

ITU case study

**The creation of the Botswana
Communications Regulatory Authority
(BOCRA)**

2014



The case study was prepared by Brian Goulden and Mandla Msimang of Pygma Consulting. The authors and the ITU wish to acknowledge and express their appreciation for the assistance provided by the Chief Executive, Mr Thari Pheko , and the staff of BOCRA in undertaking the research for this case study.

The views expressed in this paper are those of the author and do not necessarily reflect the views of the ITU or its members.

©ITU 2014

All rights reserved. No part of this publication may be reproduced, by any means whatsoever, without the prior written permission of ITU.

1. INTRODUCTION

This case study is one of a series of short case studies conducted globally by the International Telecommunication Union (“ITU”) that reviews newly constituted or reorganised National Regulatory Authorities (“NRA”) where responsibilities have been expanded to encompass the broad spectrum of the communications sector. The aim of the case study is to highlight the experiences, challenges and solutions facing NRAs transitioning from operating in the narrower ICT sector to the wider national communications sector including the telecommunications, broadcasting, postal & courier services and operators.

Botswana is a landlocked country surrounded by South Africa, Namibia, Zambia and Zimbabwe. In July 2013 it had an estimated population of 2’021’144million¹, around 62% were urban dwellers in the capital city (Gaborone), other towns or large villages. It is ranked overall 74 in the 2014 Global Competitiveness Report published by the World Economic Forum.

Despite having a small population, Botswana was one of the leaders in the introduction of what was then “telecommunications regulation” in the mid-1990s, in the 14 Member States of the Southern Africa Development Community (“SADC”). It was recognised that regulation of telecommunications was potentially a key issue particularly in supporting the required growth of telecommunication necessary to support socio-economic development in the country. It paved the way for the introduction of mobile communications services and, more slowly, the growth of pervasive internet access. The move from regulation of the telecommunications sector alone to the wider “communications” sector was very gradual but the impetus came about in 2006, with the new national telecommunications policy, that permitted more operational freedom for telecommunications services providers. This paved the way for the enactment of the Communications Regulatory Act of 2012 (“CRA 2012” or “the Act”) which culminated in the Botswana Communications Regulatory Authority (“BOCRA”).

2. THE BOTSWANA COMMUNICATIONS SECTOR

2.1 Background and the path to sector reform

Botswana’s move into the “information age” from a policy and regulatory perspective came about in the mid-1990s with the decision to establish a telecommunications regulator – Botswana Telecommunications Authority (“BTA”). BTA was created as a result of the Telecommunications Act 1996. The establishment of BTA was not simply the creation of a regulatory authority but, in effect, kick-started the liberalisation of the telecommunications sector in Botswana. BTA’s mandate was specific to the telecommunications sector and subsequent to BTA’s creation; the National Broadcasting Board (“NBB”) was created to deal

¹ ITU

with broadcasting licensing and regulation. BTA was in existence for sixteen years until its successor, the Botswana Communications Regulatory Authority was established in terms of the Communications Regulatory Act and came into existence on 1 April 2013.

One concern raised by a number of stakeholders was the apparent lack of consultation on the change from the single sector to multi-sector regulator. However, the issue of consultation is often one that depends on the stakeholder's perspective. The CRA Bill was published in the Government Gazette for comment in advance of being placed before Parliament. Apparently, there was little comment. This suggests that many operators / service-providers had little appreciation of regulation and its impact and thus the opportunity to make comment was missed. This situation indicates that BOCRA will need to have a proactive educational role not just with the public but with hitherto unregulated entities that have now come within its regulatory scope. This may place an initial burden on BOCRA staff as they will need to spend more time explaining regulatory principles and practices to those with little or no understanding of what is involved in being a regulated entity.

During its sixteen years of existence, BTA issued three Public Telecommunications Operators licences, thirty-two Private Telecommunications Network licences, and sixty-eight Value-Added Network ("VANS") licences. Over this same sixteen year period, the fixed telephone network grew from 148,000 to around 162,000 customers; mobile telephony was introduced and grew to more than 3 million subscriptions.² Based on estimates, there are around one million internet users in the country.

