

Module 6. Legal and Institutional Framework

Downloaded Monday, September 24, 2012

This document is a downloadable report from the infoDev/ITU ICT Regulatory Toolkit. Please note that the version that appears on the website at www.ictregulationtoolkit.org is the most updated version and has extra functionality (e.g., links, practice notes, reference documents etc). If you find any problems, please contact Feedback@ictregulationtoolkit.org.

Module 6. Legal and Institutional Framework

- ↳ [Executive Summaries](#)
- ↳ [1 Introduction](#)
- ↳ [2 Why Regulate?](#)
 - ↳ [2.1 Evolution of Regulatory Reforms](#)
 - ↳ [2.2 Regulation in Transition to Competitive Market](#)
 - ↳ [2.3 Regulation in a Fully Competitive Environment](#)
 - ↳ [2.4 Benefits of Regulation](#)
- ↳ [3 Legal Context of Regulatory Reform](#)
 - ↳ [3.1 Impact of Different Legal Traditions on the Regulatory Framework](#)
 - ↳ [3.1.1 Snapshot of Different Legal Traditions](#)
 - ↳ [3.1.2 Regulatory Frameworks in Different Legal Systems](#)
 - ↳ [3.1.3 Implementation of Regulatory Design](#)
 - ↳ [3.2 Impact of Multilateral and Regional Commitments](#)
 - ↳ [3.2.1 Role of the World Trade Organization](#)
 - ↳ [3.2.2 Regional Frameworks](#)
 - ↳ [3.3 Maturity of the Market - Relationship between Telecommunications Legislation and Competition Policy](#)
 - ↳ [3.3.1 The Evolution from Sector-Specific Regulation to Competition-Based Regulation](#)
 - ↳ [3.3.2 Analysis of Jurisdictional Division of Power between Competition Authorities and Regulatory Institutions](#)
 - ↳ [3.3.3 Practical Lessons for Developing Countries](#)
 - ↳ [3.4 Impact of Other Legislation](#)
 - ↳ [3.4.1 Tax Law](#)
 - ↳ [3.4.2 Foreign Ownership](#)
 - ↳ [3.4.3 Consumer Protection Law](#)
 - ↳ [3.4.4 Spam Legislation](#)
 - ↳ [3.4.5 Property Law](#)
- ↳ [4 Impact of Convergence](#)
 - ↳ [4.1 What is Convergence?](#)
 - ↳ [4.2 Different Approaches in Implementing ICT Regulation](#)
 - ↳ [4.2.1 Legislative Approach](#)
 - ↳ [4.2.2 Regulatory Approach](#)
 - ↳ [4.2.3 Self-Regulation Process](#)
 - ↳ [4.3 Modifications to Telecommunications Legislation to Address Convergence](#)
 - ↳ [4.3.1 Licensing](#)

- ▶ [4.3.2 Spectrum](#)
 - ▶ [4.3.3 Interconnection](#)
 - ▶ [4.3.4 Numbering](#)
 - ▶ [4.3.5 Universal Service](#)
- ▶ [4.4 Modification to Broadcasting and ICT Legislation to Address Convergence](#)
 - ▶ [4.4.1 Media and Broadcasting Legislation](#)
 - ▶ [4.4.2 Content](#)
 - ▶ [4.4.3 Intellectual Property Laws](#)
 - ▶ [4.4.4 Data Protection/Privacy Laws](#)
- ▶ [4.5 Case Studies of Converged Legislation](#)
 - ▶ [4.5.1 European Union New Regulatory Framework \(NRF\)](#)
 - ▶ [4.5.2 Hong Kong \(SAR\)](#)
 - ▶ [4.5.3 Malaysia](#)
- ▶ [5 Elements for an Effective Regulator](#)
 - ▶ [5.1 What Constitutes an Effective Regulator?](#)
 - ▶ [5.1.1 Structural Independence](#)
 - ▶ [5.1.2 Financial Independence](#)
 - ▶ [5.1.3 Functionality](#)
- ▶ [6 Organizational and Institutional Approaches To Regulation](#)
 - ▶ [6.1 Institutional Design Options](#)
 - ▶ [6.1.1 Overview and Comparison of Different Institutional Designs](#)
 - ▶ [6.1.2 Overview and Comparison of Different Organizational and Administrative Structures](#)
 - ▶ [6.2 Administrative Structures: Staffing and Remuneration](#)
 - ▶ [6.2.1 Staffing Process](#)
 - ▶ [6.2.2 Staffing Design](#)
 - ▶ [6.2.3 Job Descriptions](#)
 - ▶ [6.2.4 Remuneration Principles](#)
 - ▶ [6.2.5 Contracting of Consultants](#)
 - ▶ [6.3 Separation of Power and Relationship of Regulator with Other Entities](#)
 - ▶ [6.3.1 Relationships with Other Entities](#)
 - ▶ [6.3.2 Checks and Balances/Balance of Power/Separation of Power](#)
 - ▶ [6.4 Legal Status of Regulatory Authorities](#)
 - ▶ [6.4.1 Corporate Body vs. Administrative Body](#)
 - ▶ [6.4.2 Judicial Capacity of the Institutional Arrangements](#)
 - ▶ [6.5 Ethics Rules and Conflicts of Interest](#)
 - ▶ [6.5.1 Acceptance of Gifts](#)
 - ▶ [6.5.2 Personal and Financial Conflicts of Interest](#)
 - ▶ [6.5.3 Post-employment Prospects](#)
- ▶ [7 Functional Aspects of Regulation](#)
 - ▶ [7.1 Overview of Regulator's Competencies and Mandate](#)
 - ▶ [7.1.1 Rulemaking Function](#)
 - ▶ [7.1.2 Oversight Function](#)
 - ▶ [7.1.3 Licensing](#)
 - ▶ [7.1.4 Competition Policy and Competitive Safeguards](#)
 - ▶ [7.1.5 Tariff Regulation](#)
 - ▶ [7.1.6 Interconnection](#)
 - ▶ [7.1.7 Quality of Service – Regulatory Roles and Responsibilities](#)
 - ▶ [7.1.8 Consumer Protection](#)
 - ▶ [7.1.9 Establishment and Management of Universal Service Funds](#)
 - ▶ [7.2 Decision-making Process and Consultation Framework](#)
 - ▶ [7.2.1 Overview of the Public Consultation Process](#)
 - ▶ [7.2.2 Media Relations](#)
 - ▶ [7.2.3 Brief Summary](#)
 - ▶ [7.3 Accountability of Regulators and Consumer Protection](#)
 - ▶ [7.3.1 Accountability of Regulators](#)
 - ▶ [7.3.2 Accountability for Consumers](#)
 - ▶ [7.4 Dispute Resolution and Enforcement](#)
 - ▶ [7.4.1 Dispute Resolution](#)
 - ▶ [7.4.2 Enforcement](#)

Module 6. Legal and Institutional Framework

The telecommunications sector has undergone extensive changes in recent decades, from a monopoly structure to one of competition, motivated by the evolution of new technologies and services, the growing importance of telecommunications for national economies and the development of international trade in telecommunications services. This module provides an analysis of how countries have undertaken regulatory reform to adapt to these changes, and explores the legal and institutional framework necessary for effective regulation. The module is organized in seven chapters:



[1. Introduction](#)

The Introduction provides a roadmap of the study and an overview of the objectives of the module.

[2. Why Regulate?](#)

This Chapter briefly discusses the need for regulation to ensure the market transition from monopoly to competition and to safeguard the public interest.

[3. Legal Context of Regulatory Reform](#)

This Chapter provides an overview different factors that may impact regulation, such as: (i) the different legal and cultural traditions of each country; (ii) the national and international commitments undertaken by the government; (iii) the impact of other legislation that impact the sector; and (iv) level of maturity of the market.

[4. Impact of Convergence](#)

This Chapter examines the impact of convergence on regulation of the sector, analyzing how regulators have responded to convergence with more flexible and streamlined regulatory frameworks and how ICT related laws have impacted the sector.

[5. Elements for an Effective Regulator](#)

The objective of this Chapter is to identify what it means to be an effective regulator, and the different dimensions of effectiveness, including structural and financial independence and functionality.

[6. Organizational and Institutional Approaches to Regulation](#)

This Chapter provides a detailed analysis of the organizational and institutional approaches to regulation, and discusses institutional design options, the separation of power and relationship of the regulator with other entities, the legal status of regulators, their funding process, staffing procedures and ethical conduct.

[7. Functional Aspects of Regulation](#)

This Chapter provides an analysis and overview of the regulator's competencies, mandate and regulatory procedures, including decision-making procedures, accountability of regulatory activities, and dispute resolution and enforcement procedures.

SEE ALSO:

[Legal and Institutional Aspects of Regulation: Executive Summary](#)

Executive Summaries

Module 6. Legal and Institutional Framework

 [Executive Summary \(English\)](#)

 [Executive Summary \(French\)](#)

 [Executive Summary \(Spanish\)](#)

 [Executive Summary \(Russian\)](#)

 [Executive Summary \(Chinese\)](#)

 [Executive Summary \(Arabic\)](#)

1 Introduction

The telecommunications sector has undergone extensive changes in recent years. Many state-owned operators were privatized and the sector experienced a trend of liberalization worldwide, motivated by the evolution of new technologies and services, the growing importance of telecommunications for national economies and the development of international trade in telecommunications services. As a result, in most countries, the telecommunications sector has experienced a fundamental change in structure, from that of monopoly to competition.

Following the period of growth in the telecommunications industry in the late 1990s, the “dot com bubble” burst at the beginning of the 21st century, resulting in a steep drop in stock market value for major operators. The crisis in the telecommunications market affected numerous companies, but did not deter the development of new technologies and the evolution of the information and communications technology (ICT) sector. In order to adapt to these new developments, countries have been undertaking a review of their existing frameworks, enacting new legislation and creating new regulatory authorities to implement the legal and regulatory framework. Such a framework is essential for the sector, particularly as countries move from state control to market competition, and is necessary to attract new entrants as well as private investment.

Based on analysis of legal and regulatory frameworks worldwide, studies conducted by industry experts and institutions such as the World Bank, and information collected by the International Telecommunication Union, this report provides an update of the 2000 Telecommunications Regulation Handbook published by *infoDev*. It serves as a best practice toolkit for regulators and policymakers in the context of the current ICT environment.

The importance of conducting this study is evidenced by the significance of the legal and regulatory framework as an enabler of development of the sector. Effective regulation requires the implementation of a supporting legal and regulatory framework to create an environment that promotes public confidence and ensures stability, transparency, competition, investment, innovation, and growth in the sector. Many of the laws, regulations, and best practice examples examined in this study address the fundamental change in the telecommunications industry from that of monopoly to competition and its evolution within the ICT sector, and provide guidelines for effective regulation for competition. However, while the toolkit highlights best practices for effective regulation, it is important to realize that the implementation of such practices may vary from country to country, requiring consideration of local political, economic, social and other conditions and circumstances in designing the appropriate legal and regulatory instruments.

The study of regulatory reform in today's converged ICT environment can be analyzed by considering three main interdependent and mutually reinforcing aspects: (i) the general legal context of regulatory reform; (ii) the institutional and organizational aspects of regulation; and (iii) the regulatory processes.

This study begins by addressing the question: [Why regulate?](#) Regulatory intervention is necessary to ensure the successful transition of a monopolistic telecommunications market to a competitive one, to safeguard consumer interests, to maintain an effective competitive marketplace, and to foster the long-term development of the ICT sector. Effective regulation has resulted in many benefits, such as greater economic and technological growth, increased investment in the sector, better quality of service, lower prices and higher penetration rates. The level of regulatory intervention will vary from country to country, and will depend on various factors, including the level of market maturity, the legal and regulatory framework, and the regulatory issues arising from new technologies and services.

In [Chapter 3](#), the question of how to regulate is addressed. How regulatory activities are conducted depends on the level of maturity of the market, and the particular cultural, legal and regulatory framework of each country. Regulation does not occur in a vacuum, and is determined to a great extent by different factors such as: (i) the different legal traditions and systems existing in a particular country that determine the structure of the legal and regulatory framework; (ii) the international commitments undertaken by governments that need to be harmonized with national legal and regulatory frameworks; (iii) the impact of other legislation affecting the sector, which can influence the effectiveness of the legal and regulatory framework, and (iv) the level of maturity of the market, which affects the interaction between sector-specific telecommunications legislation and overall competition policy.

[Chapter 4](#) addresses the impact of convergence on regulation. The union of telecommunications, broadcasting, and information technology is dissolving the once clear lines that distinguished the mode of delivery and allowed for the distinct regulation of these different sectors. Convergence can create uncertainty with respect to the regulation and classification of services, to the extent that it occurs at different levels: (i) at the service level, with bundled services (such as the “triple play” of voice, data and video); (ii) at the industry level with mergers among entities of different industries; and (iii) at the network and terminal equipment level, such as the ability to use computers for telecommunications, as well as the introduction of new means of providing traditional services, such as Voice over Internet Protocol (VoIP). Regulators have responded to convergence by adopting more streamlined legislation and regulatory procedures, which allow for greater flexibility in dealing with new technologies and services. Additionally, as regulators revise legal frameworks, they must consider existing rules that are spilling over into the ICT sector such as intellectual property rights, as well as new activities such as spam or computer viruses, which impact consumers in a negative way.

[Chapter 5](#) identifies what it means to be an effective regulator, and the different dimensions of effectiveness, including structural and

financial independence and functionality. One of the main benchmarks for assessing the effectiveness of a regulator is the degree of actual and perceived autonomy from government control and industry influence. To be effective, regulators must gain credibility and have the authority to enact and enforce their decisions. Regulatory procedures must be transparent, accountable and predictable and ensure integrity of the process. An effective regulator strengthens public and investor confidence that all market players will be treated equally, and increases the stability and objectivity of the regulatory process.

[Chapter 6](#) provides an analysis of the organizational and institutional approaches to regulation, and discusses institutional design options, the separation of power and relationship of the regulator with other entities, the legal status of regulators, their funding and staffing process, and the application of an ethics regime. There is no one single model, since each regulator's institutional design, powers, degree of autonomy, composition, and jurisdictional authority depends on the country's legal, political and institutional framework. However, a strong legal framework needs an efficient institutional and organizational framework to support it. To regulate effectively, regulators must create institutional frameworks that provide structural, political, and budgetary independence, as well as sufficient competency and the necessary organizational structure to carry out its functions. As such, regulators must have an adequate number of staff with the proper skills and capacity to carry out the regulatory activities. Moreover, they must be perceived by stakeholders as objective and unbiased. This can be enhanced by ensuring that ethics codes or rules are in place and the regulatory staff has no perceived or actual conflicts of interest.

Lastly, [Chapter 7](#) addresses the functional aspects for effective regulation including the clear definition of the functions and competencies of the regulator, accountability of regulators, and the implementation of open and transparent regulatory processes. Effective regulation requires that the decision-making process be conducted in a transparent and participatory manner, so that the regulator is accountable to the government and to the public. Transparency in regulation, and the encouragement of public participation in the decision-making process, legitimizes the regulator's actions and fosters consensus building in the industry, which facilitates compliance with regulatory decisions. To function effectively, regulators also need the proper authority and power to intervene in the operation of the telecommunications market, such as licensing operators and services, enforcing laws and decisions, and resolving disputes among licensees. In addition, enforcement of compliance with regulatory decisions is crucial for effective regulation, because without the ability to enforce laws, a regulatory regime is practically meaningless. As markets mature, many regulators are encouraging industry self-regulation, such as industry self-reporting, for enforcement purposes and reliance on alternative resolution techniques to resolve conflicts, which helps regulators to maintain oversight over the growing number of competitors in the ICT sector.

2 Why Regulate?

To understand the role of regulation in enabling the growth and development of the information and communications technology (ICT) sector and the requirement of a strong legal and regulatory framework for effective regulation, first it is necessary to discuss the need for regulation. This Chapter provides an overview of the reasons for regulation given the structural changes in the telecommunications sector from monopoly to competition, and the importance of regulation in transitioning to an effective competitive environment and fostering the long-term development of the ICT market.

2.1 Evolution of Regulatory Reforms

Prior to the telecommunications sector reforms undertaken in many countries during the last two decades, telecommunications services were largely provided under monopoly conditions, either by state entities or, to a lesser extent, by private companies. Often the operator and regulator for telecommunications services was the government; therefore, no regulatory independence existed. This classic model of supply generally concentrated policy-making, regulatory, frequency management and network operating responsibilities in a single entity.

This model worked well for many years in the more developed economies, where long-distance and international tariffs, which stayed high despite significant decreases in costs due to technological change, basically subsidized local services and led to relatively high levels of universal service. However, the model did not work as well in developing countries where networks were generally restricted to urban areas and more accessible to middle/high income consumers. Cross-subsidization kept local prices low for the wealthy, but did not generate sufficient income for infrastructure investment, and low-income consumers were subject to long waiting lists and poor quality of service.[1]

In the 1980s, countries began to recognize the increasingly important role of the telecommunications sector for economic growth. As a result, in primarily developed nations, policies evolved to introduce competition – albeit, often limited in scope, in an effort to inject dynamism into the sector, spur innovation, increase choice, enhance availability, and lower tariffs. In the 1990s, partly as a result of national, regional and multilateral efforts (further discussed in Chapter 3), many countries introduced the first wave of reform by privatizing their national operators. In the second wave of liberalization, which sometimes occurred simultaneous with the privatization or followed soon thereafter, governments began allowing the introduction of new services (e.g., mobile services and value-added services) into the market. These new services generally did not compete directly with the privatized basic telecommunications operator, which often had been granted an exclusivity period, or the non-privatized government-owned incumbent operator. The third wave of liberalization occurred once the incumbent operator's exclusivity period was over and full competition could be introduced.

ENDNOTES

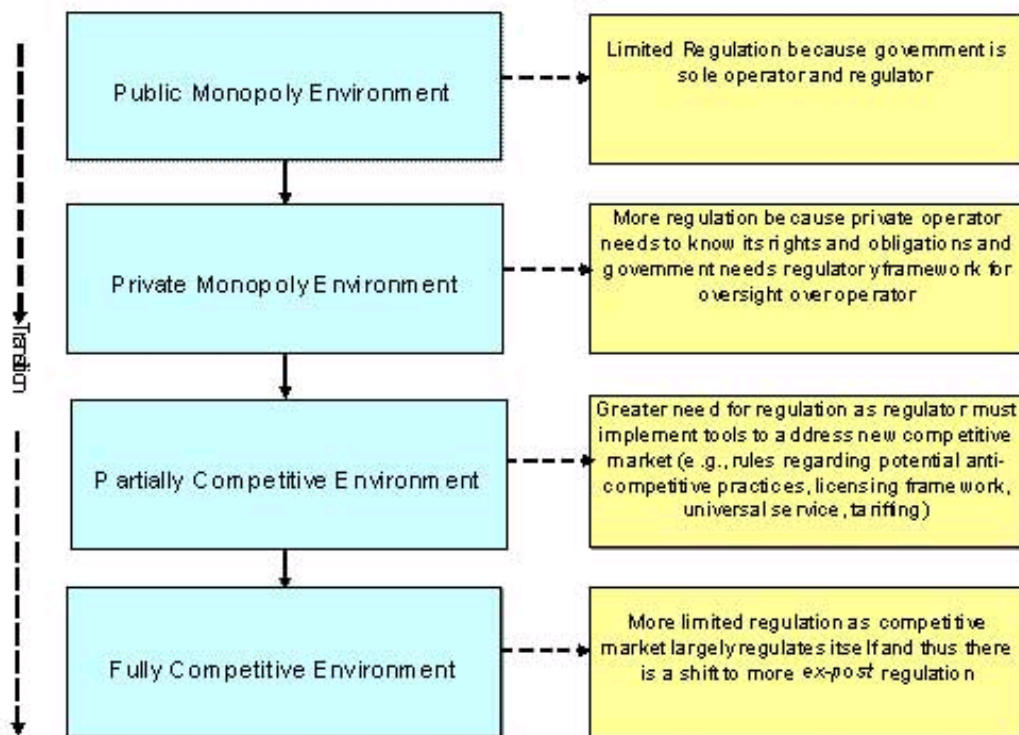
[1] See Peter Smith, *Subscribing to Monopoly: The Telecom Monopolist's Lexicon—Revisited*, Public Policy for the Private Sector, September 1995, stating that "... the idea that low, subsidized local telephone access prices are the best route to universal service is wrong. In most developing countries suffering from chronic unmet demand for telephone service, the key problem is inadequate supply (inadequate investment and inefficient investment and operations), not inadequate demand." <http://rru.worldbank.org/Documents/PublicPolicyJournal/053smith.pdf> [Accessed 9 October 2005].

2.2 Regulation in Transition to Competitive Market

The introduction of competition in the marketplace does not mean regulation is unnecessary. Quite the contrary, the role of the regulator actually increases once governments authorize competition (See Figure 5-A), particularly during the early stages of transition from the former model of monopoly provision to one of effective competition. In order to transition to an effective competitive environment, regulators must establish a regulatory framework that can resolve disputes, address anticompetitive abuses, protect consumers, and attain national goals such as universal access, industrial competitiveness or economic productivity and growth.[1]

Figure 5-A: Need for Regulation

Need for Regulation

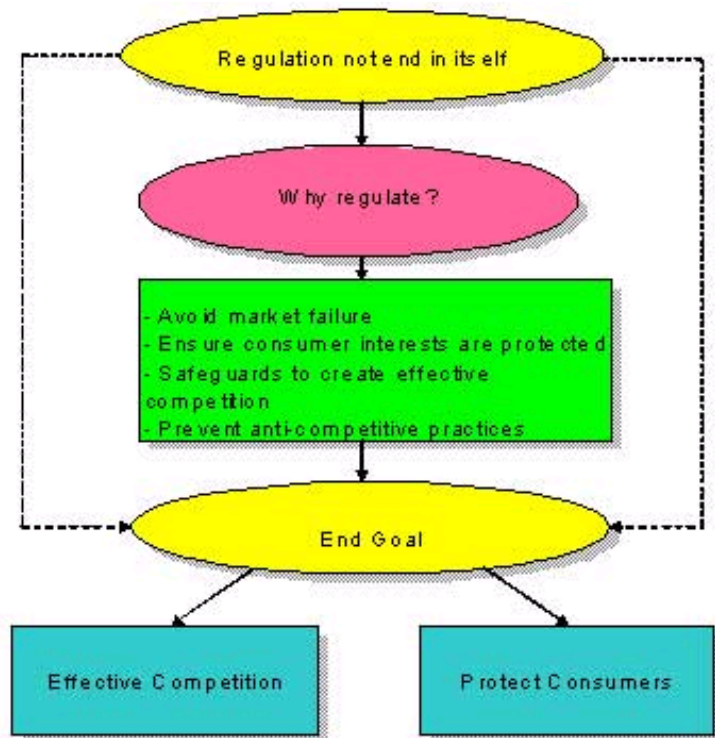


Source: Telecommunications Management Group, Inc.

As noted in Figure 5-B below, regulation is not an end in itself. Rather it is the vehicle to attain, and subsequently sustain, widespread access, effective competition and consumer protection. The liberalization and introduction of competition in the market requires strategic policies and regulations that establish an effective regulator (as discussed in Chapter 5), remove explicit barriers to entry (e.g., the inability to interconnect with the incumbent operator), and dismantle implicit barriers (such as the potential influence of the incumbent telecommunications operator over the regulator). As such, regulatory reform must include measures aimed at:

1. creating independent entities to oversee the introduction of competition in the market and establish regulatory mechanisms for issues such as interconnection, licensing, and tariff rebalancing,
2. preparing the incumbent operator to face competition, including timetables setting deadlines for the termination of market exclusivities,
3. allocating and managing scarce resources such as numbers and spectrum resources in a non-discriminatory way within the liberalized market,
4. expanding and enhancing access to telecommunications and ICT networks and services, and
5. promoting and protecting consumer interests, including universal service and privacy.

Figure 5-B: Goals of Regulation



Source: Telecommunications Management Group, Inc.

ENDNOTES

[1] International Telecommunication Union, *Trends in Telecommunication Reform: Effective Regulation*, 2002, at 21.

2.3 Regulation in a Fully Competitive Environment

In a fully competitive environment, there is a more limited need for regulation. However, regulatory authorities still have a critical role to play, particularly given the dynamic role of the sector and the unsettled issues that new technologies may introduce into the regulatory environment. Moreover, in certain areas, regulators need to maintain a prominent role because market forces often fall short of creating the conditions necessary to satisfy public interest objectives such as universal access and service.

Universal service/access policies are generally directed at achieving objectives such as the promotion of economic productivity and growth; the promotion of political and social cohesion through the integration of isolated communities into mainstream society; the improvement of delivery of government services; and the elimination of economic and social disparities between the “information rich” and the “information poor.”[1] In certain areas of a country, however, significant upfront investments, high operating costs, and uncertain demand make the satisfaction of these objectives unjustifiable on commercial grounds. Thus, government initiatives directed at providing telecommunications access and services to generally remote, unserved areas may need to be adopted. In such cases, regulators should narrowly define and identify the areas and services that will benefit from government subsidies or incentive programs so as to avoid closing the door to private investments in areas where market forces alone do not provide an incentive to offer services in such areas.[2]

Similarly, despite the increased reliance on market forces in the telecommunication sector regulatory agencies must ensure that spectrum use is properly managed and allocated. This role cannot be left solely to market forces, since the introduction of new technologies may be limited by interference, inefficient spectrum use, or lack of access to spectrum (e.g. , introduction of digital television, discussed more fully in Chapter 4).

Despite the benefits of new technologies, regulators also must be attentive and responsive to the regulatory issues that arise from the implementation of these new technologies and their related services. For example, in today's environment, regulators are grappling with how to address issues such as spam and consumer concerns regarding privacy, which were not issues of concern to regulators ten years ago. In addition, while new technologies often offer consumers greater choices at lower prices, regulators have a responsibility to ensure that consumers are aware of the potential limitations that may exist with these lower-price offerings (e.g. , emergency services may not available through such services; services offered may be of a lower quality of service). Moreover, as these new services gain prominence regulators also will need to consider whether they should be subject to obligations imposed on other providers (e.g., universal

service).

ENDNOTES

[1] International Telecommunication Union, *Trends in Telecommunication Reform: Promoting Universal Access to ICTs*, 2003, at 30.

[2] Boutheina Guermazi and David Satola, *Creating the "Right" Enabling Environment for ICT*, Chapter 2 in *e-Development: From Excitement to Efficiency*, The World Bank (2005), at 13.

2.4 Benefits of Regulation

Effective regulation has proven to result in greater economic growth, increased investment, lower prices, better quality of service, higher penetration, and more rapid technological innovation in the sector.

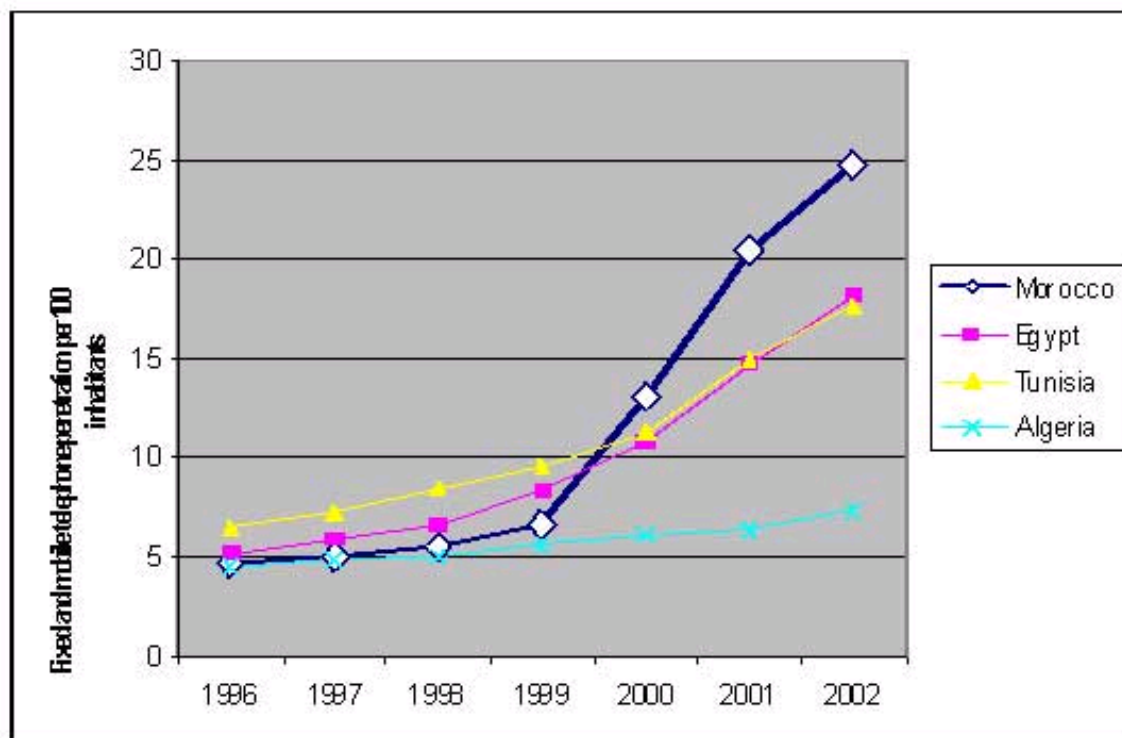
Increased Investment

Liberalization in the telecommunications sector has been greatly encouraged by World Trade Organization (WTO) commitments and obligations, particularly the WTO Reference Paper on regulatory principles.[1] Early evidence of the impact of liberalization under the WTO's Basic Telecommunication Agreement (BTA) in low income Sub-Saharan African countries shows that growth in telecommunications revenues as a percentage of GDP is higher in countries that have made GATS commitments in telecommunications.[2] Thus, investors are likely to be more willing to commit capital and technology in countries with WTO telecommunications commitments, as they are likely to be rewarded with higher revenues. Uganda, for example, reformed its telecommunications sector and enjoyed healthy revenue growth, while Ethiopia, which had not reformed, experienced much lower revenue growth.[3]

Morocco understood how important effective regulation was to attract foreign investment to developing economies as it began laying the groundwork for privatization and liberalization of its telecommunication market in the late 1990s. It passed the Post Office and Telecommunication Act [*Loi sur la poste et les télécommunications*] (August 1997) and created the National Agency of Telecommunications Regulation (Agence Nationale de Réglementation des Télécommunications, ANRT) in February 1998.

Because the Moroccan Government designed its vision for the market, including liberalization, in a clear and transparent way, this inspired investor confidence, which was reflected in the country's auction of a second mobile digital cellular licence in 1999. The winner, Medi Telecom (a joint venture of Spain's Telefonica and Portugal Telecom along with local investors) paid USD 1.1 billion for a 15 year license. This was the largest investment ever in Morocco and one of the highest prices ever paid for a mobile licence (in relation to the population).⁶ From being the country with the second lowest telephone penetration in the North Africa region, Morocco became the country with the highest (Figure 5-C). The number of mobile subscribers grew from 375,000 in 1999 to over 9 million by year-end 2004. While just over 1% of the population had a mobile phone in 1999, this had risen to almost one third by 2004.

Figure 5-C: Telephone Penetration in Morocco

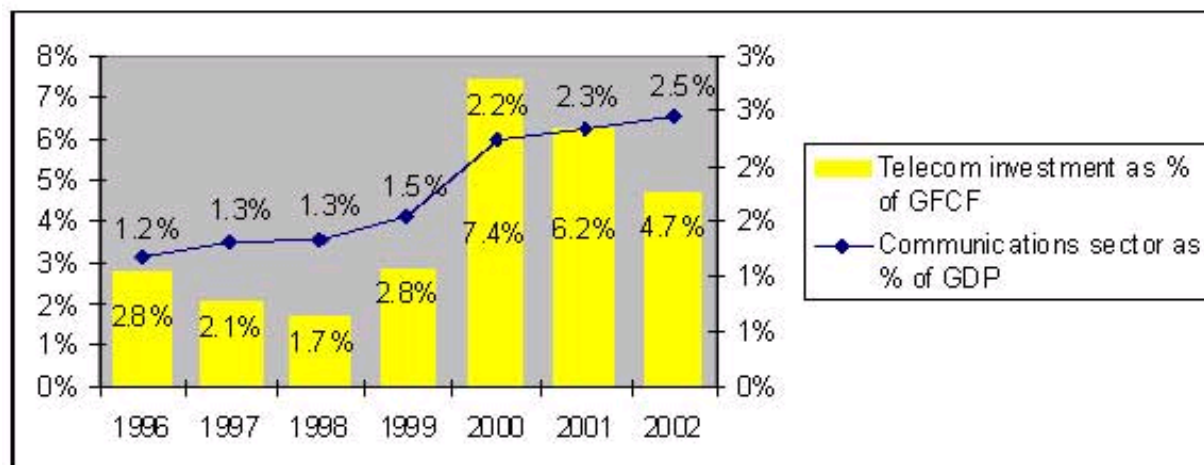


Source: Telecommunications Management Group, Inc.

In December 2000, the incumbent operator, Maroc Télécom, was partially privatized through the sale of 35% of its equity to Vivendi Universal, a French conglomerate. The privatization was regarded as one of the most successful ever in a developing country, generating MAD 23 billion (USD 2.3 billion).⁷

Morocco's success clearly illustrates how effective regulation of the sector can trigger dramatic increases in ICT development. Since the creation of the regulator, telecommunications investment has risen dramatically and the share of the sector in the national economy has doubled (Figure 5-D).

Figure 5-D: Growth of Telecommunications Investment and National Economy in Morocco



Note: GFCF = Gross Fixed Capital Formation. GDP = Gross Domestic Product.

Source: Adapted from ANRT, Direction de la Statistique.

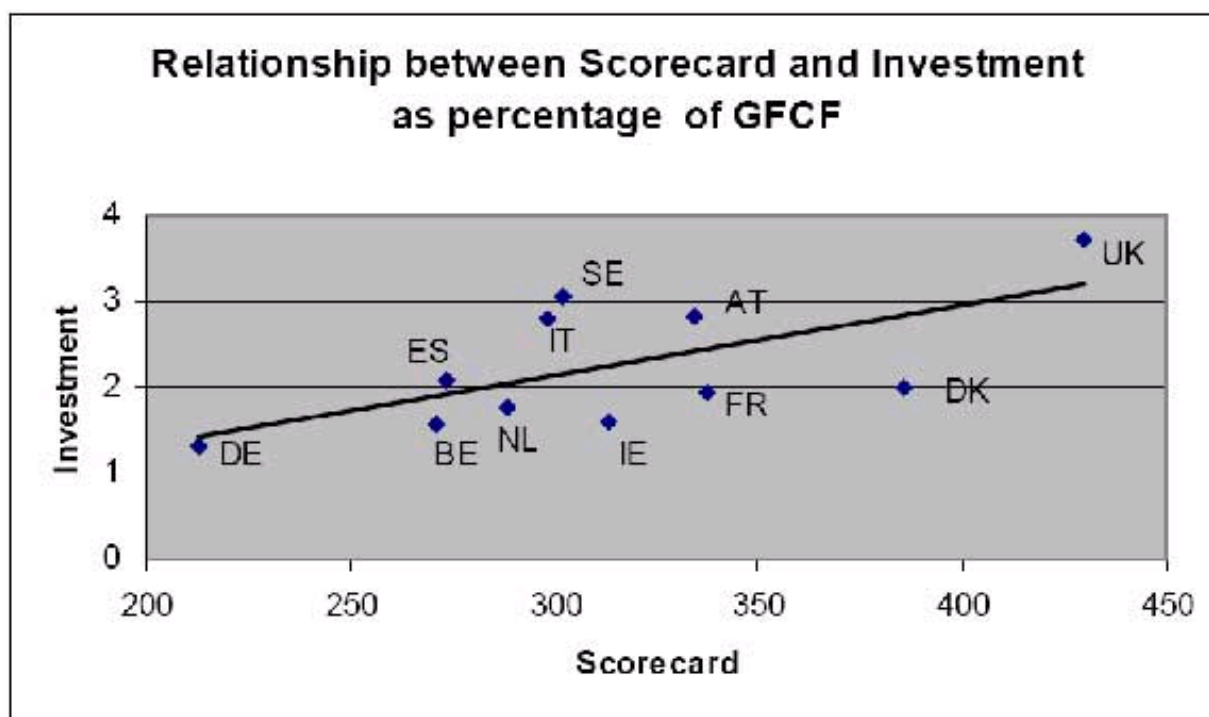
Investors consider the regulatory environment to be a critical factor in their analysis of whether or not to invest in a country. They often have a set of regulatory conditions that must be present for them to consider an investment in a particular country. A report ⁴ presented at the ITU's 2002 Global Symposium for Regulators summarizes several key findings from the private sector on this issue:

- Regulatory issues are a key factor in market entry and expansion decisions;

- Interactions between regulators and operators are most challenging during times of transition;
- Companies look at the overall regulatory environment – not just specific regulations. Transparency and responsiveness are important factors in the willingness of companies to enter and stay in markets;
- Companies employ a variety of ways to ensure that regulatory information is factored into business planning and decision-making.

As noted by the European Competitive Telecommunications Association (ECTA), a link exists between good regulation and the amount of investment attracted into a country. ECTA has designed a “scorecard” to assess regulation in the European Union. It compared the results of the scorecard to investment in the ICT sector and found that “...effective regulation continues to have a strong and positive impact on the level of investment in telecommunications networks and services.”⁵ Countries that rank high in the scorecard tend to have higher levels of telecommunications investment in relation to total investment in the economy (Figure 5-E).

Figure 5-E: Relationship between ECTA Scorecard and Investment



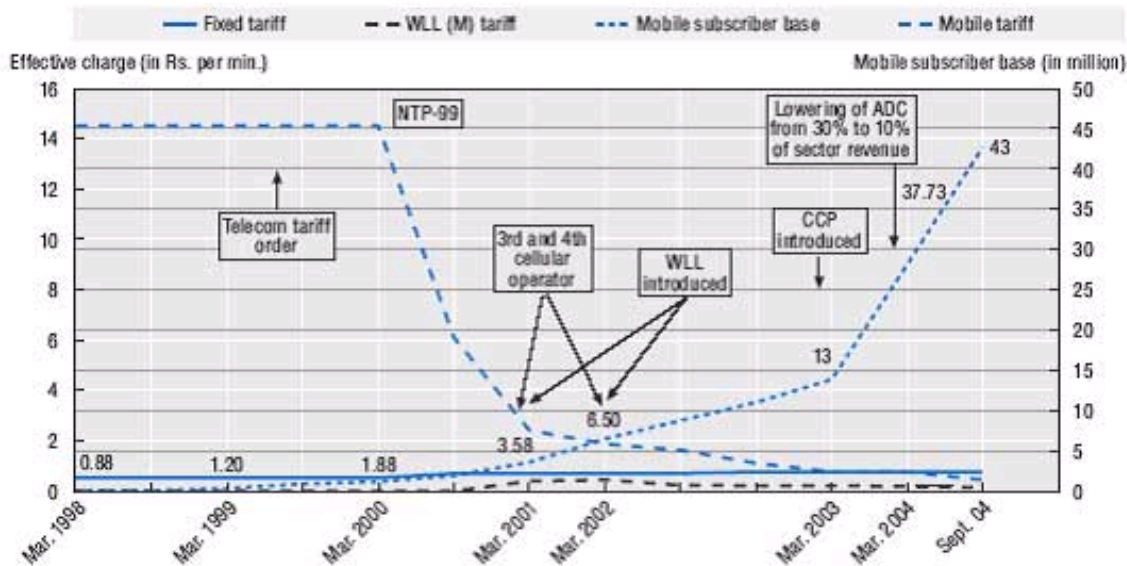
Note: Investment refers to telecommunications investment as a percentage of Gross Fixed Capital Formation (GFCF, the total amount of investment in the economy). The dots show the situation of the European Union with each country represented by its two letter country code. The Scorecard is an assessment of various regulatory functions.

Source: ECTA, “Regulatory Scorecard”.

Economic Growth and Consumer Benefits

Developing economies in Asia have made significant strides towards pro-competitive regulation and in return have achieved considerable progress in bridging the digital divide. One such country is India, where the Telecom Regulatory Authority of India (TRAI) has made a comprehensive reform of the regulatory framework to promote technological neutrality and take advantage of inter-modal competition.⁸ Competition was enhanced by issuing additional mobile licenses in 2001 and 2002 and awarding wireless local loop (WLL) licenses in 2002. Another relevant measure taken by TRAI was to move from a receiving-party-pays (RPP) to a calling-party-pays (CPP) structure in an effort to spur mobile take-up. The results of these policies have brought economic growth to the sector and produced a marked increase in mobile subscribers and a fall in mobile tariffs (see Figure 5-F). By contrast, the failure to adopt such measures, along with other factors such as delay in the introduction of a sufficiently pro-competitive interconnection regime between fixed and mobile services, has been identified as one of the causes that slowed investment and customer growth in the mobile market in Sri Lanka.⁹

Figure 5-F: The impact of India's Regulatory Reforms on Mobile Penetration and Price¹⁰



Source: Telecom Regulatory Authority of India.

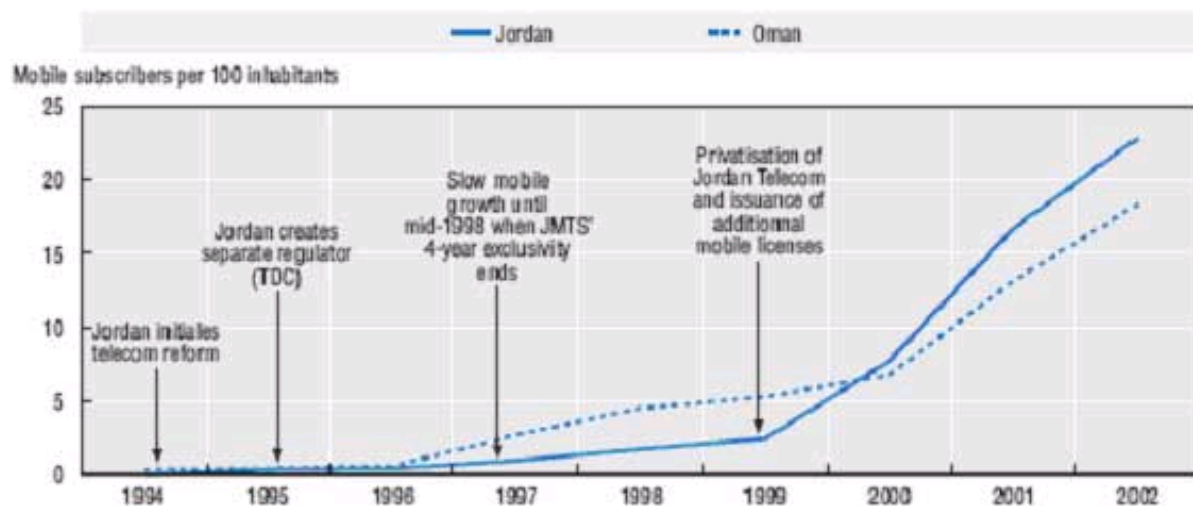
StatLink: <http://dx.doi.org/10.1787/635224378618>

Source : Boutheina Guermazi and David Satola, "Creating the "Right" Enabling Environment for ICT," in Chapter 2 of "e-Development: From Excitement to Efficiency", The World Bank, 2005, citing to the Telecom Regulatory Authority of India.

Growth of New Services

Competitive mobile markets typically show higher penetration rates than those that have not been liberalized. Jordan and Oman are good examples. Jordan's GDP per capita in 2003 was roughly USD 1800, less than one fourth of Oman's GDP per capita of USD 8000. However, Jordan's mobile penetration rate of 22.9 in 2002 was higher than Oman at 18.3 (see Figure 5-G). Much of Jordan's success in the mobile market can be attributed to the regulatory reforms started in 1994. Jordan lagged behind Oman in mobile penetration until competition was introduced into the mobile market in 1999. Oman's mobile growth has still been considerable, given the mobile operator's monopoly position. However, the liberalized market in Jordan eclipses Oman's growth, despite differences in income levels between the two.¹¹

Figure 5-G: Mobile growth in Jordan and Oman



Source: ITU Telecommunication Regulatory Database.

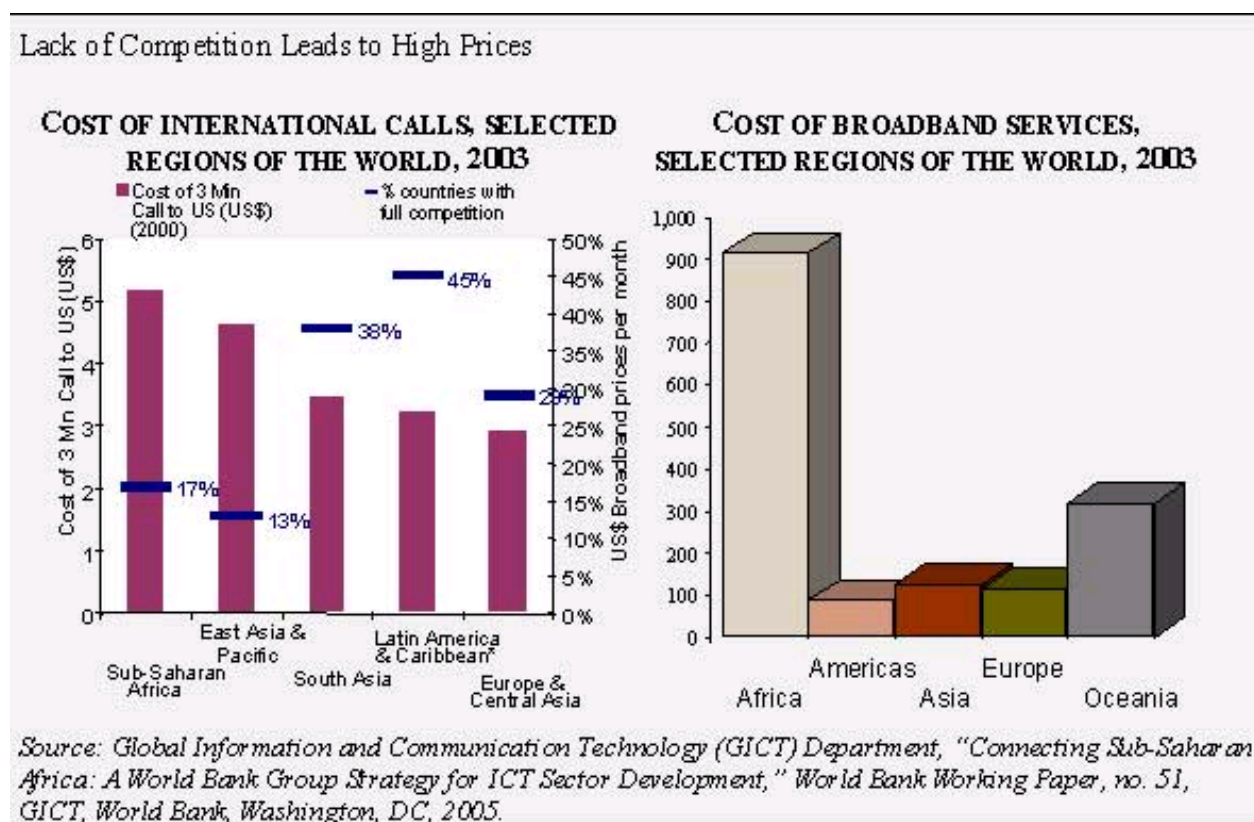
StatLink: <http://dx.doi.org/10.1787/147473851644>

Lower Prices for Consumers

Lower prices for international telephone calls, for example, are also highly correlated with the level of competition. In Africa, one of the regions of the world where competition in long-distance telephony is lowest, prices for both international telephone calls and broadband services are much higher than in other regions of the world (see Figure 5-H).¹² Regulators must often intervene to remedy shortcomings in competition and ensure that competition is working effectively, which sometimes includes imposing some form of regulation, such as

regulation on interconnection charges to force incumbent operators to charge competitive operators wholesale cost-oriented rates and eliminating restrictions on resale to allow entry of multiple operators and greater competition.

Figure 5-H: Lack of Competition Leads to High Prices



Liberalized markets in the same region and at similar income levels typically have penetration rates higher than those with non-liberalized markets. For example, the Latin American countries of Belize and Brazil have similar income levels but fixed-line penetrations vary considerably. In Belize, the incumbent operator maintains a monopoly on fixed-line provision and the penetration rate is low at only 11.3 lines per 100 inhabitants. In Brazil, the fixed-line market is considered fully competitive and the penetration rate is more than double that of Belize, at 24.1 subscribers per 100 inhabitants.

As demonstrated in Chapter 3, regulation is impacted by a variety of factors, including legal traditions, multilateral and regional commitments, other legislation and the nature of the marketplace. Thus, while the design of the regulatory framework may vary, certain critical elements should be included in an effective regulatory framework. These features, discussed in Chapters 5, 6, and 7, relate to elements for effective regulation, aspects to consider when designing the regulatory framework, functional aspects of the regulatory authority, and decision-making, accountability, consumer protection, dispute resolution and enforcement powers. Consideration and proper implementation of these features are the formula for success and will facilitate the benefits to consumers, the market, and the economy that have been achieved in many countries that have undergone regulatory reform.

ENDNOTES

[1] *Id.* at 7-8.

[2] Boutheina Guermazi and David Satola, *Creating the "Right" Enabling Environment for ICT*, at 9, citing to Harris Wiltshire & Grannis LLP, *Telecommunications Trade Liberalization and the WTO*, Final Report for the GICT Department, World Bank, 2004.

[3] *Id.* at 8.

[4] Compass Rose International, *Report to the International Telecommunications Union Global Symposium for Regulators 2002 – Feedback to Regulators from the Private Sector*, ITU, November 2003.

[5] European Competitive Telecommunications Association, *Report on the relative effectiveness of the regulatory frameworks for electronic communications*, 2005, available at http://www.spcnetwork.co.uk/cgi-bin/publisher/search.cgi?dir=news&template=news.html&output_number=1&ID_option=1&ID=927-3106-35601

[6] <http://rru.worldbank.org/Documents/PublicPolicyJournal/199welle.pdf>.

[7] ITU Effective Regulation Case Study: Morocco (2001), at 12.

[8] TRAI has been in the process of moving towards a unified licensing regime that would replace separate licensing based on technology, service or geographic area. Licensees would be able to provide any service including: telephony, Internet access, broadband, television and other value-added services.

[9] See Rohan Samarajiva, Anupama Dokeniya, Sabina Fernando, Shan Manikkalingam and Amal Sanderatne, *Regulation and Investment: Sri Lanka Case Study*, World Dialogue on Regulation of Network Economies (WDR), Stimulating Investment in Network Development: Roles of Regulators, WDR Research Cycle 2, 2005 at 154.

[10] OECD, Regulatory Reform as a Tool for Bridging the Digital Divide, Fig. 13, at 19.

[11] OECD, Communications Outlook 2005, at 306.

[12] Boutheina Guermazi and David Satola, *Creating the "Right" Enabling Environment for ICT*, at 6.

3 Legal Context of Regulatory Reform

The development of an effective regulatory framework for the ICT sector requires the establishment of a comprehensive set of laws, rules, and regulations that clearly identifies the contractual obligations and property rights of governments and stakeholders. The structure of this framework is determined, in part, by the legal and constitutional system of each country. Additionally, this Chapter discusses the other factors that impact the legal context of regulatory reform, including international and regional commitments, telecommunications-related legislation, and competition policy.

3.1 Impact of Different Legal Traditions on the Regulatory Framework

Regulation does not occur in a vacuum, and the establishment of a legal and regulatory framework is determined in large part by a country's specific legal tradition.

3.1.1 Snapshot of Different Legal Traditions

The conception of law and legal system differs depending on the country and is often rooted in perceptions based on customs, culture, religion, and politics.[1] For example, in certain countries, law is viewed as a "model code of behaviour," while in others it is considered an "instrument of compulsion." [2] Today, we have numerous classes of legal systems: civil, common, socialist, Islamic, Hindu, and African, to name a few. Among these, the most prominent in modern times are common law and civil law legal traditions. The map on Figure 3-A shows some of the predominant legal systems around the world.

It is difficult to point to one country that has a pure legal tradition without influence from other systems. For historical reasons, as well as political and economic influences, the legal systems of countries are often an amalgamation of various legal systems, incorporating elements of different legal traditions. For example, many countries in the Middle East and Africa have legal systems based on a mixture of legal traditions. Algeria has a mixed legal system (*i.e.*, socialist, French civil law, and Islamic law) whereas Cameroon has a civil law system, with elements of common law. Moreover, sometimes two countries may have different legal systems, but may have similar elements in their legal frameworks; for example, both may have the same type of government structure (*e.g.*, federal republic versus unitary state). [3] This occurs in countries such as Brazil, the United States, and Germany, where there is a distinction between federal law and state law, as opposed to countries that follow a unitary state model, such as China, France, and United Kingdom. [4]

Figure 3-A: Legal Traditions within the World



Source: Université

d'Ottawa [University of Ottawa] Faculty of Law, <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php>

Note that this map only includes Civil law, Common law, Customary law, Muslim law, and Mixed law systems. Other legal systems such as the African legal system and the Socialist Legal System are not depicted in this map.

ENDNOTES

[1] International Encyclopedia of Comparative Law, Vol. II, The Legal Systems of the World Their Comparison and Unification, Chapter 2, Structure and Divisions of the Law, René David, Chief Ed. , p. 2-2 [hereinafter Comparative Law Encyclopedia].

[2] Comparative Law Encyclopedia, 2-2.

[3] A federal republic is a state which is both a federation and a republic. A federation is a state composed of a number of self-governing regions (often themselves referred to as 'states') united by a central, federal government. In a federation, unlike in a unitary state, the self-governing status of autonomous regions is constitutionally entrenched and cannot be revoked by a unilateral decision of the central government. A unitary state is a state or country that is governed constitutionally as one single unit, with one constitutionally created legislature. The political power of government in such states may well be transferred to lower levels, to regionally or locally elected assemblies, governors and mayors, but the central government retains the principal right to recall such delegated power.

[4] Comparative Law Encyclopedia, 2-7.

3.1.2 Regulatory Frameworks in Different Legal Systems

The last two decades years has resulted in dramatic changes in the telecommunications regulatory frameworks of many countries as a result of market liberalization. Some degree of regulatory reform has been implemented in most countries, including the establishment of independent regulators in 131 countries by 2005.[1] As a result of these changes, regulatory models have been developed incorporating internationally recognized best practices, despite the countries having different legal traditions. In implementing these models, the legal tradition has influenced the procedure and approach towards the achievement of the policy and regulatory goals that support such best practices, but has not necessarily determined the content of the telecommunications regulatory framework.[2]

Similarly, the process of globalization and world trade has played a significant role in shaping the content of a country's regulatory framework. As further discussed in Section 3.3, countries seeking to attract investment in their telecommunications sectors, strengthen their economies and engage in bilateral and multilateral trade integration, are often required to fulfil several regulatory preconditions aimed at the removal of market barriers. For example, the World Trade Organization (WTO) Reference Paper, which articulates the principles of a telecommunications regulatory framework, has been adopted by close to 90 countries throughout the world. (See [Table 3-1](#) for examples of countries with different legal traditions that have committed to the WTO Reference Paper.) This Reference Paper requires countries to establish an independent regulator, as well as incorporate fundamental tenets into their telecommunications regulatory framework regarding interconnection, universal service, competitive safeguards, licensing criteria, and allocation and use of scarce resources.

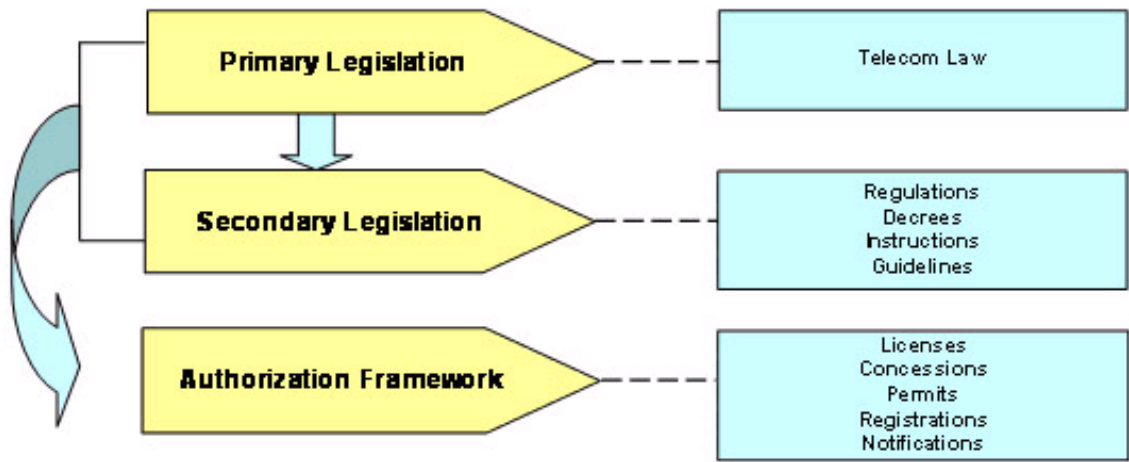
[1] See <http://www.itu.int/ITU-D/treg/profiles/SepRegAuth.asp>.

[2] Introduction to comparative legal cultures: the civil law and the common law on evidence and judgment (oral presentation of the book by Antoine Garapon & Ioannis Papadopoulos, *Jugar en Amerique et en France: Culture judiciaire française et common law*, Ioannis Papadopoulos Université Paris 1 Pantheon-Sorbonne, Cornell Law School Working Paper Serie, (2004) Paper 15.

3.1.3 Implementation of Regulatory Design

The design of legal instruments used to regulate the telecommunications sector may vary depending on the legal tradition of a country. Generally, however, the legal framework follows a hierarchy beginning with primary legislation, such as laws and decrees from which secondary legislation such as regulations, resolutions and guidelines follow (see Figure 3-B). This legislation, in turn, provides the legal basis for the regulator or the relevant ministry to issue authorization instruments such as licences, concessions, and permits to operators. This legal hierarchy provides certainty and predictability to consumers and other stakeholders because it specifies the rights and obligations (*i.e.*, the rules of the game) that apply to the sector. Such hierarchy provides assurances to stakeholders that secondary legislation (*e.g.*, rules, decrees and instructions) cannot be used by the government to nullify certain rights and obligations set forth in primary legislation. This stable environment, in turn, encourages investment and increases consumer confidence in the sector.

Figure 3-B: Hierarchy of Regulatory Frameworks



Primary Legislation

The primary legislation for the sector should consist of the framework that will be used to regulate the sector. To the extent possible, this should be issued through a legal instrument not susceptible to easy revocation by a government authority in order to ensure stability and predictability. It should lay out the basic elements and framework, such as the establishment of the regulator, the powers and responsibilities of the regulator, the role of the minister responsible for communications (if applicable), enforcement powers and ability to sanction. While the primary legislation should address fundamental regulatory issues such as universal service and interconnection, the details of such issues are better addressed through secondary legislation. When looking at primary legislation in both civil and common law traditions, many of the same elements are included, as noted in [Table 3-2](#).

In countries with civil law traditions, however, subject areas covered by the principle of legal reserve (*i.e.*, subject matters that have been constitutionally reserved to regulation by an instrument with the hierarchy of a law) also may need to be included within the text of primary legislation. Such subject areas typically encompass direct limitation of individual rights (*e.g.*, the right to free enterprise and property, or freedom of speech) as well as the regulation of prohibited conduct and applicable sanctions. Moreover, in civil law jurisdictions it is often the case that in order to regulate certain matters through secondary legislation, they must be referred to in the primary legislation. Further, the extent of specificity contained in the primary legislation from civil law jurisdictions is mixed. In certain countries, such as Bulgaria,[1] the primary legislation is quite comprehensive, including extensive details regarding the licensing framework, universal service, interconnection, consumer interests, fees, and sanctions; whereas, in countries such as Algeria,[2] the primary legislation address similar issues, but the provisions are much less detailed.

Secondary Legislation

The more detailed elements of regulatory issues may be addressed best in secondary legislation, which can be amended and modified more easily to complement the pace of technological development without the intervention of the legislature. Typical regulatory issues addressed through secondary legislation include interconnection, competitive safeguards, numbering, universal service, and tariffs.

Secondary legislation may take different forms (e.g., regulations, instructions, decrees, guidelines) and depending on the jurisdictions there may be a hierarchy with regard to the secondary legislation. For example, in Spain, regulations may only be issued by the minister, as the regulator only has authority to issue “instructions.” This challenges the independence of a regulator to establish its own policy because the ministry can always issue a regulation that modifies an “instruction” issued by the regulator.

Authorization Instruments

A variety of “authorization” instruments are used by governments to grant an entity the right to undertake certain activities in the telecommunications sector (e.g., provide telecommunications services, operate networks, and use spectrum). These instruments include concessions, franchises, delegations, licences, permits, and other forms of authorizations.[3] Typically, the general authorization framework is set forth in the primary legislation and further expanded upon and described in specific detail in secondary legislation.

Administrative acts and administrative contracts

In civil law jurisdictions, the “authorization” instrument often is either a unilateral administrative act or a bilateral administrative contract. A bilateral administrative contract when used as an “authorization” instrument generally is a concession, franchise, delegation or other type of agreement. However, not all contracts entered into with public entities are administrative contracts. In comparison to licences, concessions, franchises and delegations are more often in the form of an administrative contract than a unilateral administrative act. Typically, an administrative contract requires the consent of the parties to be amended. Thus, some investors find concessions (as well as franchises and delegations) to be a more attractive vehicle than a licence.

Usually, a telecommunications licence is a unilateral administrative act, rather than an administrative contract. Although different views exist as to whether an administrative act can be unilaterally amended or revoked, it is considered a more flexible instrument than an administrative contract.

In certain jurisdictions, such as Jordan, the “licensing” instrument consists of a licence and an administrative contract (*i.e.*, licensing agreement). Jordan’s Telecommunications Law provides that “the licence shall be issued by virtue of a resolution by the Board, provided that a contract of an administrative nature is drawn including the following terms and conditions in addition to any other conditions stipulated in this law, or the regulations issued pursuant thereto, or any exceptions determined by the Board: (...)”[4]

Shift away from concessions

While moving towards liberalization, some countries permitted the delivery of telecommunications services through the unilateral issuance of licences or concession contracts between the relevant government authority and the private party authorized to provide a particular service. As countries implement regulatory reforms, however, they are typically shifting away from concessions and moving to licences, permits, notifications and registrations which tend to be more straightforward and uniform. Moreover, in many countries, licensing instruments are much more streamlined, with the terms and conditions associated with the licence generally addressed in secondary legislation rather than the licence. From a regulator’s standpoint, this is a less cumbersome process because changes do not have to be introduced to each licence that has been issued, rather changes can be introduced by amending, or issuing new secondary legislation.

ENDNOTES

[1] Telecommunications Law of Bulgaria, Prom. SG. 88/7 Oct 2003, amend. SG. 19/1 Mar 2005, *available at* <http://www.crc.bg/v1/eng/index.htm>.

[2] Loi N° 2000-03 du 05 jourmada el oula 1421 correspondant au 05 août 2000: ixant les règles générales relatives à la Poste et aux Télécommunications, *available at* <http://www.arpt.dz/lois.htm>.

[3] Georges P. Racine, Fasken Martineau DuMoulin LLP (London), *A Review Of Key Issues Related To The Re-Licensing Of Telecom Networks And Services In Developing Countries*, One-Day Course on Re-Licensing (GICTD – World Bank), 30 March 2005, Washington, D.C.

[4] Telecommunications Law of 1995, Telecommunications Law No. 13 and its amendments, *available at* http://www.trc.gov.fo/index.php?option=com_content&task=view&id=3&Itemid=164&lang=english.

3.2 Impact of Multilateral and Regional Commitments

Significant developments have taken place on a global (e.g., WTO) and regional (e.g., EU) level to foster the trend of market liberalization and competition. As countries make global and regional commitments to open their telecommunications markets to foreign investment and harmonize local legislation with that of other countries in similar geographic or economic situations, such commitments may serve as a means to accelerate regulatory reform, facilitate global or regional best regulatory practices, and provide telecommunications investors with a level of certainty and predictability. A list of countries that established independent regulators after undertaking WTO and other regional commitments can be found at the [ITU ICT Eye](#). In addition, such multilateral and regional frameworks also serve to establish government accountability in ensuring a certain level of transparency and market-oriented regulation.

The extent and consequences of such commitments vary by country and generally have less to do with a country's legal system, and more to do with a country's political and economic situation and the level of development and competition in its telecommunications market.

3.2.1 Role of the World Trade Organization

Created in 1994 as a result of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO) is a global international trade organization that develops international commerce rules and mediates trade disputes among its members. The WTO brings together 148 members¹ that participate in negotiations and binding commitments concerning the promotion of competition and the liberalization of international trade of goods and services.

General Agreement on Trade in Services

Concluded in 1997 under the auspices of the WTO, the Fourth Protocol to the General Agreement on Trade in Services (GATS) represents one of the major steps towards liberalization of the global telecommunications marketplace and the establishment of liberalization.² The purpose of GATS is to facilitate liberalization of trade in services. Two types of obligations exist under GATS: (i) general obligations that apply to all members and all service sectors covered under GATS regardless of whether or not specific commitments have been made; and (ii) sector-specific commitments regarding market access and national treatment for sectors and activities that members agree to open to international trade. Under the general obligations, there are two main principles: (i) WTO member countries must afford each other most favored nation (MFN) treatment (*i.e.*, prohibition on discrimination that requires countries to afford "treatment no less favourable than that accorded to like services and service suppliers of any other country");³ and (ii) countries must ensure transparency of local regulations (*e.g.*, countries should publish measures of general application, and allow a period of public comment prior to their issuance). Sector-specific commitments are made regarding market access,⁴ national treatment⁵ and other additional commitments.⁶ WTO members make commitments on market access and national treatment based on one of the following four modes of supply: (i) cross border supply;⁷ (ii) consumption abroad;⁸ (iii) commercial presence;⁹ and (iv) presence of natural persons.¹⁰ Studies show that since 1997, countries that made GATS commitments have experienced faster levels of fixed-line penetration, mobile subscribership, and telecommunications sector revenues.¹¹ In particular, low-income Sub-Saharan Africa countries that have scheduled commitments out-performed those that did not (see Figure 3-B).¹²

Figure 3-B: Development/Economic Impact of WTO

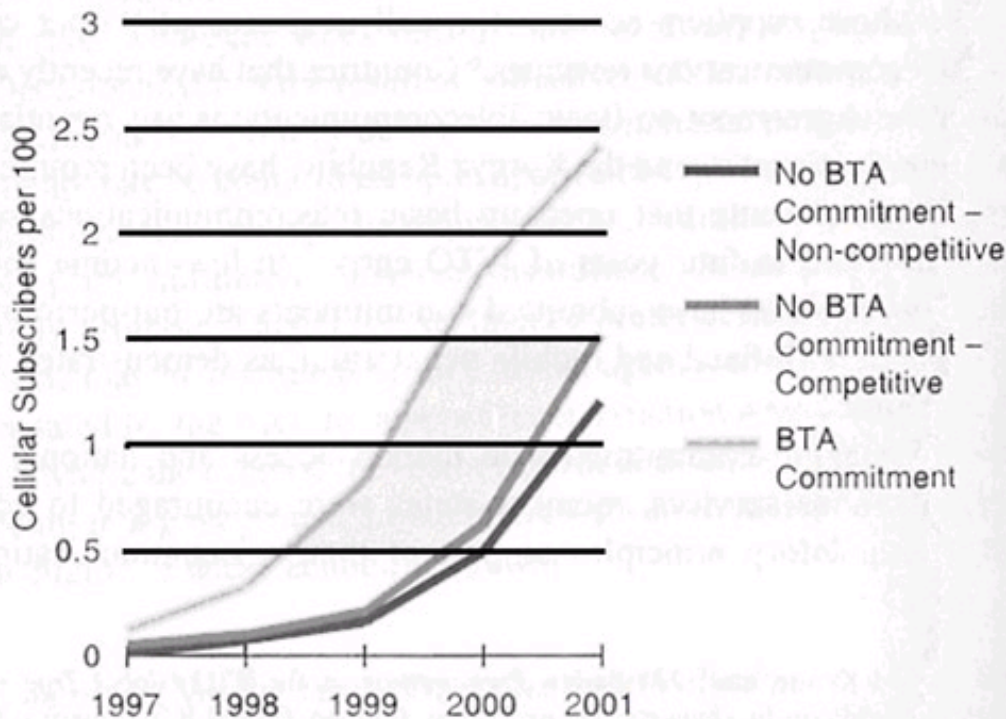


Figure 14.2 Low-income countries in Sub-Saharan Africa

Basic Telecommunications Agreement

The series of telecommunications commitments that make up a portion of the GATS are referred to as the WTO Basic Telecommunications

Agreement (BTA).¹³ (See Box 3-1.) The BTA established the basis for structural reform of the telecommunications sector aimed at removing barriers to entry and competition, and the adoption by the majority of members of certain pro-competitive regulatory principles that are set out in the “Reference Paper on Regulatory Principles.”¹⁴ These telecommunications commitments apply to basic telecommunications and certain value-added services, but not to audiovisual services. To date, 105 of the 148 WTO members have made commitments under the BTA. Ninety-eight WTO members have made specific commitments on basic telecommunications and 89 members with respect to value-added telecommunications services.¹⁵

Box 3-1: Communications Sector under GATS

Definitions/Coverage:

Telecommunications services (covered under the BTA):

- *basic telecommunications services* are public and private telecommunications services that involve end-to-end transmission of customer supplier information. These include voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, and private leased circuit services.
- *value added-services* are services for which suppliers enhance the form or content of the customer's information, thereby “adding value” to the customer's information, and include electronic mail, voice mail, on-line information and data base retrieval, Electronic Data Interchange (EDI), enhanced/value-added facsimile services, including store and forward, and store and retrieve, code and protocol conversion, on-line information and/or data processing (including transaction processing), and other services.

Audiovisual services involve the dissemination of content, including motion picture and video tape production and distribution services, motion picture projection services, radio and television services, radio and television transmission services, and sound recording.

Key Documents:

- a. GATS (general obligations and Fourth Protocol);
- b. GATS Annex on Telecommunications;
- c. Schedules of specific commitments and exemptions (country-specific); and
- d. Reference Paper.

The purpose of GATS is not to regulate competition, but to ensure that members that have made commitments do not establish regulations that would hinder the international trade of services.

WTO membership does not entail automatic submission to the BTA as countries must expressly make commitments through their respective schedule of commitments. These schedules may contain modifications or derogations from the overall text. Members are free to include in their schedules the sectors and activities that will be covered under the commitments. Commitments are made by identifying a particular subsector in the respective schedule and therefore only the services listed in a schedule are open to international trade, subject to any limitations or conditions set forth in the applicable schedule. As a result, if a sector or activity does not appear listed in a schedule it means that a commitment has not been made regarding that sector or activity, and it is not open to international trade.¹⁶

Countries can make BTA commitments as part of their accession to the WTO, as part of a formal round of negotiations (e.g., the Doha round of negotiations launched in November 2001), or unilaterally. As a result of the MFN treatment imposed under GATS, a telecommunications commitment made by a WTO member benefits all members regardless of whether or not such other members have made commitments. GATS rules also apply to the provision of services by monopoly service providers, to the extent the provider has been granted special or exclusive rights to provide the service under monopoly (i.e., the rules do not apply to *de facto* monopolies).¹⁷

Telecommunications services and audiovisual services appear as different subsector classifications under the main “Communications” sector heading of the GATS Services Sector Classification List.¹⁸ While the structure of these schedules is the same, countries were given the flexibility of creating distinctions or sub-divisions within the telecommunications sector heading (i.e., local, long distance and international; wire and radio-based; public or non-public; and resale or facilities-based services), making limitations on market access or national treatment, and in certain cases, adding technological conditions (e.g., for satellite access). As a result, the items and terms included under each classification vary among members, creating potential discrepancies in the manner in which countries classify different types of services.¹⁹

These commitments are important documents that establish international obligations undertaken by countries and are a clear reference for potential foreign investors on the countries' liberalization strategy. Countries may decide to gradually open their market to competition or to take a more aggressive approach. However, they must clearly specify in their commitments where and for how long they wish to restrict their commitments.

