MISA (Zimbabwe) position on the independence of broadcasting and telecommunications regulatory bodies

1 Introduction

This paper seeks to advance the Media Institute of Southern Africa's (MISA) position on the need for an independent regulator in the telecommunications and broadcasting sectors in Zimbabwe. To achieve this, the paper gives a background to MISA and its activities, mission and values, as well as its key achievements to date. This is followed by a discussion of the objectives of communications regulation, which include, among many others, the need to maintain order, facilitate the entry of new players and the need to promote fair competition, freedom of speech and universal access. The paper argues that public accountability, transparency and predictability are one of the major characteristics of independent communications regulators and this is supported by continental and regional covenants such as the African Charter on Broadcasting and the SADC Protocol on Information and Communication Technologies.

South Africa's Independent Communications Authority is hailed as a model independent regulator on the continent. Several comparisons with the South African situation are made in our critique of local regulators, the Posts and Telecommunications Regulatory Authority of Zimbabwe and the Broadcasting Authority of Zimbabwe. It is argued that the manner in which the Zimbabwean regulators are constituted makes them susceptible to direct political interference. For that reason, we urge that they both need to be replaced by a truly independent communications regulator that will oversee both sectors. This new regulator's independence must be guaranteed by the law and must have financial, structural and functional independence in order to regulate the sector effectively and impartially. The paper finally argues that although modern regulators have to pay greater attention to 'new' media regulation, traditional regulatory objectives such as licensing, tariff regulation, quality of service, consumer protection and universal access are still major regulatory objectives in many countries.

2 Background to the Media Institute of Southern Africa (MISA)

2.1 Brief history

MISA is a regional non-governmental organisation with national chapters in 11 SADC countries including Zimbabwe. Officially launched in September 1992, MISA focuses on the need to promote free, independent and pluralistic media (as envisaged in the 1991 Windhoek Declaration), as a principal means of nurturing democracy and human rights in Africa.

2.2 Mission

The mission of MISA is to play a leading role in creating an environment of media freedom and free expression that promotes independence, pluralism and diversity of views and opinions, media sustainability, competency and professionalism in the region. MISA aims to create an environment in which society is empowered to access information as an inalienable right and in which the resultant free information flow strengthens democracy by enabling more informed citizen participation.

2.3 Vision

Consequently, MISA's vision is of a Southern African region in which the media enjoys freedom of expression, independence from political, economic and commercial interests, pluralism of views and opinions. It is a vision of a region where members of society (individually or collectively), are free to express themselves through any media of their choice, without hindrance of any kind. A region, too, where access to information must be unhindered and where information is readily available.

2.4 Principles and values

The mission and vision of MISA are based on the following principles and values:

- Respect for freedom of expression as defined in Article 19 of the Universal Declaration of Human Rights, and Article 9 of the African Charter on Human and Peoples' Rights;
- Respect for media freedom, independence, diversity and pluralism as provided for in the Windhoek Declaration of 1991;
- Support for the separation of power as provided for in the SADC Information Communication Technologies (ICT) Declaration of 2001, with the government being responsible for a conducive national policy framework, independent regulators responsible for licensing, and a multiplicity of providers in a competitive environment responsible for providing services;
- Support for a three-tier system of broadcasting (with public, commercial and community media) as provided in the African Charter on Broadcasting of 2001;
- Media professionalism and the observance of high ethical standards in media products that seek to inform, empower, educate and entertain;
- Citizens' right to access to information in order to enhance transparency and citizen participation in government, judiciary and legislative issues;
- Participatory democracy, respect for human rights, equality, human dignity, freedom and non-discrimination; and,
- Gender equality in and through the media and society.

2.5 Broadcasting and diversity campaigns

The focus of MISA's strategies in the broadcasting and diversity campaign are on three levels:
(1) the enactment of broadcasting legislation that allows for a three-tier system of broadcasting;
(2) the setting up of independent regulatory authorities to oversee the running of the broadcasting and telecommunications sectors in the SADC region;
(3) and the transformation of state or national broadcasters into genuine public service broadcasters (PSBs).

In particular, the second focus is informed by the fact that the communications market offers products that are by their nature, public goods in the sense that everyone has a right to them. It is our belief that to ensure that this public good is accessible to everyone, there is a need to have a truly independent regulator to regulate the sector. Such a regulator must have legally guaranteed provisions to run the sector free from any political, commercial or other sectional interests. Any attempts at interfering with the work of communications regulators should be frowned upon in any country that claims to be a democracy, as it is an abridgment of everyone's right to freedom of speech in and through the media.

3 The need for regulation

There are three basic reasons for the need for regulation in the field of broadcasting and telecoms. One is the impact of the media (and other means of communication) in society in general. The media's products – information and entertainment – are far more than mere consumer products, thus they require special protection (Mandić, 2001). The media play a key role in promoting the free flow of information and ideas, and in assisting people to make informed decisions about issues affecting their lives. If the media are indeed the 'Fourth Estate', their regulation should only be aimed at promoting this role as society's watchdogs. This is to say that the media should be allowed to flourish, as it is hoped that the resultant availability of diverse information, views and analysis will strengthen democracy by enabling informed citizen participation in governance issues. Secondly, the broadcasting frequency spectrum is not an infinite resource – it is a public good that needs careful management in order to give everyone a chance to use it. Finally, the importance of both broadcasting and telecoms in Africa cannot be over emphasised, given their capacity to reach a wide audience at comparatively low costs, and their ability to overcome barriers of illiteracy.

4 Objectives of regulation

The 1990s wave of liberalisation and privatisation of former state broadcasting and telecoms monopolies has brought unprecedented changes in the global communications sector. The rapid advances in technology that followed it, and in particular, the growth of the internet, mobile and other wireless voice and data services, at once meant that without proper regulation, the sector was going to be chaotic. With new players coming in at every turn, regulation was needed not only to maintain order in the field, but also to facilitate entry by removing barriers to competition; ensuring fair business practices and protecting the rights and needs of consumers. In many countries, the effective and efficient regulation of this sector resulted in greater economic growth and development, increased investment, job creation, lower prices, better quality of service, and more rapid technological innovation (InfoDev and ITU, 2007). Some of the widely accepted objectives of regulation are:

- To optimise the use of scarce resources, such as the frequency spectrum, telephone numbers and rights of way
- To foster competitive markets, which are characterised by the efficient supply of (telecoms and broadcasting) services
- To promote universal access to basic telecoms and broadcasting services
- Where competitive markets do not exist or fail, to prevent abuses of market power such as excessive pricing and anti-competitive behaviour by dominant firms
- To create a favourable climate for investment and the expanding of telecoms and broadcasting systems
- To protect consumer rights, including freedom of expression and the rights to privacy

Approaches to regulating the industry differ from country to country; however, the principle of *public interest* should be the backbone of any regulatory intervention. In addition to these 'public interest' reasons for regulating communications are issues of freedom of expression and universal service.