In 1999, BTA licenced the first Internet Service Providers ("ISP"); but forbore from further action to regulate the internet. In the same year, the first two commercial FM radio stations – Gabs FM and Yarona FM - were licensed by the then separate broadcasting regulator, the National Broadcasting Board ("NBB"). Broadcasting in Botswana was regulated in terms of the Broadcasting Act 2000, Act 6 of 1998. Interestingly, prior to this, broadcasting was regulated by the BTA in terms of the Telecommunications Act, 1996. The 2012 CRA merged the two entities by establishing BOCRA.

In terms of section 10(1) of the now-repealed Broadcasting Act, the NBB's functions were to:

- Issue broadcasting licences;
- Exercise control over and supervise broadcasting activities, including cross-border relaying of radio and television programmes to or from Botswana; and
- Allocate available spectrum resources to ensure the widest possible diversity of programming and optimal utilisation of spectrum resources.

² BTA Annual Report 2013

The latter responsibility, the management and licensing of spectrum, overlapped with the BTA and was done in practice by the BTA. It seems to be the only area of regulation that was somewhat 'converged' prior to the passing of the new legislation. Signal distribution licensing and regulation, however, clearly fell within the BTA's mandate and not the NBB.

Notwithstanding the broadcasting institutions and regulatory activity undertaken before the establishment of BOCRA³, it is clear that its establishment was driven primarily by events in the telecommunications sector and convergence. In 2004, a study began on the further liberalisation of the telecommunications market in Botswana. This led to a Ministerial statement, in 2006, which lifted the ban on the provision of Voice over IP services ("VOIP") by ISPs and permitted the mobile operators to provide their own transmission links. Emphasis was placed on technology neutrality in all services and this policy shift paved the way for the converged regulator.

Between the 2006 shift in policy and the 2013 creation of BOCRA from the foundation of BTA, the regulator focused its attention on key issues such as universal service and access, consolidation of the service-neutral licensing regime, development of technical specifications and type-approval procedures, numbering plans, and spectrum management strategy. In 2009, BTA established its spectrum monitoring facility and began the process of implementing SIM card registration. Work on a cost model and pricing framework followed in addition to the allocation of the fixed wireless access spectrum. In 2011, the implementation of recommendations on cost-modelling and pricing led to reductions in wholesale and retail prices. Subsequently, BTA had significant involvement in the work surrounding the introduction of the submarine cables designed to improve international data and voice capacity.

Subsequent to BTA's establishment, in 2009 a Competition Authority was created which had a remit to deal with all competition matters within Botswana. The Competition Authority acts as the secretariat to the Competition Commission, which adjudicates on cases of anti-competitive behaviour. In terms of section 89 of the CRA 2012, BOCRA must refer *all* competition matters that may arise in the discharge of its functions under the CRA 2012 to the Competition Authority. BOCRA is in the process of concluding a Memorandum of Understanding with the Competition Authority to ensure that they can effectively work together on relevant competition issues.

3. BOCRA

3.1 Status

As indicated, BOCRA was established with effect from 1 April 2013 and assumed the responsibilities of the former sector regulator, BTA. The legislation that underpins BOCRA's activities is the Communications Regulatory Authority Act 2012, enacted in November 2012,

³ There was previously no postal sector regulator.

and provided for additional responsibilities including the takeover of broadcasting regulation from the NBB, which had a separate legal existence from that of the former BTA, but had interestingly and conveniently been serviced by a secretariat provided from the BTA's staff resources. Thus, the institutional arrangements that accompanied the legal changes brought about by the Communications Regulatory Act were minimal compared to those in other countries where two separate regulatory agencies need to be merged. In addition to the broadcasting mandate, BOCRA has a much greater role in the regulation of the postal services sector which includes the national postal services provider, Botswana Post, as well as international and domestic courier services. A new area of responsibility for BOCRA is regulation of internet content, which is included in the broad definition of the "regulated sector" which is set out in the Act. The complexity of this responsibility is recognised as potentially challenging by all concerned within the Authority.