Ghana, for example, undertook commitments aimed at phasing in competition over a given period. More specifically, Ghana committed to:[20](#)

- Duopoly operators for the provision of local, domestic and international long distance services, and private leased circuit services for an exclusive five-year period, ending in 2002. Additional suppliers of local services can be licensed to supply underserved areas where duopoly operators have declined right of first refusal.
- Full competition in data transmission, Internet and Internet access (excluding voice) and teleconferencing.
- Mobile services (terrestrial and satellite-based) including mobile data services, fixed satellite services, paging and cellular with the reservation that cross-border voice services can only be supplied through commercial arrangements with the duopoly operators.
- The Reference Paper on regulatory principles.

However, Ghana stated in its commitments that the government would conduct a review of its policy after the duopoly period so as to determine whether to license additional telecommunications services suppliers.

This is different from Jordan's WTO commitment where the Government specified that no restrictions would exist after 1 January 2005. Jordan's commitments are based on a WTO Chairman's Note S/GBT/W/2/Rev.1 dated 16 January 1997. This Note foresees that unless otherwise noted in the sector column, any basic telecommunications service listed encompasses local, long distance, and international services for public and non- public use; that it may be provided on a facilities-basis or by resale; and that it may be provided through any means or technology (e.g., cable, wireless, or satellites).[21](#)

Jordan's commitments also indicate that it has removed market access limitations on spectrum availability pursuant to another WTO Chairman's Note S/GBT/W/3 dated 3 February 1997. This Note recognizes the right of all WTO members to exercise spectrum/frequency management that may affect the number of service suppliers provided this is done in accordance with the relevant provisions of GATS.

The effects of the BTA extend beyond the countries that have made commitments thereunder, with some countries, such as the United States, adopting parallel commitments under bilateral agreements beyond the scope of the WTO (see Box 3-2).

Box 3-2: Beyond the WTO - U.S. Harmonization Efforts

Given the slow progress of the Doha Round of negotiations and the uncertainty as to the treatment of certain converged services under the WTO classification framework, the United States has sought to fulfil certain of its trade objectives by means of such bilateral and regional trade agreements. As a result, numerous countries have adopted telecommunications commitments outside the scope of the WTO that are similar to, or which extend beyond, those under the BTA pursuant to these bilateral and regional free trade agreements.

In 2002, the U.S. Congress passed the Trade Promotion Authority Act allowing the executive branch to negotiate trade agreements where Congress can only vote to approve or reject the agreements, without making any modifications (this process is referred to as "fast-track authority").[22](#) Within this authority is the mandate for the United States Trade Representative (USTR) to ensure that the agreements concluded foresee and prevent trade barriers in digital services, including the trade of digital services and goods (the "digital trade agenda").[23](#) Under such fast-track authority and the USTR mandate, to date the United States has concluded eight free trade agreements (and is in the process of negotiating three other agreements, including the U.S.-Andean FTA with Peru, Ecuador and Colombia, and the U.S. SACU FTA, with five member countries of the Southern African Customs Union (SACU) -- Botswana, Lesotho, Namibia, South Africa and Swaziland) where countries have generally agreed to an open and competitive telecommunications market, and removing barriers to the trade of digital goods and services.[24](#) In broad terms, all trade commitments under the FTAs (except for few carve-outs – e.g., Costa Rica, under the CAFTA), provide for: (i) reasonable and non-discriminatory access to the networks of the signatory parties; (ii) the right of telecommunications companies to interconnect with networks in the signatory countries at nondiscriminatory, cost-based rates; (iii) non-discriminatory access to facilities, such as telephone switches and submarine cable landing stations; (iv) the ability to lease elements of telecommunications networks on non-discriminatory terms and to resell such telecommunications services; (v) the recognition by each signatory of the importance of supplying services by electronic means as a vehicle to establish a vibrant e-commerce environment; (vi) non-discriminatory treatment of digital products; and (vii) the protection of intellectual property rights. To a large extent, these principles parallel those under the WTO's Reference Paper, but extend these obligations to digital services and goods that may not be covered under certain countries' WTO commitments.

The United States has also used the FTA as a means to further expand the scope of WTO commitments of certain countries or to achieve some of the same objectives sought under the WTO. For example, the recently approved U.S.-Central American Free Trade Agreement (CAFTA) is directed to promote trade liberalization between the United States and Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. Although some of the CAFTA countries are WTO members, they had not fully adopted the BTA or the WTO Information Technology Agreement.

However, in signing CAFTA these countries committed to a chapter on telecommunications services that incorporates many elements of the BTA and the Reference Paper. In addition, CAFTA, which was substantially modeled after the ten-year old North American Free Trade Agreement (NAFTA), also contains a relevant section directed to the liberalization of telecommunications among the signing parties. Thus, through CAFTA, Costa Rica, for the first time made a commitment to open its market to foreign competition in Internet services, private data networks, and wireless services. CAFTA also requires the Dominican Republic, Guatemala, Honduras and Nicaragua to join the WTO ITA so that U.S. high-tech exports enter their markets duty-free.²⁵

WTO Reference Paper

The Reference Paper, which consists of six principles that serve as a “checklist of ‘success’ of telecommunications reform in many countries,”²⁶ was conceived as a necessary instrument for the removal of regulatory barriers to market access, and its implementation is aimed at preventing anticompetitive practices by major suppliers.²⁷ Members may adopt the Reference Paper in whole or in part, and by doing so, they commit to maintain appropriate regulatory measures to ensure a competitive marketplace, as well as transparent and fair regulatory procedures. The six Reference Paper principles are:

1. *Competitive safeguards*: Members are required to establish competitive safeguards preventing major suppliers from engaging in anticompetitive conduct. The Reference Paper does not define competitive safeguards or anticompetitive practices; this is left for each member to determine in its national legislation. However, the Reference Paper lists certain examples of anticompetitive practices including: anticompetitive cross-subsidization; use of information obtained from competitors with anticompetitive results; and withholding technical data.
2. *Interconnection*: Major suppliers (*i.e.*, those with the ability to materially affect the terms of price and supply in the market by exploiting their control over “essential facilities” or their position in the market) of members are required to provide interconnection upon request, under non-discriminatory terms and conditions, and at cost-orientated rates that are transparent and feasible.
3. *Universal service*: Members have the right to define the kind of universal service obligation they wish to maintain, provided such obligations are not anticompetitive *per se*, and are administered in a transparent, non-discriminatory and competitively neutral manner. Universal service obligations may not create unnecessary burdens on service suppliers.
4. *Public availability of licensing criteria*: To the extent a licence is required, members should make publicly available: (i) the licensing criteria and the time it will take to decide on a licence application; and (ii) the terms and conditions of individual licences.
5. *Independent regulators*: Members should ensure that the regulatory authority is separate from, and not accountable to, any supplier of basic telecommunications services, and that their decisions are impartial with respect to market participants. This requirement seeks equal, transparent and objective treatment of all operators in the market.
6. *Allocation and use of scarce resources*: Allocation and use of scarce resources (*i.e.*, frequencies, numbers, and rights of way) should be carried out in an objective, timely, transparent and non-discriminatory manner, and the allocation of frequency bands should be made publicly available. Details of government-use frequencies do not have to be made publicly available.

To date, close to 90 countries have committed to adopting the Reference Paper.²⁸ The Reference Paper has been criticized for its general nature and the fact that it does not prescribe the manner in which these principles should be applied. However, it has provided countries with a baseline approach of what are considered the “minimum standards of international good practice.”²⁹ Moreover, it can be, and has already been, used as a vehicle to evaluate the appropriateness of existing measures or the lack thereof under the WTO’s dispute settlement mechanism (the decisions of which are binding upon WTO members). (See Section on “WTO Dispute Settlement Mechanism” below for a discussion on the U.S.-Mexico Panel Report.)

Annex on Telecommunications

Concluded at the Uruguay Round, the GATS Annex on Telecommunications recognizes that access to and use of public telecommunications networks are essential to the effective provision of services covered under GATS and requires WTO members to allow suppliers of scheduled services to use the “public telecommunications transport network and services” on reasonable and non-discriminatory terms.³⁰ This obligation extends to any kind of service sector for which a schedule has been made accepting specific market access and national treatment (*e.g.*, value-added services, banking services, legal services, and computer services) regardless of whether the particular country has liberalized its basic telecommunications sector. As a result, the Annex on Telecommunications does not deal with market access to basic telecommunications (as this is dealt with in each member’s schedule) and does not specifically require liberalization of telecommunications services; rather it deals with the ability of service suppliers to access such services.³¹ Such ability is limited by the right of the network owner to establish access and use conditions that address public service responsibilities, the protection of the technical integrity of the network or to deny use of the network for services not covered under any schedule of commitments.

Audiovisual Services

Also under the “Communications” sector list are audiovisual services (*i.e.*, motion picture and videotape production services, motion picture projection services, radio and television services, sound recording, and others). These services are not covered under the BTA, and the national laws of each country are used to interpret the services that fall under the audiovisual subsector (*e.g.*, for most WTO member

countries, satellite services fall under broadcasting/audiovisual activities, but under U.S. legislation these are considered telecommunications services).[32](#)

Audiovisual services are not as liberalized as telecommunications services and many countries maintain rules prohibiting foreign ownership of broadcasters and reception of foreign satellite television programming. Some countries expect to achieve greater liberalization of these services through the Doha Round of negotiations; however, there have been challenges in achieving a unified approach since a division exists between those countries with a strong interest to export audiovisual services and those whose cultural and/or economic objectives direct them to protect their domestic industries.

New Round of Services Negotiations

WTO members commit to progressively liberalize trade in services through periodical rounds of negotiations.[33](#) The Doha Round of negotiations launched in 2001 includes negotiation of telecommunications services and audiovisual services, and there have been proposals to: (i) update the listing of services; (ii) negotiate an e-commerce classification; (ii) enhance provisions on regulatory independence; and (iii) limit licensing and universal services fees. Negotiations (expected to conclude in 2005) are still underway and WTO members are expected to address the following issues:[34](#)

- (i) reduction of national treatment exemptions and increase of market access on basic telecommunications and value-added services, and negotiation on the coverage of new convergence services and technologies (*i.e.*, VoIP and broadband);
- (ii) increasing the number of countries that adhere to the Reference Paper;
- (iii) reclassification of basic telecommunications and value-added services; and
- (iv) recognizing the maturation of e-commerce related to market access for telecommunications-related services that also form the basis for e-businesses, as well as those that use networks for this purpose.

Regulatory Impact of WTO commitments

WTO commitments constitute legally binding obligations on members, enforceable through the WTO's binding dispute settlement process. As a result, the impact of WTO commitments on a country's regulatory framework can be seen through voluntary compliance of a member's commitments or as a result of enforcement through the WTO's dispute settlement mechanism.

Voluntary Compliance

WTO commitments may have a greater impact on developing countries than on developed countries. For many developed countries, adoption of the GATS principles was a reinstatement of pro-competitive liberalization policies that were already in place and compliance with GATS did not require substantial legislative reform. However, for many developing countries, liberalization of their telecommunications market required certain reforms to their telecommunications legislation and structure.

GATS seeks the establishment and enforcement of a framework without creating unnecessary barriers to trade.[35](#) It explicitly recognizes members' right to regulate the supply of services in order to meet national policy objectives, and therefore liberalization does not imply deregulation. One of the main objectives of GATS with respect to developing countries is to increase their participation through progressive liberalization, taking into account their development levels.[36](#) To achieve such liberalization and comply with GATS telecommunications commitments, many WTO members were required to modify their laws to reflect compliance with their international commitments (*e.g.*, implementing transparent regulatory structures and procedures, establishing an independent regulator; and removing market access barriers). While GATS does not require members to privatize the incumbent operators, many countries did engage in privatization and liberalization efforts as a means to introduce competition in the market. However, even when countries have adopted the legal and structural reforms necessary to comply with their WTO commitments, effective competition and adequate enforcement of a regulatory framework may sometimes be hindered by the size of the market and the country's lack of technical, financial, and human resources.

For example, Bangladesh has been WTO a member since its inception in 1995. Bangladesh did not expressly agree to adopt the Reference Paper, [37](#) but rather to review the creation of regulatory disciplines, including specific commitments to:[38](#)

- issue licences to two additional fixed-line operators;
- introduce full competition in voice and data transmission over closed user groups and Internet access services;
- grant licences to four mobile telephone service suppliers; and
- make no limitations on national treatment (subject to certain subsidies and tax benefits that may only be extended to national operators).

In 2001, Bangladesh approved the Telecommunications Act, establishing an independent regulator and setting the stage for telecommunications reform. Mobile licences were also issued to four companies, which has permitted growth and competition in the sector. Licences were also granted to fixed-line operators, but competition and growth in this market has been slower as a result of interconnection issues with the fixed incumbent telecommunications operator.[39](#) Bangladesh is expected to privatize the incumbent operator and remove additional barriers that still exist in the mobile services market (*i.e.*, restrictions on interconnection with the incumbent operator).[40](#)

Also illustrative of the impact of the WTO is Uganda. Although a founding WTO member, Uganda made GATS commitments on basic telecommunications unilaterally (*i.e.*, not as a part of formal negotiating rounds) and revised these commitments in 1999 as a result of the introduction of competition and privatization of the incumbent operator. In its schedule of specific commitments Uganda:

- agreed to adopt the Reference Paper;
- maintained the right of duopoly major licence holders and other pre-existing licence holders over international gateway services (including international roaming for mobile services) “according to the terms of those licences”; and
- agreed to grant licences to three mobile carriers.

Uganda began its telecommunications liberalization process in 1994 with the introduction of competition in the mobile sector where three operators currently compete. Liberalization of the fixed-line market began in 1997 when it awarded a second licence to a fixed-line operator, granting it “shared-exclusivity” with the incumbent telecommunications operator until 2005. In 1997, Uganda issued the Telecommunications Act establishing an independent regulatory body, as well as a neutral supervisory body for the settlement of telecommunications disputes.

Other countries that were not WTO founding members, but have acceded to the WTO post BTA, have been required to undertake significant market restructuring as part of their accession, including dismantling of their monopoly telecommunications operators. For example, Croatia and Georgia, which entered telecommunications commitments in 2000, were required to open their telecommunications market to competition by removing existing monopolies by 2003 and 2004, respectively.⁴¹ In 2001, Moldova also agreed to lift the existing monopoly by 2003.⁴²

WTO Dispute Settlement Mechanism - Effects of the DSB decision within Mexico

The impact of WTO commitments in the shaping of national legislation also can be seen in the context of the dispute settlement mechanism provided in GATS.⁴³ WTO Dispute Settlement Body (DSB) rulings are binding for the members upon which judgment has been passed, and are automatically adopted unless there is a consensus to the contrary.⁴⁴ In this sense, dispute settlement constitutes a coercive mechanism for enforcing members' WTO commitments in such cases where voluntary compliance is not forthcoming. Hence, such disputes may arise, for example, when one member takes, or omits to take, certain actions that another member state deems a breach of pre-existing WTO commitments. WTO rules exclude individual service providers from directly seeking relief, but the service provider may seek its country of origin government to put pressure on another country's government to comply with its GATS obligations, and ultimately activate the dispute settlement procedure.

To date, only one telecommunications case has been submitted to the DSB: a case involving trade of services between the United States and Mexico, which resulted in the Report of the Panel on Mexico's Measures Affecting Telecommunications Services (the Panel Report).⁴⁵ In 2000, after failed bilateral talks, the United States initiated a WTO consultation proceeding claiming Mexico's failure to comply with its commitments under the GATS Annex on Telecommunications and the Reference Paper with respect to basic and value-added services. Mexico's schedule of commitments (adherence to the Reference Paper, market access, and national treatment) required it to:

- ensure cost-orientated interconnection;
- prevent anticompetitive practices; and
- ensure that foreign service suppliers have access to Mexican public telecommunications networks.

The United States claimed that Mexico:

1. Failed to ensure that local operator, Telmex, provide interconnection to U.S. suppliers on cost-orientated, reasonable rates, terms and conditions (*i.e.*, inconsistency with interconnection principles under the Reference Paper).
2. Maintained legislation that failed to prevent anticompetitive practices by Telmex, allowing it to establish international interconnection rates on behalf of all of the suppliers in the market (*i.e.*, inconsistency with the competitive safeguards principles under the Reference Paper).
3. Failed to comply with the Annex on Telecommunications, as U.S. suppliers were unable to access Mexico's public telecommunications network for the provision of certain international services (*i.e.*, non-facilities based services through Mexican commercial agencies, “comercializadoras,” and international simple resale through cross-border leased circuits).

As a result of the failed consultation proceedings, in 2002, a Panel was constituted, concluding with the DSB Panel Report in June 2004 which found that Mexico had breached several of its WTO telecommunications obligations. As a result, the United States and Mexico agreed on an implementation timetable addressing the compliance issues laid out in the Panel Report. According to such compliance agreement, Mexico was required to:

1. Revise its International Long Distance Rules (the ILD Rules), eliminating those aspects of the existing ILD Rules that implemented the “uniform settlement rate” system, the “proportional return” system, and the requirement that the carrier with the greatest proportion of outgoing traffic to a country negotiate the settlement rate on behalf of all Mexican carriers for that country. All such practices were deemed by the Panel Report to be a breach of Section 1.1 of the Reference Paper.⁴⁶ Thus, the new ILD Rules had to allow the competitive commercial negotiation of international settlement rates.
2. Maintain regulations authorizing the issuance of permits for the resale of international long distance public switched telecommunications services. Such regulations would have to regulate commercial agencies (comercializadoras) established in Mexico and permit them to purchase and resell these telecommunications services through the use of capacity of concessionaires. The absence of such regulations was deemed by the Panel Report to be a breach of Article 5 (a) and (b) of the Annex on Telecommunications.

In light of this compliance schedule, Mexico has undertaken the following reforms:

1. New international long distance telecommunications rules⁴⁷ were approved providing for the competitive negotiation of settlement accounting rates or international interconnection rates, including prices for incoming and outgoing traffic.⁴⁸ In addition, foreign operators now are free to decide which Mexican operator they wish to use to terminate their traffic in Mexico.⁴⁹
2. With regards to the rules for licensing of “comercializadoras,” Mexico issued Regulations for the Resale of Long distance and International Long distance Telecommunications Services, allowing the commercial resale of long distance and international long distance services originating in Mexico. This regulation authorizes the issuance of licences for the resale of international long distance public switched telecommunications services.

Converged Services in the WTO Framework

Regulatory frameworks that are vertically structured around industries and more service-orientated, face greater challenges in adapting to and enabling convergence. While the WTO framework was an important step towards removing traditional barriers to trade and competition in the telecommunications market, its vertically segmented structure may lead to an un-harmonized approach towards convergence. As shown above, communications subsectors are technology oriented, and may not provide the flexibility necessary to accommodate new converged services.

A 1998 note by the WTO Secretariat highlighted that the GATS “classification of services [may be] inadequate [...] to meet the rapid changes of the sector [...] and any other list that might be devised could become quickly out of date.” Moreover, the lack of specificity regarding the scope and services under each commitment creates a degree of uncertainty about members’ commitments in connection with converged services. Moreover, WTO members have the flexibility to use their national legislation to interpret or define the category of services for which commitments have been made and therefore the treatment and liberalization of the same service may vary by country. The evolution of convergence has caused the vertical separation of services and industries to disappear, making the WTO’s service-based classification obsolete. This also leads to uncertainty regarding the commitments applicable to newly developed services, as such services may potentially fall outside of the scope of existing classification headings and therefore not be subject to any commitment.

ENDNOTES

¹ As of February 2005, the WTO was comprised of 148 members. The list of members and their respective dates of accession may be found at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

² Note that liberalization of value-added services had occurred during the Uruguay Round in 1994, but basic telecommunications services were not liberalized until 1997 with the Fourth Protocol to the GATS. This is because at the time of the Uruguay Round, most basic telecommunications services were provided by operators holding legal monopoly rights, whereas value-added services were considered less “fundamental to society” and member states were more willing to open these services to foreign trade. (See Nihoul, P.L.G., *Audiovisual and telecommunications services: a review of definitions under WTO law*, The WTO and Global Convergence in Telecommunications and Audiovisual Services (edited by Damien Geradin and David Luff), 2004, at 362).

³ Article II of the General Agreement of Trade in Services [hereinafter GATS]. This rule also extended to suppliers that have been granted rights to provide services on an exclusive basis (i.e., monopoly suppliers authorized by law, not de facto monopoly).

⁴ Article XVI, of GATS. Market access refers to the ability of foreign investors to provide services in a WTO member state and prohibits members from limiting the number of service suppliers in their domestic market.

⁵ Article XVII of GATS. The national treatment obligation implies that WTO members must treat domestic and foreign suppliers in the same manner – i.e., foreign services and service suppliers must be treated on terms that are no less favourable than a member state accords its domestic services and service suppliers.

⁶ Article XVIII of GATS.

⁷ Cross-border supply refers to the delivery of a service from the territory of the service supplier to that of the consumer (e.g., international long distance telephone calls).

⁸ Consumption abroad - refers to a consumer’s use of services outside of the consumer’s territory.

⁹ Commercial presence refers to the supply of services by the service supplier in a foreign market through the establishment of an enterprise in such market.

¹⁰ Presence of natural persons refers to the supply of services in a foreign market where the service supplier has an individual or employee in such foreign market.

¹¹ Analysys and Harris, Wiltshire & Grannis, *Telecommunications Trade Liberalization and the WTO*, Final Report for the World Bank, 2004, at 1 [hereinafter Analysys and Harris, Wiltshire & Grannis. *Telecommunications Trade Liberalization*].

¹² Ann Buckingham, Camilla Bustani, David Satola, and Tim Schwarz, *Telecommunications Reform in Developing Countries*, in *Telecommunications Law and Regulation* (Ian Walden and John Angel eds., 2005), at 591 and 592 (citing to the Bressie, K, M Kende, and H. Williams, *Participation in the WTO Global Trading System in Telecommunications is a Motor for Domestic Sector Reform*, (mimeo, Global ICT Department, the World Bank (2003)).

13 Note that there is no freestanding Basic Telecommunications Agreement, as the term is used to reference the schedule of specific commitments and Article II (MFN exemptions) initially submitted WTO members under the Fourth Protocol to the GATS. These commitments, originally concluded by 69 countries, accounting for more than 90% of global telecommunications revenues, entered into force on 5 February 1998. See Background Note by the Secretariat, Telecommunications Services, WTO, December 8, 1998, S/C/W/74. [hereinafter *WTO Secretariat Background Notes*].

14 GATS Fourth Protocol, the Reference Paper is available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

15 Analysys and Harris, Wiltshire & Grannis, *Telecommunications Trade Liberalization and the WTO*, Final Report for World Bank, 2004, at 6.

16 For a complete list of member states' commitments and exemptions, please refer to "Telecommunications Commitments and Exemptions" at http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm.

17 Article VIII:1 of GATS.

18 GATS Services Sectoral Classification List (MTN.GNS/W/120).

19 See WTO Secretariat Background Notes at p. 3 where the secretariat notes that "this breakdown does not necessarily reflect and does not need to correspond to any particular government's national practice with respect to classifying services as basic or value added" (e.g., in some countries, mobile telephony, paging or data transmission may be designated as value-added services).

20 GATS/SC/35/Suppl1, available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm.

21 Jordan's current commitments may be found in the document GATS/SC/128 dated 15 December 2000. *Id.*, at 26.

22 Trade Act of 2002, 19 U.S.C. §3801 (2000).

23 Wunsch-Vincent, Sacha, *The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*, Institute for International Economics (2003) at 8.

24 FTA with Singapore (January 15, 2003), Chile (January 1, 2004), Morocco (June 15, 2004), Bahrain (September 14, 2004), Australia (May 18, 2004), Bahrain (September 14, 2004), Central America, CAFTA (August 2, 2005). Negotiations are currently underway with the Colombia, Ecuador and Peru (the Andean FTA) and Panama.

25 See Final Text, CAFTA, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file498_3933.pdf.

26 Angus Henderson, Iain Gentle and Elise Ball, *WTO principles and telecommunications in developing nations: challenges and consequences of accession*, Telecommunications Policy 29 (2005), at 205-331, (citing recent initiatives by the World Bank and APEC-Tel to examine whether WTO principles represent best practices for certain countries in the developing world.)

27 At the time the Reference Paper was conceived, most basic telecommunications services were provided by legal monopolies or state-owned operators. The Reference Paper does not prohibit the existence of such monopolies or state-owned operators, rather it requires member states to ensure that such operators do not abuse of their dominant position to the detriment of competition in the marketplace.

28 WTO Services Database, response of 7 October 2005.

29 Ann Buckingham and Mark Williams, *Designing Regulatory Frameworks for Developing Countries*, in Telecommunications Law and Regulation (Ian Walden and John Angel eds., 2005), Section 15.2, at 645.

30 Article 5(a) of the Annex on Telecommunications.

31 Article 2cl(x) of the Annex on Telecommunications.

32 Nihoul, P.L.G., *Audiovisual and telecommunications services: a review of definitions under WTO law*, The WTO and Global Convergence in Telecommunications and Audiovisual Services (Damien Geradin and David Luff eds.), 2004, at 375.

33 Article XIX of GATS.

34 Analysys and Harris, Wiltshire & Grannis, *Telecommunications Trade Liberalization*, at 20.

35 See *GATS Training Module, Chapter 1, Basic Purpose and Concepts*, available at http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s2p1_e.htm.

36 Preamble to GATS, and Article XIX.

37 See *id.* Additional Commitments.

38 See Bangladesh Schedule of Specific Commitments. GATS/SC/8/Suppl.1.

39 Analysys, Harris, Wiltshire & Grannis, *Telecommunications Trade Liberalization*, at A-25.

[40](#) *Id.* at 20.

[41](#) Croatia's Schedule of Specific Commitment (GATS/SC/130); Georgia's Schedule of Specific Commitments (GATS/SC/129).

[42](#) Moldova's Schedule of Specific Commitments (GATS/SC/134).

[43](#) For a more detailed review of this dispute settlement mechanism see Section 7.4 of this handbook.

[44](#) Any country that has the intention to block a particular ruling has to persuade all other WTO members including its adversary in the case to share its view.

[45](#) The great majority of cases that arise are settled between the member countries *via* consultations.

[46](#) This provision establishes that: "Appropriate measures shall be maintained for the purpose of preventing suppliers who alone or together, are major suppliers from engaging in or continuing anti-competitive practices."

[47](#) See the resolution "Pursuant to Which the Federal Telecommunications Commission Issues International Telecommunications Rules" (Resolución Mediante la cual la Comisión Federal de Telecomunicaciones Expide las Reglas de Telecomunicaciones Internacionales), issued by Cofetel, and published in the Official Gazette of the Federation on 11 August 2004, effective as of 12 August 2004.

[48](#) Interestingly, however, Cofetel did not make reference to the WTO panel resolution and to its commitment with the United States to revise the ILD Rules as a factor that brought about the reform. Instead, it cited as one of Mexico's international commitments leading to the issuance of the IT Rules, ITU Recommendation D.140 (Accounting Rate Principles for International Telephone Services), pursuant to which the ITU recommended to its members, as one of the principles that should be applied when establishing or revising accounting rates for international telephone services, that "accounting rates for international telephone services should be cost-orientated and should take into account relevant cost trends."

[49](#) For further analysis, see Björn Wellenius, Juan Galarza, and Boutheina Guermazi, *Telecommunications and the WTO: The Case of Mexico*, World Bank, June 2005, at 12.

3.2.2 Regional Frameworks

Europe

i. Regional Framework

Beginning in the mid 1990s, the European Commission's Convergence Green Paper^{[1](#)} commenced the policy formulation debate on the regulatory implications of convergence. This process resulted in the 1999 Review^{[2](#)} that examined the existing regulatory framework for telecommunications, and presented a series of policy proposals for a comprehensive cross-border regulatory framework covering all transmission networks and services. As a result thereof, in 2002, the EC approved a new regulatory framework (NRF) consisting of a Framework Directive and four principal specific directives:

1. the directive on the authorization of electronic communications networks and services (Authorization Directive);
2. the directive on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive);
3. the directive on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); and
4. the directive concerning the processing of personal data and the protection of privacy in the telecommunications sector (Data Privacy Directive) (hereinafter the Specific Directives).^{[3](#)}

Also part of the NRF are the Commission Recommendation on Relevant Markets and the Commission Guidelines on Market Analysis which directs regulatory authorities to conduct market analysis of specific markets that may be susceptible to regulation.^{[4](#)}

Specifically, the NRF seeks to achieve "sustained effective competition without on-going regulatory intervention"^{[5](#)} by removing regulation where competition has been determined to be effective and refocusing regulation where it does not exist. The general goals of the NRF are to encourage competition in the electronic communications markets, to improve the functioning of the internal market, and to guarantee basic user interests that would not be guaranteed by market forces.

The NRF is intended to be technology neutral, leaving behind such concepts as voice telephony and the distinctions between fixed and mobile communications previously relied upon by the EU for its telecommunications liberalization process during the 1990s. This is a corollary of the lessons derived from convergence, as it has been recognized that rigid regulatory concepts cannot evolve at the same pace as that of technological changes. The Framework Directive stresses the need for the EU member states to ensure that national regulatory authorities make regulation technologically neutral, "that is to say that it neither imposes nor discriminates in favor of the use of a particular type of technology."^{[6](#)} It should be noted, however, that technological neutrality does not preclude member states from promoting specific services where this is deemed justified, (e.g., digital television as a means for increasing spectrum efficiency).

A relevant aspect of the NRF is that the EU has separated the regulation of transmission from the regulation of content. Therefore, content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, is excluded from the scope of the framework.⁷

ii. Regional Regulatory/Supervisory Body

There is no European-wide regulatory authority, but the NRF created the European Regulators Group (ERG),⁸ composed of the heads of the national regulatory authorities (NRAs) of the member states to ensure cooperation and coordination between such NRAs and the EC. One of the ERG's main duties is to achieve consistent applications of the provisions of the NRF throughout the EU.⁹ The ERG plays an active role in the implementation and harmonization of the NRF, through the issuance of non-binding recommendations and common positions that serve as NRF implementation guidelines, with the objective of achieving of regulatory harmonization.

For example, in 2004, the ERG in conjunction with the European Commission Services Directorate-General (DG) Information Society and DG Competition issued a Common Position on the Approach to Appropriate Remedies in the New Regulatory Remedies (the Common Position). The Common Position seeks a "consistent and harmonized approach to the application of remedies by NRAs" particularly where market failures hinder competition in the market.¹⁰ While this document is non-binding to the NRAs, it has been actively used as an implementation guide in the imposition of remedies where competition problems have been found to exist.

iii. Regional Harmonization Efforts

EC recently proposed the i2010 – European Information Society 2010, a strategic framework seeking to "build towards an integrated approach to information society and audiovisual media policies in the EU."¹¹ Specifically, the EC recognizes that to address digital convergence, EU rules on information society and media should be consistent, and as a result proposes the following general policies: "(i) completion of Single European Information Space which promotes an open and competitive single market for information society and media (ii) strengthening innovation and investment in ICT research to promote growth and more and better jobs; (ii) achieving an inclusive European Information Society that promotes growth and jobs in a manner that is consistent with sustainable development and that prioritizes better public services and quality of life."¹² The Single European Information Space seeks to accelerate the economic benefits of digital convergence through various measures, including a review of the electronic communications framework in 2006, modernizing EU rules on audiovisual services, and defining a new efficient spectrum management strategy in 2005.

All countries seeking accession to the European Union are required to align their legislation to the *acquis communautaire*, (i.e., the entire body of European laws, including treaties, regulations and directives passed by the European Union and decisions of the European Court of Justice). For many candidate countries with transitional economies, negotiating and adopting Chapter 19 of the *acquis* (the telecommunications and IT chapter) requires significant regulatory reform to accommodate the telecommunications *acquis*. Implementation of *acquis* required the establishment of an independent telecommunications regulatory authority and a "separation of policy and law making authorities from ownership interests." As such, candidates are required to:

- Adopt a national telecommunications policy for the development of the sector consistent with EC policy;
- Prepare market players for the pressure of competition expected when they join the EU;
- Prepare the telecommunications market through the transposition and implementation of EC legislation, in particular through price rebalancing;
- Ensure the objective enforcement of the regulatory framework through an adequately resourced and well-trained independent regulatory authority; and
- Address the communications needs of under-developed regions, especially the adoption of a universal service policy.¹³

Americas

MERCOSUR

i. Regional Framework

Mercado Común del Sur (Common Market of Southern Cone or MERCOSUR) created in 1995, is the economic block formed by Argentina, Brazil, Paraguay, and Uruguay, with Bolivia, Peru, and Chile as associate member states. The MERCOSUR treaty seeks commercial integration among member countries and in particular (i) the free movement of goods and services among the signatory countries; (ii) the coordination of macroeconomic policies in communications; and (iii) the harmonization of national legislation in the relevant areas to strengthen the integration process.¹⁴ MERCOSUR does not have a single body of telecommunications rules or directives. Instead, through its regional institutional process, decisions issued by the Common Market Council¹⁵ on relevant commercial matters governed under the MERCOSUR treaty are later adopted into the national legislation of the member states.

ii. Regional Regulator/Supervisory Body

The Common Market Group of MERCOSUR established Working Subgroup 1 (SGT1), which is responsible for the negotiation of communication related matters under the treaty (i.e., postal services, broadcasting, radio communications, and public telecommunications services). The Common Market Group issued a negotiating directive for SGT1 instructing it to identify adequate steps for harmonization and consolidation of rules and practices in telecommunications.¹⁶ The areas subject to review by SGT1 included:

- Ongoing identification of spectrum bands that could be subject to harmonization;
- Compilation and consolidation of laws and telecommunications rates of each member state;
- Advance mobile telecommunications services;
- Use of numbering resources within MERCOSUR;
- Convergence of telecommunications networks and services;
- Definition of the structure of common public telecommunications services to be provided in MERCOSUR;
- Establishment of interconnection criteria of the public networks of the member states; and
- The regulatory harmonization of converged services.

SGT1 is responsible for issuing regulatory recommendations to the Common Market Council on matters regarding postal services, radiocommunications, broadcasting, and public telecommunications services. SGT1 is comprised of four commissions, each one responsible for one of these four sectors of communications. These commissions hold joint meetings to discuss overlapping matters, propose ways of harmonizing legislation where their industries converge and remove legislation that hinders the integration of member states. SGT1 issues recommendations that must be ratified by the Common Market Council, and once ratified, member states must adopt the necessary measures to incorporate them into their national legislation.¹⁷ SGT1 has also issued general guidelines followed by the regulatory agencies of the member states with the objective of harmonizing administrative procedures and establishing common approaches on international forums.

iii. Regional Harmonization Efforts

Since its inception in 1995, SGT1 has issued several recommendations that have been incorporated into the national legislation of the member states. These include:

- The provision of basic public telephone services in the bordering areas of MERCOSUR;
- The adoption of common bands for paging and trunking services;
- Manuals and procedures for frequency coordination for radiocommunications and broadcasting services;¹⁸
- Adoption of a Unified Code of Emergency Services within MERCOSUR;¹⁹
- Regulatory framework for FM radio broadcasting;
- Harmonization of new technologies;²⁰ and
- General rules for international roaming within MERCOSUR.

Other private efforts include the signing of a multilateral agreement, SINTONIA, among Brazil's EMBRATEL, Uruguay's ANATEL, Argentina's TELINTAR and Chile's CTC-Mundo, aimed at serving multinational business customers that operate in the MERCOSUR region in order to ensure integrated, homogenous services throughout the region. This agreement has been further expanded to include Bolivia-based Entel, Paraguay-based Antelco, and Telefónica del Perú in Peru.

OECS

i. Regional Framework

In 1981, Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines formed the treaty-based Organisation of Eastern Caribbean States (OECS).²¹ The OECS seeks to promote economic integration and cooperation among its member states, maximizing the benefits of their geographical position to facilitate their collective integration with the global economy. The OECS recognizes telecommunications as an essential tool for economic diversification and five countries (the Commonwealth of Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines) developed a Telecommunications Reform Project in an effort to seek ways of introducing competition in the sector.²² A review of the sector concluded that the high costs of access to telecommunications services and the lack of physical infrastructure and trained personnel in the sector were factors affecting the development of the telecommunications industry. The OECS governments also recognized the inadequacy of their telecommunications regulatory framework and the need to create regulatory frameworks favourable for development and investment in accordance with the WTO BTA. As a result, the five participating countries agreed to adopt a harmonized regulatory framework and a competitive regulatory authority.

ii. Regional Regulator – ECTEL

On May 4, 2000, the Commonwealth of Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines (the Contracting States) signed a treaty establishing the Eastern Caribbean Telecommunications Authority (ECTEL) a regional advisory body to promote market liberalization and competition in their telecommunications industry.²³ ECTEL's main objectives include promoting market liberalization and competition in the telecommunications sector of the Contracting States and establishing a harmonized regional regulatory regime. ECTEL is headed by a Council of Ministers, including the minister responsible for telecommunications in each of the Contracting States.

ECTEL's functions include:²⁴

- Coordinating with and advising the Contracting States on telecommunications matters to meet the objectives of the ECTEL Treaty;

- Issuing recommendations to the Contracting States on a harmonized regional radio spectrum plan;
- Preparing and recommending the adoption by the Contracting States of harmonized regulation including application forms and other forms in respect of licences, frequency authorizations and tender documents; and
- Designing and conducting open tender procedures for individual licences as requested by Contracting States.

iii. Harmonization Efforts

At the recommendation of ECTEL, each Contracting State adopted harmonized telecommunications legislation and regulations liberalizing the industry and introducing competition.²⁵ Each Contracting State also established establishment of National Telecommunications Regulatory Commissions (NTRCs), with the responsibility of formulating national telecommunications policy, and ensuring efficient, economic and harmonized development telecommunications and broadcasting services in each Contracting State. To date, each Contracting State has adopted harmonized telecommunications regulations dealing with equipment and public networks, interconnection, private network licensing, licensing and authorizations, spectrum management, numbering, tariffs, confidentiality in network and services, and fees.

The new regulatory frameworks required all telecommunications licences to be issued on a non-exclusive basis, resulting in the termination of the monopoly service provider's (Cable & Wireless) exclusive rights in the Contracting States. As a result, in 2001, the Contracting States entered into an agreement with Cable & Wireless establishing the terms for a joint collaboration and a gradual transition to full competition.²⁶

Africa

i. Regional Framework – ECOWAS

The Economic Community of West African States (ECOWAS) is among the various regional economic communities in Africa that have been proactive in creating initiatives to foster cooperation and integration of their telecommunications and information technology activities. As opposed to other African regional initiatives, such as the Southern African Development Community (SADC) the ECOWAS Treaty foresees the harmonization of legislation, including in the telecommunications field, similar to the EU model.

ECOWAS, founded in 1975, is a regional organization of West African States (Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo). Its main objective is to form a unified economic zone in West Africa through economic integration and shared development in various industries, including telecommunications.²⁷ In the area of telecommunications, the ECOWAS treaty seeks to establish "common transport and communications policies, laws and regulations."²⁸ The treaty further requires member states to:

- Develop, modernize, coordinate and standardize their national telecommunications networks in order to provide reliable interconnection among member states;
- Complete, with dispatch, the section of the pan-African telecommunications network situated in West Africa;
- Coordinate their efforts with regard to the operation and maintenance of the West African portion of the pan-African telecommunications network and in the mobilization of national and international financial resources;" and encourages member states to seek private sector participation so as to achieve these objectives.²⁹

In addition, the Council of Ministers³⁰ of ECOWAS has determined that the following items are priorities for the region:³¹

- Harmonization of regulatory frameworks and institutions.
- The evolution of a regional regulatory framework - the ECOWAS ICT Task Force has been established to harmonize ICT policies of member countries.
- Fostering competition.
- Building a robust Regional Backbone Infrastructure capable of supporting seamless cross-border connectivity.
- Reducing costs associated with rights of way through the installation of optical fibre cable on power lines to carry electricity supply between countries that have electricity.
- Granting operating licences on a priority basis to private investors that are interested in entering the markets in the region.

ii. Regional Regulatory/Supervisory Body

In 2002, ECOWAS was responsible for the creation of the West African Telecommunications Regulatory Association (WATRA), the main objective of which is to coordinate dialogue regarding telecommunications and regulation in the West African region. WATRA is an association of regulators and the respective government ministries of West African Territories responsible for telecommunications matters.³²

WATRA is intended as a vehicle to foster continued development of information communications technology (ICT) within the subregion, and decisions and directives issued by the Conference of Regulators are binding on all national regulators. In this respect, WATRA encourages the establishment of consistent standards throughout the region to facilitate the deployment of interoperable ICT systems and services. The

members expect WATRA to “become a leading forum for regulators in the region to exchange ideas and formulate plans regarding regulatory and technical issues that will accelerate development of infrastructure across the region.”³³

Given the limited resources available for the development of regulatory frameworks that promote ICT sector development, WATRA may provide countries with a source of information (e.g., best practices and regulatory modeling) and support in the development of appropriate regulatory structures.

In September 2005, WATRA took on the leading role in approving the ECOWAS telecommunications guidelines on key regulatory issues at an Ordinary General Meeting in Accra.³⁴ These guidelines will be the basis for ECOWAS Telecommunications Directives that are expected to be adopted by ECOWAS Ministers in early 2006. These efforts are a first in Africa and will set an example for other subregions in Africa and around the world.

iii. Harmonization

ECOWAS has undertaken a Telecommunications Regulation Harmonization Project³⁵ aimed at designing a strategy for the harmonization of telecommunications policies in ECOWAS. To date, each ECOWAS country, with the exception of one, has commenced liberalization of the telecommunications sector and has separated postal and telecommunications operation from regulation. In addition, 11 ECOWAS countries³⁶ have established telecommunications regulatory authorities.³⁷

As ECOWAS progresses in its harmonization efforts, some of the challenges it may face include harmonization of existing national ICT policies (e.g., regional spectrum and licensing); evolving common principles for interconnection and universal access; safeguarding the interests of citizens (e.g., control of content); and using ICTs to reduce distance barriers among communities.³⁸ See Box 3-3 for a description of other African regional harmonization initiatives.

Box 3-3: Other African Regional Initiatives

Economic community: South African Development Community (SADC)

Member states: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe.

Related Telecommunications Association: Communications Regulators Association of Southern Africa (CRASA)³⁹

Harmonization Efforts: SADC is among the most advanced regional economic communities with respect to telecommunications liberalization and ICT issues. TRASA has advocated establishment of independent regulators, and is proactive in attracting foreign investment in telecommunications infrastructure development. It advocates the introduction of operators to compete with the incumbent telecommunications operator and the corporatization of the public operator.⁴⁰ TRASA also has established model ICT policies, legislation document, and regulatory guidelines for the SADC countries.

Economic community: West African Economic and Monetary Unit (UEMOA)

Member states: Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo.

Related telecommunications association: None

Harmonization efforts: UEMOA is currently working on directives aimed at the harmonization of telecommunications laws of the member countries. Given that all its members are also members of ECOWAS, UEMOA has actively participated in ECOWAS and WATRA workshops on the ECOWAS guidelines and aims to harmonize its directives with ECOWAS.

Economic community: Common Market for Eastern and Southern African (COMESA)

Member states: Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

Related telecommunications association: Association of Regulators of Information and Communication in Central and Eastern Africa (ARICEA)

Harmonization efforts: Through ARICEA, COMESA has been very proactive in member state capacity building. It has initiated programs to harmonize ICT policies and attract foreign investment to the region, and drafted model ICT policies, licensing rules, and frameworks. It also has established an agenda to stimulate regulatory harmonization.

Economic community: Central African Economic and Monetary Community (CEMAC) and Economic Community of Central African States (CEEAC)

CEMAC Member states: Cameroon, the Central African Republic, Chad, Democratic Republic of the Congo, Equatorial Guinea and Gabon.

CEEAC Member States: Angola, Burundi, Cameroun, Chad, Central African Republic, Gabon, Republic of Congo, Democratic Republic of the Congo, Equatorial Guinea, Rwanda, São Tomé and Príncipe

Related telecommunications association: Central African Telecommunication Regulators Association (ARTAC)

Harmonization efforts: Working towards the promotion of economic integration among Central African states.

Asia

ASEAN

Over the past decade, creating an effective framework to promote growth in the telecommunications industry has been a top priority for the Association of Southeast Asian Nations (ASEAN), an intergovernmental organization comprised of the Governments of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. ASEAN has several committees, meetings, and working groups⁴¹ focused on promoting liberalization and harmonization of the ICT industry⁴² and it has developed several ambitious proposals (e.g., the development of a seamless telecommunications network and a uniform regulatory framework among ASEAN countries). However, these proposals have yet to yield concrete results, largely due to the lack of binding authority of ASEAN's decisions on its member countries.⁴³

ASEAN countries also have signed several framework agreements and declarations vowing to open their markets to competition and work together towards the enhancement of their ICT sectors.⁴⁴ As of September 2003, ASEAN continued to develop the e-commerce legal infrastructure to promote trust and consumer confidence. At the time, four member states (Brunei, Indonesia, Malaysia, and Vietnam) indicated their readiness to implement the first phase of the ASEAN Telecommunications Regulators Council Mutual Recognition Arrangements (ATRC MRA) in 2003. Bilateral MRAs were carried out between Brunei and Singapore and between Indonesia and Singapore.⁴⁵

In 2004, the ATRC agreed to develop non-binding regulatory models on best practices in “(i) competition and management and interconnection; (ii) convergence and new services; and (iii) cooperation on capacity-building.” The purpose of these models is to serve as guidelines for ASEAN regulators to develop new legislation and regulatory practices to establish their respective systems and processes. Such regulatory frameworks have not yet been developed.

A 2004 study conducted on the “Liberalization and Harmonization of the ASEAN Telecommunications” indicates that all ASEAN member countries are in different stages of market liberalization (i.e., either fully liberalized, substantially liberalized, in transition or in the first stages of policy change).⁴⁶ The study found that a framework for reform was needed, consisting of three stages: (i) establishing the foundations for a regulatory regime; (ii) fostering network development through the introduction of competition; and (iii) full liberalization.

A second study focused on the objectives identified by the ASEAN Telecommunications Regulatory Council (i.e., interconnection and competition management; convergence and licensing of new service; and confronting the digital divide). The study recognized that work still needs to be done in these areas and that the first priority is the establishment of a “robust regulatory framework,” that will ensure effective regulation and an “independent regulator capable of dealing with sector-specific issues of market dominance.”⁴⁷

ENDNOTES

¹ Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and its Implications for Regulation, COM (97) 623 (3 December 1997).

² Towards a New Framework for Electronic Communications Infrastructure and Associated Services – The 1999 Communications Review, COM (1999) 539 (10 November 1999).

³ Framework Directive (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002, on a common regulatory framework for electronic communications networks and services, [hereinafter the *Framework Directive*]. Sector specific-regulation has been reduced from more than twenty directives to five. Available at: <http://www.euroblind.org/fichiersGB/com200221.htm>, supplemented by other directives: See also (i) Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 (*Authorization Directive*) (ii), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 (*Access Directive*) (iii), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 (*Universal Service Directive*) (iv), Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (*Data Privacy Directive*). [hereinafter the *NRF*], available at <http://www.euroblind.org/fichiersGB/com200221.htm>].

⁴ Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante

regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on common regulatory framework for electronic communication networks and services (2003/311/EC), dated 11 February 2003 (Commission Recommendation on Relevant Markets); and, *Commission Guidelines on market analysis and the assessment of significant market power under Community regulatory framework for electronic communications network and services* (2002/C 165/03), dated 11 July 2002 (Commission Guidelines on Market Analysis).

⁵ Viviane Reding, Member of the EC responsible for Information Society and Media. "The Review of the Regulatory Framework for e-Communications," SPEECH/05/515, 1st Meeting of the Centre for European Policy Studies Taskforce on Electronic Communications, Brussels, 15 September 2005, at 1.

⁶ Framework Directive, note 3, at 3.

⁷ The content of television programs is covered by Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities 1989 OJ L 298. Directive as amended by Directive 97/36/EC of 30 July 1997, OJ L 202.

⁸ ERG was created by the *Commission Decision establishing the European Regulators Group for Electronic Communications Networks and Services*, (2002/627/EC) dated on 29 July 2002 as amended by the *Commission Decision amending Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services* (2004/641/EC) dated on September 14, 2004.

⁹ *Commission Decision*: 2002/627/EC of 29 July 2002, as amended by *Commission Decision* 2004/3445/EC of 14 September 2004. The other committees include: (i) Communications Committee; (ii) Radio Spectrum Committee; and (iii) Radio Spectrum Policy Group.

¹⁰ *ERG Common Position on the approach to appropriate remedies in the New Regulatory Framework* ERG(03)30rev1, 1 April 2004, available at http://www.erg.eu.int/doc/whatsnew/erg_0330rev1_remedies_common_position.pdf.

¹¹ Commission of the European Communities, *Communication From the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – 'i2010 – A European Information Society for growth and employment*, COM(2005), 1 June 2005, at 3.

¹² *Id.*

¹³ See *Enlargement of the European Union, Guide to the Negotiations*, Chapter by Chapter, at 63.

¹⁴ Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 1991. <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp>. [hereinafter the MERCOSUR Treaty].

¹⁵ MERCOSUR's institutional structure is comprised of various commissions, boards and secretariats. The Common Market Council is the principal body within MERCOSUR and it is integrated by the Ministers of Foreign Affairs and the Ministers of Economy of the member countries. It is responsible for enforcing the MERCOSUR Treaty and issuing decisions that are binding on the member states. A second body within MERCOSUR, the Common Market Group, operates as the executive branch of MERCOSUR and oversees compliance with the Treaty and its protocols. In order to fulfil its duties, the Common Market Board may create Working Subgroups that specialize in the different subject matters under the treaty (See Article 9 of the Treaty).

¹⁶ Pautas Negociadoras del SGT No. 1 "Comunicaciones," MERCOSUR/GMC/Res. No. 61/01; available at <http://www.cnc.gov.ar/internacionales/mercosur/Pautas.asp>.

¹⁷ Art. 40 of the Protocol of Ouro Preto, December 17, 1994. This is an additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR. This protocol recognizes MERCOSUR as an international juridical person with responsibility to negotiate agreements with third party countries or other regional blocks. Article 40 of the Protocol establishes a procedure for each the adoption by member states of norms issued by MERCOSUR, available at http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp.

¹⁸ Resolution issued by the Common Market Group of MERCOSUR, Res. GMC 17/94.

¹⁹ Resolution issued by the Common Market Group of MERCOSUR, Res. GMC 18/02.

²⁰ Resolution issued by the Common Market Group of MERCOSUR, Res. GMC 24/94.

²¹ Treaty Establishing the Organisation of Eastern Caribbean States (the Treaty of Basseterre), June 18th 1981. Anguilla and the British Virgin Islands are associate members of the OECS.

²² See http://www.oecs.org/proj_telecoms.htm.

²³ Treaty Establishing the Eastern Caribbean Telecommunications Authority, May 4, 2000, available at http://www.nttc.vc/regulations/ECTEL_Treaty.pdf.

²⁴ See <http://www.ectel.info/ectelnew/aboutdoc/function%20and%20powers.pdf>.

²⁵ The telecommunications laws and regulations of each Contracting State may be found at <http://www.ectel.info/ectelnew/ntrcs.html>.

26 Available at <http://www.ectel.int/about/Agreement.pdf>.

27 <http://www.ecowas.info/ecoint.htm> (See Introduction section).

28 Treaty of the Economic Community of West African States, May 28, 1975, as amended, at Article 32.1(a) [hereinafter *ECOWAS Treaty*].

29 Article 33.2 of the ECOWAS Treaty.

30 The supreme institution within ECOWAS is the Authority of Heads of State and Government of Member States (the "Authority"), composed of Heads of State and/or Government of Member States. It is responsible for the general direction and control of the community and adopts measures aimed at the progressive development of the community. The Council of Ministers, comprised of the minister in charge of ECOWAS Affairs and any other minister of each member state, is responsible for the ongoing functions of the community. The Council of Ministers issues recommendations to the Authority on actions aimed at achieving the community's objectives, issues directives on matters concerning coordination and harmonization of economic integration policies, and performs any other tasks authorized by the Authority. See <http://www.ecowas.int/>.

31 Sofie Maddens, *Support to the Establishment of an Integrated ICT Market in West Africa*, ITU-EU West Africa Common Market Project, Report 2: Licensing Report, August-October 2004.

32 www.watra.org.

33 Sofie Maddens, *Support to the Establishment of an Integrated ICT Market in West Africa*, ITU-EU West Africa Common Market Project, Report 2: Licensing Report, August-October 2004.

34 For full text see http://www.itu.int/newsroom/press_releases/2005/12.html.

35 This project is a joint European Union-ITU project aimed at assisting ECOWAS countries in harmonizing legislation in the sector, and consists of assistance in harmonization of legislation and policy and of capacity building assistance to ECOWAS countries. See http://www.itu.int/ITU-D/treg/projects/itu-ec/Ghana/modules/Compil-Guidelines_final.pdf for the full text of the guidelines.

36 Although Benin has established an interim Directorate within the Ministry Direction de la Politique des Postes et Télécommunications, it cannot be considered an independent and autonomous regulator.

37 Sofie Maddens, *Support to the Establishment of an Integrated ICT Market in West Africa*, ITU-EU West Africa Common Market Project, Report 2: Licensing Report, August-October 2004.

38 *Id.*

39 <http://www.crasa.org/>.

40 Hodge, James, University of Cape Town, *WTO Telecommunications Negotiations: How Should SADC Countries Respond*, SATRN, January 2003.

41 ASEAN Telecommunication Ministers Meeting (TELMIN), ASEAN Telecommunication Regulators' Council (ARTC), ASEAN Telecommunication Senior Officials Meeting (TELSOM), Working group on ASEAN Information Infrastructure, Working group on Capacity Building Programmes, Working group on Universal Access and Digital Divide, Working group on Intra ASEAN Trade and Investment, Working group on Internet.

42 See Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?*, 53 ICLQ 935, 949, stating that: "Despite three decades of close cooperation, ASEAN still lacks a supranational decision-making or law-making organ for legislating community law, or for the enforcement of any ASEAN protocol or resolution of disputes. ASEAN leaders have repeatedly rejected the idea of supranationality. It may be argued that this is the Achilles' heels of ASEAN integration."

43 See A Commentary on Regional Institutions in the Pacific Rim: Do Apec and ASEAN Still Matter? 13 Duke J. Comp. & Int'l L. 337, *372 - 373.

44 See the 1995 Framework Agreement on Services of the ASEAN, recommending that members liberalize trade in services by eliminating discriminatory measures and limitations on market access among the member states. The Framework Agreement also provided that member should negotiate measures affecting trade in specific service sectors with the objective of achieving commitments beyond their respective GATS commitments. In November 2000, the ASEAN member states signed an e-ASEAN Framework Agreement to "(1) promote cooperation to develop, strengthen and enhance the competitiveness of the ICT sector; (2) reduce the digital divide within individual ASEAN member states and amongst ASEAN member states; (3) promote cooperation between the public and private sectors in realizing e-ASEAN; and (4) liberalize trade in ICT products, ICT services and investments to support the e-ASEAN initiative." In the Framework, they agreed to adopt electronic commerce and legislative frameworks that facilitate the development of an e-ASEAN. Other efforts include the 2002 Manila Declaration for the development of the ICT industry and deployment of new technologies.

45 See <http://www.aseansec.org/6269.htm> (referring to the results of The 3rd Meeting of the ASEAN Telecommunications and IT Ministers (TELMIN), held in September 2003).

46 The Asia Pacific School of Economics and Government (ANU), Society for the Advancement of Technology Management at the University of the Philippines, and the Thailand Development Research Institute, *Liberalization and Harmonization of ASEAN*

3.3 Maturity of the Market - Relationship between Telecommunications Legislation and Competition Policy

A growing trend among countries with highly competitive telecommunications markets, is a growing reliance on competition laws to regulate the sector. The relationship between telecommunications legislation and competition policy varies by country, and is influenced by the country's level of economic development and the maturity of the market. Regardless of the regulatory model adopted, it is essential that telecommunications policies be guided by underlying principles of competition in order for markets to develop for the benefit of consumers. The relationship between telecommunications and competition policies is determined by and evolves in response to factors such as market maturity (*i.e.*, the level of competition in the marketplace) and a country's institutional framework. This section will explore the regulatory models adopted by different countries with respect to their telecommunications and competition regimes, existing regulatory trends in the relationship between these two frameworks, and whether such trends can be transferred effectively to developing countries.

3.3.1 The Evolution from Sector-Specific Regulation to Competition-Based Regulation

The degree of competition in the market plays an important role in the development of new regulatory trends. In a growing number of instances, especially for new services and technologies for which operators have no market power the focus has been on, if not removing *ex-ante* regulation, at least not creating additional conditions. Competition law tends to be *ex-post* as competition authorities are generally required to intervene after an anticompetitive practice has been committed. On the other hand, telecommunications regulations tends to be *ex-ante* as regulators are generally given authority to impose approval conditions and intervene prior to certain actions involving industry participants (*e.g.*, approval of tariffs or interconnection rates; change of control or mergers).

A 2001 ITU Study Group report on the impact of convergence stated that "any possible action to review the *ex-ante* regulatory framework – and possibly imposing new conditions – may cause or 'create' undesirable restrictions, which may have a negative impact on the market expansion, and consequently on the growth of new businesses."¹ In 2004, the Study Group noted that the "main trend is to move from sector specific *ex-ante* law towards *ex-post* application of competition law."² Similarly, a 2005 OECD Roundtable on Communication Convergence highlighted "the need for regulators to move away from *ex-ante* towards *ex-post* regulation."³ An argument in favor of *ex-post* regulation has been that it is more flexible and is not as interventionist as *ex-ante* regulation because it relies on market forces to dictate the rules of the game unless abuses are committed. Among the disadvantages cited for *ex-post* regulation is that it may be too slow to adapt in a fast paced communications environment⁴ (*e.g.*, where cases take years to decide and parties end up resolving their contentions outside of the administrative process). Despite the increasingly important role that competition policy is playing in the telecommunications industry, the need for employing *ex-ante* regulation for some period of time is recognized as a necessary means to promote competition in markets where competition has not effectively developed and in certain traditional service markets which may not be ready for an immediate removal of such *ex-ante* regulation.⁵

Evolution of the European Union Model

The EU has followed a coordinated reform strategy which began almost two decades ago with the adoption of a series of directives to guide the transition from monopoly to full liberalization. This first framework, referred to as the "1998 Package" in honor of the year in which full liberalization was achieved, was comprised of a sequence of directives prescribing the progressive removal of market barriers and the encouragement of competition, as well as the harmonization of telecommunications regulation throughout the EU. The liberalization process began with niche market segments (*e.g.*, terminal equipment) and moved gradually towards core market segments (*e.g.*, voice telephony).

In light of the maturity and liberalization achieved, in 2002 the EC issued the a new regulatory framework, the NRF, essentially prescribing that sector-specific regulation (*ex-ante* regulations) be confined to cases where effective competition is absent, *i.e.*, in markets where there are one or more undertakings with significant market power, and where national competition law remedies are not sufficient to address the problem.⁶ As such, the NRF places greater reliance on generic EU competition law, and seeks a "market-based" approach to regulation, as opposed to a "service-based" approach.

The NRF⁷ replaced much of the sector-specific regulation with technologically-neutral, general competition law rules,⁸ with the "aim [of reducing] *ex-ante* sector-specific rules progressively as competition in the market develops."⁹ The NRF provides new market definitions and its significant market power (SMP) concept has been re-defined to be more closely aligned with the competition policy provisions of the concept of dominance set out in the European Treaty.¹⁰

Under the Framework Directive, the EC must identify the product and service "markets" that may raise competition issues and may be subject to *ex-ante* regulation.¹¹ (See Table 3-4 for the list of markets currently identified by the EC.) In making such determinations, the member states rely on EU competition principles and practices. In turn, the NRAs must conduct an analysis of the markets that have been

identified as being susceptible to regulation, using the following criteria: (i) determine whether there are entry barriers of a structural, legal or regulatory nature; (ii) examine the state of competition relative to such barriers to determine if effective competition could develop in a relevant period of time; and (iii) determine whether the exclusive application of competition law would properly address market failures.¹² If after conducting its analysis, the NRA determines that regulation is warranted, it may propose a draft measure, which the EC may request be withdrawn if it (i) concerns definition of relevant markets; (ii) would create a barrier to the entry; or (iii) would be incompatible with the EC's laws or policy objectives (e.g., to move from sector-specific regulations to competition laws). Even if the EC identifies a market as being "susceptible" to *ex-ante* regulation as it would be possible for an operator to maintain market power, it does not mean that regulation will always be required.¹³ Regulation will only be warranted if there is a finding that effective competition does not exist in the relevant market.

In essence, the NRF sets forth the following three-step process:¹⁴

- **Definition of Markets:** NRAs are required to identify markets the characteristics of which warrant the application of *ex-ante* regulation based on three criteria: (i) high and non-transitory entry barriers; (ii) the dynamic state of competitiveness behind entry barriers; and (iii) the sufficiency of competition law in the absence of *ex-ante* regulation.
- **Market Analysis:** NRAs are required to assess the level of competition in the markets which it has identified under (i) above.
- **Imposition of Remedies:** If the NRA finds that a particular market lacks effective competition and identifies operators with significant market power, it may impose certain specific obligations (*i.e.*, those in the Universal Service Directive or Access Directive mentioned in Section 3.2.2 above). The NRA may also maintain or amend obligations that may already be in place. The Framework Directive provides a review and consultation process for the approval of any such remedies to ensure that they are consistent with the objectives of the NRF and that they do not further affect competition in the market.

Table 3-4: Markets Susceptible to *ex ante* Regulation in the EU¹⁷

Retail Level		Wholesale Level	
1.	Access to the public telephone network at a fixed location for residential customers.	8.	Call origination in the public telephone network provided at a fixed location.
2.	Access to the public telephone network at a fixed location for non-residential Customers.	9.	Call termination on individual public telephone networks provided a fixed location.
3.	Publicly available local and/or national telephone services provided at a fixed location for residential customers.	10.	Transit services in the fixed public network.
4.	Publicly available international telephone services provided at a fixed location for residential customers.	11.	Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.
5.	Publicly available local and/or national telephone services provided at a fixed location for non-residential customers.	12.	Wholesale broadband access.
6.	Publicly available international telephone services provided at a fixed location for non-residential customers.	13.	Wholesale terminating segment to leased lines.
7.	The minimum set of leased lines.	14.	Wholesale trunk segments of leased lines.
		15.	Access and call origination on public mobile telephone networks.
		16.	Voice call termination on individual mobile networks.
		17.	The wholesale national market for international roaming on public mobile networks.
		18.	Broadcasting transmission services, to deliver broadcast

	content to end users.
--	-----------------------

[Note that markets are often referred to by the numbers assigned to them under the EC Recommendation (e.g., the mobile termination market may be referred to as “Market 16”).]

EU Directives are binding rules meant to be implemented on a national level by each member state. Depending on the maturity of the market and the legislation in place at the time of adoption of the Framework Directive, some countries have had to implement modifications in their national legislation and are at varying stages regarding their analyses of the above-mentioned markets.

Transposition of the EU Model

Understanding the EU's regulatory evolution and the state of the EU markets during both phases of regulatory interventions is crucial when considering implementation of a similar model in developing countries. Many developing countries find themselves in a transitional stage similar to the one that existed in the EU during the implementation of the 1998 Package. Therefore caution may be warranted to avoid rushing into its implementation in markets that may not be ready for near-term regulatory dismantling, as they may require some continued regulation to ensure the development of competition.

Additionally, in markets where full liberalization has been achieved, effective application of the EU's competition-based approach may be influenced by a country's lack of experience and resources to dictate and enforce generic competition principles. The principal elements that may pose a challenge to the successful emulation of the EU model in developing countries are the differences in: (i) market composition and development; and (ii) the institutional frameworks.[18](#)

With respect to market composition and development, the following differences have been identified as potential challenges in adopting the EU model in developing countries:[19](#)

- **Dominance of Mobile Networks.** Large mobile penetration in developing countries, resulting in the preeminence of mobile networks with respect to fixed networks, may require that some elements of price regulation traditionally aimed at dominant fixed-line incumbent be applied to mobile networks. However, some other regulations (e.g., local loop unbundling) may be inapplicable to wireless networks.
- **Universal Service and Rural Access.** Compared with Europe and other developed countries, developing countries tend to have lower levels of teledensity. Where most developed countries (with higher teledensity levels) focus on issues of “content, quality and price of basic services,” countries with developing communications markets may be required to focus their regulatory resources on the implementation of access measures.
- **Market Liberalization.** Some developing countries have not achieved full liberalization of all market elements and certain monopoly vestiges still exist (e.g., incumbent telecommunications operator's control over international gateway; preferential access to essential facilities by the incumbent's mobile business). As such, developing countries may require greater regulatory intervention as the market transitions to greater liberalization.

The legal, political and institutional dynamics in developing countries also may contribute to the need for more prescriptive sector regulation. The legal and judicial systems in many developing countries may lack sufficient depth and expertise on matters of competition principles, and courts may lack the technical knowledge to effectively resolve complex matters in a constantly evolving market. Political interference by well-connected or state-owned operators is also a factor that supports maintaining sector-specific regulation in order to avoid arbitrary implementation of regulation.[20](#)

Where generic competition principles may not be applied for the reasons mentioned above, countries may consider incorporating competition law principles into their sector-specific framework, as a mechanism to foster the growth of the market and prevent anticompetitive practices that may hinder its development.

While the EU model as a whole may not be transferable to the developing world, certain of its underlying principles can serve as the foundation for an effective regulatory framework:[21](#)

- Establishment of an independent regulator;
- Existence of an efficient mechanism to appeal decisions of the regulator;
- Applying regulation with principles of transparency, non-discrimination and objectivity;
- ‘Two-tier’ regulation, where the activities of operators with significant market power are held to greater regulatory supervision;
- Adoption of technology neutral approach (i.e., recognizing the fast-paced development of convergence and shift regulation from technology/service-based, to technology neutral);
- Reducing market access barriers;
- Avoiding over-regulation and progressive reduction of unnecessary regulation upon the existence of effective competition;
- Engaging in open, transparent and thorough consultation prior to the issuance of any regulation that would impact the market; and
- Reducing bureaucratic processes in an effort to reduce costs and streamline processes where possible.

Box 3-4: Singapore

In 2005, the Info-communications Development Authority (IDA), the telecommunications regulator in Singapore, issued a Code of Practice for Competition in the Provision of Telecommunications Services following adoption of a regulatory policy similar to that of the EU. The Code of Practice specifically recognizes that consumer welfare is best promoted through market forces rather than regulation, and states that the IDA will “place primary reliance on private negotiation and industry self-regulation” subject to its duty of preventing anti-competitive conduct.²² However, the Code of Practice recognizes that *ex ante* regulatory intervention may be required where markets are not sufficiently competitive.²³

ENDNOTES

- ¹ International Telecommunication Union, ITU-D Study Group 1, Document 1/187 (Rev. 1), *Final Report on ITU-D Question 10/1: Regulatory impact of the phenomenon of convergence within the telecommunications, broadcasting, information technology and content sectors*, 6 September 2001, at 1 [hereinafter *ITU-D Q 10/1 Final Report*].
- ² International Telecommunication Union, Telecommunication Development Bureau, ITU-D Study Groups, Document RGQ10-1/1/013(Rev.1)-E, *Question 10/1: Impact of convergence of telecommunications, broadcasting, information technology and content sectors*, 23 March 2004 (response to question 2.3).
- ³ OECD, Working Party on Telecommunication and Information Services Policies, *Summary of the OECD Roundtable on Communications Convergence*, London, July 8, 2005. DSTI/ICCP/TISP(2005)8, at par. 1 [hereinafter *Summary of OECD Roundtable*].
- ⁴ International Telecommunication Union, *Competition Policy in Telecommunications: The Case of Denmark*, November 2002, at Box 4.3 (citing ITU source).
- ⁵ *Id.*
- ⁶ See Viviane Reding, Member of the EC responsible for Information Society and Media, *The Review of the Regulatory Framework for e-Communications*, SPEECH/05/515, 1st Meeting of the Centre for European Policy Studies Taskforce on Electronic Communications, Brussels, 15 September 2005, at 3, stating that: “one of the main goals of the framework is to re-focus regulation, and to withdraw regulation as competition becomes effective.”
- ⁷ In 2002, the European Union approved a new regulatory framework consisting of a Framework Directive (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002, on a common regulatory framework for electronic communications networks and services, [hereinafter the Framework Directive]. Sector specific-regulation has been reduced from more than twenty directives to five. Available at <http://www.euroblind.org/fichiersGB/com200221.htm>, supplemented by other directives. See also (i) Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (Authorization Directive) (ii), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic Communications networks and associated facilities (Access Directive) (iii), Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (iv), Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (Data Privacy Directive). [hereinafter the NRF], available at <http://www.spamlaws.com/f/docs/97-66-ec.pdf>.
- ⁸ See NRF.
- ⁹ See Framework Directive.
- ¹⁰ See Article 82 of European Treaty. See also International Telecommunication Union, *Competition Policy in Telecommunications: The Case of Denmark*, November 2002, at 21, Section 4.1.1.
- ¹¹ Commission of the European Communities, *Commission Recommendation of 11/02/2003 on the Relevant Product and Service Markets within the Electronic Communications Sector Susceptible to ex ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on Common Regulatory Framework for Electronic Communications Networks and Services*, C(2003)497 [hereinafter *EC Recommendation on Relevant Markets*], available at http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf.
- ¹² For definitions of what constitutes structural and legal entry barrier, see Whereas clauses 11 - 14 of EC Recommendation on Relevant Markets.
- ¹³ *EC Recommendation on Relevant Markets*, at Whereas (20).
- ¹⁴ Directive 2002/21/EC, Article 15 and 16.
- ¹⁵ *Commission Recommendation on Relevant Markets*, OJ 8.5.2003 L 114/45.
- ¹⁶ Directive 2002/21/EC, Articles 6 and 7.
- ¹⁷ *Id.* at Annex. The EC recommended that EU member states conduct a market analysis of the markets described above and determine whether ex-ante regulation is warranted.

[18](#) Ann Buckingham and Mark Williams, *Designing Regulatory Frameworks for Developing Countries*, in Telecommunications Law and Regulation (Ian Walden and John Angel eds., 2005), section 15.3.

[19](#) *Id.*

[20](#) *Id.*

[21](#) *Id.*, at Section 15.4.

[22](#) Singapore, Telecommunications Act (Chapter 323), Code of Practice for Competition in the Provision of Telecommunication Services 2005, Government Gazette, S 87/2005, 18 February 2005, at Article 1.5.1.

[23](#) *Id.* at Article 1.5.4.

3.3.2 Analysis of Jurisdictional Division of Power between Competition Authorities and Regulatory Institutions

The relationship between telecommunications laws and competition policies can be depicted through the jurisdictional division of power between competition authorities and regulatory institutions. When there are separate entities enforcing telecommunications and competition rules, balancing the interplay and jurisdiction between these two entities is a key element in allowing the industry to expand. On the other hand, where a single entity exists (either a telecommunications regulator or a general competition authority), policies applicable to the telecommunications market should encourage growth and competition in the industry. Examples of different models adopted include:

1. The most common scenario where countries have both a telecommunications regulator and one or more entities with jurisdiction over economy-wide competition matters (e.g., the United States, Chile, and South Africa); or a telecommunication regulator and a competition authority with a specific mandate over competition in the telecommunications sector (e.g., Australia);
2. A model adopted in certain developing countries where there is no competition authority, but a sector-specific regulator with sector-specific competition mandates (e.g., Dominican Republic);
3. The least common model adopted in New Zealand, where a sector-specific commissioner is part of the general, economy-wide competition authority.

