

## **Regulatory Effectiveness: Namibia's Communications Regulatory Framework**

### **ABSTRACT**

Communications regulatory frameworks are established to achieve regulatory objectives such as affordable pricing, universal ICT access and usage, and competition. These objectives may however not be met. Levy and Spiller (1996) argue, the manner a country's political and social institutions interact with the regulatory processes and economic realities, may result in such a failure. The confidence of private investors and the performance of utilities may be negatively impacted as a result.

In this paper however, we present the regulatory outcomes of Namibia's communications regulatory framework. We studied the performance of the two dominant and publicly owned telecommunications corporations. We assessed how the national institutional endowment in relation to the regulatory governance and regulatory incentives, such as benchmarking, influenced the performance of the telecommunications sector. We use this analysis to determine the effectiveness of the regulatory framework in achieving the regulatory purpose.

One of the major findings of the study was that the roles of the Minister of ICT, as policy maker and as shareholder representative over the dominant public operator Telecom Namibia Limited (TN) are in conflict. This conflicting exercise of roles resulted in the political support of a transaction to transfer Powercom (Pty) Ltd to TN. Additionally, the independent High Court ruled against the regulator but in favour of TN. The outcome was that this event led to a concentration of the telecommunications market, with the exit of the only privately owned mobile cellular operator. Further outcomes include TN making annual losses and being unable to invest in market growth. The shareholder bailed out TN as opposed to incentivising efficient performance. TN is desperately adopting the predatory pricing strategy and indications are that it is resorting to abusing its dominant position for competitive leverage given its poor performance. A paradigm shift in policy is therefore required to address the poor performance of Namibia's communications regulatory framework to be able to achieve the regulatory purpose.

### **KEYWORDS**

communications regulatory framework, regulatory effectiveness, institutional endowment, regulatory governance, regulatory purpose, regulatory incentives, competition, regulatory independence, telecommunications sector performance, Telecom reform, indicators, policy

### **1. INTRODUCTION**

Communications regulatory frameworks are established to achieve regulatory objectives such as affordable pricing, ICT access and usage, and competition. These objectives may however not be met. Levy and Spiller (1996) argue the interaction between country's political

and social institutions, such as the executive, the legislative, the judiciary with the regulatory processes may result in market failure.

In this paper we assess the outcomes of Namibia's communications regulatory framework and make policy and regulatory recommendations to reform the regulatory framework.

## **2. RELATED WORKS**

In 2007, NEPRU reported Namibia was lagging behind Botswana and South Africa in the telecommunication sector reform and performance, due to its institutional weaknesses (NEPRU, 2007). Research ICT Africa (RIA) conducted a study regarding Namibia's telecommunications sector performance review for the period 2008 to 2009 (RIA, 2010). The Telecom Regulatory Environment (TRE) study reported Namibia's framework still required improvement in order to be evaluated as efficient. Stork and Sherbourne found TN may become heavily indebted in future, prepaid mobile services are too high, but that stakeholders perceptions of the regulatory environment improved (RIA, 2010, pg. 23).

The communications regulatory landscape has since changed. This study assessed the performance of Namibia's communications regulatory framework in the context of Namibia's institutional endowment, the regulatory governance and the regulatory incentives.

## **3. APPROACH USED TO CONDUCT THE STUDY**

Documentary information was used for analysis, as data in this study. It included annual reports, regulations, legislation, policies and newspaper reports (Clarke & Dawson, 2000).

The analysis of the data meant the search of patterns, trends and common themes within the data in terms of the various units of analysis.

## **4. REGULATORY PURPOSE AND REGULATORY EFFECTIVENESS**

Intven and McCarthy (2000) argue regulatory intervention is required for competition. The regulators intervene to prevent market failure (Intven & McCarthy, 2000). The further purpose may be to meet public interest objectives as outlined in national policies, protect the consumer interest and to increase access to technology and services (Intven & McCarthy, 2000), (Blackman & Srivastava, 2011, p.10) and (OECD, 2014, p.13 and 15). Reasonable services must be provided at reasonable prices and this necessitates regulation (Melody, 2001, p.159). CRAN was established to achieve these typical aims, as set out in its enabling legislation and the national policy provisions (MICT, 2009a).

In emphasising the regulatory imperative, Melody (2001) states interconnection with dominant licensees on reasonable terms is crucial for new entrants, but will only occur if

regulation enforces it. Levy and Spiller, in the context of regulatory governance and regulatory incentives, state "...successful regulatory policy encourages both private investment and efficient operation..." (Levy & Spiller, 1996, p.14). These elements all refer the regulatory purpose, the attainment of which may result in regulatory effectiveness.

## **5. NAMIBIA'S TELECOMMUNICATIONS SECTOR PERFORMANCE REVIEW**

### **5.1 BELOW PAR ICT ACCESS AND USAGE FOR THE MAJORITY OF NAMIBIANS**

Namibia's 2013 ICT Development Index (IDI) global ranking is 117<sup>th</sup>. out of 166 countries, improving slightly from 118<sup>th</sup>; and regionally 7<sup>th</sup>. This indicates that growth in ICT access and usage has largely remained static. The IDI access sub-index ranking increased to 118<sup>th</sup> from 121. The IDI use sub-index ranking dropped to 110<sup>th</sup> from 106<sup>th</sup> (ITU, 2014, pg. 42-45).

Namibia's rankings are well below the developing country and global averages. The ranking is however higher than the African region's average. Neighbouring Botswana and South Africa on the other hand, have averages that are higher than the developing countries average (ITU, 2014, pg. 85).

Mobile cellular subscriptions per 100 inhabitants have increased between 2012 and 2013 to over 100%. The ranking for the mobile-telephone sub-basket is 80<sup>th</sup> with 2.13 as a percentage of GNI, at the cost of US\$10.36 (ITU, 2014, pg. 113).

