Regulation: An Introduction
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Legal practitioners operating in the field of regulation are a relatively rare breed. Few lawyers know what regulatory law entails or how important an area it is.

More young law graduates should be considering regulation as a career option – either in competition law, or utility regulation (such as telecommunications, electricity, broadcasting), or in one of the limited number of law firms specialising in these areas.

This article sets out to examine the role and importance of regulation, what issues and areas regulation covers, and how regulation is structured and institutionalised. It builds on a previous article that unpacked the relationship between policy, law and regulation.

It draws heavily on examples and practices from the ICT sector, but the issues and principles are applicable across the board.

What is a Regulator?

Regulatory structures and institutions abound in the modern economy, so much so that it has been referred to as the ‘regulatory state’.

South Africa is no exception, with numerous regulators managing various economic and social areas. These include:

- the Independent Communications Authority of South Africa (ICASA);
- the National Energy Regulator of South Africa (NERSA);
- the Competition Commission and the Competition Tribunal;
- the National Consumer Commission (NCC) and the National Consumer Tribunal;
- the Information Regulator;
- the .ZA Domain Name Authority (ZADNA).

Each of these entities exists and derives its mandate from one or more Acts of Parliament (see previous article on Policy, Law and Regulation).

There are also a range of non-statutory bodies that perform regulatory functions, often practising self-regulation in terms of a mandatory code of conduct. Examples here include:

- the Broadcasting Complaints Commission of South Africa (BCCSA);
- the Advertising Regulatory Board (ARB) - formerly the Advertising Standards Authority of South Africa;
- the Internet Service Providers’ Association (ISPA).
Why, then, the proliferation of structures like these? What do policy-makers and governments seek to achieve through regulation.

**Why Regulate?**

There are many rationales for regulation. Most regulatory authorities and regulatory structures exist because of a combination of objectives and justifications.

Broadly speaking, a regulatory authority is established to oversee and manage a specific sphere of competence (e.g., telecommunications, energy, consumer protection) in the “public interest” – the welfare of the society and the economy as a whole, along with the individuals and entities of which it is comprised.

Underpinning the notion of ‘public interest’ are a range of more specific rationales or regulatory objectives. These are not mutually exclusive and may include:

- **Competitive objectives.** This approach sees regulation as intended to ensure the proper competitive functioning of the markets, to the benefit of both market players and consumers. The regulator, therefore, aims to promote “fair” competition, by preventing anti-competitive conduct, such as the abuse of market dominance\(^1\) and price manipulation by ensuring that non-discriminatory rules are put in place.

  Nevertheless, pro-competitive regulation may also include the imposition of ‘asymmetrical regulation’ – rules designed to protect the market position of new entrants and smaller players (such as the imposition by ICASA of differential mobile termination rates in South Africa’s telephony market).

- **Social objectives.** This regulatory rationale prioritises regulatory interventions that protect the rights and interests of users and vulnerable groups in society. This includes intervening to promote universal access and service (for example, by imposing universal service obligations on licensees) and putting in place measures and procedures to ensure proper protection of the rights of consumers (for example, by establishing operator codes of conduct, along with channels for complaints and dispute resolution). Similarly, price and quality of service regulation serve social objectives to the benefit of consumers.

  A number of broader, socially-desirable regulatory interventions can also be considered as falling under the umbrella of the social objectives of regulation – such as measures to ensure and protect access to information, or to promote media diversity by limiting cross-media ownership and control, or to ensure broad-based black economic empowerment. Even cybersecurity measures can be considered as aimed at promoting social objectives for regulation.

- **Economic objectives.** The economic rationale for regulation tends to focus on optimising the functioning of the sector. It aims to promote public confidence in the market by means of transparent and predictable regulatory and licensing processes

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1 Market dominance is usually formally defined in legislation - and differs from one jurisdiction to another. A dominant firm usually enjoys a specified substantial share within a particular market, to the detriment of both competitors and consumers.
designed to create a favourable climate to promote investment and to develop and expand the sector. Such an approach tends to favour economic incentives designed to optimise the market structure and to address market failures. These might include various forms of rate and price regulation, the imposition of open access and interconnection requirements, and requirements for cost-based regulation, accounting separation and unbundling.

- **Technical objectives.** The technical rationale for regulation prioritises practical and engineering issues, and is concerned with optimising the use of scarce resources. It focuses on issues like electro-magnetic spectrum band planning and the prevention of interference, the allocation and management of numbering, and addressing the technical issues associated with rights of way, interconnection and facilities leasing. It also deals with equipment type approvals.