The structure of competition policy and interplay between institutions is not necessarily pre-determined by the legal system in place. In some cases this may be the result of political and practical considerations such as management of existing human and financial resources, the development and size of the telecommunications market, and the level of competition that exists in the market. (See [Table 3-5](#) for a list of certain countries with both a telecommunications regulatory body and a competition authority.)

Scenario 1 – Existence of Competition and Telecommunications Authorities

United States

In the United States, the Federal Communications Commission (FCC) is the independent regulator in charge of overseeing interstate and international communications, but in matters involving competition issues, it must coordinate with the U.S. Department of Justice (DOJ) or the Federal Trade Commission (FTC) depending on the industries involved and the economic impact.[1](#)

The Communications Act of 1934 (as amended by the Telecommunications of 1996) establishes pro-competitive principles that govern the telecommunications industry in the United States and gives the FCC authority to review and approve (*ex-ante*) merger transactions involving licensed telecommunications carriers.[2](#) The Communications Act requires the FCC to consult with DOJ prior to granting certain authorizations to local exchange carriers, and the antitrust law gives the FCC concurrent authority with DOJ to review mergers among telecommunications carriers.[3](#) DOJ's Antitrust Division and the FTC are primarily responsible for overseeing enforcement of U.S. antitrust laws (the Sherman Act and the Clayton Act).[4](#) DOJ's Antitrust Division has authority to prevent anticompetitive conduct (e.g., contracts, combinations and conspiracies in restraint of trade) that is subject to either criminal or civil action under U.S. antitrust laws and to review proposed mergers and acquisitions of telecommunications carriers (*i.e.*, to assess their competitive effect and challenge those that threaten to harm competition).[5](#) As a result, activities performed by telecommunications service providers in the United States are subject to the FCC's regulatory enforcement under the Communications Act, as well as the DOJ's enforcement under the antitrust laws. However, in a recent Supreme Court decision on whether a carrier's breach of certain duties under the Communications Act also generated antitrust liability under the Sherman Act, the Supreme Court determined that such liability arises where a regulatory structure is already in place to prevent anticompetitive injury.

The FTC is responsible for preventing and penalizing unfair and deceptive market practices in restraint of trade.[6](#) While the FTC does not have authority to review mergers involving the FCC-licensed telecommunications common carriers, it does have authority to review mergers of unregulated non-common carriers or mergers involving common carriers that reach a certain monetary threshold.[7](#) Therefore, when a merger does not involve a telecommunications common carrier, in principle it may be reviewed by either the FTC or DOJ, as was the case of the merger of America Online (an Internet service provider) and Time Warner (a cable/media operator). The jurisdictional division among these three entities runs parallel and may often overlap. Rather than multiple agencies reviewing a transaction, the law requires one agency to give the other(s) investigative "clearance" to conduct the review. To avoid the overlap and duplicity of review

between the FTC and DOJ, and the extensive delays in obtaining such clearance, in 2002, the two entities entered into a Memorandum of Agreement allocating areas of responsibilities in reviewing mergers and enforcing antitrust laws.⁸ As a result, the DOJ now is responsible for enforcing antitrust laws on telecommunications matters (See [Box 3-5](#) for a snapshot of this tripartite review).

In reviewing mergers or other antitrust actions, the DOJ and FTC focus purely on competition issues, basing their decisions on whether a particular transaction will result in an accumulation of market power that would reduce competition and affect consumers.⁹ While the FCC also may engage in a competition analysis, it applies a broader sector-oriented analysis, focusing on whether the transfer would benefit or harm the public interest, convenience, and necessity.¹⁰ In some cases, the FCC may approve a merger, but may place conditions on the merger after consultations with the DOJ on competition issues.

Chile

Chile, like the United States, has a sector-specific regulator (SUBTEL) and a competition authority. However, the competition authority can intervene in telecommunications matters and apply competition law not only to private parties, but to the regulator itself.

SUBTEL, created in 1977 under the Ministry of Transportation and Telecommunication, is the entity responsible for overseeing the operations of telecommunications networks, and developing and enforcing technical industry standards.¹¹ SUBTEL also is required to approve the transfer of any concession, authorization or permit.¹² The Telecommunications Law of 1982 sets forth certain competition-related provisions applicable to the industry¹³ and operates in conjunction with Chile's antitrust law (Decree 211), which generally prohibits activities that are a restraint to competition.¹⁴ Pursuant to Decree 211, the Tribunal for the Defense of Open Competition (*Tribunal de Defensa de la Libre Competencia*, the "Tribunal") and the National Economic Prosecutor (*Fiscalía Nacional Económica*, the "NEP") are the entities primarily responsible for the promotion and protection of competition in all markets.¹⁵

Unlike the United States, Chile's antitrust law does not require the competition authorities to approve mergers and the Tribunal may not initiate antitrust investigations on its own. However, the Tribunal (at the complaint of interested parties) may prevent actions that can potentially harm competition. The NEP or any private party may file a claim with the Tribunal alleging that a party has engaged in actions that restrain competition and affect the public.¹⁶ Despite the lack of a requirement for authorization, in 2005 the Tribunal issued a pre-merger decision in one of the most significant acquisitions in the Latin American telecommunications market: the acquisition by Telefónica Móviles of BellSouth's Latin American mobile business.

In this instance, Telefónica Móviles and BellSouth filed a motion with the Tribunal requesting that it expressly approve the acquisition in order to avoid potential post-merger litigation.¹⁷ After conducting cost and competition analyses, the Tribunal approved the merger with certain conditions (e.g., divestiture of a particular spectrum concession to avoid 100 per cent control of a particular band by the merged entity).¹⁸

The Tribunal has authority to order Chilean regulators, including the telecommunications regulator, to take certain actions where it identifies competition concerns,¹⁹ such as regulating prices for the telecommunications industry if they find that competitive conditions do not exist.²⁰ Although SUBTEL and the Tribunal generally work well together, there have been instances where the Tribunal has imposed its authority on the regulator.

For example, in 2000, two mobile operators operating in the 800 MHz band petitioned for, and acquired, from SUBTEL additional spectrum in the 1900 MHz band (PCS). Another mobile operator filed a complaint with the NEP. The NEP, in turn, initiated a proceeding with the Antitrust Commission (currently the Tribunal). The Commission ordered SUBTEL to conduct a public spectrum auction without giving preferential treatment to the two mobile operators that had originally applied for the spectrum. Although a more transparent process was used to grant the right to additional spectrum, some argue that the case merely represents an effort to use the competition institution to delay the allocation of new spectrum. In addition, others believe that the competition authority became too involved in technical matters.²¹

In principle, the jurisdictional division of power between the telecommunications regulator and the competition authority in Chile appears to be clear, where intervention by SUBTEL is forward-looking and the competition authority is generally involved on a retrospective basis. However, the example of Telefónica Móviles and BellSouth above shows that companies may prefer to voluntarily submit themselves to the judgment of competition authorities for specific guidance in order to reduce uncertainty and post-acquisition problems.

European Union

In Europe, competition matters are divided between the respective competition authorities within the EC and the EU member states. There are two separate directorates within the EC that address competition and electronic communications matters: the Competition Directorate General (Competition DG), which has played a significant role in the development of EU telecommunications policy; and the Information Society and Media Directorate-General (DG InfoSoc), responsible for developing Information Society initiatives and harmonization efforts.²² There is no European-wide telecommunications regulatory authority.

The DG Competition Directorate is responsible for designing and enforcing general competition rules under the EU's Community Treaties, and ensuring "that competition of the EU market is not distorted."²³ Its four main areas of action with respect to competition policy are antitrust and cartels, merger control, liberalization (i.e., introducing competition in monopolistic sectors), and state aid control (to ensure that competition in the Common Market is not distorted). At the EU level, the general competition rules are set forth in the EC Treaties, and pursuant to these, sector-specific competition rules are issued to govern certain sectors of economic relevance. For instance, member states are subject to the Directive on Competition Electronic Communications Markets,²⁴ which prohibits them from establishing exclusive or special rights for the provision of electronic communications networks. This Directive also establishes the general competition principles applicable to the industry and requires the removal of competitive barriers for: (i) vertically integrated public undertakings; (ii) use of

frequencies; (iii) satellites; and (iv) cable television networks. Member states are required to adopt the necessary measures to ensure compliance with this sector-specific competition directive.

Competition Matters – Relationship between the EC and NCAs

The EC has the authority to deal with competition matters on a community level, and national competition authorities (NCAs) are responsible for enforcing national competition laws. In some instances, EC authority may be shared with that of NCAs and in others, the EC may have exclusive authority (e.g., when certain practices may have impact on trade between member states or are deemed to be “Community dimension”).

The EC Treaty also established general competition rules that apply to all industries throughout the EU, and are enforced in coordination with the NRAs.²⁵ Article 81 of the EC Treaty prohibits anticompetitive agreements (e.g., agreement between competitors and vertical agreements) that may have an effect on trade between member states and which prevent, restrict or distort competition in the common market. Exemptions may be granted if there are overriding countervailing benefits (e.g. improvement in efficiency or the promotion of research and development). Article 82 of the EC Treaty prohibits (without the possibility of exception) the abuse of a dominant position to the extent it may affect trade between member states. NCAs must apply articles 81 and 82 of the EU Treaty in individual cases, in cooperation with the EC and the other member states.²⁶ In practice, there have been few cases in the telecommunications sector in which the EC has had to act under the provisions of articles 81 and 82.²⁷ However, the EU's merger control procedures are a useful example to illustrate the allocation of powers between the EC and NCAs.

In 2004, the EU adopted New Merger Control Regulations (NMCR)²⁸ setting forth a referral system for the allocation of merger decisions between the EC and the NCAs, which complies with the subsidiarity principle set forth in Article 5 of the EU Treaty. According to the subsidiarity principle, unless the EC has exclusive authority to act, EC action is only permissible when the purpose of the proposed action will not be sufficiently achieved by the member states' action (i.e., where the independent action by the member states' institutions will not achieve such purpose effectively).²⁹ Under the NMCR, the EC has exclusive jurisdiction over mergers of “Community dimension”, as a result of the transaction exceeding certain turnover thresholds. Mergers that do not meet that turnover should be reviewed by the NCAs, unless referred to the EC through the NMCR's referral process.

EC dimension mergers are those where:

- (i) the combined worldwide turnover of the undertakings concerned (i.e., the merging parties) is greater than €5 billion; and each of at least two of the undertakings concerned had a turnover within the EU of more than €250 million; or
- (ii) the combined worldwide turnover of the undertakings concerned is greater than €2.5 billion; their combined turnover in each of at least three member states is greater than €100 million; in each of those three member states, the turnover of each of at least two of the undertakings concerned is €25 million; and the EU wide turnover of each of at least two of the undertakings concerned is greater than €100 million;

However if more than two-thirds of each of the merging parties' EU turnover in either case is in *one and the same* EU member state, the merger must be examined by the NCA of that member state.

Cases also may be allocated to and from the EC and NCAs through a referral procedure that seeks to allocate the case to the best placed authority in a manner consistent with the subsidiarity principle. Where clearance is required in more than three jurisdictions it may be approved by the EC (provided such competition authorities do not object to such referral), in which case such approval would be valid EU-wide. Pursuant to Article 9 of the NMCR, at the request of a member state, the EC may refer a EC dimension transaction to such member state where the transaction (i) threatens to significantly hamper competition in a distinct market within that member state; or (ii) affects competition on a market within that member state, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.³⁰ Article 22 of the NMCR allows the EC to accept a member state's referral of a non-EC dimension referral where trade among member states may be affected.

The EC also has issued merger guidelines³¹ to provide companies instructions on when mergers are likely to be challenged or not, and a document on best practices on the conduct of EC merger control proceedings,³² which seeks to enhance the efficiency of investigations and to ensure transparency in the merger review process.

Role of the NRAs

Unlike the United States, in the EU, NRAs generally do not participate in merger reviews, as these are under the competence of the NCAs. However, in the EU, NRAs play an important role in enhancing competition in national telecommunications markets through sector-specific policies, as they are required to “promote competition in the provision of electronic communications networks, electronic communications and associated facilities and services.”³³ NRAs may participate jointly with NCAs in assessing and ensuring competition in the communications market. As explained in Section 3.3.1 above, NRAs are required to consult with the EC prior to the adoption of measures following a determination of market power and the EC has the authority to require an NRA to withdraw a draft measure.

Given the increasingly competition-oriented regulatory approach of the EU model (see Section 3.3.1, above), there are some areas of overlap between regulatory policy (applied by the NRAs) and competition law (enforced by the NCAs). This has led some to debate over

the future role and institutional structure of NRAs within a deregulatory framework in markets where full liberalization and competition exists. Although some have even suggested that NRAs potentially could be absorbed by competition authorities, this view is rejected as unsound regulatory practice.³⁴ The importance of sector-specific regulation and enforcement remains relevant as NRAs are charged with achieving efficiency from a technical and allocation perspective (*i.e.*, use of scarce resources), as well as ensuring competition and meeting universal service goals. Although NRAs apply certain aspects of competition law (as underlying principles of sector regulation), the interaction between the two enforcement authorities are considered an effective regulatory model.³⁵

South Africa

The South African Competition Act expressly recognizes the concurrent jurisdiction that may be exercised by the competition authorities and sector-specific regulators. The Independent Communications Authority of South Africa (ICASA), an independent body responsible for regulating the telecommunications and broadcasting industries, is also responsible for ensuring fair competition among industry players in these industries.³⁶ The Competition Act, which was greatly influenced by developed country experience, establishes three entities responsible for economy-wide competition matters:

- a. *Competition Commission* – an independent body responsible for the implementation of the Competition Act, (*i.e.*, it investigates restrictive business practices and abuse of dominant positions and mergers);³⁷
- b. *Competition Tribunal* – an independent tribunal responsible for adjudication in the first-instance of contested competition matters (*i.e.*, it determines whether anti-competitive practices have occurred, and if applicable, imposes sanctions under the Competition Act; it also reviews larger mergers when they have been referred to the consideration of the Tribunal and adjudicates appeals on decisions from the Competition Commission on intermediate mergers and Competition Act exemptions);³⁸ and
- c. *Competition Appeal Court* – has status equivalent to a high court and considers appeals from decisions rendered by the Competition Tribunal; also confirms orders by the Competition Tribunal on the divestiture of assets by parties who have merged in contravention of the Competition Act (The Competition Commission, the Competition Tribunal and the Competition Appeals Court are, for purposes of this section collectively referred to as the “Competition Authorities”).

The Competition Act expressly recognizes the possibility of the Competition Authorities and sector regulators (*i.e.*, ICASA) to exercise concurrent jurisdiction over industry-specific competition matters, which to the “extent possible” should be managed pursuant to an agreement between the Competition Commission and the regulator for purposes of harmonizing their exercise of jurisdiction and ensuring a consistent application of the Competition Act.³⁹ To this end, the Competition Commission and ICASA entered into a Memorandum of Agreement setting forth the manner in which they would operate when both have jurisdiction over the “investigation, evaluation and analysis of mergers and acquisition transactions and complaints involving telecommunications and broadcasting matters.”⁴⁰ Although neither entity waived its respective authorities, they agreed on the establishment of a joint working committee to facilitate cooperation and consultation of matters that require their involvement.⁴¹

In the case of mergers that require the approval of the Competition Commission and ICASA, the Memorandum of Agreement recognizes that the entities may consult each other, but requires them to make independent determinations based on their respective legislations. In the event that each reaches different determinations, the Memorandum of Agreements sets forth a procedure by which both entities should try to reach the same decision on the merger. If either the Competition Commission or ICASA fails to approve the transaction, the merger may not go through.⁴² Decisions may be appealed to the relevant courts (*i.e.*, the Competition Tribunal if appealing a decision of the Competition Commission; or the ordinary courts if appealing ICASA’s decision). In some cases however, even after bringing the matter before the court, companies have opted to settle given the court’s and the Competition Tribunal’s limited understanding of industry-specific matters and the length of time it takes a court to decide on these issues.⁴³

India

India has a telecommunications regulator and an economy-wide competition authority. Enacted in 2003, India’s Competition Act is in its initial stages of development, with enforcement entrusted to the Competition Commission of India. The Competition Act generally prohibits anticompetitive agreements (*i.e.*, one that is likely to cause an appreciable adverse effect on competition within India) and abuse of dominant position (*i.e.*, where an enterprise directly or indirectly, imposes unfair or discriminatory conditions in the purchase and pricing conditions), and regulates corporate “combinations” through the acquisition of shares, control and mergers. The Competition Commission has an express mandate over competition issues with respect to a variety of services, including “communication” services.⁴⁴

The Telecommunications Regulatory Authority of India (TRAI) is an autonomous body responsible for the regulation of telecommunications services in India. TRAI is responsible for “facilitate[ing] competition and enforce[ing] efficiency in the operation of telecommunications services” in order to facilitate growth.⁴⁵ TRAI is also responsible for adjudicating disputes among service providers and between groups of licensees on matters concerning technical compatibility and interconnection between service providers, revenue sharing arrangements, quality of telecommunications services and interests of consumers. However, the TRAI Act specifically excludes from TRAI’s jurisdiction matters concerning “the monopolistic trade practice, restrictive trade practice and unfair trade practice.” If a matter is brought before TRAI that raises such competition issues, or any other issue under the jurisdiction of the Competition Act, TRAI is required to refer such issues to the Competition Authority.⁴⁶

Table 3-5 below shows certain countries that have both a communications regulator and a competition authority, and the entity with jurisdiction over competition issues in the telecommunications sector.

Scenario 2 – Lack of Competition Authority, but Enforcement of Sector Specific Competition Rules by Telecommunications

Regulator

Dominican Republic

The Dominican Republic has no general competition rules or authority, but has an extensive body of telecommunications regulations that grants the telecommunications regulator exclusive power over competition aspects in the industry. The General Telecommunications Law (GTL)⁴⁷ created the regulatory authority (Instituto Nacional de Telecomunicaciones or INDOTEL) with the responsibility of “preventing or correcting anti-competitive or discriminatory practices according to the GTL and its regulations.”⁴⁸

Woven into the GTL is a set of competition rules and principles applicable to the telecommunications industry. For example, the section on “*Practices that Restrict Competition*” specifically prohibits telecommunications carriers from (i) offering identical services on different conditions; (ii) engaging in practices that “limit, hinder or distort the consumer’s right to choose;” and (iii) engaging in practices that restrict competition (i.e., abuse of dominant position, predatory practices and failure to negotiate in good faith).⁴⁹ The GTL also contains competition-specific definitions such as: effective competition, honest competition, discrimination, dominant position, anticompetitive practices, and practices that distort competition in the telecommunications market.⁵⁰ Finally, the GTL requires telecommunications companies to obtain INDOTEL’s approval prior to the transfer of any licence or consummation of merger.⁵¹

The Ministry of Industry and Commerce recently submitted to the Dominican Senate a Competition Defense Bill, which has yet to be approved.⁵² Although the Bill appears to be of general application, it is unclear whether (once approved) its provisions would complement those of the GTL and whether it would require the Ministry’s involvement on telecommunications competition-related issues. However, for purposes of ensuring competition in strategic markets such as the telecommunications market, INDOTEL is given ample duties to regulate competition⁵³ and is currently working on competition regulations.⁵⁴

Scenario 3 – The Case of New Zealand - Competition Authority Enforcing General Competition Policies and Sector-Specific Regulations

New Zealand introduced industry specific provisions, such as the regulation of interconnection and number portability, with the adoption of the Telecommunications Act in 2001, but the general competition statutes play an important complementary role, notably the Commerce Act of 1986, as amended, which prohibits anticompetitive practices (e.g., misuse of a dominant position) and business acquisitions that create or strengthen dominance.⁵

The Ministry of Economic Development (MED) advises the Minister of Communications on “the operation and regulation of specific markets and industries...including telecommunications.”⁵⁶ The general, economy-wide competition authority is the Commerce Commission (Commission), which is an independent agency not subject to government direction.⁵⁷ The Commission is responsible for enforcing competition legislation including the Telecommunications Act 2001.⁵⁸ Within the Commission, primary responsibility for making decisions about, and providing advice to the Minister on telecommunications, rests with the Telecommunications Commissioner.

The jurisdictional division of power between these two agencies with respect to telecommunications matters is clearly defined in New Zealand’s legislation, and is evidenced in rulemaking proceedings. An interplay between MED and the Commission recently took place in connection with the Commission’s proposal regarding the regulation of mobile termination rates. Under the Telecommunications Act, the Commission is responsible for conducting “investigations into the desirability of regulating additional services or amending the regulation of services where considered necessary, and make recommendations to the Minister of Communications.”⁵⁹ In 2004, as a result of complaints of high mobile termination rates and lack of competition in New Zealand’s mobile termination market, the Commission initiated an investigation to determine whether to regulate the mobile termination market. In June 2005, the Commission issued a report to the Minister of Communications recommending the regulation of fixed-to-mobile termination rates (excluding 3G networks).⁶⁰

Under the Telecommunications Act 2001, the Minister of Communications has the ultimate authority to accept or reject the Commission’s recommendations, or to require the Commission to reconsider its recommendation “for any reason specified by the Minister.”⁶¹ However, the Minister of Communications cannot reject the Commission’s recommendation and substitute his own preferred outcome – if he rejects the Commission’s recommendation, then the regulatory status quo prevails. As a result of this authority and despite supporting a reduction of mobile termination rates, the Minister of Communications required the Commission to reconsider its recommendation, particularly on aspects of implementation and achieving benefits to end-users.⁶²

As of the date of this publication, New Zealand’s mobile termination proceeding has not concluded, but it serves to highlight the interplay between the relevant agencies. Worth noting is the broad authority of the Minister of Communications with respect to the recommendations of the Commission, which may be subject to reconsideration for reasons not specifically set forth in the Telecommunications Act or the Commerce Act.

New Zealand’s approach has not been emulated in other countries, and there are no indications that this approach would lead to higher levels of competition than that achieved by countries with sector-specific regulation.⁶³ Furthermore, this approach is unlikely to be successful in developing countries that lack expertise in the enforcement of generic competition laws.

ENDNOTES

¹ See Communications Act of 1934 § 2(a), 47 U.S.C § 152(a) (2000); and Clayton Act § 11(a), 15 U.S.C. § 21(2000).

² Communications Act, 47 U.S.C. §§ 214, 310(d), 25.229, and 34-39. FCC approval is required for the transfer of licences and authorizations concerning common carriers, public and private radio, satellite earth stations, and submarine cable landings.

- ³ Section 271 of the Communications Act (as amended) requires the FCC to consult with DOJ; Clayton Act 15 U.S.C. §21(a); See also, Clayton Act 15 U.S.C. §§ 7 and 11, which allow FCC to block acquisition of certain common carriers where such acquisition would result in a lessening of competition or a creation of a monopoly.
- ⁴ The Sherman Antitrust Act and Clayton Act generally prohibit conspiracies in restraint of trade, monopolization and anticompetitive mergers. Specifically, Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) prohibits every “contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade.” Section 7 of the Clayton Act (15 U.S.C. § 18) prohibits mergers where the effect may be “substantially to lessen competition, or to tend to create a monopoly.”
- ⁵ Clayton Act.
- ⁶ *Id.*
- ⁷ Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C §18a, requires parties to a merger to submit a pre-merger filing to the FTC and DOJ depending on the size of the parties and the size of the transaction, and to observe a 30-day waiting period before closing the transaction. A filing under the Hart-Scott-Rodino Act is required if: (i) the transaction is valued at more than \$212.3 million; (ii) the transaction is in excess of excess of \$53.1 million but less than \$212.3 million, where the acquiring or acquired person has annual net sales or total assets of \$106.2 million or more and the other party has annual net sales or total assets of \$10.7 million.
- ⁸ See Memorandum of Agreement between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations, 5 March 2002, available at <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.
- ⁹ See 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission (revised April 8, 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.
- ¹⁰ See Comments of FCC General Counsel Christopher J. Wright, *Introducing the Transactions Team Presentation on Timely Consideration of the Applications Accompanying Mergers*, 1 March 2000 (where the General Counsel lists the following four-pronged public interest standard used in considering merger: (i) whether the transfer would violate the statute; (ii) whether the transfer would violate regulation; (iii) whether the transfer would frustrate the purpose of the Communications Act or a regulation; and (iv) whether the transfer is likely to provide affirmative public benefits), at <http://www.fcc.gov/Speeches/misc/statements/wright030100.html>.
- ¹¹ Decreto N° 1762, 1977.
- ¹² Ley General de Telecomunicaciones 1982. See Article 21, available at http://www.subtel.cl/prontus_subtel/site/artic/20061229/asocfile/20061229125842/titulo_ii.PDF.
- ¹³ Ley General de Telecomunicaciones 1982. See articles 8, 12 and 24, available at http://www.subtel.cl/prontus_subtel/site/artic/20061229/asocfile/20061229125842/titulo_ii.PDF and http://www.subtel.cl/prontus_subtel/site/artic/20061229/asocfile/20061229125842/titulo_iii.PDF.
- ¹⁴ Texto Refundido, Coordinado y Sistematizado del Decreto Ley No. 211 del 1973; D.F.L. Num. 1, Santiago, Chile 18 October 2004, available at http://www.tdlc.cl/institucional/DL211_refundido.pdf.
- ¹⁵ Chile, Decreto Ley No. 211 of 1973, Article 2.
- ¹⁶ Texto Refundido, Coordinado y Sistematizado del Decreto Ley No. 211 del 1973; D.F.L. Num. 1, (Chile), 18 October 2004, at Article 18.
- ¹⁷ See Resolution No. 2 dated 4 January 2005. Procedimiento No Contencioso Operación de Concentración Entre Empresas; Telefónica Móviles – BellSouth, Rol, No. 01-04, (Chile) (stating in the first “whereas” clause that Telefónica Móviles, S.A. had submitted the Stock Purchase Agreement with BellSouth Corporation requesting that the Tribunal determine whether or not it infringed the provisions of Decree 211).
- ¹⁸ *Id.* The Tribunal's decision was appealed by Telmex Chile Long Distance S.A. before the Supreme Court of Chile, which reaffirmed the decision of the Tribunal on 15 July 2005. See Corte Suprema, Resolución Recurso 396/2005 – Resolución 14631 – Secretaria: Unica, available at <http://mail.fne.cl/db/tabla.nsf/WCSSentencias/1DB38DB90E831F0B8425726F00574C96?OpenDocument>.
- ¹⁹ Chile, Decreto Ley No. 211 of 1973.
- ²⁰ OECD, Inter-American Development Bank, *Competition Law and Policy in Chile: A Peer Review*, January 2004, Section 5.1.
- ²¹ OECD, Global Forum on Competition, *The Relationship Between Competition Authorities and Sectoral Regulators*, Contribution from Chile, DAF/COMP/GF/WD/(2005)4 , 12 January 2005, at par. 13 [hereinafter OECD Global Forum on Competition 2005]. See also OECD, Inter-American Development Bank, *Competition Law and Policy in Chile: A Peer Review*, January 2004, Section 5.1.
- ²² See Europe's Information Society, *Regulation of the Information Society Sector*, Information Society Policies at a Glance, at http://www.europa.eu.int/information_society/policy/index_en.htm.
- ²³ http://europa.eu.int/comm/competition/index_en.html.
- ²⁴ Commission Directive 2002/77/EC of September 16, 2002, on competition in the markets for electronic communications networks and

services. Official Journal of the European Communities, L249/21.

²⁵ Consolidated Version of The Treaty Establishing The European Community, Articles 81 and 82, Official Journal of the European Communities C 325/33, at <http://europa.eu.int/Eur-Lex/Lex/En/Treaties/Index.Htm>.

²⁶ Council Regulation 1/2003, OJ L 1, 14.01.2003, Article 5 (power of national competition authorities), Article 11 (cooperation between the Commission and the national competition authorities).

²⁷ Edward Pitt, *Competition Law in Telecommunications*, Section 8.7 "Procedures for Enforcement of the Competition Rules", in *Telecommunications Law and Regulation* (Ian Walden and John Angel eds.) 2005.

²⁸ See Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

²⁹ Article 5 EU Treaty. The subsidiarity principle, is essentially a principle of national autonomy.

³⁰ EC Merger Regulation, Article 9.

³¹ Merger Guidelines available at http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf.

³² Best Practices, available at http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf.

³³ Framework Directive Article 8(2).

³⁴ Christina Spyrelli, *Regulating the Regulators? An Assessment of Institutional Structures and Procedural Rules of National Regulatory Authorities*, *International Journal of Communications Law and Policy*, Issue 8, Winter 2003/2004, at 50 – 51.

³⁵ *Id.* at 51.

³⁶ Independent Communications Authority of South Africa Act No.13 of 2000.

³⁷ Republic of South Africa, Competition Act, as amended, Chapter 4, Part A, at <http://www.compcom.co.za/>.

³⁸ Republic of South Africa, Competition Act, as amended, Chapter 4, Part B, at <http://www.comptrib.co.za>; for the Tribunal's merger review process, see <http://www.comptrib.co.za/legislation/ICN%20Merger%20Template%20-%20South%20Africa.pdf>.

³⁹ Republic of South Africa, Competition Act, as amended, Section 21(h), Section 3(1A)(b) and 82(1), (2) and (3) and Chapter 4, Part A, at <http://www.compcom.co.za/>

⁴⁰ Memorandum of Agreement entered into between the Competition Commission and the Independent Communications Authority of South Africa, dated 16 September 2002.

⁴¹ *Id.*

⁴² Memorandum of Agreement entered into between the Competition Commission and the Independent Communications Authority of South Africa, dated 16 September 2002, at Article 2.3.4.

⁴³ Africa, Network for Capacity Building and Knowledge Exchange in ICT Policy, Regulation and Applications, Chapter 4: Module 3: *The Role of Regulation in Competition: Regulatory Intervention in the ICT Sector*, at 34 (citing the example of the dispute between NextCom and Cell C over the issuance of a third cellular licence in South Africa, where after several court hearings the parties reached an out-of-court settlement).

⁴⁴ India, Competition Act 2002 No. 12, PAUSA 24, 1924, 14 January 2003, Chapter 1, Article 2, (establishing that the Competition Act is applicable to "services", defined as service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as [...] communication.") See <http://www.competition-commission-india.nic.in>.

⁴⁵ The Telecom Regulatory Authority of India Act, 1997, No. 24 of 1997, Registered No. DL-33004/97, Chapter III, Article 11.1.h, available at <http://www.trai.gov.in>.

⁴⁶ India, Competition Act 2002 No. 12, PAUSA 24, 1924, 14 January 2003, Article 21 (establishing that "where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.") Pursuant to Article 2(w) a "statutory authority" is any authority, board, corporation, other body corporate, established by or under any Central, purposes of regulating production or supply of goods or provision thereof or any matter connected therewith or incidental thereto."

⁴⁷ Ley General de Telecomunicaciones No. 153-98 [General Telecommunications Law No. 153-98] Official Gazette No. 9983, Year CXLVI (Dominican Republic), 28 May 1998.

[48](#) *Id.* at Article 78.

[49](#) *Id.* at Article 8.

[50](#) *Id.* at Article 1.

[51](#) *Id.*

[52](#) Secretaría de Estado de Industria y Comercio [Ministry of Industry and Commerce], Proyecto de Ley de Defensa a la Competencia [Competition Defense Bill] (Dominican Republic), submitted in May 2005.

[53](#) Organisation for Cooperation and Economic Development (Competition Division) and Inter-American Development Bank, *Tratamiento del Control de Fusiones en el Anteproyecto de Ley de Defensa de la Competencia de la República Dominicana: Consideraciones institucionales*, [Treatment of Mergers under the Competition Defense Hill of the Dominican Republic: Institutional Considerations] Third Forum on Competition in Latinamerica, Madrid, Spain, July 19 – 20, 2005.

[54](#) ITU World Telecommunications Regulatory Database, Complete 2004 country profile for the Dominican Republic, Section 3, Heading "Future Plans."

[55](#) New Zealand, Commerce Act 1986 (as amended by the Commerce Amendment Act 1990).

[56](#) See <http://www.med.govt.nz/about/index.html>. Other industries include energy, intellectual property, tourism, economic development, broadcasting and commerce.

[57](#) New Zealand Commerce Act 1986, Section 8.

[58](#) See *id.* The Commission also enforces the Commerce Act 1986, the Fair Trading Act 1986, the Electricity Industry Reform Act 1998, the Dairy Industry Restructuring Act 2001 and the Credit Contracts and Consumer Finance Act 2003.

[59](#) See <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Overview.aspx>. See also New Zealand, Telecommunications Act 2001, at Schedule 3 (Procedure for Altering Regulated Services), available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes. Other Commission duties set forth under the Telecommunications Act include: "(i) making determinations on disputes over access [to certain designated services]; (ii) making determinations on disputes over [access prices]; (iii) conducting pricing reviews of its determinations for designated access services if requested to do so by a party to a particular determination; (iv) undertaking costing and monitoring activities relating to the Telecommunications Service Obligations and determines how these costs will be allocated to other industry players; and (v) deciding whether to approve telecommunications access codes which have been submitted to the Commission by the Telecommunications Industry Forum." (*Id.*)

[60](#) New Zealand Communications Communication, *Telecommunications Act 2001: Schedule 3 Investigation into Regulation of Mobile Termination*, Final Report, June 9, 2005, available at <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobileTerminationRates/ContentFiles/Documents/MT%20Report%20PUBLIC%20version1.pdf>

[61](#) New Zealand Telecommunications Act 2001, Schedule 3, Clause 6(b) and Clause 13.

[62](#) Letter issued by Hon David Cunliffe, Minister of Communications to Douglas Webb Telecommunications Commissioner, dated 9 August 2005, available at <http://www.med.govt.nz/pbt/telecom/mobile-investigation/media/minister-20050809.html>.

[63](#) Ann Buckingham and Mark Williams, *Designing Regulatory Frameworks for Developing Countries*, in Telecommunications Law and Regulation (Ian Walden and John Angel eds., 2005), Section 15.2.3, at 649.

3.3.3 Practical Lessons for Developing Countries

Regardless of the stage of development of their telecommunications market and regulation, the most significant lesson that developing countries may draw from some developed countries is that the objective of competition policy is to foster the expansion of the market, the availability of new technologies, and the accessibility of low-cost quality services to the public.

The small number of players in a market, and the lack of technical, human and financial resources may not make it feasible for developing countries to engage in dramatic legislative change (*i.e.*, from sector-specific to general competition rules). A report issued by the International Competition Network (ICN)¹ evaluated the effectiveness of competition advocacy in regulated sectors (including telecommunications) and draws several important lessons in this respect:²

1. Regulatory agencies should be aware of the importance of competition. To the extent there is both a competition authority and a regulatory agency, the latter should endeavour to consult with the former in developing and proposing new regulations in order to achieve pro-competitive policies.

2. An “open and active dialogue” should be maintained between competition authorities and sector regulators. This may include (i) requiring competition authorities to opine on proposed telecommunications regulations or telecommunications regulators to be consulted prior to the issuance of general competition guidelines that may affect the sector; (ii) participation of competition authorities in meetings with the regulator and the incumbent telecommunications operator in order to “promote competition values;” or (iii) the ability of competition authorities to “advise regulators on market definitions.”
3. Having the competition authority adopt “formal procedures,” which may include (i) the development of formal memoranda on cooperation between the competition authority and the telecommunications regulator; and (ii) implementation of telecommunications regulation that provides the competition authority with decision-making power on competition matters.
4. Using the media as a means to enable the competition authority to explain “its views and arguments within the framework of advocacy activities to the wider public.”
5. Ensuring an adequate level of technical expertise that may include (i) exchanging “high quality of information” between the competition authority and the telecommunications regulation; and (ii) developing “technical know-how” with the competition authority so that competition principles can be effectively transferred to the telecommunications sector.
6. Having a “forward looking” approach, which involves developing sound strategies to “anticipate and address” potential competition problems and deal with them before they negatively impact the market (This is the goal sought by the market analysis under the EU NRF discussed above).
7. Adopting a “legalistic approach,” which may include (i) incorporating formal rules governing the relationship between the competition authority and the telecommunications regulator to ensure that the “recommendations and opinions made by the competition agency are provided at the early states of the regulated sector reform” (see Box 3-6 for example of Brazil’s legalistic approach); (ii) developing a code of conduct that seeks to improve the relationship among industry participants; and (iii) establishing conditions regarding the protection and exchange of confidential information.

Box 3-6: Example of Implementation of a Legalistic Approach Memorandum of Understanding – Brazil

The Brazilian System of Defense of Competition (SBDC), comprised of the Administrative Council of Economic Defense (CADE), the Secretariat of Economic Law (SDE), and the Secretariat for Economic Monitoring (SEAE), is responsible for ensuring the protection of competition in Brazil. CADE has entered into several competition promotion agreements with sector-specific regulatory agencies in order to institutionalize cooperation among them in competition and antitrust matters (this would be an example of the “formal procedures” approach).³ However, General Telecommunications Law contains specific provisions governing the interplay between the telecommunications regulator, Anatel, and CADE and establishing the hierarchy of competition law with respect to the telecommunications sector, as follows:

- General competition rules (*i.e.*, “rules for the protection to the economic framework”) are applicable to the telecommunications sector, to the extent that they do not conflict with the telecommunications law (Article 7 of the General Telecommunications Law);
- Any act among telecommunications service providers that seeks any form of economic concentration is subject to the controls, procedures and conditions set forth in the general competition law and will be submitted for consideration by CADE.
- Anatel has the ability to supervise, control and prevent activities that harm the economy, unless such activities fall within the purview of CADE.

Under this structure, Anatel’s duties are similar to those of the SDE, which initiates administrative proceedings and issues determinations on mergers to be approved by CADE.⁵

ENDNOTES

¹ ICN is an international body that provides competition authorities with an informal venue to address practical competition concerns. It is a project-oriented initiative and does not exercise any rulemaking functions. Information available at <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn>.

² See generally ICN, *Competition Advocacy in Regulated Sectors: Examples of Success*, April 2004 [hereinafter Competition Advocacy Report], available at http://www.internationalcompetitionnetwork.org/capacitybuild_sg4_seoul.pdf. This report was prepared as a result of the work of the Capacity Building & Competition Policy Implementation Working Group of the ICN that reviewed responses to questionnaires submitted by more than 33 member countries. The objective of their work was to “compile a compendium of successful case studies and discern common patterns or strategies” focusing on “regulated sectors in developing and transitioning economies.” According the report, competition advocacy “refers to those activities conducted by a competition authority related to the promotion of a competitive economic environment by means of non-enforcement mechanisms, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition.” (ICN Competition Advocacy Report, citing to the ICN’s Advocacy Working Group: “ICN 2002 Advocacy Study”).

³ OECD Global Forum on Competition 2005, Contribution from Brazil, 12 January 2005, DAF/COMP/GF/WD(2005)14, at par. 8.

[4 LEI Nº 9.472](#), sobre a organização dos serviços de telecomunicações, a criação e funcionamento de um órgão regulador e outros aspectos institucionais [Law No. 9.472 on the organization of telecommunications services, the creation and determination of the institutional functions of the regulatory agency and other matters (Telecommunications Law)] (Brazil) 16 July 1997, Articles 7 and 19.XIX.

[5](#) OECD Global Forum on Competition 2005, Contribution from Brazil, 12 January 2005, DAF/COMP/GF/WD(2005)14, at par. 22.

3.4 Impact of Other Legislation

The effective implementation of telecommunications regulation and the achievement of its objectives may be influenced by other laws that affect the sector. In meeting other government objectives, laws may be passed that directly or indirectly affect the development of the telecommunications sector. These laws may enhance or diminish the effectiveness of the telecommunications legal and regulatory framework in creating an enabling environment for the development of the sector, affecting the degree of investment and competitiveness in the sector, and the ease of accessibility by new entrants to the market.

The breadth of legislation potentially affecting the telecommunications sector is quite expansive. This section focuses on the legislation generally considered to most directly impact the sector – tax laws, foreign ownership laws, consumer protection laws, spam legislation, and property laws. The interaction between competition law and telecommunications law is addressed more fully in Section 3.3.

3.4.1 Tax Law

The regulation of telecommunications services will be affected by the taxation of such services, whether at the federal, state or local level. The taxation of telecommunications services, the amount of taxes, and the determination of any exemptions, will depend on the particular tax laws in each country. Taxes collected from telecommunications operators and service providers are important sources of revenue to many governments, and are used for a variety of purposes, including financing the cost of regulating the sector, and helping fund universal service programs, emergency services, and services for disabled persons. However, excessive taxation of the telecommunications industry can retard competition, and discourage technological development and investment in the sector. Given the importance of the telecommunications sector, the development of adequate telecommunications infrastructure and the costs associated with such development, investment in the sector is critical. One of the main considerations for attracting investment in telecommunications infrastructure and services are the additional costs associated with the taxes levied by individual governments. Many countries, for example, offer incentives to attract foreign direct investment in the form of tax concessions, holidays and credits, export subsidies, import entitlements and accelerated depreciation.¹ Some governments have created “tax-free” zones to attract investors in the telecommunications sector. Panama, for example, created a tax-free environment in the Howard Special Economic Area and the “City of Knowledge Tecnopark” as an incentive for companies to establish businesses.²

The effect of taxation on the “digital divide”, particularly in developing countries, is evident in a new study recently released by the GSM Association on the impact of taxation on mobile-phone adoption.³ The study shows that developing countries with high mobile taxes have fewer mobile telephones per person than countries with low taxes (see Figure 3-C below). The growth and demand for mobile services make taxation of handsets attractive in many countries, particularly in developing nations where taxes of mobile phones are often a main source of revenue.⁴ The burden of mobile phone taxes can be quite high. For example, in many countries, a value-added tax is charged, in addition to customs duties on imported handsets. Syria imposes an import duty of 45.6%, Ghana 33%, Uganda 27%, and Bangladesh USD 5 per handset. In addition, subscribers may be taxed when they sign up for services and when they make calls. For example, Turkey imposes a subscription tax of USD 24, Bangladesh USD 14, and Pakistan and Senegal USD 8. The study does not make any specific recommendations, but the research shows that eliminating all import duties and sales taxes on low-cost handsets (below USD 30) could lead to 930 million additional sales by 2010. The study also predicts that a reduction of one percentage point in sales taxes on mobile services could result in a 2% increase in mobile penetration between 2006 and 2010 in a typical developing country.⁵

Figure 3-C: Mobile Phone Taxes and Penetration Rate



The advance of new technologies in the telecommunications sector is also likely to impact the way countries impose telecommunications taxes. For example, as regulators define VoIP services, they must also consider the tax implications of the regulatory classification of VoIP, which could affect whether VoIP services are subject to federal, state or local taxes, whether interconnection fees apply, and whether VoIP providers are subject to universal service contributions.⁶

ENDNOTES

¹ Asian Development Outlook 2004, *Part 3: Foreign Direct Investment in Developing Asia*, at 213.

² See Business Panama at <http://www.businesspanama.com/investing/opportunities/telecommunication.php>.

³ *Tax and the Digital Divide: How new approaches to mobile taxation can connect the unconnected*, GSM Association Mobile Tax Report, 2005, [hereinafter *Tax and the Digital Divide*] available at <http://www.gsmworld.com/TAX/>.

⁴ *Making the Connection*, The Economist, 29 September 2005.

⁵ *Tax and the Digital Divide*, at 4.

⁶ James E. Nason, *Can You Hear Me Now? Dialing UP Taxes on VoIP*, Deloitte, 2004.

3.4.2 Foreign Ownership

Given its status as a critical public utility, telecommunications has been regarded as an integral part of a country's sovereignty and thereby subject to [foreign ownership restrictions](#) under either telecommunications legislation or a country's foreign investment law. However, largely as a result of liberalization, many countries have eased foreign ownership restrictions in order to attract investment, particularly as

public sector financing has shrunk since the 1980's and the private sector, both domestic and foreign, has had to assume responsibility for financing development in the ICT sector.¹ Foreign investment has facilitated the growth and development of the telecommunications sector in many countries, increasing access to capital for network development and modernization, and allowing for the transfer of technology and know-how. However, despite the benefits of foreign investment, not all countries are initially open to establishing a legal environment that is conducive to overseas ownership in the sector (see Box 3-7 below). Where foreign ownership restrictions continue to exist, governments should balance the reasons for such restrictions with the need for creating a favourable environment that is conducive to competition and development as well as an adequate access to capital.

Box 3-7: Vietnam's Business Corporation Contracts

Under Vietnam's investment law of 1992, as amended in 2000, foreign companies are allowed to provide services to Vietnam's telecommunications market only under a Business Corporation Contract (BCC). A BCC is, in essence, a partnership agreement between a foreign and a Vietnamese party in which private investors provide capital and receive a negotiated return on their investment for a prescribed number of years. Foreign investors are not allowed to own equity stakes in Vietnamese telecommunications companies and the Vietnamese party is the only party permitted to hire and manage a workforce. A foreign company must be present in Vietnam for at least two years before entering into BCC negotiations.

In most cases, such schemes discourage foreign investors because they have no operational control over their investments. Lack of ownership rights and limits on management control increase investor risk and consequently, increase the cost of capital, reduce its availability and impede the transfer of management expertise to firms in the host country. Since a BCC arrangement de-links management from investment risks, the incentives for effective, profit-oriented management are also reduced.

Unsurprisingly, as the Vietnamese telecommunications market gradually opens, resistance among foreign investors to BCCs is growing.

Source: European Union, Asia IT&C Program, "Promoting Internet Policy and Regulatory Reform in Vietnam: Assessment Report 2004," GIPI Vietnam, 2004.

The level and nature of foreign investment in a country depends on various factors, such as openness of the market, government policies, infrastructure quality, political and regulatory stability, taxes and tariffs, labor costs, international commitments, and the existing legal framework. In South Africa, for example, foreign ownership restrictions in the telecommunications sector originate from the political history of the region. To address the effects of apartheid, the government's policy of economic reform has been based on economic empowerment, which encourages ownership and significant participation by historically disadvantaged groups.² In the ICT sector, Sections 35(3) and 35(4) of the Telecommunications Act requires the regulator, ICASA, to promote the empowerment and advancement of disadvantaged groups and women by giving them preference in the award of any licences for up to 30 per cent equity ownership (and sometimes higher).³

Although foreign ownership restrictions have been eased in numerous countries they continue to exist in some countries, even in liberalized economies, chiefly due to concerns regarding national identity and security, economic espionage, damage to law enforcement interception capabilities, and potential for damage to critical infrastructure.⁴ For example, although India recently raised the foreign direct investment limit in the telecommunications sector from 49 per cent to 74 per cent in order to attract more investment in the sector, it has imposed various conditions on foreign investment to address national concerns which limit the impact of the changes. These conditions state that: (i) the majority of the Board of Directors, including the Chairman, Managing Director and Chief Executive Officer, must be resident Indian citizens; (ii) at least one resident Indian promoter must hold 10 per cent equity in any telecommunications company; (iii) the Chief Technical Officer and Chief Financial Officer must be resident Indian citizens; (iv) no sensitive information relating to subscribers and accounts can be transferred outside India; and (v) the identity of subscribers must be traceable at all times.⁵

Although a country's telecommunications laws may contain foreign ownership restrictions, it is often the case that other national laws regarding foreign investment in general may impose limitations. [Canada](#) and the [United States](#), for example, not only have foreign ownership restrictions in their telecommunications laws, but have national laws regarding foreign investment such as the Committee on Foreign Investment in the United States (CFIUS) review in the United States and the Investment Canada Act in Canada. In the United States, the Committee on Foreign Investment in the United States (CFIUS) review is applied to all foreign acquisitions of U.S. companies to evaluate the impact on national security. If countries have foreign investment laws which require a review of telecommunications transactions and investment, they should ensure they do not become a hurdle that is non-transparent, timely, resource-intensive, and creates uncertainty. On the other hand, the Investment Canada Act provides for the review by the Minister of Industry of any foreign acquisitions in order to ensure a "net benefit" to Canada.

ENDNOTES

¹ Boutheina Guermazi and David Satola, *Creating the "Right" Enabling Environment for ICT*, Chapter 2 in e-Development: from Excitement to Efficiency, The World Bank (2005), at 4.

² See *ICT Draft Black Economic Empowerment Charter for the ICT Sector*, Preamble, May 2005 at <http://www.ictcharter.org.za/content/ICTbeecharter04may2005-Minister.pdf>.

³ Telecommunications Act 103 of 1996, as amended, 1 July 1997, available at <http://www.icasa.org.za>.

⁴ For an interesting article regarding such concerns from the U.S. perspective, see James A. Lewis, *New Objectives for CFIUS: Foreign Ownership, Critical Infrastructure, and Communications Interception*, 57 Federal Communications Law Journal, 457-478, May 2005.

⁵ *FDI cap in telecom hiked to 74 pc*, Business Line, Internet Edition, 3 February 2005, available at <http://www.thehindubusinessline.com/2005/02/03/stories/2005020303080100.htm>.

3.4.3 Consumer Protection Law

It is important that the telecommunications legal and regulatory framework create an environment that promotes public interest, confidence and participation in the sector. Most countries have done so by enacting consumer provisions in telecommunications legislation, such as number portability, quality of service and universal service. Many countries also have general consumer laws to protect consumer interests in the purchase of goods and services, which also affects telecommunications. The popularity of mobile phones has also resulted in the enactment of special legislation in some countries against mobile phone theft. The interaction of different consumer protection laws that affect the telecommunications sector is seen, for example, in Australia,¹ where consumer protection legislation is embodied in the Telecommunications Act 1997, the Telecommunications (Consumer Protection and Service Standards) Act 1999, the Privacy Act 1988 and the Spam Act 2003.² In addition, there are general consumer safeguards under the Trade Practices Amendment (Telecommunications) Act 1997,³ general unfair trading legislation and customer rights under contract law in Australia.

Due to the interaction of different consumer protection laws, such as in the case of Australia, a need exists for consistency among the laws in order to lessen confusion, and to ensure that the highest standard of consumer protection prevails. In particular, consumer issues and the degree of regulatory oversight may be influenced by the maturity of the national market and the degree of competition in the sector. For example, in highly competitive markets, such as Australia, Hong Kong SAR, Malaysia and Singapore, more reliance is placed on industry self-regulation through voluntary codes of practice. In Malaysia, the Consumer Forum, comprised of service providers, telecommunications companies, broadcasting stations, non-governmental organizations and public interest groups, is designated by the Malaysian Communications and Multimedia Commission (MCMC) to prepare industry codes on consumer protection issues.⁴

Furthermore, given the constantly evolving nature of the telecommunications sector due to new technological developments and convergence, in particular the development of the Internet and the ICT sector, and the large quantity and range of personal information involved, these developments provide certain challenges that may not necessarily be addressed by telecommunications laws or general traditional consumer protection laws. Therefore, many countries are adopting additional laws and regulations that are focused on consumer protection matters in the ICT sector, such as intellectual property rights spam, privacy, fraud, identity theft, cyber crime, and e-commerce transactions. Such legislation protecting consumer activities in the ICT sector, and providing for the security of electronic networks and communications, are necessary to create trust and confidence in the use of digital networks.⁵ Further discussion of the impact of ICT related legislation in the telecommunications sector is found in Chapter 4, Section 4.4. A more detailed discussion regarding the regulatory responsibility for consumer protection is available in Chapter 7, Section 7.3.

ENDNOTES

¹ On July 1, 2005, the Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA) were merged to form a new regulator, the Australian Communications & Media Authority (ACMA). The ACMA and the Australian Competition and Consumer Commission (ACCC) are responsible for regulating the broadcasting industry, the Internet, the telecommunications industry, and the radiocommunications industry. See <http://www.acma.gov.au>.

² The Acts are available at <http://www.comlaw.gov.au>.

³ The Trade Practices Amendment (Telecommunications) Act 1997, no. 58 of 30 April 1997 is administered by the Australian Competition and Consumer Commission (ACCC) which regulates anticompetitive conduct by carriers and service providers.

⁴ Dr. Bob Horton, *Telecommunications Consumer Protection in the Asia-Pacific Region*, Report to the ITU Global Symposium for Regulators, December 2002.

⁵ See Boutheina Guerhazi and David Satola, "Creating the 'Right' Enabling Environment for ICT," Chapter 2, e-Development: from Excitement to Efficiency, The World Bank, (2005).

3.4.4 Spam Legislation

Closely related to consumer protection legislation is legislation against spam, or the sending of unsolicited, usually commercial, electronic messages. Spam is a recent phenomenon that has become more prevalent with the growth of Internet usage, although spam can also be carried out through other electronic means, such as facsimile, telephone, short message service (SMS) and instant messaging services.

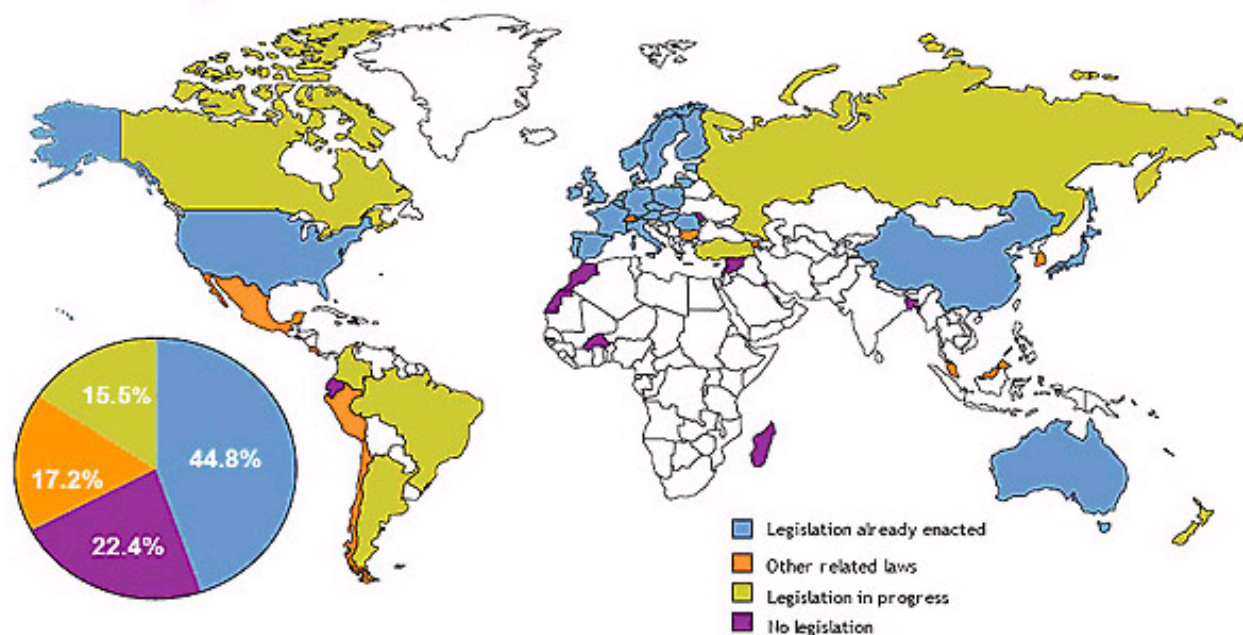
See Box 3-8 for the definition of spam. With the growth of ICT, a continually increasing number of countries have implemented legislation against spamming to supplement existing consumer protection laws (see Figure 3-D).¹ The problems associated with spam are magnified in developing countries, where high volumes of incoming and outgoing spam can cause a severe drain on the limited and costly bandwidth that is available for ICT.²

Some countries, however, such as Bangladesh, Burkina Faso, El Salvador, Kuwait, Madagascar, Moldova and Lebanon have no spam legislation, while others such as Bulgaria, Chile, Costa Rica, [Malaysia](#), Mexico, Peru, South Korea and Switzerland have no specific anti-spam legislation, but use alternative laws to address spam issues, such as consumer protection laws, telecommunications law, or data protection law. Several countries such as Argentina, Brazil, Canada, Hong Kong SAR, Russia, Singapore and New Zealand are in the process of enacting specific anti-spam laws, while others such as [Australia](#), Austria, Belgium, [China](#), Czech Republic, Hungary, Japan, Lithuania, the Netherlands, and the [United States](#) have already enacted specific spam legislation.³ In the EU, legislation against spam is codified in the Directive on Privacy and Electronic Communications which requires member states to prohibit unsolicited communications sent via e-mail, SMS, facsimile, or telephone.⁴ The Directive's basic principles are that: (a) member states should take an opt-in approach, whereby they ensure under applicable legislation that businesses obtain prior consent before sending unsolicited e-mails for direct marketing; (b) senders must clearly indicate the use of cookies or other tracking devices, including spyware; and (c) the definition of spam is technology neutral.

Although national efforts are the main forces in combating spam, due to the "borderless" nature of spam, it is just as important to have international enforcement cooperation. For example, countries such as Australia, Korea, the United Kingdom and the United States have signed bilateral and multilateral memoranda of understanding to coordinate and improve spam enforcement activities. The OECD, to support the development of an inclusive response to spam, has launched an Anti-Spam Toolkit containing resources and information on anti-spam activities at the international level, to help policy-makers, regulators, and industry players formulate policies and find solutions to spam.⁵

Figure 3-D: Anti-Spam Legislation Worldwide

Survey results



Source: ITU Global Survey on Anti-Spam Laws and Authorities, April 2005.⁶

Box 3-8: What is "Spam"?

There is no internationally agreed definition of what constitutes spam. The following are definitions provided by Australia, the European Union and the United States.

Australia: The legislation refers to the phrase "unsolicited commercial electronic messages" (the word "spam" is not specifically mentioned). There is no reference to bulk messaging; therefore a single unsolicited commercial electronic message could be spam. The judicial provisions are technologically neutral, and therefore apply to any unsolicited commercial messages delivered to the consumer via email, SMS, MMS and instant messaging. Faxes and voice-to-voice telemarketing are excluded.

European Union: The term spam is neither defined nor used. Rather, the Directive uses the term

"electronic mail for the purposes of direct marketing." The judicial provisions are technically neutral and therefore apply to direct marketing efforts made using e-mail, calling machines, faxes and SMS messages.

United States: The term spam is neither defined nor used. The Federal Trade Commission (FTC) refers to an "unsolicited commercial electronic mail message"; however, judicial provisions do not limit spam to e-mail. In addition, the FCC adopted new rules to protect consumers from receiving spam on their wireless devices, such as cellular phones and pagers.

Source: ITU Survey on Anti-Spam Legislation Worldwide 2005.

Despite the enactment of anti-spam laws that are necessary tools for combating spam, such laws have been unsuccessful in abating spam.⁷ Therefore, in addition to enactment of anti-spam laws, which usually involve the sanctioning of spammers through an "opt-in" or "opt-out" approach (Box 3-9), it is also important to consider alternative legal mechanisms such as the establishment of industry-led enforceable codes of conduct for Internet Service Providers (ISPs). This proposed approach would require ISPs to establish and enforce codes of conduct that prohibit their users from using the ISP as a source of spamming and other prohibited acts such as spoofing and phishing and prohibiting users from entering into peering arrangements with ISPs that do not uphold similar codes of conduct.⁸ The ultimate goal of such codes of conduct is to ensure that ISPs assist with the anti-spam efforts by taking adequate action to keep spammers off the Internet.⁹

Box 3-9: Opt-in or Opt-out?

Most anti-spam laws involve the "opt-in" versus the "opt-out" approach.

Opt-in: This approach, adopted by the EU Directive, prohibits marketers and senders of commercial electronic messages from sending messages to a recipient unless the recipient has affirmatively asked to receive them. Affirmative requests for messages can be delivered directly by a recipient or they can be constructively construed from an existing business relationship between the recipient and the sender. For example, under opt-in laws, if a person purchases a product from a merchant, that merchant may send that person offers in the future until the merchant receives a request to stop sending such offers.

Opt-out: This approach, adopted by the United States, Japan and South Korea, allows senders to send messages to a recipient even if there is no existing business relationship and the recipient has not specifically opted to receive the messages. However, senders must honor the requests of recipients to remove them from a sender's mailing list.

Source: ITU Survey on Anti-Spam Legislation Worldwide 2005.

ENDNOTES

¹ For additional information, the OECD published a document to aid countries either considering the development of an anti-spam regime, wishing to review existing regulations, or looking to improve cross-border regulatory frameworks in the development and review of anti-spam regulation strategies. See *Anti-Spam Regulation*, OECD Task Force on Spam, 15 November 2005, available at <http://www.oecd.org/dataoecd/29/12/35670414.pdf>. The ITU has launched a cybersecurity gateway with additional resources and links to information on national and international cybersecurity related initiatives worldwide, available at <http://www.itu.int/cybersecurity/index.html>. A joint initiative to gather information and resources on combating spam known as the Stop Spam Alliance was undertaken by Asia-Pacific Economic Cooperation (APEC), the EU's Contact Network of Spam Authorities (CNSA), the ITU, the London Action Plan, the OECD and the Seoul-Melbourne Anti-Spam group, available at <http://stopspamalliance.org/>.

² *Spam Issues in Developing Countries*, OECD Task Force on Spam, 26 May 2005, at 7.

³ ITU Survey on Anti-Spam Legislation Worldwide, 2005, available at http://www.itu.int/osg/spu/spam/legislation/Background_Paper_ITU_Bueti_Survey.pdf.

⁴ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications).

⁵ The OECD Anti-Spam Toolkit is available at www.oecd-antispam.org

⁶ The ITU survey was sent to 189 ITU member states, and these survey results are based on the 58 responses received. See <http://www.itu.int/osg/spu/newslog/ITU+Global+Survey+Of+AntiSpam+Laws+And+Authorities.aspx>

⁷ John G. Palfrey, Chapter 7: *Stemming the International Tide of Spam*, in *International Telecommunication Union, Trends in Telecommunication Reform: Regulating in the Broadband World*, (2006), available at http://www.itu.int/ITU-D/treg/publications/Chap%207_Trends_2006_E.pdf.

8 *Id.*

9 *Id.*

3.4.5 Property Law

National laws regarding property transactions can affect the effectiveness of the telecommunications legislation in several ways. Property taxes, for instance, can affect investment in the sector. In addition to taxes, property laws with regard to ownership rights and government confiscation are other factors that investors usually consider when deciding whether to invest in a particular country, and affect the level of public confidence in the stability of the sector. Some countries, such as Jordan, have “investor friendly” property laws. Foreign entities are allowed to own or lease property in Jordan for investment or personal use, provided that their home countries permit reciprocal rights to Jordanians. Investment properties have to be developed within five years from the date of approval, and foreign companies which hold a majority share in a Jordanian company or wholly owned subsidiaries of foreign companies, are automatically given national treatment with respect to ownership of land where the company’s business allows for ownership of land or real estate.¹

Property laws also affect the actual application of the rights granted to licensees under the telecommunications legislation with regard to their access to critical networks and infrastructure. The ability of operators to offer telecommunications services often requires the building of infrastructure, such as installation of cable or optical fiber lines, poles, ducts, and construction of towers, which in turn involves the need to access public or private property. Telecommunications operators’ access to rights of way is often reflected in telecommunications legislation, which gives the government the right to appropriate property for such use. Where such appropriation involves private ownership, the landowner is usually compensated for the use of property. However, access to property as provided under the telecommunications law can become complicated in practice, depending on the property laws existing in the particular country. While the federal government has control over federal property, states and municipalities often have jurisdiction over property under their administration.

For example, some countries, such as Brazil, have property laws that are applied at the federal, the state and the municipal level. Rights of way and access of telecommunications operators to property in Brazil are governed in part by the federal Civil Code,² the Telecommunications Law,³ and the municipal laws of each state. Articles 21 and 22 of the Constitution establish the exclusive authority of the federal government to legislate and exploit telecommunications services in Brazil, which is defined as a public service. The power of the government to regulate telecommunications has been delegated to the regulatory agency, Anatel, which regulates the sector under the provisions of the Telecommunications Law. Article 74 of the Telecommunications Law specifically states that the telecommunications licensee is not exempt from complying with engineering regulations and municipal, state and federal laws regarding construction and cable and equipment installation in public areas. Articles 20 and 30 of the Constitution provide that states and municipalities may be authorized to legislate upon specific matters related to the provision of telecommunications services, such as the rights of municipalities to legislate on urban planning and environmental matters and to charge telecommunications operators for the use and occupation of the land under their jurisdiction. Under Title II, Article 1286 of the Civil Code, the owner of a real property must allow public service providers to install cables, ducts and conduits for the provision of public services, pursuant to the payment of a proper indemnity. Article 1369 of the Civil Code states that property owners may confer to any third party the right to build on its land by means of a public deed, and under Article 1371, the tenant is responsible for payment of fees and taxes applicable to the property.

ENDNOTES

¹ Jordan Economic Boycott Law no. 11 of 1995. See also U.S. Department of State, 2005 Investment Climate Statement – Jordan, *available at* <http://www.state.gov/e/eb/afd/2005/42064.htm>.

² Brazil Civil Law, as amended, (Código Civil Brasileiro), Law no. 10.406, 10 January 2002.

³ General Telecommunications Law, Law No. 9.472 of 16 July 1997, *available at* http://www.planalto.gov.br/ccivil_03/Leis/L9472.htm.

4 Impact of Convergence

This Chapter addresses the international response of policy-makers and regulators to convergence and its effects on their legal and regulatory frameworks. First, it analyses the different regulatory approaches most commonly used to address convergence (*i.e.*, legislative, regulatory and self-regulation approaches) and describes the advantages and disadvantages of each approach. Second, it outlines the impact that convergence is having on different regulatory processes, namely licensing, spectrum, interconnection, universal service, and numbering. Finally, it analyses and describes the type of legislation and regulatory processes that should be implemented by countries to facilitate a converged environment.

4.1 What is Convergence?

There is no universal definition of convergence, although generally it is understood to mean the ability of different networks to carry similar kinds of services (*e.g.*, voice over Internet Protocol (IP) or over circuit switched networks, video over cable television or Asynchronous Digital Subscriber Line (ADSL) or, alternatively, the ability to provide a range of services over a single network, such as the so-called “triple play.” Box 4-1 summarizes some of the issues that regulators should consider with regard to convergence.

Box 4-1: Checklist of Issues for Regulators to Consider with Regard to Convergence

1. Does the regulatory framework facilitate the provision of different services over different platforms (*e.g.*, technology neutrality)?
2. Does the regulatory framework support full competition?
3. Does the regulatory framework allow service providers to offer multiple services?
4. What are the regulatory policies for these new technologies and services with regard to numbering, spectrum, universal service, and interconnection?
5. Does the country's legal framework contain the necessary legislation to support an ICT environment (*e.g.*, intellectual property laws, computer crime, electronic transactions, data privacy and security)?
6. How much turn-around time and process is required for the country's legal framework to respond to future changes in the sector?

Convergence is accelerating as existing networks are modified to offer new services (*e.g.*, upgrade of telephone networks to offer ADSL, alteration of electric power networks to offer broadband services, and the modification of cable networks to offer interactive services). Convergence is also possible with wireless broadband technologies. As a result, different network infrastructures can today provide a plethora of services (Table 4-1). Cable television providers can offer consumers voice, Internet access, and broadcast services over the same network as one bundled package of services, and for one monthly price. Likewise, a mobile service provider may be able to offer a subscriber data and video services, as well as voice services, and digital television (DTV) providers are offering interactive services.

Table 4-1: Developing viable business models with convergence

Multiple service provision under different network infrastructures			
Infrastructure	Voice	Data	Video
Copper line	PSTN	DSL, FTTP	VOD, IPTV
Cable	Some	Cable modem	Analogue, DTV
Mobile	Analogue, 2G, 3G	2.5 G, 3G	DVB-H, others
Fixed Wireless	Some (VoIP)	Proprietary, 3G, WiMax, LMDS, MMDS	DVB
Powerline Communications	VoIP	BPL	VOD, DVB, IPTV

DSL=Digital Subscriber Line, FTT= Fiber to the premise, VOD=Video on Demand, IPTV=Internet Protocol TV, DVB=Digital Video Broadcasting, 2G = Second generation mobile service, 3G=Third generation mobile service, BPL=Broadband over Power Line.

Source: Telecommunications Management Group, Inc.

The combination of services over the same platform is challenging common perceptions about the best means to license and regulate providers in the information and communications technology (ICT) sector. Traditionally, regulatory frameworks were designed for an era when clear functional differences existed between services and infrastructure, but these regulations are increasingly inadequate for dealing with today's world.

Policy-makers and regulators are responding to the challenges presented by the ICT sector in a variety of ways. First, there has been a shift towards an equal or technology-neutral regulatory treatment of different information and communications infrastructure. For example, the European Union (EU), India, and Kenya¹ have introduced, or are in the process of introducing, legal frameworks and regulations to regulate aspects of convergence through a flexible and a technology neutrality approach.

Second, governments such as Malaysia, Singapore, and the United Kingdom, are modifying the structure of regulatory authorities by providing them with the authority to regulate the telecommunications, broadcasting, and information technology sectors. Finally, governments are drafting and implementing new laws and regulations to create the necessary legal enabling framework to support an ICT sector. These laws and regulations deal with such issues as intellectual property, content, data protection, security, and computer crime.

Another approach to convergence is to accommodate it within the existing legal and regulatory framework. This is possible in countries where there are no barriers to market entry or restrictions on the type of service offering. Although operators can, and do, offer multiple services over multiple platforms in fully competitive markets, it is often a cumbersome process requiring multiple licences and regulatory oversight by different institutions.

ENDNOTES

¹ The Communications Commission of Kenya announced in 2004 its intention to adopt gradually a technology-neutral and unified licensing framework. See public consultation on intention to merge licence published on 21 September 2005 at <http://www.cck.go.ke>.

4.2 Different Approaches in Implementing ICT Regulation

There are three approaches taken by countries to address convergence: (i) a legislative approach; (ii) a regulatory approach; and (iii) a self-regulation approach. Although the first two are most commonly used among policy-makers, the self-regulation approach is gaining increasing popularity. Each of the approaches presents advantages and disadvantages as discussed below, but no one approach results in an optimal solution. In general, countries see more effective results when several approaches, especially the legislative and the regulatory ones, are used together. Moreover, the first two approaches are generally more effective when they also incorporate a consultative process (see Box 4-2), such as a public hearing. Additionally, incorporating a self-regulation approach with industry participation allows policy-makers to better understand the consequences of convergence and its trends, as well as to balance the different interests involved in convergence regulation.

Box 4-2: The public consultative process within the European Union New Regulatory Framework

The liberalization of telecommunications in the European Union (EU), completed in 1998, is generally considered a marked success. Opening up formerly monopolistic markets led to dramatically lower prices and improved services for consumers and businesses, boosting Europe's communications industry and creating economic growth.

Ongoing technological innovation, however, overtook the telecommunications regulatory regime. Digitalization now allows many kinds of content to be delivered over different networks. The Internet has become a global infrastructure for a range of electronic communications services. Information and communications technologies are converging, opening up myriad possibilities for new industries and services.

To tackle the emerging policy and regulatory issues associated with this new technological environment, the European Commission (EC) published a Green Paper on the convergence of telecommunications (Convergence Green Paper) in December 1997.¹ This was followed by a five-month public consultation period, including a public hearing, to allow the EC to receive feedback from industry, member state regulators, and other interested parties. The EC subsequently published the results of the public consultations in March 1999.²

Later that year, the EC launched a review of its telecommunications framework in a consultation document known as "the 1999 Communications Review",³ which was published in November 1999. The aims of the review were fivefold: (i) to promote more effective competition; (ii) to react to technological and market developments; (iii) to remove unnecessary

regulation and simplify associated administrative procedures; (iv) to strengthen the internal market; and (v) to protect consumers.