Fixed-broadband prices, as a percentage of GNI in Namibia was 10.62, for US\$51.68. The speed is estimated at 0.38 Mbit/s, unlimited. This ranks Namibia 119<sup>th</sup>, out of 165 (ITU, 2014, pg. 124).

Namibia's ICT price basket and sub-basket for 2103 is ranked 114<sup>th</sup> with a 4.9% ranking, indicating how more expensive Namibia is. The Mobile-cellular sub-basket as a percentage of GNI per capita is 2.1%. The Fixed Broadband sub-basket as a percentage of GNI per capita for 2013 is 10.6% (ITU, 2014, pg. 167).

On a positive note, the Mobile-cellular subscriptions per 100 inhabitants increased from 95.0 to 110.2 in 2013.

The International Internet bandwidth Bit/s per decreased from 3'564 in 2012 to 3'398 (ITU, 2014, pg. 243).

The Internet user Percentage of households with computers increased from 14.3% in 2012 to 15.4% in 2013. The Percentage of households with Internet access increased from 13.0% to 16.0% in 2013. The percentage of people using the Internet increased from 12.9% in 2012 to 13.9% in 2013.

The Fixed (wired)-broadband subscriptions per 100 inhabitants marginally increased from

1.2 to 1.3 in 2013. The Wireless-broadband subscriptions per 100 inhabitants increased from 33.2 to 34.2 in 2013 (ITU, 2014, pg. 243). The percentage of rural population covered by at least a 3G mobile network between 2009-2012 increased to 11% (ITU, 2014, pg. 8).

The Communications Regulatory Authority of Namibia (CRAN) released its report in February 2015. It reported broadband services are charged at US\$25.30 per GB prepaid, by the first quarter of 2014. On the contrary, in South Africa it is charged at US\$13.70 (CRAN, 2014, pg. 31 - 32).

Regarding the cost of cheapest prepaid mobile product for OECD countries for the “40 calls/60 SMSs” basket by operators in NAD, MTC was the cheapest operator until the first quarter of 2014. TN mobile finally launched competitive products thereafter. MTC, as dominant operator charged US\$9.21 and was overtaken by TN with a price of US\$8.05, that was 13% cheaper (CRAN, 2014, pg. 31 - 32).

Namibia ranked 13<sup>th</sup> among dominant operators in the Region and 2<sup>nd</sup> in SADC in the first quarter of 2014. Namibia ranked 17<sup>th</sup> in terms of cheapest product in a country. The cheapest product rank improved from 20<sup>th</sup> in the fourth quarter of 2010 to 17<sup>th</sup> in the first quarter of 2014. Prices have reduced steadily and the ranking is slowly improving (CRAN, 2014, pg. 31 - 32).

The ITU and CRAN reports indicate the digital divide is evident in Namibia. Internet access and use is lacking for the majority of the over 2.2m population. The regulatory purpose is not met (CRAN, 2014).

The ITU is hopeful Namibia will meet the 5% affordability target by 2015, supported by strong policies aimed at reducing bottlenecks in the wholesale market. It recommends regulatory focus on the broadband market.

## **5.2 TELECOM NAMIBIA IS THE REGULATORY PROBLEM**

The report by TN’s auditors in preparing its 2014 annual financial statements sum up the performance of TN as “...the directors take cognisance of the fact that the matters outlined above give rise to a material uncertainty which may cast significant doubt about the Group’s ability to continue as a going concern and, therefore it may be unable to realise its assets and discharge its liabilities in the normal course of business.” (TN, 2014, pg. 106).

TN reported its third loss, of N\$557 million in 2014 (2013: N\$86million). A significant part of the losses are attributable to impairment losses of N\$16 million (2013: N\$49 million) which was recognised against foreign investments in the group and N\$343 million (2013: N\$99 million) in the Company due to the uncertainty of the recovery of these investments. The revenue increased with a mere N\$43,123 million. The turnover budget shortfall amounted to N\$147 million and additional costs exceeded the budget by N\$144 million. TN aims to achieve an EBITDA margin of over 30% by 2018 by focusing on revenue growth, reducing operating expenses and managing capital expenditure (TN, 2014).

Revenue from mobile services increased from N\$44.627m in 2012 to N\$65.846m in 2013, to N\$160.388m in 2014. This may signify an increase in customer growth, increased ARPU's and MOU's due to low rates. It seems that the ARPU and MOU's may have kept increasing from N\$58 in ARPU in December 2013, up from N\$43 in September 2013 (CRAN, 2014, pg. 14).

The CRAN market report concludes: "Due to the declining business model of Telecom Namibia and inadequate fixed broadband offerings, Telecom Namibia is loosing voice and data revenue to MTC and, as a consequence, lacks the capital to build a mobile network that could compete with MTC. Telecom Namibia needs substantial funds to invest into mobile and fixed broadband in order to compete in the short to medium term" (CRAN, 2014, pg. 34).

### **5.2.1 AMBITIOUS FUTURE PLANS**

TN has an N\$2billion national broadband plan to roll out fibre optic cables. It plans to finance the N\$1,6 billion from its own supposed funds and the remaining portion from the capital market. It aims to expedite the delayed roll out of GSM/LTE network of TN Mobile for faster broadband speeds and install 267 base stations (TN, 2014). To obtain funding, the government would need to start supporting TN with more than just letters of comfort. The credit rating by Fitch indicates the government should give tangible support for the rating to improve. Alternatively, the government may consider funding TN's NGN plans directly to ensure universal access, to make the plans a reality.

### **5.2.2 UNPAID REGULATORY LEVIES**

TN has unpaid regulatory levies amounting to N\$22.204 million for 2013 and N\$21.030 million in 2014. It requested an equity injection of N\$400 million from the government and a letter of comfort and support to meet its immediate liquidity requirements that fell due in early 2015 (TN, 2014).

