details.php?chaine=jva-illegal-sptc-tells-mtn&id_news=17313&id_article=119.

[1220] Swaziland (1983) 'Swaziland Television Authority Act, 1983', Kingdom of Swaziland, Mbabane, Sections 2 & 17, available online at http://www.sptc.co.sz/regulator/STVAACT.pdf.

[1221] Swaziland (1983) 'Swaziland Posts and Telecommunications Corporation Act', Act No 11 of 1983, Kingdom of Swaziland, Mbabane, Sections 2 & 86, available online at http://www.sptc.co.sz/regulator/PostandTelecommunicationsCorporationAct1983.pdf.

[1222] SPTC (1992) 'Swaziland Radio Regulations 1992', Swaziland Posts and Telecommunications Corporation, Mbabane, available online at http://www.sptc.co.sz/regulator/SwazilandRadioRegulations.pdf.

There are no provisions under current law dealing with signal distribution licences.

As noted previously, there are also no provisions under current law dealing with frequency spectrum licensing.

The forthcoming Electronic Communications Act[1223] requires signal distributors to acquire "electronic communications network" licences from the Swaziland Communications Commission.

Broadcasting services will in the future be licensed under forthcoming legislation, the Swaziland Broadcasting Bill and the Swaziland Broadcasting Corporation Bill[1224], but copies of these are not publicly available. An earlier draft of the legislation makes no distinction between television and radio broadcasting, and provides for 4 categories of broadcasting licence to be issued by the Swaziland Communications Commission, viz: public broadcasting service; commercial broadcasting service; community broadcasting service; or subscription broadcasting service[1225].

The licensing framework for broadcasting in Swaziland, therefore, appears, to be moving from a vertical licensing framework (but one not fully in accordance with W/120) towards a horizontal licensing framework.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

According to OMD, the television market comprises 3 broadcasters, viz: the state-owned Swazi TV (broadcasting in English, siSwati and isiZulu, and covering all major centres); Channel Swazi (broadcasting in English and siSwati); and DStv (a multi-channel subscription satellite broadcaster)[1226].

1223 Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).
1224 MISA Swaziland (2013) 'Broadcasting legislation enters Swazi parliament – good news or bad?', MISA Swaziland, Mbabane, 25 April 2013, available online at http://misaswaziland.com/2013/04/25/broadcasting-legislation-enters-swazi-parliament-good-news-or-bad/.
1225 Swaziland (2009) The Swaziland Broadcasting Bill, 2009', Kingdom of Swaziland, Mbabane, Section 6(2), available online via http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/Activities/SA/docs/SA-1_Legislations/Swaziland/Broadcasting_bill.PDF.
1226 Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p31.

OMD also lists the following radio broadcasters: 3 state-owned radio stations (including Radio Swaziland National Service (SBIS1), broadcasting in siSwati; Radio Swaziland English Service (SBIS2) and one private religious station[1227]. FesMedia notes that the state-owned radio stations fall under the Swaziland Broadcasting and Information Services (SBIS), and that the private Christian radio station is the Voice of the Church (VOC)[1228], the only domestic radio alternative voice. The third state-owned radio station appears to be the Information Service[1229].

There are no authoritative up-to-date viewership or listenership figures available for the various broadcasters. FesMedia suggests that SBIS is the dominant provider in the radio sector, with a transmitter network that reaches 95 per cent of the country (compared to 75% coverage for Swazi TV), and cites a dated survey putting listenership as follows:

Swaziland: Radio Listenership		
	2005[1230]	
	% Listened in last week	**Market Share**[1231]
SBIS1 (Radio Swaziland National Service	76%	48%
SBIS2 (Radio Swaziland English Service)	44%	28%
VoC (Voice of the Church)	38%	24%

The Swaziland Television Authority is 100% government-owned and is managed by a government-appointed board of directors.

DStv is 100% owned by MultiChoice (South Africa).

1227 Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p31.

1228 FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p6, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf.

1229 Radio Station World (nd) 'Swaziland', Radio Station World, available online at http://radiostationworld.com/locations/swaziland/.

1230 FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p29, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf. These figures presented here do not cover the full spectrum of listenership, which includes some South African stations, such as Jacaranda FM (9%) and Ukhozi FM (5%).

1231 Figures are given to the nearest percent.

SBIS is 100% government-owned and falls under the Ministry of Information, Communications and Technology[1232].

Channel Swazi is privately-owned by Qhawe Mamba[1233].

The Voice of the Church is owned by evangelical media distributor Trans World Radio (United States of America[1234].

OMD puts television penetration in Swaziland at 35% of households[1235].

Despite the claim by the state-owned television broadcaster, the Swaziland Television Authority (STA), to be a public broadcaster[1236], it falls far short of meeting the criteria. Nowhere in its enabling legislation, for example, is it given any vestige of a public broadcasting mandate. Secondly, its 9-person governing board of directors lacks independence, being largely made up of ministerial appointments and nominees from other ministries, without any clear appointment criteria or procedural checks and balances[1237]. In addition, the STA is further compromised by the structural conflict of interest of being both an operator and a regulator. The state-owned radio stations have even less pretension to being a public broadcaster, falling directly under the Ministry of Information, Communications and Technology. FesMedia lists several instances of political interference in content at both sets of stations[1238],

FesMedia gives Angola a score of 1,0 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large", indicating non-compliance, and go on to state that the "current broadcasting regulators, the SPTC and STA… are entirely controlled by government… [and] are neither obliged nor expected to act in the public interest" [1239].

[1232] MICT (nd) 'Swaziland Broadcasting & Information Services', Ministry of Information, Communications and Technology, Mbabane, available online at http://www.gov.sz/index.php?option=com_content&view=article&id=388&Itemid=402.

[1233] Moahloli, Z (2011) 'Channel Swazi back on air, says Qhawe', *Times of Swaziland*, Mbabane, 12 July 2011, available online at http://www.times.co.sz/News/66552.html.

[1234] Wikipedia (nd) 'Trans World Radio', *Wikipedia*, available online at http://en.wikipedia.org/wiki/Trans_World_Radio.

[1235] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p31.

[1236] STA (2010) 'Frequently Asked Questions about Swazi TV', Swaziland Television Authority, Mbabane, available online at http://www.swazitv.co.sz/frequentlyaskedquestions.php.

[1237] Swaziland (1983) 'Swaziland Television Authority Act, 1983', Kingdom of Swaziland, Mbabane, Section 5(1), available online at http://www.sptc.co.sz/regulator/STVAACT.pdf.

[1238] FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p47, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf.

[1239] FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p45, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf.

This situation under the forthcoming Public Broadcasting Bill which will apparently “pave the way for the merger of the SBIS and Swazi TV into one state broadcaster”, but no copy of the bill is publicly available[1240].

Range of Services: Type of services offered by foreign entities.

There is a satellite television subscription service, DStv, offered by MultiChoice, a South African company.

Market Share: market share between foreign and local suppliers[1241].

There are no authoritative market share figures. Anecdotal accounts suggest a high rate of cross border viewership of South African television broadcasters.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

As noted previously, the government enjoys a stranglehold over broadcasting in the country. It may impede liberalisation of the airwaves as it has sweeping powers in both the radio and television sectors.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There are no known formal limitations on the number of broadcast licensees in the market. However, in practice, no new licence applications appear to have been granted. FesMedia describes a 2009 invitation to apply for “four [regional]community radio licences.. and one [national] commercial licence” but

1240 FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p43, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf.

1241 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

notes that since a 'new government took over... the licensing process has been stalled ever since" [1242].

Neither the 1983 Swaziland Posts and Telecommunications Act nor the 1983 Swaziland Television Authority Act (1983) addresses the question of pluralism and diversity in radio and television broadcasting. They are also silent on foreign ownership.

The forthcoming Broadcasting Bill only appears to deal with cross media ownership and control only insofar as it relates to community broadcasting[1243].

Other than the restrictions noted above under the section dealing with telecommunications, there are no additional market access restrictions specific to broadcasting.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

Applicants for radio station licences are required by the SPTC to provide "proof of meaningful Swazi participation in management and running of the station"[1244]. It is not clear whether this applies also to television licensees. Other than that, there are no known restrictions additional to those noted above under the section dealing with telecommunications.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

The Swaziland Television Authority is empowered to issue television licences, which are subject to the Minister's approval[1245], but makes no specification of

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[1242] FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p43, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf.

[1243] Swaziland (2009) The Swaziland Broadcasting Bill, 2009', Kingdom of Swaziland, Mbabane, Section 10(2), available online via http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/Activities/SA/docs/SA-1_Legislations/Swaziland/Broadcasting_bill.PDF.

[1244] SPTC (nd) 'Rules of Entry into Broadcasting Industry', Swaziland Post and Telecommunications Corporation, Mbabane, available online at http://www.sptc.co.sz/regulator/RULESOFENTRYINTOBROADCASTINGINDUSTRY.pdf.

[1245] Swaziland (1983) 'Swaziland Television Authority Act, 1983', Kingdom of Swaziland, Mbabane, Section 17, available online at http://www.sptc.co.sz/regulator/STVAACT.pdf.

licensing procedures. The is no information on how the Voice of the Church secured its licence.

Radio communication licences as required by radio stations (and, on the face of it, by television stations licensed above) are issued by the Managing Director of the SPTC (who may also, by regulation, provide for exemptions in respect of certain classes of service or entities. The Minister also determines licence, fees and terms and conditions of licences[1246]. These are set out in the 1992 Swaziland Radio Regulations[1247].

The stalled licensing process from 2009 was done by invitation to apply, which implies a competitive process, but no copy of the ITA is available[1248].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Currently, as we have seen above, the regulation of broadcasting is undertaken by the fixed-line incumbent, the Swaziland Posts and Telecommunications Corporation (SPTC), with the Swaziland Television Authority (STA) responsible for the licensing of television broadcasters.

The forthcoming Swaziland Communications Commission Act[1249] will remove the regulatory and licensing powers of the SPTC and STA and confer them on the new Swaziland Communications Commission.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

[1246] Swaziland (1983) 'Swaziland Posts and Telecommunications Corporation Act', Act No 11 of 1983, Kingdom of Swaziland, Mbabane, Sections 86& 89, available online at http://www.sptc.co.sz/regulator/PostandTelecommunicationsCorporationAct1983.pdf.

[1247] SPTC (1992) 'Swaziland Radio Regulations 1992', Swaziland Posts and Telecommunications Corporation, Mbabane, available online at http://www.sptc.co.sz/regulator/SwazilandRadioRegulations.pdf.

[1248] FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p43, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf.

[1249] Swaziland (nd) 'The Swaziland Communications Commission Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

SBIS would appear to be the dominant provider in the radio sector, with a combined listenership market share of over 75%[1250]. No comparative figures are available for television.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

As noted above, the Swaziland Competition Commission enjoys ex post authority to deal with abuse of dominance across the economy, including in respect of broadcasting, and the forthcoming Electronic Communication Act will allow the planned Swaziland Communications Commission to impose ex ante obligations on licensees enjoying market dominance.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour in the broadcasting sector.

4.12.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Swaziland joined the WTO in January 1995[1251], but has made no overall horizontal commitments, and no specific commitments in relation to communications services[1252].

Swaziland is a member of the Common Market for Eastern and Southern Africa (COMESA), in addition to its membership of the Southern African Development Community (SADC). It is also a member of the Southern African Customs Union (SACU) and forms part of the Common Monetary Area (CMA, along with Lesotho, Namibia and South Africa). It is also a beneficiary of the African Growth and Opportunity Act (AGOA)[1253].

1250 FesMedia (2011) *African Media Barometer: Swaziland 2011*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p29, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Swaziland_2011.pdf.

1251 WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

1252 WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/SWZ, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9575/Swaziland_GATS_Schedule.pdf.

1253 WTO (2009) 'Trade Policy Review: Southern African Customs Union - Annex 5: Swaziland', WT/TPR/S/222/SWZ, World Trade Organisation, Geneva, p417,

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

In practice, no attempt appears to have been made specifically to limit either cross-border trade or consumption abroad (in respect of both market access and national treatment) of any communications services. However, SPTC's monopoly on the international gateway would in effect appear to constitute such a restriction.

In addition, the current monopoly provision of both fixed and mobile telecommunications services, along with the stalled market entry in the broadcasting sector, (both noted above) constitute specific restrictions in relation to commercial presence.

Moves towards further liberalisation and undertaking of WTO commitments are compounded by capacity constraints: the WTO notes that "lack of understanding of the relevant provisions especially during drafting of national laws in the Ministry of Justice and Constitutional Affairs (MOJCA), makes it difficult to address WTO obligations"[1254].

The World Bank ranks the Swaziland 100th out of 148 countries on its GATS Commitments Index[1255].

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

Swaziland is a member of the 'Common Monetary Area' (together with Lesotho and South Africa, and, formerly, Namibia). Members "enjoy preferential access to [each others'] capital and money markets and the transfer of funds, to or from the area of any other member of the Common Monetary Area, is exempt from exchange controls[1256]. Swaziland maintains MFN exemptions in respect of financial services in relation to the other members of the Southern African Customs Union, viz, Botswana, Lesotho, South Africa.

[1254] See WTO (2012) Trade Policy Review - Swaziland - http://www.wto.org/english/tratop_e/tpr_e/tp322_e.htm.

[1255] World Bank (2010) 'Swaziland Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Swaziland_brief.pdf.

[1256] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/SWZ, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/9013/2634/9575/Swaziland_GATS_Schedule.pdf, p4.

There is no evidence of MFN inconsistent measures in the communications sector[1257]. In respect of the World Bank's MFN Tariff Trade Restrictive Index (TTRI), Swaziland is ranked 81st out of 181 countries[1258].

4.12.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[1259] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[1260], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Swaziland is not a signatory to the WTO Reference Paper on Telecomms Services.

The assessment here is made on the basis of the current legal situation. This will change once the forthcoming legislation comes into effect.

1. Competitive safeguards: ***Partially Compliant (3/5).*** The 2007 The Competition Act prohibits an number of anti-competitive practices, including "discriminatory pricing" and the abuse of dominance, but none that deal specifically with misuse or withholding of information. The 1983 Swaziland Posts and Telecommunications Act has no competitive safeguards.

However, the forthcoming Electronic Communication Act empowers the regulator to impose ante-ante obligations on licensees that would address anti-competitive cross-subsidisation, along with the abuse or withholding of information[1261].

[1257] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.
[1258] World Bank (2010) 'Namibia Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Namibia_brief.pdf.
[1259] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.
[1260] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.
[1261] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

2. Interconnection: ***Not Compliant (0/5).*** As noted above, The 1983 Swaziland Posts and Telecommunications Act contains no provisions dealing with interconnection.

The forthcoming Electronic Communication Act does, however, contain a number of provisions dealing with interconnection, including the requirements of non-discrimination and transparency[1262].

3. Universal service: ***Minimally Compliant (1/5).*** The 1983 Swaziland Posts and Telecommunications Act contains no provisions dealing with universal access and service.

The forthcoming Electronic Communication Act makes provision for the imposition upon designated licensees of universal service obligations, but defines these only in relation to fixed telephony. The Act further makes provision for the establishment of a universal access fund, sourced from contributions specified in operator licences, along with a donor-funded Rural Access Fund[1263].

4. Public availability of licensing criteria: ***Minimally Compliant (1/5).*** There are no provisions in the 1983 Swaziland Posts and Telecommunications Act dealing with transparency in relation to licensing categories or procedures, and nothing publicly available in this regard. Nor are any of the licences publicly available. There are some guidelines available covering terms and conditions and application procedures for Internet service provider licensees[1264].