The review drew on the key messages of a series of consultations, reports and independent studies, in particular, the Communication on the Convergence of the Telecommunications, Media and Information Technology Sectors, the Communication on the Consultation on the Radio Spectrum Green Paper,⁴ the Report on the Development of the Market for Digital Television in the European Union,⁵ and the Fifth Report on the Implementation of the Telecom Regulatory Package.⁶

A public hearing was held in January 2000 in which interested parties were invited to submit their comments on the 1999 Communications Review. The public consultation period ended in February 2000 and the results of these consultations were published in April 2000.⁷ After reviewing the responses of all interested parties, including member states' regulators and industry representatives, the EC issued several "orientations" (i.e., policy documents) in April 2000 and subsequently proposed in July 2000 a package of measures for a new regulatory framework for electronic communications networks and services.⁸

The result of these lengthy consultations is the EU new regulatory framework (NRF), comprised of six specific directives and one decision,⁹ which tackles convergence by generally extending and adapting liberalization to electronic communications.¹⁰

ENDNOTES

¹ European Commission, *Green Paper on the Convergence of the Telecommunications, Media, and Information Technology Sectors and the Implications for Regulation*, COM 97(623), 3 December 1997, available at <http://europa.eu/scadplus/leg/en/lvb/l24165.htm>

² European Commission Communication, *The Convergence of the Telecommunications, Media, and Information Technology Sectors and the Implications for Regulation – Results of the Public Consultation on the Green Paper*, COM (1999) 108, 10 March 1999, available at [http://ec.europa.eu/archives/ISPO/convergencecp/com\(99\)108/com\(99\)108enfinal.html](http://ec.europa.eu/archives/ISPO/convergencecp/com(99)108/com(99)108enfinal.html)

³ The 1999 Communications Review, COM (1999) 539, at <http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/review99/com2000-239en.htm>

⁴ European Commission, *Green Paper on Radio Spectrum Policy in the context of European Community policies such as Telecommunications, Broadcasting, Transport, and R&D*, COM (1998) 596, available at http://ec.europa.eu/comm/information_society/policy/spectrum/greenpaper_en.htm

⁵ European Commission, *The Development of the Market for Digital Television in the European Union – Report in the context of Directive 95/47/EC on the use of standards for the transmission of television signals*, COM (1999) 540, 9 November 1999, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31995L0047&model=guichett&lg=en

⁶ European Commission, *5th Report on the Implementation of the Telecommunications Regulatory Package*, 1999, available at http://europa.eu.int/information_society/policy/ecomm/implementation_enforcement/annualreports/5threport/index_en.htm.

⁷ European Commission, *Communication from the Commission: The results of the Public Consultation on the Communications Review 1999 and Orientations for the new Regulatory Framework*, COM (2000) 239 26 April 2000, available at <http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/review99/com2000-239en.htm>

⁸ For links to the texts of the proposed new Regulation and Directives, in COM(2000)384, 385, 386, 392, 393 and 394 see http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/index_en.htm

⁹ See http://europa.eu.int/information_society/policy/ecomm/todays_framework/overview/index_en.htm.

¹⁰ European Commission, Factsheet 13: *Electronic Communications New Regulatory Framework – Principles*, September 2005, available at http://europa.eu.int/information_society/doc/factsheets/013-regulatory_framework.pdf.

4.2.1 Legislative Approach

The legislative approach consists of developing legislation that responds to convergence, either in the immediate term or in anticipation of convergence trends. Legislative solutions define new laws or create new regulatory frameworks to respond to convergence and guide future policy direction. This can be done by developing and implementing a reform of the entire legal framework for telecommunications or by amendments to existing laws.

An advantage of the legislative approach is that it allows the introduction of a new framework to deal with convergence, without constraints imposed by other regulations or by the existing telecommunications law that may contain categories in which converged services do not fit. A new law or an amendment of an existing law aimed at addressing convergence through a technology-neutral approach with a simplified service category can eliminate contradictions and inconsistencies in regulatory classifications. This ultimately

makes the regulator more efficient and effective.

For example, in some jurisdictions, Voice over Internet Protocol (VoIP) is considered a data service, in others a specific service, and others treat it as a basic voice service. (See discussion in Box 4-3) However, arguably, neither category is completely satisfactory because VoIP has elements of all three services. Nevertheless, in order to address the legal constraints and to avoid a legislative change, regulators have had to interpret VoIP to fit within one of these three categories, or create a different category specific for VoIP.

Box 4-3: VoIP - Information Service or Voice Service?

The European Union (EU) initially excluded Voice over Internet Protocol (VoIP) from the definition of voice service and considered it a data transmission service (*i.e.*, information service) provided it did not meet the legal definition of voice services which requires “real time” communication.¹ However, that qualification did not fit the needs of VoIP providers, such as numbering resources.

With the introduction of the New Regulatory Framework (NRF), the EU modified its approach and declared that VoIP services can be either an electronic communication service (*i.e.*, information service) or a voice service. Operators have commercial freedom to choose the regime (with its corresponding rights and obligations) in which they want to operate.²

In the United States, VoIP is considered an unregulated information service³ rather than a telecommunications service, but the Federal Communications Commission (FCC) has stated that VoIP may present characteristics of a telecommunications service when it appears to consumers as a substitute to traditional voice service offered through the public switched telephone network (PSTN) and uses numbering.⁴

Given the numerous issues surrounding IP-enabled services, the FCC initiated a rulemaking proceeding in 2004 to determine the appropriate regulatory classification of IP-enabled services, including whether certain types of VoIP services should be regulated.⁵

When designing new legislative frameworks to address convergence, flexibility and foresight are critical elements. Given that the market of new services and technologies is extremely dynamic, legislators must be mindful not to develop legislation that may rapidly become outdated. Legislation should allow the regulator sufficient flexibility for interpretation so that solutions can be implemented as needed despite the evolving nature of convergence, and can do so without constricting future applications and technologies that could benefit the economy and consumer welfare.

In addition, the evolution of convergence, combined with the uncertainty about which technologies and services will succeed in the marketplace, requires a continuous review of the applicable legislation. Some jurisdictions, such as the EU and Malaysia, have established a permanent legislative review process to address convergence.⁶

Legislative approach through amendment of existing laws

Although a legislative approach commonly involves a modification of the entire legal framework, it may also be carried out through a process of amendments. Through an amendment process, policy-makers can obtain the feedback of industry, consumers and other affected parties for each amendment and address external input before carrying out the legal reform. The amendment process can be quite effective to address urgent convergence challenges without the time-consuming process required for an entire legal framework reform, and is useful to prepare industry and consumers for further regulatory changes. For example, in Hong Kong (SAR), the Government introduced numerous reforms by amending existing legislation, such as the Telecommunications Ordinance, as well as introducing new legislation including the Electronic Transactions Ordinance.⁷

[Table 4-2](#) summarizes the advantages and disadvantages of the legislative approach.

ENDNOTES

¹ European Commission, *Notice on the Status of voice communications on Internet under Community Law under Directive 90/388/EEC*, 10 January 1998 and, European Commission, *Communication on the Status of Voice Communications on Internet under Community Law under Directive 90/388/EEC*, 22 December 2000.

² European Commission, *Consultation Document on the Treatment of Voice over Internet Protocol (VoIP) under the EU Regulatory Framework*, 14 June 2004.

³ 47 U.S.C. § 230 (b).

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd11501 (1998) (Stevens Report).

⁵ FCC, *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, (2004) [hereinafter FCC, *IP-Enabled Services*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-28A1.pdf.

⁶ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive),

Article 25, 7 March 2002, and Malaysia, Communications and Multimedia Act 1998 (CMA), Section 122, available at http://www.mcmc.gov.my/mcmc/the_law/ViewAct.asp?cc=4446055&lq=e&arid=900722.

7 OFTA Virtual Training Centre, ICT Legislations, FAQ, available at <http://www.itu-coe.ofa.gov.hk/vtm/ict/faq/q1.htm>.

4.2.2 Regulatory Approach

Under the regulatory approach, countries do not develop new legislation to address convergence. Instead, they modify existing regulations or institute new regulations to address new technologies. For example, in the United States, the Federal Communications Commission (FCC) introduced regulatory modifications to allow new technologies, such as power line communications (PLC). (See Box 4-4.)

Box 4-4: FCC's rules regarding Broadband Power Lines¹

In October 2004, the U.S. Federal Communications Commission (FCC) modified regulations to support the development of Access Broadband over Power Lines ("Access BPL"), and provide the necessary safeguards against harmful interference to existing services (e.g., licensed radio services). Access BPL technology provides high speed services using the communications capabilities of the electrical power grid.

The FCC's new rules:

- Impose technical requirements on BPL devices (e.g., the capability to avoid the use of any specific frequency and the ability to adjust or shut down a unit remotely);
- Establish frequency bands within which BPL may not operate ("excluded frequency bands") in order to safeguard aeronautical communications;
- Create an Access BPL notice database to identify and resolve harmful interference in an organized manner;
- Require equipment certification for Access BPL systems (replacing the former verification requirement); and
- Establish an improved measurement procedure for all equipment that uses radiation and electromagnetic field safety (RF) energy to communicate over power lines in order to ensure that other licensed uses are protected from harmful interference.

The regulatory approach can be a practical way of addressing convergence provided that existing regulations can be modified or new ones introduced relatively quickly. However, the regulatory approach must be carefully managed to minimize inconsistencies between new and existing rules.

In jurisdictions where the regulator's actions are constrained by the legal framework, a regulatory approach may be extremely limited to the point of being ineffective or unavailable as an option. In addition, since convergence may result in different services and technologies being provided by a single operator, more than one branch of the government, or more than one regulatory agency, may need to be involved. To eliminate inconsistencies, a common policy articulated by the highest level of the government may be required. The involvement of different branches of the government and regulatory agencies slows the process and eliminates one of the main advantages of the regulatory approach, its fast pace.

Most often, the regulatory approach is used by policy-makers in conjunction with the legislative approach. This complementary mix allows governments to establish new legal frameworks to address convergence while dealing with its specific effects through regulation. For this combined approach to work most effectively, the legislation must be sufficiently flexible to allow periodic regulatory adjustments.

For example, this mixed approach was used in Spain. The Government of Spain had already implemented the NRF and modified its interconnection regulation to allow broader interconnection than traditional switching (e.g., operators were able to interconnect to parts of the infrastructure or have access to wholesale services for subsequent resale (i.e., broadband wholesale service). However, because operators' needs were changing due to increased provision of IP-based systems and services, the regulator implemented a subsequent resolution introducing a capacity-based interconnection system that would serve as an alternative to the traditional time-based system and the access to parts of infrastructure and wholesale services.

Table 4-3 summarizes the advantages and disadvantages of the regulatory approach.

Table 4-3: Pros and Cons of the Regulatory Approach in Telecommunications/ICT Regulation

PROS	CONS
It allows a faster approach (than legislation) to address	It may cause inconsistencies among existing and new

convergence and its effects, introducing regulatory measures according to the pace of the technology.	rules.
It allows regulators to make precise rules addressing the effects of convergence.	It may raise asymmetries among existing operators and those that operate technologies that arise from convergence.
When used in conjunction with the legislative approach, it allows for the quick updating or elimination of outdated rules. It also allows flexibility in interpreting existing rules.	In jurisdictions where different branches of the government deal with convergence, it may entail the intervention of a higher level of government to harmonize a common approach.

ENDNOTES

¹ FCC, *IP-Enabled Services*.

4.2.3 Self-Regulation Process

The self-regulation process consists of developing and designing convergence policy through an ad hoc or existing consultative body. This body is normally composed of several government agencies, industry representatives, and other interested parties.

The role and functions of these consultative bodies varies, but they generally issue recommendations to the government addressing the need for changes in convergence legislation and/or regulation. To the extent that industry representatives are involved, self-regulation and industry guidelines may be an outcome of this approach. These consultative bodies may address specific issues of convergence (*i.e.*, VoIP or Next Generation Networks (NGN)) or may undertake a more comprehensive analysis assessing the consequences of the legislative and regulatory environments. A consultative body is a valuable tool that provides a way to constantly review and monitor the effects of convergence and provide first-hand contact with industry and other parties that deal with convergence directly.

Australia has several consultative forums for the communications sector, with the Australian Communications Industry Forum (ACIF)¹ being the most important. The ACIF implements and manages industry self-regulation. For example, as part of its activities, the ACIF addressed convergence in a December 2004 meeting on VoIP self-regulatory activities.² Industry representatives focused on consumer information on VoIP and also established the (NGN)³ Future Operations Group (NGN FOG)⁴ to discuss and analyze issues relating to NGN implementation. The NGN FOG approved a report on policy and regulatory considerations for new and emerging services that will be formally transmitted to the Department of Communications, Information Technology and Arts (DCITA), the branch of government in charge of telecommunications.⁵

However, the self-regulation process has certain potential problems. For example, the intervention of industry representatives may pose a risk in those jurisdictions where competition has not developed or where significant asymmetries exist among operators, since the consultative body may be dominated by these operators and its conclusions could reflect narrow interests. In these cases, self-regulation guidelines developed by these consultative bodies may result in rules that benefit existing operators to the detriment of new competitors that operate new technologies providing converged services. Policy-makers must carefully manage these risks in order not to regulate convergence according to the special interests of a few companies and against consumers and the public welfare.

Table 4-4 summarizes the advantages and disadvantages of the self-regulation approach.

Table 4-4: Pros and Cons of the Self-Regulation Approach in Telecommunications/ICT Regulation

PROS	CONS
It provides first-hand knowledge of the effects of convergence and can provide insight on the effects of proposed regulation.	The establishment of a consultative body, and the development of procedures to ensure its neutrality, may be difficult.
It can be a useful tool to introduce the measures to address convergence with the pace and flexibility requested by the industry.	In those jurisdictions where competition has not developed or where significant asymmetries exist among operators, recommendations may not be neutral and may tend to foreclose effective entry by new convergence technology-based operators.
	It may not result in quick solutions if recommendations to modify existing regulations must be implemented through a subsequent legislative approach.

ENDNOTES

¹ See <http://www.acif.org.au>.

² See <http://www.acif.org.au/projects/seminars/voip>.

³ According to the ACIF NGN FOG Group, although there is not a universal definition of the term “Next Generation Network”, there is an emerging consensus in the telecommunications industry that it refers to the future ubiquitous networks, able to support fixed, mobile and nomadic users and able to carry voice, data and multimedia services.

⁴ See http://www.acif.org.au/projects/previous/ngn/ngn_fog.

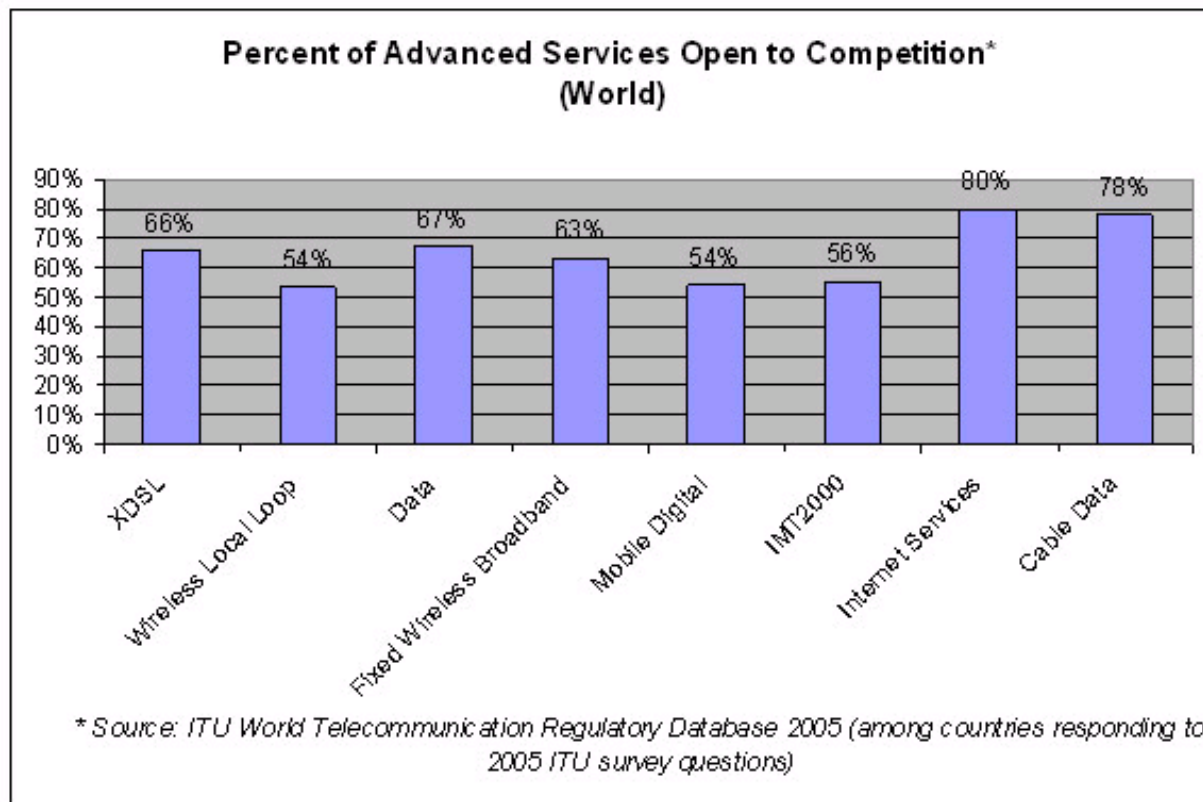
⁵ See *Policy and Regulatory Considerations for New and Emerging Services*, at http://www.acif.org.au/data/page/275/Policy_&_Regulatory_report_final.pdf.

4.3 Modifications to Telecommunications Legislation to Address Convergence

Policy-makers are implementing reforms to their legal frameworks in order to address the issues raised by convergence. Most of these reforms are focused on telecommunications legislation and regulation. However, due to convergence, legal reforms of telecommunications legislation are increasingly coordinated with and, in some cases even integrated into legislation affecting broadcasting and information technology. These reforms are resulting in the opening to competition of increasingly more advanced and converged services (see Figure 4-A). Countries where such an approach is not carried out have less effective regulatory tools to handle convergence and therefore may miss the full benefits of its development and the introduction of advanced and converged services for the market and consumers. For instance, reforms may be developed in the telecommunications regulatory framework, but if regulation in other ICT sectors is not also modified to address the challenges of new technologies (*i.e.*, privacy and security issues, e-signature, e-commerce, etc.), the market will not fully develop because consumers will be reluctant or unable to use all ICT capabilities until these challenges are fully addressed.

Reforms due to convergence are following common trends affecting various aspects of telecommunications regulation, particularly in the areas of licensing, spectrum, interconnection, universal service, and numbering. With regard to licensing, modifications to regulations have focused mainly on reducing market-entry requirements for new technologies by introducing a simpler and technology-neutral licensing regime. In the area of spectrum management, the concept of technology and service neutrality is being proposed, as well as spectrum trading and in-band migration, to allow the more flexible introduction of new services and obtain a more efficient use of the spectrum. Interconnection ideas are also shifting and new concepts are being implemented such as “access” and “capacity based interconnection.” For purposes of universal service and numbering, technology-neutrality and inter-modality portability is being introduced.

Figure 4-A: Percentage of Advanced Services Open to Competition Worldwide



4.3.1 Licensing

Licensing frameworks traditionally consisted of a large number of different service categories, and applicants applied for separate licences in order to provide each service. In addition, licences were often granted based on the type of technology that was being offered by the applicant (e.g., VSAT licence).

Convergence has had an impact on this categorization and made it complicated for regulators to continue to grant licences in this manner. For example, a cable television operator intending to provide “triple play” services generally would require three different licences, one for each of the bundled services (i.e., broadcasting, voice and data), instead of one single licence. Countries have been modifying their licensing frameworks to address this new situation by simplifying their licensing regimes. This has been primarily implemented by: (i) introducing technology-neutral licences with broader service categories; (ii) establishing a unified and technology-neutral licence that allows operators to provide multiple services under one licence using any kind of technology; (iii) “de-licensing” whereby the operator merely needs to submit a notification or registration with the regulator, although specific rights of use may be required when scarce resources such as spectrum or numbering are involved in the provision of a service; or (iv) not requiring any registration or notification on the basis that the services provided fall outside of the regulator’s authority or because the regulator has decided to forbear from regulating a particular service.

However, these modifications may not be sufficient to fully address convergence if they are not accompanied by related measures in the regulatory framework to introduce competition and non-discrimination. For example, in many jurisdictions, cable television operators, which were initially licensed to provide broadcasting services, can provide voice and data services without any specific restriction. On the other hand, traditional telecommunications operators may not be allowed to compete with cable operators if broadcasting service licences are restricted. In this case, the lack of reform in broadcasting legislation becomes a bottleneck that restricts competition and discriminates against telecommunication operators.

The modification of the licensing regime may not be an easy task for policy-makers and regulators because of the existing legal framework and market structures already in place. However, necessary reforms may be introduced through a transition process in which market and legal structures are smoothly adapted. A regulator willing to follow this transition into a technology-neutral licensing regulation likely will address the following decisions (Box 4-5):

Box 4-5: Decisions to Undertake in the Transition to a Technological-neutral Licensing Regime¹

1. Deciding which model of licensing will be adopted.
2. Deciding whether the existing licensing framework will be overhauled in one step or through a gradual, phased in fashion.
3. Deciding which entity or entities will be responsible for licensing, authorizations, and notifications.
4. Mapping various services licensed under a service or technology-specific regime to a less burdensome licensing regime
 - a. This includes deciding which services may still be subject to licensing, which may require only an authorization or notification process and which may become unlicensed as well as eliminating any geographical licensing restrictions and redesigning the application process.
5. Ensuring a level playing field under the new licensing regime so that neither existing service providers nor new market players will be at a competitive disadvantage, *i.e.*, whether existing licensees will require any compensation for moving to the new licensing regime or whether the transition can be accomplished in the absence of compensation; how to address issues such as large licence fees paid during a period of limited competition while reduced licence fees apply in the new regime, changes to bank guarantee policies, etc.
6. Revising existing universal access/service regulations, including modifications to network rollout, coverage or investment requirements as well any contributions to universal access funds and reviewing which services consumers should be provided under the nation's universal access/service definition.
7. Reviewing and updating other regulations such as quality of service, interconnection, spectrum and numbering, both to transfer any such regulations currently included in licence terms and conditions to stand-alone regulation as well as updating such regulations to accommodate convergence.
8. Developing a regulatory framework that incorporates recent technological developments, such as WiFi, VoIP and WiMax and anticipating a continuous technical and market evolution.
9. Developing regulatory capacity to regulate disputes, enforcement and sanctions.

(a) General Licence Categories and Technology Neutrality

The first trend in licensing reform is to introduce technology-neutral licences that combine converged services or broaden the types of services that fall within one licence.

For example, in Malaysia, the prior licensing framework consisted of 31 service-based licences, whereas its new framework consists of four general and technology-neutral licences: Network Facilities Provider (NFP); Network Services Provider (NSP); Application Services Provider (ASP); and Content Application Services (CSP) (a special subset of application services that includes television and radio broadcast services and Internet content services).²

The Eastern Caribbean Telecommunications Authority (ECTEL), has developed a technology-neutral licensing approach with four categories of licences: Individual Licences (generally for services that are infrastructure-oriented); Class Licences (ISPs or resale, among others); Frequency Authorization Licences (that is an ancillary licence that would be required in addition to an Individual or Class Licence); and Special Licences (that are foreseen for special cases in emergency circumstances).³ ECTEL classifies licences based on the service that will be provided without regard to the type of technology being used. For instance, whereas previously an operator might obtain a VSAT licence, it now obtains a licence for the service (*i.e.*, a private or a public network service) it will be offering using that VSAT.

(b) Unified Licensing

A second trend is the introduction of a unified licensing regime, in which licences evolve into a single licence covering a wide range of services. This approach has been or is being adopted by various countries, including Kenya and India.

Kenya's new licensing regime, announced in September 2004, adopted a unified and technology-neutral licensing framework that permits any form of communications infrastructure to be used to provide any type of communications service.⁴ This licensing regime differs significantly from the previous service-specific licensing regime consisting of 46 types of licences grouped into nine categories. Kenya is introducing its new regime gradually and has established a transition period during which it will issue three types of technology-neutral licences (*i.e.*, individual network operator (major) licence, non-facility based service provider (minor) licence, and frequency licence), before completely moving to a unified licensing regime.

The Telecommunications Regulatory Authority of India (TRAI)⁵ has also adopted recommendations for its future licensing framework in order to introduce a unified licence regime. It proposes to implement three different categories of licences (*i.e.*, unified licence, class licence

and, simple authorization), with a unified licence allowing an operator to provide any kind of service.

(c) De-licensing

A third trend is the movement in certain countries towards lighter licensing regimes or de-licensing. Traditionally, many countries used three general approaches to authorize telecommunications networks and services -- individual licences, class licences, and open entry. In the initial phase of liberalization in particular, countries leaned towards a higher degree of regulatory control over market entry, thus requiring individual licences in most cases, where: (i) there was a need for access to public property and/or locations of public use and/or third party's properties to roll out the networks (*i.e.*, deploy a base station or a fiber network); (ii) there was a need for scarce resources (*e.g.*, frequencies and/or numbers), and (iii) the government of a particular country determined that the service needed to be provided in a certain way.

Convergence has called this premise into question, with countries realizing that burdensome administrative procedures relating to market entry limit the offer of a greater variety of applications or services. As a result, many countries (including all 25 EU member states) are moving towards a general authorization regime.

De-licensing involves a general authorization or class licence system in which operators are free to provide services subject to regulatory obligations. Typically, the operator must submit to the regulator a notification containing minimal information before, or within a short time after, initiating service. However, operators do not have to wait for approval before commencing service.

A registration regime typically requires minimal information, but involves stricter formalities in that prior acceptance of the registration by the regulator is required for the operator to commence its activities. In addition, unlike a notification, a registration may be rejected by the regulator.

In April 2004, Japan implemented a review of its Telecommunications Business Law and established a registration and notification regime. Operators in Japan that install networks of a certain size and scale must obtain a registration from the Ministry for Internal Affairs and Communications. However, all other operators are only required to submit a notification to the Ministry.⁶

The EU has moved towards a simple authorization regime using minimal regulatory intervention and requiring individual licences only where strictly necessary (*e.g.*, for the use of resources such as radio frequencies and numbering). The regime covers authorization of all electronic communications networks and services regardless of whether they are provided to the public. The objective of the new framework is to ensure the freedom to provide electronic communications networks and services, subject only to the conditions relating in particular to welfare, public security, and public health. However, one interesting aspect of the new regime is that the definition of "electronic communications networks and services" is so broad that in certain EU jurisdictions various services that were previously unregulated now require a notification and operators are now subject to a variety of related obligations (*e.g.*, fees and taxes) to which they were not previously subject.

(d) Eliminating Licence Requirements on New Converged Services

A fourth trend to address convergence is to eliminate filing requirements with the regulator on the basis that the services fall outside of the regulator's authority or because the regulator has decided to forbear from regulating a particular service.

This approach has been followed in the United States for ISPs and the services they provide (*e.g.*, e-mail, Internet access, and VoIP). To date, services provided by ISPs have been treated as unregulated "information services" in order to promote the continued development of the Internet.⁷

(e) Adherence to Regulatory Requirements and Obligations

As many regulatory functions were based on a license regime at inception, the move to forbear from licensing is viewed by some, as eroding the regulator's authority in relation to the new entrant, leading to a license being issued even when regulatory oversight is no longer required. Although a regulator may decide that certain categories of service or network providers will not be subject to licensing requirements, this does not exclude the possibility of the regulator imposing certain regulatory obligations on such providers, such as contributions towards universal service funds or compliance with emergency service requirements. For example, although the FCC has not implemented licensing, notification or registration requirements for ISPs, it has determined that certain VoIP providers must comply with emergency number ([E911](#)) requirements. This determination is part of a rule-making proceeding that was initiated by the FCC to determine whether VoIP services should be regulated and whether providers of such services should be subject to certain regulatory requirements.⁷

ENDNOTES

¹ Mindel De La Torre and Sofie Maddens, *Transitioning Regulation from Old to New*, in Trends in Telecommunications Reform 2004/2005: Licensing in an Era of Convergence, ITU (2004).

² Malaysia Communications and Multimedia Act 1998, Act 588, available at http://www.mcmc.gov.my/mcmc/the_law/ViewAct.asp?cc=4446055&lq=e&arid=900722.

³ For more information see <http://www.ectel.info>.

⁴ For further information see <http://www.cck.go.ke>.

⁵ See <http://www.trai.gov.in>.

⁶ Telecommunications Business Law (Law No. 86 of December 1984) as amended by Law No. 125 of 24 July 2003), available at http://www.soumu.go.jp/joho_tsusin/eng/Resources/laws/2001TBL.pdf.

⁷ 47 U.S.C. § 230 (b).

4.3.2 Spectrum

Most countries allocate spectrum on a national basis in accordance with the ITU frequency allocation table, and then assign specific frequencies for use by particular radio services. Traditionally, spectrum licences have been subject to stricter government controls than other types of licences because they involve the use of a scarce resource and can be hampered by interference.

Policy-makers and regulators are beginning to introduce changes within spectrum regulations to address the challenges of convergence. First, regulators are starting to grant the right to use spectrum without regard to the type of technology being used (*i.e.*, technology-neutral approach). Australia, New Zealand and Guatemala have taken steps to improve their regulations to be more technology neutral, and in India, TRAI has published two consultation documents soliciting opinions on various convergence-related issues including its proposed technology-neutral spectrum licensing regime and whether there should be flexibility in spectrum allocation to take full advantages of new services and technologies.¹

The United States has similar rules to Australia and generally takes a technology-neutral approach. Congress authorized the FCC to allocate spectrum for flexible use when it: (i) will be in the public interest; (ii) will not deter investment in communication services, systems and technology developments; (iii) will not result in harmful interference; and (iv) is consistent with international agreements.²

Second, regulators are allowing spectrum trading or in-band migration. In Australia, spectrum licences are tradable and technology neutral.³ Spectrum licences authorize the use of spectrum and licensees are free to use any device and technology within their spectrum, provided that such devices comply with the conditions of the licences and the advisory guidelines established for the corresponding bands. To avoid interference, the Australian Communications Authority (ACA) creates a document called “interference management framework” for each auction in which it sets forth the rules for spectrum use.⁴ In addition, in Guatemala, the 1996 Telecommunications Law⁵ introduced private spectrum rights that are granted in frequency usage portions (Títulos de Uso de Frecuencias – TUC), which have technical limitations to protect against interference (*e.g.*, maximum power transmission and emission). These private rights are limited for a period of time (15 years plus an additional 15 year extension if requested), but they can be traded without limitation other than the technical condition related to each TUC to protect against interference.

(a) Introduction of Technology Neutrality in Spectrum Regulation

The introduction of technology neutrality in spectrum regulation brings with it certain limitations. The premise of a technology-neutral approach is that any service should be provided through any kind of technology in any frequency band, and the use of spectrum can be altered at any time. However, in practical terms, this is not feasible for various reasons:⁶

1. **Interference.** Traditionally, regulators have addressed interference problems by mapping the services and allocating them in a national table of frequencies. Only those services allowed in a frequency band could be licensed therein. However, now that countries have introduced a technology-neutral approach in spectrum regulation, interference issues may be dealt with in a different manner. One option followed by certain regulators is to issue specific technical rules associated with the specific spectrum granted. These technical rules introduce some limitations to the spectrum use, and thus in the strictest sense full technology neutrality is not possible, but it does resolve the problem of interference.
2. **Economies of scale.** The implementation of new technologies is more effective and economically viable when efficient economies of scale (*e.g.*, decreases in the cost of equipment and technology development) are achieved by industry coordinating in the development of a standard and the identification of specific spectrum bands. In certain instances, countries and regions with industrial interests tend to develop their own standards (*e.g.*, GSM in Europe). A technology-neutral approach in spectrum regulation challenges this coordination as different technologies and standards could be deployed in the same spectrum bands. However, although the costs related to deploying different technologies and standards are potentially higher in the short term because the economies of scale of each standard are lower than if a unified standard is adopted, a standard competition policy could have its benefits in the medium term because standards are enhanced and improved in a competition environment, providing consumers with better options and reducing technology costs.
3. **International coordination.** The ITU Radio Regulations, which are binding on the signatories of the ITU Constitution and Convention, are the international regulations used by the member nations to allocate and manage spectrum within their jurisdictions. The Radio

Regulations affect the extent to which technology neutrality can be implemented; however, the ITU Radio Regulations are broad enough to allow development of different radiocommunications services within the designated spectrum bands, so countries still have a wide degree of discretion to introduce technology neutrality.

(b) Spectrum Trading

A second response to convergence has been the introduction of spectrum trading and in-band migration. Spectrum trading refers to the ability of licensees to sell or trade their spectrum rights. Countries may decide to limit spectrum trading for specific uses or technologies or to allow unlimited trading except for requiring adherence to rules regarding interference (Table 4-5).

Table 4-5: Spectrum Trading

Spectrum - Secondary trading		
Countries	Secondary Trading is allowed	Change of Spectrum Use Permitted on Transfer
El Salvador	v	
Australia	v	v
Bulgaria	v	
France	v	
Hungary	v	
Ireland	v	
Poland	v	v
Slovenia	v	
Spain	v	
Sweden	v	
United Kingdom	v	v
Source: ITU World Telecommunication Regulatory Database 2005		

Within the EU, the NRF allows spectrum trading.⁷ In 2004, certain member states and the European Commission commissioned an independent study regarding the conditions and options of introducing spectrum trading. The report recommended the implementation of spectrum trading and further liberalization of spectrum use.⁸ The United Kingdom has already allowed spectrum trading for certain types of licensed transmissions, and is expected to expand to more types of licences.⁹ Furthermore, the United Kingdom has introduced measures to liberalize spectrum by, among other things, reducing obligations of current licences and allowing them to modify their spectrum use provided they do not cause interference.¹⁰

(c) In-band Migration

Various countries are introducing [in-band migration](#) which refers to the policy of allowing operators to use existing licensed spectrum to provide new services. Jurisdictions in the Americas and Asia have used this policy with the introduction of IMT-2000 systems,¹¹ allowing existing mobile operators to provide third generation (3G) networks in their assigned frequencies. This policy has permitted operators to decide when to deploy 3G networks and has been effective in reducing implementation costs because it has allowed operators to use their existing spectrum without incurring the cost of new licences. As a result, 3G mobile networks have proliferated throughout these two regions.

(d) New Wireless Technologies

Regulators are also facing the introduction of Wireless Local Area Networks (WLAN and WiFi), technologies that operate in the Industrial, Scientific and Medical (ISM) bands. The ISM bands are generally unlicensed because they operate on a non-interference basis. Regulators have generally allowed WiFi networks to operate unlicensed, provided that their transmitting characteristics fall into those designed for that band. In practice, this has resulted in the implementation of a technology-neutrality approach for the ISM band. For example, of the 67 countries that responded to the ITU's annual regulatory survey,¹² only two prohibit WLANs in the 2.4 GHz band and four in the 5 GHz band. Thirty-nine countries allow WLANs without any prior notification or registration in the 2.4 GHz band, and 25 in the 5 GHz band. Finally, 27 countries allow WLANs with a simple registration or notification in the 2.4 GHz band and 28 in the 5 GHz band. In line with the "hands-off" policy approach, the European Commission has issued a recommendation ¹³ calling on EU member states to facilitate WLANs without imposing any specific regulatory conditions. In Singapore, the band in which WLAN operates was already being used. To facilitate the introduction of WLANs, the regulator migrated existing systems out of the band to allow WLANs to operate.

New wireless technologies are introducing challenges to regulators. These technologies, such as WiMAX (Wireless Inter-operability for Microwave Access) have a wider geographical coverage than current wireless technologies, such as WiFi. WiMAX will be able to provide fixed, nomadic and portable wireless broadband connectivity (the fixed expected capacity is 40 Mbps and the mobile is 15 Mbps).¹⁴ Although the initial specification operated in the 10-66 GHz bands, it was further amended to operate additionally in the 2-11 GHz bands. This has made the technology available in a range of radiocommunications bands. An improvement of the WiMAX standard, which is expected to be completed in 2006, will be mobility and regional roaming.

Due to the need to achieve the efficient economies of scale for WiMAX technology, the WiMAX Forum¹⁵ is trying to obtain a harmonization of WiMAX deployment in three bands (the licence exempt 5GHz band, the 3.5 GHz band and the 2.5 GHz band).¹⁶

Regulators are sensitive about the benefits of the introduction of new wireless standards and in 2005 some started the process to licence some of these bands, in some cases on a technology-neutral basis, having in mind the deployment of WiMAX technologies.

(e) Digital Terrestrial Television

The introduction of digital television in satellite and cable broadcasting was generally lauded as an improvement in technology that would offer consumers better quality and interactive services. However, given its spectrum implications, digital terrestrial television (DTTV) has gained the attention of regulators and policy-makers.

DTTV is more spectrum efficient than analogue terrestrial television, and therefore requires less spectrum per channel. As a result, it makes available a considerable amount of spectrum in bands that new and existing technologies are demanding. In addition, in order to receive DTTV consumers must acquire a new television set or a top box, introducing a disruptive effect for consumers that must be carefully managed.

Regulators and policy-makers are facing the challenges arising from these two factors by establishing policies to: (i) require analogue broadcasters to give back analogue spectrum and assign the newly available spectrum to new uses, and (ii) pursue a smooth transition for consumers that minimizes the disruptive effect of requiring a new device.

Most countries have implemented policies establishing long parallel emissions periods allowing consumers to have a smooth transition, and designating a specific date whereby broadcasters must switchover from analogue television (*i.e.*, switch-off date) to DTTV. Countries such as Italy, Germany, Spain, Australia, and Japan have established analogue television switch-off dates from 2007 to 2012, implementing a parallel emissions period averaging between eight and ten years.

Initially, countries like the United Kingdom, decided not to mandate a specific switch-off date on the basis that the transition should occur when specific coverage and affordability conditions were met.¹⁷ However, the transition process was occurring at a slower pace than anticipated by Ofcom, and thus in December 2004 Ofcom issued broadcasters digital licences in place of their analogue licences and established a switch-off date of 31 December 2012.¹⁸

In the United States, the 1997 Balanced Budget Act, amended the Telecommunications Act¹⁹ and established 31 December 2006 as the switch-off date, but allowed analogue broadcasters to continue their emissions until more than 85% of households had a digital receiver. Realizing that this condition would permit analogue television to continue far beyond the originally anticipated 2006 switch-off date, in December 2005 the U.S. Congress passed legislation intended to establish a mandatory switch-off date of 17 February 2009.²⁰

Unlike the United States and the United Kingdom, other jurisdictions, such as Canada, have not set a specific switch-off date and opted to allow the market to dictate the introduction of DTTV. In India, TRAI stated in its recommendations on Private Terrestrial TV Broadcasting Service²¹ that, although switchover to DTTV was necessary in light of similar developments worldwide, analogue television would continue to dominate the Indian market for several years. Thus, TRAI recommended allowing both analogue and digital television without setting a switch-off date, provided sufficient spectrum was available.

Among the countries that have established a switch-off date for analogue television, some jurisdictions are accelerating this date to expedite the process to transition spectrum and assign it to new uses. Within the EU, the EC issued a communication proposing that member states accelerate the switch-off date to 2010 if possible and establish 2012 as the common EU switch-off date.²² Spain and Germany responded by accelerating the switch-off date to 2010 and 2007, respectively. Overall, ten member states have set the switch-

off date to 2010 and ten others to 2012.²³

Similar to the United States and the United Kingdom, the EC rationale for changing the switch-off date was twofold: (i) to benefit consumers by introducing DTTV improvements in the market (e.g., interactive services, better picture quality, sound and mobile reception) and (ii) obtain the economic benefits of the freed-up spectrum that can be used to enhance broadcasting services and other uses.²⁴

An open issue currently being debated in various countries is how the freed-up spectrum will be used and what new uses should be assigned to these bands. Jurisdictions, such as the EU, are initiating this debate, where the EC has issued a communication calling on member states to launch a debate on the use of the freed-up spectrum resulting from the switchover to harmonize its use in the EU area.²⁵ The EC, based on recommendations from the EU Radio Spectrum Policy Group,²⁶ has identified three categories of possible spectrum use: (i) improvement of terrestrial broadcasting services (e.g., services with higher quality, such as HDTV, or enhanced interactive options); (ii) converged broadcasting services (e.g., mobile television), and; (iii) potential non-broadcasting uses including new technologies and existing technologies that do not currently operate in these frequencies (e.g., extension of 3G services).

ENDNOTES

¹ TRAI, *Consultation Paper No. 11/2004: Efficient Utilization, Spectrum Allocation, and Spectrum Pricing*, 31 May 2004, available at <http://www.trai.gov.in/trai/upload/ConsultationPapers/74/consultation%20paper%20on%20spectrum%20released.pdf> and *Consultation Paper No. 1/2006: Issues relating to Convergence and Competition in Broadcasting and Telecommunications*, 2 January 2006.

² Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997) 47 U.S.C. § 3004 (2000).

³ Radiocommunications Act 1992, Act No. 174 of 1992, as amended, at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/F8047D62822494A9CA256F71004D84F4/\\$file/Radiocommns1992.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/F8047D62822494A9CA256F71004D84F4/$file/Radiocommns1992.pdf).

⁴ See http://www.acma.gov.au/WEB/STANDARD/pc=PC_300171.

⁵ Ley General de Telecomunicaciones, Decree 94-96 of the Congress of the Guatemalan Republic as amended by Decree 155-97 of the Congress of the Guatemalan Republic (Congreso de la República de Guatemala), at <http://www.itu.int/ITU-D/treg/Legislation/Guatemala/leygen.pdf>.

⁶ Chris Doyle, *Convergence and Spectrum Licensing*, in *Trends in Telecommunications Reform 2004/2005: Licensing in an Era of Convergence*, ITU (2004).

⁷ See Framework Directive, Art. 9.

⁸ A report commissioned by the European Commission found that two-thirds of European countries are considering implementing spectrum trading. European Commission, *Study of the Conditions and Options in Introducing Secondary Trading of Radio Spectrum in the European Community*, May 2004, at http://ec.europa.eu/information_society/policy/radio_spectrum/docs/ref_docs/secontrad_study/secontrad_final.pdf

⁹ Ofcom, *Statement on Spectrum Trading* (2004), at http://www.ofcom.org.uk/consult/condocs/spec_trad/statement/sts.pdf.

¹⁰ Ofcom, *Statement on Spectrum Liberalization* (2005), at <http://www.ofcom.org.uk/consult/condocs/sfr/sfr/>

¹¹ According to the ITU webpage: "International Mobile Telecommunications-2000 (IMT-2000) is the global standard for third generation (3G) wireless communications, defined by a set of interdependent ITU Recommendations. IMT-2000 provides a framework for worldwide wireless access by linking the diverse systems of terrestrial and/or satellite based networks." For further information, see <http://www.itu.int/home/imt.html>

¹² ITU World Telecommunication Regulatory Database 2005.

¹³ http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32003H0203&model=quichett.

¹⁴ WiMax Forum, at www.wimaxforum.org.

¹⁵ WiMax Forum, *White Paper: Regulatory Position and Goals of the WiMax Forum*, August 2004.

¹⁶ *Id.*

¹⁷ These conditions were that: (i) DTTV had a coverage of 99.4% households; (ii) 95% of consumers had a digital receiver, and; (iii) such receivers were affordable. House of Commons Debate, The Secretary of State for Culture, Media and Sport (Mr. Chris Smith), 29 October 1999, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmhansrd/vo991029/debtext/91029-01.htm>.

¹⁸ Ofcom's Press Release, *Broadcasters Accept Digital Replacement Licences*, 14 December 2004, at http://www.ofcom.org.uk/media/news/2004/12/nr_20041214.

¹⁹ Communications Act. 47 USC. Section 309 (j) (14) (A) and (B) as added by the Balanced Budget Act of 1997, Pub L No 105-33 Stat. 251

(1997).

20 Deficit Reduction Act of 2005. S.1932. Subtitle D - Digital Television Transition Act of 2005.

21 TRAI, *Recommendations on Issues Relating to Private Terrestrial TV Broadcasting Service*, 29 August, 2005, available at <http://www.trai.gov.in/trai/upload/recommendations/8/recom29aug05.pdf>.

22 Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of Regions on accelerating the transition from analogue to digital broadcasting, COM (2005) 204 final, 24 May 2005 available at http://europa.eu.int/information_society/policy/ecom/doc/info_centre/communic_reports/switchover/com_2005_0204_f_en_acte.pdf.

23 Telecom Council, MEMO/05/458, Brussels, 1 December 2005.

24 Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of Regions on accelerating the transition from analogue to digital broadcasting, COM (2005) 204 final, 24 May 2005, available at http://europa.eu.int/information_society/policy/ecom/doc/info_centre/communic_reports/switchover/com_2005_0204_f_en_acte.pdf.

25 Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of Regions on the EU spectrum policy priorities for the digital switchover in the context of the upcoming ITU Regional Radiocommunications Conference 2006 (RRC-06), COM (2005) 461 final, 29 September 2005, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0461en01.pdf.

26 Radio Spectrum Policy Group (RSPG) Opinion on the "Impact on spectrum of the switchover to digital broadcasting", RSPG04-55, available at <http://rspg.groups.eu.int>.

4.3.3 Interconnection

The technological innovations that have resulted in the convergence of telecommunications, information and broadcasting have raised numerous regulatory issues regarding interconnection. Until recently, interconnection policies were mainly used to facilitate competition by requiring incumbent telecommunications operators (or dominant suppliers) to provide interconnection to competing operators. Today, effective interconnection arrangements are considered an essential element to foster the development of integrated ICT markets. Convergence has forced a reassessment of this policy in order to take into account the interconnection of different types of networks and service providers (e.g., cable television/content providers and IP networks/ISPs).

Traditional interconnection regulation was established for telecommunications operators with interconnection rates generally based on time (i.e., per minute). Services based on IP protocol, however, do not fit within the traditional schemes of switched voice interconnection and requires different kinds of access (e.g., interconnection at an IP level or the higher frequencies of the local loop necessary to provide ADSL data services over the existing copper wiring) and different kinds of charges. This is necessary to permit, in a converged environment, the fundamental principle that any network operator is able to interconnect with any other operator regardless of the network (i.e., "any-to-any" interconnection). Countries are addressing these needs by introducing: (i) a symmetrical interconnection regime, (ii) new kinds of "access" through interconnection regulation and (iii) a technology-neutral interconnection charging system based on capacity, instead of time and distance.

(a) Introduction of a Symmetrical Interconnection Regime

Traditionally, only public switched network operators (fixed or mobile) were subject to interconnection obligations. However, there has been some ambiguity regarding other operators, such as cable networks or ISPs. As convergence blurs the traditional difference between networks, regulators are introducing a symmetrical interconnection regime in which any operator, regardless of the type of network it has, is obliged to interconnect with any other operator. For instance, in Denmark, communications network providers offering service to the general public (including traditional telephone network operators as well as broadcasters and Internet service providers) have the obligation of, and the right to, interconnection. In Argentina, new legislation¹ implemented a symmetrical interconnection regime where all operators are obliged to interconnect upon request.

However, some jurisdictions have maintained asymmetrical interconnection. For instance, the EU NRF requires regulators throughout the EU to carry out a market analysis to determine which operators have significant market power. Interconnection has been separated into three different markets (i.e., call origination, call termination and transit). Regulators will decide after this analysis which markets are deemed to have significant market power. In each such market, an operator is obliged to provide interconnection. By way of example, the EC has determined that all mobile operators are dominant in the provision of termination on their networks as there is no realistic possibility of substitution.²

(b) New Kind of Access

To address the different needs of IP network and service operators for interconnection, the EU NRF introduced the concept of "access",³

principally for origination, which allows ad hoc interconnection to network infrastructure via direct access or resale (such as local shared access⁴ or bitstream access⁵). Within the EU, member states have implemented “access” interconnection and granted this right to operators other than traditional voice providers. Member states, such as Denmark, Finland, and Greece, have determined that all operators have a right to bitstream access, and Austria has allowed ISPs to request unbundled infrastructure.

The United Kingdom has proposed implementing an “equivalence of inputs” (EoI) for NGN⁶ that obliges the incumbent telecommunications operator to make available the same products⁷ and services to other operators as it makes available to itself, at a wholesale price (which is the same ‘transfer’ price that a network division may provide to a retail division), and using the same system and processes. EoI implements a further step within the “access” concept, as it allows operators to request directly, on a wholesale basis, services which have a retail counterpart instead of regulating a physical connection. See Table 4-6 for a comparative summary of the EU concept of access and the U.K. concept of EoI.

Table 4-6: The EU Concept of Access and the U.K. Concept of Equivalence of Inputs

Access ⁸	OFCOM Proposal of Equivalence of Input ⁹
Making facilities and services available to another operator for the purpose of providing electronic communications services under defined conditions. It includes, among other things ■ physical interconnection, ■ access to network elements and associated facilities (<i>i.e.</i>, local loop), ■ access to physical infrastructure, including buildings, ducts, and masts, ■ access to software systems, including operational support systems, ■ access to numbering translation, ■ access to fixed and mobile networks, ■ access to conditional access systems, and, ■ access to virtual network systems.	Making available to competitors the same products and services that an operator with significant market power makes available to itself, which includes: ■ a wholesale price, and ■ the same systems and processes. No retail service may be launched by an operator with significant market power without a corresponding wholesale product offered to other operators as EoI.

(c) Capacity-based Interconnection

A relatively new measure being implemented to address convergence needs for interconnection is a flat charge representing the cost of the capacity, rather than a per-minute rate. Some jurisdictions, such as Spain and Colombia, have implemented a capacity-based interconnection (CBI) modality that allows operators to request a specific capacity for interconnection and pay a flat rate charge that reflects the fixed cost nature of the interconnection capacity. As interconnection capacity is dimensioned to peak-hour traffic, CBI rates reflect true economic costs and do not require artificially spreading such fixed costs over projected traffic minutes to arrive at a per-minute charge.

In Spain, CBI was introduced in the incumbent’s Reference Interconnection Offer¹⁰ (RIO), and allows operators to request interconnection through three different models: (i) on a capacity basis; (ii) a time-based model; or (iii) a mix of both. Capacity-based interconnection may be requested in two capacity units (64kbps and 320kbps) and the RIO allows for the reselling of excess capacity. Similarly, in Colombia, the regulator issued a resolution¹¹ allowing operators the option of choosing time-based interconnection or capacity interconnection on a per-city basis. However, there is only a single 2 Mbps capacity unit and reselling is not allowed.

The table below compares the capacity interconnection models of Spain and Colombia.

Table 4-7: Comparison of Capacity Interconnection Models of Spain and Colombia

Issue	Spain	Colombia
Is use of both models (time and capacity) by an operator permitted?	Yes, but the operator must select at each interconnection point (POI) the model it is going to be used.	Yes, but only for national operators that interconnect in more than one city. Capacity-based interconnection cannot be used simultaneously with time-based interconnection in the same city.
What is the minimum	There are two MCUs:	Capacity interconnection charges are established

Capacity Unit (MCU)	- For those POIs that have interconnection links equal or less than four 2 Mbps (120 channels of 64 kbps) the MCU is 64 kbps. - For those POIs having interconnection links more than four 2 Mbps (120 channels of 64 kbps); the MCU is 5x64kbps.	according to a 2 Mbps (E1) link, but the regulation expressly states that a different unit may be agreed upon by the parties. Currently, there has not been any interconnection agreement signed by any operator with an MCU lower than 2 Mbps.
What types of traffic are allowed?	There are two types: - Internet traffic only - Voice + Internet traffic	Not expressly defined. Any type of traffic is allowed.
Is resale possible?	Yes	No
Is overflow possible?	Yes. Operators may opt for capacity links without or with an overflow possibility	Yes. Overflow routes must be established by both parties in order to guarantee the minimum quality parameters established in the regulation.

(d) Networks that Require Interconnection

The types of networks and services to be considered in interconnection policies vary with the development of new technologies. Examples of services that have required a reshaping of such policies are mobile data, cable television, and Internet.

When first introduced, Short Messaging Service ("SMS") provided mobile users the ability to transmit text between mobile terminal devices. Today, SMS may be transmitted from call centers and websites, and may even be received by fixed line users. This has pushed the boundaries of voice-focused interconnection policies and has forced regulators to consider whether traditional interconnection policies should be applicable to SMS traffic between mobile operators, content providers and fixed line operators. In Bahrain, Venezuela, and Mexico, regulators ordered interconnection for SMS providers.¹³

Another challenge regarding interconnection with mobile networks is the emergence of multimedia applications, prompting questions as to whether mobile network operators can operate as ISPs and whether there should be any limitations on the ability of users to access mobile portals. Whether a mobile network operator can operate as an ISP is generally based on the scope of the mobile provider's licence or whether a special licence is required to provide Internet access. Where the provision of Internet access does not require a licence, mobile operators generally do not encounter problems in deploying mobile Internet services. Consumers should be allowed to use alternative access and content providers, but this is not possible when mobile operators lock users in their portals. Mobile operators should be required to open their networks to other Internet service providers, content providers and other portals.

Regulators have also taken different decisions regarding Internet access via cable television modem networks. Some countries such as the United States, have ruled that Internet access is unregulated and, therefore, cable operators have no obligation to open their networks to alternative ISPs.¹⁴ Other countries, such as Canada, have ruled that cable television companies are obliged to make their Internet access network available for resale to other operators.¹⁵

ENDNOTES

¹ Decree PEN 764/2000, B.O. 29476 (05/09/2000) dated 3 September 2000, at http://www.cnc.gov.ar/normativa/pdf/dec0764_00.pdf

² Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3.

³ Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (EU Access Directive), available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=2002&nu_doc=19

⁴ "In the case of shared access, the incumbent continues to provide telephony service, while the new entrant delivers high-speed data services over that same local loop." See European Electronic Communications Regulation and Markets 2004 (10th Report), dated 2 December 2004.

⁵ As defined by the European Electronic Communications Regulation and Markets 2004 (10th Report), dated 2 December 2004: "Bitstream access is a wholesale product that consists of the provision of transmission capacity in such a way as to allow new entrants to offer their own, value-added services to their clients."

⁶ Ofcom, *Next Generation Networks: Further Consultation*, 30 June 2005, available at

<http://www.ofcom.org.uk/consult/condocs/nxgnfc/ngnfc1.pdf>.

⁷ Services are limited to those determined as being provided under “Significant Market Power.”

⁸ EU Access Directive.

⁹ OFCOM, *Next Generation Networks: Further Consultation*, 30 June 2005.

¹⁰ See <http://www.cmt.es/>

¹¹ CRT Resolution No. 469 of 2002.

¹² This limitation reflects the telecommunications licences in Colombia that originally were for individual cities.

¹³ Mindel De La Torre and Sofie Maddens, *Transitioning Regulation from Old to New*, in *Trends in Telecommunication Reform 2004/2005: Licensing in an Era of Convergence*, ITU (2004).

¹⁴ FCC, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities. Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185 and CS Docket No.02-52 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf.

¹⁵ CRTC Telecom Decision 99-11, available at <http://www.crtc.gc.ca/archive/ENG/Decisions/1999/DT99-11.HTM>.

4.3.4 Numbering

Numbering policies and regulations were developed to address voice telephony services. As a result, numbering plans established different ranges for voice services and within fixed telephony, numbering was divided into geographic areas. This differentiation had a twofold function of informing end users of the charges of the calls and maintaining the interconnection cost structure based on services (*i.e.*, mobile voice service vis-à-vis fixed voice service) and distance. Since this allowed subscribers to be reached by a unique combination of digits, numbering became an essential resource for telecommunications networks operators. However, with the advent of convergence, regulators are finding that modifications to such policies and regulations are necessary.

(a) Assignment of Numbering Resources to New Technologies Service Operators

One of the significant impacts on numbering regulation relates to the proliferation of VoIP services. This has raised questions among regulators as to whether numbering resources should be assigned for VoIP and whether traditional telephone service operator obligations should be imposed on VoIP providers. Regulators have adopted a variety of solutions. For example, in some jurisdictions, providers are allowed to use geographic numbers provided they offer service under the traditional voice service regime, which imposes various obligations (*e.g.*, quality of service, access to emergency services, and lawful interception). In addition, countries such as Singapore, Japan, South Korea and some EU Member states (*e.g.*, Ireland, France, Germany, and Austria), have created a specific numbering range for VoIP services, due to the special characteristics of the service, most notably its nomadic use.

Some countries, such as Japan, Spain, and the United Kingdom, have combined both measures, and grant geographic numbers to VoIP providers if they operate under the voice service regime (*i.e.*, voice quality of service, lawful interception obligations, access to emergency services), and specific number ranges if VoIP providers operate under the “information service” regime. The implementation of this differentiation has the additional intention of highlighting to consumers that these services are not equal and that VoIP specific range service providers do not necessarily provide the same set of features commonly associated with public voice service.

(b) Inter-modal Portability

A second modification on numbering regulation has been the introduction of inter-modality portability. Number portability is the ability of a consumer to maintain the same telephone number when changing service providers. Number portability may be inter-modal (*e.g.*, porting a number from a fixed to a mobile network or vice versa) or restricted to one type of network. The United States has included a geographically restricted inter-modal portability, meaning that a consumer may port among different types of networks within a limited geographical area. In Argentina, the telecommunications law allows inter-modal portability to be implemented by the regulator although it has not been adopted yet. Hong Kong (SAR) is currently discussing whether to introduce inter-modality portability to address fixed to mobile convergence.¹ However, there are signs that number portability could potentially be expanded to other services, such as VoIP. In Denmark, the regulator has implemented a non-geographic numbering plan (*i.e.*, a consumer may be reached at a telephone number that does not correspond to its geographical location) where numbers are not attached to a specific service, and consequently, there are no portability restrictions among services.²

However, the implementation of inter-modal portability is currently limited to few jurisdictions. Geographical restrictions on inter-modal portability often respond to the potential effects on traditional numbering plans that are based on distance, services, and interconnection

cost structures and for this reason, inter-modality portability may require a numbering policy restructure to be implemented.

(c) ENUM

ENUM is an international initiative on electronic numbering, a protocol that converts a telephone number of the public telephone network ("PSTN") into an IP address.³ The ENUM initiative has established the possibility of introducing a fully neutral approach to numbering, simplifying numbering regulations and addressing complexities resulting from convergence. Essentially, by translating a PSTN number to an IP address, ENUM would make it easier to contact people through electronic means (e.g., linking users' email, telephone number, fax and instant messenger address allowing them to be reached by any of these means through a single number). ENUM developments may potentially define the future direction of numbering policies. In addition, ENUM may address some of the transparency concerns with VoIP, due to the mapping of PSTN numbers to "uniform resource locators" (URLs). ITU-T Study Group 2 and the Internet Architecture Board are working together in the implementation of ENUM. An interim procedure to administer the delegation of ENUM resources has been approved by the ITU-T Study Group ²⁴ and several countries including Australia, China, France, Japan, Republic of Korea, and Sweden, have started ENUM trials.⁵

(d) Domain Names

As numbering policies continue to be influenced by the development of IP networks, the management of country-code top-level Internet domain names ("ccTLDs") has become another regulatory issue. Several countries have given their telecommunications regulators the responsibility to manage ccTLDs,⁶ yet some regulators may not have the necessary resources to take on this task. Although regulators maintain the control and legal responsibilities, they may rely on others for the domain names management including other government agencies, private companies, academic institutions and non-profit organizations.⁷ Furthermore, some governments have even commercialized the ccTLDs that correspond to their jurisdictions in order to obtain an additional source of revenues.⁸

ENDNOTES

¹ OFTA, *Licensing Framework for Deployment of Broadband Wireless Access: Analysis of Comments Received, Preliminary Conclusions and Further Consultation*, 31 August 2005, available at <http://www.ofta.gov.hk/en/report-paper-guide/paper/consultation/20050831.pdf>.

² ITST, *Guide to the Danish Numbering Plan*, July 2003, at <http://www.itst.dk/image.asp?page=image&objno=143612075>.

³ ENUM resulted from the work of the ITU's Internet Engineering Task Force's (IETF's) [Telephone Number Mapping working group](#). The working group was assigned with the task of defining a Domain Name System (DNS)-based architecture and protocols to map a PSTN telephone number to a Uniform Resource Locator (URL) through which a recipient could be contacted. For further details, see ITU-T Resolution 49, available at http://www.internet.org.za/telecoms_act.html#Under-serviced_area_licence.

⁴ See <http://itu.int/ITU-T/inr/enum/procedures.html> and <http://www.itu.int/ITU-T/inr/enum/procedures-02.html>.

⁵ See <http://www.itu.int/osg/spu/presentations/2004/enum-country-experiences-fta-uganda-rs.pdf>. For an example of an ENUM trial, see also <http://www.enum.org/>.

⁶ For instance, in Mauritius, The Information and Communications Technologies Act 2001 assigns the domain name administration to the regulator, ICTA.

⁷ Prof. Michael A. Geist, University of Ottawa Law School, *ccTLD Governance Project*, at <http://www.itu.int/itudoc/itu-t/workshop/ccTld/ccTld006.html>.

⁸ For instance, Tuvalu has leased its .tv ccTLD to a private company.

4.3.5 Universal Service

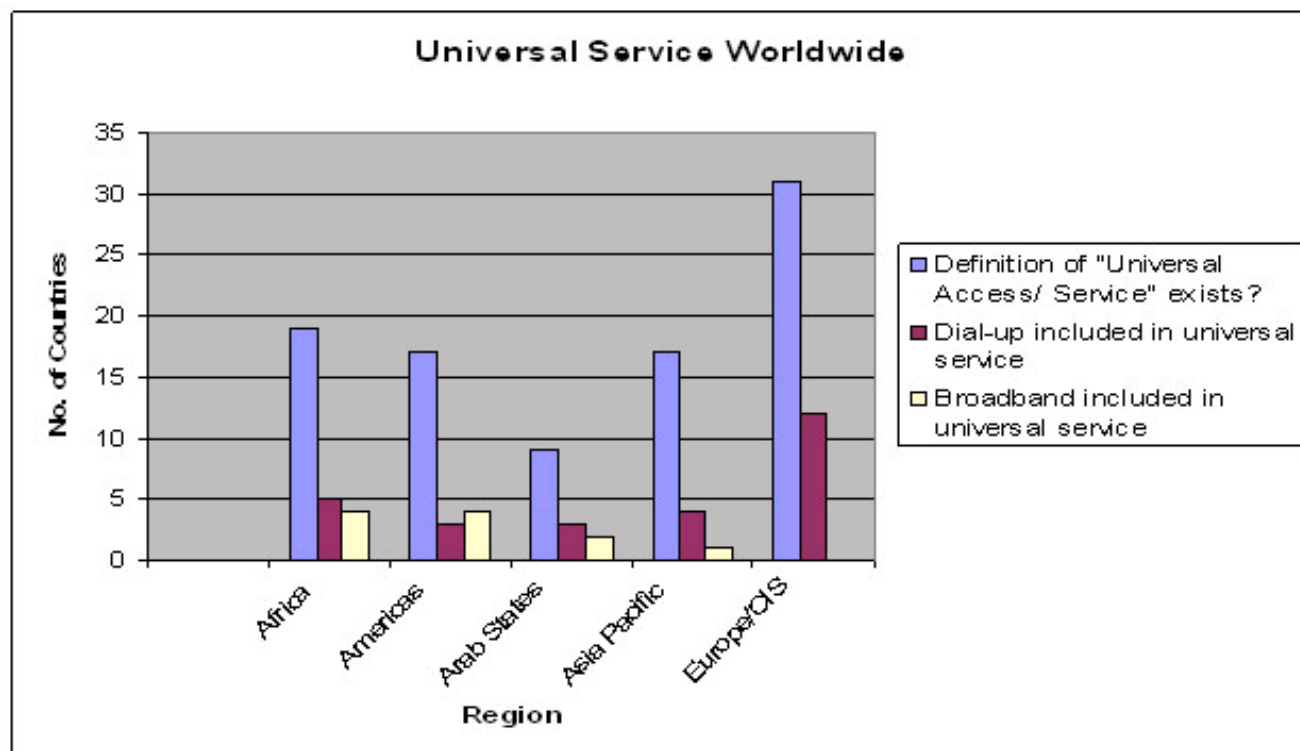
Convergence is challenging traditional universal service policies and the means by which universal service objectives are currently met. Universal service was initially an obligation imposed on the monopoly operator that concentrated on the provision of voice telephony, requiring operators to expand coverage to provide services in remote and underserved areas. Incumbent operators typically cross-subsidized the cost of their universal service obligations with revenues derived from other services. With the introduction of competition and new technologies, regulators substituted this implicit cross-subsidization with a requirement that all or some operators contribute a percentage of their revenues to a universal service fund.

The primary question confronting regulators in jurisdictions where a universal service contribution system exists, is whether operators offering converged services such as VoIP, should have universal service obligations, and whether they should contribute on the same basis as traditionally established operators. Most countries have not imposed universal service obligations on service operators using new technologies due to concerns that such obligations would inhibit their development and the development of new technologies and new market players. However, this trend seems to be shifting as more traffic shifts from public switched telephone networks to IP-protocol

networks. In Canada, for example, universal service requirements have been imposed on all service providers, including VoIP providers. Canada's approach is consistent with its technology-neutral policy to VoIP, equating such providers to traditional voice operators, provided the service is offered through access to the public switched telephone network (therefore, excluding PC-to-PC VoIP).¹

In addition, as IP technologies are gaining importance, regulators are modifying the Universal Service obligations to include narrowband and broadband Internet access. For example, of the 93 countries that responded to the ITU's annual regulatory survey, 27 included narrowband Internet service in the universal service definition and 11 included high-speed Internet.

Figure 4-B: Universal Service Worldwide³



ENDNOTES

¹ CRTC, Telecom Decision 2005-28, *Regulatory framework for voice communication services using Internet Protocol*, 12 May 2005, at <http://www.crtc.gc.ca/archive/ENG/Decisions/2005/dt2005-28.pdf>.

² ITU World Telecommunication Regulatory Database 2005.

³ ITU World Telecommunication Regulatory Database 2005.

4.4 Modification to Broadcasting and ICT Legislation to Address Convergence

In order to facilitate the development of new technologies, which brings telecommunications, broadcasting, and the Internet closer together, the regulatory frameworks governing these industries are being coordinated, and correspondingly modified, so that they are all focused on the same objectives.¹ Today, the ICT sector requires governments to undertake a broader perspective of law and regulation and assess the impact and interaction of telecommunications legislation with ICT related legislation, such as media/broadcasting legislation, content laws, intellectual property laws, and privacy laws. As shown in Table 4-8, several countries (e.g., Hong Kong SAR and India) have adopted or are in the process of adopting ICT-related legislation.

Table 4-8: Snapshot of ICT Legislation in Hong Kong SAR and India²

Hong Kong SAR	India
The Telecommunications Ordinance, (Chapter 106), 2000	The Indian Telegraph Act, 1885
The Broadcasting Ordinance (Chapter 562)	The Indian Wireless Telegraphy Act, 1933

The Personal Data (Privacy) Ordinance (Chapter 486), 1995	Telegraph Wire Unlawful Possession Act, 1950
The Electronic Transactions Ordinance (Chapter 553), 2000	The Cable Television Networks (Regulation) Act, 1995
The Telecommunications Regulations, 2000	The Telecom Regulatory Authority of India Act, 1997
The Copyright Ordinance, 1997	The Information Technology Act, 2000
The Patents Ordinance, 1997	The Information Technology (Certifying Authority) Rules, 2000
The Trade Marks Ordinance (not yet in operation)	The Cyber Regulations Appellate Tribunal (procedure) Rules, 2000
The Intellectual Property Ordinance, 1998	The Information Communications and Entertainment Bill, 2000
The Control of Obscene and Indecent Articles Ordinance, 1998	The Convergence Bill, 2002

However, to achieve the benefits of the information society requires the adaptation of legal frameworks and in-depth coordination with the relevant sectors to develop integrated solutions to the regulatory challenges arising from convergence and the introduction of new technologies.

ENDNOTES

¹ *The Implications of Convergence for Regulation of Electronic Communications*, OECD Working Party on Telecommunication and Information Services Policies, 12 July 2004, at 3-7.

² OFTA Virtual Training Centre, ICT Legislations – FAQ, available at <http://www.itu-coe.ofta.gov.hk/vtm/ict/faq/q2.htm>

4.4.1 Media and Broadcasting Legislation

While the driving force behind telecommunications regulation has been primarily the liberalization of the sector and promotion of competition, the regulation of broadcasting and media has been mostly influenced by the social and cultural impact of the industry.¹ Broadcasting is defined by the ITU as a radiocommunication service in which the transmissions are intended for direct reception by the general public. This service may include sound, television, or other types of transmission.² Broadcasting often has substantial content regulation because it is perceived as playing a special role in the cultural life of a country and in developing a national identity. For example, in order to promote social objectives, the majority of OECD countries have regulations regarding broadcasting content and media ownership.³

Telecommunications and broadcasting services traditionally have been regulated separately, whether by the same regulatory entity or a different regulatory entity.⁴ In a majority of countries, broadcasting is regulated by a separate entity or responsibility over broadcasting is shared by the telecommunications regulator with other government entities responsible for broadcasting. In other countries, such as Australia, Bulgaria, Canada, Croatia, Ghana, India, Italy, Japan, Malaysia, Norway, South Africa, Switzerland, Tanzania, the United Kingdom and the United States, the telecommunications regulator also fully responsible for broadcasting.⁵

Convergence has resulted in new technologies and services that often are not encompassed in existing service definitions and regulation. This has challenged the adequacy of the current industry-based regulatory framework. For instance, should audiovisual content offered through the Internet or a mobile telephone be defined as telecommunications or broadcasting?⁶ As broadcast content and telecommunications network carriage become more integrated, a need exists to review telecommunications and broadcast media regulation to accommodate the regulation of new services and ensure consistency in policy and regulation. Convergence from a broadcasting perspective is primarily manifested in the joint offerings of video and high-speed Internet service (and often voice service), mostly via cable television networks.⁷

In order to address the challenges of convergence, some jurisdictions such as Australia, Malaysia, Hong Kong (SAR), and the United Kingdom have established a common regulator with responsibilities over the telecommunications and broadcasting sector. Regulators such as the Office of Communications (OFCOM) in the United Kingdom and the Malaysian Communications and Multimedia Commission (MCMC) have undertaken regulatory reforms to enact new converged regulatory frameworks that apply to all electronic communications networks and services. In Hong Kong SAR, the Office of the Telecommunications Authority (OFTA) is currently reviewing its broadcasting regulatory regime, and considering the benefits of establishing a unified regulator, merging the Broadcasting Authority (BA) and OFTA into one regulator to oversee the electronic communications sector.

ENDNOTES

¹ *Id.* at 10.

² Article 1.38 of the ITU Radio Regulations, at <http://www.itu.int>.

[3](#) OECD Communications Outlook 2005, Chapter 7, at 203.

[4](#) According to an OECD survey, only six of the 30 member countries give responsibility for broadcasting to the same regulator or Ministry, namely Canada, Italy, Japan, Switzerland, the United Kingdom and the United States. See *The Implications of Convergence for Regulation of Electronic Communications*, OECD Working Party on Telecommunication and Information Services Policies, 12 July 2004, at 7. Australia recently in July 2005 merged the Australian Communications Authority and the Australian Broadcasting Authority to form a new regulator, the Australian Communications & Media Authority. However, in most of these countries despite the unified regulator, broadcasting and telecommunications still have separate legislation. Some countries, such as the United Kingdom in enacting the Communications Bill, have moved towards creating a single legislative instrument for all electronic communication services.

[5](#) ITU World Telecommunication Regulatory Database 2005.

[6](#) *The Implications of Convergence for Regulation of Electronic Communications*, OECD Working Party on Telecommunication and Information Services Policies, 12 July 2004, at 7.

[7](#) *Id.*

4.4.2 Content

Historically, content has been delivered by different service providers using distinct networks (e.g., television from terrestrial and satellite broadcasting, and telephone through telephone networks).[1](#) With digitalization, content formerly dedicated to specific networks now can be conveyed on different infrastructures and delivery platforms. This poses a potential conflict in regulation as different standards of content regulation are applied to telephony, sound and television broadcasting, print media and the Internet. With convergence, policies may need to be changed to achieve the common social objectives of promoting and protecting cultural traditions, public service, and protecting citizens from harmful material across all types of networks and delivery platforms.