### **5.2.3 SLIDING CREDIT-RATING**

Casting further doubt abouts its performance, TN saw its credit-rating drop to a BB from a BBB-. To remedy this situation, TN requested an N\$200 million bailout to fill the gap in its budget, either as a loan guaranteed by government, or as unissued shares from the NPTH, its sole shareholder, which is directly owned by government (Informante, 2014 December 18). NPTH came to the rescue with N\$400 million in April 2015 (Windhoek Observer, 2015 April 10).

### **5.2.4 LOW MOBILE CUSTOMER BASE**

TN suffered a 27% loss of subscribers in the last quarter of 2013, at the time when the MTR of

N\$0.20 was announced by CRAN. At the end of September 2013 TN's active SIM cards stood at 103,925 but dropped to 75,752 at the end of December 2013. TN's mobile services customers total 100,000 of which 80% are prepaid and 20 % post-paid.

TN lost 32.6% of its post-paid subscribers and 25% of its prepaid customers. However the ARPU and MOU were higher in the last quarter of 2013 (CRAN, 2014, pg.13-14).

### **5.3 MTC's PERFORMANCE**

MTC's 2014 revenue is reported to have increased from N\$1,831,8 million in 2013 to N\$2,081,8 million. This represents a growth of 13.7%. It is attributed to growth of the subscriber base and new products and services. The subscriber base is indicated to have grown from 2 269 501 to 2472 093. The directors adopt the going concern basis in preparing the statements (MTC, 2014, pg.4). MTC's on-net traffic percentage was 97.2% whereas TN's was at 5.1% as at December 2013 (CRAN, 2014, pg.15).

MTC kept declaring dividends to NPTH. In 2013, N\$384 million and N\$263 million in 2014. NPTH paid a dividend of N\$159 million to the government in June 2015 for the 2014 financial year (Namibian, 2015a).

The profit margin was 23.4% in 2013, with an EBITDA margin of 55.0%. CRAN states the high profitability may be an indication of a lack of effective competition. MTC's on-net percentage was 97.2% whereas TN's is at 5.1% as at December 2013 (CRAN, 2014, pg.18).

## **6. NAMIBIA'S INSTITUTIONAL ENDOWMENT AND REGULATORY GOVERNANCE**

### **6.1 THE INSTITUTIONAL ENDOWMENT**

Levy and Spiller (1996) identify five, non-static elements for any country's national endowment. These elements are: Legislative and Executive bodies, the Judiciary, customs and norms, the character of the competing interest and the country's administrative capabilities. It is within this unique institutional endowment of Namibia that the outcomes are assessed against regulatory governance to attempt and explain why Namibia may have the regulatory outcomes it does.

#### **6.1.1 LEGISLATIVE AND EXECUTIVE INSTITUTIONS**

Namibia has a constitutional separation of powers. It has a two-tier Parliament. The President appoints the Ministers of ICT and Public Enterprise. (Constitution of the Republic of Namibia, 1990).

The ruling SWAPO party has been in power since Namibia's independence in 1990. The Presidential candidate received 772 528 votes out of the total of 890 738 counted (87%) in the

2014 elections. SWAPO has a two-thirds majority, with 77 seats out of the total 96. It garnered 715 026 (80%) votes (ECN, 2014a, December, 30) and (ECN, 2014b, December, 30).

Ministers are statutorily empowered over a State-Owned Enterprise (SOE) that legally report to them. The Minister of ICT (the Minister) is the line Minister for TN, CRAN, MTC and NPTH, as the shareholder representative. The Minister exercises oversight and makes policies and regulations in terms of the Communications Act (2009), TN's and NPTH's enabling legislation.

CRAN is not structurally created as an independent regulator. CRAN is classified as an SOE at a macro level, even if at the micro level it is organisationally separate from the Ministry of ICT (MICT) (Brown et.al., 2006, pg. 50). This is a contradictory structure, considering the Communications Act (2009) aims to establish an independent regulatory Authority. The Minister, in consultation with the State-Owned Enterprises Governance Council (SOEGC), presided over by the Prime Minister, has power to approve the budget and strategic plan of CRAN (MICT, 2009b) and in terms of the State-Owned Enterprises Governance Council Act (2006). This affords wide and discretionary powers for the Minister. If unchecked, it may result in an avenue for political interference, regulatory capture and a conflict of interest.

The management of the regulator and the management of TN are appointed by their respective Boards. In terms of the State-Owned Enterprises Governance Council Act (2006), the management is subject to the SOEGC's performance management processes (Namibia Prime Minister, 2006). The management of the MTC are however appointed from Portugal Telecom, in terms of the shareholders agreement with Namibia Post and Telecom Holdings Limited (NPTH) (MTC, 2013).

The Boards, including three members of the MTC board, are in turn appointed by the Minister, in consultation with the Cabinet (Namibia Prime Minister, 2006, September 14).

### **6.1.2 THE JUDICIARY**

High Court Judges are appointed by the President on the recommendation of the Judicial Service Commission (Constitution of the Republic of Namibia, 1990).

The Judiciary reviews the decisions of the regulator in terms of the Communications Act (2009). The High Court of Namibia is independent, strong, credible, professional and well respected. No judge has been reported to be the subject of corrupt investigations or conflict of interest.

In the court case against the NCC, the NCC won the off-net rate ruling (Smuts, 2012). CRAN however lost the Powercom take-over court case against TN (Ueitele, 2012).

## **7. ANALYSIS OF THE TELECOMMUNICATIONS SECTOR PERFORMANCE IN RELATION TO THE INSTITUTIONAL ENDOWMENT AND REGULATORY GOVERNANCE**

### **7.1 POTENTIAL PITFALL'S FOR CRAN'S INDEPENDENCE AND CREDIBILITY**

Despite not being structurally independent, CRAN has been credible in complying with its regulatory duties in implementing independent regulatory interventions and regulatory incentives.

The benchmarking regulatory incentives, if enforced effectively, however may predictably be disastrous to TN's performance given its financial position.