3.2 Responsibilities

BOCRA's responsibilities include a broad mandate which covers the regulation of telecoms, internet and ICT, commercial radio and television communications, broadcasting, postal services and related matters. These responsibilities are set out in the 2012 CRA Act (section 6) and include the following:

- Protect and promote the interests of consumers, purchasers and other users of the services of the sector, particularly in respect of prices, availability, quality and variety of services and products that will meet reasonable demands throughout Botswana;
- Ensure as far as practicable, that the regulated sectors have and maintain the resources to provide the services and are otherwise fit and proper persons to provide services;
- Monitor the performance of the regulated sectors in relation to levels of investment, availability, quantity, quality and standards of services, competition, pricing, costs of services, the efficiency of production and distribution of services, and any other matters that BOCRA may decide upon;
- Facilitate and encourage private sector investment and innovation in the regulated sectors;
- Enhance public knowledge, awareness and understanding of the regulated sectors
- Foster the development of the supply of services and technology in each regulated sector in accordance with recognised standards;
- Encourage the preservation and protection of the environment and conservation of natural resources in accordance with appropriate laws;
- Issue Public telecommunications Operator ("PTO") and broadcasting licences (after prior notification to the Minister of Communications & Transport);
- Impose administrative sanctions and issue and follow-up enforcement procedures to ensure compliance with conditions of licences, permits, permissions, concessions, authorities and contracts;

- Promote efficiency and growth in the regulated sectors and disseminate information about matters relevant to its regulatory functions;
- Hear complaints and disputes from consumers and regulated suppliers and resolve or facilitate their resolution;
- Consult with other regulatory authorities with a view to improving the regulatory services that it offers and obtaining market intelligence about the sectors it regulates;
- Foster and promote user of consumer forums to provide information to enable it to improve its regulatory duties and functions;
- Ensure the needs of low income, rural and disadvantaged groups of persons are taken into account by regulated suppliers;
- Maintain a register of licences, permits, permissions, concessions, authorities, contracts and regulatory decisions which is available to the public and from which the public may obtain copies of any entry (for a fee);
- Make industry regulations for better carrying out its responsibilities - including codes and rules of conduct, records to be kept by regulated suppliers, definition of and information about cost accounting standards to be adopted by regulated suppliers, standards applicable to regulated services, compliant handing procedures, circumstances surrounding access rights by one regulated supplier to the facilities owned or controlled by another regulated supplier, records, forms and content for SIM card registration, and price control regulations;
- Represent Botswana in international regulatory and other relevant for a concerning the regulated sectors;
- Advise the minister on matters and propose policy and legislation relating to the regulated sectors;
- Promote and facilitate the convergence of technologies.

A key requirement in carrying out these responsibilities is the need to take regulatory decisions “in an open, transparent, accountable, proportionate, and objective manner and not show undue preference to any person or organisation”⁴.

3.3 Key activities

The 2012 CRA enables service and technology neutral licensing by providing only for Service Licences⁵ and System or Infrastructure Licences. There is also provision for licence exempt services. Additionally, in Botswana, radio frequency licences are treated separately from telecommunications licences⁶.

⁴ CRA Act 2012 sec 6 (2) w

⁵ These include cellular telephony services, packet switched data services, paging services and voice over the internet services.

⁶ It is worth noting that in December 2012, the BTA proposed the introduction of an additional licence category to be known as Facilities Based Operators licence in a discussion paper. This type of licence was proposed, to

In light of the fact, that the licensing regime distinguishes between infrastructure and services, but retains categorisation between types of services the Botswana licensing regime may therefore be considered *partially* converged. BOCRA furthermore has sole discretion to determine when to limit the number of licences to be issued and when to require a competitive tendering process. However, the concept of ‘exclusive licenses’ remains; and the Minister has certain powers to override the regulator and must grant permission when exclusive licences are issued.

The CRA 2012 appears to transfer most of the functions to regulate the broadcasting industry to BOCRA, however, certain regulations in terms of the Broadcasting Act were not repealed. From a licensing perspective, the Broadcasting Act of 1998, provided for private, community and public broadcasting services, whilst the 2012 CRA does not include community broadcasting, and replaced public broadcasting with state broadcasting. These inconsistencies have yet to be clarified in the implementation of the new converged regime.