As noted in a previous piece, regulatory authorities are established to provide ongoing oversight and management of their respective sectors. A regulator is able to draw on, maintain and exercise an in-depth pool of expertise and experience far greater than that available to the policy-makers and legislators that created it and designed its enabling legislation in the first place.

The regulator is therefore able to interpret and apply the policy-driven, broad guidelines set out in legislation in a highly contextualised and granular manner that is able to respond to and interact with the changing, unfolding exigencies of sector trends and market dynamics. Further, a regulator is able to respond with far greater speed and flexibility than a legislature can do. In order to achieve this is necessary for the regulator to be independent - and issue that will be discussed in more detail below.

**Regulation and ICT Sector Reform**

Independent sector-specific regulators came into being as part of the process known as ‘telecomm reform’.

Under pressure of technological advances, industry and consumer demands for new ICT-enabled services, and the ideological shifts commonly referred to a neo-liberalism, fundamental changes were instituted in the telecommunications sector from the early 1990s. Under the ensuing process of ICT sector reform, monopoly provision of telecommunications services was gradually overtaken by:

- the privatisation of incumbent telcos;
- the introduction of competing service providers (often through the licensing of mobile operators); and
- the establishment of sector-specific regulatory entities.

The diagram below illustrates the spread of the changes to the market structure as a consequence of the three phenomena over the key period from 1990 - 2010.
This set of policy and regulatory changes are by no means confined to the ICT sector, even though ICT offers an excellent case study. Similar pressures have affected railways, water reticulation, electricity supply and more.

The new regulatory bodies created as a result of these reforms are not identical. They differ in scope, mandate, structure and degree of independence, issues to which we now turn in our discussion.

**Scope of Regulation**

Regulatory bodies may **differ in scope**, according to the sectors of the economy they hold responsibility for.

Some regulators have a mandate that is **economy-wide**, covering the entire area of economic activity. Competition and consumer protection regulators typically enjoy this wide degree of scope and mandate. In South Africa, the [Competition Commission](https://www.competition.gov.za) and [Competition Tribunal](https://www.competition.gov.za) is a good example of such an economy-wide regulatory structure. Their investigations have ranged from bread suppliers through construction conglomerates to the airline industry. Their expertise allows them to address anti-competitive conduct and adjudicate mergers and acquisitions in a wide variety of contexts.

More common are regulatory bodies whose scope is restricted to a specific sector, such as telecommunications or broadcasting or electricity. **Sector-specific regulation** usually works best in sectors where a high degree of specialised expertise is required to deal with the issues of the market, such as interconnection, spectrum management or digital terrestrial broadcasting. South Africa’s [National Energy Regulator](https://www.nersa.gov.za) (NERSA) is an example of such a sector-specific regulator.
In many jurisdictions, a number of sector-specific regulators have been brought together into converged regulatory bodies, usually where there is sufficient overlap or synergy between the regulatory issues that they need to address. For example, telecommunications and broadcasting regulators are often brought together because of the overlaps between the spectrum, licensing and content issues they are required to oversee. Postal services are also often added to the mandate. The Independent Communications Authority of SA (ICASA) is a good example of such a converged regulator, responsible for telecommunications, broadcasting and postal services.

Similar economies of scale and scope underpin the creation of multi-sector utilities regulator, under allows for the benefits of having a single, streamlined regulatory body overseeing a number of public utility sectors such as telecommunications, roads, water and energy. The model is common at state level in the US. The Rwanda Utilities Regulatory Authority (RURA) is a good example from Africa of such a of multi-sector utilities regulator, holding responsibility for telecommunications, electricity, gas, water, waste removal, and transport of goods and persons.

It is also necessary distinguish styles of regulation, which range from light touch regulation of the kind favoured in the European Union, to the command and control regulation that is generally typical of sector-specific regulation.

Regulators also differ in the approach they take to the regulatory issues under their jurisdiction. The mandate of some regulators requires in advance or ex-ante interventions. This is typical of sector-specific regulation, where the regulatory mandate of a body such as South Africa’s ICASA deals with issues that require the setting of rules, requirements or specifications in advance - such as for spectrum management, licensing, ownership and control, interconnection and facilities leasing, all in the ICT sector. Other regulatory approaches focus on ex-post interventions, dealing with the consequences of market conduct or addressing complaints over business practices. Competition regulators generally operate using this kind of approach.