The regulatory interventions are dependent on all operators complying, but are particularly dependent on TN's participation, as a dominant operator. A failure of TN's meaningful participation and compliance, may compromise the any regulatory incentives or regulatory interventions from CRAN. Any unreasonable non-compliance by TN, any reasonable fair and reasonable decision by CRAN, may have the undesired effect of holding the sector ransom.

The concern is not so much CRAN complying with its legal duties as a regulator, but the effective exercise of its administrative discretion to enforce regulatory incentives on TN and MTC, both being incentivised to adopt such measures in the shortest possible period of time. Further, it depends on any political interference from the shareholder in safeguarding TN's or MTC's interest, as major employers.

The challenge for CRAN lies in matters such as enforcing the payment of TN's regulatory levy or universal service levy, so that other operators are not discouraged to do the same or file lawsuits against CRAN for discriminatory practices. It is in these areas, that the independence of CRAN may be potentially impacted, given its structural position as an SOE responsible to the Minister of ICT and the Prime Minister.

The Minister, in approving or disapproving the budget and strategic plan, may possibly exercise more than a policy directive, and may micro-manage CRAN and intervene in its operational activities by deciding on its strategic plans, projects and budget line items and refusing to approve such plans unless the changes are made, or approving same subject to the changes politically demanded.

In the event CRAN fails to make such changes CRAN may be in violation of the SOEGC Act and subject to legal liability and poor performance assessments for its management. This therefore may compromise any regulatory interventions and regulatory incentives CRAN may devise to address the performance of the telecommunications sector. Pertinent regulatory interventions such as infrastructure sharing and implementing benchmarking incentive regulation for wholesale Broadband services, are a few examples.



The fact that the Minister of ICT is appointed by the President as shareholder Minister over CRAN, TN and MTC and the lack of an independent review in terms of a joint Parliamentary Committee, may result in CRAN's independence being undermined.

The Board members that are appointed by the same Minister may be less likely to stand their ground against the Minister for fear of being removed from office. The Board may be less likely to restrain the arbitrary actions of the Minister of ICT, as they are not independent executive Board members appointed by a joint Parliamentary committee, but by the Cabinet.

In other words, the structure that establishes CRAN as an SOE, whereby the Minister of ICT appoints the Board and the Board in turn appoints the CEO and executive management of the regulator, approves the CRAN budget and strategic plans, does not restrain arbitrary government power sufficiently. This is further buttressed by the fact that a joint Parliamentary committee does not oversee the operations of CRAN. The powers are too flexible for proper regulatory governance to be exercised. If regulatory interventions and incentives prove controversial to TN, it may lobby the shareholder to intervene in the regulatory process.

The opposition party, Rally for Progress and Development (RDP) objected to the Powercom transfer transaction. If this transaction had been tabled to Parliament, in one form or another, greater oversight could have been exercised. The RDP prophetically stated: "The proposition of the acquisition of Leo by Telecom Namibia must thus be rejected as mis-directed, ill-conceived and would lead to unintended negative results. Finally, it is the view of the RDP that the Minister, given his pronouncements on the matter, has moved into space allotted to the Regulator. The Minister is reported as saying that if Leo were to go under, the staff of Leo would be added to the ranks of the unemployed" (RDP, 2012).

## **7.2 TN STRATEGICALLY CIRCUMVENTING INFRASTRUCTURE SHARING REQUIREMENT?**

TN's relationship with the government has allowed TN to purchase Powercom, with no parliamentary oversight. This has resulted in TN transferring its passive infrastructure to Powercom. Powercom voluntarily withdrew its licence in 2013 as it intended to stop providing licensed telecommunications services (CRAN, 2013c).

In its 2014 annual report TN claims Powercom (Pty) Ltd, created in October 2013, is now an infrastructure sharing company as "TN sold all its towers to Powercom". Its business is the "leasing (of) communications towers", referred to as "passive infrastructure". Powercom aims to become the market leader in telecoms infrastructure management and support services (TN, 2014, pg. 13).

Given that Powercom surrendered its licence to CRAN, Powercom making passive infrastructure available on a shared basis to other communications service providers under long-term contracts is not regulated by CRAN. There is no requirement for open and transparent pricing under the communications regulatory framework. Passive infrastructure

operated by an unlicensed company may practically not be defined as a communications network under the Communications Act (2009). Powercom may possibly therefore not be legally required to apply for a licence. A requirement to licence Powercom may require an amendment of CRAN's legislation. This strategy may have been deliberately adopted to circumvent CRAN's jurisdiction that requires the sharing of passive and active infrastructure. The management of TN are the Board members of Powercom. This action may be tantamount to an abuse of a dominant position. This behaviour is contrary to the intention of the legislature and the ethos of the fundamental duty of an operator dominating such a vast national communications network to share that very infrastructure. This infrastructure must not be allowed to result in a regulatory blind spot as it may have a disastrous impact on competition for future and current licensees. This may create bottlenecks for the sector.

This is of grave regulatory concern. CRAN reported the existing interconnect and infrastructure sharing agreements it perused display "...disparity in pricing in that different pricing for the same access to infrastructure is levied to different licensees; and the charging of unusually high, sometime exorbitant, tariffs levied for access to infrastructure to one licensee whilst another licensee is charged at a much lower tariff for the same access request" (CRAN, 2014, pg. 13).

CRAN held a public consultation in respect of the infrastructure sharing agreement (CRAN, 2015a). It should investigate this issue and craft a clear regulatory intervention.

However, under the competition rules of the Competition Act, the Namibian Competition Commission may have jurisdiction over Powercom, and CRAN must explore this avenue.

### **7.3 THE DEPENDENCY SYNDROME**

It is solely on the basis of the possible government support and statements of accessing the capital market that the directors prepared the 2014 financial statements of TN on a going concern basis. The status of TN's financial position gives rise to a material uncertainty about its ability to continue as a going concern (TN, AFS 2014, pg. 106).

It begs the question "has TN become another Air Namibia that will continuously be bailed out by government with taxpayer money?" This is the norm in Namibia. Defunct SOE's are simply bailed out and are allowed to make losses year after year. Very little accountability is instilled for such erroneous corporate decisions that cost the taxpayer millions of dollars and divert treasury funds away from other socio-economic development projects.