The forthcoming Electronic Communication Act does, however, make extensive provisions dealing with transparency and procedures affecting individual licences[1265].

5. Independent regulators: ***Not Compliant (0/5).*** There is no separate, independent regulator in Swaziland - all telecommunications regulation is undertaken by the state-owned Swaziland Posts and Telecommunications Corporation (SPTC).

The forthcoming Swaziland Communications Commission Act will, however, establish a separate regulator. However, there appear to be a number of limitations upon the independence of the proposed Swaziland Communications Commission in terms of international best practice, especially as regards the ability of the Minister to intervene in the exercise of its functions: for example,

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[1262] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).
[1263] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).
[1264] SPTC (2008) 'Guidelines and General Information for the Granting of Licences for Operating Internet Services', Swaziland Posts and Telecommunications Corporation, Mbabane, available online at http://www.sptc.co.sz/regulator/LicencesGuidelines.pdf.
[1265] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

appointments to the Board of the Commission are done by the Minister without transparency or checks and balances; all regulations drafted by the Commission are issued by the Minister, who may also direct the Commission to deliberate on any issue of his choice; and the allocation of frequencies, satellite orbits, numbering administration, universal access policy are all subject to the approval of the Minister[1266].

6. Allocation and use of scarce resources: *Minimally Compliant (1/5).* The 1983 Swaziland Posts and Telecommunications Act does not deal with allocation and use of either spectrum or numbering at all. It does, however, deal extensively with rights of way, but only in relation to the fixed-line incumbent, the SPTC[1267].

The forthcoming Electronic Communication Act does, however, deal extensively with frequency spectrum, numbering and rights of way[1268].

Once the forthcoming legislation comes into operation, Swaziland's compliance with the WTO Regulatory Reference Paper will be substantially increased, which will pave the way for the country becoming a signatory. Further reforms, however, are still required to ensure full compliance.

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[1266] Swaziland (nd) 'The Swaziland Communications Commission Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).
[1267] Swaziland (1983) 'Swaziland Posts and Telecommunications Corporation Act', Act No 11 of 1983, Kingdom of Swaziland, Mbabane, Parts III, available online at http://www.sptc.co.sz/regulator/PostandTelecommunicationsCorporationAct1983.pdf.
[1268] Swaziland (nd) 'The Electronic Communications Bill, 2010', mimeo (sourced by email, apparently as adopted in June 2013).

4.13 TANZANIA

4.13.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The 2003 TCRA Act assigns the regulator authority over licensing (subject to consultation with the Minister in respect of licences of over five years in duration), but does not specify any classification[1269]. In 2005 the Regulator promulgated a converged licensing framework, with the following licence categories : Network Facilities (which "authorizes ownership and control of electronic communication infrastructure"), Network Services (which "gives authorization to operate electronic communication networks in order to deliver services"), Application Services (which "authorizes reselling or procurement of services from Network Service operators… [where] the licensee does not own network infrastructure nor operate network [sic]"), and Content Services (which "authorizes the provision of content")[1270]. The latter category is not applicable to telecommunications. Spectrum licensing is one of 7 licence categories falling outside the converged licensing framework and dealt with separately.

The regulator has issued 21 Network Facilities Licences, 17 Network Services Licences and 84 Applications Services Licences. Fixed and mobile telephony operators hold licences under the first two categories (although a number hold all three), with Internet Service Providers largely holding Applications Services licences only[1271].

The licensing regime in Tanzania is thus fully converged (or horizontal or unified or multi-service), distinguishing only between infrastructure, services and

[1269] Tanzania (2003) Tanzania Communications Regulatory Authority Act, 2003', Act No 12 of 2003, United Republic of Tanzania, Dodoma, available online at http://www.tcra.go.tz/policy/Tanzania%20Communications%20Regulatory%20Act-2003.pdf, Section 6 (1) (b) (i).

[1270] TCRA (2005) 'Guidelines and Procedures for Licensing Electronic and Postal Communications in Tanzania', Tanzania Communications Regulatory Authority, Dar es Salaam, available online at http://www.tcra.go.tz/licensing/pdf_documents/ANNEX%2013%20-%20LICENSING%20GUIDELINES.pdf. .

[1271] TCRA (2012) 'Licensing Information', Tanzania Communications Regulatory Authority, Dar es Salaam, available online at http://www.tcra.go.tz/licensing/CLFlicensed_operators.php.

content. As such, it goes well beyond the vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm lists Tanzania's telephony market as comprising two fixed-line operators, the mainland–based Tanzania Telecommunications Company (TTCL) and Zanzibar Telecom Ltd (ZanTel). Further they suggest there are "eight operational mobile networks, with four additional players licensed under [the] new converged regulatory regime", with the four major players being Vodacom, AirTel, Tigo and ZanTel. Internet Service Provider (ISP) licensees include Benson Informatics Limited (BOL), SasaTel (Dovetel), Africa Online, Raha.com, Tele2, Alink, SatCom Networks, SimbaNet, Afsat and Cats-Net[1272].

The regulator issues comparative quarterly statistics for the telecomms market.

Tanzania: Fixed & Mobile Subscribers		
	2012 (June[1273])	
	Subscribers	**Market Share**
Vodacom (mobile)	12 317 029	44,0%
AirTel (mobile)	7 504 511	26,8%
Tigo (mobile)	5 613 330	20,0%
Zanzibar Telecom Ltd (ZanTel) (fixed & mobile)	2 356 457[1274]	8,4%
Tanzania Telecommunications Company (TTCL) (fixed & mobile)	227 424[1275]	0,8%

[1272] BuddeComm (2012) 'Tanzania - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Tanzania-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

[1273] TCRA (2012) 'Quarterly Telecom Statistics: Quarter 4 (June 2012) Report', Tanzania Communications Regulatory Authority, Dar es Salaam, available online at http://www.tcra.go.tz/publications/telecomStatsJune12.pdf, p2.

[1274] 99,6% of ZanTel's subscribers are mobile subscribers.

SasaTel (mobile)	4810	0,0%
Benson (mobile)	1 050	0,0%
Total	**28 024 611**	

According to the ITU, the market in Tanzania as at 2011 was broken down as follows: 161 100 fixed-line subscribers[1276]; 25 666 500 mobile subscribers[1277]. This translates to a per capita market penetration rates in the telecommunications sector for Tanzania as at 2011 of 0,3% for fixed-line, 55,5% for mobile and 11,0% for the Internet (from 0,4%, 46,8% and 12,0% respectively in 2010[1278].

There is no market share breakdown for Internet services.

The shareholding of Vodacom is broken down as follows:

- 65% - Vodacom (South Africa / United Kingdom)[1279];
- 35% - Mirambo Ltd (Tanzania)[1280].

The shareholding of AirTel is broken down as follows[1281]:

- 60% - Bharti Airtel (India);
- 40% - Government of Tanzania.

Tigo is 100% owned by Millicom International Cellular of Luxembourg[1282].

1275 70% of TTCL's subscribers are fixed line customers.

1276 ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

1277 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

1278 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

1279 Vodacom (2012) 'Vodacom Integrated report For the year ended 31 March 2012', Vodacom, Johannesburg, August 2011, available online at http://www.vodacom.com/pdf/annual_reports/ar_2012.pdf, p22. Vodacom, in turn, is 65% owned by Vodafone Plc of the United Kingdom.

1280 Vodacom (nd) 'Vodacom Tanzania', Vodacom Tanzania, Dar es Salaam, available online at http://www.vodacom.co.tz/about-us/who-we-are.

1281 TeleGeography (2012) 'Government confirms 40% stake in Airtel Tanzania', TeleGeography, Washington DC, 17 Apr 2012, available online at http://www.telegeography.com/products/commsupdate/articles/2012/04/17/government-confirms-40-stake-in-airtel-tanzania/.

The shareholding of Zanzibar Telecom Ltd (ZanTel) is broken down as follows[1283]:

- 65% - Emirates Telecommunications Corporation (ETISALAT) (UAE);
- 18% - Government of Zanzibar;
- 17% - Meeco International of Tanzania.

Tanzania Telecommunications Company (TTCL) was partially privatised in 2001, but the exact current shareholding is unclear[1284].

Range of Services: Type of services offered by foreign entities.

As can be seen from the ownership breakdown above, foreign entities have a controlling interest in each and every provider with substantial market share in the voice telephony market. No information is available in respect of ISPs.

Market Share: market share between foreign and local suppliers[1285].

Voice telephony providers with as foreign controlling interest account for over 99% of the voice telephony market.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

There do not appear to be any such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

1282 Tigo (2010) 'Tanzania Capital Markets Event, 8th and 9th Sept 2010', presentation, available online at http://files.shareholder.com/downloads/MICC/0x0x400685/22D470E7-43A4-46F3-8DC0-AB3DEBB35CB7/tanzania.pdf.

1283 ZanTel (2011) 'About Zantel', Zanzibar Telecom Limited, Zanzibar, available online at http://www.zantel.co.tz/about_us.html. Elsewhere on the site on a page with an earlier date Kintbury Investments of the Channel Islands is listed as a shareholder (cf ZanTel (2010) 'Company Profile', Zanzibar Telecom Limited, Zanzibar, available online at http://www.zantel.co.tz/company_profile.html).

1284 Wikipedia suggests, without citing sources, that initial shareholders included MSI Cellular (United Kingdom) and Detecon (Germany) (jointly 35%), along with "local financial institutions" (14%), "international financial institutions" (10%), "TTCL employees" (5%) (Wikipedia (nd) 'Tanzania Telecommunications Company Limited', Wikipedia, available online at http://en.wikipedia.org/wiki/Tanzania_Telecommunications_Company_Limited.

1285 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

As noted above, the licensing regime for Tanzania is fully technology neutral.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

In the absence of either general horizontal GATS commitments, or any in respect of communications services[1286], limited information on the legal status of foreign enterprises is available.

The World Bank notes that all land is publicly held in Tanzania with occupancy under 99-year leasehold and that the country "[does] not allow freehold land title of any form" for foreign investors[1287] except as a "right of occupancy for purposes of investment approved under the Tanzania Investment Act; as a derivative right for purposes of investment approved under the Investment Act; or as an interest in land under a partial transfer of interest by a citizen for purposes of investment approved under the Investment Act in a joint venture"[1288].

Further, the World Bank points out that "foreign capital participation in the telecommunications sector is limited to a maximum of 65%", and gives Tanzania a score of 65 out of 100 for foreign equity participation in the telecommunications sector overall[1289]. The 100% foreign ownership of Tigo appears, however, to contradict this assertion.

[1286] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/TZA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2680/1546/Tanzania_GATS_Schedule.pdf.

[1287] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p44.

[1288] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p157.

[1289] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p157.

This is reflected in Tanzania's commitments governing telecommunications services, made in relation to the East African Community, and which specify "35% local shareholders" with the commitment that this restriction be phased out by 2015 "subject to harmonized national shareholding requirement for local shareholding among EAC Partner States"[1290].

Tanzania has made neither general horizontal GATS commitments, nor any in respect of communications services[1291]. Limited further information on the legal status of foreign enterprises is available.

Tanzania has, however, made commitments governing telecommunications services in relation to the East African Community, which specify no restrictions (other than those relating to shareholding – see below) which might limit the commercial presence of foreign enterprises[1292]. The 2009 Right of Establishment Regulations[1293] lend further weight to this position.

The World Bank notes that "it takes 14 procedures and 38 days to establish a foreign-owned limited liability company (LLC)" and that "domestic as well as foreign-owned LLCs must have at least 2 shareholders"[1294].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

Tanzania has made neither general horizontal GATS commitments, nor any in respect of communications services[1295]. No further information on discriminatory measures based on nationality is available.

[1290] EAC (2009) 'The East African Community Common Market Schedule of Commitments on the Progressive Liberalisation of Services ', Annex V EAC Secretariat, Arusha, available online at http://www.iag-agi.org/bdf/docs/schedule_on_trade_in_services.pdf, p 40.

[1291] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/TZA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2680/1546/Tanzania_GATS_Schedule.pdf.

[1292] EAC (2009) 'The East African Community Common Market Schedule of Commitments on the Progressive Liberalisation of Services ', Annex V EAC Secretariat, Arusha, available online at http://www.iag-agi.org/bdf/docs/schedule_on_trade_in_services.pdf, p 40.

[1293]. EAC (2009) 'The East African Community Common Market (Right of Establishment) Regulations', Annex III, EAC Secretariat, Arusha, available online at http://www.iag-agi.org/bdf/docs/annex_on_the_right_of_establishment.pdf.

[1294] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p157.

[1295] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/TZA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2680/1546/Tanzania_GATS_Schedule.pdf.

Under Tanzania's East African Community commitments with respect to telecommunications services, the presence of natural persons will be in "accordance with the Schedule on the Free Movement of Workers"[1296] which seek to harmonise the treatment of nationals of EAC member states.

Tanzania is ranked 127th out of 183 countries in terms of ease of doing business by the World Bank[1297].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

Licensing for telecommunications services is almost entirely in the hands of the regulator in Tanzania. TCRA issues the invitation to apply, performs the evaluation of the applications, subjects applications to a public notice and comment procedure. The Minister is only involved when the "Recommendations of the Board [are] submitted to the Minister for consultation"[1298]. Both VoIP and international gateways were fully liberalised with the introduction of the converged licensing regime. There are no anti-competitive or discriminatory restrictions in respect of interconnection.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

With 44% market share, Vodacom is the only dominant operator in the telephony market.

[1296] EAC (2009) 'The East African Community Common Market Schedule of Commitments on the Progressive Liberalisation of Services ', Annex V EAC Secretariat, Arusha, available online at http://www.iag-agi.org/bdf/docs/schedule_on_trade_in_services.pdf, p 40.

[1297] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

[1298] TCRA (nd) 'Procedures and Processes', Tanzania Communications Regulatory Authority, Dar es Salaam, available online at http://www.tcra.go.tz/licensing/procedure_processes.php.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Tanzania in 2008 was 33,3% of monthly gross national income per capita - above the average for sub-Saharan Africa of 23%, making Tanzania the 10th most expensive out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 32,8% and 204,0% (14th cheapest of 32 African countries)[1299].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

According to Bowman Gilfillan, there is a competition authority in Tanzania. It is a structure similar to that of South Africa, with a Fair Competition Commission, holding investigative powers, and a Fair Competition Tribunal and Court of Appeal, holding enforcement powers. Both were established under the 2003 Fair Competition Act[1300].

The Act does deal with dominance, which is defined to occur for firms with a market share exceeding 35% - if "acting alone, that [firm] can profitably and materially restrain or reduce competition in that market for a significant period of time" - and taking into account "competition from imported goods and services " and "economic circumstances of the relevant market"[1301]. Dominant firms are prohibited from conduct that is likely to "appreciably prevent, restrict or distort competition"[1302]. The Act provides for penalties, including compliance and compensatory orders, applicable to both the firm and its directors[1303].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour.

[1299] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[1300] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p49.

[1301] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p47.

[1302] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p47.

[1303] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p48.