While convergence poses challenges to the regulatory framework, it is recognized that differences in the expectations, context and intrusiveness of different services exist, and could justify the differentiation in regulatory approaches.[2](#) Therefore, while Internet content remains mostly unregulated, regulation requiring a minimum level of domestic content on television is still a feature of broadcasting regulation and licensing in many countries. For instance, the 2002 National Trade Estimate Report on Foreign Trade Barriers by the U.S. Trade Representative states that approximately 30 trade partners have local content restrictions in the audio-visual sector.[3](#)

Additionally, an ITU survey regarding broadcasting and Internet content demonstrates that broadcasting content is more highly regulated than Internet content in the majority of countries. Of the approximately 125 countries surveyed by the ITU, almost all of the countries had some form of regulatory entity responsible for broadcasting content, except for Bahrain, Nicaragua, Paraguay, Peru, St. Vincent and the Grenadines, and Spain. On the other hand, the majority of the countries surveyed had no regulatory entity responsible for Internet content. Of the regions surveyed, Internet content seems to be more heavily regulated in the Asia Pacific region and Europe and least regulated in the Americas and Africa.[4](#)

Some of the issues regulators face regarding content regulation are:[5](#)

- Applicability of public service provisions;
- Cross media ownership, cross sector ownership and restriction on the size of individual broadcasters;
- Cultural diversity, local content quotas and local production of content;
- Programming standards associated with accuracy and impartiality in the reporting of new and current affairs;
- Intellectual property rights;
- Role and means of supporting public broadcasting; and
- Programming standards associated with decency, censorship and freedom of speech.

(a) Broadcasting Content

Due to the role of broadcast media in defining the cultural identity of a country, one of the main issues in regulating broadcasting is the quota on national content. Two EU directives, the Framework Directive[6](#) and the Television Without Frontiers Directive[7](#) have redefined broadcasting in the region. In particular, the Directives separate regulation of content from the regulation of transmission, place specific limits on the regulation of transmission and permit EU member countries to regulate content in order to achieve social objectives.[8](#) The Television Without Frontiers Directive stipulates that where practicable and by appropriate means, broadcasters should reserve a majority of their transmission time for European content (excluding time appointed to news, sports, games, advertising and teletext services).[9](#) In addition, broadcasters should reserve at least 10% of their transmission time or program budget for European works created by producers who are independent broadcasters.[10](#)

In Australia, the Australian Content Standard requires all commercial free-to-air television licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6 a.m. and midnight. There are also specific minimum annual sub-quotas for Australian adult drama, documentaries and children's programs.[11](#)

(b) Internet Content

In many countries, ISPs and Internet data centers are not required to review, monitor or classify the content that they host, and are therefore not held liable for the transmission of prohibited content unless they have specific knowledge of the illegal content or fail to report and take corrective action. This policy results from the rationale that, like traditional telecommunications carriers, ISPs are merely a conduit that passively transmit data and therefore are not responsible for the nature, or character of that data. Thus, it would be unjust, unreasonable and impractical to expect an ISP to monitor content in order to safeguard against illegal use or criminal activity.

The EU Directive on Electronic Commerce follows this approach. ISPs have no liability when the service provided is a mere transmission or access to a communication network, to the extent that the ISP cannot select or modify the content of the transmission, or select the receiver of the transmission. There is no liability on the ISP when the service is an automatic, intermediate or temporary storage of data (caching) so long as the provider does not modify the information, complies with conditions on access, and acts promptly to remove or disable access to the information when required. Furthermore, the ISP is not liable when the service offered consists merely of the storage of information, provided that the ISP does not have knowledge of illegal activities or information, or upon being aware, acts promptly to remove or disable access to the information.¹²

Japan's ISP Liability Law¹³ follows an approach similar to the EU, but imposes a stricter standard on ISPs. In Japan, ISPs are not generally liable for damages caused by infringement of laws as a result of the transmission of information via the Internet. They may be held liable, however, if they were either aware of the infringement or were aware of the information and should have known of the infringement, and could technically prevent the transmission of the information. Any person whose right is allegedly infringed by transmission of the information via the Internet can request that the ISP disclose the person who transmitted the information, and the ISP may disclose such information if the right of the requesting person has been obviously infringed and the requesting person has legitimate reason to be entitled to such disclosure.

Because an ISP provides access to the Internet, some argue that it is in the best position to take action against illegal activity conducted over the Internet. As a result, in some countries ISPs have been given a degree of responsibility over content regulation under certain circumstances. Although a country may not have specific legislation regarding Internet content, this does not mean that ISPs are immune from liability for content handled under their networks under other laws. For example, in Mexico, ISPs may be held responsible under the Federal Criminal Code which provides that any person who publishes, by any means, exposes or distributes obscene books, writings, images or objects commits a crime against public morality and good custom, and can be sanctioned with imprisonment and/or fines. ISPs are not deemed responsible for the distribution of the prohibited material under the Federal Criminal Code based on the provision of Internet access or for providing shared, dedicated, or co-located hosting because they are not obliged to know the content of the web sites that they host. However, ISPs may be responsible for distribution of prohibited content when providing hosting services, where they collaborate in the production and development of the content with the author of the website and consciously host the website with specific knowledge of its contents.¹⁴

As a result of the growing international concern for cyber-crimes, such as copyright infringement, computer-related fraud, child pornography and hacking, 31 countries, including members of the Council of Europe, Canada, Japan, South Africa and the United States signed the Convention on Cyber-crime, an international treaty. The convention is designed to: (1) harmonize domestic criminal law in the area of cyber-crime; (2) provide for domestic criminal procedural law powers necessary for the investigation and prosecution of such offenses as well as other offenses committed by means of a computer system or evidence in relation to which is in electronic form; and (3) establish a fast and effective regime of international cooperation.¹⁵ In addition to streamlining definitions and civil and criminal penalties for cyber-crimes, the Convention also gives signatory countries common powers to search and intercept the Internet communications of suspected terrorists.

Box 4-6: Need for Regulation of Cyber-crimes

"The fast developments in the field of information technology have a direct bearing on all sections of modern society. The integration of telecommunication and information systems, enabling storage and transmission, regardless of distance, of all kinds of communication opens a whole range of new possibilities. These developments were boosted by the emergence of information super-highways and networks, including the Internet, through which virtually anybody will be able to have access to any electronic information service irrespective of where in the world he is located. By connecting to communication and information services users create a kind of common space, called "cyber-space," which is used for legitimate purposes but may also be the subject of misuse. These "cyber-space offenses" are either committed against the integrity, availability, and confidentiality of computer systems and telecommunication networks or they consist of the use of such networks or their services to commit traditional offense. The transborder character of such offenses, e.g., when committed through the Internet, is in conflict with the territoriality of national law enforcement authorities."

Source: Council of Europe, Convention on Cyber-crime, Explanatory Report.

ENDNOTES

- ¹ Nicholas Higham, *Content Regulation*, in *Telecommunications Law and Regulation*, (Jan Walden and John Angel eds., 2005), at 408.
- ² *Id.* at 419-420.
- ³ Ivan Bernier, *Content regulation in the audio-visual sector and the WTO*, in *The WTO and Global Convergence in Telecommunications and Audio-Visual Services* (Damien Geradin and David Luff eds., 2004) at 217.
- ⁴ ITU World Telecommunication Regulatory Database 2005, *ITU Survey on Broadcasting Content Regulatory Authority and Internet Content Regulatory Authority*.
- ⁵ *The Implications for Convergence for Regulation of Electronic Communications*, OECD Working Party on Telecommunication and Information Services Policies, 12 July 2004.
- ⁶ European Union Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).
- ⁷ European Union Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of 19 June 1997 (Television Without Frontiers Directive). On December 13, 2005, the European Council submitted a proposal to modernize the Television without Frontiers Directive, which will be decided by the European Parliament and the Council. To keep up with convergence, technological progress and market developments, the proposal seeks to harmonize the rules in the Directive on the basis of the "country of origin" principle (which enhances legal certainty by ensuring that only one EU Member State – the country of origin – will have jurisdiction over any given media service provider) for all audiovisual media content regardless of technology. The proposal also distinguishes between "linear services" (e.g., scheduled broadcasting via traditional television, the Internet, or mobile phones which "pushes" content to viewers), and "non-linear" services (e.g., video-on-demand, non-scheduled broadcasting, and web-based news which the viewer "pulls" from a network). Generally, linear services would be subject to stricter rules, while non-linear services would be subject only to a minimum set of principles. See http://europa.eu.int/information_society/newsroom/cf/itemlongdetail.cfm?item_id=2343.
- ⁸ OECD Communications Outlook 2005, Chapter 7, at 203.
- ⁹ *Television Without Frontiers Directive*, Article 4.
- ¹⁰ *Id.* Article 5.
- ¹¹ *Broadcasting Services (Australian Content) Standard* 1999, July 2004.
- ¹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce).
- ¹³ Law Concerning Limitation of Damages to Telecommunications Service Provider and Disclosure of Sender Information (ISP Liability Law), 22 November 2001.
- ¹⁴ Memorandum by Kendra Medina Chávez, Ríos Ferrer y Guillén-Llarena, S.C. Abogados, 16 February 2001.
- ¹⁵ Council of Europe, Convention on Cyber-crime, ETS 185, signed 23 November 2001.

4.4.3 Intellectual Property Laws

Closely related to content legislation is the issue of protection of intellectual property rights associated with the growth of ICT use. In an era of electronic commerce, the sale and exchange of copyrighted material in digital format must be protected in order to ensure the continued investment and development of the ICT sector. Digitalization of information results in new risks for holders of copyright and related rights in their works, but also makes it potentially easier to administer and control acts of exploitation by means of access control, identification and anti-copying devices.¹ The EU has adopted a [copyright directive](#) and jurisdictions such as the [United States](#) and Hong Kong (SAR) have also passed legislation enforcing intellectual property laws in the ICT sector.

Many works of literature, film, music and art, as well as computer programs have been transferred into digital format. One of the most basic rights granted under copyright is the right to control reproduction under the Berne Convention, which covers reproduction in "any manner or form."² This right is critical to determining reproduction rights in e-commerce, as the transmission of a work presupposes the uploading of that work into the memory of a computer or digital device, and when the work is transmitted over networks, multiple copies are made in the memories of the network computers.

Some of the most significant issues arising from the extension of copyright protection in the digital environment are: (i) scope of copyright protection in the digital environment; (ii) responsibility of online providers; (iii) rights of performers in the digital environment; (iv) rights of digital broadcasters, such as webcasting and digital film and television online; (v) linking of copyright information online, including deep-linking and framing; (vi) protection of databases; and (vii) peer-to-peer file sharing systems, such as Napster.³

In the trademark field, commercial branding, advertising and marketing, including the use of domain names to identify one's presence on the Internet are heightened by the online environment and can result in unfair competition. The general international consensus is that trademark protection under international and national laws should extend to the Internet, and the protection should be neither more nor less extensive than that granted in the physical world.⁴ Some of the issues regarding the protection of trademarks in the digital environment are:

- a. use of trademarks as meta tags - which are HTML codes inserted into the header of a webpage that allows search engines to identify the contents of the page and index it;
- b. sale of trademarks as keywords;
- c. pop-up advertisements;
- d. mousetrapping – an aggressive marketing technique that forces users to remain on a specific website, by disabling a user's browser functions; and
- e. linking and framing.

In general, patents protect inventions. In the patent field, with the growth of e-commerce, the scope of patentable subject matter has increased, resulting in issues with respect to:⁵

- a. scope of patentable subject matter, including online business method patents and software protection;
- b. prior art effect – as applied to prior art in electronic form “cyber art,” and
- c. enforcement of patent rights.

ENDNOTES

¹ Jasmin Battista, *The EC Copyright Directive, on of the most significant measures ever adopted by the European Union in the copyright field*, The Global Cyberlaw e-Journal, Issue no. 1, 2001, available at http://www.globalcyberlaw.com/TGCLeJ/issue_1.html.

² Berne Convention for the Protection of Literary and Artistic Works, Article 9(1).

³ *Intellectual Property on the Internet: A Survey of Issues*, World Intellectual Property Organization (WIPO), December 2002, Section III (A), para. 66.

⁴ *Id.*, Section III(B), para. 123. See also WIPO, *Use of Trademarks on the Internet: Issues Paper*, para. 6 (1999).

⁵ *Intellectual Property on the Internet: A Survey of Issues*, World Intellectual Property Organization (WIPO), December 2002, Section III (D).

4.4.4 Data Protection/Privacy Laws

(a) Personal Data

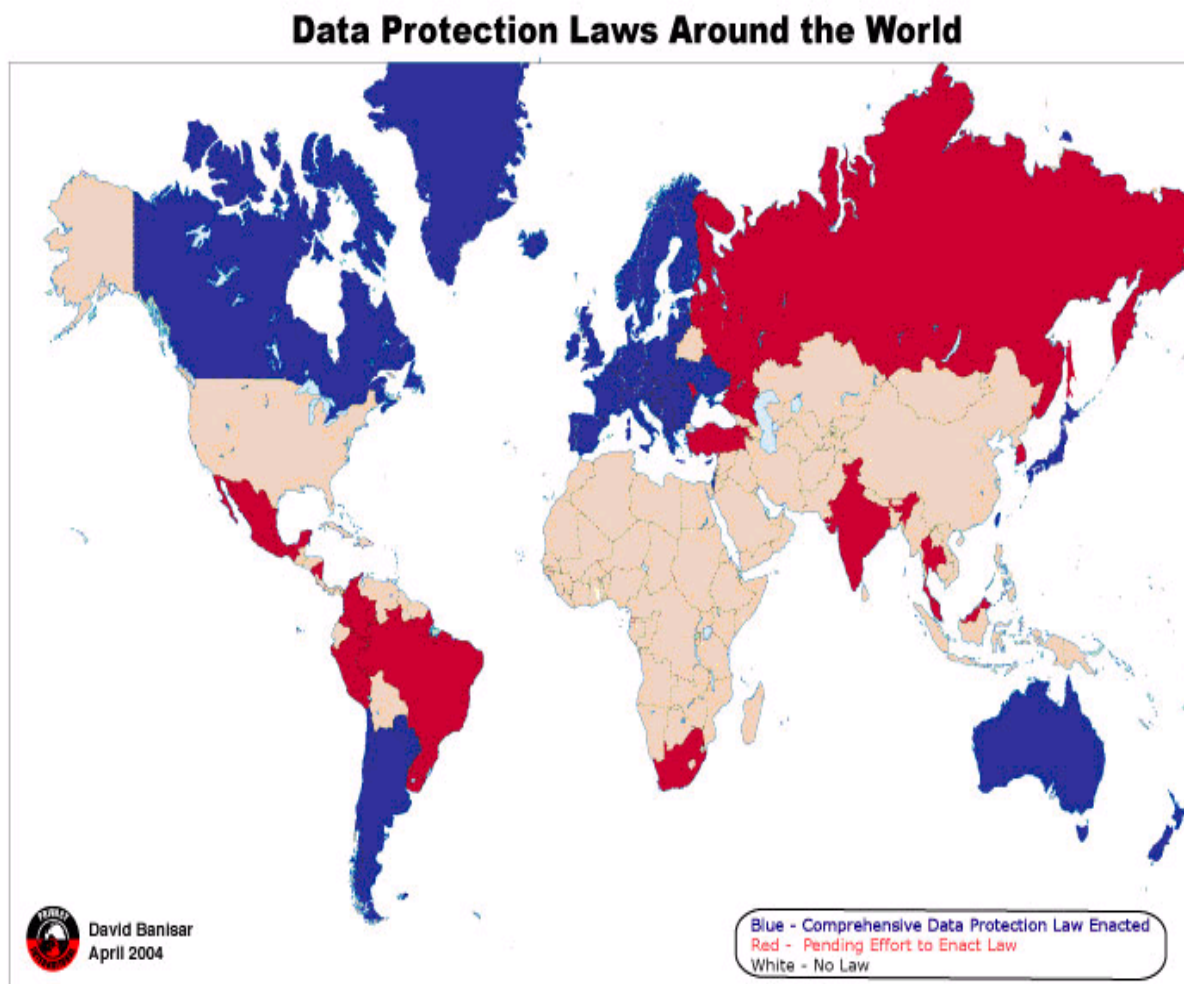
Due to the sensitivity of information involved in communications activities, most telecommunications legislation contains provisions regarding the privacy and confidentiality of user information. However, the ICT environment has greatly facilitated the global transmission of personal information, and it has become much easier to collect and share private information through the Internet. As a result, many countries have enacted data protection legislation to protect individuals' privacy rights by restricting the manner in which personal information is used in the private and public sectors.¹ Some countries, such as Australia, have also undertaken efforts to harmonize privacy provisions in telecommunications legislation and in other related legislation to ensure a consistent standard of privacy protection. In 2005, the Australian Privacy Commissioner conducted a review of the Privacy Act in light of the developments in private sector industries, and issued recommendations to improve the private sector provisions in the Privacy Act.² With regard to telecommunications, the Office of the Privacy Commissioner (OPC) recommended that the Telecommunications Act and the Privacy Act be amended to provide consistency and to clarify what constitutes authorized uses and disclosures under each Act, and to ensure that the Privacy Act cannot be used to lower the standard of privacy protection provided by the Telecommunications Act.

In the EU's Data Protection Directive³ and Privacy Directive,⁴ privacy in the processing of personal data and the confidentiality of communications are recognized as fundamental rights that should be protected. The Privacy Directive requires member states to harmonize and ensure an equivalent level of protection of the right to privacy with respect to personal data in the electronic communication sector.⁵ Pursuant to this, the Data Protection Directive prohibits the transfer of personal information to any country that does not have adequate privacy laws.⁶ As a result, EU member states have implemented legislation that prohibits the transfer of personal information from the EU to third countries unless such countries have adequate privacy protection in their laws.

To date, a majority of countries around the world have enacted laws relating to data protection (See Figure 4-C). Often, the protection of personal data is not encompassed in a single law but is covered by a variety of laws depending on the type of information that is being protected. In the United States, for example, legislation has passed regarding medical records (The Standards for Privacy of Individually Identifiable Health Information, or “HIPAA Privacy Rule”),⁷ credit reports (Fair Credit Reporting Act),⁸ and immigration and citizenship information (USA Patriot Act).⁹ Similarly, in Argentina, the protection of personal data is regulated by different legal instruments, namely the

Argentine Constitution, the Personal Data Protection Act, Decree No. 1558, and the Data Retention Law, Law No. 25.873, which was incorporated into the Telecommunications Law. In New Zealand, data protection legislation is contained in a number of laws, including the Telecommunications Information Privacy Code 2003¹⁰ and the Privacy Act 1993.¹¹

Figure 4-C: Data Protection Laws Worldwide



Source: Privacy International, *Global Map of Data Protection*.¹²

(b) Data Retention

Another factor that has shaped the policy on the use of communications data with regards to privacy of information is the concern with national security after the events of September 11th, 2001, in the United States, and the recent terrorist attacks in Spain and in England. One example of the current debate surrounding the use of communications data for national security purposes is the initiative on data retention rules. Some laws, such as the EU Data Retention Directive¹³, require communications service providers to retain all data created by their users for a prescribed period of time, while other countries, such as the United States, require communications service providers to store specific sub-sets of data for a more limited amount of time for specific purposes. The issue of data retention is hotly opposed by operators and service providers because of the resources required to comply. In Argentina, the Data Retention Law was promulgated in February 2004 and mandated a 10 year data retention period.¹⁴ However, due to opposition by ISPs, who would bear the burden and costs of retaining the data, and civil liberties groups regarding the long retention period, the government suspended the application of the law in 2005.¹⁵

ENDNOTES

¹ Christopher Millar, *Communications Privacy*, in *Telecommunications Law and Regulation*, (Jan Walden and John Angel eds., 2005), at 381.

² See the Privacy Commissioner's report into the operation of the private sector provisions of the Privacy Act 1988. Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, March 2005, available at <http://www.privacy.gov.au/act/review/revreport.pdf>.

³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (EU Data Protection Directive).

⁴ Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications).

⁵ *Id.*, Article 1.

⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (EU Data Protection Directive), Chapter IV.

⁷ 45 C.F.R. Parts 160 and 164, 14 August 2002.

⁸ Fair Credit Reporting Act, Pub. L. No. 91-508 (1970), amended by PL 104-208 (1996).

⁹ H.R. 3162, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act of 2001), Pub. L. No. 107-56.

¹⁰ Telecommunications Information Privacy Code 2003, 2 May 2003.

¹¹ Privacy Act 1993, Law No. 28, 17 May 1993.

¹² See <http://www.privacyinternational.org/survey/dpmap.jpg>.

¹³ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (EU Data Retention Directive), available at <http://www.ispai.ie/DR%20as%20published%20OJ%2013-04-06.pdf>.

¹⁴ Argentina Data Retention Law 2004, Law No. 25.873, 6 February 2004.

¹⁵ Decree 357/2005 suspending Law No. 25.873, 22 April 2005.

4.5 Case Studies of Converged Legislation

This section contains case studies on converged legislation in the EU, Hong Kong, and Malaysia.

4.5.1 European Union New Regulatory Framework (NRF)

The EU NRF is the paradigm legislation aimed at addressing convergence and its challenges. The NRF is the EU's electronic communications regulatory framework, and is composed of six Directives¹ that address the convergence of telecommunications, media, and information technology. The NRF does not address content.²

The NRF establishes a unified, technology-neutral system of authorization that covers all comparable services, with the objective of addressing convergence between different electronic communications and services, and stimulating their further development. The authorization system has only a procedural notification requirement.

The general authorizations issued by NRAs must, at a minimum, provide the following rights:

1. The right to provide electronic communications networks or services or both.
2. The right to request interconnection or access to facilities of other providers. However, only providers of public services and networks have the right to be supported by the regulator in case negotiations with a significant market power operator fails.
3. The right to apply for rights of way.
4. The right to be considered for designation as a universal service provider (only for providers of public services and networks).

NRAs may not attach conditions to an authorization other than the ones set forth in the NRF.³ Member states may impose different requirements on services and networks to grant numbering, but NRAs may not discriminate among providers of comparable services. Member states may establish the requirement to obtain a separate licence for spectrum rights, although the NRF introduces the possibility of spectrum trading.

The NRF requires NRAs to conduct a market analysis on certain markets susceptible to *ex ante* regulation. The NRAs may propose draft measures if they find that effective competition does not exist in the relevant market. The NRF notes that newly emerging markets, such as

VoIP, should not be subjected to inappropriate obligations, and while it cautions against the imposition of premature obligations, its also notes the need to prevent full control of the market by the dominant player.

The NRF also created several Committees to assist the Commission in the implementation of the NRF. One of these is the European Regulatory Group (ERG), an advisory body to encourage cooperation and coordination among the NRAs of member states. Since its establishment, the ERG has been actively involved in the implementation and harmonization of the NRF, issuing non-binding recommendations and common positions that serve as NRF implementation guidelines, with the objective of achieving regulatory harmonization.

The ERG has been actively involved in the EU VoIP debate. It has had an influential role with the issuance of a common position⁴ that is followed by various member states. Other committees and groups that also contribute to the management, implementation and further development of the new framework are:

- The [Communications Committee](#) with regulatory and advisory functions regarding implementation issues arising from the five directives.
- The [Radio Spectrum Committee](#) to deal with technical implementation measures aimed at harmonization of frequency allocation and to develop common external radio spectrum policy objectives.
- The [Radio Spectrum Policy Group](#) providing a platform for member states, the Commission and stakeholders to coordinate the use of radio spectrum.

Finally, the NRF establishes a periodic review mechanism of the directives to determine the need for modification in light of changing technological or market conditions.

How does the NRF deal with VoIP?

As a result of the growing significance of VoIP, the European Commission (EC) opened a public consultation proceeding to develop a VoIP harmonized regulation (the "EC Consultation Document").⁵ This process occurred at the same time the NRF was being implemented.

The EC Consultation Document opened a comment process on the challenges brought by VoIP, proposing preliminary guidelines for VoIP regulations. Under such recommended preliminary guidelines, service providers have the commercial freedom to offer services that qualify the provider as an electronic communications service (ECS) provider or as a publicly available telephone service (PATS) provider.

Each category of service provider has different rights and obligations:

- Only PATS providers have PATS number portability; ECS providers do not.
- Only PATS subscribers have a right to request carrier selection and pre-selection.
- Only PATS subscribers have the right to be listed in the public telephone directory.
- Only PATS providers have the obligation to provide access to emergency services.
- Quality of service standards only applies to PATS providers.

From a customer perspective, a VoIP service provided as ECS and PATS have a similar look and feel. Therefore, the EC Consultation Document suggested that to avoid consumer disinformation, member states could require ECS providers to give precise information to customers on how they differ from PATS and the impact that their services have on power line terminals, access to emergency services, and caller location.

So as not to hinder the development of VoIP services, the EC Consultation Document encouraged VoIP providers to rapidly devise and implement technical requirements and solutions such as how to handle emergency services, lawful call interception, and caller ID.

With respect to numbering, the EC Consultation Document provided the following possibilities for Member states under the NRF:

1. Allocation of geographic numbers to ECS providers, allowing mobility in limited area (e.g., a city or a telephone district)
2. Allocation of geographic numbers to ECS providers, allowing countrywide mobility
3. Allocation of geographic numbers to ECS providers, without mobility
4. Establishment of a new range of numbers specific for ECS VoIP services

Within the NRF and taking into account this Consultation Document and the ERG common statement,⁶ member states have been adopting and implementing decisions on VoIP services.

Some jurisdictions, such as Spain and the United Kingdom, allow the service provider to freely decide which rights and obligation regime (the ECS or PATS) will be applicable when offering the service. Others, such as Austria and Finland, establish specific parameters for the service, limiting the freedom of the providers to choose the applicable regime.

There have also been different approaches on numbering. Some jurisdictions such as Spain and the United Kingdom, have established a specific range for ECS VoIP providers, while allowing non-geographic numbering for VoIP PATS providers. Spain permits nomadic use within a particular telephone district while the United Kingdom does not have any nomadic restriction. Other jurisdictions, such as Germany, France or Austria, have recently established a specific range of numbers for ECS VoIP service.

Portability within a particular numbering range (i.e., geographic to geographic or special ECS VoIP range to special ECS VoIP) has been

allowed in some jurisdictions, such as Spain and Ireland, while others, such as United Kingdom, only allow portability for PATS service providers.

How does the NRF deal with WLANs?

The EC adopted a Recommendation in March 2003 urging EU Member states to facilitate the use of public WLANs.⁷ The EC recognized the importance of WLANs as an alternative platform for broadband access to information society services and suggested that the desirability of promoting a harmonized approach for the provision of public WLAN access throughout the EC. To that end, the EC Recommendation advises that the provision of WLAN access on a commercial basis should be allowed under the least onerous system, *i.e.*, to the extent possible without any specific conditions. The NRF principle of technologically-neutral regulation should ensure that there is no discrimination between the various WLANs and other technologies. As an example of how the Recommendation has been applied, France does not require any licence for the implementation of WLANs. The use or provision of a private WLAN by an already licensed public operator is allowed without any regulatory notification. Furthermore, a simple declaration will suffice for those providing public WLAN access who do not have a public network licence.⁸

The EU legislation approach to address convergence

The purpose of the NRF is to address convergence by a comprehensive transformation of the applicable legal framework by means of a technology-neutral and flexible approach.

The NRF was the result of several consultative processes involving interested parties (*e.g.*, member states, consumers and industry representatives), which gave the EC a broader perspective of convergence regulation, its effects, and its challenges. In addition, from a convergence standpoint, the practical implementation of the NRF is supported by consultation proceedings, harmonization processes, and ultimately, member states regulations. An example of this approach is the VoIP EC Consultation Document cited above. NRAs have a choice of: (i) establishing their own consultative processes at a national level; (ii) waiting for the results of the EC consultative proceeding; or (iii) adopting regulations on the subject directly.

The EU's legislative approach to convergence involves an additional element of regional harmonization, which is achieved through EC guidelines (as in the case of VoIP) and the common position of the ERG. ICT-related regulation in the EU is addressed separately from the NRF, but takes into account the existing links between them.

ENDNOTES

¹ Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, dated on 7 March 2002 (Framework Directive); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (Authorization Directive); Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector. In addition, the following two legal documents also compose the NRF: (1) Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on common regulatory framework for electronic communication networks and services (2003/311/EC), dated 11 February 2003 (Commission Recommendation on Relevant Markets); and, (2) Commission Guidelines on market analysis and the assessment of significant market power under Community regulatory framework for electronic communications network and services (2002/C 165/03), dated 11 July 2002 (Commission Guidelines on Market Analysis).

² See Framework Directive, *Preamble* (5).

³ See Authorization Directive, Article 6.

⁴ ERG Common Statement on VoIP regulatory approaches, ERG (05) 12, at http://erg.eu.int/doc/publications/erg0512_voip_common_statement.pdf.

⁵ European Commission, *Consultation Document on the treatment of Voice over Internet Protocol (VoIP) under the EU Regulatory Framework*, dated 14 June 2004.

⁶ Common Statement on VoIP regulatory approaches, ERG (05) 12, at http://erg.eu.int/doc/publications/erg0512_voip_common_statement.pdf.

⁷ European Commission adopts Recommendation to Promote Public Wireless Broadband Services in Europe, 20 March 2003, at http://europa.eu.int/information_society/topics/telecoms/radiospec/doc/pdf/rln_recommendation/press_release_en.pdf.

⁸ See ART's RLAN web page at <http://www.art-telecom.fr/dossiers/rln/menu-gal.htm>. The regulator also lists a map with the location of Wi-Fi hotspots in France on its website.

4.5.2 Hong Kong (SAR)

Hong Kong (SAR) is adopting different regulatory measures to address convergence, focusing on fixed/mobile convergence.

Currently, there are two different types of licences for fixed services and mobile services (*i.e.*, fixed telecommunications service licence and public radiocommunications services licences). However, Hong Kong (SAR) has proposed¹ merging these licences into a unified licence with specific rights and obligations. Among the different aspects proposed to be included in this unified licence is inter-modal fixed to mobile portability.

In addition, Hong Kong (SAR) is introducing an additional type of licence for Broadband Wireless Access (BWA);² which refers to wireless local loop connection of end-users to telecommunications networks for voice, data, and multimedia communications.³ The BWA licences will be completely technology neutral and will allow both mobile and fixed services from January 2008.

VoIP

Prior to the issuance of a statement by OFTA in June 2005, VoIP was not expressly regulated in Hong Kong (SAR).⁴ Instead, VoIP was treated as a technology that could be operated under any service or network licence, and the licence under which VoIP was provided determined the operators' rights and obligations.

In June 2005, the Government issued a statement that sets forth two specific class licences to operate VoIP services that differentiate between VoIP services that are marketed with characteristics equal to voice services (Class 1) and those that are not (Class 2).

Class 1 licences provide numbering rights equal to voice services and their users will have portability; however, Class 1 licensees must provide emergency access service and comply with a minimum set of quality of service standards.

Class 2 licences do not have numbering rights, and to the extent that numbers are not assigned, operators are not required to provide access to emergency services.

To protect consumers, operators will be required to clearly declare in their marketing materials the type of licence under which they operate (Class 1 or Class 2).

WLANs

Since January 2003, OFTA has required a class licence for WLANs. The licence, which does not require approval, is automatically granted upon registration of the name, contact details, location of the service, and identification of the frequency band being used.⁵

ICT-Related Regulation

Currently, broadcasting and telecommunications are regulated by separate entities and are subject to different regulations. OFTA is the regulatory authority responsible for regulating the telecommunications industry and ensuring compliance with the Telecommunications Ordinance. Broadcasting in Hong Kong (SAR) is regulated by the Broadcasting Authority (BA) pursuant to the Broadcasting Ordinance, which divides broadcasting into four categories of television program services: (a) domestic free television program service; (b) domestic pay television program service; (c) non-domestic television program service; and (d) other licensable television program services. In addition, Hong Kong (SAR) has separate regulatory frameworks for the provision of media content or television program services and for the transmission of these services. Transmission networks are licensed and regulated by OFTA pursuant to the Telecommunications Ordinance, whereas television programming and content (regardless of the transmission mode) is regulated by the BA under the Broadcasting Ordinance.

In response to convergence, the Hong Kong (SAR) Government is now reviewing the broadcasting regulatory regime, covering convergence strategy, media ownership and the merits of establishing a unified regulator (merging the BA and OFTA into one regulator) to oversee the electronic communications sector. A public consultation document on the Government's proposal for a unified regulator named Communications Authority was published in March 2006.⁶ As stated by the Secretary for Commerce, Industry & Technology John Tsang, "convergence at the infrastructure level means that cable and satellite broadcasters are facing increasing competition not only from their peers, but also from telecommunications providers and new media firms that are branching out into the broadcasting business. The increase in broadband penetration also means the increase of converged services on broadband networks (such as PCCW's launch of broadband television service via ADSL in addition to video services on the Internet portal and Hong Kong SAR Broadband Network's telephony, broadband Internet access and video triple-play service via its communications network). These developments have required the Government to review its definition of broadcasting and the relevance of considerations such as spectrum scarcity, as well as current regulatory measures that many no longer be justified on public interest grounds in view of the convergence trend."⁷

ENDNOTES

¹ OFTA, *Revision of Regulatory Regimes for Fixed-Mobile Convergence - Consultation Paper*, 21 September 2005, at <http://www.ofta.gov.hk/en/report-paper-guide/paper/consultation/20050921.pdf>.

² OFTA, *Licensing Framework for Deployment of Broadband Wireless Access: Analysis of Comments Received, Preliminary Conclusions and Further Consultation*, 31 August 2005, at <http://www.ofta.gov.hk/en/report-paper-guide/paper/consultation/20050831.pdf>.

³ *Id.*, and OFTA, Press Release: *OFTA Conducts Further Consultation on Broadband Wireless Access*,

at http://www.ofta.gov.hk/en/press_rel/2005/Sep_2005_r1.html.

⁴ OFTA, *Statement on Regulation on Internet Protocol (IP) Telephony*, 20 June 2005, at <http://www.ofta.gov.hk/en/tas/ftn/tas20050620.pdf>.

⁵ OFTA, *Statement of the Telecommunications Authority: Class Licence for the Provision of Public Wireless Local Access Network Services*, 17 January 2003, at <http://www.ofta.gov.hk/tas/others/ta20030117.pdf>.

⁶ The consultation paper is available at http://www.citb.gov.hk/ctb/eng/paper/pdf/CA_consultation_paper.pdf.

⁷ See Hong Kong SAR Government Information Centre, *Broadcasting in Hong Kong SAR*, May 2005, available as reference document below. See also "Broadcasting trends prompts new laws," address given by the Secretary for Commerce, Industry & Technology John Tsang to the Cable and Satellite Broadcasting Association of Asia Convention 2003, Hong Kong SAR Government Information Services Department, October 29, 2003, available at <http://www3.news.gov.hk/ISD/ebulletin/en/category/ontherecord/031029/html/031029en11001.htm>.

4.5.3 Malaysia

The Communications and Multimedia Act 1998 (CMA)¹ came into effect on 1 April 1999, providing a regulatory framework to accommodate the convergence of the telecommunications, broadcasting, and computing industries.

The basic principles underlying the CMA are transparency, technology neutrality, flexibility, and transparency. Regulation is reduced by the establishment of generic provisions, and self-regulation is promoted.

In addition, the Malaysian Communications and Multimedia Commission (MCMC) was established on 1 November 1998, as the sole regulatory authority of the new framework, thereby restructuring the different branches of the government that previously had jurisdiction over the telecommunications, broadcasting, and computing industries.

The CMA encourages industry self-regulation and establishes an industry forum as a dynamic tool for the industry to formulate and implement voluntary codes of rules. These industry codes of self-regulation may be prepared at the industry's own initiative or by request of the MCMC.

Finally, the CMA establishes a permanent review process, which must be conducted every three years by the MCMC, to examine rules and regulations under the CMA and adapt them to the dynamics and evolution of convergence. Pursuant to this review process, the MCMC must provide written recommendations to the Minister to modify or to repeal any rules or regulation under the CMA.

Licensing

The Malaysian licensing framework separates the network from the service, and places emphasis on the activity rather than on the technology. The following are licensable activities:

- *Network Facilities Providers* ("NFP") are considered "the fundamental building block of the convergence model upon which network, applications and content services are provided."² NFPs own facilities and equipment (i.e., satellite earth stations, broadband fiber optic cables, telecommunications lines and exchanges, radio communications transmission equipment, mobile communications base stations, and broadcasting transmission towers);
- *Network Services Providers* provide basic connectivity and bandwidth that supports a variety of applications, and enables transport between different networks;
- *Applications Service Providers* provide specific services to end-users (e.g., voice services, data services, content-based services, electronic commerce, and other transmission services); and
- *Content Applications Service Providers* provide traditional broadcast services, online publishing and information services.³

The above services fall under one of the two categories of licences created by the MCMC: individual and class. Individual licences are for situations where a high degree of regulatory control is deemed necessary. This is the case of infrastructure (i.e., NFP) when there may be reasons to limit the number of licences because of technical constraints (e.g., scarce radio spectrum), to avoid duplication, to protect major investments or for national security considerations. See [Table 4-8](#) for a summary and comparison of the licensing framework in Malaysia under the old and new regimes.

VoIP

In Malaysia, VoIP service can be provided in two ways:

1. PC-to-PC based, or what is known as Internet telephony; and
2. Phone-to-phone through the Public Switched Telephone Network (PSTN), which involves multistage access dialing known as VoIP.

The Ministry of Energy Communications and Multimedia had issued a policy position that the provision of PC-to-PC based Internet telephony is not subject to licensing. However, the provision of VoIP requires an Applications Service Provider (ASP) individual licence as stipulated in

the Communications and Multimedia (Licensing) Regulations 2000.

WLANs

Given the technology-neutral approach of the CMA, the provision of WLAN activities do not require registration or application to the MCMC provided that the business (or the service provided) does not involve any of the following categories as defined by the Law:⁴

- (a) Network Facilities Provider (NFP) activities
- (b) Network Services Provider (NSP) activities
- (c) Applications Services Provide (ASP) activities

Prospective providers of wireless hotspot Internet services which contract with a licensed Internet Access Service Provider (IASP) for access to the Internet do not require licensing under the CMA 1998. However, as this is not an Internet ASP (IASP) service, consumers would not be protected by any quality of service determinations as these providers would have to compete to provide the best service possible.

ENDNOTES

¹ The Malaysian Communications and Multimedia Act 1998 is available on the Malaysian Communications and Multimedia Commission's website at http://www.mcmc.gov.my/mcmc/the_law/ViewAct.asp?cc=4446055&lq=e&arid=900722.

² Malaysian Communications and Media Commission, *What We Do*, at http://www.mcmc.gov.my/mcmc/what_we_do/licensing/cma/framework.asp.

³ Communications and Multimedia Act 1998, Act 588, (Malaysia), Part 4, *available at* http://www.mcmc.gov.my/mcmc/the_law/ViewAct.asp?cc=31478525&lq=e&arid=900722.

⁴ Please refer to the Communications and Multimedia (Licensing) Regulations 2000 for the definition of each activity.

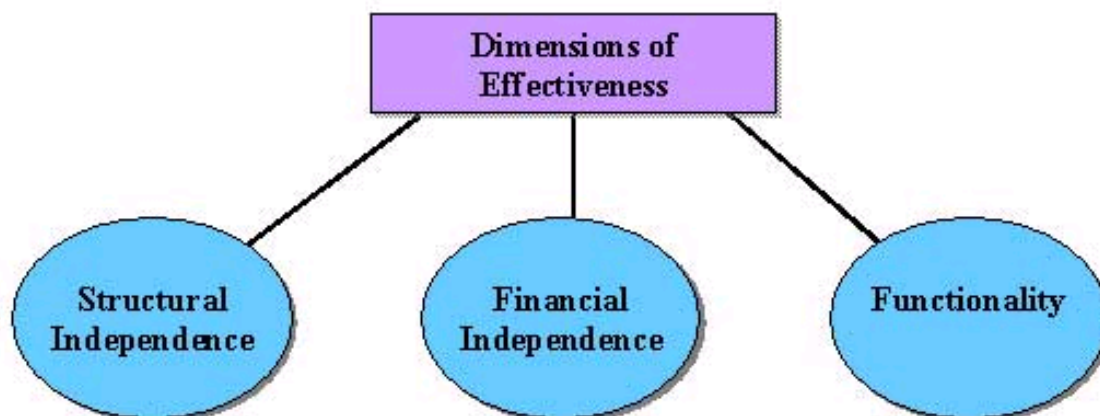
5 Elements for an Effective Regulator

The aim of a regulator is to ensure that the sector is working properly and that consumer and other stakeholder interests are protected in a fair and balanced manner. An effective regulator is the vehicle to ensure credible market entry, as well as compliance with and enforcement of existing regulations. To achieve this, governments must create and maintain an environment conducive to good governance and regulatory success. Regulatory procedures must be transparent, accountable and predictable, and ensure integrity. However, the mere fact that these factors are in place, at least on paper, does not necessarily guarantee success. As shown throughout this module, regulators do not work in a vacuum but within the context of a legal tradition, a sector and a country. Priorities must be set, the necessary statutory framework in which the regulator will operate must be created, procedures put in place, and relationships between stakeholders established. The way in which these different processes work together and are respected within a general context of good governance will determine the effectiveness of the regulator and ultimately the success of the market.

5.1 What Constitutes an Effective Regulator?

Independence is a critical attribute for a regulator to be effective. However, effectiveness has additional dimensions (see Figure 5-A). In a broad sense, an effective regulator is structurally and financially independent, but the real effectiveness of the regulator will lie in how it achieves successful functionality, ideally in an independent and autonomous manner.

Figure 5-A: Dimensions of Effectiveness



On the one hand, in a structural sense, independence means guaranteeing that the regulator maintains an arms-length relationship with private industry and the other branches of the government.¹ On the other hand, successful functionality is achieved when the regulator establishes clear rules that will govern such matters as its mandate and functions, its funding, and the implementation of its authorities, and then is able to execute those rules fairly and in a timely fashion.

Box 5-1 : General Safeguards Essential for Effectiveness ²

- Providing the regulator with a distinct legal mandate, free of ministerial control.
- Prescribing professional criteria for appointment.
- Involving both the executive and the legislative branches in the appointment process.
- Appointing regulators for fixed terms and protecting them from arbitrary removal.
- For a board or commission, staggering the terms of the members to ensure continuity within the top ranks of the agency.
- Exempting the agency from civil service salary and employment rules that make it difficult to attract and retain well-qualified staff,

as well as to terminate poorly performing staff, as necessary where the civil service system and salaries do not seem to work.

- Providing the agency with a reliable and adequate source of funding.

Table 5-1 contains a summary of the aspects for an effective regulator as discussed in this Chapter.

ENDNOTES

¹ However, as shown in Chapter 6, the regulator typically has some kind of relationship with other government authorities, which is often a strong one that includes some kind of oversight mechanism. In Article 5(2) of the Revised ONP Framework Directive, the EU guarantees the independence of national regulatory authorities by ensuring that “national regulatory authorities shall be legally distinct from and functionally independent of all organizations providing telecommunications networks, equipment or services,” and further affirms that “Member States that retain ownership or a significant degree of control of organizations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.” EU Revised ONP Framework Directive 90/387/EC, 10 June 1997, available at <http://europa.eu.int/ISPO/infosoc/legreg/telecom.html#Directives%20Lib>.

² Warrick Smith, *Utility Regulators – The Independence Debate*, Public Policy for the Private Sector, The World Bank Group, Public Policy Journal, Issue 127, October 1997.

5.1.1 Structural Independence

A regulator can function in an effective manner in a given market within a range of organizational structures. As discussed more fully in Chapter 6, there are various institutional options for structuring a regulator. In some cases, although increasingly rare, the ministry may be responsible for regulating the sector. Alternatively, there may be a unit inside the ministry that acts in the capacity of a regulator. There may be a formal office outside a government ministry that serves as the regulator. Lastly, a regulator can be legally independent; that is, separate from the central governmental structure.

Pursuant to the World Trade Organization (WTO) Reference Paper that requires countries to establish a regulator separate from the operator, in recent years many countries have established a structurally independent regulator, which separates the function of regulating the telecommunication market from that of supplying services. ¹ Governments have identified the need to clarify and separate the various functions of the state, as it often acts as: (i) owner/shareholder of enterprises (i.e., incumbent providers of basic services); (ii) regulator (e.g., enacting and enforcing the general rules); (iii) overseer of competition in the market; and (iv) protector of consumer interests.

Providing a regulator with structural independence will reduce the possibility of political or industry capture. When a regulatory body bows to external pressure from operators or other government entities, it often lacks independence and its decisions are neither objective nor transparent. For example, regulators may adopt negative stances against the introduction of new technologies and services or interconnection disputes to protect the interests of incumbent operators. However, governments must also ensure that they do not create a situation whereby the regulator itself is effectively “captured” (meaning undue influence by politicians and/or dominant players) because its statute provides or it believes that it is responsible for ensuring the health of the industry (including the incumbents), and as such it must take actions protective of the incumbent operators. In addition, regulators are often forced to take certain “protective” actions because of exclusivity provisions imposed on them by government policy (e.g., that the incumbent operator will have exclusivity over part of the market for a certain number of years such that new technologies which may threaten their market share must be kept out – e.g., VoIP).

These decisions can be detrimental in that they often limit competition that would benefit consumers and erode confidence in the regulator since it is perceived as “captured” by the incumbent or other government entities. Ultimately, the mandate of the regulator should not be to ensure the viability of the industry but to protect consumer interests.

Although structural independence is an important element of an effective regulatory environment, it alone is not sufficient to ensure successful development of the sector. In order to be fully effective, a regulator also requires financial independence and functionality as further discussed below.

ENDNOTES

¹ The Reference Paper to the WTO Agreement on Basic Telecommunications services notes specifically that there should be a regulatory body established that “is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and procedures used by regulators shall be impartial with respect to all market participants.”

See http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

5.1.2 Financial Independence

The funding sources and budgeting processes of regulatory authorities can have an important impact on their independence, efficiency and cost of regulation. 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 the degree of a regulator's autonomy and competence when carrying out its responsibilities.

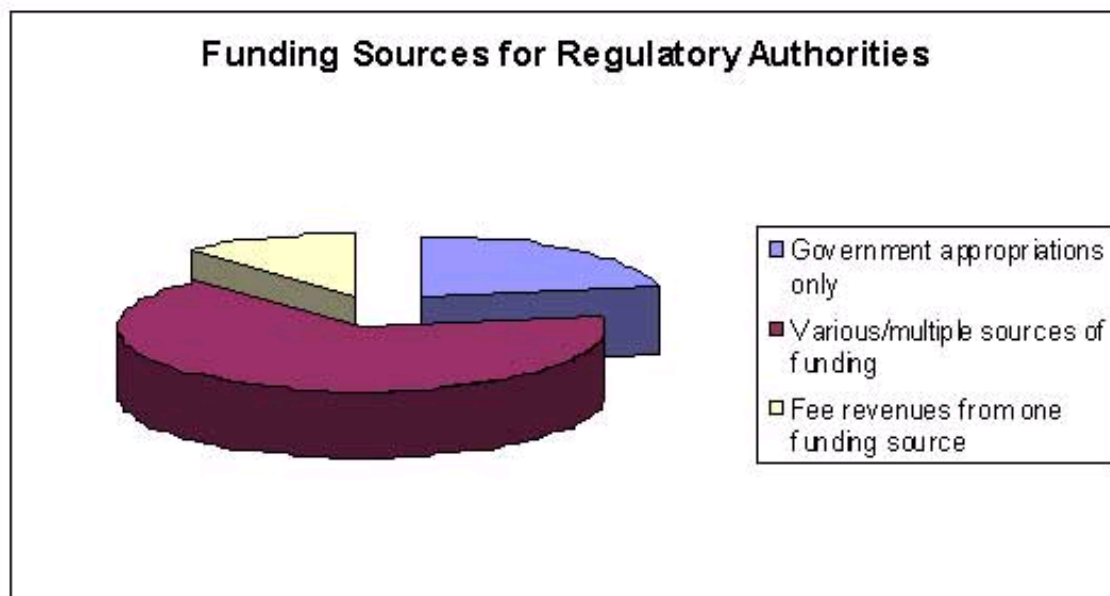
The funding mechanism is critical to ensuring effectiveness of the regulatory function. While a regulator's budget may come from the government or from the telecommunications sector itself through licensing fees, fines and other administrative charges, the key is that funding should be free from political and private interest influence.¹

There are two primary vehicles used by countries to fund a regulator's budget. One source of funding is a formal allocation from the government's budget. This approach, however, may permit a greater role of the elected government in directing regulation as well as establishing policies to support the overall economic goals of a country.²

A second approach is to allow the regulator to collect monies from the industry through fees and contributions.³ Regulators may receive payments from operators for spectrum or licensing fees⁴, penalties resulting from enforcement, or charges associated with administrative tasks such as providing numbering resources. Some countries assess special taxes on telecommunication operator revenues (in addition to income taxes imposed by the treasury), of which a portion is often earmarked for universal service purposes.⁵

The ITU's World Telecommunication Regulatory Database 2005 reveals that, for the most part, telecommunications regulatory authorities are funded through general government budget appropriations, licensing (usually one-time) fees, spectrum fees, regulatory fees (usually annual fees that can be based on a percentage of operator's turnover or revenues), or a combination of these sources. (See Figure 5-B.) Of the 119 countries that provided information on the breakdown of their regulatory authority's financing sources, two-thirds indicate that they rely on a combination of sources for their funding. The remaining one-third relies on a single source of funding.⁶

Figure 5-B: Sources of Funding for Regulators



Source: ITU World Telecommunication Regulatory Database 2005

Reliance on Government Appropriations

In certain countries, the regulator's budget is part of the government appropriations allocated to the ministry under whose authority it resides. In Mexico, the Comisión Federal de Telecomunicaciones (COFETEL) is considered a "decentralized" division of Mexico's Secretaría de Comunicaciones y Transportes (Communications and Transportation Secretariat - SCT) and even though it can make regulatory decisions independently of the SCT, it must do so within the budget assigned to it by the Secretariat.⁷ Similarly, the Comisión Nacional de Telecomunicaciones (CONATEL) in Honduras – a "decentralized" division of the country's Ministry of Finance – proposes its annual budget to the Ministry of Finance, and the Ministry incorporates the proposal budget into its government appropriation proposal, which must be approved by the national congress.⁸ In South Africa, the Independent Communications Authority of South Africa (ICASA) Act of 2000 specifies that the regulatory authority will be funded by a parliamentary appropriation. The same act also indicates that any revenues received by the regulatory authority – other than through the government appropriation – must be paid into the National Revenue Fund within 30 days of receipt.⁹

In these cases, the government's authority to determine the budget gives it a degree of direct influence and intervention, or at least the appearance of such, over the policies and regulations the agency may wish to implement, possibly reducing the agency's effectiveness in regulating its telecommunications sector. The regulator may also face uncertainty as it must rely on the commitment of the government toward the telecommunications sector in order to have the resources necessary to implement its policies and regulations. Lastly, governmental budget limitations may make relying on the government as the only source of funding problematic as the funding level may be inadequate or not released timely in order to meet increasing regulatory needs.

Use of Multiple Funding Sources, But With Little or No Control of their Budgets

Relying on multiple sources of funding rather than solely on government appropriations allows regulators to have more financial independence and can make them less subject to outside influences. However, having to surrender revenues to the government and having its budget approved by the government can act as a system of checks and balances that prevents a regulatory authority from over-spending and perhaps even over-charging the regulated entities, although this control may be seen as diminishing the regulator's ability to determine the funds it will require to implement the policies and programs needed by the telecommunications sectors.

The National Communications Board (SIDEAMET) of Estonia, which is supervised by the Ministry of Economic Affairs and Communications,¹⁰ relies on a number of sources of funding (e.g. , licensing, numbering), but all revenues collected are deposited in a bank account under the name of the Ministry of Finance of the Republic of Estonia. The revenues are deposited into the state budget and it is the government that determines the appropriation to be received by SIDEAMET each year.¹¹

In the United States, the Federal Communications Commission (FCC) operates through a government allocation of funds. However, the FCC is required by Congress to collect regulatory fees to offset a portion of the annual allocation. In recent years, regulatory fees have represented about 90 per cent of the total annual budget; therefore, the government allocation has effectively amounted to about 10 per cent of the FCC's total operating budget.

Use of Multiple Funding Sources and Control of their Budgets

The majority of telecommunications regulatory authorities have diverse sources of funding which provide some level of financial independence from the government. Although government budget appropriations are a staple in most regulatory budgets, increasingly regulators have developed other funding sources such as: administrative and service fees; numbering fees; authorization fees; fine and penalty fees; and revenues earned from auctions. A few regulators also look to generate funds by investing in property, leasing facilities, earning interest on local bank certificates and fixed deposit accounts, and obtaining loans and grants from multilateral organizations. Financial independence, coupled with the authority to manage and administer their own funds gives regulatory agencies more regulatory certainty so that they can assert more independence in regulating the telecommunications sector.

In Brazil, the Agência Nacional de Telecomunicações (Anatel) has the Fundo de Fiscalização das Telecomunicações as its only financial resource . All revenues collected by Anatel must be deposited in this fund and it is from this fund that Anatel obtains its expenditures each year. Anatel receives revenues from several income sources, including: government appropriations; credit operations; concessions, permits, authorizations, and spectrum fees; fines and penalties; operating and inspection fees; donations, legacies, subventions and other resources assigned to the Agency; and fees, prices or fines from the sale or leasing of assets as well as publications, technical data and information.¹² The situation is similar in Nigeria as the Communications Act of 2003 requires that the Nigerian Communications Commission (NCC) "establish and maintain a fund from which all expenditures incurred by the Commission shall be defrayed." The NCC receives its funds from government appropriations, licensing fees, spectrum fees, grants, loans, gifts, and aid.¹³ The Uganda Communications Act of 1997 establishes that the Uganda Communications Commission (UCC) "shall operate its own bank account."¹⁴ However, the Commission must declare any surplus from its operations to the Minister of Finance.

The Telecommunications Regulatory Authority (TRA) in Bahrain, which has an independent budget, also has to declare and relinquish any surplus to the country's public treasury within one month after the accounts have been audited. It is only allowed to keep the surplus (or part of it) for future development projects after coordinating with the Ministry of Finance and National Economy and upon approval by the Council of Ministers.¹⁵ The Tanzania Communications Regulatory Authority (TCRA) submits an estimated budget to the Minister responsible for Communications for approval. At the end of the fiscal year, the TCRA deposits "to a special account all surplus funds of the Authority"¹⁶ and can use the funds from this special account only for "one or more of the following purposes: (a) consumer education or information projects; (b) special non-recurring projects; (c) budgeted capital expenditure; (d) major rate regulating inquiries; and (e) training, research and development."¹⁷

Another example of a regulatory authority with financial independence is Botswana. The Botswana Telecommunications Authority (BTA) revenues derive mainly from the following sources: government appropriations; licensing fees; service fees; and contributions or endowments from any source. As the BTA has the authority to manage its own budget and can determine what to do with any surplus, the regulator has invested its monies in Bank of Botswana certificates, fixed deposit accounts, as well as in purchasing and leasing properties, thus diversifying its sources of funding to an even greater extent. Presently, BTA has a surplus that allows it to cover operating expenditures for the year, as well as the flexibility to evaluate its capital expenditure options in order to prioritize projects for the next two years.¹⁸

ENDNOTES

¹ Thomas E. Leavey, *Benchmarking Postal Regulator Effectiveness* , Universal Postal Union, January 30, 2004, at 4.

² International Telecommunication Union, *Trends in Telecommunications Reform 2002: Effective Regulation* , Chapter 8 (2002).

³ Organisation for Economic Cooperation and Development, Working Party on Telecommunications and Information Services Policies, *Telecommunications Regulations: Institutional Structures and Relationships* , DSTI/ICCP/TISP (99)15/FINAL, 26 May 2000, at 17, available at <http://www.oecd.org/dataoecd/39/32/21330624.pdf>.

⁴ It should be noted that, in those countries that have been moving from using licensing for market entry to a "general authorization" regime, as in the EC, individual license fees will gradually disappear as a source of revenue. See OECD, *Telecommunication Regulatory*

Institutional Structures and Responsibilities, at 10.

⁵ In Spain and Jordan, for example, a holder of a licence for the provision of services to a third party is obliged to pay a percentage of the revenue derived on an annual basis.

⁶ ITU World Telecommunication Regulatory Database 2005.

⁷ Reglamento Interior de la Secretaria de Comunicaciones y Transportes de México (2003 updated version), Chapters II and VII.

⁸ Update of the Telecommunications Sector Law of Honduras, Decree 118-97, Section II, Article 14.

⁹ Independent Communications Authority of South Africa (ICASA) Act 2000, Part 1, Section 15.

¹⁰ Estonian Electronic Communications Act of 2005.

¹¹ SIDEAMET (Estonia) Annual Report 2003 at <http://www.sa.ee/atp/failid/riltoiveng.htm>.

¹² Brazil, General Telecommunications Law, Law No. 9.472 of 16 July 1997, Section V, Article 51.

¹³ Nigerian Communications Act 2003, Part IV Financial Provisions, Article 17.

¹⁴ Uganda Communications Act 1997, Part IV Financial and Related Provisions, Articles 18-20.

¹⁵ Bahrain Telecommunications Law 2002, Section 19- Expenditure.

¹⁶ Tanzania Communications Regulatory Authority Act 2003, Part X, Financial Provisions, Article 50.

¹⁷ *Id* .

¹⁸ Botswana Telecommunications Act 1996, as amended, and BTA Annual Report 2003-2004.

5.1.3 Functionality

Despite best attempts, a government may establish a regulator that is structurally and financially separate from the other branches of government but yet may not function in an effective manner. In contrast, a regulator may not be legally separate from the other government agencies (*i.e.*, it may report to a particular ministry) but may have functional effectiveness. There is no single feature that determines functionality, rather, it is comprised of a combination of elements described below and expanded upon in Chapters 6 and 7 that allow the regulator to function effectively on a day-to-day basis and thereby establish its credibility. Without functional effectiveness, it is difficult, if not impossible, for a regulator to attain the necessary credibility among participants in the sector and potential investors.

Well-Defined Functions and Responsibilities

The foundation of functional success is contained in the development of a well-defined legal and regulatory framework that establishes the regulator and clearly articulates its functions and responsibilities. In the event that other government entities have responsibilities over the sector, the delineation of responsibilities between the regulator and the other government entities must be clearly indicated to avoid disputes between the agencies over jurisdiction.

Specifying the functions and responsibilities of the regulator will also assist operators and investors in knowing that the regulator does not have the ability to engage in discretionary actions that are not provided for in the law or regulations. This, in turn, will reduce uncertainties and increase investor confidence in the sector. In addition, it assists consumers to participate in the regulatory process because they know the regulator's responsibilities and to ensure that the regulator fulfils such responsibilities.

Decision-making Authority

A regulator must be granted the ability to make decisions, and then must make the decisions that come with the decision-making authority. The credibility of the regulator will be severely limited if other government authorities have the ability to intervene or overrule the regulator. However, this does not mean that a process should not exist for a regulator's decision to be reviewed if no sound basis exists for a particular determination. Moreover, parties should have the ability to challenge a regulator's decision. However, a regulator's position will be undermined if the participants can lobby other branches of government and thereby overturn a decision that is not favourable to them. Likewise, the necessary protections should be implemented in the law or regulation to ensure that parties are not able to use the court system to easily overturn the decisions of the regulatory body.¹

Appointment, Removal and Mandate

While it is expected that a regulator would have some connection to the government, the appointment of the head of the organization, whether a single person or a collegiate body (*e.g.* a commission), should be reviewed and voted on by a legislative body. Hearings associated with such appointment proceedings will provide opportunity for a thorough review of the appointee's credentials. While one individual is often designated as head of the regulator, independence is enhanced by establishing a collegiate body composed of members with staggered terms of office.² To reduce concerns over removal being misused for political purposes, causes for removal should be

carefully defined.³ Section 6.2 contains further discussion on staffing procedures.

The process by which the head of the regulator is appointed, the criteria used, the terms of appointment, the duration of the appointment, and policies for removal from an appointment all involve potential government influence. A regulator is less likely to feel subject to pressures from the executive branch if there is a fixed term of office. Furthermore, providing the head of the regulator with a fixed term coupled with limited discretion for the executive to remove the head of the regulator ensures that a regulator will not be “captured” by threats of removal for failing to comply with a request or demand from the executive with regard to a particular decision. Many countries have very limited situations in which the head of the regulator may be removed from office, normally restricted to just cause.

Staff

The staff that comprises the regulatory agency requires technical, legal, regulatory, financial and industry expertise. An independent regulator is expected to be more knowledgeable about the regulated sector than a traditional government agency and therefore better able to compile and analyse pertinent information required for the decision-making process.⁴ The head of the regulator is in the best position to determine the necessary staff for the organization and should have the autonomy to recruit employees and make personnel changes.⁵ Furthermore, a regulator must have the flexibility to bring in highly skilled staff and introduce incentives and compensation packages to retain them. Without such flexibility, a regulator is likely to be subject to limited resources and high turnover of employees as they are enticed to join the higher paying private sector.

Ethics

Rules regarding ethics and conflict of interest clarify the role that the regulator and its staff must comply with in the workplace, in their day-to-day interaction with industry, and in certain cases, their post-employment obligations (e.g., “cooling off” periods) . Such rules enhance the credibility of the regulator and its staff because they diminish the possibility and perception of “capture” by industry.

Consistency

It is important for regulatory authorities to be consistent in their decisions because predictability establishes or reinforces their credibility within the sector. In addition, consistency in decision-making and in applying rules establishes some form of precedent for stakeholders to be aware of and, moreover, to rely on when making important investment decisions. Even in civil law jurisdictions, which do not rely on the concept of precedent in the same manner as common law jurisdictions, in practice previous decisions clearly have persuasive value and are commonly cited by administrative agencies in their decisions.

Accountability

To ensure accountability, it is necessary to ensure that there is a system of checks and balances whereby the government and the public can evaluate the performance of the regulator. There are various mechanisms by which this can take place. A regulatory authority could be required to report to a body that does not make policy decisions in the sector. This can enhance impartiality, enforce levels of accountability and provide further scrutiny and review of decision-making. As an example, a regulator may be required to report to the legislature. In such cases, while the legislature may be positioned to make general policy decisions, it does not deal in the day-to-day management and regulation of the industry. ⁶ See Section 7.3 for further discussion on accountability of regulators and reporting requirements.

While it is important that regulatory decisions be free of political influence, there should be some avenue to seek reconsideration of a regulator's action. One option is to allow the judiciary to rule on disputed actions and decisions of the regulator. This option may, however, present certain limitations if the court system is not equipped to address technical issues or the court process may be lengthy and resource-intensive. If judicial oversight is implemented, it should be limited to the procedural and/or possibly arbitrary nature of the decision, rather than on technical or substantive aspects of a case for which the courts would generally have little expertise.

Timeliness

Timeliness also relates to accountability. Regulators should be held accountable for not making decisions or failing to make decisions in a timely manner. In statutes in various countries, regulators have specific timeframes within which they must issue licences and yet they often fail to issue the licence within such timeframe without repercussions. Even without set timeframes, regulators have a responsibility to act responsively to complaints, spectrum requests, licence applications, and other requests from industry and consumers. Although certain regulators may have resource constraints and may not be able to respond as quickly as a larger regulator, it is still critical that the regulator make all efforts to respond as quickly as possible. If a regulator does not act responsively in fulfilling its responsibilities, particularly given the dynamic state of the sector, the industry and consumers will be negatively impacted.

Transparency and Public Participation

Transparency is an effective tool to establish the legitimacy of the regulator. In order for the public to be aware of the activities of the regulator, it is necessary for the regulator to publish decisions, consultative documents, and other relevant materials regarding its proposed activities.

By providing numerous channels of communications with private industry and consumers, the regulator will be able to obtain a first-hand account of the issues that are of concern to them and ensure that the proposed positions that the regulator is intending to pursue are consistent with the realities of the marketplace. Hearings, public consultations, publishing draft documents for preliminary review and seeking comments from interested parties are all effective tools for providing information to the regulator and enhancing interaction with the

sector participants and consumers.

Enforcement and Dispute Resolution

A regulator's credibility is enhanced if it has the ability to handle complaints, conduct investigations, enter into agreements, and impose applicable penalties and sanctions without oversight and approval from another government agency. Regulators must be able to impose appropriate sanctions, as well as be willing to take such enforcement actions, if regulatory decisions, licence conditions, or applicable laws and regulations are violated. This does not mean that the regulator cannot negotiate a settlement with affected parties. However, the regulator should act as the final decision-making authority in these cases, defining the terms and parameters towards favourable dispute resolution and enforcement of policy.⁷ See Section 7.4 for a more complete discussion on dispute resolution and enforcement issues.

ENDNOTES

¹ Organisation for Economic Cooperation and Development, Working Party on Telecommunications and Information Services Policies, *Telecommunications Regulations: Institutional Structures and Relationships* , DSTI/ICCP/TISP (99)15/FINAL, 26 May 2000, at 14.

² OECD, *Telecommunications Regulations: Institutional Structures and Relationships*, at 15.

³ Thomas E. Leavey, *Benchmarking Postal Regulator Effectiveness* , Universal Postal Union, 30 January 2004.

⁴ Gesner Oliveira, Eduardo Luiz Machado, Lucas Martins Novaes and Carla Beatriz Guimarães Ferreira, *Aspects of Independence of Regulatory Agencies and Competition Advocacy*, International Competition Network, Competition Policy Implementation Working Group, Subgroup 3, Competition Advocacy in Regulated Sectors, May 2005, at 6.

⁵ OECD, *Telecommunications Regulations: Institutional Structures and Relationships* , at 15.

⁶ In Austria, Canada, Germany and the United States, the regulator reports to a legislative body. See OECD, *Telecommunications Regulations: Institutional Structures and Relationships* , at 15.

⁷ International Telecommunication Union, *Trends in Telecommunications Reform 2002: Effective Regulation* , Chapter 9 (2002).

6 Organizational and Institutional Approaches To Regulation

Fundamental elements must be addressed to create a successful regulatory authority. In particular, countries must determine the appropriate legal status of the regulator and the impact, if any, that the organization's legal standing has on its operations and functions. The legal status of the regulatory authority will depend on the country's political and legal systems.

Once the regulator's mandate and competencies have been established, it is important to determine the regulator's institutional design, as well as its relationship with the government, industry, and the public. The institutional design of the regulator will affect the structure of the regulator, including its leadership and management organization and its organizational and administrative structures. Additionally, the successful management of a regulator and the effective exercise of its functions will be affected by the administrative structure of the regulator, such as its staffing process and the ethical conduct of its staff.

6.1 Institutional Design Options

Governments have a range of options for regulating the telecommunications sector. When establishing a regulatory authority, governments must take into consideration the level of development and liberalization of the ICT sector, resources available within the country, as well as the historical context and the administrative and legal frameworks available for regulating the sector.

As competition increases, new regulatory priorities (e.g., market entry regulation) emerge, and issues of regulatory autonomy gain prominence (with the separation of regulation and operation) and can affect the choice of structure for the telecommunications regulator.¹ The main issues relate to ensuring separation between regulation and operation (especially in the case where the historical operator was still under public ownership), guaranteeing an independent and long-term strategy for regulation and competition in the market and ensuring protection of regulation from short-term and sometimes personal political and economic pressures. The regulator also has to be insulated from undue influence by politicians, industry, legacy operators, and consumers. As a result, much emphasis has been placed on the need to create independent regulatory authorities for the telecommunications sector.

Today, a majority of countries have a national regulatory authority for telecommunications -- the ITU T-Reg website lists 131 countries with a "separate regulatory authority."² Although some of the agencies fall into what are generally called "converged"³ regulatory authorities, the majority can still be described as focusing primarily on the telecommunications sector. Initial consensus often led to the establishment of a specific sector regulator, but the growing force of convergence has prompted a new and growing trend towards creating converged regulators. The justification is that a converged regulator is better suited to respond to new technologies and the interdependency of different communications services. Some countries have taken a different approach by including the regulation of the telecommunications sector in the mandate of a multi-sector utilities regulator, or by opting for an approach that veers away from sector-specific regulation and relies on the application of competition and antitrust rules to the communications sector.

In selecting the appropriate institutional structure, countries have various design options available from which to select, including economy-wide, infrastructure-wide, communication-wide or purely telecommunications-focused institutions. The choice depends in part on the extent to which the telecommunications sector is similar to (or different from) other sectors of the economy in a particular country and on the availability of suitably qualified staff. The greater the degree of openness and liberalization in the telecommunications sector, if matched by the other components of the utilities sector (e.g., electricity, water), and the greater the similarity in developments among the sectors, the larger is the scope for the application of cross-sector rules that are applicable to competitive activities in general. A key question that ultimately drives the choice of institutional format is whether the regulatory framework strikes the right balance between recognizing the specificity of the telecommunications sector and promoting the coherence of regulatory decisions across sectors.⁴

As the telecommunications market becomes liberalized and more competitive, disputes among operators, and between users and operators, generally increase. The regulator needs to have the authority to effectively resolve disputes and establish procedures to adjudicate them, and sufficient manpower to oversee enforcement (for further details on dispute resolution, see Section 7.4.1). These factors impact government decisions regarding the mission statement and mandate of the regulator and in some cases influence the choice of institutional design, including internal administration and staffing.

Flexibility is also a key issue that must be considered in choosing among the institutional design options. Appropriate regulatory structures change over time as sectors evolve. The change depends on the nature of the issues at stake – in transport and telecommunications, for example, where monopolies previously considered "natural" are eroding, the mandate of regulators is likely to change more rapidly.

The choice of institutional design *per se* will not guarantee success of the regulator. Whatever the institutional design option chosen, several important principles should be kept in mind, including:

- Regulators must be perceived by industry to be independent – thus the importance of transparency and accountability of the regulator;
- Regulators should have the expertise to assess and make sound judgments on both technical and industry-specific issues – thus the importance of appropriate appointment and staffing mechanisms;
- The regulator must take into account various viewpoints and interests, including economic, social and political objectives. This balance should be reflected in the institutional structure and in the system of checks and balances;
- The institutional design, internal structure, and administration must be flexible enough to allow the regulator to adapt to market realities.

ENDNOTES

¹ Michel Kerf, Manuel Schiffler and Clemencia Torres, *Telecommunications Regulators: Converging Trends?*, Public Policy for the Private Sector, The World Bank Group, Public Policy Journal, Issue 230, May 2001.

² See <http://www.itu.int/ITU-D/treg/profiles/SepRegAuth.asp>.

³ In this context, “converged” regulator means a regulator dealing with the various sectors of the electronic communications industries, such as telecommunications (and in some instances postal services), information technologies and broadcasting.

⁴ Michel Kerf and Damien Geradin, *Controlling Market Power in Telecommunications: Anti-Trust vs. Sector-Specific Regulation: An Assessment of the United States, New Zealand and Australian Experiences*, Berkeley Technology Law Journal, Issue 14:3 (Fall 1999), available at <http://www.law.berkeley.edu/journals/btlj/articles/vol14/>.

6.1.1 Overview and Comparison of Different Institutional Designs

There are four main institutional designs for telecommunications regulatory entities. First is the single-sector regulator whose sole function is to oversee the telecommunications sector (designated as Model 1 in this Section). The term single-sector is somewhat misleading as these entities, which in most cases originated from the separation of the operational and regulatory activities of state-owned post and telecommunications companies (PTTs), often include the postal and telecommunications industry as well as radiocommunications. The second design is known as the “converged” regulator, meaning those regulatory entities that oversee a broader range of services which, in addition to telecommunications, also include information and communications technologies, including broadcasting (designated as Model 2 in this Section). The multi-sector regulatory authority (Model 3) usually encompasses various industry sectors that are considered public utilities, e.g., telecommunications, water, electricity, and transportation. The fourth category is not a regulatory authority per se, but an approach in which general competition policy is the main method of overseeing the telecommunications sector (designated as Model 4 in this Section).

Characteristics of these models of institutional entities for telecommunications regulatory agencies are as follows.