4.1 Freedom of expression and access to information

Broadcasting and telecommunications are integral mechanisms for the promotion of freedom of expression and access to information by members of the public. Their growth in the past few years has seen both these sectors play a central role in enabling citizens to communicate with each other, and express themselves in matters concerning the way they are governed. Thus, most commentators emphasise that the regulation of both these sectors should only be aimed at promoting their role as enablers of free speech in line with such declarations as the African Charter on Broadcasting (ACB), which states that: *the legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas as well as a three tier system for broadcasting…*

This call is reiterated by the African Charter on Human and People's Rights (ACHPR), and Article 19 of the United Nation's Universal Declaration on Human Rights (UNDHR), which notes that the media only help to make the idea of freedom of expression a reality: *everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers* [*emphasis added*]. In Zimbabwe, Section 20 (1) of the Constitution also upholds the right to free expression. Although the section does not make explicit reference to freedom of the media, it is held by many to extend to freedom of the media as well.

4.2 Universal service and universal access

In telecommunications, the concept of 'universal service' refers to the policy of providing telephone services to all community members and is based on the North American concept of 'a telephone in every home' (TeleCommons Development Group, 2002). However, in Africa, it is generally recognised that universal service (in the North American sense) is not achievable, thus a more realistic goal is *universal access*, where a working and affordable telephone should be within the reach of the whole population of a country. Like in telecoms, 'universal service' in broadcasting is used to refer to the process of ensuring that every citizen in a country – particularly the rural poor – has got access to a television or radio service. Although the concept, its content and implementation can vary from country to country, its objectives have become an important feature of many communications regulators the world over.

The idea behind universal service/access in communications is based on the notion of accelerating the social and economic development of rural and remote areas. In the absence of basic telecoms services, the cost of commercial, agricultural and household transactions can be very high in an agrarian economy like Zimbabwe. Routine tasks like finding markets for agricultural produce, determining prices, and transportation of goods can be virtually impossible without access to telephones, faxes and (lately) email and internet services (Goulden, 1999). Further, access to information about key services such as health, education, water, and sanitation, is very limited when there is no access to communication services like telephones, radio and television services. Broadcasting, in particular, is an essential feature of citizenship in developing countries, where citizens can use radio services to register criticism of elected representatives, as well as articulate their aspirations and wishes.

It is MISA-Zimbabwe's submission that in addition to achieving the regulatory objectives referred to above, promoting freedom of speech and access to information, and ensuring universal service should be the main guiding principles of regulating the electronic communications sector in Zimbabwe. This will be in line with the international standards and

norms on freedom of expression, as well as in line with the Constitution of the country. The extent to which a country is said to be democratic is the extent to which it is seen to actively promote free expression and communication between the people and their leaders through such institutions as the media. We posit that one of the ways of promoting free expression and communication is through the creation of an enabling environment for media freedom through (among other things), establishing a truly independent regulator to regulate the country's communications sector in the public interest, free of any political, commercial or individual self-interest.

5 Elements of an independent regulatory body

The independence of a regulator is subject to many different interpretations. However, for the purposes of this paper, regulatory independence is going to be used to refer to three main elements:
(1) an arm's-length relationship with political authorities
(2) an arm's-length relationship with regulated firms and other private interests
(3) organisational autonomy – such as pre-approved sources of funding and the powers to recruit key personnel and consultants (Smith, 1997).

These elements are key if a regulator is to execute its duties efficiently and effectively. Of course, it is important to mention that *absolute independence* of a regulator is neither possible nor desirable. A public regulator is not created to do as it likes but to implement public (government) policies and to operate within its legal mandate. This implies that there should be checks and balances to ensure that the regulator does not stray from its mandate, engage in corrupt practices, or become grossly inefficient. A few of these checks and balances are discussed below.

5.1 Public accountability

Public accountability implies that because regulators are normally tasked with serving the public interest rather than government, commercial, or individual self-interest, they are expected to account, on a regular basis, to the public on how they carry out their daily duties (Mendel, 1998; Mandić, 2001). Striking the proper balance between independence and public accountability is notoriously difficult, but the following measures have been adopted by a growing number of countries:

- Mandating rigorous transparency, including open decision-making and publication of decisions and the reasons for those decisions
- Allowing interested parties a chance to provide relevant input in decision making through public consultation processes
- Providing effective arrangements for appealing the agency's decisions
- The production of annual public reports of the regulator's activities, budgets and audited financial statements, which are reviewed annually by parliament or a select multi-party committee
- Subjecting the regulator's conduct to scrutiny by an ombudsman or other public watchdogs such as a complaints commission
- Permitting the regulator's removal from office in cases of proven misconduct or incapacity (Kupe, 2003; Smith, 2007).

5.2 Transparency

Transparency entails making available, in a timely fashion, all relevant information (WTO, 1998). This information can be regulatory rules and policies, upcoming regulations, and all previous regulatory decisions (precedents) and agreements. Such openness on the part of the regulator enhances the confidence of all stakeholders in the independence of that regulator and strengthens its legitimacy. Importantly, transparency reduces the probability that interested parties (especially those adversely affected by a regulatory decision) will believe that decisions are biased or discriminatory. When regulatory decisions are made a matter of public record, it is difficult for corrupt or discriminatory decisions to be made.

5.3 Predictability

Investors in any sector always require that any regulatory processes of that sector are predictable. Independent regulators are predictable if they adhere to the rule of law. The most important features of the rule of law are respect for precedent and the principle of *stare decisis* (InfoDev and ITU, 2007). Respect for precedent means that regulators do not reverse policy decisions unless there is evidence that those decisions have led to obvious problems. The principle of *stare decisis* requires that cases with the same underlying facts be decided in the same way every time they come up (*Ibid*.). Predictability also enhances confidence in, and the credibility of, the regulator.

6 Principles guiding the operations of independent regulatory bodies

The argument for the independence of regulators in the field of telecoms and broadcasting is guided by several regional and continental covenants such as the African Charter on Broadcasting (ACB), African Union (AU) Declaration of Principles on Freedom of Expression in Africa, and the SADC Protocol on Culture, Information and Sport. These are discussed below.

Perhaps the most important of these covenants is the ACB, which states that:
All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party. (Part I(2)).

In addition, sub-sections (3) and (5) state that: *Decision-making processes about the overall allocation of the frequency spectrum should be open and participatory, and ensure that a fair proportion of the spectrum is allocated to broadcasting uses… Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content*.

The Charter further makes it clear that the right to communicate includes the right to "access to telephones, email, internet and other telecommunications systems, including through the promotion of community-controlled information communication technology centres."

The calls of the ACB are supported by the AU Declaration of Principles on Freedom of Expression in Africa (2002), which, in Part V states that there should be "an *independent regulatory body* [which] shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions" and that "licensing processes shall be *fair and transparent*,

and shall seek to promote diversity in broadcasting" [*emphasis added*]. Part VII of the Declaration reads like the ACB:

- Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature
- The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party
- Any public authority that exercises powers in the areas of broadcast or telecoms should be formally accountable to the public through a multi-party body

The Declaration also places emphasis on the issue of universal service, stating that all governments should ensure that there is a "pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups" (Part III).