4.13.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Broadcasting in Tanzania is regulated by the Tanzanian Communications Regulatory Authority of 2003. Section 3 of the Electronic Communications and Postal Act recognises the following broadcasting categories:

(a) public services;

(b) commercial services;

(c) community services;

(d) non-commercial services;

(e) subscription broadcasting service;

(f) support services for subscription content services; and

(g) any other licence as may be determined by the Authority

In addition, the Information and Broadcasting Policy of 2003 (which is currently under review) recognises three types of media ownership types within the country:

1. *State/Public Media*
2. *Commercial/Private Media*
3. *Community Media*

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

Tanzania has one of the most vibrant broadcasting landscapes in the SADC region, with 60 radio stations and 15 television stations. Four of these TV stations have a wide enough coverage to be considered national stations. They are Independent Television (ITV), Television ta Taifa (TVT), Star TV and Channel 10. All these national television stations are free-to-air.[1304]

The country has two publicly-owned broadcasting stations: Radio Tanzania Dar es Salaam (RTD) and Televisheni (Television) ya Taifa (TVT).

IPP Media, held under IPP group and one of East Africa's largest media conglomerates dominates the media sector in Tanzania. It owns among others, three television stations, four radio stations and a number of different newspapers (published in both Swahili and English). IPP Media is also a wide content provider for East African news on the Internet.[1305]

OMD puts television penetration in Tanzania at 6% of households[1306].

The national broadcaster, Tanzanian Broadcasting Corporation (TBC) strives to operate as a public broadcaster, but the appointment of its Board Chairperson and Director-General are done by the President, while the Minister of Information appoints board members of the broadcaster. This form of appointments compromise and undermines the public service mandate of the broadcaster. In addition, the TBC does not have an editorial charter, or at least its charter is not known.[1307]

Range of Services: Type of services offered by foreign entities.

The broadcasting leading stations in Tanzania are owned, managed and run by Tanzanians, apart from Chanel 10 TV which has been bought by the South African e.tv, a free-to-air broadcasting company.[1308] There is also the South African satellite subscription television service, DStv available in the country.

Market Share: market share between foreign and local suppliers[1309].

TBC, IPP Media Group, African Media Group and Sahara Communications have the biggest market share in the broadcasting sector.

1304 Johns, M and Mhando, N (2009) *African Media Development Initiative: Tanzania Context*, p. 18 and 20, available online at http://downloads.bbc.co.uk/worldservice/trust/pdf/AMDI/tanzania/amdi_tanzania9_ngo.pdf.

1305 Ownership and Regulation of the Media in Tanzania, available at http://arts1091.unsw.wikispaces.net/Media+in+Tanzania+-+Ownership+and+Regulation,

1306 Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p32.

1307 FesMedia (2010) *African Media Barometer – Tanzania.* Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Tanzania_2010_English.pdf.

1308 Johns, M and Mhando, N (2009) 'African Media Development Initiative: Tanzania Context', available online at http://www.radiopeaceafrica.org/assets/texts/pdf/TAN_AMDI_Report_pp4%201.pdf, pp 18 & 20.

1309 In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

None. The Tanzanian media sector is relatively liberalised and the government seems committed to open up the media sector.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

Section 10 (b) of the Broadcasting Act of 1993 states "an application for a licence under this Act may be made only by:

> *a company at least 51% of whose share-holding is beneficially owned by a citizen or citizens of the United Republic which is not, directly or indirectly, controlled by persons who are not citizens of the United Republic and whose principal place of business or registered office is in the United Republic.* [1310]

This means that foreign entities are entitled to 49% ownership[1311].

However the Electronic Communications and Postal Act of 2010, which effectively repeals the Broadcasting Act of 1993 and the Communications Act of 2003, is silent on local shareholding percentage. Section 26(2) states "The

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[1310] Tanzania (1993) Broadcasting Act, available online at http://www.tcra.go.tz/policy/Tanzania%20broadcasting%20Act%206%20of%201993.pdf.

[1311] The Media Services Bill lowers the shareholding of foreigners in the media in Tanzania was therefore lowered from 49% in the first draft to 30%- Media Council Position Paper No 1, May 2012, available online at http://www.google.co.za/#hl=en&tbo=d&q=Media+Council+Position+Paper+No+1%2C+May+2012+-++-+Tanzania&oq=Media+Council+Position+Paper+No+1%2C+May+2012+-+Tanzania&gs_l=serp.12...17412.19922.0.21352.11.11.0.0.0.0.297.2258.2j2j7.11.0.les%3B..0.0...1c.1.363v89kjk7Y&bav=on.2,or.r_gc.r_pw.&fp=3131691699ece451&bpcl=39314241&biw=1920&bih=985.

Minister shall, in consultation with the Authority, make regulations prescribing the minimum local shareholding requirement and procedure for approval and transfer of shares of electronic communications and postal licence.

Tanzania has over the years reduced barriers to foreign investment, including unconditional transfer of profits and lack of expropriation of any foreign investments. There are no limits on foreign ownership for most sectors. However, in the case of the broadcasting sector, there are some restrictions as stated above. Foreign entities cannot own more than 49% of a broadcasting

Efforts have been made to attract foreign investment, for instance in January 2005, the government adopted the Investment Promotion Act[1312] to assist local and foreign investors in obtaining necessary licences and providing other assistance and incentives.[1313] The Tanzanian government has also created the Tanzanian Investment Centre that serves as "to coordinate, encourage, promote, and facilitate investment in Tanzania and to advise the government on investment related matters."

All Tanzanian broadcasters are currently required to have a minimum 51% local ownership, meaning that foreign ownership in media enterprises may be allowed up to a maximum of 49%.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

None, apart from those mentioned above.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

Broadcasting licences are issued by the Tanzanian Communications Regulatory Authority (TCRA). The TCRA was formed through the merger of the Tanzania Communications Commission and the Tanzania Broadcasting Commission.

[1312] Published on Jan. 3, 2005 in Tanzania Gazette, Supplement No. 87 (passed by Parliament and approved by President in December 2004).
[1313] World Bank (2007) Trade in Information and Communication Services: Opportunities for East and Southern Africa- Final Report on Kenya, Tanzania and Uganda: A Study Commissioned by the Global Information and Communications Department, World Bank, p. 50-51, available at http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1208273252769/Trade_in_ICT_services-opportunities_for_E&SA_mod.pdf

Although the TCRA is seen as an independent body which is protected against political interference through supportive legislation, there are concerns that the Authority is not entirely independent since both the board chairman and Director General are presidential appointees.[1314]

Prospective broadcasting content providers are required to apply to the TCRA for licences. Section (6) (1) states:

> *Any person or a company that wishes to operate any electronic communications system or offer postal communications, electronic communications or content services shall apply to the Authority for a licence.*

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Broadcasting in Tanzania is undertaken by an independent regulator, the TCRA. However, the regulatory system cannot be considered to be independent as the selection of board members is done by the Minister.

Spectrum allocation is conducted and managed competitively through procedures laid down in the Tanzania Communications (Radiocommunication and Frequency Spectrum) Regulations, 2005 and the Electronic and Postal Communications Act of 2010.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As stated above, the IPP Media Group and the TBC state broadcaster have the biggest market share in the broadcasting sector.

Pricing: How do the prices of services compare to international benchmarks.

Not applicable.

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

[1314] As noted by panellists who gathered to discuss the African Media Barometer (AMB) in Tanzania, July 2010. See FesMedia (2010) *African Media Barometer – Tanzania*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia.

The competition law regime in Tanzania is governed by the Fair Competition Act of 2003 which came into effect in 2004. Its implementing bodies are the Fair Competition Commission and the Fair Competition Tribunal[1315].

The Electronic Communications and Postal Act also includes provisions for the promotion of competition. Sections 60-66 of the Act deal with anti-competitive practice and conduct.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

Although both the Competition Act and the Electronic Communications and Postal Act seek to protect against monopolies, in practice Tanzania has monopolies in many areas. In the media sector, the reality of cross-ownership is worrying.

4.13.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Tanzania has been a member of the WTO since January 1995[1316], but has made neither general horizontal GATS commitments, nor any in respect of communications services[1317].

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

Despite the absence of WTO commitments, there appear to be no barriers in respect of commercial presence, and very few in respect of presence of natural persons.

[1315] Mkocha, G (2009) Competition Policy and Law in Tanzania – Paper presented at the Third Annual Competition Commission, Competition Tribunal and Mandela institute Conference on Competition Law, Economics and Policy in South Africa at the South Africa Competition Commission, 2009/09/03, available online at http://www.compcom.co.za/.../ Godfrey-Mkocha-Competition-Policy-and-Law-in-Tanzania-for-South-Africa.doc.

[1316] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

[1317] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/TZA, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7213/2680/1546/Tanzania_GATS_Schedule.pdf. Tanzania has only made GATS commitments under Tourism and Travel Related Services.

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

Tanzania's commitments in relation to the East African Community could potentially complicate the implementation of regional MFN in the communications sector. There is no evidence, however, of MFN inconsistent measures in the telecommunications sector[1318].

4.13.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[1319] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[1320], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

1. Competitive safeguards: ***Fully Compliant (5/5).*** The economy-wide powers of the Fair Competition Commission and the Fair Competition Tribunal deal with a range of anti-competitive practices, including collusive agreements and the abuse of dominance where the "object, effect or likely effect of the conduct is to appreciably prevent, restrict or distort competition"[1321] but do not specifically address the practices focused on in the WTO Reference Paper. The 2010 Electronic and Postal Communications Act does provide for the regulation of market dominance and a limited range of anti-competitive practices[1322]. The

[1318] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

[1319] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1320] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1321] Tanzania (2003) 'The Fair Competition Act', Act No 8 of 2003, United Republic of Tanzania, Dodoma, Section 10, available online at , 2003 http://www.competition.or.tz/fcc_files/public/fca_no_8-2003.pdf.

[1322] Tanzania (2010) 'The Electronic and Postal Communications Act, 2010', Act No 3 of 2010, United Republic of Tanzania, Dodoma, Part IV, available online at http://www.tcra.go.tz/images/documents/policies/epoca.pdf.

2011 Competition Regulations issued by the regulator, however, cover a comprehensive range of anti-competitive practices, including cross-subsidisation, the misuse and withholding of information and much more[1323].

2. Interconnection: ***Largely Compliant (4/5).*** The 2010 Electronic and Postal Communications Act deals with interconnection at a fairly general level[1324] but the 2011 Interconnection Regulations issued by the regulator are far more detailed and specific[1325]. These set out the obligation to interconnect, procedures for reaching interconnection agreements, deal with timeliness, non-discrimination, reference interconnect offers, points of interconnection, dispute settlement, and rates and charges. Interconnection agreements are not, however, publicly available.

3. Universal service: ***Largely compliant (4/5).*** Although the imposition of universal service obligations upon licensees is dealt with in the 2010 Electronic and Postal Communications Act[1326], the establishment, governance and operation of the Universal Communications Service Access Fund is provided for via separate legislation, which sets out, inter alia, a transparent and non-burdensome regime [1327]. Subordinate regulations issued by the Minister set out the procedures and operation of the Fund in more detail[1328]. The ITU, however, reports the Fund as having a low level of activity, and as having failed to produce financial reports[1329].

4. Public availability of licensing criteria: ***Fully Compliant (5/5).*** Licensing criteria, procedures and timeframes are set out in some detail in the 2010

[1323] TCRA (2011) 'The Elecrtonic [sic] and Postal Communications (Competition) Regulations, 2011', Government Notice No 420, Tanzania Communications Regulatory Authority, Dar es Salaam, 9 December 2011, available online at http://www.tcra.go.tz/images/documents/regulations/competition.pdf.

[1324] Tanzania (2010) 'The Electronic and Postal Communications Act, 2010', Act No 3 of 2010, United Republic of Tanzania, Dodoma, Part IV, available online at http://www.tcra.go.tz/images/documents/policies/epoca.pdf.

[1325] TCRA (2011) 'The Electronic and Postal Communications (Interconnection) Regulations, 2011', Government Notice No 425, Tanzania Communications Regulatory Authority, Dar es Salaam, 9 December 2011, available online at http://www.tcra.go.tz/images/documents/regulations/interconnection.pdf.

[1326] Tanzania (2010) 'The Electronic and Postal Communications Act, 2010', Act No 3 of 2010, United Republic of Tanzania, Dodoma, Section 17, available online at http://www.tcra.go.tz/images/documents/policies/epoca.pdf.

[1327] Tanzania (2006) 'The Universal Communications Service Access Act, 2006', United Republic of Tanzania, Dodoma, Section 17, available online at http://www.tcra.go.tz/images/documents/policies/ucsa.pdf.

[1328] MCT (2009) 'Universal Communications Service Access Fund Regulations 2009', Ministry of Communication, Science and Technology, Dar es Salaam, available online at http://ucaf.go.tz/downloads/UCSAF%20Regulations.pdf.

[1329] ITU (2013) 'Universal Service Fund and Digital Inclusion For All Study', International Telecommunication Union, Geneva, pp57,8, available online at http://www.itu.int/en/ITU-D/Conferences/GSR/Documents/ITU%20USF%20Final%20Report.pdf.

Electronic and Postal Communications Act[1330] and are supplemented by detailed regulations[1331]. Detailed information on licensing is available on the website of the regulator, including pro forma versions of the various licence types. Actual individual licences are not, however, available on the website of the regulator.

5. Independent regulators: ***Partially Compliant (3/5).*** The ICT sector regulator is largely separate from and not accountable to suppliers of goods and services. There are some checks and balances (but no transparency requirements) in the rather convoluted appointments process to the Board of the regulator, but government appointees make up the majority of the Nomination Committee, which recommends a shortlist from which the Minister makes the final appointments. There are, however, professional criteria governing Board appointments, together with conflict of interest restrictions in appointment to and proceedings of the Board. Although the Minister may not intervene "in relation to the discharge of the regulatory function", he "may from time to time as occasion necessitates it, give to the Authority directions of a specific or general character on specific issues". Given that government still has substantial shareholdings in some licensees, some degree of structural conflict of interest is likely[1332].

6. Allocation and use of scarce resources: ***Largely Compliant (4/5).*** The 2010 Electronic and Postal Communications Act contains detailed provisions relating to the allocation and control of frequency spectrum, which is fully under the control of the regulator, with some support from a Spectrum Consultative Committee[1333]. There are also provisions dealing numbering and, to a lesser extent, rights of way[1334]. The National Frequency Spectrum Plan does not, however, seem to be publicly available.

Tanzania's compliance with the WTO Reference Paper is high in almost all of the criteria. There is nothing currently that would prevent the country becoming a

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[1330] Tanzania (2010) 'The Electronic and Postal Communications Act, 2010', Act No 3 of 2010, United Republic of Tanzania, Dodoma, Part II(a), available online at http://www.tcra.go.tz/images/documents/policies/epoca.pdf.

[1331] TCRA (2011) 'The Electronic And Postal Communications (Licensing) Regulations, 2011,, Government Notice No 430, Tanzania Communications Regulatory Authority, Dar es Salaam, 9 December 2011, available online at http://www.tcra.go.tz/images/documents/regulations/licensing.pdf.

[1332] Tanzania (2003) 'Tanzania Communications Regulatory Authority Act, 2003', United Republic of Tanzania, Dodoma, available online at http://www.tcra.go.tz/policy/Tanzania%20Communications%20Regulatory%20Act-2003.pdf. See Sections 6($), 7(5), 8, 11 and First Schedule.

[1333] Tanzania (2010) 'The Electronic and Postal Communications Act, 2010', Act No 3 of 2010, United Republic of Tanzania, Dodoma, Sections 71-8, available online at http://www.tcra.go.tz/images/documents/policies/epoca.pdf.