Model 1 – Single sector regulators

[This organizational structure](#) focuses mainly on the telecommunications (and sometimes postal) sector, with other government entities responsible for broadcasting and information technology issues. Many countries around the world still use the single-sector regulatory authority approach,¹ including Algeria (Regulatory Authority for Post and Telecommunications), the Comoros (National Society of Postal Services and Telecommunications), Jordan (Telecommunications Regulatory Commission, which includes postal oversight), Egypt (National Telecommunications Regulatory Authority), and Oman (Telecommunications Regulatory Authority).² The single-sector regulator also includes organizational structures where the ministry is a regulator, such as the Ministry of Internal Affairs and Communications in Japan.

Prior to liberalization it was common for a state-owned operator to be responsible for regulating the post and telecommunications industries as well as for radiocommunications issues, and in some cases, even serving as international representatives of their respective countries with regard to their operations. After liberalization, this structure was no longer possible under most countries' legislation.³ Thus, the operation and regulation functions were separated and independent regulators were established. In many countries, when telecommunications regulators were initially established, they simply took over the “regulatory function” from government-owned PTTs and therefore their mandate almost automatically included the administration of radiocommunications and postal services in addition to telecommunications.

In Europe, once the PTTs were separated and privatized, the regulation of telecommunications, radio and the postal sector often was assigned to one agency.⁴ Telecommunications regulators in Europe were established by combining certain units within the public administration (or from the state-owned operator) or by transferring employees or units from the ministry to the new organization. The units that were transferred often remained the same and were integrated into the structure of the new organization, which was based on fields of activity and communications technologies. Within this context, regulators in Europe were generally organized in a technology/field-oriented regulatory structure and emphasis was placed on the recruitment of technologically-oriented staff (e.g., engineers).

A key advantage of a single-sector regulatory authority is that it can be focused on the complex technical challenges of the telecommunications sector, including network and service development. The telecommunications sector tends to be more dynamic than other utilities and a single-sector regulator can often adapt to this more easily. One disadvantage of sector-specific regulators is that

sufficient resources may not be available to staff the different regulator agencies and there may be duplication for regulatory activities that are common to different industries.

A justification for a single-sector regulator is based on the perception that the telecommunications sector includes specific technical issues, such as numbering, that are unique to the telecommunications sector and exhibits specific characteristics that differentiate it from other industries. Decision-making within communications policy is based on the expertise of the regulators. As experts, they participate in drafting laws and act as advisors to the appropriate ministry or other authorities when necessary. Regulators require not only need expertise in the technical, financial, and legal aspects of communications, they also need to systematically analyse present and future developments, and be able to cooperate with other countries on sector issues at the international level. Therefore, it is vital that staff is sufficient in number and suitably qualified to be able to face such a task. The perceived need for a specialized skill-set led the Cape Verde Government to establish a separate ICT specific regulator in 2004 (Institute of Communications and Information Technology – ICTI) in parallel with and despite the existence of a multi-sector (economic) regulator (Autoridade de Regulamentação Económica – ARE) which also has a mandate to regulate telecommunications. Since becoming operational, ICTI has in practice undertaken both the technical and economic tasks in the ICT sector, with ARE focusing on the other sectors. This has been in part because ICTI has the staff and desire to review a wide range of telecommunications issues, including tariffs, that would normally be within the purview of ARE, and because the two institutions have come to an agreement allowing ICTI to take the lead role on telecommunications issues.⁵

Another advantage of single-sector regulators relates to the origin of their staffing. In many cases, single-sector regulators tend to inherit staff from the former PTT and therefore have a core of specialized professionals from the start with a thorough understanding of the technical issues and strong engineering skills, a key advantage when dealing with complex network issues. Opponents of the single-sector regulatory structure argue that the origin of this specific skill set is, in fact, one of the key disadvantages of establishing a single-sector regulator. These critics argue that staff could be biased in favour of the incumbent, and thus more subject to capture by dominant forces. While this is an issue to be considered, it is not unique to the single-sector regulator. Whatever the option chosen, there must be a series of “checks and balances” to ensure that the regulator can perform its mandate independently.

One major concern within the single-sector model is the possibility of institutional rigidity. Since a single-sector regulator is restricted to telecommunications, this type of structure can limit the effectiveness of the agency and its staff members as it faces the issues raised by convergence. Given that regulatory authority has historically focused on a narrow sector, the regulatory authority may become nearly frozen in time in terms of defining the sector it is regulating. As a consequence, it may not necessarily draw the appropriate staff from across the broader communications sector necessary to be flexible and, therefore, is unable to adapt to the continuous changes in the communications sector. A practical example of such difficulties has been the case of single-sector telecommunications regulators having difficulties when incorporating next generation technologies and services into the regulatory framework.

In recent years, and especially with convergence in the communications sector blurring the boundaries between industries, overlapping responsibilities between sectoral regulators has also become an issue, leading sometimes to duplication of regulations and required authorizations for what are essentially similar services being offered to the public. This can cause conflicting decisions across sectors, or indeed lack of decisions where overlap between mandates cannot be resolved on a political level. The challenges of convergence have led several countries, including South Africa and the United Kingdom, to move away from single-sector regulators and evolve towards a converged regulator, thus merging agencies in charge of the various aspects of the communications sector.

Model 2 – Converged regulator

With a [converged institutional design](#), all communications services *i.e.*, telecommunications including radiocommunications, broadcasting and media (and in some instances postal services), are under the umbrella of one agency.

Several countries have followed the route of converging their institutions dealing with the communications sector, typically combining formerly discrete agencies responsible for telecommunications, broadcasting or information technology into one entity:

- In December 1999, the Info-Communications Development Authority of Singapore Act of 1999 disbanded the former telecommunications regulator (Telecommunications Authority of Singapore, TAS) and the information technology agency (National Computer Board, NCB), to create one new statutory board, the Infocomm Development Authority (IDA).⁶
- The Independent Communications Authority of South Africa (ICASA) is the regulator of telecommunications and the broadcasting sectors. It was established in July 2000 as a result of the Independent Communications Authority of South Africa Act No.13 of 2000. It took over the functions of two previous regulators, the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA).
- In 2001, the Saudi Arabian Council of Ministers issued a decision changing the name of the Saudi Communications Commission to the Communications and Information Technology Commission in light of new tasks it assumed in information technology.
- Several EU member states, including Finland and the Netherlands, are also moving to converged regulators that regulate the licensing of infrastructure across the telecommunications and broadcasting sectors through a single regulatory body. In 1997, Italy created a single regulatory body with responsibility for all telecommunications and broadcasting matters. Austria also established such a regulatory authority in 2001.
- A similar approach was also taken by the United Kingdom. The Office of Communications (Ofcom) was established in the United Kingdom in December 2003 as a result of the Communications Act 2000⁷ and became the regulator for television, radio, and telecommunications. Ofcom combines five former agencies: the Broadcasting Standards Commission (BSC), the Independent Television Commission (ITC), the Office of Telecommunications (OfTel), the Radiocommunications Agency (RA), and the Radio

Authority.

- Even the European Commission's Information Society Directorate was granted new responsibilities for audiovisual and media policies. The new Information Society and Media Directorate General brings together all three aspects of modern day electronic communications: broadcasting; computer networks; and electronic communication services.[8](#)

Like the single-sector telecommunications regulator, the converged communications regulator tends to be strong in specialized engineering skills in the communications sector, which is an important core expertise in dealing with complex network issues. In addition, the converged communications regulator also meets the challenges posed by service convergence by bringing in related skills, and therefore overcomes what is generally viewed as being one of the main disadvantages of a single-sector regulator (e.g., a telecommunications regulator overly focused on the telecommunications sector).

This model also better meets the need for flexibility in terms of its internal administration's ability to meet market realities. It gives the regulatory authority and its staff the flexibility to better handle the continuous technological and regulatory changes and developments within the ICT sector. By having all services – which are increasingly provided over a single network – under one regulator, the staff responsible for specific services can work with other parts of the regulator that are dealing with related issues, and therefore the regulator can take a more consistent approach when considering changing technologies and their effect on legacy regulations.

In addition, the converged model tends to resolve some of the overlap between telecommunications and broadcasting that has tended to become one of the regulatory issues regarding convergence. As was clearly shown in the EU's 1997 Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors,[9](#) and in its "99 Review,"[10](#) convergence in communications has called into question the service-based vertical regulatory system, with industry increasingly demanding a reorganization of the regulatory institutions in order to address the challenges posed by convergence.

As further stated by David Currie:[11](#)

"Ofcom believes that convergence is a reality and that a converged regulator is best placed to nurse that convergence. When the Internet can deliver what looks to all intents and purposes like television broadcasting in a few years' time, then Ofcom and the Government will face awkward choices. Should, in the interests of fairness, the content regulation of terrestrial, cable and satellite broadcasting be rolled out to Internet broadcasters? Or should the content regulation of terrestrial, cable and satellite broadcasters be significantly rolled back, passing the baton to smart navigational devices that allow people to find the content that they want (subject to the law) and avoid the content that they do not want to see or hear? A converged regulator like Ofcom will I hope be able to bring wisdom to that debate."

Model 3 – Multi-sector regulator

[Multi-sector regulators](#) oversee not only the telecommunications sector, but other industry sectors with common economic and legal characteristics (e.g., telecommunications, water, energy, and transportation). Costa Rica, the Gambia, Jamaica, Latvia, Luxembourg, Niger and Panama, as well as state public utility commissions in individual states in the United States, have chosen this type of organizational structure.[12](#)

The advantages and disadvantages of multi-sector regulators have been discussed in various fora, and opinions vary. One of the main arguments generally raised in favour of a multi-sector regulator is based on the perceived lack of resources and the need for economies of scale to effectively regulate the different infrastructure industries and sectors. It is often argued that with this type of structural organization, one set of staff can be used to oversee a variety of industries. The rationale is that telecommunications is considered to form part of the overall infrastructure sector along with other utilities, such as electricity and water, and that infrastructure services share certain aspects: they are aimed at providing basic needs to the public; they often use similar rights-of-way; and they typically involve the economic regulation of large monopolies with network economic characteristics (i.e., high sunk and fixed costs). However, experience in some countries, such as Latvia, has shown that existing multi-sector regulators are performing poorly.

The answer to the staffing question is straightforward on the one hand and more complex on the other. Looking at the question in the strictest sense, single-sector regulators will look for highly technical staff focused on the telecommunications sector and generally organize their staff in industry-based units (e.g., post, telecommunications, radiocommunications). Converged regulators will look for staff that can bring in the expertise and know-how from the different sectors they are regulating. Generally these regulators are organized in functional units or indeed in horizontal, project-based units (See section 6.1.2.3. for details on administrative structures regarding functions of regulatory authorities). Multi-sector regulators will recruit staff specialized in the different sectors, and are generally organized in terms of the sectors within their mandate although some pool legal and economic resources to deal with, for example, tariffing issues that may be common across the different sectors.

An important question within this context, however, is to what extent staff can actually be used across the sectors. Our experience shows that staff within this model is generally recruited in terms of the sector they are regulating and only legal and occasionally economic staff is pooled to deal with specific issues that occur across the sectors. Luxembourg, for example, has organized its agency according to industries/services: telecommunications, electricity, gas, postal and spectrum management issues – these are then divided into smaller issue-specific units.[13](#) This can also be seen in Belize and Niger. An interesting discussion of this issue is presented in the WDR Discussion Paper # 0204 of March 2002 which claims that:

"Examination of the actual organization of U.S. state-level multi-sector regulatory agencies, the Public Utility Commissions (PUCs), does not provide much evidence of economies of regulation, except at the level of the decision-makers, or Commissioners. Generally, staff members specialize in a particular sector such as telecommunications or water and work within distinct divisions that are devoted to

sector-specific regulation. Resources are shared at the levels of commissioners, who hear cases pertaining to all sectors, the senior staff who manage the agency as a whole, and the legal staff responsible for hearings and related procedural matters. Generally, the different divisions are located in common facilities and use common amenities such as libraries, which may yield certain savings. ... It must also be noted that U.S. PUCs do not have jurisdiction over frequency management, cable and broadcasting. ... The U.S. PUC experience shows that there may be significant economies in areas such as use of buildings, libraries, and training facilities in common. This does not, however, justify multi-sector regulation as such, only close collaboration among sectoral regulatory agencies."[14](#)

It is also often the case that a multi-sector regulatory authority is not created from scratch, but is the result of merging several existing agencies. In most countries it is not possible to dismiss employees in the course of such a merger, negating the realization of the hoped-for economies of regulation. In addition, a merger of two going concerns often creates significant morale problems and results in increased expenditures.[15](#)

Another disadvantage of this model is that often the telecommunications sector is the most liberalized sector under the auspices of the multi-sector regulator and therefore can be negatively affected if the telecommunications regulator is merged with other more highly regulated and less agile industries. Indeed, it may make matters worse by having telecommunications regulated in an environment with utilities that are progressing at a different pace where the needs and priorities are different, or where resources are practically non-existent. Moreover, by adding sectors, such as electricity and gas, that do not always produce revenues for the regulator, the telecommunications sector may bear a disproportionate share of the costs of regulation, potentially driving up regulatory costs for telecommunications providers.

Supporters of this model argue that having a multi-sector regulator can reduce political and other influences regarding the decision-making process as opposed to, for example, the single-sector regulator. Despite such claims concerning "capture" (meaning undue influence by politicians and/or dominant players), this does not necessarily seem linked to the institutional design option *per se* but is more a product of whether a clear set of "checks and balances" is incorporated in the design of the regulator. Indeed, a risk of the multi-sector regulator could even be that "capture" by a dominant ministry or entity not only affects a single sector but all sectors regulated by the multi-sector regulator. In addition, there may be greater complexity in establishing the legal framework for the multi-sector regulator, including the level of independence and allocation of functions as between the minister and the regulator.[16](#) Furthermore, potential delays in instituting necessary reforms may result due to the disadvantages mentioned above.

Some argue that using cross-sector institutions to regulate telecommunications is justified in light of the growing convergence between telecommunications and other sectors. Ensuring that cross-sector rules and institutions are used to regulate telecommunications as well as other similar (utility) sectors may bring benefits, such as greater regulatory certainty (as operators may better forecast what to expect by observing how the regulatory framework is applied in other sectors) and lower risks of distortion between different activities. A counterargument is that the rationale behind establishing a multi-sector regulator is more a question of regulatory efficiency than of dealing with convergence in the communications sector. Even within this model it really depends on the mandate of the multi-sector regulator (*i.e.*, whether it deals with just telecommunications or with communications as well as water, electricity, and transport) to determine whether a utilities-based regulator has the staff and internal administration that allows it to effectively cope with the challenges posed by ICT convergence.

As the market develops, and convergence affects the way in which communications is offered to the people, regulators not only are expected to possess high technical expertise, but to have an understanding of the structure and development trends of the communications market. Furthermore, regulators should be able to anticipate potential situations that could threaten or interfere with the development of the electronic communications industry. The concern that staff in a single-sector telecommunications regulator may face difficulties when incorporating next generation technologies and services into the regulatory framework is heightened with a multi-sector regulator since the staff of a multi-sector regulator would not necessarily be as technically focused on the communications sector. Obviously, a multi-sector regulator could recruit staff suited to the task of regulating the communications market, but the risk, especially where economists and legal experts are shared across the utilities sector, is that the pool of expertise becomes more diluted, thus compromising the capability and ultimately the credibility of the regulator.

A clear discussion of the advantages and disadvantages of multi-sector regulators is presented by Schwartz and Satola in the Table 6-3.[17](#)

Model 4 – No specific telecommunications regulatory authority

An alternative approach is to rely on the application of competition and antitrust rules rather than on detailed sector-specific rules and institutional designs. Until the passage of the Telecommunications Act of 2001, New Zealand, for example, had chosen to entrust antitrust authorities with the task of administering all rules controlling market power in telecommunications.[18](#) There was no sector specific regulatory requirement except for special obligations on Telecom New Zealand, called the Kiwi Share Obligations, which in effect regulate the price and availability of residential telephone service. Instead of sector specific regulation, the regulatory regime for telecommunications in New Zealand relied primarily upon general competition law, the Commerce Act 1986, to prevent anticompetitive behaviour. Thus, the primary constraint on the conduct of telecommunications firms in New Zealand was the same competition law that applied to all economic enterprises in New Zealand.[19](#)

However, in late 2000, the Minister of Communications determined that New Zealand's reliance on the Commerce Act and general competition authority was inadequate in some respects to regulate the telecommunications sector.[20](#) As a result, the Telecommunications Act 2001, which contained sector-specific provisions, was passed in December 2001 to complement the generic competition provisions of the Commerce Act. Furthermore, the position of a Telecommunications Commissioner, a specialist stand-alone commissioner within the

Commerce Commission, was established, *inter alia*, to regulate the telecommunications sector, and in particular to resolve disputes over regulated services, to report to the Minister on further designations or specifications of additional services, and to monitor and enforce the Kiwi Share obligations.²¹ Additionally, the Telecommunications Commissioner has statutory responsibility for decisions made under the Telecommunications Act.

Table 6-4: Model 4 – No Specific Telecommunications Regulatory Authority

Advantages	Disadvantages
■ Simple to implement. ■ Inexpensive. ■ Reliance on economy-wide rules and institutions to regulate the sector promotes a coherent treatment between telecommunications and other sectors. ■ Less risk of political capture where the judges are ultimately in charge of enforcing economic regulation in the telecommunications. Judges are seen to enjoy a clearer and more straightforward protection against undue pressures from the government and are independent from industry.	■ Non-specialized judges are ill-equipped to deal with complex telecommunications regulatory issues (e.g., local interconnection cases in New Zealand).²² ■ Legal processes are often not designed to give a voice to those who are not directly parties to the dispute. ■ Costs of protracted litigation and regulatory mistakes can be very high. ■ Sector-specific issues such as interconnection and number portability may be difficult to resolve in the absence of sector-specific requirements. ■ Lack of clear accountability channels renders it unnecessary to set and achieve sector objectives such as universal service, thereby opening the door for ineffective or sometimes unnecessary regulation. ■ There is no actual functioning example of this model.

ENDNOTES

¹ An analysis of names suggests that out of 131 regulators, 112 are single-sector regulators (e.g., “Telecommunications Authority,” “Communications Commission”).

² See ARPT (Algeria) www.arpt.dz; TRC (Jordan) www.trc.gov.jo; NTRA (Egypt) www.tra.gov.eg; SNPT (Comoros) www.snpt.km; and TRA (Oman) <http://www.tra.gov.om/test1/index.htm>.

³ In Europe, for example, Article 5a of the 1990 ONP Framework Directive, as revised (Council Directive 90/387/EEC of 28 June 1990, as revised) states that:

“In order to guarantee the independence of national regulatory authorities:

- National regulatory authorities shall be legally distinct from and functionally independent of all organizations providing telecommunications networks, equipment or services.
- Member states that retain ownership or a significant degree of control of organizations providing telecommunications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.”

⁴ This was the case in Portugal, where ICP was mandated to regulate the telecommunications, radiocommunications and the postal sector. Similarly, the Belgian Institute for Postal Service and Telecommunications (BIPT) deals with both sectors. In the Netherlands, a separate organization (RDR) was set up for radio administration, and another responsible for telecommunication and postal administration (OPTA). In Sweden, PTS, which was set up in 1993, was assigned several of the tasks previously handled by the operator, Televerket.

⁵ Created by Cape Verde Government Resolution 1/2004 of 19 January 2004, available at <http://www.icti.cv>.

⁶ “Originally, the proposal to create a merged agency would have included SBA, as a reflection of the determination that multimedia services, including audio and video content, would be delivered via converged platforms such as the Internet or other packet-switched networks. But SBA retained its status as a separate agency, largely because its defenders argued that it had a unique function, as a content regulator, that was not shared with any of the other agencies, which were concerned with content neutral issues of network build-out and operation. Because of prevailing social norms in Singapore, the regulation of pornography and racial “hate” content remained a politically sensitive issue, and there was insufficient support within the government to complete SBA’s merger with other communications related industries.” ITU Effective Regulation Case Study: Singapore (2001), at 11, footnote 27.

See http://www.itu.int/itudoc/itu-d/publicat/sqp_c_st.pdf.

⁷ <http://www.ofcom.org.uk>.

[8 http://www.europa.eu.int/comm/dgs/information_society/index_en.htm](http://www.europa.eu.int/comm/dgs/information_society/index_en.htm).

[9](#) European Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation towards an Information Society Approach, Document COM (97) 623, at <http://ec.europa.eu/archives/ISPO/convergencecp/97623.html>.

[10](#) Due to rapidly changing technologies, convergence and the new challenges of the liberalized markets, EU member states carried out a review in 1999 of legislative measures (the “99 Review”) and adopted a single, coherent new framework, consisting of six Directives (the “New Regulatory Framework”) that covers the whole range of electronic communications has been agreed and applied from July 2003 (with the exception of data protection applied from end October 2003).

See http://europa.eu.int/information_society/policy/ecomm/history/index_en.htm.

[11](#) David Currie, Presentation at the 4th ECTA Regulatory Conference, 10 December 2003, available at http://www.ofcom.org.uk/media/speeches/2003/12/currie_20031210.

[12](#) See ARESEP (Costa Rica) <http://www.aresp.go.cr/cgi-bin/menu.fwx>; OUR (Jamaica) <http://www.our.org.jm/>; Ente Regulador de los Servicios Públicos (Panama) <http://www.ersp.gob.pa/default.asp>. Links to U.S. State PUC’s can be found at <http://www.dps.state.ny.us/stateweb.htm>.

[13](#) Institut Luxembourgeois de Régulation (ILR), Annual Report 2003, at 18.

[14](#) Rohan Samarajiva and Anders Henten, *Rationales for Convergence and Multisector Regulation*, World Dialogue on Regulation for Network Economies, WDR Discussion Paper 0204, March 2002, at 13-14, available at <http://www.regulateonline.org/2003/2002/dp/dp0204.htm>.

[15](#) The merger of the U.K. regulatory authority Office of Gas and Electricity Markets (Ofgem), which combined the former Office of Electricity Regulation (Offer) and the Office of Gas Regulation, resulted in significant expenditures for the United Kingdom. WS Atkins Management Consultants, *External Efficiency Review of Utility Regulators: Final report*, February 2001, available at http://archive.treasury.gov.uk/pdf/2001/regulators_1902.pdf.

[16](#) Tim Schwartz and David Satola, *Telecommunications legislation in transitional and developing economies*, World Bank Technical Paper No. 489, The World Bank Group, 2000, at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2000/11/17/000094946_00110406110171/Rendered/PDF/multi_page.pdf.

[17](#) *Id.*

[18](#) Michel Kerf and Damien Geradin, *Controlling Market Power in Telecommunications: Anti-Trust vs. Sector-Specific Regulation: An Assessment of the United States, New Zealand and Australian Experiences*, Berkeley Technology Law Journal, Issue 14:3 (Fall 1999).

[19](#) The system worked as follows: The Minister of Commerce advised the Government on establishing telecommunications regulation, and the competition authority, the Commerce Commission, was responsible for the supervision of the telecommunications market based on the Commerce Act. The courts played a greater role in the supervision of telecommunications regulation than in other countries that have sector specific regulations.

[20](#) New Zealand, *Ministerial Inquiry into Telecommunications: Final Report*, 27 September 2000, available at <http://www.teleinquiry.govt.nz/reports/final/final.pdf>. In particular, New Zealand experienced major problems under the old “light-handed” regulatory regime with the length, cost and clarity of relying on courts to resolve access disputes, which hindered competition in the sector. *Id.* Section 3.7.1.

[21](#) Hon. Paul Swain, Minister of Communications, *Government announces ‘world-leading’ telecommunications reform*, Media Release, 20 December 2000, available at <http://www.med.govt.nz/pbt/telecom/response/index.html>.

[22](#) Damien Geradin, *Controlling Market Power in Telecommunications: Anti-Trust vs. Sector-Specific Regulation*, Mediterranean Telecommunications Forum on Regulatory Policies and Investment, 18-19 September, 2003.

6.1.2 Overview and Comparison of Different Organizational and Administrative Structures

Organizational Structures

Determining the ideal organizational structure for a regulatory authority requires an assessment of various factors including: the country’s needs and objectives; political environment; legal requirements; and available expertise in the labor market.¹ There are essentially two models of leadership organization for regulatory authorities: (i) the collegial body (a board or commission composed of multiple members); and (ii) the single regulator (often given the title of chairperson or president). Each has its advantages and disadvantages, and variations of each model are in use around the world.

The collegial body model usually involves a board or commission made up of individuals with different areas of expertise, potentially bringing those varied perspectives to bear on each regulatory issue. In addition, a collegial body could be seen as more independent, as it

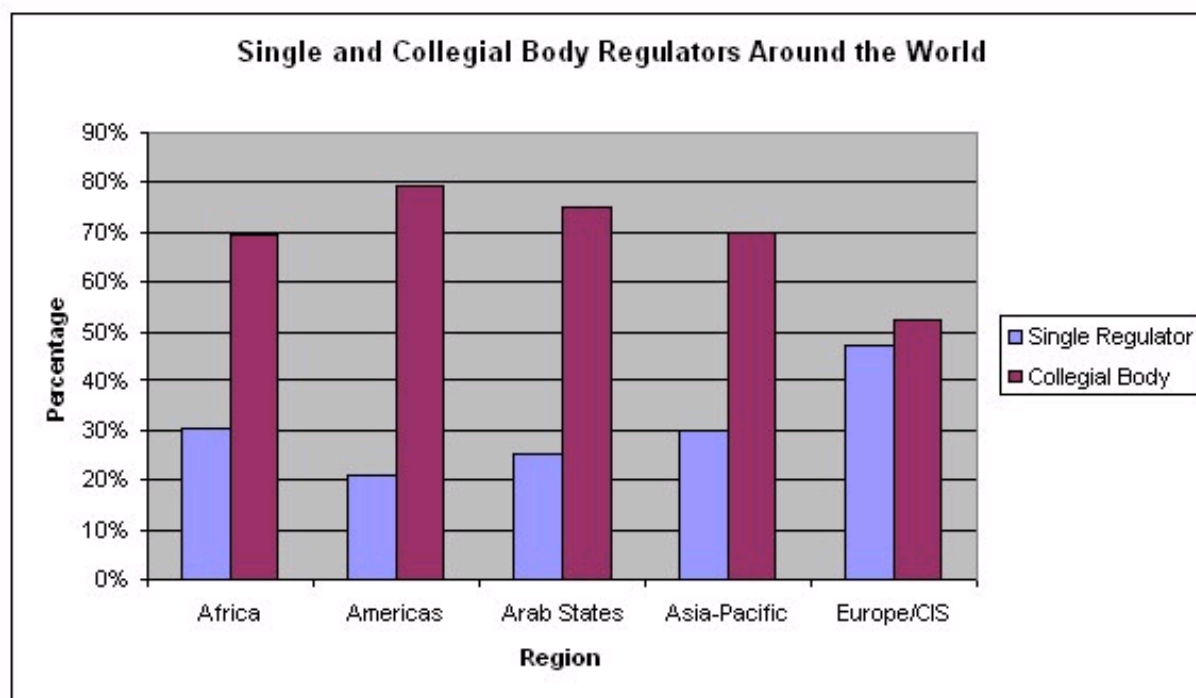
is less likely that all members would be influenced by the same actors, whether in the government or the private sector. Collegial bodies also often impart a sense of legitimacy in decision-making, as it is less likely that a single individual was responsible for any particular decision. However, as in any decision-making process involving more than one actor, the development of regulatory decisions can be a slower process and more subject to internal struggle.

By comparison, the single regulator model has the potential benefit of a consistent approach to regulation and decision-making, as decision-making authority is vested in a single individual who may have a unified plan for the telecommunications sector. In contrast to the collegial body model, single regulators can make decisions much more quickly, even when constrained by due process regulations. However, the single regulator is also potentially more vulnerable to undue influence exerted by external actors, whether in the government or in the private sector. In addition, a single individual may not be able to match the expertise of a collegial body made up of individuals from different backgrounds, although experienced staff can provide substantial expertise.

The number of regulators led by collegial bodies and single regulators continues to fluctuate as governments restructure their regulatory frameworks for telecommunications. However, based on responses received by the ITU to its annual Telecommunications Regulatory Survey during the past two years, approximately 75 per cent of the regulators are collegial bodies with the remaining 25 per cent constituting single regulators.² Based on 2005 data,³ it can be seen that there are significant differences between the balance of collegial bodies and single regulators in various regions. (See Figure 6-A.)

In the Americas, 20 per cent of the 29 countries indicated that their regulatory agencies were headed by a single regulator, while among the 38 European/CIS states, 47.4 per cent reported regulators headed by a single individual. Approximately 30 per cent of countries from both the African and Asia-Pacific regions reported that they had single regulators, as did 25 per cent of the Arab states.⁴

Figure 6-A: Single Regulators and Collegial Bodies Regulators around the World



Management Structure

(a) Regulatory authorities headed by a collegial body

Almost two-thirds of the 131 countries that submitted responses to the 2005 ITU survey indicated that their regulatory agencies are collegial bodies.⁵ These multi-member commissions or boards of directors are composed of a varying number of members (usually an odd number from three to seven to minimize tie votes) that oversee and direct all activities of the regulator. One member is the chairperson or president of the commission/board and sometimes has a “casting” or deliberative vote that counts twice and acts as a tie-breaking vote, if necessary.

Depending on the appointment process of the regulator, collegial body members can be appointed by one single branch of government, multiple branches of government and/or other industry stakeholders. This issue is further discussed in Section 6.2 on Staffing and Remuneration.

Management and administrative functions

The day-to-day management and administrative functions of the regulator are handled in varying combinations by: an executive director, chief executive officer (CEO), the chairperson, and/or managing director (collectively referred to herein as managing director). In some

countries, like Botswana, Brazil, Canada, Greece, Ireland, Jordan, Malaysia, Mexico, Portugal, South Africa, and Venezuela, the managing director of the regulatory authority is the chairperson of the commission/board.[6](#)

The managing director acts as a liaison between the commission or board of directors and the departments/divisions that comprise the regulatory authority. In the Dominican Republic, the managing director is part of the board and acts as its secretary, but does not vote.[7](#) In Peru, the managing director of the Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTEL) participates in the board of directors' meeting sessions, but essentially acts as an observer and cannot vote.[8](#)

The duties and responsibilities of the managing director differ from country to country. In Bahrain, the general director not only handles the day-to-day affairs of the regulator, but also determines the internal structure and organization of the agency, and has authority to: delegate his functions to other agency staff; employ staff members and consultants; and establish conditions of employment for staff members (this last one with approval from the board).[9](#) In Peru, OSIPTEL's managing director is responsible for managing the regulator and carrying out the policies established by the board of directors and president of the regulator. In addition, the managing director is responsible for: the legal, administrative and judicial representation of the regulator; proposing policies and strategies for the development of OSIPTEL; developing the annual report and the regulator's budget for approval; and hiring, promoting, suspending and firing staff members (decisions regarding management staff members need approval from the board of directors and president of OSIPTEL).[10](#)

(b) Single individual structure

Single individual regulators are headed by a CEO, president or director general (collectively referred to herein as CEO) who oversees all policy, management, and administrative activities of the regulatory authority. In most cases, the CEO is appointed by the central government, often the minister responsible for communications. The term of office is fixed and generally varies from two to six years. However, in certain countries, including Estonia, Ethiopia, Iran, Liechtenstein, Norway, Oman, and Sudan, the CEO does not have a specific term of office.[11](#)

The duties and responsibilities of the CEO differ from country to country, but they are generally granted a broad scope of authority and responsibility. In Romania, the president of the National Regulatory Authority for Communications (ANRC) has a broad slate of responsibilities including managing the regulator, issuing decisions, approving the regulator's organizational structure, and acting as the liaison with high-ranking authorities and officials both in Romania and abroad.[12](#) In Guatemala, the Superintendencia de Telecomunicaciones (SIT) is headed by a superintendent who is responsible for managing and defining SIT policies, developing the regulator's organizational structure, appointing and removing SIT employees, preparing its annual budget, and informing (at least twice a year) the Ministry of Communications, Transportation and Public Works of the regulator's activities and internal administration issues.[13](#) In addition, recent global events such as the Enron and Worldcom incidences have led to the evolution and shaping of a broad body of corporate governance and reporting principles which are gaining wide acceptance globally. The move to define principles for corporate standards of performance has also been quite active leading to new legal requirements as shown by the King Report in South Africa and the Sarbanes-Oxley Act in the United States.

The CEO is typically assisted by one or more deputies to whom he can delegate responsibilities. For example, in Romania, the president of the ANRC is assisted by a vice-president.[14](#) Similarly, in Denmark, the director general of the National IT and Telecom Agency is assisted by two deputy generals.[15](#)

Administrative Structure regarding Functions of Regulatory Authorities

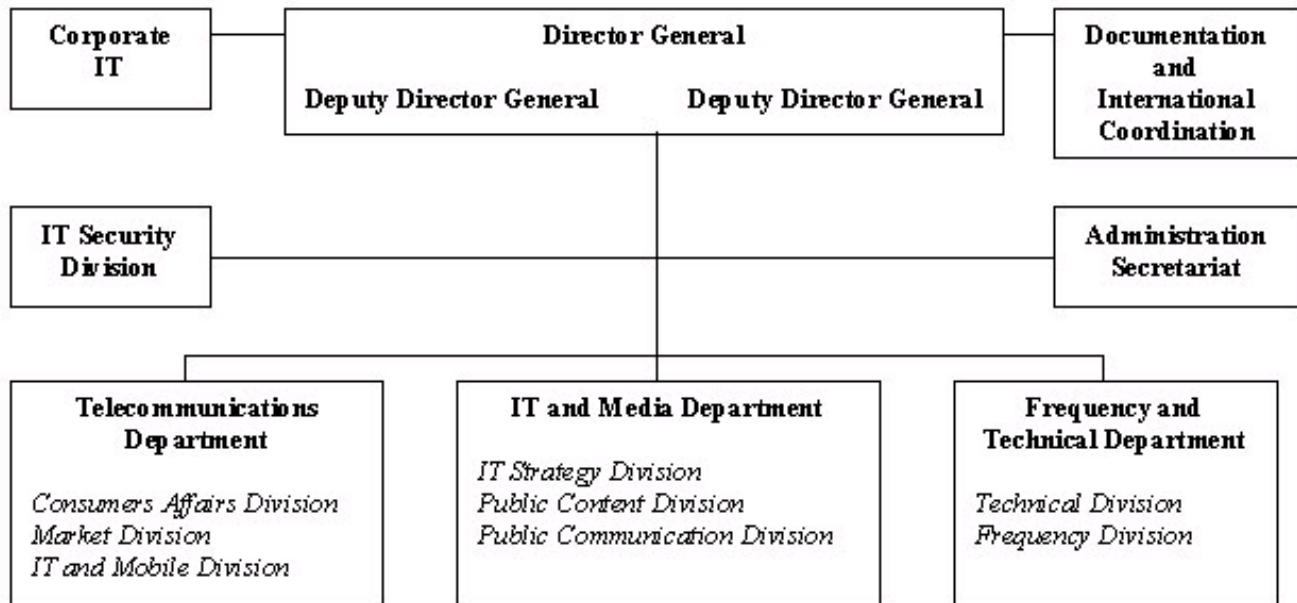
Once the scope of work and type of management structure is established, a country must determine how the functions of the regulatory authority will be organized (e.g., whether by industry/service, function or project).

(a) Industry or service-based departments

Many regulators follow a vertical (all regulatory issues) structure comprised of departments that address specific services areas (e.g., broadcasting, telecommunications, and information technology) under the authority of the regulator, as well as departments typically responsible for operations and administrative functions.[16](#)

Denmark's National IT and Telecom Agency, a converged regulator, is divided into seven departments/divisions: (1) telecommunications; (2) IT and Media; (3) frequency and technical; (4) IT security; (5) documentation and international coordination; (6) corporate IT; and (7) the administration secretariat. The Telecommunications, IT and Media and Frequency and Technical departments are further divided into smaller units that are responsible for specific issues such as public content, frequency, consumer and market affairs within those industries/services.[17](#) Below is the organizational chart for Denmark's National IT and Telecom Agency:

**DENMARK
NATIONAL IT AND TELECOM AGENCY**



Source: <http://www.itst.dk/mainpage.asp>

In the case of Luxembourg, which has a multi-sector regulator, departments/divisions are responsible for the following industries/services: telecommunications, electricity, gas, postal and spectrum management issues. Similar to Denmark's regulatory authority, each of these departments/divisions is divided into smaller issue-specific units.¹⁸

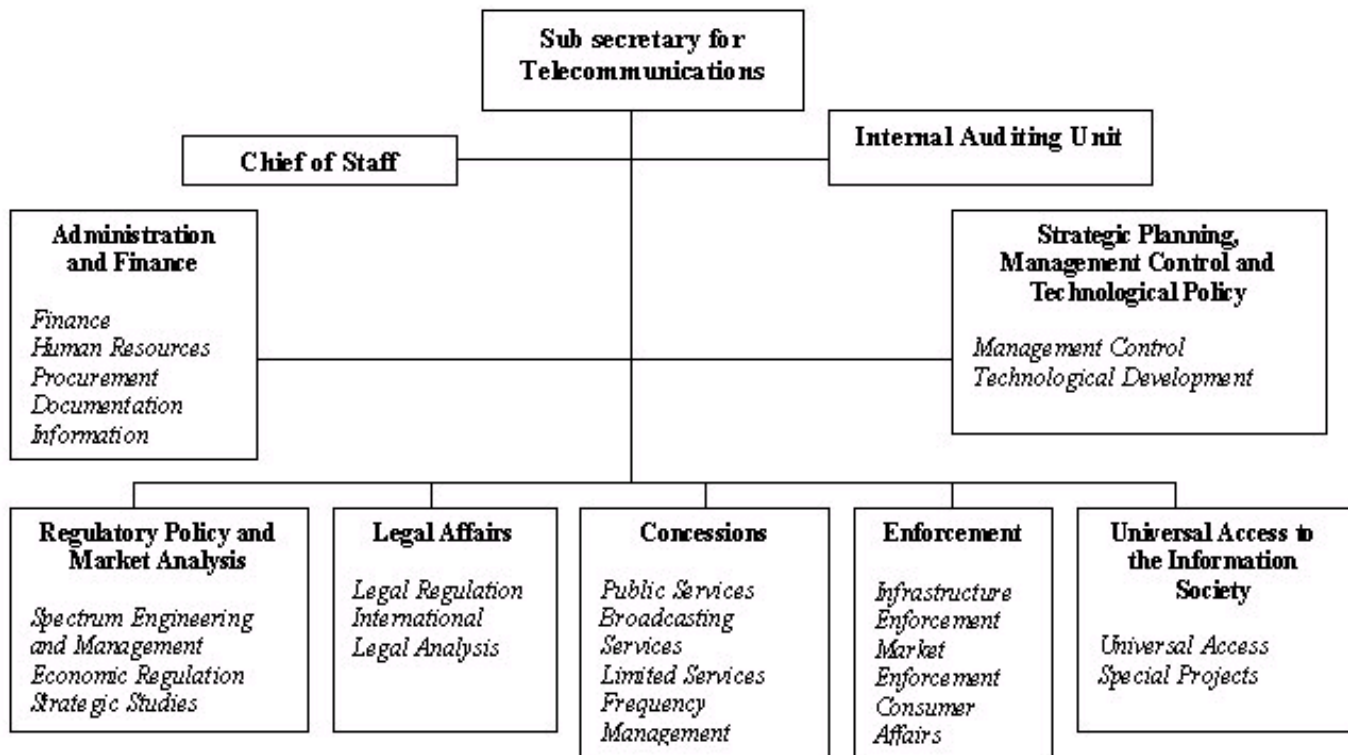
(b) Function-based departments/divisions

These regulators follow a horizontal (narrow range of regulatory issues) structure, but they cover all the specific service sectors that are regulated. Function-based departments/divisions have responsibility for areas such as: administration and human resources; enforcement; legal analysis; licensing; public relations; technical analysis and development; research and market analysis; user/customer services; and universal service fund administration.

For example, Chile's Subsecretaria de Telecomunicaciones (SUBTEL), is divided into seven function-based divisions: Administration and Finance; Regulatory Policy and Market Analysis; Legal; Concessions; Enforcement; Universal Access to the Information Society; as well as a division for Strategic Planning, Management Control and Technological Policy. Each of these divisions is subdivided into units that are responsible for more specific topics. The Administration and Finance Division, for instance, is subdivided into five units that are responsible for finance, human resources, procurement, documentation, and a unit that handles information (including claims and suggestions). The Regulatory Policy and Market Analysis Division of SUBTEL is subdivided into three units, one for spectrum engineering and administration, one for economic regulation, and one for strategic studies.¹⁹

Malaysia's Communications & Multimedia Commission (MCMC), a converged regulator, is also divided into function-based divisions. They include: Industry Development; Regulatory State Coordination; Technical; Resource Planning & Management; Monitoring & Enforcement; and Management & Support Services. Similar to the Chilean model, each of these divisions is then subdivided into topic-specific units. The Regulatory State Coordination Division is subdivided into two departments, one for regulatory coordination (which includes units for licensing and for universal service provision) and the other for state coordination (which includes a unit to manage regional office matters).²⁰ Below is the organizational chart for Chile's SUBTEL showing how this regulator has divided responsibilities by function:

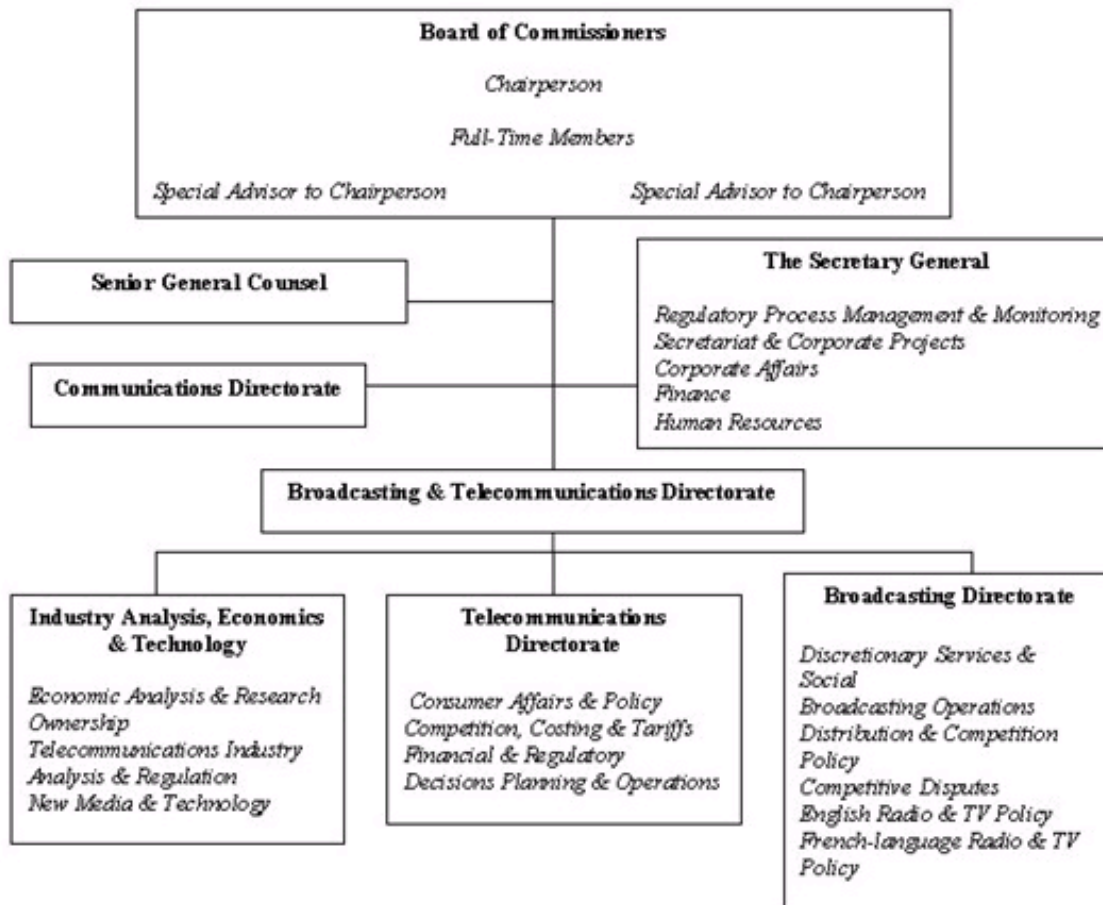
CHILE
SUBSECRETARIA DE TELECOMUNICACIONES



Source: <http://www.subtel.cl>

Some regulators combine aspects of the industry/service and function-based structure models. The Canadian Radio-television and Telecommunications Commission (CRTC) divides the Commission's responsibilities into the following departments/divisions: Broadcasting and Telecommunications Directorate; General Counsel Directorate; Communications Directorate; and Secretary General.²¹ The SIT of Guatemala distributes responsibilities among three main departments/divisions: telecommunications; administrative; and legal.²² Below is a diagram of Canada's CRTC showing how a regulatory authority can combine both industry/service and function-based departments/divisions within its organizational structure:

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

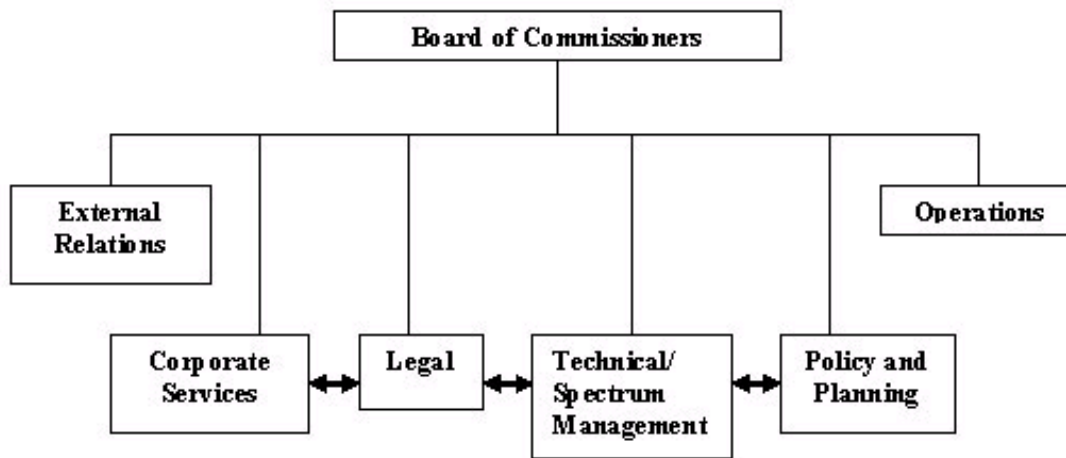


Source: <http://www.crtc.gc.ca>

(c) Project-based departments/divisions

These regulators can be organized as either industry/service-based or function-based departments/divisions, but they have a horizontal structure because departments/divisions collaborate when a project needs the support and expertise of various competencies.²³ Morocco's Agence Nationale de Réglementation des Télécommunications (ANRT) is a function-based regulator divided into departments/divisions that deal with technical, administrative and operator issues, but has as a horizontal structure because staff members from units within these different departments/divisions are, as a matter of course, brought together to work on projects that require varied skills.²⁴ The Malta Communications Authority (MCA) also utilizes a matrix organizational structure that allows the regulator "to adapt to change and maximize its expertise by shifting emphasis from a functional to a project-based approach."²⁵ Below is a diagram of Malta's MCA, showing how this function-based regulatory authority uses a horizontal structure:

MALTA COMMUNICATIONS BOARD



Source: MCA Annual Report 2004

However, it should be pointed out that regardless of the departmental/division structure of the regulators, it is often the case that multiple departments and subunits will work together to accommodate the evolving needs of the telecommunications market, as well as facilitate and expedite internal procedures.

ENDNOTES

- ¹ International Telecommunication Union, *Trends in Telecommunications Reform 2002: Effective Regulation*, Chapter 7, at 117-118 (2002).
- ² ITU World Telecommunication Regulatory Database 2005.
- ³ *Id.* Including the most recent responses for countries which did not respond in 2005.
- ⁴ ITU World Telecommunication Regulatory Database 2005.
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ Dominican Republic, Ley General de Telecomunicaciones, No. 153-98 Capitulo XII, Titulo II, available at http://www.indotel.org.do/mlvgnn555m5yeh45hbi0vb2v/ley_153-98.aspx?article=17.
- ⁸ Reglamento General del Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTEL), 2001 available at <http://www.osiptel.gob.pe/Index.ASP?T=T&IDBase=2728&P=%2FOsiptelDocs%2FGL%2FEL%5FSECTOR%2FMARCO%5FLEGAL%2FLEGLISLACI%D3N%5FTELECOMUNICACIONES%2Fost%5F01%5F03%2Ehtm>
- ⁹ Bahrain Telecommunications Law, 2002, available at http://www.tra.org.bh/en/pdf/Telecom_Law_final.pdf.
- ¹⁰ Reglamento General del Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTEL), 2001 available at <http://www.osiptel.gob.pe/Index.ASP?T=T&IDBase=2728&P=%2FOsiptelDocs%2FGL%2FEL%5FSECTOR%2FMARCO%5FLEGAL%2FLEGLISLACI%D3N%5FTELECOMUNICACIONES%2Fost%5F01%5F03%2Ehtm>
- ¹¹ ITU World Telecommunication Regulatory Database 2005.
- ¹² Government Ordinance No. 79 on the General Regulatory Framework of Communications, 2002 (unofficial consolidated text).
- ¹³ Ley General de Telecomunicaciones de Guatemala, 2002.
- ¹⁴ Government Ordinance No. 79 on the General Regulatory Framework of Communications, 2002 (unofficial consolidated text).
- ¹⁵ National IT and Telecom Agency (Denmark) at <http://www.itst.dk/mainpage.asp>
- ¹⁶ Sofie Maddens Toscano, Presentation on Organization, Structure and Function of NRAs, Accra (July 2005).
- ¹⁷ National IT and Telecom Agency (Denmark), at <http://www.itst.dk/mainpage.asp>
- ¹⁸ ILR Annual Report 2003, at 18.

¹⁹ SUBTEL (Chile) <http://www.subtel.cl>.

²⁰ MCMC (Malaysia) <http://www.mcmc.gov.my/mcmc/>.

²¹ CRTC (Canada) <http://www.crtc.gc.ca>.

²² SIT (Guatemala) <http://www.sit.gob.gt/organigrama.html>.

²³ Sofie Maddens Toscano, Presentation on Organization, Structure and Function of NRAs, Accra (July 2005).

²⁴ See ANRT (Morocco) <http://www.anrt.net.ma>. See also International Telecommunication Union, *Trends in Telecommunications Reform 2002: Effective Regulation*, Chapter 7, at 120 (2002).

²⁵ MCA Annual Report and Financial Statements 2004, at 43.

6.2 Administrative Structures: Staffing and Remuneration

The administrative structure of the regulator, including staffing processes, the legal status of the staff, remuneration principles, and the ability to contract outside consultants provide key insights into the independence, depth of knowledge, and impartiality of the regulator, as well as its ability to attract and retain qualified personnel. By examining a regulator's qualifications (for both leadership and staff positions), we can discern the types of expertise present among the regulatory leadership and staff, while the appointment and removal processes for regulatory authority leaders can provide an indication of the influence over the regulator wielded by other government agencies. The legal status of the regulator's staff is an important indicator of the protections afforded to the staff, particularly regarding liability for the decisions made by the regulator, as protection from liability is an important consideration for current and potential staff members. Analysis of remuneration principles for both leadership and staff positions provides insight into multiple issues, including the status afforded to the leadership and staff as compared to other government employees and the flexibility afforded to the regulator to offer salaries that will attract and retain qualified personnel. The ability of regulators to contract outside experts is another important enhancement to the regulator's ability to act independently and efficiently, providing the potential for impartial analysis, enhancement of capacity that is lacking within the regulator, and solicitation of advice from concerned stakeholders.

6.2.1 Staffing Process

Qualification Requirements for Heads of Regulatory Authorities

Most regulatory authorities are empowered by laws or regulations that provide some guidance as to the qualifications of the single regulator or collegial body members. Such qualifications vary, ranging from specific disciplines for collegial body members from various backgrounds to general requirements for relevant expertise. For example, members of the five-member Bulgarian Communications Regulation Commission (CRC) may be "only Bulgarian citizens with higher education and at least 5 years of service, of whom at least one is a qualified lawyer and one economist."¹

In India, by comparison, members of the TRAI must have special knowledge of or professional experience in telecommunications, industry, finance, accountancy, law, management or consumer affairs.² However, Indian law also requires that members appointed from within the Government previously must have held a high position in the Government.²

By requiring regulators or collegial body members to have experience in certain professional sectors, an effort is being made to ensure that the regulatory authority is led by individuals with expertise beyond simply telecommunications. Regulators face issues involving questions of law, finance, economics, trade, consumer affairs and security, in addition to telecommunications; thus, it is important that such expertise be reflected not only among the regulatory staff, but also among the regulator's leadership.

The difference between, for example, the Bulgarian and Indian approaches is that Bulgaria's CRC will always (under current law) include at least one lawyer and one economist. One potential downside to this approach is that some countries may find it difficult to find appropriately qualified candidates for the specifically mandated positions. If, for example, the authorizing law requires the presence of an economist and a qualified economist is not available, there would be a vacancy among the regulatory authority leadership. This vacancy might not only manifest itself in a lack of economic expertise, but could also complicate decision-making by a collegial body that is a member short of its intended size and/or which lacks a tie-breaking vote. On the other hand, while the balance of areas of expertise among the members of India's TRAI may fluctuate over time and lack certain areas of expertise depending on the composition of the regulatory authority leadership, it also provides for the flexibility to emphasize differing areas of expertise among the TRAI leadership as the Indian Government, as well as market conditions and other factors, influence regulatory priorities.

In addition to mandating specific areas of expertise that the regulator must reflect and setting general expertise qualifications, a third approach to determining regulatory authority or collegial body qualifications is to avoid specifying *any* requirements regarding expertise (e.g., Cameroon, Ecuador, Malaysia, and the United States). This approach provides greater flexibility than the Indian approach, by allowing the regulatory authority to be led by anyone appointed to the task. While this approach certainly provides the most flexibility to appoint

regulators, it also opens the door to the possibility of appointing unqualified regulatory authority leaders. However, in practice, it is unlikely that a completely unqualified individual would be appointed to lead a regulatory authority. In cases where appointees are selected by – or at least recommended by – multiple branches of government, such as Ecuador and the United States, it is improbable that multiple stakeholders would approve of an unqualified appointee. Even in countries such as Cameroon and Malaysia, where the regulatory authority leadership is appointed by a single branch of government, the appointing authority runs the risk of not only negatively impacting the telecommunications sector, but also the political risk of being seen as having made an unwise appointment.

Table 6-5 provides an overview of the advantages and disadvantages of the different approaches discussed above.

Table 6-5: Advantages and Disadvantages of Different Staffing Approaches

Approach	Advantages	Disadvantages
Require regulatory authority to have specific areas of expertise (e.g., one attorney and one economist).	Ensures that certain areas of expertise will always be represented among the regulatory authority leadership.	Because the requirement is written into law or regulation, regulatory authority has less flexibility to adjust its composition in response to changing regulatory needs or market structure. Some countries may face difficulty finding qualified individuals to fill the mandated areas of expertise.
Require all regulatory authority leaders to demonstrate expertise in at least one of several fields.	Ensures that all regulatory authority leaders are well-versed in at least one of several relevant fields. By not mandating which fields must always be represented, regulatory authority retains some flexibility to emphasize certain areas of expertise as necessary. Greater likelihood that regulatory authority leadership posts will not remain vacant due to absence of qualified individuals.	Creates potential for regulatory authority leadership to lack expertise in certain fields.
No specific expertise requirements for regulatory authority leadership.	Provides the most flexibility to appoint regulatory authority leaders.	Potential for appointment of unqualified regulatory authority leaders.

Appointment Process

The manner in which the head of the regulatory authority is appointed provides important insight into the independence of the regulator. Generally, if the head of a regulatory authority is appointed by a single branch of government it is less likely to exhibit independence than those who have the support of multiple branches of government. For example, a collegial body may feature members selected by different branches of the government, ensuring that no single branch has excessive influence over the regulatory authority. In Bulgaria, for example, the chair of the Commission for the Regulation of Communications is appointed by the Council of Ministers, the deputy chair and two other members are appointed by the National Assembly, and one member is appointed by the President of Bulgaria.⁵

In a 2000 report, the Organisation for Economic Cooperation and Development (OECD) found that the majority of its members were characterized by independent regulators that are led by an individual or individuals appointed by the president or minister upon the recommendation of the cabinet or minister.⁶ In addition, the legislature may be involved in approving the members of the collegial body. For example, a nomination or appointment may be made by the head of government or a minister and then confirmed or approved by another government body (e.g., council of ministers, cabinet, or Senate). In the United States⁷ and Nigeria,⁸ the commissioners are appointed by the president of the country, but require confirmation by the country's Senate. In Portugal, the governing ministry (currently the Ministry of Public Works, Transportation and Communication) proposes board member candidates for the Autoridade Nacional de Comunicações (ICP-ANACOM) and their appointments are made official through a resolution issued by the Council of Ministers.⁹

An interesting example of the appointment process is Colombia, which has a rotating leadership. The Comisión de Regulación de Telecomunicaciones (CRT) is officially headed by the Minister of Communications, who serves as the President of the CRT. However, the CRT is also advised by a Committee of Commissioned Experts (Comité de Expertos Comisionados) selected by the President of Colombia. Each year, this panel of three experts elects one of its members to serve as the Executive Director of the CRT for a one-year term. As such, the President of the CRT (the Minister of Communications) is a member of the Government, and the Executive Director is an expert who serves at the will of the President of Colombia.¹⁰

In addition to appointments recommended by a cabinet or minister, regulatory authority leaders may be nominated by other industry stakeholders. In Turkey, for example, the Telecommunications Authority collegial body includes members who represent the telecommunications sector and consumers. The member representing the sector is selected from among candidates put forward by each operator who claims at least 10 per cent market share. The member representing consumers is selected from among candidates nominated by the Ministry of Industry and Commerce and the Turkish Association of Chambers and Exchanges.¹¹

In the Dominican Republic, the head of the five member board is appointed by the central government (i.e., the president), but three members are nominated by various industry groups – one by the telecommunications service providers, two by the broadcasting service community (one nominated by the television networks and the other by the radio and cable television networks), and the last member is selected, based on their professional qualifications, to represent consumer interest groups. However, the central government ratifies all nominations.¹² In Uganda, seven commission members are appointed by the Minister with the approval of the cabinet. However, five of the board members are appointed based on a recommendation from each of the following institutions: the Institution of Professional Engineers, the Uganda Law Society, the Broadcasting Council (nominee must be a member of the council), and the remaining two members are well-respected professionals chosen from the public. Similarly, the legislation establishing the regulatory authority may require that the members of the board represent the different regions of the country (e.g., Nigeria¹²).

By comparison, regulatory authority heads that serve at the pleasure of the government – or the pleasure of one particular branch of the government – may be viewed as less independent because their job security is closely linked to one particular actor. Cases in which regulatory authority heads are appointed by a single or limited group of actors include Barbados¹⁴ and Indonesia.¹⁵ In Botswana, the Minister for Science, Communications and Technology appoints all five members of the Board of Directors, including the Chairperson of the Board.¹⁶

A variation of the view of such appointees as less independent is when they are appointed by a figure outside the government, such as a monarch. For example, the head of Morocco's ANRT is appointed by a royal decree and can only be removed from office by another royal decree.¹⁷ In the case of Morocco, this arrangement theoretically confers a *greater* degree of independence upon the ANRT's director general with respect to the government, because the director general serves at the pleasure of the king, rather than the government or the prime minister. However, while the director general enjoys a degree of independence from the government, he may still be removed from office by the king at any time.

Fixed Terms

A large majority of countries mandate fixed terms for the heads or members of the board of the regulatory authority. Of the 85 countries that responded to the 2005 ITU Telecommunication Regulatory Survey, 75 indicated that their regulators had fixed terms, with the majority ranging between two and five years. The remaining 10 countries indicated that no fixed term of office was specified in their laws or regulations.¹⁸ Similarly, a 2000 OECD report noted that most member states had fixed terms for their regulatory authority heads.¹⁹ In some countries, like Bahrain, Panama and South Africa, the term can vary depending on the position the person holds within the authority.²⁰ In most countries, collegial body members can serve no more than two consecutive terms of office.

Individuals with fixed terms of office, particularly those that do not coincide with changes in government, are likely to feel more secure in their position and exhibit more independence than those individuals who serve at the pleasure of the government. Often the applicable law or regulation indicates whether individuals can be reappointed to a position after their term has expired. Much like term limits for legislators and heads of state, it is debatable whether limiting an individual's tenure in a regulatory leadership position permits them more freedom to act without regard for reappointment or forces qualified individuals to give up their position due to an arbitrary regulatory or legislative provision.

Removal from Office

Just as important as the appointment process and criteria in establishing regulatory independence is the power of removal of regulatory heads from office. Legislation or regulation often specifies the cases in which a regulatory authority head or collegial body member may be removed from office (such as conflict of interest or failure to perform official duties). For example, in Canada, members of the Canadian Radio-television and Telecommunications Commission (CRTC) must be a Canadian citizen ordinarily resident in Canada and must not have any direct or indirect role in a telecommunications undertaking or business.²¹ Similar conflict of interest prohibitions are common among telecommunications regulators, sometimes extending to cover the immediate family of the regulatory body official, as is the case in Hungary²² and Jordan.²³ In India, members of the collegial regulatory body (the TRAI) can also be removed from office for conflict of interest reasons or for abuse of their position, although the Supreme Court must support such a dismissal.²⁴

In addition, it is not uncommon for laws or regulations to specify that regulatory authority heads or collegial body members can be removed from office for failure to commit appropriate time to their duties. In Hungary, members of the Communications Regulatory Commission's collegial body are to be removed from office if they are unable to carry out their duties continuously for more than 90 days.²⁵ In Jordan,²⁶ Sudan,²⁷ and Tanzania,²⁸ members of the collegial bodies can be removed from office for failure to attend a minimum number of meetings. Similar to conflict of interest or abuse of power rules, minimum attendance or participation rules increases the likelihood that regulatory authority leaders are carrying out the job to which they were appointed.

Some regulators also hold their agency leaders to a high moral standard. In India, for example, members of the TRAI can be removed from office as a result of offenses which are judged to involve "moral turpitude" or as a result of a loss of mental or physical function that prevents the member from fulfilling their duties.²⁹ Similar moral qualifications are found in the laws and regulations governing membership in the collegial bodies of telecommunications regulators in countries including Brazil,³⁰ Jordan,³¹ and Sudan.³²

Legal Status of Staff

In the majority of cases, the staff members of regulatory authorities are considered public employees (or other similar terms, such as civil servant or public servant), making their employment subject to the same rules applied to public employees throughout the government.

In some cases, the head(s) of the regulatory authority are also considered to be public employees for some or all purposes. For example, the Canadian Radio-Television and Telecommunications Commission Act specifically states that Commission members are public employees for purposes of superannuation.³³ All collegial body members and other employees of the TRAI in India are considered public employees.³⁴ Similarly, all members, officers, and employees of Singapore's Infocomm Development Authority (IDA) are considered public servants for the purposes of Singapore's penal code.³⁵ The Singapore penal code includes statutes relating to crimes carried out by public servants, as well as punishments for crimes carried out against public servants and contempt for the authority of public servants.³⁶ In cases such as Singapore, the explicit application of the penal code to all IDA personnel is in line with the conflict of interest and abuse of power rules previously discussed, stating that IDA members and staff are not immune to the laws of conduct applicable to other citizens.

However, not all regulatory authorities classify their employees as public employees. In Botswana, employees of the BTA are considered parastatal staff and are subject to the BTA Conditions of Service. No other civil service rules apply to BTA staff. In addition, as will be discussed below, the fact that BTA employees are not classified as public employees provides the regulatory authority with greater flexibility to offer competitive salaries and benefits. Although not subject to civil service regulations, BTA staff is protected from liability for actions taken in their professional capacities by principles of common law.³⁷ Similarly, Singapore IDA personnel (including collegial body members, officers and staff) are also protected from personal liability for actions taken in good faith or to carry out the provisions of the IDA Act.³⁸

In some jurisdictions, such as India, the law specifically protects not only the personnel authority, but also extends protection to the federal government and the authority itself from liability for any actions carried out in good faith under the law or relevant regulations.³⁹ Despite the freedom conferred by such protections, some countries do permit the assignment of liability to regulatory authority personnel. For example, all personnel of Venezuela's Comisión Nacional de Telecomunicaciones (National Telecommunications Commission - CONATEL) are jointly and severally liable under civil, penal and administrative law for the decisions undertaken by the regulator.⁴⁰ While such laws are likely intended to impress upon all regulatory personnel the importance of taking the appropriate regulatory actions, they are more likely to result in an overly conservative regulatory approach due to fear of personal liability among authority personnel.

Protection from individual liability is important to the functioning of a regulator, as it empowers regulatory personnel to make their best efforts in support of the regulator's goals, or the duties assigned to the regulatory authority by applicable laws and regulations, without fear of being held personally liable for adverse consequences. This freedom is an important protection for employees (and incentive for potential employees) who have an interest in contributing to the effective regulation of the telecommunications sector, but who cannot afford the risk of personal liability for regulatory actions. Protection from liability for actions carried out on behalf of the regulatory authority is a specific protection afforded to regulatory personnel; however, in certain countries, such as Singapore, that protection does not confer immunity from all criminal laws and rules of conduct upon all regulatory authority personnel.

ENDNOTES

¹ Law of the Telecommunications, Prom. SG. 88/7 Oct 2003, amend. SG. 19/1, Chap. 3, Sect. I, Art. 20 (2), March 2005.

² The Telecom Regulatory Authority of India Act, 1997 (No. 24 of 1997), Chap. II, Section 4(b), as amended in 2000.

³ The Telecom Regulatory Authority of India Act, 1997 (No. 24 of 1997), Chap. II, Section 4(b), as amended in 2000.

⁴ International Telecommunication Union, *Trends in Telecommunication Reform: Effective Regulation*, 2002, at 124.

⁵ Law of the Telecommunications, Prom. SG. 88/7 Oct 2003, amend. SG. 19/1, Chap. 3, Sect. I, Art. 20 (2), March 2005.

⁶ Organisation for Economic Co-operation and Development, Working Party on Telecommunication and Information Services Policies, *Telecommunications Regulations: Institutional Structures and Responsibilities*, May 2000, at 18.

⁷ U.S. Federal Communications Commission, *About the FCC: A Consumer Guide to Our Organization, Functions and Procedures*, at 2, available at <http://www.fcc.gov/aboutus.html>.

⁸ Nigerian Communications Act, 2003, Part 2, Section 8.

⁹ Statutes of ICP (Autoridade Nacional de Comunicações) Decree-Law 3009, December 2001.

¹⁰ Comisión de Regulación de Telecomunicaciones, Resolution 274 of 2000, available at <http://www.crt.gov.co/Documentos/Normatividad/ResolucionesCRT/00000274.pdf>.

¹¹ Turkey, Amending Law No. 4502, Article 17.

¹² Dominican Republic Ley General de Telecomunicaciones, No. 153-98 Capítulo XII, Título II.

¹³ Nigerian Communications Act, 2003, Part 2, Section 8.

¹⁴ International Telecommunication Union, *Telecommunication Regulatory Survey: Barbados*, 2004.

- [15](#) Indonesia Minister of Communications Decree No. 31 of 2003.
- [16](#) Botswana Telecommunications (Amendment) Act, 2004, available at [/en/Publication.aspx?id=2345](#).
- [17](#) ITU Effective Regulation Case Study: Morocco (2001), at 22.
- [18](#) ITU World Telecommunication Regulatory Survey Database, 2005.
- [19](#) Organisation for Economic Co-operation and Development, Working Party on Telecommunication and Information Services Policies, *Telecommunications Regulations: Institutional Structures and Responsibilities*, May 2000, at 18.
- [20](#) Bahrain Telecommunications Law, 2002; Panama Ley 26 creating the Panamanian Regulatory Authority for Public Services, 1996; and ICASA Act (2000).
- [21](#) Canadian Radio-Television and Telecommunications Commission Act, R.S. 1985, c. C-22, 5(1).
- [22](#) Hungary, Act C of 2003, Article 14 (7).
- [23](#) Jordan Telecommunications Law No. 13 of 1995, as amended, Article 9 (a) (1).
- [24](#) The Telecom Regulatory Authority of India Act, 1997 (No. 24 of 1997), Chap. II, Section 7, as amended by The Telecom Regulatory Authority of India (Amendment) Ordinance, 2000 (No. 2 of 2000).
- [25](#) Hungary, Act C of 2003, Article 15 (4) (a).
- [26](#) Jordan Telecommunications Law No. 13 of 1995, as amended, Article 10 (a) (3).
- [27](#) Sudan, National Telecommunications Council Act 1994, as amended, Chap. III (12) (c).
- [28](#) Tanzania Communications Regulatory Authority Act No. 12 of 2003, Section 12 (1) (e).
- [29](#) The Telecom Regulatory Authority of India Act, 1997 (No. 24 of 1997), Chap. II, Section 7.
- [30](#) Brazil Telecommunications Law No. 9.472, Title III, Chapter I, 16 July 1997.
- [31](#) Jordan Telecommunications Law No. 13 of 1995, as amended, Article 10 (a) (6).
- [32](#) Sudan National Telecommunications Council Act 1994, as amended, Chap. III (11) (b).
- [33](#) Canadian Radio-Television and Telecommunications Commission Act, R.S. 1985, c. C-22, 5.
- [34](#) The Telecom Regulatory Authority of India Act, 1997 (No. 24 of 1997), Chap. VI, Section 26.
- [35](#) Infocomm Development Authority of Singapore Act (Cap. 137A), Act 41 of 1999, Sec. 12.
- [36](#) Singapore Penal Code (Cap. 224), Chapter V, Chapter VI and Chapter VIII, Sections 116, 119, 128, 129, 152.
- [37](#) ITU Effective Regulation Case Study: Botswana (2001), at 22-23.
- [38](#) Infocomm Development Authority of Singapore Act (Cap. 137A), Act. 41 of 1999, Sec. 11.
- [39](#) The Telecom Regulatory Authority of India Act, 1997 (No. 24 of 1997), Chap. VI, Section 28.
- [40](#) Ley Orgánica de Telecomunicaciones, Gaceta Oficial N° 36,970 (General Telecommunications Law) (2000) (Venezuela).

6.2.2 Staffing Design

Many factors affect the staffing design of a regulatory authority. Principally among these are market conditions, established objectives and goals, scope of the regulator's responsibility, selected management structure, distribution of responsibilities/duties within the regulator, and available resources.

In most cases, the head of the regulatory authority is empowered by the applicable law or regulation to hire appropriate staff as deemed necessary to conduct the business of the regulatory authority provided such appointments are made within the confines of the regulator's budget. The hiring of staff for the regulatory authority also is usually subject to national civil service or public employment laws or regulations.

Often the regulatory authority has detailed requirements that it must follow when filling a vacancy within the agency. India's TRAI, for example, must fill each position by promotion, deputation or direct recruitment, with specific guidelines laid out for each method.¹ Detailed regulations, such as TRAI's, provide transparency to the public, ensure that candidates are informed of selection procedures, and facilitate the orderly internal process of hiring new staff.

However, the fact that regulatory authorities may be empowered to hire staff does not guarantee an abundance of qualified applicants. Regulators face significant challenges in recruiting and maintaining qualified staff. First, they need to identify individuals with the relevant expertise. Second, they must be provided by the government with the resources to offer compensation packages that will attract such qualified individuals. Third, they must be able to retain their staff members despite a highly fluid sector in which technologies, business plans, and regulations change with some frequency. Without addressing such challenges, regulators are likely to face staff shortages and high turnover rates.

In general, telecommunications regulators are composed of a diverse group of professionals that include: attorneys, economists, engineers, market analysts, accountants, and administrative support personnel. In addition, depending on the needs and resources of the regulatory authority, some have provisions that allow them to hire consultants on an “as needed” basis.

According to the results of the ITU's World Telecommunication Regulatory Database survey for 2005, telecommunications regulator staff sizes range from 5 to over 2,200 employees.² (See Table 6-6 below.)