An important component of BOCRA’s activities is its responsibility to levy and manage a Universal Service facility that will be funded from contributions of 1% of gross turnover from all licenced operators across all regulated sectors. In line with the multi-sector regulatory approach and converged framework that is in place, the universal service fund will cover all aspects of the regulated communications sectors.

A key power vested in BOCRA in terms of Section 8 of the CRA 2012, is the right to obtain information from regulated suppliers in order that it may effectively carry out its functions. Alongside this power, is the clear obligation on BOCRA to safeguard commercial or other sensitive information provided to it by regulated entities.

BOCRA has powers conferred on its staff to enter premises without a warrant to undertake enquiries, examinations or inspections in respect of potential breaches of the CRA 2012. In addition, penalties are set out for breaches of the Act.

These powers were not apparent in the erstwhile Telecommunications Act.

One new key activity is the responsibility for dealing with “content” issues in the broadcasting sector. Although BOCRA’s mandate clearly covers content, the term “content” is not defined in the CRA 2012. As the state broadcasting media (BTV and Radio Botswana) are unregulated, it is understood that their “content” does not come within the purview of BOCRA. However, the commercial broadcasting licensees’ “content” may raise issues to be considered by BOCRA. The principal challenges with “content” regulation are that the

allow companies to provide a wide range of wholesale services including without limitation fibre, towers space and ducts.

-
<http://www.bta.org.bw/sites/default/files/documents/Consultation%20Paper%20on%20the%20Creation%20of%20FBO%20Licence.pdf>

appropriateness of content can be a very subjective area and, unless there are very clear guidelines on what is and what is not acceptable, there can be long drawn out and expensive processes to be pursued. There may also be allegations of partisanship on the part of complainants or, indeed, the regulator and this may throw doubt on the credibility of regulatory decisions. BOCRA will need a clear set of guidelines on acceptable standards and these will need regular review to ensure they continue to be in line with the evolving standards of society-at-large and changes in legislation or, in a wider context, aligned with international standards and treaties / agreements to which Botswana is signatory.

3.4 Scope of BOCRA's mandate

The scope of BOCRA's mandate is significantly wider than that of its predecessor organisations, BTA and NBB, and one particular area that may cause considerable work, especially since NBB was merely a non-executive board with BTA serving as its secretariat, is the regulation of content in the broadcasting sector. The main Government-owned broadcasters – Botswana Television (“BTV”) and Radio Botswana 1 and Radio Botswana 2 (RB1 & RB2) are considered to be “state broadcasters” rather than “public broadcasters” and are not subject to regulation, but all other broadcasters are licensed and regulated.

3.5 Governance

BOCRA is headed by a seven-member Board, appointed by the Minister of Transport & Communications. Board members are selected taking account of their academic qualifications and their personal experience and expertise. The aim being to provide a range of members experienced in the areas being regulated as well as in key areas such as consumer protection, financial accounting and management, economics and general business management. The Board Chairperson is appointed by the Minister and the Vice-Chair by the Board members themselves. In a departure from the arrangements that prevailed for BTA, the BOCRA CEO is a member of the Board. This enables greater cohesion in terms of decision-making and communication between Board and officials.

In the context of review of BOCRA's activities, the Board are required to submit the Strategic Plan to the Minister of Transport & Communications

3.6 Management

BOCRA management is led by a Chief Executive Officer (“CEO”), supported by two deputy CEOs, each of whom has a distinct role – (1) Operations & Strategy and (2) Regulatory Affairs. At the level below the deputy CEOs, there are individual departments led by Director; these are:

- Corporate Support
- Legal
- Human Resources

- Technical Services
- Business Development
- Internal Audit
- Compliance & Monitoring
- Broadband and Universal service
- Broadcasting Services
- Postal Services

The present organisational structure is shown in Figure 1.