[1334] Tanzania (2010) 'The Electronic and Postal Communications Act, 2010', Act No 3 of 2010, United Republic of Tanzania, Dodoma, Sections 79-81 & 161, available online at http://www.tcra.go.tz/images/documents/policies/epoca.pdf.

signatory, and only limited changes in law would be required to ensure full compliance.

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4.14 ZAMBIA

4.14.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Zambia's 2009 ICT Act distinguishes between "network" and "service" licences. The former "allow the holder thereof to construct, own or make available an electronic communications network, or to provide a network service", whilst the latter "allow the holder thereof to provide one or more electronic communications services"[1335].

Whilst electronic communications services are loosely defined, the lengthy definition of electronic communications networks is borrowed almost verbatim from the European Union and includes "transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, radio, optical or other electro-magnetic means, including satellite networks, fixed, circuit and packet switch [sic], internet, mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting and cable television networks irrespective of the type of information conveyed"[1336].

The Act further provides for individual and class licences in each of the two major types of licence[1337].

The regulator has distinguished five categories of network infrastructure for which individual licences are applicable, viz "mobile cellular... fixed Internet...

[1335] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Section 10(1), available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

[1336] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Section 2(1)., available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

[1337] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Section 10(2), available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

fixed... public radio paging... network service", alongside three categories of network service for which individual licences are applicable, viz "mobile cellular... international voice... fixed". Class licences are applicable in respect of four categories of network (viz: "wireless Internet... public data... public pay phone... private network") and three of service (viz: "Internet service (ISP)"... citizen band... value added service") licence[1338].

The licensing of frequency spectrum is dealt with separately[1339], but spectrum licences are issued "at the same time" as the corresponding telecommunications licence[1340].

The licensing regime in Zambia is thus primarily a converged one (horizontal or unified or multi-service), distinguishing between infrastructure and services at the top level, but with some vertical categorisation at a lower level. As such, it goes well beyond the vertical framework as set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm describes Zambia's telephony market as comprising one fixed-line operator, Zambia Telecommunications Ltd (Zamtel), and three mobile operators, Airtel, MTN Zambia ((formerly Telecel) and Zamtel (formerly Cell Z, a subsidiary of Zamtel, now part of the Zamtel brand)[1341].

The most recent comparative figures for telecomms market share date from December 2012.

[1338] ZICTA (nd) Licensing Guidelines', ', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=50&Itemid=93.

[1339] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Section 54), available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

[1340] ZICTA (nd) Licensing Guidelines', ', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=50&Itemid=93.

[1341] BuddeComm (2012) 'Zambia - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Zambia-Telecoms-Mobile-Broadband-and-Forecasts.html. The full report is available on a for sale basis.

Zambia: Fixed & Mobile Subscribers		
	2012 (Dec)[1342]	
	Subscribers	Market Share
Zamtel (fixed)	82 542	1%
Airtel (mobile)	4 744 000	45%
MTN Zambia (mobile)	4 112 000	39%
Zamtel (mobile)	1 687 000	16%
Total	10 625 218[1343]	

Figures from the ITU for 2011 are in agreement with the breakdown above, giving 85 700 fixed-line subscribers[1344]; 8 164 600 mobile subscribers[1345]. This translates to a per capita market penetration rates in the telecommunications sector for Zambia as at 2011 of 0,6% for fixed-line, 60,6% for mobile and 11,5% for the Internet (from 0,9%, 41,6% and 10,0% respectively in 2010[1346].

The regulator lists the following Internet service provider licensees: Acme Technology; AfriConnect; Airtel; A-Plus Technologies; Comium Data; Coppernet Solutions; Foris Telecom; iBurst; Internet Technologies; iWay Africa; Koza Telecomms; Morse Communications; MTN Business Solutions; MTN;

1342 ZICTA (2012) 'ICT Sector Statistics for period ending December 2011', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=54&view=finish&cid=209&catid=7. Subscriber numbers for the three mobile operators are approximate, and market share is rounded to the nearest percent, because the ZICTA report provides only an approximate breakdown, except for fixed.

1343 This figure is exact.

1344 ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

1345 ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

1346 ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

Postlink; Preworx; Pronet Africa; Quick Edge; Real Time; Transaction Payment Solutions; WiMax; Zamnet Communications Systems; Zamtel[1347].

Zambia: Internet Subscribers		
	2011 (Dec)[1348]	
	Subscribers	Market Share
Zamtel	12 693	60,8%
AfriConnect	4 352	20,8%
Zamnet	2 134	10,2%
Others	1 696	8,1%
Total	20 875	

Zamtel remains, somewhat controversially and subject to ongoing litigation, 100% government-owned, following the reversal of the sale of a 75% stake to Libya's Lap Green Networks[1349].

Bharti Airtel is "almost 97 percent" owned by Bharti Airtel of India, with the latter having failed to acquire the remaining shareholding which is publicly traded on the Lusaka stock exchange[1350].

MTN Zambia has the following ownership structure:

[1347] ZICTA (nd) 'Internet Service Provider', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=62:internet-service-provider&Itemid=111. . . . .

[1348] ZICTA (2012) 'ICT Sector Statistics for period ending December 2011', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=165:ict-sectorstatistics-for-period-ending-december-2011&catid=22:er&Itemid=41. No more recent figures are available from ZICTA. These figures are inconsistent with the ITU estimates cited above for Internet penetration, presumably because they reflect contract accounts only. Some of the ISPs listed by ZICTA have as few as 11 clients.

[1349] See: Simuchoba, A (2012) ' Zambia to re-negotiate Zamtel sale', The Monitor, Gaborone, 23 January 2012, available online at http://www.mmegi.bw/index.php?sid=1&aid=72&dir=2012/January/Monday23http://www.mmegi.bw/index.php?sid=1&aid=72&dir=2012/January/Monday23; and Malakata, M (2012) 'Lap Green Networks sues Zambian govt', ITWeb, Johannesburg 3 February 2012, available online at http://www.itweb.co.za/index.php?option=com_content&view=article&id=51224.

[1350] Lusaka Time (2012) 'Bharti Airtel shares to resume trading on Lusaka Stock Exchange', Lusaka Times, Lusaka, 31 July 2012, available online at http://www.lusakatimes.com/2012/07/31/bharti-airtel-shares-resume-trading-lusaka-stock-exchange/.

- 86% - MTN Group (South Africa)[1351];
- 10% - Special Purpose Vehicle;
- 4% - Unclear[1352].

According to the WTO, in 2009 MicroLink (curiously not listed by ZICTA as a licensee) was the only ISP with part foreign ownership[1353]. It is currently a joint venture between CEO John Taylor and Gilat Satcom (Israel)[1354].

International communications access is provided by a number of routes. These include:

- The links of both Zamtel via its point of interconnection with Telecom Namibia at Shesheke[1355] and Liquid Telecom via its Southern Africa terrestrial fibre network[1356] to the West Africa Cable System (WACS - with a design capacity of 5,12 Tbit/s);
- The links of both Zamtel via its point of interconnection with Telecom Namibia at Shesheke[1357] and Liquid Telecom via its Southern Africa terrestrial fibre network[1358] to the South Atlantic 3 / West Africa Submarine Cable (SAT-3, with a capacity of 340 Gbit/s);
- The links of both Liquid Telecom via its Southern Africa terrestrial fibre network[1359] and ISP MicroLink via its partner Gilat Satcom[1360] to the Eastern Africa Submarine Cable System (EASSy) with a capacity of 2,72

1351 MTN (2012) 'Integrated Business Report – for the year ended 31 December 2011', MTN Group Limited, Johannesburg, p28, available online at http://mtn-investor.com/mtn_ar2011/pdf/full.pdf,.

1352 MTN (2012) 'Integrated Business Report – for the year ended 31 December 2011', MTN Group Limited, Johannesburg, available online at http://mtn-investor.com/mtn_ar2011/pdf/full.pdf, p170, notes that 10% of MTN Zambia is held by an un-named SPV, but fails to state to whom an additional 4% was sold in 2011.

1353 WTO (2009) 'Trade Policy Review Report by the Secretariat: Zambia', WT/TPR/S/219. World Trade
Organisation, Geneva, p68.

1354 BiztechAfrica (2013) 'Gilat Satcom, Microlink boost Zambia fibre', *BiztechAfrica*, Johannesburg, 7 February, available online at http://www.biztechafrica.com/article/gilat-satcom-microlink-boost-zambia-fibre/5260/.

1355 Malakata, M (2012) 'Zambia's Zamtel connects to WACS, Sat-3 undersea cables', *Computerworld Zambia*, Lusaka, 26 July 2012, available online at http://news.idg.no/cw/art.cfm?id=B45D8E38-B435-0BE2-5D80DDFB5A76D6E8.

1356 YoungNation (2013) 'Liquid Telecom Extends Fibre Optic Footprint', YoungNation, available online at http://www.youngnation.co.zw/liquid-telecom-extends-fibre-optic-footprint.

1357 Malakata, M (2012) 'Zambia's Zamtel connects to WACS, Sat-3 undersea cables', *Computerworld Zambia*, Lusaka, 26 July 2012, available online at http://news.idg.no/cw/art.cfm?id=B45D8E38-B435-0BE2-5D80DDFB5A76D6E8.

1358 YoungNation (2013) 'Liquid Telecom Extends Fibre Optic Footprint', YoungNation, available online at http://www.youngnation.co.zw/liquid-telecom-extends-fibre-optic-footprint.

1359 YoungNation (2013) 'Liquid Telecom Extends Fibre Optic Footprint', YoungNation, available online at http://www.youngnation.co.zw/liquid-telecom-extends-fibre-optic-footprint.

1360 BiztechAfrica (2013) 'Gilat Satcom, Microlink boost Zambia fibre', *BiztechAfrica*, Johannesburg, 7 February, available online at http://www.biztechafrica.com/article/gilat-satcom-microlink-boost-zambia-fibre/5260/.

Tbit/s - MTN also plans to connect to EASSy[1361] but the completion status of the project is unknown;

- Liquid Telecom via its Southern Africa terrestrial fibre network [1362] to Seacom with a capacity of 2,6 Tbit/s;
- Liquid Telecom via its Southern Africa terrestrial fibre network[1363] to The East African Marine System (TEAMS with a capacity of 1,28 Tbit/s.

Range of Services: Type of services offered by foreign entities.

As can be seen from the above, the provision of voice communications is dominated by mobile companies under majority foreign ownership and control.

Market Share: market share between foreign and local suppliers[1364].

Foreign suppliers together account for over 80% of the mobile voice communications market. Although at least one foreign company (MTN Business) is also active as an ISP, this market remains dominated by the state-owned incumbent.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

Apart from the Zambian government's controversial role in the stalled privatisation of Zamtel and in the preservation of its monopoly on the international gateway for voice traffic[1365], there do not appear to be any other such stakeholder groups or organisations.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

[1361] TeleGeography (2012) 'MTN Zambia to invest USD3 million on connection to EASSy', TeleGeography, Washington DC, 29 March 2012, available online at http://www.telegeography.com/products/commsupdate/articles/2012/03/29/mtn-zambia-to-invest-usd3-million-on-connection-to-eassy/.

[1362] Econet connects Zambia to Seacom and Sat3 undersea cables Zambian Watchdog. November 14, 2011 http://www.zambianwatchdog.com/econet-connects-zambia-to-seacom-and-sat3-undersea-cables/?ModPagespeed=noscript.

[1363] YoungNation (2013) 'Liquid Telecom Extends Fibre Optic Footprint', YoungNation, available online at http://www.youngnation.co.zw/liquid-telecom-extends-fibre-optic-footprint.

[1364] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[1365] Habeenzu, S (2010) 'Zambia ICT Sector Performance Review 2009/2010', Towards Evidence-based ICT Policy and Regulation, Vol 2, Policy Paper 17, ResearchICTafrica, Cape Town, available online at http://www.researchictafrica.net/publications/Policy_Paper_Series_Towards_Evidence-based_ICT_Policy_and_Regulation_-_Volume_2/Vol%202%20Paper%2017%20-%20Zambia%20ICT%20Sector%20Performance%20Review%202010.pdf.

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

As noted above, Zambia's licensing framework is largely technology neutral, distinguishing primarily between "network" and "service" licences, but with some technology-specific sub-categories.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

Individual licences for both networks and services are issued "conditionally through a competitive process announced at the instance of the Authority" - in other words, through a public tender process at the discretion of the regulator[1366]. Following the lifting of the formal regulation limiting the number of suppliers in the mobile voice market, a fourth mobile operator is expected to be licensed in the near future[1367].

There are no formal restrictions on foreign ownership in law, regulation or licensing practice (this despite a World Bank reference to "policy that at least 30% of [fixed-line] equity must be domestically owned"[1368]).

The World Bank, however, describes Zambia as "among the world's most open economies to foreign ownership and… consistently… among the largest

[1366] ZICTA (nd) Licensing Guidelines', ', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=50&Itemid=93.

[1367] BiztechAfrica (2013) 'Former Minister advises caution on 4th Zambian licence', *BiztechAfrica*, Johannesburg, 29 March 2013, available online at http://www.biztechafrica.com/article/former-minister-advises-caution-4th-zambian-licenc/5654/#.UjcSwtIjwVA.

[1368] WTO (2009) 'Trade Policy Review Report by the Secretariat: Zambia', WT/TPR/S/219. World Trade
Organisation, Geneva, pviii. The aborted sale of a 75% stake in ZamTel to Lap Green already exceeds this 'policy' threshold.

recipients of FDI per capita"[1369]. The WTO notes the establishment in law of the Zambia Development Agency and that the ZDA Act "does not distinguish between treatment for domestic and foreign investors"

The World Bank notes that a "foreign company is not required to obtain an investment license from the Zambia Development Agency (ZDA), unless it wants to benefit from associated tax exemptions and incentives and to acquire land"[1370]. According to the WTO such investment licences are subject to fairly general criteria, including that the "investment will have developmental benefits and not harm the environment", and provides important guarantees in respect of "funds transfer, due process in expropriation, and recourse to adequate dispute settlement"[1371].

The World Bank notes that Zambia has certain minimum foreign capital requirements, pointing out that a "foreign company establishing a subsidiary in Zambia must be issued a certificate of compliance for the following minimum capital requirements… [USD 1 000] for private companies… [and USD 10 000] for public companies"[1372]. The World Bank further notes that a "foreign company establishing a subsidiary in Zambia must authenticate its documents abroad[1373]. However, the World Bank gives Zambia a score of 100 out of 100 for foreign equity participation in the telecommunications sector overall[1374].

Zambia has made some horizontal GATS commitments in relation to foreign investment restrictions, and permits, "with permission from the Bank of Zambia, a foreign-controlled company [to] obtain loans or overdrafts of up to one third of the value of its paid up capital"[1375]. With Zambia having made no horizontal GATS commitments in relation to commercial presence of foreign entities, nor

[1369] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p117.
[1370] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p168.
[1371] WTO (2009) 'Trade Policy Review Report by the Secretariat: Zambia', WT/TPR/S/219. World Trade
Organisation, Geneva, p27.
[1372] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p38.
[1373] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p168.
[1374] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf, p168.
[1375] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZMB, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7513/2634/9664/Zambia_GATS_Schedule.pdf, p2.

any commitment in respect of communications services[1376], limited further information on the legal status of foreign enterprises is available.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

Zambia has indicated that it is not bound to the GATS provisions in relation to foreign personnel, reserving the right to implement "measures concerning the entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment". Further, "the employment of such persons shall be agreed upon by the contracting parties and approved by the Ministry of Home Affairs. Enterprises must also provide for training in higher skills for Zambians to enable them to assume specialized roles"[1377].