Fitch stated "TN has legal, operational and strategic links with the state of Namibia, which has secured some of TN's debt in the past and provided financial guarantees. Further deterioration without tangible signs of support from the government may result in a further widening of the difference between the ratings of TN and the Namibian government, reflecting more imminent liquidity risks. Given the deterioration in TN's financial profile and the absence of additional government support, Fitch has widened the gap between the parent and TN by a further notch. TN has strong operational and strategic links with the Namibian government; however, the legal links are limited." (Reuters, 2014, August 13). This

demonstrates the dependent relationship between the government and TN that would continue to create an expectation for TN to request funding from government. TN may continue to lobby the government when regulatory incentives may not be favourable to its financial position.

#### **7.4 THE NPTH QUESTION**

In July 2014, the Cabinet took the decision to dismantle NPTH by 2017. MTC and TN will in turn be directly owned by the government of Namibia (Namibian, 2015b, May 11). This may make TN a direct burden on the taxpayer, and the shield of NPTH, with its dividends from MTC will disappear. MTC will now directly pay dividends to the government and TN can no longer get its hands directly on it from NPTH.

However, as indicated in the Fitch report, the government has never directly paid any equity to TN, only NPTH did. Fitch reported "Future developments that could lead to positive rating actions include: - A positive action on Namibia's sovereign rating, providing that the strength of parent subsidiary linkage does not weaken - Significant, tangible government support could narrow the two-notch differential between the ratings of TN and the sovereign" (Reuters, 2014, August 13). The dismantling of NPTH may create even more direct links and legal links for bailouts, as the government would be the direct shareholder. CRAN may therefore be tempted to design regulatory incentives based on this relationship, whether directly or indirectly.

#### **7.5 INTENDED CONSEQUENCES - MARKET CONCENTRATION**

TN approached Cabinet beforehand and obtained its approval for the transfer of Powercom, the only private operator of a mobile cellular service, to TN (New Era, 2012a). CRAN imposed a suspensive condition that TN be privatised with a minimum of 25% and that the establishment Act of TN be amended to enable the privatisation. The court held the decision was *ultra vires* and violated the "separation of powers" principle as the decision seeks to order Parliament to amend a piece of its legislation (Ueitele, 2012). Due to the High Court's ruling against CRAN, CRAN was unable to promote private investment, the result being a consolidated market.

In its report reviewing the performance of the telecommunications sector, CRAN highlights the takeover of Powercom by TN as a major regulatory event that took the sector backwards to a pre-liberalisation era of government controlled telecommunications companies (CRAN, 2014). It was the exit of private investment. It instead resulted in the concentration of the sector. The total sector is now 96% owned by two state-owned companies.

## 7.6 COMPETING SOCIAL AND ECONOMIC INTERESTS

The social conflict lies in the income disparity of Namibia. The national unemployment average is estimated close to 34% using the broad definition (NSA, 2012, page vi - xiii). The GINI-coefficient gradually dropped to 0.5971 in 2009/2010 from 0.6003 in 2003/2004, calculated on the adjusted per capita income for every single household member. This inequality is amongst the highest in the world (NSA, 2012).

TN's losses are also attributed to wage bill of Powercom (TN, 2014). TN offered voluntary retrenchment packages to 136 employees, and absorbed 100 employees from Powercom in 2012. TN borrowed N\$64 million from Standard Bank to be able to pay the packages, repayable at N\$6,5 million per month over for a year (Informante, 2015, January 22).

The social conflict, within the institutional endowments is that government would not want to see the Powercom employees lose their jobs given the high unemployment rate and gini-coefficient. The Minister of ICT stated "...the taking over of Leo means that Telecom Namibia's staff complement will balloon to 1 500 after taking over 150 former Leo employees (Informante, 2013, August 28). This was surely a basis for the political approval of the transfer transaction.

## 8. ANALYSIS OF SECTOR PERFORMANCE IN RELATION TO THE INSTITUTIONAL ENDOWMENT AND REGULATORY INCENTIVES

Regulatory rules about pricing, competition and interconnection are part of the overall regulatory incentive structure (Levy and Spiller (1996, pg. 4). Regulatory incentives may include regulatory decisions regarding rate of return regulation, cost allocation and revenue recovery such as revenue caps and price caps and benchmarking. However, benchmarking is also treated by some as a regulatory intervention and not as a regulatory incentive. For the purpose of this study, benchmarking is treated as a regulatory incentive (Regulation Body of Knowledge).

CRAN is allowed to implement regulatory incentives such as benchmarking, in exercising its discretion when assessing interconnection rates for approval, by section 49(13) – (14) of the Communications Act (2009). Similarly, section 53(20)(a) – (b) and (d) of the Communications Act (2009) allows CRAN to prescribe limits on the tariffs licensees may charge, prescribe methods of the sharing of costs between customers in urban and rural areas and prescribing any other matter relating to tariffs that is necessary or expedient.

Benchmarking, price caps or rate of return incentives do not operate in a vacuum. It operates in tandem with regulatory interventions such as rate and tariff approvals in respect of termination rates, interconnection rates, retail pricing, promoting competition and preventing abuse of dominant positions and infrastructure sharing. These regulatory interventions and incentives are extracted from Montoya and Trillas (2007), Tenbücken and Schneider (as cited in Jordana and Levi-Faur, 2004) Galpaya and Samarajiva (2009),

Waverman and Koutroumpis (2011), Namibia's TRE as reported on by Sherbourne and Stork in the RIA (2010), GATS and the TRGI and TRE surveys and the ECTA (2009) scorecard the Communications Act (2009), (Brown et.al., 2006).