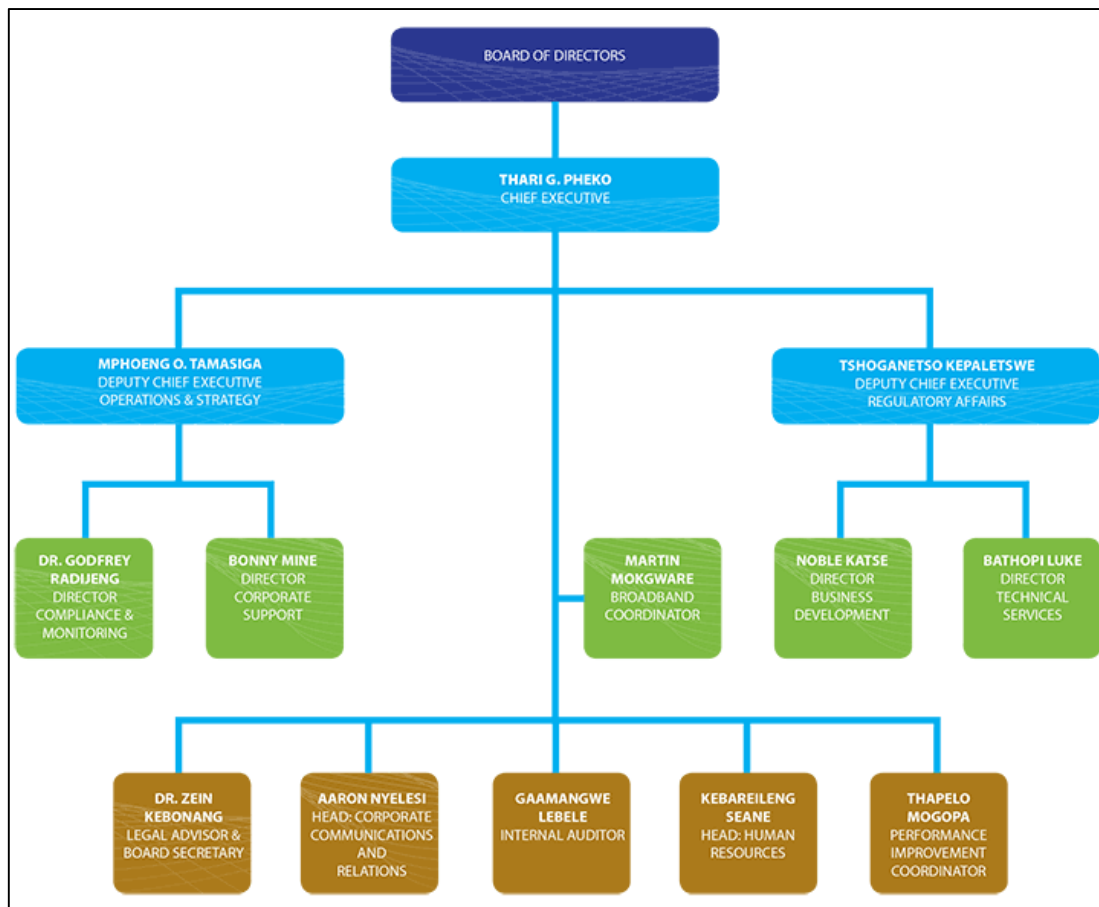


Figure 1: BOCRA Organogram⁷⁷

The CEO is appointed by the Minister, on the recommendation of the Board. The senior staff are appointed by the Board on the recommendation of the CEO, who, in turn has authority to appoint more junior staff. The Board is responsible for determining the terms & conditions of employment for all BOCRA staff. The remuneration of the Board is determined by the Minister, in line with normal practice in public bodies in Botswana.

⁷⁷ Source: BOCRA Website (www.bocra.org.bw, viewed on 16.5.2014)

An indication of staffing levels is that prior to the creation of BOCRA, BTA's staff complement numbered 71, of which almost 65% were professional staff with appropriate academic or professional qualifications. Currently BOCRA is undergoing a strategy review and staff numbers may increase as a result. BOCRA management has indicated that the focus required of its team now covers all aspects of the communications sector and thus there will be a need for additional skills, learning and development to accommodate the changes in mandate.