The World Bank also notes that for foreign companies "at least 50% of the directors must be residents."[1378].

The WTO suggests that foreign acquisitions of local companies are well tolerated, noting that the Competition and Consumer Protection Commission "rarely ever raises competition concerns on a foreign company taking over a local company, where the foreign company has no presence in Zambia" [1379].

Zambia is ranked 84th out of 183 countries in terms of ease of doing business by the World Bank[1380].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting,

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[1376] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZMB, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7513/2634/9664/Zambia_GATS_Schedule.pdf. . . . .

[1377] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZMB, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7513/2634/9664/Zambia_GATS_Schedule.pdf. . . . .

[1378] World Bank (2010) 'Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies, World Bank Group, Washington DC, p37, available online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[1379] WTO (2009) 'Trade Policy Review Report by the Secretariat: Zambia', WT/TPR/S/219. World Trade
Organisation, Geneva, p46.

[1380] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

The 2009 ICT Act places telecommunications licensing firmly under the control of the regulator with a very limited role for the Minister[1381]. However, the events surrounding toe possibility of licensing a fourth mobile operator, as reported above, suggest a far greater involvement for government than that specified in the law. Individual licence applications follow a "competitive process announced at the instance of the Authority", whereas class licences follow a registration process[1382].

VoIP is legalised in Zambia for all licensed operators who may deploy VoIP "only as a technology for providing a licensed service and not as a service by itself"[1383].

International gateway services are now fully liberalised[1384], with voice falling under a specific individual licensing category[1385]. Previously, all voice traffic was required to pass through the international gateway of the incumbent, Zamtel, with only international data access liberalised[1386].

The 2009 ICT Act which empowers the regulator to regulate interconnection contains no provisions permitting anti-competitive or discriminatory practices, placing specific interconnection obligations upon dominant operators[1387]. The

[1381] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Sections 9 & 10, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14. The regulator is only obliged to carry out "general directives with respect to the carrying out of its functions" as issued by the Minister.

[1382] ZICTA (nd) Licensing Guidelines', ', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=50&Itemid=93.

[1383] CAZ (2006) 'Guidelines for the Use of VoIP in Zambia', Communications Authority of Zambia, Lusaka, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=110&view=finish&cid=180&catid=19.

[1384] GSMA (2012) 'Gateway Liberalisation- Stimulating Economic Growth', GSM Association, London, p112, available online at http://www.gsma.com/publicpolicy/wp-content/uploads/2012/03/gatewayliberalisation.pdf.

[1385] ZICTA (nd) Licensing Guidelines', ', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=50&Itemid=93.

[1386] WTO (2009) 'Trade Policy Review Report by the Secretariat: Zambia', WT/TPR/S/219. World Trade
Organisation, Geneva, pp67,8.

[1387] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Sections 41, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14. The regulator is only obliged to carry out "general directives with respect to the carrying out of its functions" as issued by the Minister.

regulator has subsequently intervened to standardise and lower interconnection changes[1388].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

As noted above, both Airtel and MTN Zambia are dominant in the voice telephony market with shares of 45% and 39% respectively. If fixed-line telephony is considered a separate market, the monopoly provider, Zamtel, clearly has dominance. Zamtel has dominance in the ISP market with a share of 61%.

Pricing: How do the prices of services compare to international benchmarks.

According to the International Telecommunication Union, the price of a monthly mobile basket of services for Zambia in 2008 was 18,5% of monthly gross national income per capita - just below the average for sub-Saharan Africa of 23%, making Zambia the 16th cheapest out of 32 African countries surveyed. The corresponding percentages for fixed and broadband were 41,6% and 137,2% (12th cheapest of 32 African countries)[1389].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

According to Bowman Gilfillan, there is a competition authority in Zambia. It is a structure similar to that of South Africa, with a Competition and Consumer Protection Commission, holding investigative powers, and a Competition and Consumer Protection Tribunal, holding enforcement powers. The former had been established under the Zambian Competition and Fair Trading Act of 1994, which was repealed by the Competition and Consumer Protection Act No 24 of 2010, which established the latter[1390].

[1388] ZICTA (2010) 'Speech by the Director General of the Zambia Information and Communications Technology Authority, Ms Margaret K Chalwe, on the Occussion [sic] to Announce the Determination of Interconnection Rates for Mobile and Fixed Network Providers', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=54&view=finish&cid=146&catid=18&m=0.

[1389] ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, pp 16, 37 & 40, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

[1390] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p56.

The Act does deal with dominance, which is defined to occur for single firms with a market share exceeding 30%, or for markets with up to three firms enjoying a combined market share exceeding 60%. Abuse of dominance includes, inter alia: "imposing, directly or indirectly, unfair... prices or other unfair trading conditions; limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition; denying any person access to an essential facility; selling goods below their marginal or variable cost; [and] the conclusion of contracts subject to... supplementary conditions which... have no connection with the subject matter[1391]. The Act provides for financial penalties for abuse of dominance of up to 10% of annual turnover[1392].

The 2009 ICT Act requires the regulator to consult the Zambia Competition Commission on "any matter relating to competition in the sector"[1393].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour.

4.14.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

The licensing framework for broadcasting in Zambia is set out in the 2002 Independent Broadcasting Authority Act[1394] as amended in 2010[1395]. The

[1391] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p58, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[1392] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, p58, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf.

[1393] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Sections 8, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14. The regulator is only obliged to carry out "general directives with respect to the carrying out of its functions" as issued by the Minister.

[1394] Zambia (2002) 'The Independent Broadcasting Authority Act, 2002', Act No 17 of 2002, Republic of Zambia, Lusaka, available online at http://www.zambialii.org/files/zm/legislation/act/2002/17/ibaa2002349.pdf.

legislation does not distinguish between radio and television broadcasting. The original act does not distinguish between broadcasting and transmission or signal distribution, defining broadcasting as the "distribution of television or radio, by means of terrestrial or satellite"[1396]. The 2010 Amendment, which defines a broadcasting service as being "conveyed by means of an electronic communications network" [1397], appears to imply that a signal distributor would require an infrastructure licence from the telecommunications regulator, but this cannot be independently confirmed.

The IBA Act now provides for three categories of broadcasting services that need to be licensed: commercial broadcasting services, community or religious broadcasting services and subscription broadcasting services[1398].

The licensing framework adopted for broadcasting in Zambia is therefore only partly in alignment with W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

Sources differ on the number of broadcasters in the country. The following compilation is compiled from reports by the OECD[1399], FesMedia[1400] and

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1395 Zambia (2010) 'The Independent Broadcasting Authority (Amendment) Act 2010, Republic of Zambia, Lusaka, available online at http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=660.

1396 Zambia (2002) 'The Independent Broadcasting Authority Act, 2002', Act No 17 of 2002, Republic of Zambia, Lusaka, Section 2, available online at http://www.zambialii.org/files/zm/legislation/act/2002/17/ibaa2002349.pdf.

1397 Zambia (2010) 'The Independent Broadcasting Authority (Amendment) Act 2010, Republic of Zambia, Lusaka, Section 3, available online at http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=660.

1398 Zambia (2010) 'The Independent Broadcasting Authority (Amendment) Act 2010, Republic of Zambia, Lusaka, Section 23, available online at http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=660.

1399 Zambia (2013) 'Competition Issues in Television and Broadcasting: Contribution from Zambia', Document No DAF/COMP/GF/WD(2013)21, Global Forum on Competition, 28 February & 1 March 2013, Organisation for Economic Co-operation and Development, Paris, p3, available online at http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD%282013%2921&docLanguage=En.

1400 FesMedia (2011) *African Media Barometer- Zambia*. p. 28, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Zambia_2011_01.pdf.

OMD[1401], and represents a considered summary, given that the market estimates across the three sources range from a low of 31 to a high of 70 stations in total, with the upper estimate being the most credible.

There are 11 television stations. These include:

- 1 state-owned public broadcaster (*Zambia National Broadcasting Corporation* (ZNBC, with 2 channels))
- 6 private commercial stations, including *Central Broadcasting Company* (CBC), *Chipata Television* (provisional licence), *Copperbelt Television* (CB TV), *Mobi TV*, *Muvi TV*[1402] (free-to-air in Lusaka only), *North-West TV* (provisional licence), *Western TV*;
- 1 religious broadcaster, *Trinity Broadcast Network* (TBN);
- 3 satellite subscription broadcasters, *MultiChoice Zambia*, *My TV* and *Muvi Television* (including their second channel, *Africa Unite*).

There are a total of 59 stations in the radio broadcasting market:

- 3 state-owned public broadcast stations (*ZNBC 1*, *ZNBC 2* and *ZNBC 4*);
- 21 commercial stations (including *Choice*, *Ichengelo, , Q FM Radio Phoenix and*, *Sky FM*,);
- 17 community stations (including *Breeze FM*, *Itezhi-Tezhi*, *Mazabuka Community Radio*, *Mpika* and *Walamo*);
- 15 religious stations (mostly Catholic, including *Radio Christian Voice* and *Yatsani Radio*);
- 3 educational stations (*UNZA Radio* (University of Zambia), *Parliament Radio* and *Hone FM* (Evelyn Hone College))

Stations whose classification is unclear include: *5 FM Radio*, *Chikuni Radio, Flava FM*, *Hot FM*, *Radio Maranatha*, *Radio Maria*, *Radio Musi-o-Tunya*, *Yar FM, Zambezi FM Radio*[1403].

There is limited market share information available.

The OECD puts the market share in the subscription broadcasting market as follows: *MultiChoice Zambia* (69 000 subscribers, 90% market share) My TV

[1401] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p33.

[1402] Counted below as a subscription broadcaster.

[1403] TuneIn (nd) 'Zambia Radio Stations', TuneIn, Palo Alto CA, available online at http://tunein.com/radio/Zambia-r101316/.

(6 000 subscribers, 8% market share) and *Muvi Television* (2 000 subscribers, 3% market share)[1404].

A 2010 market survey reported the following percentages of interviewees listening to each of the ten most popular radio stations:

Zambia: Radio Listenership[1405]	
	2010
	% Listening to over past week
ZNBC Radio 1	48%
ZNBC Radio 2	38%
ZNBC Radio 4	26%
Radio Phoenix	16%
Q FM	12%
Sky FM	12%
Ichengelo	11%
Radio Christian Voice	10%
Breeze FM	9%
BBC Radio	8%

OMD puts television penetration in Zambia at 23% of households[1406].

The Zambia National Broadcasting Corporation is 100% state-owned.

[1404] Zambia (2013) 'Competition Issues in Television and Broadcasting: Contribution from Zambia', Document No DAF/COMP/GF/WD(2013)21, Global Forum on Competition, 28 February & 1 March 2013, Organisation for Economic Co-operation and Development, Paris, available online at http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD%282013%2921&docLanguage=En. The figures in this report do not add up correctly.

[1405] AudienceScapes (2010) 'Zambia's State Run ZNBC Dominates Radio Listening: What Does This Mean for Information Access?', Intermedia, New York, October 2010, available online at http://www.audiencescapes.org/sites/default/files/AScapes%20Briefs_ZNBC%20in%20Zambia.pdf.

[1406] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, p33, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf.

DStv has the following shareholding:

- 51% - MultiChoice Africa (South Africa);
- 49% - ZNBC[1407].

Trinity Broadcast Network (TBN) is a Christian station headquartered in Costa Mesa, California[1408].

Radio Phoenix was bought out by management from its original owner, Errol Hickey[1409].

No information is readily available on the ownership structures of any of the other private radio stations.

The 1987 ZNBC Act, gives the ZNBC a public service mandate requiring the corporation to:

> *(a) provide varied and balanced programming for all sections of the populations;*
>
> *(b) serve the public interest...*
>
> *(d) offer programmes that provide information, entertainment and education;*
>
> *(e) contribute to the development of free and informed opinions and as such, constitute an important element of the democratic process...*[1410]

The station is, however, viewed by some commentators as a state broadcaster rather than a public broadcaster. For example, both Limpitlaw and FesMedia note disapprovingly that the 2010 ZNBC Amendment Act makes appointment of its governing Board at the sole discretion of the minister, with the latter stating that as of 2011 the Corporation had no Board in place[1411].

1407 OSI (2010) 'Public Broadcasting Africa Series: Zambia', Open Society Institute, p83, available online at http://www.afrimap.org/english/images/report/Zambia%20Broadcasting%20Survey%20Web.pdf.

1408 Wikipedia (nd) 'Trinity Broadcasting Network', I, available online at http://en.wikipedia.org/wiki/Trinity_Broadcasting_Network

1409 Mukwita, A (2011) 'Zambia's Largest Independent Radio Station Sold to Management, Owner Says', Bloomberg, New York, 7 January 2011, available online at http://www.bloomberg.com/news/2011-01-07/zambia-s-largest-independent-radio-station-sold-to-management-owner-says.html.

1410 Zambia (1987) 'The Zambia National Broadcasting Corporation Act', Chapter 154 (Vol 11, Act No 16 of 1987 (Amended 1994, 2002), Republic of Zambia, Lusaka, Section 7, available online at http://www.zambialii.org/files/zm/legislation/consolidated-act/154/cap154.RTF.

1411 See: Limpitlaw, J (2012) 'Media Law Handbook for Southern Africa', Volume 1, Konrad-Adenauer-Stiftung Regional Media Programme, Johannesburg, p361, available online at http://www.kas.de/wf/doc/kas_23503-1522-2-30.pdf?120710123933 and FesMedia (2011) *African Media Barometer- Zambia*. p. 28, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p44, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Zambia_2011_01.pdf.

FesMedia gives Zambia a score of 1,1 out of 5 on the indicator dealing with regulation of "broadcasting services and licenses in the public interest and [ensuring] fairness and a diversity of views broadly representing society at large"[1412], indicating non-compliance. They point to the fact that "there is no operational broadcasting regulatory body in Zambia that regulates licences in the public interest and ensures fairness and a diversity of views" [1413].

Range of Services: Type of services offered by foreign entities.

Two foreign entities are active in the Zambian broadcasting market: Trinity Broadcast Network and MultiChoice Zambia.

Market Share: market share between foreign and local suppliers[1414].

As noted above, local broadcasting companies have the biggest market share in the radio broadcasting market. MultiChoice Zambia (DStv) is overwhelmingly dominant in the subscription broadcasting market. No definitive information is available in respect of the television broadcasting market.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

The dominance of the state in the broadcasting sector and the absence of effective regulation may be seen as a threat to liberalisation.

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign

[1412] FesMedia (2011) *African Media Barometer- Zambia*. p. 28, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p44, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Zambia_2011_01.pdf.

[1413] FesMedia (2011) *African Media Barometer- Zambia*. p. 28, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p45, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Zambia_2011_01.pdf.

[1414] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

There do not appear to be quantitative limitations on the numbers of suppliers.

There are, however, firm restrictions that prevent majority foreign ownership of broadcasters. Broadcasting licences are only available to a "citizen of Zambia", which is defined as a "company in which not less than seventy-five percent of the company's shares are held by Zambians"[1415]. The previous loophole, which allowed the Minister, in consultation with the IBA, to exempt certain broadcasters from this restriction (which is presumably how Trinity Broadcast Network and MultiChoice Zambia acquired their licences) was removed in 2010.