There is also a wide degree of variation in regulatory mandate enjoyed by regulatory authorities around the world over the various sector functions. The diagram below illustrates responsibilities for various regulatory functions in the ICT sector. Some, such as the management and assignment of numbers, are typically the exclusive mandate of the regulator. Responsibility for interconnection rates is, for example, far less commonly within the mandate of the regulator. Not shown here, are issues such as cyber-security or Internet content, which are far less commonly within the purview of the ICT sector regulator, and which may fall under the jurisdiction of another regulatory body or may not be regulated at all. In South Africa, for example, the Film and Publications Board (FPB) has sought, controversially, to assume responsibility for regulating online content, and universal access and service largely falls under the Universal Access and Service Agency of South Africa (USAASA). And in some jurisdictions, such as France, control over spectrum is vested in a dedicated spectrum management agency.
Structures for Regulation

The exercise of regulatory authority is exercised through a wide variety of institutional arrangements in different jurisdictions.

Prior to the arrival of telecommunications reform, sector regulation was undertaken by government, usually via the minister in charge of the incumbent telco. This is still the case in some jurisdictions, such as Japan, where ICT sector regulation is undertaken by the Ministry of Internal Affairs and Communications (MIC).

Under ICT sector reform, the function was moved over to an independent regulator, with the last hold-out in Africa, Ethiopia, currently busy with the process. In some cases, regulation has been undertaken by a single-headed regulatory entity. This can create problems of capacity and continuity, and is not generally considered good practice, except in the case of ombud functions.

The most common form or regulatory structure is the collegial regulatory commission, where regulatory decisions are undertaken or overseen by a council or board. This is the case in 70% of the countries in Africa. Such a structure is intended to allow for the benefits of collective wisdom in regulation, with decisions the outcome of debate and consensus between individuals appointed on the basis or sector expertise and experience. It also can be structured to provide for continuity of leadership through staggered terms of office, and reduces the possibilities for political interference.

In some jurisdiction, such as New Zealand, a commission and tribunal model has been adopted. This is the approach been set out in South Africa’s recent ICT Policy White Paper for the envisaged ‘economic’ regulator. It is, however, and approach more suited for ex post regulation.
Regulatory Independence

One of the key issues in regulation is the question of regulatory independence - ensuring that ICT sector regulation is free from political interference from the side of the ministry and insulated from pressures from operators in the sector.

Government interference can be driven by short-term political gain rather than the long-term welfare of the sector as a whole. Indeed, in cases where the state still has a shareholding in the incumbent telco, government involvement is likely beset by a structural conflict of interest.

And the ability of licensees to influence the regulator according to their bottom-line financial interests leads to a situation referred to as regulatory capture, where the regulator is seen to do the bidding of the ICT industry rather than acting in the public interest.

It is for these reasons that the key WTO Regulatory Reference Paper - a set of regulatory principles that are legally binding for WTO signatory governments - requires a regulatory body that is “separate from, and not accountable to, any supplier of basic telecommunications services”.

What, then, is meant by regulatory independence?

No regulator is independent of the enabling statutes from which it derives its authority and in terms of which its mandate is defined. Indeed, any regulatory interventions that are ultra vires, outside the regulator’s legal mandate, are likely to be challenged and overturned in court. Further, regulation is likely to be influenced by government policy.

Rather, regulatory independence, in the words of the iconic Bill Melody, is the “power to… implement policy without undue interference”.

There are a number of key aspects to regulatory independence.

These include ensuring:

- **Structural autonomy**, whereby appointment, accountability and removal processes for the political heads of the regulator are insulated from intervention in the part of the minister;
- **Regulatory authority**, whereby the regulator has the power to finalise and promulgate regulations without involvement form or interference by the ministry;
- **Financial independence**, whereby the regulator is insulated from having its budgetary priorities and financial allocations determined by the minister. In some jurisdictions, this is ensured by having the regulator funded via the collection of licence and spectrum fees, or by the imposition of a regulatory levy, or both, as in the cases of Botswana and Namibia.

South Africa’s ICASA is widely considered to fulfil most of these criteria, as an ‘Institution Supporting Constitutional Democracy’ under Chapter 9 of South Africa’s Constitution.

The appointment of councillors is undertaken via a parliamentary process that does not involve the minister, and ICASA accounts to Parliament. Further, ICASA is specifically
protected from political interference: it is only required to “consider” the policies and “policy directions” issued by the Minister, and, since 2005, it issues regulations under its own authority. However, its financial independence is rather more limited, as it is funded via the annual budget vote for the Department of Communications and Digital Technologies.

Conclusion

In this article, we have looked briefly at the nature of regulation, its rationales, and a range of regulatory models, structures and mandates. Below are some suggestions for further reading on the issues touched on above.

Further Reading


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