3.7 Financial provisions

The CRA 2012 sets out the financial arrangements (Section 24). BOCRA's funds comprise the following:

- Fees levied in respect applications for or grant of licences, approvals, permissions, contracts, including any periodic renewal fees;
- Annual fees based on a percentage, which is determined by BOCRA, of net operating revenues of the regulated activities of each regulated supplier;
- Fees that BOCRA may impose for goods and services provided within its mandate, where the legislation permits the charging of fees;
- Funds from the National Assembly (Parliament) by way of loans or grants for specific projects to be undertaken;
- Funds by way of grants or donations from any source except from any regulated supplier or their associated companies or subsidiaries.

BOCRA's financial year runs for 12 months from 1 April to 31 March of any year. There is a clear statement of the need to maintain full and accurate financial accounts and these are subject to audit by independent external auditors appointed by the Board. The Board is required to submit its audited accounts to the Minister of Transport & Communications within 14 days of completion of the audit. Normal practice is that within 30 days of receipt, the Minister lays the audited accounts before the National Assembly.

As far as budgets are concerned, BOCRA is required to submit its annual financial plan to the Minister at least three months before the start of the financial year. The submission to the Minister shall include the following:

- A budget for the year
- The Authority's goals for the forthcoming year
- The Authority's proposed activities for the forthcoming year.

An important element of the budget process is for BOCRA to ensure that its income (referred to above) meets the expenditure to be incurred in carrying out its duties and obligations.

One particular success that BTA achieved under both its CEOs was to be a financially self-sufficient institution not reliant on Government subsidies.

3.8 Challenges faced by BOCRA

An immediate challenge for BOCRA is ensuring that it has adequate resources to deliver its mandate successfully. A vital element in the resource equation is the availability of the right people with the right qualifications, experience, training and potential to deliver effective regulation across a number of new sectors. BOCRA is fortunate that it has a significant cadre of experienced regulatory staff but their experience has been very focused on the telecommunications sector. So it will be essential to re-focus and re-tool the BOCRA team to take account of their wider mandate and adapt their experience to the new environment. One area where there will be particular challenges is that of postal and related services. However, the staff member appointed to head the postal regulatory section began at an early stage to acquire an understanding of unique components of postal operations. However, this individual resource will need to be supplemented by additional staff with the potential to be trained in regulation. The particular postal services situation is likely to be reflected in the other new sectors. It is likely that the need for skills re-focusing / re-tooling will continue as a medium term challenge. One fortunate element of the situation is that there is unanimity of view between the Board and the management / staff that this is a key area and, it is hoped that adequate financial resources will be available to ensure BOCRA can develop its human capabilities in the shortest possible time. One way forward may be to utilise the services of the Commonwealth Telecommunications Organisation (“CTO”) and International Telecommunication Union (“ITU”) to assist with provision of experienced regulatory trainers and other development / learning opportunities. BOCRA also needs to put in place frameworks for the regulation of its new broadcasting and postal mandates. CRA 2012 also provides for the regulation of the Internet – a responsibility that will prove even more challenging.

A short-term challenge faced by the BOCRA management was that the BOCRA Board was not appointed until around six months after the organisation began its operations. This effectively denied the management the opportunity to submit issues to the Board for approval / ratification in real-time and gain any relevant Board level input to the decisions etc. Once the Board was appointed, a process was put in place to review and ratify those issues that had had to be dealt with previously.

4. EFFECTS OF THE CHANGES

4.1 Regulatory processes

The general regulatory procedures and processes are publicised on the BOCRA website. However, with the expansion of the number and scope of business of the regulated entities, it is likely that procedures and processes will need to be reviewed. In addition, BOCRA plans

to educate newly regulated entities in the general issues of regulation and this will be an additional but vital activity for BOCRA to undertake.

BOCRA's approach to converged regulation as a transparent, fair and open system will apply to all the regulated sectors. However, the different nature of the regulated sectors will, inevitably, lead to some differences in mechanisms and processes. As BOCRA evolves its approach, consideration will no doubt be given to the need for light-touch regulation in a number of areas but closer monitoring in others.