Over the years, Zambia has undertaken reforms that made it easier for enterprises to do business. These have included "abolition of price controls, liberalization of interest rates, abolition of exchange rate controls, 100% repatriation of profits, free entry investment in virtually all sectors of the economy, trade reforms aimed at simplifying and harmonizing the tariff structure, and removal of quantitative restrictions on imports. Moreover, it shortened the time taken for business name registration and company incorporation was shortened from 21 days to 3 days" [1416].

Although Zambia has a relatively healthy investment environment, as noted above and as set out in the previous section dealing with telecommunications, the broadcasting legislation places restrictions on foreign investment in the broadcasting sector.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

Other than the restriction on foreign shareholding noted above, there do not appear to be further restrictions or requirements based on nationality.

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid).

[1415] Zambia (2010) 'The Independent Broadcasting Authority Act 2002' (as amended), Republic of Zambia, Lusaka, Section 22.

[1416] NEPAD-OECD (2011) Accelerating reform in Africa: Mobilising investment in infrastructure and agriculture- Highlights of the Policy Framework for Investment in Zambia. document has been prepared as a background Report prepared for the 5th NEPAD-OECD Ministerial Conference on 26-27 April 2011, Dakar, Senegal, p3, available online at http://www.oecd.org/investment/investmentfordevelopment/47662751.pdf.

Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

The 2002 IBA Act places the licensing of broadcast services under the control of the Independent Broadcasting Authority (IBA), which, in " consultation with the Zambia Information and Communication Technologies Authority... determines that there is need for the provision of additional broadcasting services" and issues the necessary public invitation to apply, manages the application process and procedure, and awards and issues the licence(s)[1417].

FesMedia suggests that the IBA exists only paper, that there is no operational broadcasting regulatory body in Zambia, and that "up until now... the Minister... continues to use his discretion to grant broadcasting licences" [1418].

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Although, in law, broadcasting regulation is undertaken by a separate regulator, the Independent Broadcasting Authority, the broadcasting regulatory environment appears not to be operational and cannot be considered to be independent due to the fact that the broadcasting regulator appears not to have been constituted, is subject to the appointment of its Board at the discretion of the Minister, and that the issuing of licences is controlled by the Ministry of Communication.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

In the absence of definitive viewership and listenership figures, it is difficult to draw firm conclusions on market dominance. It would appear, however, that the *Zambia National Broadcasting Corporation* (ZNBC) is the dominant provider in both markets. ZNBC radio theoretically covers all 72 districts in Zambia, while ZNBC TV reaches 65 of the country's districts[1419].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

[1417] Zambia (2010) 'The Independent Broadcasting Authority Act 2002' (as amended), Republic of Zambia, Lusaka, Sections 20-23.

[1418] FesMedia (2011) *African Media Barometer- Zambia*. p. 28, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, pp33 & 42, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Zambia_2011_01.pdf.

[1419] FesMedia (2011) *African Media Barometer- Zambia*. p. 28, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p6, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Zambia_2011_01.pdf.

As noted above Zambia has established a Competition and Consumer Protection Commission with economy-wide powers and a mandate that includes dealing with abuse of dominance.

The 2002 Independent Broadcasting Authority Act contains only very general competition principles, enjoining the IBA to "promote a pluralistic and diverse broadcasting industry" and to "discourage monopolies"[1420]. There are, however, no provisions in the law dealing with cross media ownership and control.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

The Competition and Consumer Protection Commission does not appear to have dealt with any cases in the broadcasting sector. The OECD does not see any issues relating to vertical integration in the broadcasting market but is concerned at the level of cross media ownership and control[1421].

4.14.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Zambia has been a member of the WTO since January 1995[1422], but, aside from horizontal provision in respect of foreign personnel, it has made no commitments in relation to communications services[1423].

Zambia is a member of the World Trade Organisation (WTO) and is a signatory of the TRIPS Agreement. The country is a signatory of the following preferential trade agreements: the Trade Protocol of SADC, the Cotonou Agreement, the

[1420] Zambia (2010) 'The Independent Broadcasting Authority Act 2002' (as amended), Republic of Zambia, Lusaka, Section 5.
[1421] Zambia (2013) 'Competition Issues in Television and Broadcasting: Contribution from Zambia', Document No DAF/COMP/GF/WD(2013)21, Global Forum on Competition, 28 February & 1 March 2013, Organisation for Economic Co-operation and Development, Paris, p10, available online at http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD%282013%2921&docLanguage=En. The figures in this report do not add up correctly.
[1422] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.
[1423] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZMB, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/7513/2634/9664/Zambia_GATS_Schedule.pdf. Zambia has, however, made commitments in respect of: Business Services; Construction and Related Engineering Services; Health Related
and Social Services; Tourism and Travel Related Services .

African Growth and Opportunity Act (AGOA) and the European Business Assistance Scheme (EBAS).

Zambia is also a member of the Common Market for Eastern and Southern Africa (COMESA), in addition to its membership of the Southern African Development Community (SADC).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

There does not appear to have been any attempt specifically to limit either cross-border trade or consumption abroad (in respect of both market access and national treatment) of any communications services.

However, the current hiatus in respect of licensing of additional mobile operator(s) and the restrictions on foreign ownership of broadcast licensees (both noted above) would seem to constitute specific restrictions in relation to commercial presence.

Were these two restrictions to be addressed, Zambia could readily make commitments in respect of communications services.

The World Bank ranks the Zambia 82nd out of 148 countries on its GATS Commitments Index[1424].

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in the communications sector[1425]. In respect of the World Bank's MFN Tariff Trade Restrictive Index (TTRI), Zambia is ranked 88th out of 125 countries[1426].

4.14.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[1427] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC,

[1424] World Bank (2010) 'Zambia Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Zambia_brief.pdf.

[1425] Kruger, P (2008) 'MFN exemptions of the SADC EPA group', TRALAC Trade Law Centre, Stellenbosch, available online at http://www.tralac.org/2008/05/21/mfn-exemptions-of-the-sadc-epa-group/.

[1426] World Bank (2010) 'Zambia Trade Brief', World Bank, Washington DC, available online at http://info.worldbank.org/etools/wti/docs/Zambia_brief.pdf.

only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[1428], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Zambia is not a signatory to the WTO Reference Paper on Telecomms Services**.**

1. Competitive safeguards*: **Somewhat Compliant (2/5).*** The 2009 ICT Act does contain a section dealing with economic regulation, allowing the regulator to establish market dominance and prohibiting anti-competitive cross-subsidisation, but does not deal with misuse of information[1429]. Whilst the Competition and Consumer Protection Commission is, as noted above, able to deal with abuse of dominance, its purview does not specifically cover the issues identified in the Reference paper..

2. Interconnection: *Largely Compliant (4/5).* The 2009 ICT Act deals extensively with interconnection, requiring all suppliers to interconnect in a timely fashion via appropriate points of interconnection. Interconnection agreements are required to be lodged with the regulator and to be available for public inspection. Reference Interconnect Offers (RIOs) are required for dominant operators. The regulator is authorised to adjudicate in respect of interconnection disputes. However, there do not appear to be any regulated interconnection procedural guidelines, and no interconnection agreements or RIOs are available on the website of the regulator.

3. Universal service: *Partially Compliant (3/5).* The 2009 ICT Act makes provision for the establishment of a Universal Access and Service Fund, and for the regulator to make specified regulations governing universal access and service, and to determine contribution to and expenditure from the Fund[1430].

[1427] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1428] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1429] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Part V, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

[1430] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Part VIII, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

There are no specific provisions requiring transparency, non-discrimination and competitive neutrality, but these principles would be in line with the tenor of the legislation. There are also no specific provisions allowing the imposition of universal service obligations. ZICTA issued universal access and service regulations in 2012 but these are not publicly available[1431]. The ITU reports the Fund to be as yet inactive, with current projects funded at the regulator's discretion[1432].

4. Public availability of licensing criteria*: Largely Compliant (4/5).* The 2009 ICT Act includes considerable detail dealing with the criteria and procedures for individual licence applications[1433]. The regulator has further issued a comprehensive set of licensing guidelines[1434]. Individual licences, however, are not publicly available, nor are their detailed terms and conditions.

5. Independent regulators: *Partially Compliant (3/5).* The 2009 ICT Act creates the Zambia Information and Communication Technology Authority (ZICTA) as an "autonomous body [which] shall not be subject to the direction of any other person or authority"[1435]. The Board, however, is appointed on a stakeholder basis, with the Minister holding veto power over nominations, and with no criteria for nomination that would deal with conflicts of interest and ensure impartiality and expertise[1436]. The Minister, under whose portfolio the incumbent fixed line operator falls, also holds the power to direct the work of the regulator by issuing "general directives" and by issuing regulations and specifications in respect of a number of key regulatory areas, albeit " in consultation with· the Authority"[1437].

[1431] The file on the ZICTA website at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=54&view=finish&cid=191&catid=24 is corrupted.

[1432] ITU (2013) 'Universal Service Fund and Digital Inclusion For All Study', International Telecommunication Union, Geneva, available online at http://www.itu.int/en/ITU-D/Conferences/GSR/Documents/ITU%20USF%20Final%20Report.pdf.

[1433] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Part III, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

[1434] ZICTA (nd) Licensing Guidelines', ', Zambia Information and Communications Technology Authority, Lusaka, available online at http://www.zicta.zm/index.php?option=com_content&view=article&id=50&Itemid=93.

[1435] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Part III, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

[1436] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, First Schedule, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

[1437] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

6. Allocation and use of scarce resources: ***Partially Compliant (3/5).*** The 2009 ICT Act assigns the regulator full control over spectrum management, partial control over numbering (subject to the Minister), and deals with rights of way, albeit with limited involvement from the regulator. There is no requirement, however, that the band plan be published, and neither it nor the numbering plan are publicly available[1438].

As can be seen from the above, there are several areas in respect of which Zambia falls short of compliance with the WTO Reference Paper on Telecoms Service. Although there is nothing fundamental preventing the country becoming a signatory, amendments to legislation and improvements in regulatory practice would need to be undertaken to ensure full compliance.

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[1438] Zambia (2009) 'Information and Communication Technologies Act No 15 of 2009', Republic of Zambia, Lusaka, Sections 54, 55 and 62 respectively, available online at http://www.zicta.zm/index.php?option=com_jdownloads&Itemid=74&view=finish&cid=40&catid=14.

4.15 ZIMBABWE

4.15.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Zimbabwe's 2000 Postal and Telecommunications Act adopts a vertical categorisation of telecomms licences into the following categories: "radiocommunication service... fixed-line telephone service... telegraph service... telex service... satellite telephone service... Internet service... electronic mail service... leasing of telecommunication lines... [and] such other telecommunication service as the Minister may prescribe"[1439]. The website of the regulator differentiates between fixed telephone services, mobile cellular services, public data network services, and Internet access providers (Class A and Class B)[1440].

The licensing regime in Zimbabwe remains thus a vertical technology-specific one rather than a converged (horizontal or unified or multi-service) one. It is, however, not in alignment with the vertical categorisation set out in W/120.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

BuddeComm describes Zimbabwe's telephony market as comprising a de facto fixed-line monopoly enjoyed by TelOne (formerly PTC) (with two additional licensees, TeleAccess and, Afritel, having failed). Mobile licensees include Econet, NetOne and Telecel Zimbabwe. The Internet Service Provider (ISP) market is described as "reasonably competitive with six major players". In addition "eight companies have been licensed to provide VoIP telephony

[1439] Zimbabwe (2000) 'Postal and Telecommunications Act Chapter 12:05', (as amended), Republic of Zimbabwe, Harare, available online at http://www.potraz.gov.zw/files/Postal_Act.pdf, Section 34.
[1440] See drop-down menus on the website at http://www.potraz.gov.zw/.

services" along with several "data carriers". Players in these markets include: Liquid Telecom, DataOne, Powertel Communications, Telco Internet, Broadlands Networks, Aquiva, Africa Online, ComOne, Ecoweb, MWeb, Telecontract, Dandemutande and Taurai Zimbabwe[1441].

The most recent comparative figures for telecomms market share as supplied by the regulator[1442], but undated (although clearly from 2012), are given below:

Zimbabwe: Fixed & Mobile Subscribers		
	2012 (Undated)	
	Subscribers	**Market Share**
TelOne (fixed)	336 000	2,9%
Econet (mobile)	7 000 000[1443]	61,2%
NetOne (mobile)	1 800 000	15,7%
Telecel Zimbabwe (mobile)	2 300 000	20,1%
Total	11 436 000	

According to the ITU, the market in Zimbabwe as at 2011 was broken down as follows: 356 000 fixed-line subscribers[1444]; 9 200 300 mobile subscribers[1445]. This translates to a per capita market penetration rates in the telecommunications sector for Zimbabwe as at 2011 of 2,8% for fixed-line, 72,1%

[1441] BuddeComm (2012) 'Zimbabwe - Telecoms, Mobile, Broadband and Forecasts: Executive summary', BuddeComm, Bucketty NSW, available online at http://www.budde.com.au/Research/Zimbabwe-Telecoms-Mobile-and-Broadband.html. The full report is available on a for sale basis.

[1442] Phibion Chaibva, Postal and Telecommunications Regulatory Authority of Zimbabwe, Harare, personal correspondence, 15 November 2012.

[1443] Econet Wireless Zimbabwe reported 7,1 million subscribers in September 2012, up from 6,4 million in February 2012. See: New Zimbabwe (2012) 'Econet subscriber numbers hit 7 million', New Zimbabwe, Bromsgrove, 18 September 2012, available online at http://www.newzimbabwe.com/business-9087-Econet+subscriber+numbers+hit+7+million/business.aspx

[1444] ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/MainTelephoneLinesPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

[1445] ITU (nd) 'Mobile-cellular telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/CellularSubscribersPublic&ReportFormat=HTML4.0&RP_intYear=2011&RP_intLanguageID=1&RP_bitLiveData=False.

for mobile and 15,7% for the Internet (from 3,0%, 61,2% and 11,5% respectively in 2010[1446].

The Zimbabwe regulator reports 10 914 770 mobile voice subscribers, along with 346 211 fixed voice and 3 266 411 data and Internet subscribers as at the second quarter of 2012[1447].

TelOne, and its mobile subsidiary, NetOne, are 100% state owned, although failed privatisation talks with Telkom (South Africa) and Mahanagar Telephone Nigam Limited (MTNL) (India) have been reported[1448].

Econet Wireless is a publicly listed company, trading on the Zimbabwe Stock Exchange, with the following major shareholders[1449]:

- 42,7% - Econet Wireless Global Limited;
- 11,6% - Barclays Zimbabwe Nominees (Private) Limited – NNR;
- 6,2% - Econet Wireless Holdings Limited;
- 5,2% - Austin Eco Holdings Limited – NNR;
- 5,0% - Old Mutual Life Assurance Company of Zimbabwe Limited.

Telecel Zimbabwe has the following major shareholders[1450]:

- 60% - Telecel International / Orascom / Vimpelcom (Russia / Egypt);
- 40% - Empowerment Corporation (including Seplon Investments, Kestrel Corporation, National Miners' Association of Zimbabwe).

No shareholder breakdown of ISPs is readily available.

Range of Services: Type of services offered by foreign entities.

As can be seen above, the provision of mobile voice communications is dominated by Zimbabwean companies, with Telecel Zimbabwe as the only foreign service provider. No information is available in respect of ISPs.

[1446] ITU (2012) 'Measuring the Information Society 2012', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

[1447] POTRAZ (2012) 'Postal & Telecommunications Quarterly Sector Statistics Report – 2nd Quarter of 2012', Postal and Telecommunications Regulatory Authority of Zimbabwe, Harare, available online at http://www.potraz.gov.zw/files/POTRAZ_Quaterly_Sector_Statistics.pdf.