On the regional level, Article 20 of the SADC Protocol on Culture, Information and Sport (2001) and the SADC Declaration on Information and Communication Technologies (ICTs) (2001), requires all SADC heads of state and government to commit themselves to creating favourable regulatory environments for the media in their countries, by not only accelerating the liberalisation of the telecoms sector, but also by establishing a three-tier separation of power – with the government being responsible for creating a conducive national policy framework, independent regulators responsible for licensing, and a multiplicity of providers in a competitive telecommunications environment (Ramadi, 2006).

6.1 Regulating in a converged environment

Convergence – which can be described as the 'coming together' of previously separate entities such as the personal computer, television and telephone, affects regulation in two ways. Firstly, convergence leads to the development of new services and modes of delivery unforeseen by 'traditional' regulation. Secondly, it affects the overall market structure and the level of competition by changing the conditions for supply or patterns of demands, which again affects traditional regulation regimes (Bezzina and Terrab, 2005). Thus, in addition to 'traditional' regulatory issues such as affordability, universal service and quality of service, modern regulatory agencies now have to pay more attention to issues such as interconnection, licensing, price regulation, and security issues in the new converged environment.

There are two approaches to regulating a converged communications environment. The first relies on elaborating the existing vertical regulatory systems for telecoms and broadcasting to take into cognisance the phenomenon of convergence. Here it is hoped that as technology and new services develop, they would transcend the vertical systems and all move into a new regulatory framework. This method is also known as the 'evolutionary' approach to regulating convergence (Mandić, 2001). The second option, also known as the 'revolutionary' approach, involves a fundamental re-assessment of existing regulation in an attempt to devise a new comprehensive regulatory model comprising both traditional and new services (Sauter, 1998).

In a dynamic period of technological changes, regulation must also be dynamic and responsive to the changing conditions. Accordingly, some countries have adopted new 'converged' regulatory frameworks, where the former separate regulators of telecoms and broadcasting

have been merged to form one comprehensive regulator with responsibilities over both sectors (Bezzina and Sanchez, 2005). These countries include Australia, Bulgaria, Canada, Croatia, Ghana, India, Italy, Japan, Malaysia, Norway, South Africa, Switzerland, Tanzania, the United Kingdom and the United States. The argument for this approach is often that in a converged environment, the absence of a 'converged' regulator allows for the possibility of unequal treatment of players in the industry (InfoDev and ITU, 2007).

7 Independent regulation in South Africa

Prior to the advent of democracy in South Africa in 1994, broadcasting and telecommunications were regulated separately under the Broadcasting Act (1976) and the Radio Act (1952) respectively. Both these Acts provided for the complete control of electronic communications by the South African government (Bowman and Gilfillan, 2007). This exposed the South African media to rampant abuse by the apartheid government. Thus, during the 1990s negotiations on the transition to democracy, stakeholders emphasised the need to free the public broadcaster, the South African Broadcasting Authority (SABA) from any form of control by government, as well as setting independent regulatory agencies to oversee the country's communications sector (White, und.). One of those bodies established was the Independent Broadcasting Authority (IBA), which was tasked with regulating broadcasting in the public interest.

The reform of the telecommunications sector was kick-started in 1994, with the publication of the *White Paper on Telecommunications Policy*, which agitated for the liberalisation of the sector in line with international declarations which South Africa is signatory to[1]. The first phase of this reform saw the privatisation of former state-owned fixed line network (Telkom) and the licensing of two new mobile operators, Mobile Telecommunications Networks (MTN) and Vodacom. Further, the Telecommunications Act (1996) provided for the entry of other parties into the fixed telephone network sector. In 2005, a second network operator (SNO), Neotel, was licensed to provide a fixed telephone service. The Telecommunications Act introduced other far-reaching changes, the establishment of the South African Telecommunications Regulatory Authority (SATRA), which was to be responsible for regulating the sector in the public interest. For the first time in the country's history, the general public interest was at the forefront of all communications policies.

7.1 ICASA: convergence of regulators

Both the IBA and SATRA were not to last for long, however, when in 2000, the government decided to merge them and form the Independent Communications Authority of South Africa (ICASA). The merger of the two bodies was a result of the realisation that technological and other developments in the fields of broadcasting and telecommunications had caused a rapid convergence of these fields, a situation which needed the establishment of a single broadcaster to oversee both sectors (ICASA Act).

ICASA is guaranteed of its independence by the ICASA Act as follows: *"the Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice… [it] must function without any political or*

[1] In particular, the World Trade Organisation's (WTO) Reference Paper on Telecommunications (http://www.itu.int/newsarchive/press/WTPF98/WTORefpaper.html) and the General Agreement on Telecommunications Services (GATS).

commercial interference" (Part II, Section 4). This independence is further entrenched in Section 192 of the country's Constitution.

7.2 Ensuring public accountability and transparency

As part of the measures for ensuring transparency, the ICASA Act states that every year, the Authority must provide the Department of Communications (DoC) with a report which outlines, among other things, information regarding licences granted, renewed, amended, transferred, suspended or revoked. Further, the Authority must provide the Minister with a copy of its annual activity and audited financial accounts. The Minister of Communication is then required by law to "table a copy of the annual report in Parliament within 30 days after it has been received by him or her if Parliament is then sitting. If Parliament is not in sitting this should be done within 14 days after the next ensuing sitting of Parliament (Chapter 16(3)).

7.2.1 Appointment of ICASA board members

The ICASA Act states that the Authority must be run by a board of councillors who "are committed to fairness, freedom of expression, openness and accountability." The councillors are appointed by the President of the Republic of South Africa, on the recommendations of the country's National Assembly (parliament). The appointment process which involves a public nomination process is characterised by transparency and openness. In accordance with the law, the appointment process of ICASA councillors is as follows:

1. The Parliament's Portfolio Committee for Communications puts adverts in newspapers asking for nominations;
2. Members of the public can nominate anyone – except members of parliament, office bearers of the state or any political party, or people with a financial interest in the industry;
3. The committee examines the names, looking for representivity, skills and commitment to freedom of expression, and then shortlists candidates;
4. Candidates are then interviewed in public, and the interviews are screened on television (DStv and at times SABC 2);
5. The Committee comes up with a shortlist of names;
6. This is passed onto parliament for ratification;
7. The list then goes to the President for appointment. The President can reject names but not suggest others. So far, the President has never practiced this right

All ICASA councillors have security of tenure, with 5-year terms of office. They can only be removed from office on account of proven misconduct, absenteeism from work and council meeting or proven inability to perform duties. A councillor can only be removed or suspended from office by the President in the event of a National Assembly resolution is passed. The ICASA Council also has full authority to set up its own administrative secretariat to assist the Authority in the execution of its duties. This includes the CEO, who will take charge of all the financial, administrative and clerical functions of the Authority, and any other staff, consultants, or special and standing committees that the council may deem necessary.

Although ICASA has been criticised for its continued delays in publishing regulations, and its inability to retain qualified staff, it is clear there is a deliberate attempt to entrench the regulator's independence, and to make sure that it is run as efficiently and as transparently as is possible. The fact that the President, the Minister of Communications or any other political

figures for that matter have no power to interfere with the work and affairs of ICASA means that the councillors are free to conduct their business without fear of retribution from government. We submit that there is an urgent need for the creation of an independent regulator modelled along the lines of ICASA in Zimbabwe. The following section offers a critique of the current regulatory framework in Zimbabwe, with a view of offering recommendations on how Zimbabwe itself can achieve regulatory independence.

