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Comments regarding Communications Bill (as read a First Time) [B.6-2009]

Introduction

The Institute for Public Policy Research (IPPR) and the Namibian Economic Policy Research Unit (Nepru) welcome the broad intentions of the Communications Bill – that is to liberalise Namibia's telecommunications sector, establish a single competent regulator for the telecommunications, broadcasting and IT sectors, and to manage the radio spectrum. These developments should open up new business opportunities and generate growth and employment. The clear links between effective regulation and competition on the one hand and access to information, economic growth and employment on the other hand makes the passing of the Bill imperative. Indeed it is long overdue since consultations about it first started seven years ago in 2002. However, some problem areas remain in the Bill. We will make brief comments on several aspects of the Bill. Some of these concern language and definitions, but there are three themes which we would suggest require Parliament's further attention. The first is the fact that the Bill mixes up the roles of regulator and policy maker, which could undermine the independence of CRAN (Communications Regulatory Authority of Namibia). Put simply the Minister appears to have powers that are excessive if CRAN is to be a genuinely independent authority as envisaged in the preamble to the Bill. The second theme concerns Part 6 of the Bill which deals with intelligence gathering issues. Such matters would be more appropriate as an amendment to the existing law dealing with the Namibia Central Intelligence Service. Thirdly, there are several concerns arising from the fact that CRAN – aside from being the independent regulator for telecommunications – also has a responsibility to act as a watchdog over broadcast content and an effective broadcast complaints commission.

1. CRAN is not an Enterprise

The new authority Communications Regulatory Authority of Namibia (CRAN) is subject to the State-owned Enterprise Governance Act of 2006 (see Board of Authority (8), Appointment of Members (9), for example). There is a problem with definition here: CRAN is not an enterprise but a regulatory institution. Indeed, it is via the State-owned Enterprise Governance Act (Section 14) that the Minister has the right to appoint the Board. Applying the State-owned Enterprise Governance Act of 2006 is not appropriate for an independent regulator. CRAN should be accountable to Parliament, which could approve the appointment of Board members.

Alternatively, Board members could be appointed by an independent panel headed by a retired judge and then approved by Parliament.

2. The Bill mixes up the roles of regulator and policy maker

Parliament passes the laws that constitute the legal framework of a country. The legal framework establishes the regulator and defines its powers and duties. The implementation of laws (and their interpretation) should be left to the regulator. The Minister can influence regulation through policy directives (as is envisaged in Section 7 of the Bill). Policy directives are meant to provide greater clarity for the regulator (and the public) on what the policy for the sector means and how the law should be interpreted.

- 38 (6) concerning the issuing of telecommunications licences requires the concurrence of the Minister, for example, and contradicts the foreseen independence of the regulatory authority. This should be a matter for CRAN and the Minister's involvement is not necessary.
- In Section 72 dealing with assistance by telecommunications providers, the Bill reads: "The Minister must make regulations prescribing". The Minister's role is to provide policy guidance and not to regulate.

3. Establishment of Communication and Information Policy Unit 3 (1) and (2)

This does not belong in the Bill, it is an internal ministerial matter.

4. Term of Office 11

Re-appointments of board members could be limited to two terms.

5. Chairperson of Board 13

The chairperson would ideally be appointed by Parliament since CRAN is expected to function as an independent regulator. At present, the Minister would appoint.

6. Remuneration of members 14

The Minister of Finance or the Minister of Information should not be responsible for determining the remuneration of Board members. Parliament would need to approve the budget of the authority and is the appropriate body for approving such remuneration levels.

7. Meetings of Board 15

First and subsequent meetings of the Board should be determined by the Chairperson, not by the Minister.

8. Chief executive officer 20 (4g)

The CEO should report to the Board at each Board meeting and not only every six months.

9. Annual report 26 (1)

At present, the sub-section says that the financial report should be produced 'as soon as possible' after the end of the financial year. 'As soon as possible' is too vague. A time limit of not more than four months should be set, since the Board needs to approve the report within six months after the end of the financial year (26(4)).

10. Annual report 26 (5)

Annual report should be submitted by the Chairperson to the Minister, not by the CEO.

11. Public availability of information 27 (9)

Email should be mentioned explicitly, not just mail and telefax, as a means for members of the public to request information from the Authority.

12. Interception Centres 70-77

Part 6 of the Bill deals with aspects of the Central Intelligence Service and does not belong in the Communications Act. It is unclear as to how the Bill would work in tandem with the Namibia Central Intelligence Service Act, which sets out clear safeguards to prevent abuse of interception processes and explicitly acknowledges the supremacy of Article 13 of the Constitution (Section 24 of that Act). No such safeguards against abuse appear in this Bill, nor is there any acknowledgement of Constitution's Bill of Rights. Amendments to the Namibia Central Intelligence Service Act (10 of 1997) would be a more appropriate way of dealing with the issue of interception. At present the wording of the Bill is open to challenge in terms of the Constitution's stipulations on privacy.

(70) States that: "The President must establish" interception centres. President is not defined in the Bill.

13. Duties relating to interception 71 (2)

This section states "...as may be prescribed" regarding information to be stored by providers of telecommunications services, but does not say who may prescribe. It is further unclear whether contents need to be stored generally or only in cases where a court order exists.

It would not be practical to require all content to be stored by operators. Storing content against the will of an individual may already be an infringement of privacy and in contradiction to Article 13 of the Constitution of Namibia.

14. CRAN's role in regulating broadcast content 89-90

In view of the Minister's role in appointing and overseeing CRAN, the Authority does not have the necessary independence to regulate broadcasting content and act as a broadcasting complaints commission. If CRAN is able to fulfil such a role then its independence needs to be strengthened by increasing parliamentary oversight and possibly creating a separate selection panel headed by a retired judge to appoint board members. Alternatively, a body dealing with broadcasting content could be established as a separate entity which works alongside CRAN but has the necessary independence and credibility (as envisaged in the SADC Protocol in Transport, Communication and Meteorology and the SADC Protocol on Information, Sports and Culture which see the regulation of content and technical issues relating to transmission of content as separate matters). It is also unclear as to why the Namibian Broadcasting Corporation is exempt from Sections 89 and 90 for an unspecified period of time.

It should be noted that the Namibian Communications Commission Act of 1992 set down a similar set of responsibilities on broadcast content for the NCC but as far as we are aware the NCC did not implement this section of the Act because of resource and capacity constraints.

Prepared for the Public Hearing of the National Council on the Communications Bill
September 7 to 9 2009