[1448] Sunday Mail (2012) 'Telkom, TelOne talks off', *The Sunday Mail*, Harare, available online at http://www.sundaymail.co.zw/index.php?option=com_content&view=article&id=31175:telkom-telone-talks-off&catid=41:business&Itemid=133#.UKjw2mdEWSo.

[1449] Econet (nd) 'Shareholder Analysis', Econet Wireless, Harare, available online at http://ewzinvestor.co.zw/shareholder-analysis/.

[1450] TechZim (nd) 'Telecel Zimbabwe: Ownership and Corporate Structure', TechZim, Harare, available online at http://visual.ly/telecel-zimbabwe-ownership.

Market Share: market share between foreign and local suppliers[1451].

80% of the voice telephony market is controlled by Zimbabwean companies, with only 20% provided by foreign entities.

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

Tensions between ZANU (PF) and the Movement for Democratic Change (MDC) over 'indigenisation' legislation that requires all companies to be under Zimbabwean control, may impede trade liberalisation of the telecommunications sector[1452].

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

Licences in Zimbabwe are, according to the website of the regulator, technology-specific, distinguishing between fixed telephone services, mobile cellular services, public data network services, and Internet access providers (Class A and Class B)[1453]. Licences themselves are not readily publicly available to confirm this.

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

[1451] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

[1452] Cf Bulawayo24 (2012) 'Telecel mum on indigenisation', Bulawayo24, Bulawayo, 2 February 2012, available online at http://bulawayo24.com/index-id-news-sc-national-byo-11719-article-telecel+mum+on+indigenisation.html.

[1453] See drop-down menus on the website at http://www.potraz.gov.zw/.

Zimbabwe's GATS commitments in respect of communications services impose a number of restrictions on market entry. Firstly, for "Public Telecommunications Transport Networks and Services…. [the government-owned] Posts & Telecommunications Company (PTC)… is a monopoly provider of public telecommunications services, except… [for] PABX [services which] may be provided by subsidiaries of foreign companies… [except in the case of] public sector buildings [which] are reserved to the PTC". Further, in all cases "unauthorized bypass of the PTC network is not permitted"[1454].

Zimbabwe's general GATS commitments impose the following restrictions relating to foreign investors "who seek to acquire shares in companies listed on the Zimbabwe Stock Exchange. The purchase of shares is limited to 25 per cent per counter of the listed issued share capital; this limit is in addition to any existing foreign holding in a company. A single investor is limited to a maximum of 5 per cent of the shares on offer; foreign investors bringing in hard currency may invest a maximum of 15 per cent of their assets in primary issues of bonds and stocks"[1455].

Zimbabwe's 2010 indigenisation regulations require all companies with an asset value above USD 500 000 to ensure "indigenous [ie black] Zimbabweans" hold a controlling stake in the company and to submit an "indigenisation plan" indicating how this will be effected[1456]. Telecel Zimbabwe appears to be only operator affected by this ruling.

Zimbabwe's general horizontal GATS commitments impose no restrictions relating to the legal status of foreign-owned enterprise[1457]. There are no restrictions on the commercial presence of foreign companies offering "Value-added / Enhanced services"[1458].

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory

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[1454] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZWE, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/6113/2634/9708/Zimbanwe_GATS_Schedule.pdf, pp3,4.

[1455] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZWE, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/6113/2634/9708/Zimbanwe_GATS_Schedule.pdf, p2.

[1456] Zimbabwe (2010) 'Indigenisation and Economic Empowerment (General) Regulations, 2010' (as amended, Republic of Zimbabwe, Harare, available online at http://www.kubatana.net/docs/legisl/indig_econ_empowrmnt_general_regs_si21_110325.pdf.pdf.

[1457] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZWE, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/6113/2634/9708/Zimbanwe_GATS_Schedule.pdf.

[1458] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZWE, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/6113/2634/9708/Zimbanwe_GATS_Schedule.pdf, p4.

requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

In terms of its general horizontal GATS commitments, Zimbabwe reserves the right to impose restrictions on foreign personnel, reserving the right to impose "measures concerning the entry and temporary stay of intra-corporate transfer of executive and senior managerial personnel and except for specialists, subject to lack of availability in the local labour market."[1459].

Zimbabwe is ranked 171st out of 183 countries in terms of ease of doing business by the World Bank[1460].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

The 2000 Postal and Telecommunications Act places licensing under the control of the regulator, with no direct involvement of the Minister[1461]. Licences for fixed and mobile telecommunications services are processed on application, via a public notice and comment procedure[1462]. VoIP appears now to be legalised in Zimbabwe, with at least one operator providing such services[1463]. International gateway services appear to be relatively liberalised, with at least 5 licensees able to offer such services[1464]. The 2001 Interconnection Guidelines contain no anti-

[1459] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZWE, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/6113/2634/9708/Zimbanwe_GATS_Schedule.pdf, p2.

[1460] World Bank (2012) *Doing Business 2012: Doing Business in a More Transparent World*, World Bank, Washington DC, available online at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf.

[1461] Zimbabwe (2000) 'Postal and Telecommunications Act Chapter 12:05', (as amended), Republic of Zimbabwe, Harare, available online at http://www.potraz.gov.zw/files/Postal_Act.pdf, Section 34.

[1462] POTRAZ (2001) 'Postal and Telecommunications (Licensing, Registration and Certification) Regulations 2001', Statutory Instrument 11A of 2001, Postal and Telecommunications Regulatory Authority of Zimbabwe, Harare, available online at http://www.potraz.gov.zw/images/potraz/Licensing_11A_OF_2001_(3).pdf.

[1463] TeleGeography (2012) 'Aquiva Wireless launches VoIP in Zimbabwe', *TeleGeography*, 18 April 2012, available online at http://www.telegeography.com/products/commsupdate/articles/2012/04/18/aquiva-wireless-launches-voip-in-zimbabwe/.

[1464] Kabweza, L (2010) 'An Overview Of Zimbabwe's Telecommunications – POTRAZ Presentation Download', *TechZim*, 5 March 2010, available online at http://www.techzim.co.zw/2010/03/zimbabwe-telecoms-overview/.

competitive or discriminatory provisions[1465], nor are there any such provisions in the legislation.

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

Econet is dominant in the voice telephony market, with 61% market share. TelOne holds a monopoly in the miniscule fixed sub-market.

Pricing: How do the prices of services compare to international benchmarks.

International Telecommunication Union has no comparative (2008) pricing data for Zimbabwe[1466].

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

According to Bowman Gilfillan, there is a competition authority in Zimbabwe, the Competition and Tariffs Commission, which was established in 1998 in accordance with the 2006 Competition Act. The Act covers "all economic activities within or having an effect within Zimbabwe (including the activities of the Government and other statutory bodies or parastatal organisations)"[1467].

The Act does deal with dominance or "monopoly", which is defined to occur where a single firm (or several firms with "substantial economic connection") "exercises... substantial market control over any commodity or service" [1468]. Abuse of dominance appears not to be defined, but is prohibited unless the "existence of... pro-competitive features" can be shown[1469]. The Commission

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1465 POTRAZ (2001) 'Postal and Telecommunications (Interconnection Guidelines) Notice, 2001', Statutory Instrument 28 of 2001, Postal and Telecommunications Regulatory Authority of Zimbabwe, Harare, available online at http://www.potraz.gov.zw/images/potraz/Interconnection%2028%20OF%202001.pdf.

1466 ITU (2009) 'Information Society Statistical Profiles: Africa', International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf.

1467 Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p59.

1468 Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p61.

1469 Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at has wide discretion in imposing remedial steps in cases of abuse of market dominance[1470].

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

There is no evidence available of anti-competitive behaviour.

4.15.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

Broadcasting in Zimbabwe is regulated by the Broadcasting Services Act (BSA) of 2001 and two subsequent Broadcasting Services Amendment Acts of 2003 and 2007. According to Section 7 of the BSA, the Broadcasting Authority is in charge of licensing commercial, community and subscription broadcasting services. The licensing of 'public broadcasters' is regulated by Section 37 which states that the Zimbabwe Broadcasting Corporation "shall be deemed to be licensed to provide every class of broadcasting service that it provided immediately before the date of commencement of this Act," which took effect in April 2001. The BAZ is also responsible for licensing roadcasting, railcasting and webcasting services. This provision extends its powers of control to include internet radio and television as well as pre-recorded programmes for reception by passengers on any public transport or railway service[1471].

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

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http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p61.

[1470] Bowman Gilfillan (nd) 'Competition Law Africa', Bowman Gilfillan, Johannesburg, available online at http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf, p61.

[1471] Chiumbu, S (2010), Public Broadcasting in Africa Series: Zimbabwe, Open Society Initiative, AfriMap

Despite the liberalisation of the airwaves more than a decade ago and the recent commitments by the Government of National Unity (GNU) to license exiled stations, broadcasting still remains a quasi state monopoly where long standing prospective broadcasters such as Radio Dialogue, SW Radio Africa, Voice of the People, Studio 7, and others have been denied licences while those perceived to be loyal to ZANU PF have recently been allocated licences for commercial radio broadcasting. The newly licensed radio stations are Star FM and ZiFM. Star FM is owned by state-controlled Zimpapers, while ZiFM is run by journalist-cum-businessman Supa Mandiwanzira who is linked to ZANU PF[1472].

OMD puts television penetration in Zimbabwe at 31% of households[1473].

The state broadcaster, Zimbabwe Broadcasting Corporation dominates the market. ZBC is exclusively owned by government and operates one television channel and five radio stations: National FM broadcasting in 17 local languages; Power FM, a youth music station; Radio Zimbabwe broadcasting in chiShona and siNdebele; English language, Spot-FM and SW-24/7 transmitting on short and medium wave.

Although, the GPA required the inclusive government to license exiled radio stations such as SW Radio Africa, Studio 7, and local stations such as Radio Dialogue, that has not been done. This has left the ZBC as the only dominating force in the market.

Range of Services: Type of services offered by foreign entities.

There is satellite television subscription service offered by MultiChoice Africa.

Market Share: market share between foreign and local suppliers[1474].

Broadcasting market structure[1475]:

	Name	Audience ratings	Market share
ZBC radio stations	Power FM		33%
	Radio Zimbabwe		22%
	Sport FM		6%
	National FM		6%

[1472] Chitemba, B. "Zimbabwe: Mandiwanzira Defends New Radio Stations, *c*, 12 October 2012.
[1473] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf, p34.
[1474] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.
[1475] See "ZBC radio stations top" Zimbabwe Broadcasting Corporation website < http://www.zbc.co.zw/news-categories/local-news> last checked 16 Nov. 2012. The ZBC statistics are based on the latest Zimbabwe All Media Products Survey (ZAMPS) for the third quarter of 2012.

Private commercial	Star FM		Not available
	ZiFM		Not available
Pirate stations	SW Radio Africa		Not available
	Studio 7		Not available
	VOP		Not available
ZBC television stations	ZBC TV 1		63%
	ZBC TV 2		20%
	MultiChoice		68%

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

The government enjoys a stronghold over broadcasting in the country. Even with a liberalised broadcast environment, there are still serious concerns that this is sham liberalisation of the airwaves. Recent licensed competitors such as ZiFM in radio broadcasting are seen as an extension of ZANU PF propaganda machinery.[1476]

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

[1476] The statistics on market share for the first 3 radio station are based on 2012 ZAMPS survey while the rest are based on the ZAMPS 2011. Stats on Satellite broadcasting may reflect the dominant use of Wiztec, a satellite technology that, allows piracy of the SABC and E-TV signals into Zimbabwe. According to the Sunday Mail, a state owned newspaper, 80% percent of Zimbabwe's urban population and roughly 10 percent of the rural population own free-to-air decoders and have access to the three SABC channels.

Section 8 (1) and (2) states that licences shall be issued "only to individuals who are citizens of Zimbabwe resident in Zimbabwe ... or to a body corporate in which controlling interests is held by citizens of Zimbabwe resident in Zimbabwe." "Controlling interests" is defined as "all" or "one hundred per centum" of securities or shares[1477]. While it is acceptable that broadcasting in a country should be controlled by nationals this clause aims to disqualify any foreign co-ownership in broadcasting and thus makes foreign investments in this industry impossible. While other countries also impose limitations on foreign ownership, it is only in terms of the quota in shares.

Foreign investment in this sector is not legal as locals are required to have a 100% controlling stake in shares. This means foreign ownership is prohibited.

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

The only legal foreign broadcasting in Zimbabwe is through the DStv subscription model. MultiChoice Africa has re-launched the DStv Compact bouquet, now featuring 25 satellite television channels and more than 50 music and radio channels. DStv Compact is designed as an alternative to the Premium Bouquet, which features the full range of more than 50 television channels as well as the music and radio channels selection[1478].

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

Applicants are invited to apply by BAZ. The Amendment Act 2003 gives the BAZ (and not the minister in charge of broadcasting, as was the case under the principal 2001 Act) the power to determine who is to be issued a licence and when, to set the terms and conditions applicable in each individual case and to decide on the amendment, suspension and cancellation of licences. Section 10(1) states the following:

> *(1) The Authority shall, if it determines that there is a need for the provision of additional broadcasting*

services, and after carrying out its functions in terms of the First Schedule, publish a notice in the Gazette and in a national newspaper inviting applications

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[1477] See BSA, 2001.

[1478] See Balancing Act, http://www.balancingact-africa.com/news/en/issue-no-338/more/multichoice-relaunch/en.

for licences to provide the broadcasting services or systems specified in the notice[1479]. The BAZ has the responsibility 'to plan and advise on the allocation and distribution of the available frequency spectrum […]' and 'to receive, evaluate and consider applications for the issue of any broadcasting licence or signal carrier licence.'

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

Regulation of broadcasting is through the Broadcasting Authority of Zimbabwe (BAZ). The body is seen as lacking autonomy because its President has sweeping powers to in the appointment of board members. The nomination and appointment process is not subject to any public involvement or input. In effect the president has an almost free hand to appoint a board of his or her choice, given that the Act only requires consultation with the minister and the parliamentary committee but not their consent[1480].

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

Zimbabwe broadcasting remains a quasi-monopoly of state broadcasting. The ZBC radio and television stations are dominant. (Please refer to broadcasting market structure above).

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

Zimbabwe has a Competition and Tariff Commission (CTC). It has not, however, dealt with anti-competitive behaviour in broadcasting by the state and ZBC.

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

BSA is regulating competition in favour of the ZBC. For example, Section 9(1) states that only one other licence, other than that provided to the State controlled Zimbabwe Broadcasting Corporation shall be issued to provide national free-to-air radio broadcasting services and television broadcasting services. This has been largely criticised as unwarranted and mainly a plan to protect the state broadcaster, ZBC.

[1479] See BSA, 2001.
[1480] Public Broadcasting in Africa Series: Zimbabwe, Open Society Initiative, (Written by S. Chiumbu).

The ZBC commercialisation also split ZBC into many smaller holdings, one of which is TransMedia, a signal carrier company whose primary function is to provide signal transmission services in the country. This would make ZBC a competitor that also is an infrastructure provider. This role can easily be abused.

4.15.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

Zimbabwe has been a member of the WTO since March 1995[1481], but, aside from "Value-added / Enhanced services"[1482], has made no commitments to the liberalisation of communications services.