8 The regulatory framework in Zimbabwe

8.1 Brief background

Although token attempts at liberalisation have been made, the country is one of the few in the region with virtual government monopolies in broadcasting and fixed telephone service provision[2]. The Zimbabwe Broadcasting Corporation (ZBC) and TelOne provide the only television, radio services fixed telephony services in the country. TelOne also owns a mobile services company Net*One, which entered the industry in 1996. The other two private mobile operators are Enhanced Communications Network (Econet) and Telecel (Zimbabwe). Both entered the market in mid-1998 after protracted court battles to be licensed.

Broadcasting and telecommunications are regulated by the Broadcasting Authority of Zimbabwe (BAZ) and the Posts and Telecommunications Authority of Zimbabwe (POTRAZ) respectively. The following sections analyse the two regulators in terms of their levels of independence (if at all), as well as their powers and constitution. It is argued that both regulators are not only ineffective and inefficient, but are also institutionally weak as they are not legally guaranteed their independence from political interference.

8.2 The Broadcasting Authority of Zimbabwe (BAZ)

BAZ, which falls under the Ministry of Information, was established through the Broadcasting Services Act (BSA) (2001). The BSA outlines the functions of the BAZ as follows:

1. Preparation of frequency allotment and license area plans;
2. Ensuring economic and efficient use of the broadcasting frequency spectrum;
3. Issuance of broadcasting and signal carrier licenses;
4. Monitoring of the conduct, quality and standards of licensed broadcasters; and,
5. Licensing, promotion and monitoring of marginalised community-based radio including promotion of local languages and content.

Although on paper BAZ is an independent regulator, the reality is that the regulator is not free to carry out its duties as set out in the BSA mainly because of the many provisions within the Act that expose it to direct political interference. In fact, the sections that deal with the tasks, responsibilities of BAZ reveal that the Authority is, like its print media equivalent the Media and Information Commission, a proverbial toothless bulldog which is at the behest of the Minister of Information!

[2] Seven years after 'liberalising' broadcasting, no private or community licence has been issued. In telecoms, although an SNO (TeleAccess) was granted a licence to provide fixed telephone services, the licence was later suspended after the operator failed to get off its feet.

8.2.1 Powers granted to the Minister of Information

The BSA gives the Minister of Information wide and discretionary powers to control the broadcasting industry in the country. These powers not only scare away potential investors in the sector, but also make it virtually impossible to operate a private (or community) broadcasting service[3]. In terms of the law, the Minister determines, in his/her discretion:

- The appointment, termination and alteration of the conditions of tenure of office of members of the BAZ board (Section 4);
- Who obtains a licence (Section 5);
- The terms and conditions attached to an issued licence, including decisions on amendments and cancellations of the same (Sections 11, 15 and 16);
- The closure of broadcasters, who, to his/her mind, are being "controlled" by some other person(s) or body (Section 20); and,
- The content of programmes

Entrusting discretion to one person is hardly in line with the international norms and standards on regulating broadcasting, particularly when the government still continues to be a player in the sector via its ownership of the ZBC. The ideal 'arm's-length relationship' between the regulator, the government and service providers does not exist; as such there are concerns that, in exercising his/her discretion, the Minister will favour the ZBC over other broadcasters.

The fact that power is centralised in one person means that he/she can censor the information that is available to the public by either direct censorship or simply not licensing other players. This is in direct violation of the constitution of Zimbabwe, which grants everyone the right to receive and impart ideas, information and views without interference and hindrance. The according of unrestrained power over a regulating agency to one person, who is also the head of a competing broadcaster, is hardly justifiable in any democratic society. The Minister's powers as provided by the BSA reveal the government's determination to control the information available to Zimbabweans by maintaining a monopoly of the airwaves which was declared illegal by the Supreme Court of Zimbabwe in 2000.

8.2.2 Appointment of the BAZ Board

According to Section 4(2) of the BSA, the Minister, "in accordance with any directions the President may give him/her", appoints the board which will run BAZ. Again this means the BAZ board is appointed by the Executive, and not by the public (via parliament) as is the case in our South African example above. Further analysis reveals that BAZ board members do not have any security of tenure in office, as the Minister of Information retains the power to suspend or fire them (section 4 (3) and (4)). For example, a board member maybe dismissed for having conducted him/herself in a manner that "renders him [*sic*] unsuitable as a member…." What constitutes "unsuitable" behaviour is not defined and is left to the discretion of the Minister. It has to be reiterated that the Minister of Information is a party functionary, and his/her unfettered powers to appoint and dismiss members of the BAZ board renders the Authority susceptible to political interference and manipulation.

[3] The recent admission in parliament by the BAZ board that the restrictive nature of the provisions of the BSA does not allow for the entry of new players into the broadcasting arena is testimony on the need for the limiting of the powers that are afforded to the Minister of Information. A positive move would be to repeal the whole BSA and replace it with an Act that guarantees autonomy to the regulator, with the Ministry only responsible for formulating policies, in line with continental trends.

8.2.3 Decision-making powers

BAZ does not seem to have any decision-making powers, as the Minister of Information is effectively the licensing authority with absolute and discretionary powers to:

- Decide whom, and when, to issue licences (section 5)
- Set the terms and conditions applicable to individual licences (section 11)
- Decide on the amendment, suspension and cancellation of licences (sections 15 and16)
- Singularly develop and cause the implementation of regulations applicable to the broadcasting industry (sections 25 (1) and 46)
- Interfere with and/or change the content of programmes broadcast by an licensees (sections 11(5), 39(3) and 25 (2)
- Decide when to declare an "emergency" and take over private broadcasting stations, and broadcast using those stations and their equipment (section 39(2))

The above powers reduce BAZ to a mere secretary waiting to do the bidding of the Minister of Information. As a government employee, there is a strong possibility that such powers can be used to advance only his/her employer's political ambitions, to the detriment of the public who need access to a diversity of views, analysis and information from a pluralistic media sector.

8.2.4 The Broadcasting Fund (BF)

The BSA (2001) provides for the establishment of the Broadcasting Fund (BF) that is to be administered by BAZ. The main purpose of the BF is: to enable the provision of broadcasting services to disadvantaged communities that are unable to afford television and radio sets, and to provide funds for the promotion of Zimbabwe's film and music industries. Based on the concept of universal access, the idea of setting up such a fund is a step in the right direction for the promotion of growth of the country's broadcast media sector. Elsewhere, a similar example is the South African Media Development and Diversity Agency (MDDA), which has a fund to enable historically and materially disadvantaged communities to have access to media services through providing financial assistance for small community-based media projects.