### **8.1 BENCHMARKING AND COST ALLOCATION - TN's MOBILE AND FIXED TERMINATION RATES**

In 2011 Namibia's mobile termination rate (MTR) of N\$1.06 was too high. This was contrary to the trend that rates are equal to the cost of a benchmarked efficient operator. MTC's estimated costs were found to be between N\$0.23 and N\$0.35. Namibia adopted a gliding path rate drop to N\$0.30, which included a 25% mark-up. Contrary to MTC's counter arguments that its EBITDA would drop to 36%, it increased to 53.8% in 2009, from 50.9%, and it has been increasing ever since.

The MTR decision was challenged in the High Court on the grounds that the decision was not reasonable, rational, the NCC interfered and MTC was not granted a right to be heard. Ruling in favour of the NCC, the court stated the NCC statute and the licence conditions empowered the NCC to order amendments to MTC's tariffs. It was an administrative justice right enshrined in the Constitution of the Republic of Namibia (1990). Statutory bodies are to act fairly and reasonably and comply with the requirements imposed upon them by common law and their empowering legislation. The court held the rational connection test was met regarding the regulatory decision and its aim (Smuts, 2012).

In 2013, CRAN announced a further reduction in mobile and fixed termination rates from N\$0.30 to N\$0.20 with effect from 1 November 2013. This decision went unchallenged. CRAN consulted TN and MTC. The interconnection rate for SMS between operators was reduced from N\$ 0.20 to N\$0.01 across all telecommunication providers. This is positive news for TN that has only 0.1% on-net traffic but 81% off-net. On the other hand, MTC's off-net traffic is only a mere 0.3%. CRAN states "this is despite off-net price caps implying that Namibia currently only has one competitive mobile operator. MTC currently has a factual mobile monopoly with 98% of total mobile traffic and 99.9% of total on-net traffic" (CRAN, 2014, pg. 14 - 15).

Despite these interventions based on Regional benchmarks and costs allocation, Namibia's IDI ranking indicate the services are not affordable. A large number of the population is still not able to access and use Broadband services. A possibility is that the wholesale pricing for leased lines are too high. It is above the Regional benchmarks of South Africa and Botswana, both of which have an IDI ranking that is above the Regional average and above that for a developing country. It is clear that the wholesale and pricing challenges with TN are a bottleneck and require urgent regulatory intervention.

## 8.2 BENCHMARKING AND RATE OF RETURN - TN's DATA AND IP SERVICES PRICING

In March 2013 TN applied for the approval of the wholesale and retail pricing of its local and national data links, the once-off charges, the discount structure and the backhauling pricing for its Time Division Multiplexing (TDM) product and services (CRAN, 2013a). In an effort to heed the ITU's call for a regulatory focus on affordable Broadband access and usage, CRAN rejected the application twice (CRAN, 2013b).

In addition to the increase being over 465%, the reasons included, higher rates than the Regional benchmark. When benchmarked with Botswana and South Africa, in terms of the OECD basket for 2Mbps, TN's prices were far too high (CRAN, 2013d).

In March 2015 CRAN finally approved the data link retail tariffs for TDM as submitted. CRAN held, the financial and economic benchmarking analysis showed the proposed retail prices for E1 and E3 links demonstrate a significant reduction that will improve the competitiveness of Namibia (CRAN, 2015b).

The cost model indicated the Average Cost of Capital (WACC) for an E1 was N\$909.00, which amount includes a reasonable return for TN. CRAN however did not indicate what the supposed "reasonable return" is (CRAN, 2015b).

The approval was therefore subject to the wholesale discounts being increased competitively, in comparison with the Regional benchmarks. When benchmarked with South Africa and Botswana, discounts reach 62% and 80% respectively. TN offered a mere 15%. Until this benchmarking decision is challenged, reconsidered and or enforced, customers and competitors will have to do with the current pricing that is above the Regional benchmarks (CRAN, 2015b).

The March 2015 decision is significant to TN. TN's Data and IP services revenues experienced growth from N\$541.7m (19.8%) in 2012 to N\$ 637.9m (17.8%) in 2013 and N\$241.166m for Data and N\$410.921m for IP services in 2014 (N\$652.087). The Data and IP services represents over 48.2% (N\$652.087 / N\$1 352 636) of TN's revenue. This revenue stream is what TN dominates and has realistically built its business case on. Prepaid customers are hard to predict, attract and retain for TN, unlike MTC. However, due to the regulator using the benchmark method to determine pricing there is little room to grant TN incentives that are commensurate with its budget shortfall, leaving bailouts, capital markets and loans as the few options. It is possible that a 15% discount would make up for the budget shortfall and with a 65% discount TN may just price itself right out of its debt or price smaller operators out of the market. It already seems as if the uptake for the Data and IP services are slow and this results in bottlenecks for the sector (TN, 2014).

### 8.3 BENCHMARKING - TN'S PRICING FOR THE PUBLIC SWITCHED TELEPHONE NETWORK – LEASED LINE COST MODEL

CRAN will hold a public hearing regarding TN's pricing for the "Public Switched Telephone Network – Leased Line" cost model. CRAN already stated: "In addition, the recently completed cost study (Development of Public Switched Telephone Network (PSTN)/Leased Line Cost model), which is under discussion with Telecom Namibia, also confirms that the prices are too high" (CRAN, 2015b).

## 9. ANALYSIS AND CONCLUSIONS

Namibia's ICT access and usage gap is wide, but reducing very slowly. It is evident that TN's wholesale service pricing is what is making ICT access and usage unaffordable and out of reach for the majority of Namibians. This is the reason why the regulatory purpose is not met.

Concerted effort is needed to meet the regulatory purpose. Regulatory interventions such as infrastructure sharing, affordable wholesale and retail pricing for Broadband, number portability and universal service will assist in achieving the regulatory objectives. Similarly, regulatory incentives such as benchmarking, rate of return and cost allocation with regards to mobile termination rates and the pricing of Broadband services will reduce pricing and ensure affordability.