Table 6-6: Staff Size of Regulators

Region of the World	Country	Staff Size
Africa	Gambia	5
	South Africa	300
Americas	St. Lucia	5
	United States	1,993
Asia-Pacific	Samoa	12
	Australia	518
Europe & CIS	Liechtenstein	5
	Germany	2,250

Gender composition, a factor taken into consideration by many human resources departments within telecommunications regulators, shows that the number of male staff members is usually much higher than that of women. According to the 2005 ITU World Telecommunication Regulatory Database, only 24 (21 per cent) of the countries surveyed currently have more than 50 per cent females on their staffs.³ The table below (Table 6-7) shows those countries, per region, which have a higher percentage of female than male staff members:

Table 6-7: Percentage of Female Staff Members by Region

Region	Country and Percentage of Female Staff Members (50% or more)
Africa	<i>Lesotho (56%)</i>
Americas	<i>Bahamas (59%), Barbados (75%), Brazil (52%), Canada (50%), Colombia (54%), Panama (53%), St. Vincent and the Grenadines (50%), Suriname (50%), United States (53%), and Venezuela (55%)</i>
Asia-Pacific	<i>Iran (60%) and Mongolia (51%)</i>
Arab States	<i>Bahrain (50%)</i>
Europe & CIS	<i>Bosnia and Herzegovina (53%), Bulgaria (55%), Cyprus (60%), Czech Republic (54%), Denmark (51%), Estonia (53%), Finland (59%), Ireland (56%), Latvia (63%), and Spain (59%)</i>

Source: ITU World Telecommunication Regulatory Database (2005)

Interestingly, developing countries tend to have more female than male staff members within their telecommunications regulators, but developed countries have been moving toward more equal gender representation. (See Tables 6-8 and 6-9).

Table 6-8: Percentage of Female Staff Members in Some Developed Countries

Country	Percentage of Female Staff Members (less than 50%)
Australia	43%
Belgium	27%
France	40%
Iceland	33%
Norway	36%
Singapore	47%
Switzerland	35%
United Kingdom	35%

Source: ITU World Telecommunication Regulatory Database (2005)

Despite this, the 2003 ITU World Telecommunication Regulatory Database showed that the distribution of female employees within telecommunications regulators tends to be within the junior positions. Only 10 (13 per cent) of the countries that submitted responses with respect to gender composition in 2003 indicated their professional staff was composed of more than 50 per cent females.[4](#)

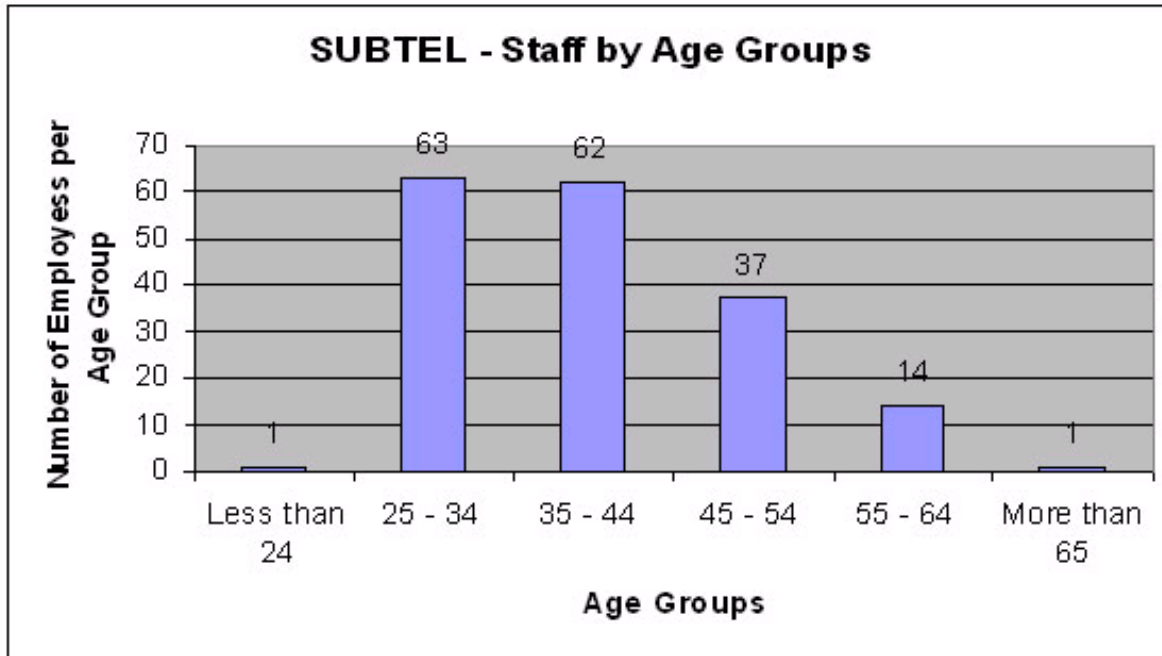
Table 6-9: Percentage of Female Staff Members in Some Developing Countries

Country	Percentage of Female Professional Staff Members (50% or more)
Bosnia and Herzegovina	50%
Bulgaria	52%
Colombia	50%
Czech Republic	53%
Dominican Republic	54%
Ethiopia	50%
Latvia	60%
Panama	51%
St. Vincent and the Grenadines	50%

This same survey revealed that of the countries headed by a collegial body, 55 per cent had females members. However, although these collegial bodies can have from 3 to 11 (sometimes more) members, only 27 per cent of them had more than one female member.⁵

The average age of employees is another aspect of a regulator's staffing composition. For the most part, regulatory authority staff members around the world range from 25 to 65 in age, with the 25 to 34 and 35 to 44 age groups being the most significant in number. In Chile, for instance, SUBTEL's staff of 178 employees had the following age group composition in 2003 (Figure 6-B):

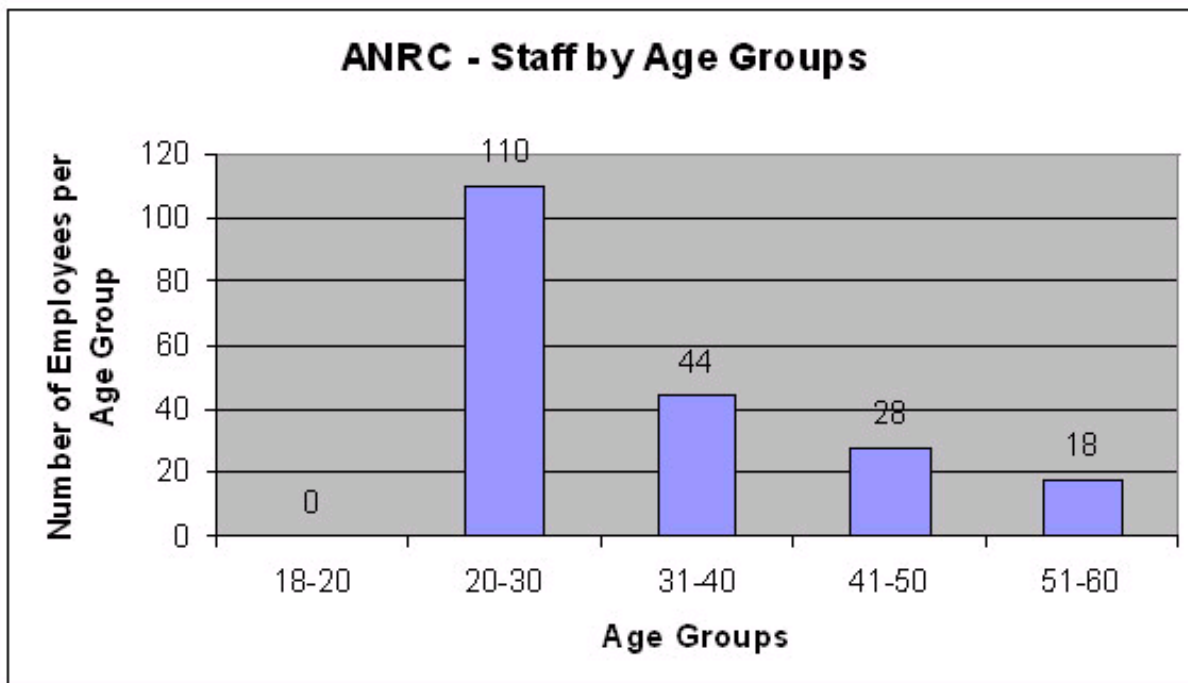
Figure 6-B: SUBTEL Staff by Age Groups



Source: SUBTEL Performance Report 2004

While 70 per cent of SUBTEL employees are between 25 and 44 years old, Romania's ANRC shows a younger staff composition with about 55 per cent of its employees less than 30 years of age (Figure 6-C):

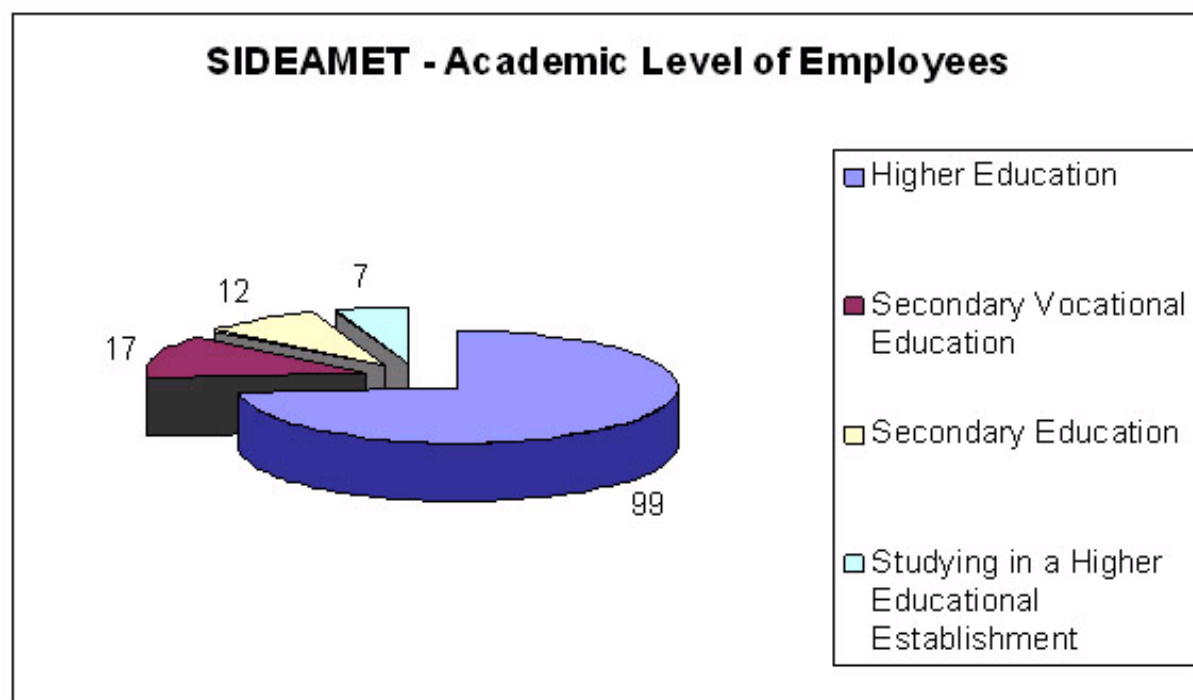
Figure 6-C: ANRC Staff by Age Groups



Source: ANRC Annual Report 2003

The academic levels of staff members vary from one regulatory authority to another, but usually include: higher education (university degrees such as Ph.D., M.A. and B.A. or their equivalents), vocational/technical education, and high school education. The Estonian National Communications Board (SIDEAMET), with a total staff of 135, has the following academic level composition (Figure 6-D):

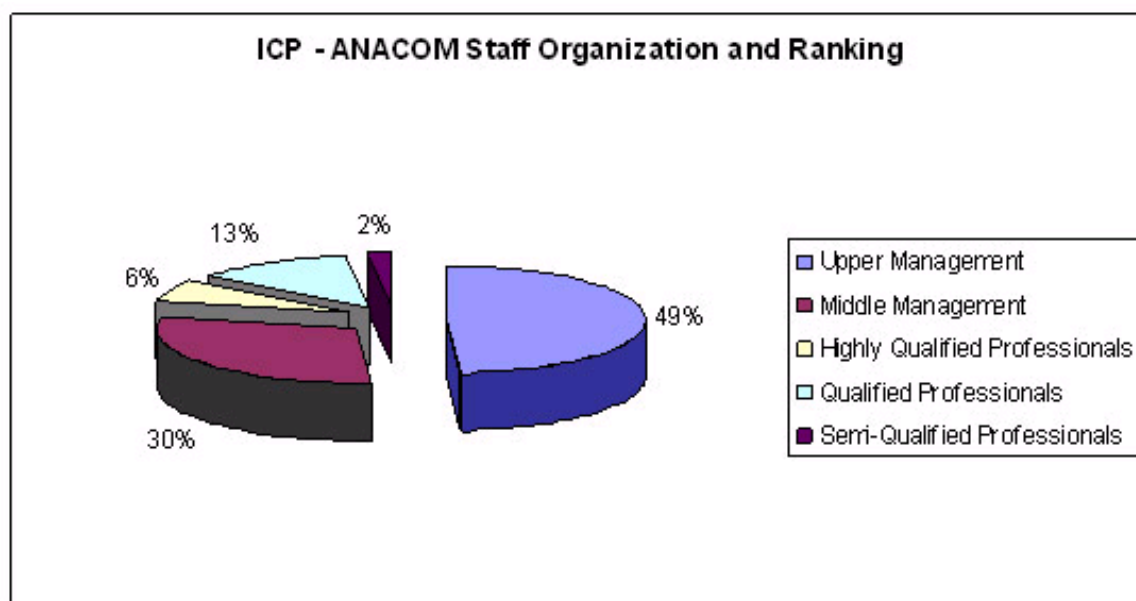
Figure 6-D: SIDEAMET Academic Level of Employees



Source: Estonian National Communications Board (SIDEAMET) Yearbook 2003

Telecommunications regulators usually organize their staffs hierarchically. There are various levels including: high-ranking management staff; professionals (which can have different levels based on their expertise, as well as their degree of responsibility); technical staff; administrative staff; and others, including consultants. It is not only the hierarchical levels that differ between regulators, but also the distribution of their staffs within each of these levels. For example, ICP-ANACOM in Portugal has the following levels and distribution (Figure 6-E):

Figure 6-E: ICP-ANACOM Staff Organization and Ranking

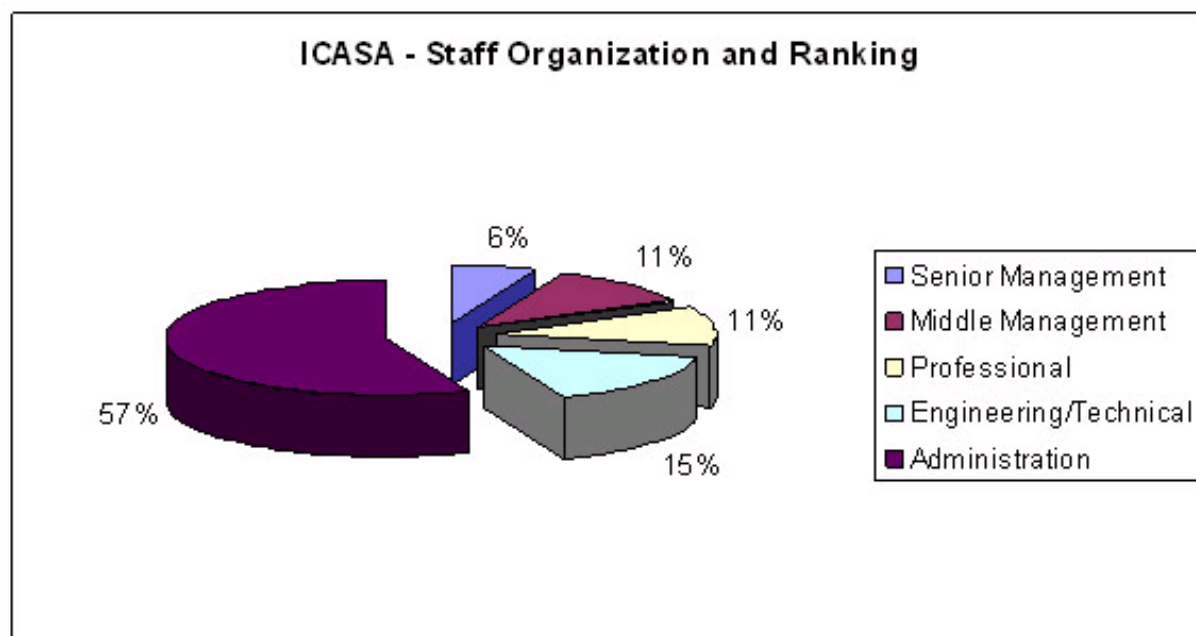


Source: Annual Report and Accounts, ICP-ANACOM 2003

In contrast, the Independent Communications Authority of South Africa (ICASA) shows the following levels and distribution of staff within

them (Figure 6-F):

Figure 6-F: ICASA Staff Organization and Ranking



Source: ICASA Annual Report, 2004

These graphs show how two regulators, with a somewhat similar hierarchical staff structure, can have very different distribution of their employees. While almost 50 per cent of ICP-ANACOM's staff is upper/senior management and its semi-qualified professionals represent 30 per cent of the total staff, ICASA seems to have an inverted pyramid in comparison, as its senior management is only 6 per cent of the total staff and its administration staff members represent almost 60 per cent of all employees.

Staff members are commonly selected based on their professional background, experience in the sector, and academic accomplishments. Similar to other staff composition characteristics, this distribution also varies among regulatory agencies. In the case of OSIPTEL in Peru, the agency relies on lawyers, engineers and economists for 70 per cent of its staff (Table 6-10):

Table 6-10: OSIPTEL Staff Background

Professional Background	Total Number of Employees	Percentage (of total staff)
Accountants	11	8%
Attorneys	37	28%
Economists	23	17%
Engineers	32	24%
Other Professions	14	11%
Secretaries	15	11%
Total	132	100%

Source: OSIPTEL Annual Report 2003

In Colombia, lawyers, engineers and economists make up 82 per cent of the staff of the Comisión de Regulación de Telecomunicaciones (CRT) (Table 6-11):

Table 6-11: CRT Staff Background

Professional Background	Total Number of Employees	Percentage (of total staff)
Administrative Support/Programmers	11	28%
Attorneys	11	28%
Business/Finance	3	8%
Economists	3	8%
Engineers	10	26%
Journalists	1	2%

Source: Jaime Andres Estrada, Commissioner, CRT (2005)

The U.S. Federal Communications Commission (FCC) shows the following distribution by profession (Table 6-12):

Table 6-12: FCC Staff Background

Professional Background	Total Number of Employees	Percentage (of total staff)
Attorneys	224	26%
Clerical & Administrative Support	70	8%
Consumer Affairs & Consumer Outreach	22	3%
Economists	26	3%
Engineers	160	19%
Finance/Accounting/Auditing	28	3%
Information Technology	40	5%
Management/Program Analyst	101	12%
Specialist	89	10%
Other	98	11%

Source: 2004 Annual FCC Employee Survey Results

The FCC, OSIPTEL, and the CRT all rely heavily on attorneys and engineers to comprise their staff, but the number of economists/accountants/business employees within the FCC is not nearly as high as at OSIPTEL or the CRT. However, the FCC has a more significant number of employees with a technical/technological background.

There are no specific guidelines regarding the percentage of employees per profession that should comprise a regulatory authority's staff. The particular expertise required is better determined by assessing the needs and upcoming workload of the regulatory authority. In addition, the legislation establishing the regulatory authority often allows the regulator to hire outside consultants and experts if the need arises, as will be discussed in Section 6.2.5.

Another aspect that certain countries consider regarding the staffing design is racial/ethnic diversity. In South Africa for instance, ICASA strives to have a staff that reflects the demographic diversity of its society (Table 6-13):

Table 6-13: ICASA Staff demographics

Race/Ethnicity	Total Number of Employees	Percentage (of total staff)
African	152	56%
Asian	18	7%
Colored	25	9%
White	77	28%
Total	272	100%

Source: ICASA Annual Report 2004

ENDNOTES

¹ The Telecom Regulatory Authority of India (Officers and Staff Appointment) Regulation, The Gazette of India, Part II, Section 1, Chapter II, 2001.

² ITU World Telecommunication Regulatory Database 2005.

³ ITU World Telecommunication Regulatory Database 2005. Only 114 of the 137 countries surveyed provided information under this category.

⁴ ITU World Telecommunication Regulatory Database 2003. Only 79 of the 122 countries surveyed provided information under this category.

⁵ ITU World Telecommunication Regulatory Database 2003. Only 81 countries provided information under this category.

6.2.3 Job Descriptions

In general, most regulatory agencies include the following information on job descriptions:

- key responsibilities and duties;
- experience required;
- qualifications/evaluation criteria;
- special skills (if needed); and
- how to apply (application instructions and procedures).

Some countries establish specific professional qualifications and background for members of the collegiate body (commissioners/board members) who are chosen on the basis of their knowledge and expertise in the communications field. They can come from both the public and private sectors and have different professional backgrounds (e.g., lawyers, economists, engineers, academics, and government officials). In some countries, however, the professional background of the chairperson of the commission/board and some members is specified. In India, for instance, members of the TRAI can be drawn from a variety of fields, but the Chairperson must be, or should have been, a Supreme Court Judge or a Chief Justice of a High Court.¹ In the Philippines, the National Communications Commission (NTC) consists of the Commissioner and two Deputy Commissioners, preferably one being a lawyer and the other an economist.² In the United States, it is not only the professional background of the candidates that is taken into consideration when considering the composition of the commission, but also their political affiliation. Of the five FCC commissioners, no more than three can be of the same political party at any given time.³

Certain regulatory agencies, like the Telecommunications Regulatory Commission (TRC) in Jordan, have minimum requirements for professional applicants, regardless of the position for which they are applying. These qualifications include a degree from an accredited university, fluency in both English and Arabic (spoken and written), and knowledge of MS Office applications. They also must be Jordanian citizens.⁴ OSIPTEL in Peru also includes minimum requirements for professional applicants, among them: university degree (in specific field depending on the job position), experience, and an intermediate knowledge of English.⁵ Similarly, the Office of the Telecommunications

Authority (OFTA) in Hong Kong includes entry requirements for professional candidates, such as: a Hong Kong university degree (or equivalent), fluency in English and Chinese (spoken and written), and knowledge of MS Office.⁶

Countries such as Canada, Dominican Republic, Nigeria, Panama and South Africa require that commission/board members be citizens of the country.⁷ In Panama and Peru, commission/board members must have at least ten years of experience in the telecommunications industry and a university degree (master's degree equivalent) in order to be considered for nomination.⁸

For those regulatory agencies that provide job descriptions, the amount of information requested and/or provided can vary from the most general to the most specific. For instance, below is a sample of a job description published by the Commission for Communications Regulation (ComReg) in Ireland (Box 6-1):

Box 6-1: ComReg Sample Job Description

Manager, Consumer Care

Date Posted:

As Manager of the Consumer Care Team, committed to delivering excellent service to consumers of telecommunications and postal services in Ireland, you will have the following key responsibilities:

- Effective day-to-day management of the Consumer Care Team
- Communication and liaison on consumer care issues, within ComReg and with external stakeholders
- Driving consumer awareness and information initiatives

You will be an individual of considerable caliber, with a track record of achievement in operational delivery and team management.

Possessing a third-level qualification, you will have the skills and capability to inspire, motivate and mentor team members to achieve their objectives.

You must be capable of working on your own initiative; have strong analytical and decision making skills; excellent communication and influencing skills and people management experience.

Experience in the area of customer service and/or telecommunications will be advantageous.

Reporting to the Information Services Manager, the successful candidate will be offered highly competitive performance-related remuneration and benefits, including bonus, together with continuous training and development.

Source: ComReg (Ireland) – <http://www.comreg.ie/recruitment>

In comparison, a job description published by the Infocomm Development Authority (IDA) in Singapore provides more detailed information with regards to the duties and requirements of the position (Box 6-2):

Box 6-2: IDA Sample Job Description

Consultant/Senior Consultant (IT Planning)

Closing Date for Application:

Responsibilities

- Formulate proposals and flesh out related systems, processes and policies for IT planning projects such as Portfolio Management and Enterprise Architecture.
- Project manage IT planning consultancy projects to ensure the quality of project deliverables, timeliness of delivery and within budget.
- Apply project outputs to put into operation MOE's IT budget and expenditure, investment decisions, resource management etc. E.g. Scoring Model, Systems Continuity Review, Audit Framework.
- Develop and review MOE IT policies.
- Provide IT audit planning, facilitation and advisory services to ITB and users.
- Project manage IT audits to ensure quality and timely delivery within budget. Manage auditors, users, ITB officers.
- Assist in special reviews and investigations, where necessary. Systems continuity reviews, cost allocation and special investigations are examples of such work.

- Supervise at least 2 staff members in the delivery of ITPP services

Requirements

- Bachelor Degree in Computer Science, Computer, Electronics Engineering or IT or equivalent. Masters in Business Admin or knowledge of business management will be an advantage.
- 6 - 10 years of relevant IT experience, inclusive of at least 2 years' experience in managing an IT project team. Experience in IT planning and/or audit functions will be an advantage.
- Good project management, written and communications skills.
- Able to conceptualize high level IT planning / governance concepts.
- Knowledge or experience in IT planning and corporate governance, and basic knowledge in IT audit practices are needed.

Source: IDA (Singapore) – Carriers @ IDA - <http://www.ida.gov.sg/idaweb/aboutida/index.jsp>

Certain regulatory agencies, such as OFTA in Hong Kong and the FCC in the United States, are even more explicit in the information they include in their job descriptions. OFTA, for example, indicates the term of the appointment (length of contract), newspapers in which the advertisement has appeared, and the policy for applicants with disabilities, among others.

The FCC indicates that it is an equal opportunity employer, whether a security clearance is required or not, whether relocation expenses will be covered or not, the policy for applicants with disabilities and preference in hiring veterans, and information that should be included in the curriculum vitae. In addition, FCC applicants must complete a Declaration for Federal Employment to determine their suitability to work for a government agency and to authorize a background investigation.⁹

Job descriptions for regulatory agencies can readily be found on most regulatory authority websites. However, many regulators do not provide specific job descriptions on their websites. Instead, they provide a description of the different departments/divisions of the regulatory authority and encourage those interested to submit their curriculum vitae for consideration.

The means used to hire employees in the regulatory industry vary from regulatory authority to regulatory authority. For instance, in Nigeria and South Africa, telecommunications regulator employees are considered public/civil servants and as such are entitled to the same salary levels, pension and benefits as other public/civil servants.¹⁰ In Canada, employees of the CRTC are appointed in accordance with the country's Public Service Employment Act.¹¹

In Latvia, Peru, Philippines, and Poland, regulators support the professional advancement of their employees by encouraging their participation in specialized training courses, seminars, and workshops.¹² For example, in an effort to prepare its employees for the country's ascension into the EU, the URTiP in Poland organized capacity building courses in foreign languages, as well as courses focused on issues related to Europe's integration.¹³ In Latvia, the Public Utilities Commission (PUC) supports efforts by its employees to further university studies at Latvian universities and sponsors employees interested in pursuing foreign language studies and in-service capacity building in regulatory institutions abroad.¹⁴

In Botswana, in addition to supporting employees' interests in obtaining specialized training and pursuing university degrees, the BTA has established the Botswana Telecommunications Authority Staff Pension Fund and assists employees in obtaining personal, car, and home loans. The BTA has also established a performance management system with the objective of rewarding performance and encouraging productivity among its employees. This system also helps the regulator determine the training needs of its staff.¹⁵

In Senegal, employees of the Agence de Régulation des Télécommunications (ART) have access to a pension fund and are offered diverse bonuses and loans, as well as medical coverage and grants for mobile phone service and home remodeling. A capacity building plan has been developed to strengthen employee skills in various areas (*i.e.g.*, management and technical) and training is carried out in Senegal and abroad. In 2004, the ART focused its capacity-building efforts on effective regulation to ensure that all staff involved had the same level of knowledge and understanding of the subject matter. In 2005, the agency focused its efforts on providing top management personnel with training, based on each individual's needs, most of which was carried out abroad. Similar to the BTA in Botswana, the ART has established a performance management system that evaluates each employee's annual performance based on their accomplishments and those areas where improvement is needed. Employees are awarded a year-end bonus (a maximum of 1.5 times their net salary) based on the results of this evaluation.¹⁶

Although various ways exist to engage employees and thus improve a regulator's efficiency and effectiveness, establishing a performance management system - such as that in place in Botswana and Senegal - can ensure consistency in achieving a regulator's objectives and goals.

Regulators must keep in mind that staff turnover is a business risk requiring management.¹⁷ A high turnover rate can be harmful as it can lead to lack of continuity and diminishes the ability to achieve the regulator's goals and objectives. Therefore, regulators need to establish the measures necessary to create a working environment that will keep staff members motivated and enhance their desire to stay with the regulator. However, a low or non-existent turnover rate is not advisable either, as new employees can often bring new skills and insights with them, so measures should be balanced to also attract new employees to the regulator.

Regulators also should continually re-examine their organizational and administrative structures in order to be prepared for changes that may occur within it, as well as in the sector it regulates. Establishing a solid and well-prepared staff can be instrumental in helping a

regulator manage internal and external changes in a successful manner.¹⁸ A regulator and its staff should aim to have the skills necessary to keep abreast of the needs and changes of the country's telecommunications market sector and thus be able to respond to these changes in an independent and transparent manner.

ENDNOTES

¹ TRAI Act, 2000.

² National Telecommunications Commission of the Philippines, NTC Practices and Procedures Manual, 1 May 1992, *available at* http://www.ntc.gov.ph/manual/manual_toc_and_preface.pdf.

³ Federal Communications Commission, *About the FCC: A Consumer Guide to Our Organization, Functions and Procedures*, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247863A1.pdf.

⁴ TRC (Jordan) <http://www.trc.gov.jo>.

⁵ OSIPTEL (Peru) <http://www.osiptel.gob.pe>.

⁶ OFTA (Hong Kong) <http://www.ofta.gov.hk>.

⁷ Canadian Radio-television and Telecommunications Commission Act; Dominican Republic Ley General de Telecomunicaciones, No. 153-98 Capitulo XII, Titulo II; Nigerian Communications Act, 2003; Ley 26 creating the Panamanian Ente Regulador de los Servicios Publicos, 1996; and South Africa Telecommunications Act, 2000.

⁸ See Ley 26 creating the Panamanian Ente Regulador de los Servicios Publicos, 1996. See also Reglamento General del Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTEL), 2001.

⁹ See OFTA (Hong Kong) <http://www.ofta.gov.hk> and FCC (United States) <http://www.fcc.gov/jobs>.

¹⁰ Nigerian Communications Act, 2003 and South Africa Telecommunications Act, 2000.

¹¹ Canadian Radio-television and Telecommunications Commission Act, 2002.

¹² Latvian Public Utilities Commission Annual Report (2004), OSIPTEL Annual Report (2003), Philippines National Telecommunications Commission Practices & Procedures Manual (1992), and Poland's Annual Report of the President of the Office of Telecommunications and Post Regulation (2003).

¹³ Poland's Annual Report of the President of the Office of Telecommunications and Post Regulation (2003).

¹⁴ Latvian Public Utilities Commission Annual Report (2004).

¹⁵ BTA Annual Report 2003-2004.

¹⁶ Agence de Régulation des Télécommunications (ART) du Sénégal.

¹⁷ Control Staff Turnover, *available at* <http://www.businesslink.gov.uk/bdotg/action/layer?topicId=1074410820>.

¹⁸ The Change Management Toolbook: Introduction, *available at* <http://www.change-management-toolbook.com/> (click on "Listen to an Audio Guide of the website") and Change Management 101: A Primer, *available at* <http://home.att.net/~nickols/change.htm>.

6.2.4 Remuneration Principles

Remuneration for Leadership of Regulatory Authority

In most cases, the compensation of regulatory authority heads or collegial body members is lower than what could be earned in equivalent executive positions in the private sector. As noted below, this also presents a challenge regarding staff remuneration. However, particularly in the case of leadership positions, it is not uncommon for regulators to be composed of individuals who are less concerned about compensation than about some combination of public service along with the experience, public exposure and contacts that can be gleaned through a regulatory leadership position.

In several cases, the governing law or regulation specifies the manner of compensation for the head(s) of the regulators, with many reserving the right for the government or its appointed representative to adjust salaries as necessary. A typical formulation is found in Sudan's National Telecommunications Council Act 1994 (as amended in 2001), which states that, "the members of the Board shall be paid such remuneration as may be specified by the Competent Minister and approved by the Minister."¹ Another common approach is for the salary of the regulatory authority head(s) to be determined in the decree or other instrument of appointment, as is the case in Jordan.² Such arrangements provide a clear determination of who sets salaries, but provides the flexibility for salaries to be adjusted as necessary by the responsible party. For those regulators in which the board or commission members serve part-time, they are often paid a per-meeting fee, as well as reasonable expense reimbursement.

In some cases, however, the salaries for the head of the regulatory authority or the collegial body members are set by law, although not in explicit numerical terms. For example, the salary of the chairman of the collegial body of Hungary's National Communications Authority is set at a level equal to that paid to permanent secretaries in the Hungarian Government, while the salaries of the remaining collegial body members and the Authority's director-general, who heads the Authority staff, are set at a level equal to the salary paid to under-secretaries.³ Similarly, the collegial body members of Bulgaria's CRC are paid salaries that are tied to the salaries paid to legislative representatives.⁴ Such arrangements serve the dual purpose of ensuring that the head of the regulator's salaries are adjusted in concert with legislators or senior ministry officials, and imbuing the regulatory leadership positions with a level of status on par with such senior government officials. The latter can help to lend legitimacy to regulatory leaders, as well as to attract qualified candidates. Directives regarding remuneration may also be linked to civil service regulations, as is the case in the United States. By law, each member of the U.S. Federal Communication Commission's (FCC) collegial body receives a salary at a particular level of the public employee pay scale.⁵

Remuneration for Staff

In countries where regulatory authority employee salaries are tied to government-wide public employee regulations, it is much more common for salaries to be lower than those offered in the private sector. In such cases, the ability of the regulator to attract qualified candidates can be stifled by the availability of higher-paying private sector opportunities. Further complicating the ability to attract qualified candidates, regulatory authority leaders may be required to obtain permission to pursue additional paid employment, as is the case in Australia (for full-time collegial body members),⁶ or simply prohibited from pursuing additional employment, as is the case in the United States.⁷ Such restrictions are intended to ensure that the individual devotes their full attention to their regulatory duties and to eliminate conflicts of interest, but can also prevent candidates from obtaining secondary employment that would help make up for the income forfeited when accepting a position at the regulatory authority.

In an attempt to circumvent the issues of low civil service salaries or restrictive civil service employment regulations, regulators have attempted to design creative and attractive compensation packages to attract experienced and qualified personnel. In a study of the Botswana Telecommunications Authority, the ITU noted that at the time of the study, the BTA offered an attractive set of fringe benefits and salaries that were likely higher than those available in private sector telecommunications jobs, as shown by the high number of private sector applicants for BTA positions.⁸ In the case of Botswana, these fringe benefits combined with the fact that civil service rules do not apply to the regulator, allowed the BTA to offer competitive salaries and benefits to attract the most qualified candidates. A similar arrangement is in effect in Singapore, where the IDA is not required to adhere to the hiring, firing, and benefits practices in place for most public employees, allowing the regulator more flexibility to offer compensation packages that are more competitive with the private sector.⁹

In some cases, the non-leadership staff compensation levels are based upon national public employee regulations when regulatory authority heads are empowered to hire staff as necessary, as long as they comply with applicable public employment laws and regulations. Such is the case in the United States where the majority of the employees of the FCC receive compensation based on a government-wide schedule of compensation in which there are several compensation "bands" and multiple levels within each band.¹⁰ In such cases, staff remuneration is adjusted in concert with other public employees across the majority of government agencies.

ENDNOTES

¹ Sudan National Telecommunications Council Act 1994, as amended, Chap. III (13).

² Jordan Telecommunications Law No. 13 of 1995, as amended, Article 11.

³ Act C of 2003, Article 19(2).

⁴ Bulgaria, Telecommunications Law 2003, Article 23.

⁵ 47 U.S.C. 154 (d).

⁶ Australian Communications and Media Authority Act, 2005, Section 31.

⁷ 47 U.S.C. 154 (B) (4).

⁸ ITU Effective Regulation Case Study: Botswana (2001), at 23.

⁹ International Telecommunication Union, *Trends in Telecommunication Reform: Effective Regulation*, 2002, at 130.

¹⁰ Under the Classification Act of 1949, the U.S. federal government established a graded pay system, referred to as the General Schedule (GS). Under the GS system jobs are ranked according to levels of responsibility. Each job is assigned a corresponding grade from GS-1 to GS-15, with a salary assigned within each grade. See The Classification Act of 1949 as amended (amended by section 1104 of the Act of October 23, 1949 as amended (63 Stat 972) on authority of Pub L. 89-554.

6.2.5 Contracting of Consultants

Options for Contracting out Services

Acknowledging that regulatory authorities may sometimes be best served by contracting certain functions to outside experts, many

regulators are empowered to enter into contracts with outside organizations for specific functions. It should be noted that such outside experts may be private sector individuals or companies, but may also be assigned to the regulator by other branches of government. A typical formulation of the authority granted to the regulator is found in Bahrain's Telecommunications Law, which authorizes the Telecommunications Regulatory Authority's General Director (the head of the TRA's staff) to employ such consultants as will enable the TRA to meet its obligations under the Law, while also taking budget considerations into account.¹ Another arrangement is for the outside expertise to be provided by a regional regulatory authority, as is the case in the eastern Caribbean states. In that case, the Eastern Caribbean Telecommunications Authority (ECTEL) serves its members as a shared regulatory body and provides specific expertise, such as tariff reviews or impact assessment studies.²

In addition to hiring outside experts, many regulators are also empowered to delegate their powers not only to particular divisions within the authority, but also to outside experts. In Singapore, the IDA is empowered to create committees for purposes which the IDA feels would be better managed or regulated by a committee. Such committees may be comprised of personnel from either within or outside the IDA, and the regulator may delegate any of its authority to such committees, with the exception of the power of delegation.³ The Australian Communications and Media Authority (ACMA) may also delegate powers, but to a more limited pool of experts, namely those within the ACMA or those made available to the ACMA by other government authorities.⁴ Other examples of regulators who may delegate some or all of their authority are found in Bahrain,⁵ Hong Kong (SAR),⁶ India,⁷ and Tanzania,⁸ among others. The power to delegate provides the regulator with additional flexibility to determine the most effective or efficient method for regulation of any particular aspect of the telecommunications sector.

In addition to hiring outside consultants and delegating authority, another method of outsourcing is the establishment of advisory or consultative committees. Advisory committees are generally comprised of interested parties or key stakeholders as identified by the regulator. The advisory committee structure provides regulatory authorities with outside expertise that can be drawn upon in the course of normal business, but which are not employed to carry out a particular regulatory task or empowered with any delegated authority role. Regulators empowered to employ such advisory committees include Australia,⁹ Bahrain,¹⁰ Hong Kong (SAR),¹¹ and the United States.¹²

Consultative committees generally do not have the power to carry out actions on behalf of regulatory authorities. However, they may provide valuable input to the regulators in devising positions and strategies on domestic and international issues. In Hong Kong (SAR), for example, the Office of the Telecommunications Authority (OFTA) currently has advisory committees addressing radio spectrum, numbering, standards and consumer issues.¹³ All four Hong Kong (SAR) committees provide advice on domestic issues, while the spectrum and standards committees also assist OFTA in the formation of positions and inputs to international fora. Similarly, the U.S. FCC currently has eight advisory committees, including committees on consumer issues, diversity, media security and reliability, network reliability and interoperability, and numbering.¹⁴ The Australian ACMA provides a standard formulation of the authority to establish advisory committees, in which it states, "[t]he ACMA may, by writing, establish advisory committees to assist in performing any of its functions," and furthermore the ACMA holds the authority to appoint the committee members as well as revoke membership, and provide the committee with specific instructions.¹⁵

The ACMA Act also notes that committee appointments are not appointments to public office under the terms of Australian law governing remuneration, which brings about another common feature of advisory committees: members are not paid by the regulatory authority for their service. Instead, they provide input to the regulator in order to shape regulatory decision-making, whether for the good of the telecommunications market as a whole or for the good of the stakeholder(s) that they represent.

Reasons for Outsourcing

As more regulatory authorities have been established or reorganized in recent years, outsourcing certain regulatory functions has served as a means for the regulators to perform their duties while building internal capacity and ultimately minimizing the need of outside experts. In the cases of Bahrain and Uganda, a consulting firm was contracted to carry out many of the functions of the regulators as they developed their own internal competencies, which helped to get the regulators quickly functioning after their establishment. In other cases, it may be that a particular staff competency is currently lacking and the regulator determines such a role is better filled by an outside consultant. For example, in the Cayman Islands, an outside consultant was hired to serve as general counsel.

In both of these cases, the deployment of external resources in a regulatory authority can be coordinated so as to maximize opportunities for knowledge transfer. In particular, consultants and regulatory authority personnel can be integrated into teams that address weaknesses in the authority's capabilities. Such arrangements provide opportunities for the regulatory authority personnel to become more familiar with the relevant issues and stakeholders, and to learn from the consultants how best to address such issues. In order to maximize the potential for knowledge transfer, regulators employing external resources should consider three primary factors, and at different phases of the integration:¹⁶

- *Traits of the consultant or expert*, such as perceived reliability and motivation, which are important to ensuring successful transfer of knowledge at the initiation of any such collaboration;
- *Traits of the recipient*, such as ability to absorb knowledge, which affects how well the authority personnel will employ the knowledge gained;
- *Level of understanding of subject matter*, which can affect the effectiveness and difficulty of knowledge transfer at all times.

As the knowledge transfer process continues and regulatory authority personnel are better able to take on the roles initially assigned to consultants, the authority gains the freedom to redeploy the consultants in other areas in which their skills may be needed.

Regulators, both established and new, may also choose to outsource certain functions not because they lack the internal capacity, but

because such functions may be best provided by outside experts. In this respect, outsourcing regulatory functions is similar to the outsourcing of business functions: focused on functions and processes that have been problematic and have led to dissatisfaction.¹⁷

It is also not uncommon for regulators to contract outside experts on an ad hoc basis for specific short-term needs. For example, regulatory authorities commonly outsource parts of tender processes, such as the development of terms of reference, feasibility studies or evaluation of bids. In Botswana, the regulator employed consultants in 2004 to assist in the evaluation of bids to procure an automated frequency management and monitoring system. Similarly, regulators have engaged the services of consultants to assist in bid evaluation for mobile licence tenders in many countries, including Jordan and the Maldives.

In addition to providing a competency that the regulator may lack, the employment of impartial external analysts for tasks such as bid evaluations may help to avoid conflict of interest issues in environments where the regulator is populated by individuals with close ties to or histories with bidders. This concern extends beyond bid evaluation to any issue for which there is reason to suspect that the regulator may not be able to make an impartial decision, or to cases in which the regulator's actions would be further legitimized by being based on external analysis and evaluation.

While not quite on an ad hoc basis, outside experts can also be contracted to address short term needs in conjunction with a particular project. For example, a concession contract may include a provision requiring outside consultants to monitor adherence to the terms of the contract or to ensure the quality of the service being offered by the concessionaire. Furthermore, outside experts often have established networks of expert contacts that enable them to gather relevant information and best practices in a more effective and efficient manner than a regulator, particularly a new independent regulator.

On an operational level, it is also not uncommon for regulatory authorities to outsource certain other functions, such as security, maintenance and cleaning, as well as employing outside contractors to fill temporary staff vacancies or to recruit support personnel.

Outsourcing can also involve different types of deliverables from the outside experts. In some cases, consultants provide a set of key issues and potential options for the regulator to take, but leave the ultimate decision up to the regulator. In other cases, the consultant may be offered the opportunity to provide binding recommendations that the regulator has no choice but to implement.

Outsourcing can be a useful tool, allowing regulators to act more independently and efficiently, providing impartial analysis of key issues or processes, and augmenting the regulator's own capacities (or lack thereof). Seeking advice from concerned stakeholders provides the regulator with important insights into the current state of the telecommunications sector as well as the possibilities for its future.

ENDNOTES

¹ Bahrain, Legislative Decree No. 48 of 2002 Promulgating the Telecommunications Law, Chap. 4, Sec. 14.

² Lorenzo Bertolini, World Bank Group Private Sector Development Vice Presidency, *Contracting Out Regulatory Functions*, April 2004, at 3.

³ Infocomm Development Authority of Singapore Act (Cap. 137A), Act. 41 of 1999, Sec. 8.

⁴ Australian Communications and Media Authority Act, 2005, Section 51.

⁵ Legislative Decree No. 48 of 2002 Promulgating the Telecommunications Law, Chap. 2, Sec. 3 (d) (2).

⁶ Hong Kong (SAR) Telecommunications Ordinance (2000), Cap. 106, Sec. 6.

⁷ The Telecom Regulatory Authority of India Act, 1997 (No. 24 of 1997), Chap. VI, Section 33.

⁸ Tanzania Communications Regulatory Authority Act No. 12 of 2003, Section 21.

⁹ See http://www.acma.gov.au/ACMAINTER.10289722:STANDARD:1475878828:pc=PC_1514.

¹⁰ Legislative Decree No. 48 of 2002 Promulgating the Telecommunications Law, Chap. 2, Sec. 3 (d) (2).

¹¹ See <http://www.ofta.gov.hk/en/ad-comm/main.html>.

¹² FCC Advisory Committees are listed on the FCC's web site at <http://www.fcc.gov>.

¹³ OFTA Advisory Committees, available at <http://www.ofta.gov.hk/en/ad-comm/main.html>.

¹⁴ Federal Communications Commission, at <http://www.fcc.gov>.

¹⁵ Australian Communications and Media Authority Act, 2005, Section 58.

¹⁶ Adapted from Gabriel Szulanski, "The process of knowledge transfer: A diachronic analysis of stickiness," *Organizational Behaviour and Human Decision Processes*, Vol. 82, Issue 1, May 2000, at 9-27.

¹⁷ Michael Sinclair, *Telecommunications Contracts: Outsourcing*, in *Telecommunications Law and Regulation*, (Ian Walden and John Angel, eds., 2005), at 268.

6.3 Separation of Power and Relationship of Regulator with Other Entities

The mandate and competences of the regulatory authority as well as its relationship with government and other market players depend on the delegation of powers by the state. The degree of delegation of such powers is determined by the political tradition of the country and on the political will to create an independent and competent regulatory authority. These factors influence the specific responsibilities, authority, and accountability for the performance of the regulator's specific activities.

Although complete “independence” is nearly impossible to attain, the regulator should have sufficient independence to implement regulations and policies without undue interference from interested parties such as politicians or other government agencies (functional independence). The institutional regulations put in place by laws and regulations as well as the administrative structure of the regulatory authority are critical to ensure such independence. The degree of independence differs considerably from country to country.

6.3.1 Relationships with Other Entities

The most common institutional structure used today is: the establishment of an independent regulatory authority which has responsibility for implementing and administering the regulatory framework, but policy-making responsibility resides with a particular ministry. (See Table 6-14.)

Table 6-14: Regulatory Institutional Structure

Function	Responsible Organization
Policy development	Government, ministry or executive branch
Regulation	Separate regulatory authority
Network operation/service provision	Privately and/or commercially operated telecommunications operators

Within this structure, the division of regulatory tasks differs greatly. Currently a highly fragmented and inconsistent pattern of regulatory responsibilities exist among countries for telecommunications, postal services, and broadcasting and media matters. In addition, telecommunications regulators can have sector-specific or multi-sectoral regulatory functions (for more detail on the institutional design of regulators, see Section 6.1.).

Furthermore, there is an inconsistent pattern of the division of regulatory functions (e.g., licensing, numbering, and spectrum management) between policy-makers and regulators around the world. In Europe, for example, only Ireland and Sweden have transferred most regulatory tasks as opposed to the formation of regulatory policy from the ministry to the regulatory authority. In other EU member states, the regulatory responsibilities are split between the ministries and the regulators (Table 6-15).

Table 6-15: EU Regulatory Responsibility Structure

Division of Regulatory responsibilities Countries	Licensing public telecommunications networks and services	General Authorizations/class licenses	Operators with Significant Market Power	Interconnection	USD	Frequency allocation and assignment	Consumer protection	Tariff control	Number management and allocation
Austria	NRA	NRA	NRA	NRA	NRA	MIN	NRA	NRA	NRA
Belgium	MIN	NRA	NRA	NRA	NRA	MIN	NRA	NRA	NRA
Denmark	NRA	N/A	NRA	NRA	NRA	NRA	NRA	NRA	NRA
Finland	MIN	MIN	MIN	NRA	MIN	NRA	MIN	N/A	NRA
France	MIN	NRA	NRA	NRA	NRA	ANF		COMP. DIR.	NRA
Ireland	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
Portugal	NRA/Min	NRA	NRA	NRA	NRA	NRA	NRA	NRA/Dir. Gen Comp.	NRA
Spain	MIN	NRA	NRA	NRA	NRA	Min.Dex.	NRA	NRA	NRA
Sweden	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
Italy	MIN	NRA	NRA	NRA	NRA	MIN	NRA	NRA	NRA

Source: IRG Report on Competencies of NRAs in the new Framework Comparative analysis 2002 and Telecommunications Management Group, Inc. research

As stated in the 2000 OECD Working Party Paper on Institutional Structures and Responsibilities,¹ the ultimate objective of the administrative structure of regulation is not to have an independent regulatory body, but rather an effective regulatory framework. This framework and its implementation determine the ability of a country to achieve policy objectives such as making the market more competitive, stimulating technological diffusion and enhancing efficiency, and ensuring that consumers benefit from these developments.

The regulator is, in fact, a stakeholder in this process of market development. This makes transparent, practical cooperation and communication between the regulator and the policy-maker (as well as with other stakeholders) essential to ensuring that regulation is responsive to government policy decisions and the realities of the market.

Although functionally independent, the regulatory authority will have relationships with various other entities as described in the paragraphs below.

Coordination with the Ministry in Charge of Communications and Other Ministries

Some countries require that the regulatory authority coordinate most closely with the ministry responsible for telecommunications.² Often the regulatory authority is required to support the minister and other relevant government bodies by preparing technical and strategic documents on its country's international positions for submission to various international fora. The regulatory authority can also propose the general policy for the telecommunications sector to ensure the expansion of telecommunications service offerings and the achievement of universal service objectives. In some cases, the regulator is required to prepare legal texts for the minister to submit to the Cabinet. Other countries require that the minister issue resolutions and regulations regarding, for example, interconnection, pricing and licensing. In some cases the regulator is even required to obtain approval from the minister for licences to be issued.

In addition to the ministry in charge of telecommunications, many regulatory authorities are required to coordinate and interact, from time to time, with various other entities and bodies, such as:

- the prime minister
- the ministry responsible for finance or economic affairs
- the ministry responsible for commerce and industry
- the ministry responsible for defense and other security entities
- the ministry responsible for internal administration
- the ministries responsible for information and broadcasting, media and content
- the ministry responsible for transportation
- the ministry responsible for justice
- the ministry responsible for research and development
- the ministry responsible for science and technology
- the competition authority

- the spectrum administrator
- municipalities

Many regulatory authorities are financially and administratively independent. However, in some cases, the annual budget and final accounts must be submitted to the ministry of finance for approval. In addition, some countries require an independent auditor to express an opinion on the final accounts of the regulatory authority to the Cabinet.

While the regulator generally is responsible for overseeing tariff policies, sometimes the basis for determining the service tariffs must be approved by the Cabinet after being evaluated by the ministry of telecommunications and the ministry of finance.

To issue radio licences for the purpose of the radio or television services, some regulatory authorities must obtain the approval of the minister of information or the ministry in charge of broadcasting, media, or content.

Coordination with the Competition Authority

A key relationship within this context is the relationship between the regulator and the competition authority. As the telecommunications market shifts from monopoly to competition, there has been increasing involvement of the competition authority in the telecommunications sector. In most countries, the telecommunications regulator is responsible for technical regulation (e.g., spectrum allocation, number allocation, type approval, and standard setting) as well as telecommunications-specific economic and social regulation (e.g., licensing, universal service, price regulation, the interconnection regime, and rights-of-way), whereas the competition authority is responsible for anti-competitive behaviour and mergers. In practice, however, there is some overlap between the telecommunications regulatory authority and the competition authorities and within that context, it is important to ensure concurrent jurisdiction and coordination (see Section 3.4 for more detail regarding the role of the competition authority).

Coordination with Non-government Entities

In addition to the various government entities that the regulator must coordinate with, the regulatory authority also is required to interact with users, consumer groups, telecommunications operators and service providers, and investors.

In addition, regulators frequently meet with other regulators either on a bilateral basis or in regional and other international fora (e.g., CITEL, Regulatel, IRG, ERG, CEPT, APT, WATRA, TRASA, COMESA, ETSI, and ITU).

ENDNOTES

[1](#) *Telecommunications Regulations: Institutional Structures and Responsibilities*, Organisation for Economic Cooperation and Development, May 26, 2000.

[2](#) For example, in both Singapore and Spain, the regulator is expected to work with the ministry regarding the issuing of wireline licences. See Irene Wu, *Traits of an Independent Communications Regulator: a Search for Indicators*, Federal Communications Commission, International Bureau, June 2004, at 12.

6.3.2 Checks and Balances/Balance of Power/Separation of Power

Independence does not mean that regulators should function in a vacuum, particularly in countries where the legal and judiciary infrastructure is weak. Independence must be balanced with clearly identified requirements for accountability, including strict procedural requirements, reporting mechanisms, public consultation, and substantive judicial review. Accountability involves establishing: (i) detailed policies and laws that set forth explicit objectives governing the regulator; (ii) specific requirements for reporting to the government or Parliament; (iii) procedural requirements; and (iv) the possibility of judicial review.

It is clear that even if independent, a regulator is still an administrative body of the government. Accordingly, its actions should be monitored so that it is accountable for its actions, and administrative measures must be in place to oversee the activities of the regulator.

When regulators are first established, there are inevitably strained relations between the regulator and the ministry that formerly performed the regulatory functions.[1](#) Relations between the regulator and the incumbent may also be strained as the incumbent experiences a policy change (normally associated with the formation of a formal regulator and the inception of its activities). In addition, when appeals are made to the court, the court is often examining new issues arising from new legislation about the powers of a new type of government agency. Thus, there is a learning process for all parties.

One mechanism for this oversight relates to the financing of the regulator. In many cases, the independent regulator's budget must be approved or endorsed by the government before the finalization of the national budget by the legislative body. (For more on budget issues, please see Chapter 5.)

A related issue is the reporting mechanisms for independent regulators. There are three types of reporting mechanisms for independent regulators. As stated in the 2000 OECD Working Party Report,[2](#) the most popular mechanism requires the regulator to report to the ministry responsible for telecommunications policy. In some countries, such as Austria, Germany, and the United States, the independent regulator must report to the legislative body. The third model is exemplified in Canada, where the CRTC reports to Parliament through the Minister of Canadian Heritage.[3](#) There are a few countries, such as Belgium and France, which do not impose any statutory reporting obligation on the

telecommunications regulator except for the publication of an annual report.

In most of these cases,⁴ the reporting obligation is not very specific. Reporting in many OECD member countries occurs through a publication of an annual report that describes the regulator's activities. Some countries, however, impose very specific reporting obligations on the regulator. For example, in Australia, ACMA reports each year to the Minister of [Communications, Information Technology and the Arts](#) on significant matters relating to the "performance" of carriers and carriage service providers.⁵

As noted in Section 6.2.1, another key oversight relationship that influences the independence of the regulator relates to the way in which the head of the regulatory body is appointed and under what conditions he or she can be replaced.

In some cases, the decision-making body of the regulator is composed of commissioners who are appointed by different branches of the government (for instance, some of the commissioners are appointed by the head of the administrative body and the others by the legislative body).

In most OECD member countries, the head of the independent regulator is appointed by the minister responsible for the sector or the president based on the recommendation of the Cabinet or the minister. For example, in Germany, the president and two vice-presidents of the Federal Network Agency⁶ are nominated by the federal government upon the proposal of the Advisory Council to the Federal Network Agency. Then, they are appointed by the President of Germany. The responsibilities of the president of the Federal Network Agency are stipulated in a contract between the Ministry of Economics and Technology and the president of Federal Network Agency. This contract is subject to approval by the federal government.⁷

Another important element relates to the enforcement of regulatory decisions, discussed more fully in Chapter 7. In the majority of countries, the independent regulator's decision cannot be overruled except through a court decision. In addition, in many countries, while the court can nullify the decisions of the independent regulator it cannot impose a new decision on the issue. However, there are countries, such as Canada, Hungary, and Mexico, which give the minister or the Cabinet power to make changes to the decisions of the independent regulator either based on appeals or on their own discretion. In Canada, nevertheless, appeals to the Cabinet must be conducted in a public manner and the power of Cabinet is generally limited to requiring the CRTC to reconsider the decision – this is the case with broadcasting. With regard to telecommunications matters, the Cabinet can directly change the decision, although this occurs rarely.

ENDNOTES

¹ See William Melody, *Stimulating Investment in Network Development: Roles for Telecom Regulation*, WDR Background Paper 0301, March 2003, at <http://www.regulateonline.org>.

² *Id.* at 1.

³ Canadian Radio-television and Telecommunications Commission Act, at <http://www.crtc.gc.ca/eng/LEGAL/CRTC.HTM>.

⁴ See William Melody, *Stimulating Investment in Network Development: Roles for Telecom Regulation*, WDR Background Paper 0301, March 2003, at <http://www.regulateonline.org> at 1.

⁵ See <http://www.acma.gov.au>.

⁶ On July 13, 2005 the Regulatory Authority for Telecommunications and Posts (RegTP) which superseded the Federal Ministry of Posts and Telecommunications (BMPT) and the Federal Office for Posts and Telecommunications (BAPT), was renamed Federal Network Agency. For more detail see <http://www.bundesnetzagentur.de>.

⁷ See <http://www.bundesnetzagentur.de>.

6.4 Legal Status of Regulatory Authorities

The legal status of the regulatory authority is a product of the political and legal system of each country. Most regulatory authorities are either public or semi-public institutions, although some regulatory bodies are established as corporate bodies.¹

ENDNOTES

¹ See for example <http://www.bipt.be>

6.4.1 Corporate Body vs. Administrative Body

The legal status of the authority is generally based on providing the most appropriate organizational structure in order to ensure consistency with the legal and administrative framework of the country. Portugal and Austria are two examples of countries that structured their regulatory authority as a corporate body instead of as an administrative body. In Portugal, the new statutes of the Instituto

das Comunicações de Portugal (ICP) changed the previous legal status of ICP from a public institute to a public corporation named ICP-AUTORIDADE NACIONAL DE COMUNICAÇÕES (ICP-ANACOM) endowed with administrative and financial autonomy, as well as its own assets.¹ This new legal form was intended to enhance the powers and procedures of the regulator and to provide greater legal and financial flexibility through its regulatory instruments. In practice, the change of legal status had an impact on the internal administration of ICP-ANACOM because the Board was granted more flexibility with regard to internal administrative matters, including salaries of the Board Members and staff, the internal organization of the Institute and procurement of goods. However, the budget is still approved by the Ministry of Public Works, Transportation and Communications and the members of the Board of Administration are appointed by resolution of the Council of Ministers, upon a proposal from the member of government responsible for communications. In terms of regulatory functions, ICP-ANACOM has wide-ranging powers, with the Ministry responsible for the establishment of licence fees. ICP-ANACOM, however, must coordinate with other entities as follows:

- *Numbering Plan*: The member of government responsible for the communications sector approves the guidelines and general principles of the national numbering plan and then ICP-ANACOM administers the plan and grants the numbers.²
- *Tariff approval*: The pricing system of the provision of universal service is established through an agreement signed between the central government, represented by the Department of Commerce and Competition (DGCC), ICP-ANACOM and the organization with universal service obligations.³
- *Technical standards*: ICP-ANACOM must coordinate with the National Standardization Organization (Instituto Português da Qualidade).
- *Frequency allocation*: ICP-ANACOM must coordinate with the sector ministry which is responsible for public tender procedures.⁴

In Austria, the independent regulator (RTR GmbH) is also a corporate body – specifically, a private sector, non-profit, limited-liability company, and 100 per cent of its shares are owned exclusively by the Austrian federal government. These shares are administered by the Federal Chancellery in cooperation with the Federal Ministry for Transport, Innovation and Technology. RTR's share capital totals €5,741,153.90 and was solely contributed by the federal government. Additional financing of the regulatory authority is governed by law, and inflows of funds include licence fees and financing amounts contributed by telecommunications providers operating in Austria. RTR's regulatory activities with regard to broadcasting are financed by contributions from broadcasting organizations located in Austria.

RTR is in charge of running the day-to-day regulatory business and also acts as the managerial unit of the Austrian Communications Authority (KommAustria – the broadcasting regulator)⁵ and the Telekom Control Commission (TKK, which acts as the judicial arm of the regulator).⁶ The members of the RTR Advisory Board are appointed by the Austrian Federal Ministry of Transport, Innovation and Technology and by the Federal Chancellery. RTR is split into two specialized sections (broadcasting and telecommunications) and has fairly typical functions and duties of a telecommunications authority.

Thus, in practice, regulators legally established as corporate bodies appear to function in much the same way as regulators which are administrative bodies in terms of reporting lines, budget and internal administration.

ENDNOTES

¹ Decree Law No. 309/2001, in I Series-A of the Diário da República of December 7, 2001, *available at* <http://www.anacom.pt/template20.jsp?categoryId=4675&contentId=17645>.

² Decree Law No. 415/98, Art. 28.

³ Decree Law No. 458/9. Art. 11

⁴ Article 31 of Law 5/2004 of February 10, 2004 (Regicom) allows for a limitation of the number of rights of use where this is necessary to ensure the efficient use of radio frequencies, but also provides that where the granting of rights of use for frequencies needs to be limited, the procedures and selection criteria shall be objective, transparent, non-discriminatory and proportionate. In the case of public tender procedures, ICP-ANACOM must coordinate with the sector ministry.

⁵ On April 1, 2001, the Austrian Communications Authority (KommAustria) was established under the KommAustria Act (KOG, BGBl. I No. 32/2001) to handle broadcasting regulatory activities. The new authority thus assumed the roles of the Private Broadcasting Authority and the Regional Radio Act Commission, which also served as the Cable and Satellite Act Commission. Since then, KommAustria has taken over responsibility for the administration of broadcasting frequencies, a task which was formerly under the responsibility of the telecommunications authorities. See <http://www.rtr.at/>.

⁶ Tasks of the Telekom-Control-Commission can be found at <http://www.rtr.at/>.

6.4.2 Judicial Capacity of the Institutional Arrangements

Telecommunications regulatory authorities around the world have a variety of responsibilities that fit loosely into various categories reflecting elements of the three branches of government. The classic case often quoted in literature regarding the judicial capacity of telecommunications regulators can be found in the United States. The concentration of different competencies, including quasi-judicial powers, is the most important aspect of the U.S. regulatory framework. In the case of the U.S. public utility commissions (PUCs), which have jurisdiction over “public utilities” operating within the state, the PUC acts in both a quasi-legislative capacity by setting rates and

approving tariffs, and a quasi-judicial capacity in hearing complaints and adjudicating rule violations against specific parties.

The state PUCs are generally multi-member boards, replete with numerous structural and procedural protections to insulate the government's decision making from political manipulations or other undue influence. In addition, to ensuring that no single branch of government dominates their actions and decisions, these regulatory commissions are "hybrid institutions," administrative agencies housed in the executive branch, vested with both judicial and legislative authorities and responsibilities.

A clear example is provided by Bull (2002)¹ in describing the powers of the Minnesota PUC:

Legislative. *The PUC acts in a legislative² manner when it establishes policies to be applied in the future. Among the commission's most important legislative functions are the:*

- *Establishment of rates for electric and natural gas service;*
- *Development and adoption of broad industry policies and standards applying in the future, such as rules and orders governing service quality, resource planning, and customer service.*

Although for most people, the dominant impression of the PUC is akin to that of a court, the commission's primary duties, in terms of the amount of time and resources it expends, relate to policymaking in the performance of its legislative function.

Quasi-judicial. *The PUC acts in a quasi-judicial³ capacity when it adjudicates disputes involving past behaviour. Examples include the:*

- *Determination of the reasonableness of a utility's rates or its allowed rate of return set in the past by the commission;*
- *Resolution of consumer complaints regard utility services; or*
- *Finding of a violation of state law or PUC order or rule by a utility, and the imposition of sanctions penalizing the violation.*

This situation, however, is not unique to the United States PUCs. Regulators in many countries have judicial or quasi-judicial powers, depending on their specific mandate. This is most evident in the dispute resolution mandates of regulators and in the enforcement capacity of regulators, where, in some cases, the staff is considered to be judicial officers.

In Morocco, the regulator's (Agence Nationale de Réglementation des Télécommunications – ANRT) employees have the power to investigate and establish by written report particular violations, to access sites, request and collect the communication of any professional documents, and seize materials which are the object of a violation.⁴ Designated ANRT employees may investigate and establish, by written report, violations of the law, and are required to file reports within five days to the King's prosecutor. These reports are considered valid until proven to the contrary.

In Portugal, ICP-ANACOM workers, respective attorneys, and qualified and duly accredited people or entities that perform oversight functions, when exercising their functions, are considered to be agents of the regulator and thus enjoy the following prerogatives:

- Access to installations, equipment, and services of entities subject to inspection and control by ICP-ANACOM;
- Authority to requisition documents for analysis, as well as equipment and material to conduct tests;
- To identify, for subsequent action, all individuals who violate legislation and regulations with which they must comply;
- To demand the collaboration of the proper authorities when deemed necessary for the performance of ICP-ANACOM agents' duties.⁵

In Portugal, an ICP-ANACOM decision has the same executive status as a decision by a court of first instance. ICP-ANACOM can proceed to juridical execution under the terms of the Civil Law Code.⁶

The officers of the Info-Communications Development Authority of Singapore (IDA) have the power to discharge their functions, require information, have full and free access to all buildings and documents and inspect, copy and take possession of such documents or equipment, arrest and search without warrant in respect of certain offenses, and compound offenses. Any person who obstructs a police officer or chief executive or employee of the IDA in the execution of his duty is guilty of an offense.⁷

Under the Telecommunications Act of Taiwan, the Directorate General of Telecommunications (DGT) may dispatch personnel or cooperate with the police, with search warrants and evidentiary documents, to enter the establishments that harbor violations of the Act, to conduct inspections, or extract relevant information.⁸

Civil law countries distinguish between public law, administrative law and private commercial law and frequently carry this distinction into their respective institutional structures, particularly with regard to the judicial or quasi-judicial status of the regulator vis-à-vis dispute resolution.⁹

Like many countries, France has administrative courts with specific responsibility for reviewing administrative actions. The telecommunications regulatory authority, ARCEP (formerly ART), however, was the first independent administrative authority in France to be granted quasi-judicial power to settle disputes, a power that is exercised under the supervision of the court, in compliance with the litigation guarantees for a fair trial.

The French Constitutional Council explicitly recognized that the law may “grant an independent administrative authority the responsibility for ensuring compliance with the constitutional principles in the field of audiovisual communications with sanctioning power, within the limits required to accomplish its task” and it is the responsibility of legislators to “include further measures for exercising such powers, intended to safeguard constitutionally guaranteed freedom and rights.”¹⁰ Specifically, the Constitutional Council acknowledged ART’s sanctioning powers in cases of failure to comply with the legislative and regulatory provisions set forth in the Post and Telecommunications Code, without this affecting in any manner the principle of separation of powers.¹¹

OPTA in the Netherlands presents another interesting example. It is formally considered to be an administrative body, but is authorized to influence relationships between civil parties. Thus, although OPTA cannot prescribe generally binding rules, it may offer guidelines for clarity among parties.

ENDNOTES

¹ Mike Bull, *The Minnesota Public Utilities Commission and Related Agencies: Structure and Function*, September 2002, available at <http://www.house.leg.state.mn.us/hrd/pubs/mpucagen.pdf>.

² Minnesota law defines the PUC’s legislative function as “the establishment and promulgation of all rules, orders, and directives of general or particular applicability, governing the conduct of the regulated persons or businesses, together with such investigative procedures as are incident thereto and all valid acts and procedures which are historically or functionally legislative in character.” Minnesota. Statute § 216A.0, subd. 2.

³ Minnesota law specifies that the PUC’s quasi-judicial function is “the promulgation of all orders and directives of particular applicability governing the conduct of the regulated persons or businesses, together with procedures inherently judicial.” Minn. Stat. § 216A.02, subd. 4.

⁴ Morocco Law No. 24-96.

⁵ Portugal, Statute of the ICP-ANACOM, Article 48, as established pursuant to Decree Law No. 309/2001 available at <http://www.icp.pt/template20.jsp?categoryId=4675&contentId=17645>.

⁶ ECC Report 43, Dispute Resolution Settlement Procedures, Bornholm, 2003.

⁷ Singapore Telecommunications Act of 1999, Part VIII.

⁸ Taiwan Telecommunications Act, as amended, Article 55.

⁹ See Robert R. Bruce, Rory Macmillan, Timothy St. J. Ellam, Hank Intven and Theresa Miedema, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*, World Bank/ International Telecommunication Union, October 2004.

¹⁰ Ruling number 88-248 DC, Rec. 18, RJC I-339, 17 January 1989, available at <http://www.conseil-constitutionnel.fr/decision/1988/88248dc.htm>.

¹¹ Elisabeth Rolin, *Settlement of disputes brought before the Telecommunications Regulatory Authority*, at <http://www.art-telecom.fr/index.php?id=8442&L=1>.

6.5 Ethics Rules and Conflicts of Interest

A major component of effective and transparent telecommunications regulation is the management of conflict of interest issues between private interests and public service duties.¹ Regulators must be fair, impartial and transparent, and just as importantly, the public must perceive them as such in order for the regulators to inspire confidence of the industry and of investors. For instance, in order to maintain the public confidence and address the conflict of interest over the roles of the Telecom Regulatory Authority of India (TRAI) as a regulator and an adjudicator, TRAI amended the telecommunications legislation in 2000 to create an independent Telecom Disputes Settlement and Appellate Tribunal (TDSAT), transferring to it all powers for dispute resolution in the sector. (For a more detailed analysis, see the practice note on the case of India in Section 7.4.1 in the online module.) The ability of a regulator to govern legitimately and effectively is based on the real and perceived integrity, honesty and ethical behavior of its officials and employees and their decisions. Thus, it is necessary for regulators to implement an ethics framework to govern the activities of their employees and ensure the adherence to minimum standards of professional and ethical behavior. Box 6-3 below provides an example of the core values of civil service for Hong Kong (SAR).

Box 6-3: Core Values of Civil Service in Hong Kong (SAR)

1. Commitment to the rule of law;
2. Honesty and integrity;
3. Accountability for decisions and actions;
4. Political neutrality;

5. Impartiality in the execution of public functions; and
6. Dedication, professionalism and diligence in serving the community.

Source: Hong Kong (SAR) Civil Servants' Guide to Good Practices.²

At the heart of any ethics framework is the prevention of conflicts of interest, which can jeopardize the ability of a regulator to make an objective and transparent decision. One way to establish the core values and standards of conduct that should govern public service is to adopt and enforce a code of ethical conduct that binds all employees. A code of ethics can be part of a more comprehensive administrative code, such as the United Kingdom's Civil Management Code,³ or it can be promulgated as separate legislation, such as Canada's Conflict of Interest and Post-employment Code for Public Office Holders.⁴ Other regulators, such as Bahrain's TRA, include conflict of interest provisions in the telecommunications legislation. In general, the ethics codes for the public service sector in most countries serve as general ethical guidelines for all government agencies, including independent regulatory entities, although different departments, agencies and regulators may develop supplemental guidelines to take into account their specific functions and circumstances. Ethics codes can vary in content, but should generally address the following:⁵

- Establishing provisions for disclosure of personal and financial conflicts of interest (which include provisions regarding gifts, impartiality in performing official duties, and seeking outside employment);
- Rules for maintaining confidentiality of information;
- Setting procurement rules;
- Rules on staff relations (such as prohibitions on sexual harassment);
- Establishing methods to report and handle misconduct and what the proper grounds are for disqualification or dismissal; and
- Safeguarding agency assets through rules on spending and financial reporting.