The BF is supposed to be sourced mainly from levies imposed on licensees by the BAZ. The levy amounts are unfortunately decided solely by the BAZ and any licensee that fails to pay it shall be subject to a fine or else have their license suspended or cancelled. With the structural weaknesses of BAZ, it is arguable that the Fund is vulnerable to political interference by the Minister. In fact, ever since the BSA was passed, the Fund has neither been utilised nor its current status made public. Unlike in the case of the MDDA, there are no stipulations within the BSA that insist on the accounts and usage of the Fund to be made available for public scrutiny.

9 The Post and Telecommunications Regulatory Authority of Zimbabwe

In the year 2000, the Zimbabwean government enacted the Postal & Telecommunications Act that provided for the creation of POTRAZ[4] which falls under the Ministry of Transport and Communications. The Act provided for the functions of POTRAZ as follows:

1. To exercise the licensing and regulatory functions of postal and telecommunications services in Zimbabwe
2. To exercise the licensing and regulatory functions of the allocation, and use of satellite orbits and the radio frequency spectrum in Zimbabwe, including the establishment of standards and codes relating to the same
3. To secure that reasonable demands for postal and telecommunication services are satisfied
4. To promote the interests of consumers, purchasers and other users, in respect of the quality and variety of postal and telecommunications services provided and telecommunication apparatus supplied
5. To maintain and promote effective competition between persons engaged in the provision of postal and telecommunication services
6. To monitor tariffs charged by cellular telecommunication, postal and telecommunication licensees with a view to eliminating unfair business practices among such licensees (Part II, Section 4).

However, like BAZ above, POTRAZ is not guaranteed of its freedom from political inference in the execution of its duties. Some of the weaknesses of POTRAZ are discussed below.

9.1 Appointment of the POTRAZ board

According to the Telecommunications Act, the POTRAZ board shall consist of people who have an interest in the development of the sector and they should have experience and/or professional qualifications in telecoms, finance, law, accountancy and administration. However, as the Act clearly states, the board members are only appointed by the President of the Republic in consultation with the Minister of Transport and Communications (Section 6(1)). Although the Act purports to promote the regulation of the sector "in accordance with practicable recognised international standards", it is clear that international requirements such as the need to involve the public in the appointment process of board members of regulatory agencies are conveniently ignored.

POTRAZ board members also have no tenure of office as the Act states that their stay in office is dependent on them complying with the terms and conditions of employment fixed by the President. The fact that these 'terms and conditions' are not explicit means that this clause can be abused to fire those board members who do not toe the party line. There are no provisions for public or parliamentary inquiries that have to be conducted before they are dismissed as is the case with the ICASA councillors in South Africa. Moreover, the 3-year period of office for each member is too short for any of them to make any impact. International norms require that members of regulatory agencies are appointed for a minimum of 5 years, and their appointments should be staggered to ensure continuity in the running of the regulator.

[4] The Telecommunications Act (2000) also led to the de-merger of the former Posts and Telecommunications Corporation (PTC) into three commercial entities, namely the incumbent fixed telephone service provider (TelOne), a mobile cellular company (Net*One) and a public postal operator (Zimpost).

To further cement the absolute control of POTRAZ by the government, the President is also mandated by law to appoint the Chairperson and vice-Chairperson of the board (Section 12). This stipulation crushes any hope of the regulator being independent from the government. The fact that the POTRAZ board does not have the power to hire, dismiss or replace the Director General (DG) who will run the agency without the Minister's approval (Section 29) means that the board is not vested with any power at all, save to be the Minister's puppets.

9.2 Powers granted to the Ministry of Transport and Communication

Like the BSA, the Telecommunications Act grants too much power to the Minister of Transport in the day to day running of POTRAZ. According to Part V, the Minister has the power to:

- Give policy directions to POTRAZ
- Direct POTRAZ to rescind, suspend or reverse its decisions; and,
- Appoint the Director General to run the Authority.

This falls foul of the ACB and the SADC Declaration on ICTs, which stipulate that all regulators in the field of electronic communications should be free to conduct their business without any form of interference. The powers granted to the Minister to give directives to POTRAZ as he/she considers "to be necessary in the national interest," (Section 25) has, in practice, been used by the ZANU (PF) government to silence dissent and further its own political agenda. It is therefore clear that although the government wants to give a semblance of liberalising the sector in accordance with international standards, it is, in fact tightening its grip on the media and other forms of communication. That the Minister can order the POTRAZ board to reverse or suspend any of its decisions (Section 26) implies that POTRAZ will never be in a position to make any sound regulatory decisions without fear of offending the Minister. This opens the regulator to direct manipulation, something which is exacerbated by the fact that there is no room for refusal to comply with these directives[5].

9.3 The Universal Service Fund (USF)

Like the Broadcasting Fund above, the idea of setting up the USF is based on the concept of universal service and access. According to the Telecommunications Act (Section 74), the objects of the USF are (among other things):

1. To make grants to local authorities or their appointed agents for the purpose of assisting needy persons to obtain access to postal and telecommunication services
2. To assist in financing the extension of postal and telecommunication services to under-serviced areas and community centres within or outside such areas

[5] The best examples of unsound regulatory decisions being made by POTRAZ amid allegations of direct ministerial manipulation include the recent 'cancellation' of the Telecel (Zimbabwe) mobile operating licence and the recent decision by the same board to reinstate the monopoly of TelOne as the only legal gateway to all incoming and outgoing international telecommunications services in the country. According to a government gazette of 29 January 2007, all the operators (including internet service providers) are supposed to comply with the directive in the next 30 days or risk being de-licensed. Other players in the sector, notably Econet, rightly pointed out that the directive was akin to re-establishing government's monopoly in the sector which was declared unconstitutional by the Supreme Court in 1998. In its court challenge of the decision, Econet opposed the granting of TelOne with exclusive rights to the international gateway, arguing that this was tantamount to the government granting unfair advantage to its own company, TelOne.

3. To promote and contribute towards the expenses of the adaptation or facilitation of the use of telecommunication services for the benefit of disabled persons, including the provision, without charge, of directory information services appropriate to meet the needs of such persons

The Act states that there are three ways of establishing and maintaining this fund:

(1) annual contributions by all licence holders (as a percentage of their gross turnover
(2) allocations from a parliamentary budget allocation
(3) any surplus of income over expenditure from the POTRAZ accounts.

To ensure the proper usage of the USF, it is stated that POTRAZ will be required to produce audited financial statements at the end of the financial year. However, unlike the accounts of the Authority itself, there is no mention of the USF audit being made public. In most countries, all the financial records of the regulator are subjected to the scrutiny of the public eye to encourage transparency and public accountability.

While the setting up of the USF is commendable, there is still no sign of its impact in under-serviced areas since it was established. In 2001, POTRAZ introduced a new licensing regime where universal service obligations were imposed on all operators, in line with the SADC Universal Service Guidelines. The regime urged the setting up of community access points ('Community Communication Centres') for telecoms services in rural and under-serviced areas. However, in 2006, POTRAZ reported that although some funds had been accumulated, these were not enough to finance any meaningful universal service project.

10 Recommendations: achieving regulatory independence in Zimbabwe

Based on the above analysis of the prevailing regulatory environment, the following are the recommendations MISA-Zimbabwe makes the following submissions with regards to achieving regulatory independence in Zimbabwe's telecommunications, broadcasting and ICT sectors.