However, the poor financial position of TN, its dominant position over essential facilities and its predatory pricing strategy, signal regulatory ineffectiveness. This requires the design of regulatory incentives that uniquely benefit Namibia's poor performing sector. This is however dependent on Namibia's institutional endowment. It is because of the government's position as shareholder of TN that it was able to purchase Powercom, but to its own financial detriment, requiring a bailout from NPTH. It was social conflicts such as Namibia's high unemployment and the fear that Powercom's employees may lose their jobs that the executive approved the transaction in the first place, even though now it has financial consequences for TN. It is this relationship with the government that offers a lifeline to TN but it does not incentivize TN to be efficient, as can be seen from the financial results of the past three years.

The policy and shareholder roles of the Minister of ICT are creating a regulatory governance conflict. This institutional endowment creates wide executive powers and has the potential to undermine the attainment of the regulatory purpose if unchecked. The courts are sufficiently independent to address any resulting conflicts.

It may be challenging for the regulator to independently design and enforce the required regulatory incentives in future. These incentives are likely to be challenged given the manner in which the Boards of the various stakeholders and management are appointed and held

responsible to perform, in terms of the wide discretionary powers of the executive. These roles require separation.

CRAN has used regulatory incentives to improve the pricing of Broadband Internet services, as per the ITU's hopes. CRAN risks facing many challenges in attempting to implement and enforce these incentives given TN's precarious financial position and its disregard for the regulator, evidenced by the non-payment of its regulatory levy and its political alignment it enjoys with the executive institutions of the country. The dismantling of NPTH and removing that lifeline of TN and replacing it with taxpayer funding may exacerbate this fact. In that instance, it is the institutional endowment regarding the political alignment of TN to the shareholder that will come head to head with the not-so-independently structured regulator.

## **10. RECOMMENDATIONS**

CRAN's enabling statute and the SOEGC Act (2006) should be amended to establish CRAN as a fully independent regulator.

CRAN should publish a policy brief to the Minister of ICT, the newly created Minister of Public Enterprises and the SOEGC, outlining the telecommunications sectors poor performance. It must highlight the risks posed to and by TN to achieving the regulatory purpose.

CRAN should inquire into the regulatory and legal impact of the relationship between Powercom and TN on the duty of a dominant carrier to share essential infrastructure. The inquiry should determine whether the transfer was a tactic to bypass the legal duty, and may be anti-competitive. The inquiry must also determine whether Powercom may require a license to share such passive infrastructure or other measures that can be implemented to prevent anti-competitiveness. This inquiry should be undertaken jointly with the Namibian Competition Commission.

CRAN must enforce the payment of TN's regulatory levy.

A Joint Parliamentary Committee should be established to exercise oversight over the regulatory role of CRAN. The Board members of CRAN should be appointed in terms of a Parliamentary nomination and appointment process.

The Minister of ICT should exercise the ICT policy role over the sector.

The newly created Minister of Public Enterprises should exercise shareholder responsibilities over TN, MTC and NPTH. In this regard, the Minister of Public Enterprises should be granted the functions previously awarded to the SOEGC, in terms of its enabling legislation. The necessary legislative amendments should be made in this regard.

The Minister of Public Enterprises should undertake a commission of inquiry over the



strategic, operational and financial affairs of TN and make recommendations to be adopted at a shareholders meeting to ensure its sustainability. The terms of the inquiry should involve assessing TN's NGN strategies, particularly 4G base stations and fibre, and determine how the government and/or NPTH can directly fund such a project, on an open access basis.

Cabinet should review its decision to dismantle NPTH. It should study the impact the dismantling will have on the operations and finances of TN. It should study the financial impact the dismantling of NPTH may have on the treasury if NPTH no longer exists to fund TN.

---

## REFERENCES

Blackman C, & Srivastava L. (2011). *Telecommunications Regulation Handbook*. 10th Anniversary Edition. The World Bank, infoDev, International Finance Corporation and ITU.

Clarke, E & Dawson, R (2000). *Evaluation Research. An Introduction to Principles, Methods and Practice*. Sage Publications. London.

*Communications Act of 2009*. Government Gazette, Vol. 4378, No. 226. (2009).

Constitution of the Republic of Namibia (1990).

CRAN (2013a, March, 13). *Notice in terms of the regulations regarding the submissions of interconnection agreements and tariffs*. Windhoek. Namibia. (Government Gazette, Vol. 5148 , No. 69).

CRAN (2013b, August, 19). *Notice in terms of the regulations regarding the submission of interconnection agreements and tariffs*. Windhoek. Namibia. (Government Gazette, Vol. 5269, No. 333).

CRAN (2013c, August, 19). *Notice in terms of the regulations regarding licensing procedures for telecommunications and broadcasting service licences and spectrum use licences*. Windhoek. Namibia. (Government Gazette, Vol. 5269, No. 337).

CRAN (2013d). *Enforcement Letter to TN dated 25 September 2013*.

CRAN (2014). *Telecommunications Sector Performance Review*. Downloaded from <http://www.cran.na/dloads/Media%20Releases/CRAN%20Market%20Report%202014.pdf> on 2 July 2015.

CRAN (2015a). *Press Statement dated 28 May 2015. CRAN consults stakeholders on the infrastructure sharing study document.* Downloaded from <http://www.cran.na/downloads/Public%20Notices%20and%20Hearings/hearing/Infrastructure%20Sharing%20Stakeholder%20Consultative%20Meeting/Media%20Release.pdf> on 1 July 2015.

CRAN (2015b, March, 2). *Notice in terms of section 53 of the Communications Act, 2009 (act no. 8 of 2009) read with the regulations regarding the submissions of interconnection agreements and tariffs.* Windhoek. Namibia. (Government Gazette, Vol. 5683, No. 102).

ECTA (2009). *Regulatory Scorecard 2009.* SPC Network. Jones Day. Downloaded from [http://www.ectaportal.com/en/upload/Scorecards/Regulatory\\_Scorecard\\_2009/ECTA\\_Regulatory\\_Scorecard\\_2009\\_Executive\\_Summary.pdf](http://www.ectaportal.com/en/upload/Scorecards/Regulatory_Scorecard_2009/ECTA_Regulatory_Scorecard_2009_Executive_Summary.pdf) on 16 February 2012.