Zimbabwe is a member of the Common Market for Eastern and Southern Africa, in addition to its membership of the Southern African Development Community (SADC).

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

Zimbabwe has made no WTO commitments in respect of either telecommunications or broadcasting. There do not appear to be any restrictions in respect of commercial presence, other than the indigenisation requirement which limits foreign shareholding to 49%.

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

There is no evidence of MFN inconsistent measures in the telecommunications sector.

4.15.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

[1481] WTO (nd) 'Understanding the WTO: The Organization - Members and Observers', World Trade Organisation, Geneva , http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

[1482] WTO (2003) 'Draft converted Schedule of Specific Commitments', S/DCS/W/ZWE, World Trade Organisation, Geneva, 30 August 1995, available online at http://www.sadc.int/files/6113/2634/9708/Zimbanwe_GATS_Schedule.pdf, p4.

The WTO Reference Paper on Telecomms Services[1483] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[1484], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

Zimbabwe is not a signatory to the WTO Reference Paper on Telecomms Services.

1. Competitive safeguards: ***Minimally Compliant (1/5).*** Zimbabwe's 2000 Postal and Telecommunications Act contains no sections dealing with the provision of competitive safeguards. As noted previously, the Competition and Tariffs Commission is empowered to deal with a range of forms of anti-competitive conduct, but few if any of these specifically correspond to those identified in the Reference paper[1485].

2. Interconnection: ***Largely Compliant (4/5).*** The 2000 Postal and Telecommunications Act has provisions dealing with interconnection, which requires the regulator to establish interconnection guidelines, stipulates that must operators to lodge interconnection agreements with the regulator, and empowers the regulator to adjudicate interconnection disputes[1486]. The 2001 Interconnection Guidelines issued by the regulator are more detailed, and additionally deal with non-discrimination, timeliness, points of interconnection, and dispute settlement[1487]. There is, however, no provision for the establishment of reference interconnect offers, nor are interconnection agreements publicly available.

[1483] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1484] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

[1485] Zimbabwe (1996) 'Competition Act', Act 7 of 1996, Chapter 14:28 (as amended), Republic of Zimbabwe, Harare, First Schedule, available online at http://www.potraz.gov.zw/images/Reports/competition%20act.pdf.

[1486] Zimbabwe (2000) 'Postal And Telecommunications Act', Act 4 of 2000, Chapter 12:05 (as amended), Republic of Zimbabwe, Harare, First Schedule, available online at http://www.potraz.gov.zw/images/potraz/Postal_Act.pdf.

[1487] POTRAZ (2001) 'Postal and Telecommunications (Interconnection Guidelines) Notice, 2001', Statutory Instrument 28 of 2001, Postal and Telecommunications Authority, Harare, available online at http://www.potraz.gov.zw/images/potraz/Interconnection%2028%20OF%202001.pdf.

3. Universal service: ***Largely compliant (4/5).*** The 2000 Postal and Telecommunications Act provides for the establishment of a universal service fund and for the imposition of universal service obligations on licensees[1488]. The ITU reports the Fund as having a low level of activity, and as having failed to submit financial reports, but notes a series of universal service obligations were imposed on operators in 2001[1489].

4. Public availability of licensing criteria: ***Partially Compliant (3/5).*** The 2000 Postal and Telecommunications Act makes detailed provision for the powers of the regulator in managing licensing[1490], but licensing criteria and procedures are not publicly available, nor are individual licences publicly available.

5. Independent regulators: ***Partially Compliant (3/5).*** The 2000 Postal and Telecommunications Act establishes the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) as the communications sector regulator. Whilst Board members are precluded from having connections with or "financial interest in any business connected with cellular telecommunication, postal or telecommunication services or systems", the Board is constituted by the President in consultation with the Minister, without due transparency or checks and balances. In addition, the Minister, who is also the shareholder in respect of the state-owned fixed and mobile operators, retains the power to direct the work of the regulator, and to overturn its decisions - creating a structural conflict of interest.

6. Allocation and use of scarce resources: ***Minimally Compliant (1/5).*** The regulator is assigned responsibility for frequency spectrum and numbering, but the legislation contains no specific sections dealing with these, and rights of way are wholly omitted. The national band plan does not appear to be publicly available.

As can be seen from the above, although largely compliant in most areas, there are one or two areas where Zimbabwe will require to make legislative and regulatory changes in order to fully comply with the reference paper. There is no reason, however, why the country cannot commit to the principles prior to introducing the necessary changes.

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[1488] Zimbabwe (2000) 'Postal And Telecommunications Act', Act 4 of 2000, Chapter 12:05 (as amended), Republic of Zimbabwe, Harare, Part X, available online at http://www.potraz.gov.zw/images/potraz/Postal_Act.pdf.

[1489] ITU (2013) 'Universal Service Fund and Digital Inclusion For All Study', International Telecommunication Union, Geneva, p63, available online at http://www.itu.int/en/ITU-D/Conferences/GSR/Documents/ITU%20USF%20Final%20Report.pdf.

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APPENDICES

APPENDIX 1 - Selected Academic and Expert Literature

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APPENDIX 2 - Country Profile Template

4.99 XXXXXXX

4.99.1 TELECOMMUNICATIONS SERVICES

The services covered in the analysis presented here include specifically, whether through facilities or via resale: voice telephony services (both fixed and mobile; local, long distance and international services), data transmission services (both packet-switched and circuit-switched), Internet and broadband services.

Services Framework: What is the classification of telecommunications services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

xxx.

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of telecommunications services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture.

xxx

Range of Services: Type of services offered by foreign entities.

xxx

Market Share: market share between foreign and local suppliers[1491].

xxx

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

xxx

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

[1491] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Restrictions on Scope of Licences: Are licences for telecomms service providers technology-neutral (eg convergence / unified / service neutral licensing frameworks), or technology specific (eg fixed, mobile, Internet etc).

xxx

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

xxx

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

xxx

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)? Are operators permitted to route their international calls using VoIP; Are foreign suppliers are permitted to own and operate an international gateway, and, if so, under what conditions. Are there any restrictions on interconnection that are anti-competitive or discriminatory?

xxx

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of telecommunications services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

xxx

Pricing: How do the prices of services compare to international benchmarks.

xxx

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

xxx

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

xxx

4.99.2 BROADCASTING SERVICES

Broadcasting is dealt with separately as a defined sub-sector within the audio-visual services, as per W/120). The services covered in the analysis presented here include: radio and television broadcasting services (terrestrial analogue, DTT, satellite); radio and television transmission services (signal distribution).

Services Framework: What is the classification of broadcasting services adopted and used as the basis for licensing in this country? How does the classification adopted differ from that set out in W/120?

xxx

FOCUS AREA 1: MARKET STRUCTURE

The assessment in respect of broadcasting services of each of the following:

Market Structure: Number of operators in the market and the structure of ownership, i.e. private or public, foreign, local and/or joint venture. Existence of a state-owned broadcaster? Extent to which it is a public broadcaster rather than a state broadcaster.

xxx

Range of Services: Type of services offered by foreign entities.

xxx

Market Share: market share between foreign and local suppliers[1492].

Xxx

Stakeholders: Any stakeholder group or business organisation with a special interest in the sector that may impede liberalisation commitments.

xxx

FOCUS AREA 2: REGULATORY REGIME & STATE OF PLAY

The following elements of the regulatory regime, including trade restrictions, in the relevant modes of supply, will be assessed:

Restrictions on Market Access: Quantitative limitations on the numbers of suppliers or the value of transactions or assets (eg are there quotas or prohibitions on the number of licences available to foreign suppliers, legal or otherwise). If there are fixed numbers of licences, the number will be specified.

Restrictions on foreign investment in existing operations and acquisition of a controlling stake; investment measures such as maximum or minimum requirements for foreign capital, or local partnership requirements.

Restrictions or requirements on the legal form in which enterprises can establish or requirements to establish a joint venture with a local partner (e.g. are foreign operators permitted to locally incorporate); restrictions on operations (e.g. are operators permitted to operate as a branch).

xxx

Other Discriminatory Measures: Discriminatory measures applied to operators based on nationality (i.e. favouring local operators, or operators from other countries), such as nationality requirements for boards of directors or employees, or restrictions on the repatriation of earnings; discriminatory requirements/practices in the allocation of licences (e.g. length of licence, requirements for renewal).

xxx

Non-discriminatory Regulatory Restrictions: How licences are allocated (e.g. first-come-first-served, at discretion, by auction, or through a competitive bid). Who makes key licensing decisions (issuing of ITA, adjudication, granting, issuing)?

xxx

[1492] In case of joint ventures, if > 50% is foreign then, such entity will be categorised as foreign.

Regulatory Best Practice: Is regulation of broadcasting undertaken by a separate regulator?

xxx

FOCUS AREA 3: LEVEL OF COMPETITION

The assessment in respect of broadcasting services of each of the following:

Dominant providers: Dominant providers of certain services in the sub-sector(s) or market(s) and their market share.

xxx

Competition Regulation: The existence of a competition authority, and its jurisdiction in the sub-sector.

xxx

Anti-competitive Behaviour: Any evidence of anti-competitive behaviour.

xxx

4.99.3 STATE OF LIBERALISATION

This focus area will assess the state of liberalisation across the region according to the following criteria:

WTO Commitments: Member States' liberalisation commitments in communication services under WTO (and EAC for Tanzania), concessions and other bilateral agreements.

xxx

WTO Implementation: The way these commitments compare to actual regulations and the level of applied openness; the sub-sectors in which restrictions exist and if these have been scheduled in existing agreements.

xxx

MFN Barriers: If Member States offer any preferential access / interconnection to other countries or enforce any specific requirements, which may impede the implementation of regional MFN in individual sub-sectors.

xxx

4.99.4 REFERENCE PAPER READINESS

This focus area will assess the readiness of member states to undertake commitments in terms of the WTO Reference Paper on Telecomms Services.

The WTO Reference Paper on Telecomms Services[1493] provides a set of best-practice regulatory principles committed by some 82 WTO Members. In SADC, only South Africa has undertaken Reference paper commitments. Analysing existing regulatory systems in SADC Member States, the study will assess the Reference-paper readiness of individual Member States, pointing out areas where compliance is achieved, is almost achieved, and is still lacking.

Regulatory Best Practice: Compliance with the WTO Reference Paper on Telecomms Services[1494], i.e. independence of regulators, procedures for allocation of licences; interconnection at cost–based terms and conditions; pro-competitive spectrum management.

xxx

1. Competitive safeguards:

2. Interconnection:

3. Universal service:

4. Public availability of licensing criteria:

5. Independent regulators:

6. Allocation and use of scarce resources:

- - - o - - -

[i] Except where stated: WEF, IBRD/World Bank, AdfB (2013). Africa competitiveness report 2013, WEF, Geneva; and World Bank (2011). Africa development indicators 2011, The World Bank, Washington.
[ii] FD = factor driven economies, T = economies in transition, ED = efficiency driven economies
[iii] Encyclopedia of the Nations (nd) 'General Agreement on Trade in Services (GATS) Commitments Index (0-100, most liberal) - Trade - Development outcomes - African Development

[1493] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.
[1494] WTO (1996) 'Telecommunications Services: Reference Paper', World Trade Organisation, Geneva, 24 April 1996, available online at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

Indicators', Encyclopedia of the Nations, available online at http://www.nationsencyclopedia.com/WorldStats/ADI-general-agreement-services-liberal.html.

[iv] ITU (2012) Measuring the Information Society 2012, International Telecommunication Union, Geneva, available online at http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf, p21. The ICT Development Index (IDI) is a composite index derived from 11 key ICT indicators, grouped under three clusters that aim to measure access to ICTs, skills required for ICTs, and intensity of ICT use. It is thus a useful tool for measuring and benchmarking the status of countries in relation to the 'information society'. . . . . It can also be used to track the 'digital divide' and to compare ICT performance within and across countries. Seychelles in 2011 was the top-ranking SADC member state, in position 70 out of 155 countries. By contrast Mozambique was ranked 147 out of 155 countries. . . . .

[v] A number of commentators have pointed out that the subscriber numbers for mobile, based as they are on 'active SIM card' counts, considerably overstate the real degree of mobile telephony penetration for a range of reasons, including: multiple SIM ownership, the use of SIMs in devices other than phones (eg 3G modems, least cost routers, vehicle tracking devices etc), the adoption of arbitrage behaviours by consumers (cf Goldstuck (2009) 'The Mobile Consumer in SA 2009', World Wide Worx, Johannesburg; Sutherland, E (2009) 'Counting customers, subscribers and mobile phone numbers', *info*, Vol 11, Issue 2. Estimates as to the degree of over-reporting vary widely. The GSM Association in 2012 release estimates for Africa and South Africa that suggest that real user penetration is overstated by a factor of between 2,06 (Africa) and 2,09 (South Africa) (GSMA (2012) 'GSMA Announces New Global Research that Highlights Significant Growth Opportunity for the Mobile Industry', GSM Association, London, 18 October, 2012, available online at http://www.gsma.com/newsroom/gsma-announces-new-global-research-that-highlights-significant-growth-opportunity-for-the-mobile-industry. If accurate, this would imply that the real user teledensity for Angola is 21,1% rather than the 43,4% recorded above. However, others have suggested s much lower over-count figure of between 5% and 15% (vs the 106% suggested by the GSMA) (cf Calandro, E, Gillwald, A, Moyo, M & Stork, C (2010) 'Comparative ICT Sector Performance Review 2009/2010', Towards Evidence-based ICT Policy and Regulation, Vol 2, Policy Paper 5, 2010, available online at http://www.researchictafrica.net/publications/Policy_Paper_Series_Towards_Evidence-based_ICT_Policy_and_Regulation_-_Volume_2/Vol_2_Paper_5_-_Comparative_ICT_Sector_Performance_Review_2009_2010.pdf)

[vi] ITU (nd) 'Mobile-cellular subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/en/ITU-D/Statistics/Documents/statistics/2013/Mobile_cellular_2000-2012.xls

[vii] ITU (nd) 'Fixed-telephone subscriptions', International Telecommunication Union, Geneva, available online at http://www.itu.int/en/ITU-D/Statistics/Documents/statistics/2013/Fixed_tel_2000-2012.xls.

[viii] ITU (nd) 'Percentage of individuals using the Internet', International Telecommunication Union, Geneva, available online at http://www.itu.int/en/ITU-D/Statistics/Documents/statistics/2013/Individuals_Internet_2000-2012.xls

[ix] Koenderman, T (2013) 'The Future of Media: South Africa & SADC Media Facts 2013', OMD South Africa Johannesburg, pp15,6, available online at http://www.omd.co.za/media_facts/FOM029_Blueprint_OMD_mediafacts2013.pdf

[x] Most recent figure is from 2010: ITU (2011) Measuring the Information Society 2011, International Telecommunication Union, Geneva, p13.

[xi] Most recent figure is from 2008: ITU (2010) Measuring the Information Society 2010, International Telecommunication Union, Geneva, p10.

[xii] No figure available from OMD. FES (2012) *African Media Barometer: Madagascar*, Friedrich-Ebert-Stiftung & Media Institute of Southern Africa, Windhoek, Namibia, p80, available online at http://www.fesmedia-africa.org/uploads/media/AMB_Madagascar_2012.pdf

[xiii] No figure available from OMD. Calculated from: StatsSA (2012) 'Census 2011: Census in Brief', Statistics South Africa, Pretoria, available online at http://www.statssa.gov.za/Census2011/Products/Census_2011_Census_in_brief.pdf