10.1 Separation of power

A regulatory environment that acknowledges the need for the separation of power is perhaps the starting point for achieving regulatory independence. 'Power' must be separated along the following lines:

Function	Responsible organisation
Policy development	Government ministry or department
Regulation	Separate regulatory authority
Network operation/service provision	Privately-owned, community-owned or commercially operated telecommunications or broadcasting services providers

Under the above set up, government officials are responsible for setting up policies in the public interest, without conflicting concerns based on their role as owners or employees of an electronic communications service provider. A separate and independent regulator will then be able to implement government policies in an impartial manner. This is vital, especially in cases of dispute resolution or of the awarding of resources like rights of way (telecommunications) and frequencies (broadcasting). This set up leaves the private or community operators free to

supply their services to the people, without fear of undue bias coming from the government and the regulator (InfoDev and ITU, 2007). Of course the degree of the separation of the above powers depends on the political tradition of a country implementing the system and the political will to achieve regulatory independence. However, the concept helps decrease instances of regulatory confusion in cases where one institution oversteps its legal mandate.

10.2 Regulating for convergence

As noted earlier, the 'coming together' of previously separate entities has also led to the 'coming together' of previously separate regulatory agencies. Countries such as South Africa (ICASA), the United Kingdom (Office of Communications - OFCOM) and Malaysia (Malaysian Communications and Multimedia Commission - MCMC) have undertaken 'revolutionary' reforms to establish regulatory agencies that deal with all electronic communication networks and services. In Zimbabwe, however, the government continues with a fragmented approach to regulation. There seems to be no co-ordination of the various activities of the two regulators, BAZ and POTRAZ. For example, POTRAZ regulates electronic transmission of data and information. This same function is also attributed to BAZ, despite the anomaly that that the two bodies report to two different ministries. This apparent duplication of roles does not only relate to internal operations, but also affects relations with international organisations such as the International Telecommunications Union (ITU), where both BAZ and POTRAZ (at times) attend the same ITU activities and conferences. With the emergence of convergence, trends dictate that electronic communication regulatory functions be harmonised under one single regulator, which falls under one ministry or government department.

There are considerable benefits in adopting this approach, chief among them is that it allows swift and efficient reactions to economic and industry conditions, and reduces instances of regulatory confusion and conflict. An Act of parliament should be enacted to establish an Independent Communications Regulatory Authority of Zimbabwe to oversee issues of frequency allocation, licensing, universal service, fair competition and the technological convergence taking place in the two sectors. Without such an agency, it remains unclear how Zimbabwe will benefit from new technological advancements such as satellite and cable radio and TV channels; mobile and wireless telephony; the internet, and the economic benefits these can bring. Moreover, an independent and 'converged' regulator of this nature will be able to swiftly deal with such issues as cross-subsidisation, mergers and joint ventures that are characteristic of the current electronic communications environment. Already, in countries like South Africa, newspapers are now also venturing into 'broadcasting' (podcasting), and 'old media' organisations such as the SABC are now distributing their news services via new platforms such as mobile phones.

10.3 Structural independence

In line with the WTO's GATS agreement that emphasises the need for regulators that are separate from, and not accountable to, any service provider, many countries the world over are setting up regulators that are structurally independent from the industry they supervise. The structural independence of a regulator is of particular importance to countries like Zimbabwe, where the government is not only a policy maker in the sector, but is also an owner of companies that provide electronic communication services (ZBC, TelOne and Net*One). A regulator that is not structurally independent from service providers is vulnerable to the twin pressures of industry and political 'capture', as both sides will try to sway its decisions. When a regulator is 'captured', it often lacks credibility as its decisions are neither objective nor

transparent. Although structural independence is an important consideration for achieving regulatory independence, it alone is not a sufficient condition. A regulator also needs financial and functional independence.

10.4 Financial independence

According to the ITU: "*the source of a regulatory authority's funds and the process by which these funds become part of the authority's actual budget can directly impact on the degree of a regulator's autonomy and competence*" (InfoDev and ITU, 2007). Where a regulator is directly financed by a government Ministry, for example, it is difficult for its decisions to be independent of that Ministry. This has negative implications on the principle of freedom of expression.

There are two primary ways of funding a regulator's budget. The first (and most common) is through allocation from a government budget. The second is through allowing the regulator to collect monies from spectrum or licence fees, fines, and other administrative costs (application and service fees, etc). A way of guaranteeing regulators' financial independence could be through the adoption of a combined funding mechanism, where a budget allocation is supplemented by fees levied on operators. The amount from licence fees and other services must be directly deposited into the regulator's coffers in order to allow it some sort of financial flexibility and the independence that comes with it.

It has to be noted, however, that increased financial independence must be balanced with public accountability by coming up with a system of ensuring that the regulator does not overspend or over-charge its fees. Such a system could include the requirement that the regulator have its budget approved by parliament and its accounts audited by the Auditor General.

In the United States, the Federal Communications Commission (FCC) operates through a combination of government allocation of funds and regulatory fees. Currently, the FCC's budget is 90% financed by regulatory fees, with the government allocation only amounting to 10% (InfoDev and ITU, 2007). In the region, the Botswana Telecommunications Authority's (BTA) revenue is also derived from a combination of government allocation, licensing fees, service fees, and contributions or endowments. As the BTA has the authority to manage its own budget and can determine what it may do with any surplus, the regulator invests some of its monies in Bank of Botswana bonds, fixed deposit accounts, as well as in real estate, thus guaranteeing itself of financial security and independence to an even greater extent (InfoDev and ITU, 2007).

10.5 Functional independence

Indeed it is true that despite their best efforts, governments may establish a regulator that is structurally and financially independent but may still not function in an effective manner, and vice versa. Functional independence can be guaranteed by addressing several issues that deal with the actual functions of a regulatory agency, among them, ensuring that the agency: has a clearly defined mandate, with its decision making powers clearly stated; its staff has security of tenure; and is able to exercise its duties in a timely, consistent and transparent manner. Without functional independence, it is difficult (if not impossible), for a regulator to gain the trust of both consumers and industry players.

10.5.1 Clearly defined mandate and independence guarantees

An independent regulator must have a clearly defined mandate. The mandate must be clearly spelt out by the relevant Act that establishes the regulator as a way of reducing regulatory confusion and the use of discretion by regulators. We submit that in addition to a clear mandate, there must be legal provisions in the Act to guarantee that the regulator will be able to carry out its duties without undue outside influence. Normally, a clause like the one found in the ICASA Act referred to above is viewed by many as enough legal guarantee. This independence can also be guaranteed in the country's Constitution.

10.5.2 Decision making powers

This point can never be over emphasised: any regulator in the field of communications must be granted, by law, the ability to make binding decisions over all players in that sector. Currently, the authority of both POTRAZ and BAZ is seriously undermined as the country's laws state that the Minister responsible for that agency has the right to reverse any decisions the regulator may have made. Further, both regulators are obliged to comply with any directives that the Executive may give, without fail. The only role both these boards play therefore is to rubber stamp executive orders, something which falls foul of many international standards and laws.