4.2 Consumers

Indications are that consumers do not expect much to change in the short-term. However, one very important element of the new BOCRA environment is that the Board is permitted to appoint Advisory Panels, comprising of people who are knowledgeable about consumer needs across the various segments of consumer interests – rural / urban dwellers, commerce and industry and small / medium enterprises, as well as those with low-incomes, disabilities, the elderly, youth and women. These Advisory Panels are supported financially by BOCRA and they are permitted to determine the most effective way of providing advice to the Board and management. This includes the creation of advisory committees that can address specific special interests or situations.

4.3 Regulated entities

Regulated entities in Botswana are not necessarily converged, despite the existence of an enabling environment thanks in the main to technology and service neutrality. As such, what is in place is multi-sector regulation which will enable converged regulation as the sector evolves and as triple and quadruple play offers and players, combining traditional telecommunications and broadcasting, become more prevalent.

The widening of the scope of the regulated sectors means that there are existing suppliers of services that are new to regulation. This will particularly affect the postal and associated courier services that are provided within and beyond Botswana. BOCRA has recommended to the Minister of Transport & Communications that Botswana Post be designated the "Public Postal Operator" and, as such, if so designated, will have the obligation to provide universal postal services. The CRA 2012 clearly indicates what universal services must be provided by the Public Postal Operator in sec 68 (1). Section 68(2) of the Act also sets out the obligations that a Public Postal Operator has in terms of provision of information, accounting, provision of non-discriminatory interconnection with other postal operators, and provision of postal services points. Botswana Post is required to report to BOCRA on these matters on an annual basis. This requirement for regulatory activity will place a burden on the Public Postal Operator and also will require BOCRA to be supportive to the Public Postal Operator in enabling it to develop its regulatory capabilities including appreciation by its staff of the new environment in which it will operate.

The indications are that those entities now required to be regulated accept the new environment. However, one large previously unregulated organisation questioned the appropriateness of being regulated by BOCRA. Their assertion is that rather than being a postal operator, they are a logistics-handling company currently regulated by various Government agencies, including BOCRA for radio transmitter-receiver licences, as well as the Department of Transport for their transport fleet. Dealing with such perspectives will require BOCRA to be proactive in educating the regulated sectors on the benefits that accrue from regulation.

4.4 Other Regulatory Bodies

BOCRA has developed a Memorandum of Understanding with the Botswana Competition Authority to ensure that they deal appropriately with issues that may impact both their jurisdictions. The MOU recognises the separate areas of primacy of expertise and seeks to ensure that the two organisations collaborate appropriately in the best interests of the Botswana economy. The situation is assisted somewhat in that the part-time Chairperson of the Competition Authority is a full-time BOCRA senior manager. Whilst formal agreements have not been reached with other regulatory bodies such as the Bank of Botswana (the central bank) or the Non-Banking Financial Services Regulator (“NBFIRA”), the indications are that any potential conflicts can be settled without undue difficulties.

5. CONCLUSION

Regulation of the ICT sector is now a mature activity in Botswana. The introduction of the CRA 2012 has created an enabling environment which supports convergence – in particular across the telecommunications, broadcasting and postal sectors. The widening of the “communications sector” to encompass all types of communications should generally present no problems in terms of the development of services and the market. However, from an institutional perspective, there will inevitably be short-term challenges surrounding issues of mutual understanding of organisations’ individual positions or perspectives. In BOCRA’s case, there is a need to up-skill / re-tool its staff to take on their wider role and focus.

In the case of the regulated sectors, the challenge is similar to that facing BOCRA – one of up-skilling to ensure that they understand the principles and practices of regulation and recognise its role in sector and national socio-economic development. This may take some of the regulated entities by surprise and this possible unpreparedness may cause some challenges. However, this can be mitigated by ensuring at the outset of any change in the regulatory environment, all stakeholders are fully engaged, by Government and its policy / regulatory institutions, on the reasons for and benefits of the change and given an opportunity to contribute to the way the regulatory landscape evolves.