ECN (2014a, December, 30). *Publication of results and particulars in respect of general election for election of President: Electoral Act, 2014.* Windhoek. Namibia. (Government Gazette, Vol. 5641, No. 259).

ECN (2014b, December, 30). *Publication of results and particulars in respect of general election for election of members of National Assembly: Electoral Act, 2014.* Windhoek. Namibia. (Government Gazette, Vol. 5641, No. 260).

Galpaya, H & Samarajiva, R (2009). *Measuring Effectiveness of Telecom Regulation Using Perception Surveys.* LIRNEasia. Downloaded from [http://lirneasia.net/wp-content/uploads/2009/10/GalpayaSamarajiva\\_TRE\\_ITS2009\\_v5.pdf](http://lirneasia.net/wp-content/uploads/2009/10/GalpayaSamarajiva_TRE_ITS2009_v5.pdf) on 16 January 2013.

Intven, H. & McCarthy, T. (2000). *Telecommunications Regulation Handbook.* InfoDev. Washington DC. USA.

Informante. (2013, August, 28). *Leo re-brands as TN Mobile.* Downloaded from <http://www.informante.web.na/node/12481> on 1 July 2015.

Informante. (2014, December 18). *Telecom seeks N\$200 million bail-out.* Downloaded from <http://www.informante.web.na/telecom-seeks-n200-million-bail-out.15312> on 1 July 2015.

Informante. (2015, January 22). *Telecom's borrowing crisis.* Downloaded from <http://www.informante.web.na/telecom's-borrowing-crisis.15382> on 1 July 2015.

ITU (2014). *Measuring the Information Society Report 2014.* Geneva Switzerland.

Jordana, J. & Levi-Faur, D. (2004). *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance.* Edward Elgar, Cheltenham.

Levy, B & Spiller, P., (1996). *A framework for resolving the regulatory problem,* in Levy, B & Spiller, P (eds) (1996) *Regulations, Institutions, and Commitment: Comparative Studies of Telecommunications,* Cambridge University Press, Cambridge.

Melody, W. (2001). *Telecom Reform: Principles, Policies and Regulatory Practices*. Technical University of Denmark. Denmark.

MICT (2009a, February, 18). *Overarching Information Communications Technology (ICT) Policy for the Republic of Namibia 2009*. Windhoek. Namibia.

MICT (2009b, November, 16). *Communications Act*. Windhoek. Namibia (Government Gazette, Vol. 4378, No.226).

Montoya, M. & Trillas, F. (2007). *The measurement of the independence of telecommunications regulatory agencies in Latin America and the Caribbean*. Utilities Policy 15 (2007) 182 - 190.

MTC. (2014) *Annual Report 2013/2014*.

Namibia Prime Minister (2006, September, 14). *State-owned Enterprises Governance Act No. 2 of 2006*. Windhoek. Namibia (Government Gazette, Vol. 3698, No.149).

Namibian (2015a).  
[http://www.namibian.com.na/indexx.php?search\\_text=NPTH&page\\_type=search](http://www.namibian.com.na/indexx.php?search_text=NPTH&page_type=search).  
Downloaded on 1 July 2015.

Namibian. (2015b, May 11). *Namibia: NPTH to Be Dismantled*. Downloaded from <http://allafrica.com/stories/201505112355.html> on 1 July 2015.

NEPRU (2007). *Policy Brief No. 18*. NEPRU. Windhoek. Namibia.

NSA (Namibia Statistics Agency). (2012). *Namibia Household Income & Expenditure Survey (NHIES) 2009/2010*.

OECD (2014), *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, OECD Publishing. <http://dx.doi.org/10.1787/9789264209015-en>

Regulation Body of Knowledge. Downloaded from <http://regulationbodyofknowledge.org/faq/price-level-and-tariff-design/promoting-investments-how-can-regulatory-incentives-be-introduced-to-promote-investment/> and <http://regulationbodyofknowledge.org/overview/third-approach-incentive-regulation/basic-approaches/> on 3 July 2015.

RDP. (2012). Downloaded from <http://rdp.org.na/blog/2012/intended-aquisition-leo-powercom-pty-trading-leo-telecom-namibia/> on 3 July 2015.

Reuters. (2014, August, 13). Downloaded from <http://www.reuters.com/article/2014/08/13/fitch-downgrades-telecom-namibia-to-bb-o-idUSFit72012020140813> on 1 July 2015.

RIA (2010). *Namibian Telecommunication Sector Performance Review. Towards Evidence-based ICT*

*Policy and Regulation*. Volume Two Policy Paper 7. Sherbourne, R & Stork, C. Cape Town.

Smuts, J. (2012). *Mobile Telecommunications Ltd v Namibia Communications Commission and others case no. A26/2011*. Smuts J (unreported) 3 April 2012.

Tenbücken, M. & V. Schneider (2004). *Divergent Convergence: Structures and Functions of National Regulatory Authorities in the Telecommunications Sector*. In J. Jordana and D. Levi-Faur, eds, *The Politics of Regulation: Examining Regulatory Institutions and Instruments in the Age of Governance*. Cheltenham: Elgar, pp. 245-72.

TN (2014). *Annual Report 2013/2014*.

Ueitele (J). (2012). *Guinea Fowl Investments Two v Communications Regulatory Authority of Namibia and others case no. A 158/2012*. Ueitele J (unreported) 24 September 2012.

Waverman, L. & Koutroumpis, P. (2011). *Benchmarking telecoms regulation – The Telecommunications Regulatory Governance Index (TRGI)*. Elsevier Ltd.

Windhoek Observer. (2015, April 10). *NPTH Bails Out Telecom*. Downloaded <http://observer24.com.na/8-latest-news/4309-npth-bails-out-telecom> on 1 July 2015.