Our submission is that once an independent regulator has been established, it must be given full autonomy to make (and enforce) its decisions. Fears that this may result in the agency abusing its powers are unfounded. Taken together with other recommendations, there will be enough safeguards to keep the regulator under check. In fact, there should be a system of judicial oversight in which all affected parties have the right to challenge the agency's decision if they feel they have been wrongly or harshly treated. However, standard procedure is that while courts can nullify the decision of a regulator, they cannot impose a new decision on the issue since they have no jurisdiction – the matter must simply be referred back to the regulator. A regulator that has no decision-making authority like BAZ and POTRAZ does not command the confidence of the competing service providers and thus is prone to regular constitutional challenges.

10.5.3 Security of tenure

First of all, the appointment and dismissal procedures of POTRAZ and BAZ members are severely flawed in that all authority is vested with one individual, the President of the Republic. This flawed process opens up both agencies to political manipulation. This is compounded by the fact that even after having the final (and only say) on who constitutes the board, the Executive still has the right to handpick the Chair- and vice-Chairpersons, as well as the Director Generals of the agencies.

Pursuant with international and regional standards, it is our recommendation that the election of board members for a regulator should be done in as public a manner as is possible. The process by which a board member is appointed, the criteria used, the terms and duration of appointment, and policies for their removal should be a matter of public record. To reduce fears of political 'capture', the tenure of all board members must be guaranteed by law and there should be minimum grounds for their dismissal arising, for example, from absenteeism from board meetings and physical or psychological inability to perform duties. The case of South Africa shows that this is possible, where appointment for an ICASA, MDDA or SABC board membership is conducted through a nationwide consultative and nomination process. The

interviews themselves are conducted by a multi-party panel which subjects all nominees to a thorough scrutiny of their credentials.

In terms of the administrative staff, the independent authority's board, as the employer, must be given full autonomy to decide who will run the agency on their behalf. The current situation in Zimbabwe where the responsible Minister has to 'approve' a DG or CEO that has been chosen by the board is flawed.

10.5.4 Public accountability and transparency, consistency and timeliness

In order to win the confidence of all stakeholders, it is necessary for the regulator to publish decisions, documents, and other relevant materials regarding its proposed activities. By providing numerous channels of communication with stakeholders, the regulator will be able to obtain first-hand accounts of the issues that are of concern to everyone and ensure that any regulatory changes being introduced are in the public interest. Holding public hearings, publishing draft documents for public review and seeking comments from interested parties, are all effective tools for providing information to the regulator and enhancing its interaction with the sector participants and consumers. These consultations can be made in parliament, or via the mass media (people are invited to make input) or, in cases where resources permit, the regulator can go on 'road shows' to meet the people and consult widely.

Measures for ensuring transparency include the requirement that the regulator produces annual reports of all its activities and decisions. These reports can either be handed over to the relevant minister (current practice in Zimbabwe) or they can be presented to parliament by representatives of the regulator. The latter recommended method has been adopted in countries like Austria, Germany, and the United States. We feel that the current provisions in the Telecommunications Act (Section 28) that the POTRAZ report given to the Minister of Transport must be tabled before parliament within six months is not enough. For an industry as dynamic as this, timeliness is of essence and taking half a year to present an annual report might have negative effects in this highly competitive sector.

Timeliness relates also to accountability –a regulator must be held accountable for *not* making decisions or failing to make decisions timeously. In statutes of various countries, regulators have specific timeframes within which they must issue licences, respond to complaints, spectrum requests, licence applications, and other general requests from industry and consumers. Although certain regulators may have resource constraints and may not be able to respond as quickly as possible, it is still critical that a regulator makes all efforts to respond as quickly as possible. BAZ is particularly guilty of not executing its duties in a timely manner. Since its establishment in 2000, the authority has never invited any applications for the provision community or private broadcasting licences under the pretext of mapping the frequency spectrum map. It has become clear to many that this delaying tactic is a deliberate attempt by the government to maintain its monopolistic grip on the airwaves.

10.6 Overview of the independent regulator's competencies and mandate

The evolution of convergence has created an increasing number of responsibilities for regulators regarding the manner in which to regulate. This has created a need to reorganise regulator's administrative functions, with many countries already combining the regulation of ICTs, broadcasting and telecoms under one body. However, although the scope of regulation has increased to include 'new' media and services, regulators still have to concern themselves

with ‘old’ regulatory objectives such as quality of service, tariff regulation, licensing, consumer protection and universal service. These responsibilities are discussed briefly below.

10.6.1 Licensing

In most countries, licensing is one of the primary functions of electronic communications regulators. Licensing procedures seek to maintain order in the industry by ensuring fair access to the limited frequency spectrum. In Zimbabwe, all the licensing powers are vested with the Executive. In order for the sector to reach its full potential, we recommend that licensing powers be devolved to an independent communications regulator. The regulator’s powers, in addition to licensing, should also include mapping the frequency spectrum; the preparation of licences; development of licence application guidelines and evaluation criteria; establishment of licence fees; licence renewals and other licence terms and conditions. In doing all this, the regulator must apply transparent and consistent evaluation criteria for looking at the different applications. This will reduce instances of unequal treatment of licence applicants.

10.6.2 Tariff regulation

A regulator must establish effective and transparent pricing regimes in order to contribute to the development of competition in the sector. All tariffs should be set formally through regulatory instruments. A fundamental goal of tariff regulation is to prevent market abuse by the dominant or incumbent operators who may resort to anti-competitive pricing regimes in order to squeeze out the newer entrants. In broadcasting, we recommend that different tariff regimes be applied to non-dominant operators versus the dominant ones, so as to ensure fair competition and to speed up the growth of the new entrants. This is the approach that was adopted in South Africa with the pricing structure of television service provision.

10.6.3 Quality of Service

Although there is no hierarchy of a regulator’s mandate, ensuring quality of service (QoS) is perhaps one of the most important objectives of regulation. A regulator must set clear QoS guidelines, as well as the methods and procedures for monitoring each operator’s performance against these guidelines. QoS standards in broadcasting relate to the technical quality of the products on offer, content (issues of decency, educational and informative value, etc.) and universal service/access. In telecoms, QoS guidelines must focus on such issues as interoperability (interconnection) between service providers, the audio/visual quality of the products on offer, as well as their accessibility. Ensuring QoS involves striking a fine balance between ensuring that the consumer is satisfied and that the day-to-day activities of the service provider are not unduly impeded. For this reason, realistic and manageable QoS guidelines must be developed in consultation with both the industry players and the consumers. QoS is also related to the issue of protecting consumer interests.

10.6.4 Consumer protection and public interest

Any independent regulator must also have, as one of its priorities, the protection of consumer interests. This means that the regulator must establish consumer obligations that all service providers must meet. Some of these obligations can include (but are not limited to), issues such as: timely and accurate billing (in telecommunications); customer contract policies and procedures, protection of consumer privacy; and terms of reference for suspension of services (in the case of telephony and satellite TV services). In addition to these obligations, public

interest standards must also be established, and these should include the rights to privacy, intellectual property rights, protection of minors, public decency, protection of local languages and ensuring cultural diversity.

The development of consumer protection regulations and public interest objectives provides for appropriate procedures for consumer inquiries, claims or complaints. While in a majority of countries regulators assume responsibility for handling consumer complaints, other countries have established separate media complaints commissions or ombudsman bodies like the South African Broadcasting Complaints Commission of South Africa (BCCSA) and the Australian Telecommunications Industry Ombudsman. As MISA-Zimbabwe we recommend that Zimbabwe also establishes such a body in order to ensure the equal and swift treatment of consumer complaints. There should be several ways of filing complaints by consumers, including: in writing, by e-mail; by telephone or fax, 'suggestion boxes', in person at the regulator's offices or in a Consumer Parliament as in the case of Nigeria. The procedures for filing complaints with the regulator should be simple in order to facilitate their submission, and can be published on the regulator's website and in the mainstream media.

10.6.5 Universal service and access

Universal service and access still remain a primary goal for many regulators, especially in this period of technological convergence. The goal of universal service is to make sure that electronic communication services are accessible to the widest number of users at the lowest cost. The obvious means to achieve universal service is usually through the establishment of a Universal Service Fund (USF) to finance the provision of these services, especially in those areas where service provision is said to be commercially unviable. The government, as a policy maker, must establish the appropriate USF objectives and targets, while an independent regulator develops the necessary guidelines for implementing these objectives.

In some countries, a separate sub-agency is set up in order to ensure that the goals and guidelines set out by the regulator are met. In Uganda, the Rural Communications Development Fund (RCDF) was created by the Uganda Communications Commission (UCC) and its main objectives are to support the development of communications infrastructure in rural Uganda through the deployment of telephone, internet and postal services (InfoDev and ITU, 2007). In South Africa, there is the Universal Service & Access Agency of South Africa (USAASA), which is mandated by the Telecommunications Act (1996) with the promotion of universal access to communication technologies by all South Africans. Together with the DoC, the Agency has worked tirelessly to lobby private companies such as Hewlett Packard, Microsoft and Open Source Foundations such as the Shuttleworth Foundation to set up community telecentres, cyberlabs and digital hubs in under serviced areas.

Together with policy makers, a regulator must set minimum targets for all service providers in terms of setting up community access points in rural areas. In South Africa, for example, mobile phone operators are required to set up community access phones (public phones) in under-serviced rural areas and townships. These phones are also reliable and cheaper than the usual mobile phone charges. Zimbabwe needs to create an independent regulator that will actively pursue the issue of universal service, so that all Zimbabweans have access to basic communication services at the lowest possible cost. With the recent economic meltdown, there are currently no working public (coin or card) payphones in the country, leaving consumers at the mercy of the more expensive privately-operated 'phone shops'. In broadcasting, many people in outlying areas like Victoria Falls, Plumtree, Beitbridge, parts of Nyanga and Kariba,

having no access to the ZBC signal (especially ZTV). An independent regulator should make sure that the ZBC lives up to its universal service goals (as a public broadcaster) by enabling all areas in the country to be in a technical position to receive its signal.

10.7 Summary of key recommendations

Creating an independent regulator is no easy task, especially in countries with limited traditions of setting independent public institutions such as Zimbabwe. However, the following is a summary of our key recommendations for the establishment of an independent regulatory environment in Zimbabwe:

- As MISA-Zimbabwe we insist on a clear separation of powers, with government being responsible for policy development, an independent regulatory authority being responsible for implementing policies and regulating the sector, and privately owned (or commercially operated) operators being responsible for service provision
- Regulation should be done in the public interest, with the aim of: creating and maintaining order in the sector, establishing fair competition and quality of service, promoting free speech, access to information and universal access, as well as consumer protection
- Providing the regulator with a distinct legal mandate of its duties and responsibilities, free of ministerial, commercial or private control
- Prohibiting the Executive from overturning the agency's decisions, except through carefully designed channels such as new legislation or appeals to the courts based on existing law
- Providing the regulating agency with a reliable source of funding. This is usually done through the collection of license fees, fines and levies from regulated firms, and budgetary allocations
- Involving everyone, that is, the executive, the legislature and the general public in the appointment process of the regulator's board
- Appointing regulators for fixed terms and protecting them from arbitrary removal
- Staggering terms of appointment for the regulator's board members so that they do not expire at the same time to ensure continuity
- Prescribing professional criteria for appointment and giving the regulator full autonomy in the hiring of key personnel.

This is not to imply that simply adopting these safeguards will make for independent regulation – in fact, political will to ensure that these safeguards are enforced diligently is also necessary. Further, the persons appointed to head regulatory agencies must themselves have the personal qualities that resist improper pressures and personal inducements (Smith, 2007).

10.7.1 Principles of proper regulatory decision-making

Once established, an independent regulator in the fields of broadcasting, telecommunications, and ICTs must adopt the following principles of proper decision-making:

- Decisions must be within legal authority of the regulator
- The regulator must consider all relevant matters
- Decisions must be made in good faith and for proper purposes
- Decisions must be reasonable

- Those affected by decisions must be accorded procedural fairness (including the right to respond)
- Government policy must be properly applied
- Regulators must not act on the direction of other persons

Adopted from those developed by the Australian Communications Authority, these principles are geared towards fostering an independent, impartial, effective and efficient regulation of the communications industry in Zimbabwe.

11 Conclusion

Regulation in the field of telecommunications and broadcasting should be done with the aim of promoting freedom of expression, access to information, fair competition, universal access, and the protection of consumer rights. In order to achieve this, a regulator must be protected from any form of outside inference, be it of a political, commercial or private nature. One of the ways of achieving this independence is through the principle of the separation of powers, where the regulator is not only separate from the suppliers of communications services, but is distant from any vested political, state or government interests. This is essential for the development of a competitive electronic communications environment in Zimbabwe.

This paper noted that while Zimbabwe is signatory to various protocols that call for the need to establish independent regulators in the field of telecoms and broadcasting, the Zimbabwean government continues to be too involved in the regulation of both sectors, with both BAZ and POTRAZ being reduced to mere figureheads in the process. We argued that the prevailing regulatory regime stifles both regulators' ability to make independent decisions and serves the whims of the ruling clique to the detriment of the citizens' right to access information. The net effect of this oppressive regulatory regime is that the country's electronic communications sectors are severely underdeveloped, as investors are wary of putting their resources in such an unpredictable sector.

The paper also pointed out that the current fragmented approach to regulation in Zimbabwe is inefficient in this period of convergence. For this reason, we recommended that the regulation of the electronic communications market in Zimbabwe must be done by a single regulator, set along the lines of South Africa's ICASA. The process of inviting applications, short listing of candidates, interviewing and appointments to the regulator's board should, as much as possible, be in the public eye so that Zimbabweans can feel they have a say in the running of their own country. The Independent Communications Regulatory Authority must be guaranteed of its financial, structural and functional independence, and must endeavour to regulate the sector in the public interest. The regulator's independence must be accompanied by checks and balances that will ensure that it remains accountable to the public. One of these safeguards is the requirement that the regulator conducts its business in the public eye, through the publication of all its activities, decisions, and financial records.