Generally, ethics rules prescribe four approaches to avoiding or mitigating ethical conflicts, whether real, potential or apparent: (1) avoidance, (2) disclosure, (3) divestment or resignation, or (4) recusal.⁶ A code of ethics may encourage employees to take precautions to avoid situations that may result in a potential conflict of interest or give the appearance of impropriety. For example, the Hong Kong (SAR) Civil Servant's Guide provides the following guidelines: "avoid being placed in a position of obligation to anyone by accepting excessive entertainment or favors" and "avoid putting yourself in a position that may arouse any suspicion of dishonesty, or of using your official position to benefit yourself, your family, relations or friends."⁷ Employees are also typically required to disclose any conflicting financial interests or personal interests or the receipt of any gifts over a certain monetary value. Where a conflict of interest is identified, the employee may be asked to resign or to divest the conflicting interest. Another resolution may be the recusal, the disqualification or removal, of the employee from the particular matter that involves a conflict of interest. The Organisation for Economic Co-operation and Development (OECD) provides guidelines in dealing with conflict of interest situations (Box 6-4).

The main issues regulators encounter regarding ethics can be grouped into three broad categories: (1) acceptance of gifts; (2) personal and financial conflicts of interest; and (3) post-employment prospects.

ENDNOTES

¹ The OECD Guidelines for Managing Conflict of Interest in the Public Service defines "conflict of interest" as follows: "A *conflict of interest* involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities." Organisation for Economic Co-operation and Development, *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service*, June 2003 [hereinafter *OECD Guidelines*], available at <http://www.oecd.org/dataoecd/13/22/2957360.pdf>.

² Hong Kong (SAR) Civil Service Bureau, *Civil Servants' Guide to Good Practices*, 2005, available at http://www.csb.gov.hk/hkgcsb/doclib/civil_e_rev.pdf

³ United Kingdom, Civil Service Management Code, available at <http://www.civilservice.gov.uk/iam/codes/csmc/index.asp>

⁴ Canada, Conflict of Interest and Post-employment Code for Public Office Holders, 2004, available at http://www.parl.gc.ca/oec-bce/site/content/coi_2004_e.pdf.

⁵ International Telecommunication Union, *Trends in Telecommunications Reform 2002: Effective Regulation*, Chapter 6, Section 6.3.1 (2002).

⁶ See Irene Wu and Cathleen Xue, *Decision-making procedures and ethics rules: the practical enablers of integrity and impartiality in telecommunications regulation*, published by the Federal Communications Commission International Bureau, August 15, 2002, at 3, available at http://www.infodev.org/files/1275_file_FCC_Paper2.pdf.

⁷ Hong Kong (SAR) Civil Service Bureau, *Civil Servants' Guide to Good Practices*, Section 6, (2005).

6.5.1 Acceptance of Gifts

Most ethical codes of conduct prohibit the improper acceptance of gifts between employees or from outside sources, which can influence the independent judgment and performance of official duties of a public employee to the benefit of the gift giver.¹ In almost all countries, civil employees cannot solicit and must decline any gifts, hospitality or other benefits from persons dealing with the agency that give rise to impropriety or the appearance of impropriety, which could influence them in their personal judgment and integrity.² For example, the Charter for the Public Service in Africa, which serves as a policy framework for public service administrations of African countries and as a source of inspiration for the development, strengthening or updating of national codes of conduct, states that: "Public service employees shall not solicit, accept, demand or receive, directly or indirectly, any payment, gifts or other advantage in kind in return for performing or refraining from performing their functions or obligations. It shall be reprehensible for public service employees to offer gifts or other advantages that might influence in their favor or in favor of family members and friends, the judgment or decisions of another person."³

Where it is impossible to decline a gift, there are different ways to handle it, such as disclosing the gift and reporting the gift to one's supervisor immediately,⁴ returning the gift or paying its market value,⁵ or obtaining permission prior to accepting the gift.⁶ For example, in Hong Kong (SAR), civil employees are required to seek permission from an authorizing officer before accepting or soliciting any prohibited gifts, and the approving authority may either allow the acceptance or solicitation of the gift unconditionally or subject to certain conditions, or refuse permission. If the gift is already in the civil employee's possession, the approving authority may (i) require the gift to be returned to the donor, (ii) require the gift to be donated to a charitable organization, or (iii) require the disposal of the gift in such other manner as the approving authority may direct.⁷

The practice of gift-giving is common in building and maintaining business or personal relationships, and may not always constitute bribery, so it is important to clearly define the difference between token niceties and outright bribery or influence-buying. Therefore, rules regarding the acceptance of gifts usually contain certain exceptions to account for local customs, for gifts below a certain monetary value, or for situations where acceptance of gifts is permissible. Differentiating between token gifts and improper bribes can be done in several ways:⁸

1. By a general rule prohibiting any gifts, invitations or courtesies;
2. By establishing situational guidelines on acceptance of gifts (e.g., whether there is an impending hearing involving the giver or whether acceptance may be justified on policy grounds, such as to fund or pursue training or developmental programs);
3. By setting guidelines on the nature of the gift (e.g., meals or invitations to ribbon-cuttings may be acceptable, while leisure resort weekends or substantial cash payments would be forbidden);
4. By imposing ceilings on the value of the gift; or
5. By requiring the declaration and registration of all gifts in a central register.

In Brazil, public service employees are prohibited from receiving a salary or any other prohibited remuneration from a private source, or receiving any means of transportation, lodging or any favours that could generate doubts as to the employee's honesty or integrity. However, the public service employee's participation in seminars and conferences is permitted provided that the information on any financial compensation and/or payment of travel expenses by the event promoter, who must not have a personal interest in any decisions made by the employee, is disclosed. Additionally, items are not considered gifts if they do not have any commercial value, or they are distributed by an entity as courtesy, for publicity purposes, as a customary public affairs matter, or on the occasion of a special event or commemorative date, and do not have a value of over BRL 100.⁹

In the United States, exceptions to the acceptance of gifts under the Standards of Ethical Conduct for Employees of the Executive Branch include, among others: (i) gifts with an aggregate market value of USD 20 or less, provided that the total value gifts received from the same person does not exceed USD 50 in one calendar year; (ii) gifts based on a personal relationship, such as a friend or family; (iii) awards and honorary degrees, other than cash or an investment interest, with an aggregate value of USD 200 or less if such gifts are a bona fide award given for meritorious public service or achievement; and (iv) discounts and similar benefits given to all government employees.¹⁰

In Hong Kong (SAR), acceptance of gifts (advantages) is permissible for: (i) gifts, discounts, loans of money or passages from tradesmen, companies or other organizations which are available on equal terms to non-civil servants; (ii) gifts, discounts, loans of money or passages from a relation; (iii) gifts and/or passages not exceeding in total HKD 2,000 from a close personal friend or HKD 1,000 from any other person on each occasion when gifts are traditionally given or exchanged, and not exceeding HKD 400 in total from a close personal friend on each other occasion; and (iv) loans of money from a close personal friend or any other person not exceeding HKD 2,000 and HKD 1,000 respectively, provided it is repaid within 14 days.¹¹ Additionally, acceptance of entertainment, which is defined as the provision of food or drink, is not considered an advantage, and is not a criminal offense. However, a public service employee is advised to refuse lavish or unreasonably generous or frequent entertainment that might result in embarrassment in performing one's duties or bring the public service into disrepute.¹²

In addition to ethics rules adopted by regulators, many countries also have laws against bribery of government officials. The Canadian Criminal Code states that: "...every one commits an offense who being an official or employee of the government, demands, accepts, or offers or agrees to accept, from a person who has dealings with the government, a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him."¹³ In the United States, under the Foreign Corrupt Practices Act (FCPA), it is unlawful for U.S. persons to bribe foreign government officials to obtain or retain business.¹⁴ In Hong Kong (SAR), under the Prevention of Bribery Ordinance, which is enforced by the Independent Commission Against Corruption (ICAC), it is considered a bribery and an offense for public officials to solicit or accept any gifts offered as an inducement to or reward in connection with the performance of their official duty, and it is also an offense for any person to offer such gifts.¹⁵

In some countries, specific local practices are prohibited. For example, the Hong Kong (SAR) Civil Servants' Guide also notes that the red packet (*hong bao*), traditionally given during Chinese New Year, is a gift of money and is considered a prohibited advantage under Section 4 of the Prevention of Bribery Ordinance, unless it is between family relations.¹⁶ The Kenya Public Officer Ethics Act 2003 explicitly prohibits the solicitation and collection of *harambees*.¹⁷ In Kenya, *harambee*, which means "pulling together," is a local practice that entails voluntary contributions in cash and in kind, such as labour, for community activities and projects such as schools and health clinics, and is considered to predispose people, particularly politicians, to corruption because it provides a means for people who steal public funds to legitimize themselves to the public.¹⁸

ENDNOTES

¹ A gift can include many things. For example, in Hong Kong (SAR), gifts in the context of ethics are referred to as "advantages" and are defined as: (i) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of any other property or interest in property of any description; (ii) any office, employment or contract; (iii) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; (iv) any other service or favour (other than entertainment), including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted; (v) the exercise or forbearance from the exercise of any right or any power or duty; and (vi) any offer, undertaking or promise, whether conditional or unconditional, of any advantage within the preceding paragraphs, but does not include an election donation within the meaning of the Elections (Corrupt and Illegal Conduct) Ordinance. See Hong Kong (SAR) Prevention of Bribery Ordinance, Chapter 201, Section 2, 9 May 2003.

² In the Philippines, public officials and employees are prohibited from soliciting or accepting, directly or indirectly, any gift, gratuity, favour, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by, the functions of their office. See Republic of the Philippines, Code of Conduct and Ethical Standards for Public Officials and Employees, Republic Act No. 6713, Section 7, *available at* http://www.gov.ph/faqs/govemp/R_A_%206713.htm. In Kenya, a public officer is prohibited from using his office to improperly enrich himself or others. Public officers are not allowed to accept or request gifts or favour from persons who have an interest that may be affected by the carrying out of the public officer's duties, or who carry on regulated activities with respect to which the public officer's organization has a role, or has a contractual or similar relationship with the public officer's organization. See Kenya, The Public Officer Ethics Act, 2003, *available at* <http://www.tikenya.org/viewdocument.asp?ID=150>.

³ See Charter for the Public Service in Africa, February 5, 2001 (adopted by the Third Biennial Pan-African Conference of Ministers of Civil Service), *available at* <http://unpan1.un.org/intradoc/groups/public/documents/cafrad/unpan004365.pdf>.

⁴ See Council of Europe, Recommendation No. R (2000) 10 of the Committee of Ministers to member states on Codes of Conduct for Public Officials, Article 19, 26 May 2000 [Recommendation No. R (2000)]. Article 19 contains suggested recommendations for dealing with improper offers, such as reporting the attempt as soon as possible to his /her supervisor or directly to the appropriate law enforcement authority, or to prepare as soon as possible a written record of the attempt, preferably in an official notebook. The Canadian Conflict of Interest Code states that where a public officer or his/her family member directly or indirectly accepts any gift that exceeds C\$200 in value from any one source other than relatives and close personal friends in a 12 month period, such gifts shall be disclosed to the Ethics Commissioner. See Conflict of Interest and Post-employment Code for Public Office Holders, Article 21(1), (2004).

⁵ The Standards of Ethical Conduct for Employees of the Executive Branch in the United States specifies that an employee who has received a gift that cannot be accepted should return any tangible item to the donor or pay the donor its market value. When it is not practical to return the tangible item, the item may, at the discretion of the employee's supervisor or agency ethics official, be given to an appropriate charity or shared with the recipient's office or destroyed. For intangible gifts, such as entertainment, services or favours, the recipient should reimburse the donor the market value. See Standards of Ethical Conduct for Employees of the Executive Branch § 2635.205, October 2002, *available at* http://www.usoge.gov/pages/laws_regs_fedreg_stats/oge_regs/5cfr2635.html.

⁶ In Hong Kong, (SAR) civil employees can accept gifts from sources and on specific occasions approved by regulation or special permission of the Governor. If a civil servant wishes to solicit or accept a gift which is not permitted by regulation, he/she must seek special permission to do so. In most cases, this permission is sought from the civil employee's Head of Department. See Government Secretariat Hong Kong (SAR), Civil Service Branch Circular No. 18/92, *The Acceptance of Advantages and Entertainment*, 4 December 1992.

⁷ Hong Kong (SAR), Acceptance of Advantages (Chief Executive's Permission) Notice 2004, 9 January 2004 (made under Chapter 201 of the Prevention of Bribery Ordinance).

⁸ International Telecommunication Union, *Trends in Telecommunications Reform 2002: Effective Regulation*, Chapter 6, Section 6.3.1.3, (2002).

⁹ Brazil Code of Conduct for Senior Government Officers at the Federal Executive Branch, Commission of Public Ethics, approved on 21 August 2000, as submitted to the President of the Republic under Explanatory Memorandum No. 37 of 18 August 2000, *available at* http://www.presidencia.gov.br/etica/frame_conduta.htm. The Code of Conduct for Senior Government Officers applies to senior government officers, Ministers, Cabinet members and heads of federal government Secretariats, and presidents and directors of government agencies of the Executive Branch, including the special agencies, foundations maintained by the public sector, state-owned

companies and companies with both private and public ownership. The Code is also applicable to members of the Board of Directors of regulatory agencies, such as Anatel, pursuant to specific legislation, the Medida Provisória No. 2.216-37 of 31 August 2001, available at https://www.planalto.gov.br/ccivil_03/MPV/2216-37.htm.

¹⁰ United States Office of Government Ethics, Standards of Ethical Conduct for Employees of the Executive Branch § 2635.204, October 2002, available at http://www.usoge.gov/pages/laws_regs_fedreg_stats/oqe_regs/5cfr2635.html.

¹¹ Hong Kong (SAR) Civil Service Bureau, *Civil Servants' Guide to Good Practices*, 2005. See also Acceptance of Advantages (Chief Executive's Permission) Notice 2004, 9 January 2004.

¹² See Government Secretariat Hong Kong (SAR) Civil Service Branch Circular No. 18/92, *The Acceptance of Advantages and Entertainment*, 4 December 1992. See also Hong Kong (SAR) Civil Service Bureau, *Civil Servants' Guide to Good Practices* (2005).

¹³ Canadian Criminal Code, R.S. 1985, C-46, Section 121(1)(c), available at <http://laws.justice.gc.ca/en/C-46/index.html>.

¹⁴ United States, Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, *et seq.*, as amended. Under the FCPA, bribery involves merely a corrupt intent, even if the corrupt act itself does not succeed. "The FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision." See Lay Person's Guide to the FCPA Statute, June 2001, published by the Department of Justice and the Department of Commerce available at <http://www.usdoj.gov/criminal/fraud/fcpa.html>.

¹⁵ Hong Kong (SAR), Prevention of Bribery Ordinance, Chapter 201, Section 4, 9 May 2003. The ICAC is an independent commission that was established in 1974 to fight corruption in the public and private sectors in Hong Kong (SAR) through law enforcement, education and prevention. It has specific powers under the Independent Commission Against Corruption Ordinance, the Prevention of Bribery Ordinance, and the Elections (Corrupt and Illegal Conduct) Ordinance to investigate, search, arrest, detain and grant bail in performing its duties. See <http://www.icac.org.hk/eng/main/index.html>.

¹⁶ Hong Kong (SAR) Civil Service Bureau, *Civil Servants' Guide to Good Practices*, Annex 1, (2005).

¹⁷ Kenya, The Public Officer Ethics Act, 2003, Section 13.

¹⁸ Anne Waiguru, *Corruption and Patronage Politics: The Case of "Harambee" in Kenya*, October 2002, (presented at the "Measuring Corruption Workshop" held by Key Center for Ethics, Law, Justice and Governance and Transparency International).

6.5.2 Personal and Financial Conflicts of Interest

Another major consideration in establishing a code of ethical conduct is the conflict of interest arising from an employee's pecuniary interests, personal affiliations and family relations. A conflict of interest is likely to arise when a public office employee's loyalty to the government conflicts with his loyalty to: (a) family and other relations; (b) personal friends; (c) clubs and societies to which they belong; (d) professional colleagues in the private sector; or (e) any person to whom they owe a favor or are obligated in any way.¹

Common examples of such conflicts include an employee's participation in proceedings that involve close associates or family members (nepotism), an employee's stockholdings in companies that have dealings with the employee's agency, or stockholdings in companies that the employee has gained confidential information through official capacities.² For example, the Brazilian telecommunications regulator Anatel's internal administrative regulations prohibit the agency's employees from participating in administrative procedures in instances where they: (i) have a direct or indirect interest on the subject matter being acted upon; (ii) have participated or may participate as an expert, witness or representative, or if such situations involve a spouse, relative or relative in the third degree of consanguinity; or (iii) are in judicial or administrative litigation with the interested party. Anatel employees who find themselves in one of the above situations must communicate this information to their superior and abstain from participating in the procedure. Employees may be subject to investigation if there is suspicion that they have intimate friendship or enmity with any of the interested parties or their respective spouses, companions, or relatives up to the third degree of consanguinity.³

Similarly, Peru's telecommunications regulator, OSIPTEL, issued a Transparency Regulation that governs transparency in the agency's procedural and administrative activities and in the activities of its employees. Article 7 of the Regulation requires that OSIPTEL directors or employees who have decision-making powers or whose opinion on the substance of the proceeding can influence the decision at issue, shall abstain from participating in activities in the following instances:⁴

1. If their participation can affect their own economic interests, or the interests of their spouse or family member up to the fourth degree of consanguinity or second degree of affinity;
2. If their participation can affect the economic interests of their partners, organizations, companies or groups of which they are a member;
3. If their participation can affect the economic interests of individuals or legal entities with whom they are seeking employment;
4. If they are a family member to the fourth degree of consanguinity or second degree of affinity with any of the other parties or their

representatives, or the other party's management staff;

5. If they have acted as advisor, expert or witness in the same proceeding, or if they have taken a stand on the issue at hand, except if their manifestation on the matter involved the correction of an error or the appeal of the decision; and
6. If they have worked in the past year with any of the other parties directly involved in the proceeding or have participated in any project with any of the other parties regardless of whether the project was actually carried out.

To avoid conflict of interest, many regulators also prohibit their employees from holding shares in companies that they regulate. For example, the Romanian Telecommunications Law prohibits the regulator's employees, including the president and vice-president, from having shares or participating as board members in any company under the regulator's competence.⁵ Similarly, the Telecommunications Act of the Independent Communications Authority of South Africa (ICASA) disqualifies persons from being a councilor if they or their family members have a substantial financial interest in the telecommunications or broadcasting industry, or if they or their business partners are employed by any person or entity in the telecommunications or broadcasting industry.⁶ The Kenya Public Officer Ethics Act prohibits a public office employee from holding shares or any interest directly or indirectly, in a corporation, partnership or any other body, which would result in a conflict of personal interests with official duties.⁷ Such conflicts of interest must be reported and the employee must refrain from participating in any deliberations with respect to the matter.⁸ The Act also prohibits the practice of nepotism or favouritism.⁹

Civil employees should not take advantage of their positions to further their own private interests, nor should they allow private interests to conflict with their public position. Conflicts may arise when employees use confidential information obtained in the course of employment to further personal interests. In Canada, for example, public office employees are not permitted to give preferential treatment in relation to any official matter to relatives or friends, or to any organization in which they, relatives or friends have an interest, nor are they allowed to use information obtained in their position as a public office employee that is not generally available to the public to further their own or any person's private interests.¹⁰

Ethics legislation in most countries also mandates the disclosure of financial and personal interests and even the divestment of such interests in order to prevent personal or financial interests from influencing the independent judgement of a civil employee. The Kenya Public Officer Ethics Act, for example, requires every public employee to annually declare their income, assets and liabilities, as well as those of their spouse(s) and dependent children under 18 years of age.¹¹ In Canada, other than "exempt assets,"¹² public office employees must declare and/or divest themselves of "controlled assets," which are those assets that could be directly or indirectly affected as to value by government decisions or policy in which the employee's agency has some role.¹³ Public office employees are also prohibited from participating in outside activities and employment that could impact their ability to perform their official duties and responsibilities objectively.¹⁴

ENDNOTES

¹ Government Secretariat Hong Kong, (SAR) Civil Branch Circular No. 19/92, Conflict of Interest, 4 December 1992.

² Irene Wu and Cathleen Xue, *Decision-making procedures and ethics rules: the practical enablers of integrity and impartiality in telecommunications regulation*, published by the Federal Communications Commission International Bureau, 15 August 2002, at 5.

³ Anatel Internal Regulations, Resolution 270, Article 39, July 19, 2001.

⁴ Reglamento de Transparencia de OSIPTEL, Resolucion No. 013-99 CD, July 9, 1999, available at OSIPTEL's website at <http://www.osiptel.gob.pe>.

⁵ Government Emergency Ordinance no. 79 of 13 June 2002 on the General Regulatory Framework for Communications, available at http://www.legi-internet.ro/en/elec_comm.htm. It was drafted by the National Regulatory Authority for Communications by inserting in the text of the Government Emergency Ordinance no. 79/2002 on the general regulatory framework for communications, published in the Official Journal of Romania, Part I, no. 457 of June 27th, 2002, the amendments and completions that have been operated through the Law no. 591/2002, published in the Official Journal of Romania, Part I, no. 791 of October 30th, 2002.

⁶ ICASA, Telecommunications Act No. 103 of 1996, as amended, available at <http://www.icasa.org.za>.

⁷ Kenya, The Public Officer Ethics Act, 2003, Article 12.

⁸ *Id.*

⁹ *Id.*, Article 17.

¹⁰ Canada, Conflict of Interest and Post-employment Code for Public Office Holders, 2004, Article 22.

¹¹ Kenya, The Public Officer Ethics Act, 2003, Part IV.

¹² Canada, Conflict of Interest and Post-employment Code for Public Office Holders, 2004, Part II, Article 10(1). Exempt assets are assets and interests for the private use of the public office holders and their families that are not of a commercial character and are not subject to public declaration or divestment, and include, among others: (i) residences or other property used or intended for use by public office holders and their families; (ii) household goods and personal effects; (iii) pension rights, life insurance policies and annuities; and (iv) automobiles and other personal means of transportation.

¹³ *Id.*, Articles 11-13. Controlled assets include: (i) publicly traded securities of corporations and foreign governments, whether held

individually or in an investment portfolio account such as, but not limited to, stocks, bonds, stock market indices, trust units, closed end mutual funds, commercial papers and medium-term notes; (ii) self-administered Registered Retirement Savings Plans, self-administered Registered Education Savings Plans and Registered Retirement Income Funds, except when exclusively composed of assets as described in section 10 (exempt assets); (iii) commodities, futures and foreign currencies held or traded for speculative purposes; and (iv) stock options, warrants, rights and similar instruments.

[14](#) *Id.*, Articles 15-18.

6.5.3 Post-employment Prospects

Regulatory provisions regarding post-employment prospects are intended to prevent any suspicion that the public office employee's duties and decisions might be influenced by the expectation or hope of future employment with a particular firm or organization, and to avoid the risk that a particular firm or organization might gain improper advantage over its competitors by employing someone who had access to information on the competitor through the course of their prior official duties.^{[1](#)} In order to prevent conflicts between the employee's current responsibilities and outside employment, ethics regulation typically require employees to report any outside appointment if there is a potential conflict, such as when an employee had significant contacts with a company while in office, or if the company was a party to the matter that the employee's department was in charge of handling.^{[2](#)} In addition to reporting requirements, former employees may be required to either avoid certain proceedings or obtain permission from a former employer prior to taking a new appointment for a specified time period after termination of employment.

In Brazil, the members of the Board of Directors of the telecommunications regulator Anatel have a four month "quarantine" period (*quarentena*) before they can undertake a new position after termination of employment if the Public Ethics Commission finds that there exists a conflict of interest between the employee's former appointment and his new position.^{[3](#)} Pursuant to Article 13 of the Code of Conduct for Senior Government Officers, any proposals of future work or business in the private sector as well as any negotiations for work that may involve a conflict of interest must be communicated immediately to the Public Ethics Commission, regardless of whether it was accepted or rejected. Article 15 of the Code states that in the absence of a law specifying a different period of time, there shall be a four-month period beginning from the date of their departure from public service, during which former public service employees are barred from performing any activity that is incompatible with the office held previously. Within this period, former public service employees must comply with the following rules: (a) they may not accept any position as a manager or counselor, or establish professional relationships with an individual or legal entity with which they had previously maintained a direct official and relevant relationship within the last six months prior to their departure from public position; and (b) they may not interfere for the benefit of, nor on behalf of, any individual or legal entity, before any federal government entity or agency, with which they had a direct and relevant official relationship during the last six months prior to their departure from a public position.^{[4](#)} In addition, the Telecommunications Law prohibits the former Board member from representing any person or interest before Anatel for a period of one year after termination of employment.^{[5](#)}

The United Kingdom's Civil Service Management Code provides that under specific circumstances, within two years of leaving government service, civil employees must file an application pursuant to the Business Appointment Rule and obtain government approval before taking any full-time, part-time, or fee-paid employment in the United Kingdom or overseas in a public or private company or in the service of a foreign government or its agencies. Such specific circumstances requiring government approval include: (i) if the employee is at a senior level; (ii) if the employee has had any official dealings with the prospective employer during the last two years of employment or if they had official dealings of a continued or repeated nature with their prospective employer at any time during government employment; (iii) if the employee has had access to commercially sensitive information of competitors of the prospective employer; or (iv) if the employee's official duties during the last two years of government employment involved giving advice or decisions benefiting the prospective employer for which the offer of employment could be interpreted as reward, or have involved developing policy, knowledge of which might be of benefit to the prospective employer. All civil service employees are required to report if they are considering any approach from an outside employer offering employment. Civil employees dealing with procurement or contract work must report any offer of outside employment whether or not they are considering the offer. The government's approval of an application under the Business Appointment Rule can be: (i) unconditional; or (ii) conditional subject to a waiting period before taking up the new appointment; or (iii) include a ban on the involvement of the applicant in dealings with the prospective employer and the government or with competitors of that employer.^{[6](#)}

Canada's Conflict of Interest and Post-Employment Code for Public Office Holders requires that before leaving office, all public service employees must disclose in writing to the Ethics Commissioner all firm offers of outside employment that could place the employee in a position of conflict of interest, and any employee who accepts an outside offer must disclose in writing the acceptance of the offer. If the employee is engaged in significant official dealings with the future employer, the employee will be removed from their current duties and assigned to other responsibilities immediately. Within one year of leaving office, or two years for ministers of the Crown or ministers of state, employees are prohibited from accepting service contracts, appointments to a board of directors of, or employment with an entity with which they had direct official dealings during the one year period preceding the termination of employment, or to represent an entity in front of a department that they had direct and significant dealings with during public office.^{[7](#)} Additionally, employees who have official dealings, other than dealings consisting of routine provision of a service to an individual, with former public office employees who are or may be governed by the post-employment compliance measures of the Code must report those dealings to the Ethics Commissioner.^{[8](#)}

ENDNOTES

^{[1](#)} See Irene Wu and Cathleen Xue, *Decision-making procedures and ethics rules: the practical enablers of integrity and impartiality in*

telecommunications regulation, published by the Federal Communications Commission International Bureau, 15 August 2002, at 6. See also United Kingdom, Civil Service Management Code, Chapter 4, Section 4.3, Article 3, *available at* http://www.fcc.gov/ib/sand/globaloutreach/ria_project.html

² *Id.* Irene Wu and Cathleen Xue.

³ Brazil Code of Conduct for Senior Government Officers at the Federal Executive Branch, Commission of Public Ethics, approved on 21 August 2000, as submitted to the President of the Republic under Explanatory Memorandum No. 37 of 18 August 2000, *available at* http://www.presidencia.gov.br/etica/frame_conduta.htm

⁴ *Id.* Code of Conduct for Senior Government Officers, Article 15.

⁵ General Telecommunications Law, Law No. 9.472 of 16 July 1997, *available at* http://www.planalto.gov.br/ccivil_03/Leis/L9472.htm

⁶ United Kingdom, Civil Service Management Code, Chapter 4, Section 4.3, Annex A and Annex B.

⁷ Canada, Conflict of Interest and Post-employment Code for Public Office Holders, 2004, Part III, Article 29. The time period limitation may be waived or reduced by the Ethics Commissioner upon consideration of whether the public interest in granting the waiver or reduction outweighs the public interest in maintaining the prohibition. Some of the factors taken into consideration in waiving or reducing the time period limitation include: (a) the circumstances under which the termination of the employee's service in public office occurred; (b) the general employment prospects of the employee or former employee making the application; and (c) the significance of the information possessed by employee or former employee to the Government by virtue of the employee's public office.

⁸ *Id.*, Article 31.

7 Functional Aspects of Regulation

When measuring the effectiveness and independence of a regulator, it is necessary to look not only at the structural and organizational design, but also at the functional aspects of regulation. In addition to the institutional design, in order to regulate effectively, a regulator should possess the proper authority and competency to exercise its regulatory functions. The scope of the regulator's mandate should be clearly established, which can vary depending on the degree of independence of the regulator and its interaction with other entities responsible for the ICT sector, such as the sector ministry, as well as its institutional design. Effective regulation also requires that the regulator adopt and implement procedures that are transparent and open to public participation and ensure accountability. These elements encourage public confidence in the regulator, compliance with regulatory decisions, laws and regulations, and create an enabling environment conducive to growth and development in the sector.

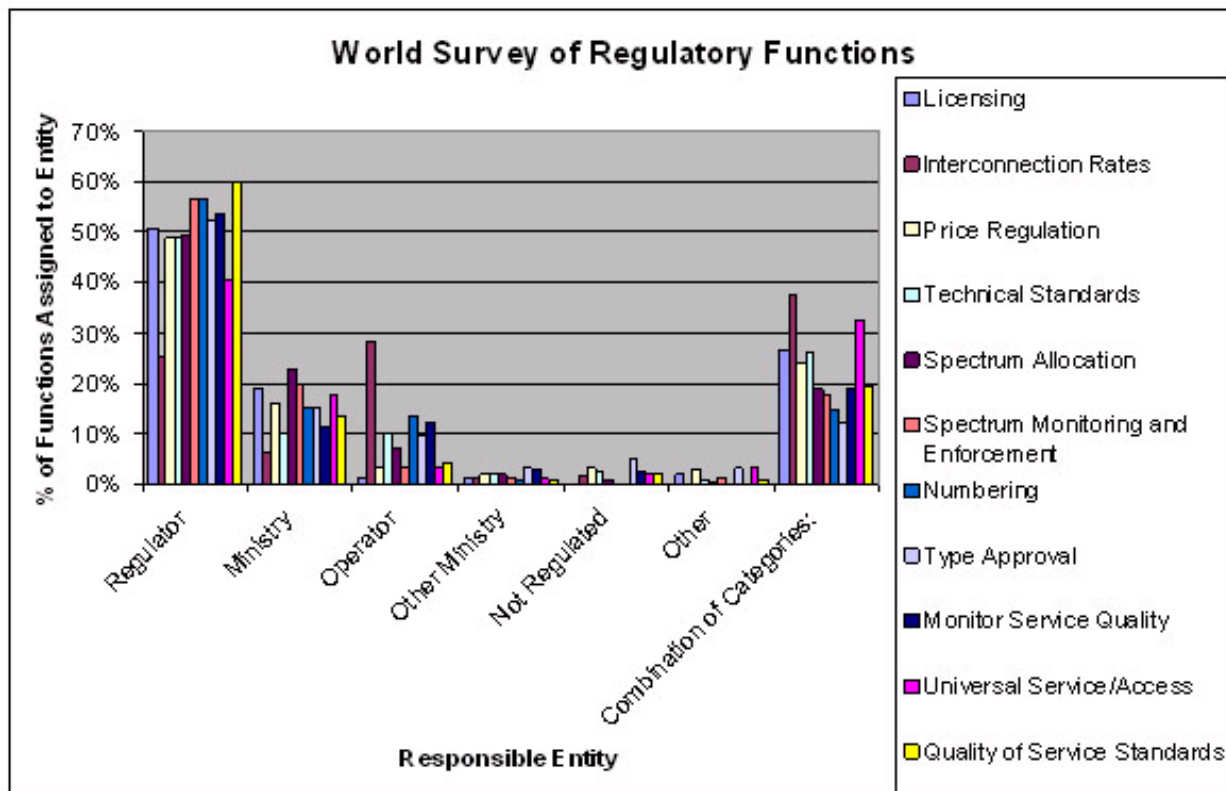
This Chapter provides an analysis and overview of the regulator's competencies and mandate, as well as regulatory procedures, focusing on three main issues: (i) ensuring an open participatory decision-making process through public consultations, (ii) ensuring the accountability of regulator's activities to the state and to consumers, and (iii) ensuring regulatory efficiency and promoting growth and competition of the sector through dispute resolution and enforcement procedures.

7.1 Overview of Regulator's Competencies and Mandate

Telecommunications regulators generally are granted authority to carry out a broad range of functions through legal instruments such as the telecommunications law, subordinate regulations, and government decrees. These functions include the authority to conduct rulemakings and issue regulations, grant licences and other authorizations, undertake adjudication and enforcement matters, as well as address various telecommunications issues, including interconnection, price regulation, numbering, and spectrum management.

In a global survey conducted by the ITU, 165 countries were asked to identify the government entity or agency responsible for 11 key telecommunications regulatory functions. The chart presented below (Figure 7-A) summarizes the division of responsibilities for these regulatory functions based on the 189 responses received.¹ Approximately 50 per cent of the respondents indicated that the telecommunications regulator has overall responsibility for the majority of the regulatory functions² whereas 25 per cent of the respondents indicated that the regulatory responsibilities were shared between the regulator and a designated ministry. Another 20 per cent of the respondents indicated that the ministry responsible for telecommunications was charged with fulfilling the identified regulatory functions.

Figure 7-A: World Survey of Regulatory Functions



Source: ITU World Telecommunication Regulatory Database 2005.

In Botswana, for example, the Telecommunications Act of 1996, as amended, grants the Botswana Telecommunications Authority (BTA) responsibility for promoting telecommunications, licensing, type approval, consumer protection, frequency management, price control, promotion and maintenance of competition, and settlement of disputes. In addition, the BTA advises the government on general telecommunications policy and acts as the government representative before regional and international bodies dealing with telecommunications matters.³

Similarly, in Taiwan, the 1996 Telecommunications Act specifies that the Directorate General of Telecommunications (DGT) is responsible for developing an integrated telecommunications development plan, supervising telecommunications enterprises, and promoting the development of an information society so as to enhance public welfare.⁴

The rapid development of the telecommunications and information technology sectors, as well as the evolution of convergence, creates an increasing number of responsibilities for regulators regarding the manner in which to regulate (*i.e.*, the appropriate structure and regulations), as well as the manner in which to treat new technologies and services. This has produced a need to reorganize administrative functions in the telecommunications sector. For example, as described in Chapter 6, many regulators are including information technology as one of the areas of focus, and therefore have created offices dealing with such issues. In other countries, regulators are also dealing with broadcasting issues. Moreover, in yet other countries, regulators are still charged with dealing with other sectors such as postal services.

ENDNOTES

¹ Some countries indicated more than one possible answer for each question, resulting in more responses received than countries surveyed.

² The two most notable exceptions are interconnection (where responsibility appears to be split between the operator and the telecommunications regulator) and universal service/access (where responsibility is more likely to be spread across several government entities, including the regulator).

³ See Botswana Telecommunications Authority.

⁴ Taiwan Directorate General of Telecommunications, available at <http://www.dgt.gov.tw/english/flash/index.shtml>

7.1.1 Rulemaking Function

The rulemaking function allows regulators to issue proposed regulations setting forth their intended procedures before issuing new rules and regulations. In order to fulfil this function, regulators must implement appropriate internal procedures that not only include detailed steps

to govern all aspects of the regulator's decision-making process, but also have the institutional capacity necessary to effectively handle all of its regulatory roles. The rulemaking function generally includes the following procedures: petitions for rulemaking; requests for declaratory ruling; complaint procedures; licence applications; licence modification requests; guidelines for interaction with members of the public and interested parties during consideration of a particular issue; procedures for the formal issuance and publication of decisions; and procedures for seeking formal appeal or reconsideration of regulatory decisions. Box 7-1 below describes the decision-making process of the FCC in the United States.

Many regulators have implemented detailed procedures which address each of the processes mentioned. A complete analysis of the decision-making and public consultation processes is included in Section 7.2.

Box 7-1: The rulemaking process of the Federal Communications Commission (FCC)

The rulemaking process consists of the following stages:

Preliminary Consultations

Petition for rulemaking: The initiative to change FCC rules and regulations, or to adopt new ones, originates from sources both within and outside the Commission. When submitted from outside the FCC, the interested party must file a "petition for rulemaking" requesting that the FCC undertake such action. If the FCC determines that the petition presents sufficient reasons to warrant the initiation of a rulemaking proceeding, an appropriate notice of the proposed rulemaking will be issued. In cases where the FCC determines that insufficient grounds exist for initiating a rulemaking proceeding, the petition will be denied and the petitioner will be notified of the FCC's decision along with the basis for the decision.¹

Petition for Declaratory Rulings: This procedure is one that may be utilized by members of the public who want the FCC to clarify the scope or application of an existing rule.

Notice of Inquiry (NOI): If the FCC is interested in a particular issue but has not formulated a specific rule change proposal, the agency may issue an NOI. In an NOI, the FCC generally asks interested parties to respond to specific questions regarding novel issues or concerns for which the FCC seeks further information before deciding on the appropriate course of action. For example, recent NOIs have addressed such issues as IP-enabled services and mobile termination rates. NOIs are initiated either in response to an outside request or by the FCC itself.

Rulemaking

Notice of Proposed Rulemaking (NPRM): When the FCC seeks to introduce changes to its rules, it issues an NPRM and seeks public comments on these proposals. NPRMs are publicly available, placed on the FCC website, and summarized in the Federal Register. A deadline is specified for both comments and reply comments. Interested parties may visit the FCC commissioners and staff to express views on the proceeding, but they must file an *ex parte* letter in the public record of the proceeding, detailing whom they visited and what they discussed. In any rulemaking where the FCC determines that an oral argument, hearing or any other type of proceeding is warranted, notice of the time, place, and nature of such proceeding will be published in the Federal Register.² After considering comments in response to an NPRM, the FCC renders its decisions in the form of a Report and Order (R&O). In the R&O, the FCC not only issues its final rules, but discusses and responds to comments submitted by interested parties. The R&O explains the FCC's decision and its rationale. It may develop new rules, amend existing rules or decide not to take any action.

Confidentiality request: If the public requests that the comments be withheld from public inspection, the documents must be clearly marked as "Confidential - Not for public inspection."

ENDNOTES

¹ 47 C.F.R. § 1.407 - Action on petitions.

² 47 C.F.R. § 1.423 - Oral Argument and other proceedings.

7.1.2 Oversight Function

This function consists of the regulator's ability to monitor the performance of telecommunications companies and ensure compliance with the telecommunications regulation and other subordinate rules. To ensure the effectiveness and transparency of the oversight function, regulators must put in place detailed subordinate guidelines such as dispute resolution and enforcement procedures.

Dispute resolution regulations generally include procedures for handling and resolving disputes between: (i) licensees and consumers; (ii) licensees, and (iii) the regulator and investors, operators or service providers.

Additionally, to ensure compliance and enforcement of regulations and licence conditions, the regulator must have the authority to investigate the activities and company records of all service providers when needed, and to impose penalties for violation of laws, regulations or licence conditions. This need is accentuated in markets transitioning to a competition market. Here, the regulator must focus on facilitating the development of the marketplace to ensure that the market power of previous monopolies, or dominant players, does not

damage the prospects and opportunities for commercial development in the sector by the newer participants. In these conditions, incumbents have clear incentives to delay the entry of such new market players (e.g., by obstructing interconnection) in order to prolong their dominance. Therefore, the overall success of a regulator's mandate is directly related to the adequate discharge of oversight powers in order to track the performance of incumbent operators, as well as their compliance with regulatory obligations.

Generally, regulations regarding monitoring and enforcement include procedures for conducting investigations regarding violations, determining fault standards, imposing penalties, requesting the regulator's review of enforcement decisions, and submitting appeals to the regulator or to the courts.

The following are examples of various procedures implemented by regulators as part of their oversight functions (Box 7-2):

Box 7-2: Procedure to request information from market players and the public

Regulators have implemented internal procedures and guidelines to ensure that information requests to stakeholders and the public are issued in accordance with pre-established parameters. These information requests are to effectively monitor and analyse telecommunications markets.

Peru

The regulator, Organismo Supervisor de Inversión Privada en Telecomunicaciones (OSIPTEL), has oversight functions that include the power to request information from both public and private parties. For instance, OSIPTEL may request telecommunications companies to provide information regarding items such as their financial records, customer contracts, and installed infrastructure. Any information provided to OSIPTEL in response to its request will be considered as having been submitted in the form of a sworn legal statement. If the information provided is incomplete, unclear or equivocal in any way, the providing party may be deemed in breach of its statutory obligation to supply information and documentation to OSIPTEL.^{[1](#)}

Portugal

Regulators have also implemented oversight procedures allowing their personnel to access a licensee's premises. Portugal's regulator, Autoridade Nacional de Comunicações (ICP-ANACOM), for example, has regulations governing the inspection of a licensee's premises or sites.^{[2](#)}

Article 12 - Exercise of Oversight

1. Under terms of the law, ICP-ANACOM may proceed with inquiries and tests at any site or entity within the scope of those functions.
2. For effects of the aforementioned paragraphs, ICP-ANACOM may accredit especially skilled or qualified persons or entities.

Article 48 - Supervisory Functions

ICP-ANACOM's workers, respective attorneys and the qualified and duly accredited personnel or entities who perform oversight functions, when exercising their functions, shall be considered agents of the authority and thus shall enjoy the following prerogatives:

- a. Access to installations, equipment and services of entities subject to inspection and control by ICP- ANACOM;
- b. Authority to requisition documents and analysis, as well as material to conduct tests;
- c. To identify, for subsequent action, all individuals who violate the laws and/or regulations whose observance they are obliged to respect;
- d. To demand the collaboration of the proper authorities when deemed necessary for the performance of their duties.

(a) Enforcement

The regulator must be given sufficient power to enforce telecommunications laws and regulations, and must have the ability not only to enforce rules of general applicability, but also to issue directions and mandate operators to carry out or to stop a particular activity. The Telecommunications Regulatory Authority (TRA) of Bahrain provides a good example of the necessary tools that regulators must have to carry out their responsibilities. Among other rights, the TRA has the power to:

1. Issue regulations, orders and determinations as necessary to implement the provisions of the Telecommunications Law;
2. Monitor and enforce compliance with licence terms;
3. In coordination with the Radiocommunications Authority, monitor and enforce spectrum usage in accordance with the Telecommunications Law and to ensure efficient spectrum usage;
4. Encourage, regulate and facilitate adequate access, interconnection and interoperability of services, including enforcing sharing of facilities and property by operators;

5. Examine complaints and resolve disputes between licensees, subscribers, and other interested parties, as well as take any necessary and proportionate measures in relation to such matters.³

Except in emergency cases, if a TRA enforcement action is expected to have a material impact on a particular telecommunications market, it must give affected parties an adequate opportunity to submit comments on the planned action.⁴

(b) Sanctions

The ability to sanction operators is closely related to enforcement and consists of the ability of the regulator to establish a fault standard for violations as well as the level of fine applied due to the violation. Most regulators' competencies include the ability to impose sanctions in order to enforce compliance with applicable laws, regulations, and licence conditions. See Section 7.4 for a detailed discussion on dispute resolution, enforcement, and sanctions issues.

ENDNOTES

¹ OSIPTEL Regulations Law No. 27336, Articles 16, 18 and 19, 5 August 2000.

² Portugal, Decree-Law no. 309/2001, 7 December 2001.

³ Bahrain, Legislative Decree No. 48 of 2002 Promulgating the Telecommunications Law, Chapter 2, Section 3 (c).

⁴ Bahrain, Legislative Decree No. 48 of 2002 Promulgating the Telecommunications Law, Chapter 2, Section 3 (f).

7.1.3 Licensing

In most countries, licensing is one of the primary functions of the regulator, although in certain countries, this responsibility falls under the jurisdiction of the sector ministry or is shared between the regulator and the ministry. Through licensing, governments often implement policies aimed at opening the market, providing services to underserved areas, modernizing telecommunications infrastructure, and supporting ICT policies. Licensing responsibilities generally include: preparation and publication of model licences; development of licence application guidelines and evaluation criteria; establishment of licence fees; and licence renewals. Recently, regulators have begun to re-examine their licensing practices as a result of increasing technology convergence and are moving towards unified or converged licensing models as discussed in Chapter 4.

As more regulators examine the need to adopt new licensing regimes in light of increasing liberalization and technological developments, it is critical to take into account and review the impact of the proposed new licensing regimes on the existing licensees and, in particular, any exclusivity provisions that were previously granted to incumbent operators. Usually, incumbent operators are concerned with issues such as licence parity; therefore, regulators are often faced with the challenge of facilitating the market entry of new service providers while at the same time addressing the acquired rights of existing operators.

In addition, when establishing licence award processes in cases where a beauty contest (comparative evaluation) process is used to select and award the licence to the best applicant, regulators should formulate objective and transparent evaluation criteria. Not only will transparent evaluation criteria be more attractive to potential new entrants, but these will also minimize the potential for unsuccessful applicants to appeal the licence award.

7.1.4 Competition Policy and Competitive Safeguards

Liberalization and increased competition in telecommunications markets require active regulatory involvement to provide new entrants with a level playing field when attempting to compete against well-established incumbent operators. Incumbent operators usually have substantial advantages, such as a legacy ubiquitous network that is largely depreciated, a substantial customer base, and market power. New entrants require assurances that adequate regulatory protection will in place so that the incumbent operators will not be permitted to engage in anticompetitive behavior or abuse their dominant position. Accordingly, regulators are generally given the power to establish competition policy and address anticompetitive practices in the telecommunications market. Regulations developed in this regard generally include elements such as market definitions, definitions of thresholds for market power, and accounting separation. See Section 3.3 for a detailed discussion on the relationship between competition policy and telecommunications regulation.

(a) Jurisdiction and Mandate over Competition Matters

Many regulators have explicit mandates in the telecommunications law to deal with anticompetitive practices in their sector. Nevertheless, countries frequently also have a separate competition authority with statutory responsibility for competition matters, generally in consultation with a sector-specific regulator. One example where this approach has been followed is Peru.

Although there is an established competition bureau, Instituto Nacional de Defensa de la Competencia y de Protección de la Propiedad Intelectual (INDECOPI), the telecommunications regulator Organismo Supervisor de Inversión Privada en Telecomunicaciones (OSIPTEL) was given primary responsibility to regulate anticompetitive behavior in the telecommunications sector. OSIPTEL's regulation states that "the

rules of free competition are ancillary to regulations issued by OSIPTEL within its areas of competence. In cases of conflict, the rules issued by OSIPTEL shall prevail.”¹

(b) Mandate to Issue Regulations on Competitive Safeguards

A major responsibility of a regulator in a liberalized telecommunications market is to ensure that operators with market power or dominance do not abuse their position with respect to their customers and existing and potential competitors. In the telecommunications industry, a dominant operator has the ability to control the essential facilities involved in interconnection unless measures are in place to restrict the operator from doing so. For example, the power to deny or overprice interconnection and network facilities gives a dominant service provider unfair and potentially insurmountable advantages over its competitors. Thus, safeguards must be designed to define, deter, and punish anticompetitive activities while at the same time creating an enabling environment that will attract the investment needed to establish competing ventures.

As telecommunications markets become more competitive, many ways exist in which dominant operators can engage in anticompetitive behavior (e.g., predatory pricing, cross-subsidization, price discrimination, discriminatory provisioning of network facilities, overpricing of essential facilities and other network elements and services provided to competitors, unfair trade practices, tie-in sales, and anticompetitive bundling). Regulators can anticipate many complaints from new entrants in this regard and it is extremely important that clearly defined rules are in place to deal effectively and transparently with such allegations.

Regulators have several tools to deal with competition issues. Competitive safeguards applied to dominant operators may be: ²

- structural, by requiring the establishment of a fully separate subsidiary to draw a clear distinction between the provision of competitive and non-competitive services;
- non-structural, such as accounting safeguards employing cost allocation rules for various services;
- conduct compliance requirements and specific obligations; and
- explicit pricing rules.

Finally, regulators must demonstrate their credibility from the outset when dealing with competition issues. This requires resources to thoroughly investigate cases brought forward by complainants as well as to initiate investigations in instances where the regulator determines there is a need to do so. Furthermore, regulators also require strong enforcement powers in order to impose penalties and apply remedies in proven cases of anticompetitive behavior. Without these powers, the regulator cannot adequately ensure that sufficient incentives and protection exist for potential new entrants and thus the market will not be fully competitive.

ENDNOTES

¹ OSIPTEL General Regulations D.S 008-2001-PCM, 2 February 2001.

² A complete analysis of the relationship between telecommunications regulations and competition policy is included in Section 3.4.

7.1.5 Tariff Regulation

Regulators must establish effective and transparent tariffing regimes in order to contribute to the orderly evolution to competition in the telecommunications sector. As markets become more competitive, tariff regulation becomes a less important regulatory function. However, when tariffs are still being set by the regulator, they should be set formally through the issuance of rules and other regulatory instruments. Additionally, before the market is fully competitive, regulators usually apply different tariff regulations on non-dominant operators versus dominant operators. In order to ensure that fair competition can develop, non-dominant operators are generally subject to less onerous tariff regulations. Dominant operators, on the other hand, can be subject to *ex-ante* tariffing regulation. For example, dominant operators may be required to submit their tariffs for regulatory approval, whereas non-dominant operators may be subject only to publication requirements.

A fundamental reason for tariff regulation is to prevent the abuse of dominance. There are two market situations in which tariffs are required to address dominance: non-competitive or monopoly markets and competitive markets. For service markets in which a dominant operator does not face effective competition, the regulatory concern is that prices will be set substantially above cost so that the operator earns a monopoly level of profit. In this circumstance, regulators have historically used “rate of return” regulation, which establishes the maximum return on capital invested, or increasingly, regulators have imposed a price cap regime (with or without consideration of the rate of return), which provides some level of incentives for operators to function efficiently and reduce costs. Price cap regulation involves the regulator creating “baskets” of services that are non-competitive. The composition of such baskets tends to vary by country to reflect individual market circumstances. Some examples of possible “baskets” of services include: basic services; basic and mobile services; basic local service; and local and access service.

For those markets in which a dominant operator faces competition, especially in the early stages of liberalization, the regulatory concern shifts to anticompetitive pricing tactics (e.g., predatory pricing and cross-subsidization) that are intended to weaken or damage new entrants. In this case, the concern is that retail prices for some services will be set below cost by a dominant carrier. Many regulators have explicit prohibitions regarding anticompetitive pricing, particularly predatory pricing.

For example, Singapore's regulator, Infocomm Development Authority (IDA) requires dominant carriers to provide telecommunications service on terms and conditions that are just, reasonable and non-discriminatory and pursuant to filed tariffs. A dominant carrier may not abuse its market position by, for example, setting prices at levels that are so low so as to unreasonably restrict competition. The IDA¹ utilizes a three-pronged test for predation, namely whether:

- the dominant carrier is selling service at a price below marginal cost;
- there is a likelihood that such price cutting will drive efficient rivals from the market or deter future efficient rivals from entering the market; and
- entry barriers are so significant that, after driving rivals from the market or deterring entry, the dominant carrier could impose price increases that would be sufficient to recapture the full amount of the loss that it incurred during the period of price cutting.

After making a determination of dominance, all regulators should adopt consistent principles and procedures to ensure that prices are just and reasonable, which is often expressed as "cost-based" prices.

Implementation of such tariff-fixing processes and procedures also requires that the regulator establish or approve a cost accounting system and allocation regime so that all of a dominant operator's costs that relate to regulated services are identifiable and consistent with the cost accounting system.

ENDNOTES

¹ Singapore, Code of Practice for Competition in the Provision of Telecommunications Services, Section 8.2.1.1, 18 February 2005.

7.1.6 Interconnection

Regulators play a critical role in overseeing interconnection. In most cases, they must review relevant economic principles regarding interconnection pricing, analyse and propose interconnection costing approaches, develop common cost models to be utilized by all operators, and develop interconnection guidelines and regulations. Interconnection is often the most contentious regulatory issue given its fundamental impact on the overall operation of competing telecommunications networks. It is also one of the most important regulations to put in place before competition can be successfully introduced. To facilitate competition, regulators must ensure that the interconnection framework is clearly defined and that interconnection charges between networks are based on objective, economically sound, and solidly substantiated costs.

As with tariff regulation, before the market is fully competitive, interconnection regulation is generally applied asymmetrically on dominant versus non-dominant operators to ensure that non-dominant operators have access to interconnection services controlled by dominant operators. Generally, dominant operators are required to publish reference interconnection offers and interconnection agreements, which serve to inform and facilitate interconnection by new entrants and other non-dominant operators, and to discourage discriminatory behaviour by dominant operators in providing interconnection.

Investor concerns regarding interconnection regimes have grown steadily over the last five years due in large part, but not limited to, numerous problems encountered between mobile operators and fixed line service providers. In the early days of competition, regulators often have difficulty in establishing adequate interconnection guidelines for mobile-to-fixed and mobile-to-mobile calls. Many investors have suffered financially as a result and thus are more diligent about ensuring that the interconnection regime is economically sound and supported by a clear regulatory position.

In this era of convergence, regulators are facing new issues such as how to transition different rights of individual groups of licensees under a specific interconnection regime to a unified licensing regime. Finally, regulators are also facing the challenge of how to address the complexities created by a multiplicity of operators utilizing a variety of technologies interconnecting among themselves. In the ITU-D study group question on interconnection, for example, the participants studied possible solutions to this issue, including the interconnection gateway exchange and interconnection billing clearing house.¹

ENDNOTES

¹ ITU-D Study Group 1, Report on Interconnection - Question 6-1/1, 3rd Study Period, Annex VI - Possible Solution for Interconnection in Multi-Operator and Multi-Service Scenario through an Interconnection Gateway Exchange and Interconnection Billing Clearing House.

7.1.7 Quality of Service – Regulatory Roles and Responsibilities

Often, a regulator's responsibility is to establish quality of service (QoS) guidelines or parameters, as well as the methods and procedures for monitoring operators' performance against these established parameters. The fundamental objective in establishing QoS targets and reporting is to ensure that the general public (*i.e.*, the consumer) is served and, at the same time, that the operator is not impeded from carrying out day-to-day operating routines as a result of excessive reporting requirements. The level of regulatory intervention with respect to QoS is often dependent on the degree of competitiveness that is present in the market. Generally, the regulator takes a more hands-off the approach with respect to QoS monitoring and reporting requirements if a market is highly competitive. Nonetheless, the

reporting and the report analysis process should not be too onerous for either the operator or the regulator irrespective of market conditions. In addition, it also should be developed in consultation between the operators and the regulator to establish realistic benchmarks and make the process manageable and useful in identifying areas where the consumer is receiving inadequate service levels.

Although different approaches have been adopted in various jurisdictions, the regulatory goal should be to ensure: (i) the delivery of acceptable service for the telecommunications user; and (ii) that consumers are aware of the variations in performance from various service providers/operators thereby allowing them to make an educated choice regarding their preferred service provider. QoS indicators are one of the most effective regulatory tools in this regard.

Ultimately, consumer should reap the benefits from the enforcement of QoS regulations. In certain instances, for example, operators opt to run the risk of incurring a penalty as opposed to investing to improve the QoS. In such cases, the imposition of monetary fines does not result in any direct benefit to consumers. On the other hand, consumers may benefit directly when the penalty for violating QoS standards is, for example, to provide consumers with services free of charge; to give the consumer retroactive rebates as compensation for the poor QoS; or to move them up to the top of a waiting list for the provision of services.

7.1.8 Consumer Protection

The development of consumer protection regulations are necessary to ensure that when dealing with telecommunications operators, the rights of consumers are protected. Consumer protection regulations must establish the telecommunications operators' obligations regarding their customers. Operators' obligations should include, but are not limited to, items such as: timely and accurate billing; customer contract policies and procedures, protection of consumer privacy; and terms of reference for suspension of service. These regulations also need to take into account procedures necessary to respond to and resolve users' claims and to ensure that the relationship between telecommunications users and operators are fair and equitable. For the discussion on procedures to address consumer protection, see [Section 7.3.2](#).

7.1.9 Establishment and Management of Universal Service Funds

Regulators must be empowered address universal service¹ and universal access issues.² The means to achieve universal service are frequently addressed through the establishment of a Universal Service Fund (USF) that provides and maintains telecommunications services in those areas of a country where service provisioning is challenging due to physical and economic restraints and thus, is less commercially viable.

(a) Establishment of Universal Service Funds

A primary goal of any telecommunications regulator is to make certain that telecommunications services are accessible to the widest number of users at the lowest cost. A common mechanism used to help achieve this goal is the creation of universal service/access development funds. These funds are being used increasingly in competitive markets given that former monopoly operators are prohibited from using cross-subsidization to meet their universal service obligations.

In most countries, establishing the objectives and priorities of the USF is the role of the government as policy-maker in close cooperation with the regulator. Regulators, in turn, are generally responsible for implementing the USF and therefore must develop appropriate guidelines that comply with the policy-maker's goals and objectives, but also enable the regulators to make decisions and carry out their duties regarding the establishment and management of the USF.

The following is an example of Uganda's innovative USF program (Box 7-3).

Box 7-3: The Rural Communications Development Fund (RCDF) of Uganda

The RCDF was created in 2001 by the Uganda Communications Commission (UCC) as part of its Rural Communications Development Policy. Its purpose is to support the development of a commercially viable communications infrastructure in rural Uganda to promote social, economic, and regional equity in the deployment of telephone, Internet, and postal services. The fund's objectives include providing access to basic communications services within a reasonable distance to all Ugandans; ensuring effective utilization of the RCDF to leverage investment in rural communication development; and promoting ICT usage in Uganda.

In particular, the RCDF fund's objectives are to:

- ensure that all sub-counties with at least 5,000 inhabitants have access to basic communications services by 2005;
- ensure that the limited resources of the RCDF were effectively utilized to create an immediate impact;
- support the creation of an Internet Point of Presence (PoP) in every district of Uganda by 2003, where each PoP would be linked to at least one Internet cybercafe;
- increase the use of ICTs in Uganda by supporting the introduction of ICT use in at least one "vanguard" institution in every district of Uganda by 2003; and

- promote the provision of communications services in rural areas as a profitable business.³

(b) Management and Administration of the USF

In addition to establishing the USF, the regulator must put in place the necessary procedures to manage and administer funds. The following are examples of countries that have implemented procedures for the management and administration of USFs.

In Taiwan, for example, the Directorate General of Telecommunications (DGT), a division of the Ministry of Transportation and Communication (MOTC), administers and manages the Universal Service Fund. The DGT oversees the affairs of the fund through the Universal Service Fund Administrative Committee, composed of seven to eleven members from agencies, academia, and sector experts. The Director General of the DGT is the chairman of the committee, and other members of the committee are selected by the DGT. The main functions of the committee include: assessment of the annual implementation plans and subsidy applications for universal service; assessment of the revenues as reported by contributing parties; auditing and calculation of the contribution proportion and amount to be made by contributing parties towards universal service charges; auditing and assessment of the Telecommunications Universal Service Fund; evaluation of the universal service regime; and other matters related to universal service in Taiwan.⁴

Similarly, in Chile, the Telecommunications Development Fund (FDT) is managed by the Telecommunications Development Council, a group composed of three ministers (including the Minister of Transportation and Telecommunications who acts as Chairman of the Council) and three telecommunications experts representing different regions of the country. However, unlike Taiwan, the Council is supported by the regulator, SUBTEL, and the Council's members include a broader group of government representatives. Each year, the Council is responsible for: (i) determining the criteria SUBTEL will consider when evaluating projects; (ii) carrying out the annual agenda of projects to be tendered and those being subsidized, as well as establishing their priorities and the subsidies necessary for their execution; and (iii) determining, through public tenders, the disbursement of funds for subsidies for projects to be carried out. The Council can request necessary information from regional, provincial or community authorities. Once a project is selected, the Council forwards all relevant information to SUBTEL for the regulator to issue the pertinent authorizations. The Council also is responsible for preparing and distributing the FDT's annual report that allows for periodic assessments of the fund.⁵

ENDNOTES

¹ Universal service policies generally focus on achieving or maintaining “universal availability” of connections from individual households to public communications networks. See International Telecommunication Union, *Trends in Telecommunication Reform: Effective Regulation*, 2002.

² Universal access describes the situation in which every person has a reasonable means to access a publicly available telephone in their community but not necessarily in their home. See International Telecommunication Union, *Trends in Telecommunication Reform: Effective Regulation*, 2002.

³ UCC District Information Portal, *About the RCDF*, available at <http://www.dip.go.ug/english/rcdf.php>; and UCC Rural Communications Development Policy for Uganda, July 2001.

⁴ DGT/Ministry of Transportation and Communications of Taiwan, Regulations on Telecommunications Universal Service (unofficial translation), June 2001.

⁵ SUBTEL Decree No. 37.146 4, Regulations for the Fondo de Desarrollo de las Telecomunicaciones, December 2001.

7.2 Decision-making Process and Consultation Framework

The principles of good regulatory decision-making are universal: (a) transparency; (b) objectivity; (c) professionalism; (d) efficiency; and (e) independence.¹ Although all of these principles are necessary for successful regulation, transparency is particularly critical, as it provides accountability and legitimacy to regulatory decisions. In the context of telecommunications regulation, transparency refers to the openness of the process of exercising regulatory power, which, in turn, ensures the fairness, accountability and credibility of the results.² Box 7-4 below provides a summary of the benefits of transparent regulation.

Box 7-4: Benefits of Transparent Regulation

- 1. Efficiency and Effectiveness** – Open processes enhance consensus and create confidence in the regulator. Increased public participation promotes diverse ideas in decision-making and increases support for rules and policies, making implementation easier. In addition, transparency can lead to greater efficiency by ensuring that duplication of functions is avoided.
- 2. Certainty and Reliability** – Regulatory credibility and legitimacy builds stability, essential for attracting investment. This is particularly important in newly liberalized markets, where potential entrants need to trust that their investments are protected from arbitrary action and that further commercial development will not be thwarted by sudden changes to “the rules of the game.”

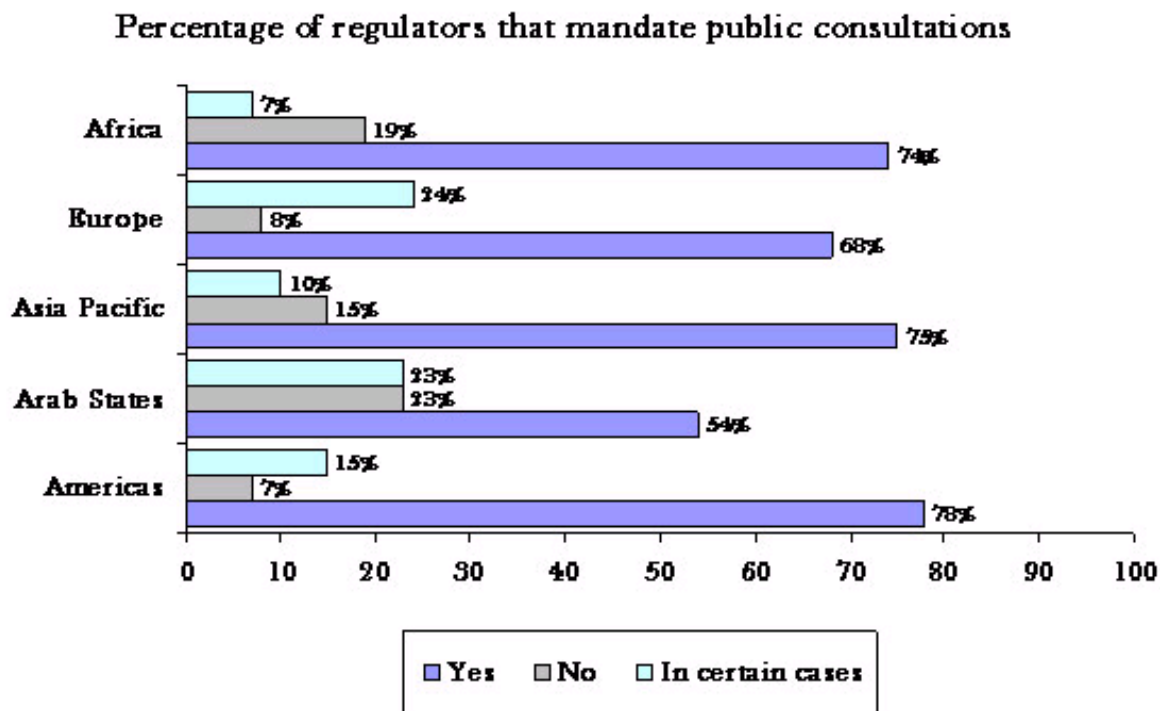
3. **Accountability and Independence** – Openness promotes accountability and legitimacy, reinforcing regulatory independence and reducing political and industry interference. Stakeholders will have confidence that their views will be heard, without bias, by the regulator. Where regulatory actions are exposed to public view, regulators are more likely to engage in careful and reflective decision-making.

4. **Continuity** – A stable set of rules governing transparency will transcend political changes and outlast political appointments, ensuring a continuous regulatory record regardless of who is in charge of the regulatory agency or which political party is in office.

Source: ITU – *Trends in Telecommunication Reform 2002*, Chapter 6.

A common way to foster openness in the regulatory process is to engage in public consultation before making decisions, thereby ensuring the participation of the general public, industry and others in the outcome of the decisions. Holding public consultations are not required in all countries, but most regulators have adopted some form of consultation process (Figure 7-B), e.g., before adopting policies, creating regulations or issuing licences.³ See, for example, the consultation procedures for [Hong Kong \(SAR\)](#), [St. Vincent and the Grenadines](#), and the [United Kingdom](#) (in the online practice notes), which are illustrative of the public consultation procedures adopted by regulators in many countries.

Figure 7-B: Percentage of Regulators Worldwide that Mandate Public Consultation



Source: ITU World Telecommunications Regulatory Database 2005.⁴

In some cases, public consultations are not undertaken due to lack of resources or other immediate constraints that make it difficult to hold them. In Botswana, for example, when the Telecommunications Regulations were promulgated in 1997, the regulator did not include public consultations because it did not have sufficient staff resources to conduct consultations and it had a tight timetable. In subsequent years, however, the regulator added extra staff and developed more expertise, so that in 2000, the Botswana Telecommunications Authority (BTA) prepared its first consultation document on telecommunications services pricing.⁵

Other countries mandate public consultations in certain occasions. In Bahrain, the Telecommunications Law requires that, except in emergency cases, the Telecommunications Regulatory Authority (TRA) must provide interested parties the opportunity to present their opinions within a reasonable period on measures having a material effect on the telecommunications market. Procedurally, the TRA issues a bylaw regarding such consultations ensuring that the public is informed from a single information source of the ongoing consultations, excluding confidential information.⁶ The EU Framework Directive mandates national regulatory authorities of member states to publish their consultation procedures and the subsequent results when they intend to take measures in accordance with the Directive or other directives that have significant impact on the relevant market. This is intended to ensure that interested parties are given the opportunity to comment on the draft measure within a reasonable period.⁷

Where the requirements for holding public consultations are mandatory, the legislation typically specifies the particular instances when

public consultations are compulsory and must be held by the regulator. For example, in Portugal, the Electronic Communications Law specifies that the regulator, the Autoridade Nacional de Comunicações (ICP-ANACOM), has discretion to determine matters that are subject to formal written public consultations, except for the following:⁸

- Change in the conditions, rights and procedures applicable to the exercise of the activity;
- Limitations on the rights to use frequency;
- Allocation of rights to use numbers that are exceptionally valuable through competitive or comparative selection procedures;
- Definition of quality of service parameters;
- Release from the obligation to offer additional resources;
- Definition of portability regulations;
- Definition of the relevant markets for products and services, determination of a relevant market as being effectively competitive or not, identification of companies with significant market power in the relevant markets, and the imposition, maintenance, change or elimination of obligations by companies with or without significant market power;
- Definition of carrier selection and pre-selection regulations;
- Definition of obligation pertaining to the universal service providers applicable to the offer of public telephones;
- Definition of the terms and conditions of the service offers specifically for people with disabilities;
- Definition of the performance objectives applicable to universal service obligations.

Although public consultation procedures can vary from country to country, minimum procedural safeguards are generally instituted to make sure that there is maximum participation in the decision-making process, such as: issuing public notice of consultations; allowing for a proper comment and reply comment period; and publishing the consultation results and final decisions.

ENDNOTES

¹ *Telecommunications Regulation Handbook*, InfoDev, Module I, Section 1.3 (2000).

² International Telecommunication Union, *Trends in Telecommunication Reform 2002: Effective Regulation*, Chapter 6, (2002).

³ *Id.*, at Section 6.1. "It is worth noting that many regulatory authorities are not bound by explicit statutory requirements to follow transparent procedures. Even so, many agencies are engaging in public consultation voluntarily."

⁴ ITU survey on Public Participation. In the Americas, out of the 31 countries surveyed, 27 countries responded, resulting in a response rate of 87 per cent. In the Arab States, 13 responses were received out of 19 countries surveyed, resulting in a response rate of 68.4 per cent. 28 countries were surveyed in the Asia Pacific region, and 20 countries responded, resulting in a response rate of 71.4 per cent. In Europe, 45 countries were surveyed, and 38 responded, resulting in a response rate of 84.4 per cent. In Africa, 41 countries were surveyed, but only 27 countries responded, resulting in a response rate of 65.8 per cent.

⁵ ITU Effective Regulation Case Study: Botswana (2001).

⁶ Bahrain Telecommunications Law, Legislative Decree No. 48 (2002), Art. 3(f).

⁷ Council Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), Art. 6, 7 March 2002. The exceptions to the public consultation requirement include: (a) exceptional circumstances where there is an urgent need to act, (b) dispute resolution between undertakings, and (c) resolution of cross-border disputes.

⁸ ICP-ANACOM Consultation Procedures, adopted pursuant to the Electronic Communications Law no. 5/2004 available at <http://www.anacom.pt/template12.jsp?categoryId=95282>.

7.2.1 Overview of the Public Consultation Process

Public consultations can take different forms depending on: the nature of the issue being consulted; the number of people that could be affected by the decision; the impact on the market; and whether a formal written consultation process is mandated by legislation. Public consultations can range from informal meetings to more formalized and structured written consultations. Some of the forms of public consultations used by regulators are:¹

- Formal invitations for written submissions;
- Individual meetings with one or more interested parties;
- Meetings, seminars, and workshops with representative groups and other interested parties;
- Issuing draft documents containing the preliminary view of the regulator and soliciting comments from the public at large before taking a final decision;
- Public hearings;
- Surveys;

- Consultation with independent advisers; and
- Discussions and consultation with regulatory professionals and regulatory institutions in other jurisdictions.

Generally, regulators use formal written consultation procedures as a minimum safeguard to ensure public participation in its decision-making process, but often supplement this process with informal consultation methods such as public hearings or surveys. (Box 7-5 summarizes the objectives for holding public consultations.) For example, in Peru, the Board of Directors of the regulator, Organismo Supervisor de Inversión Privada en Telecomunicaciones (OSIPTEL), may form ad hoc consultative committees, composed of experts who, due to their authority, knowledge, and representation on the consultation issue can assist in the discussion or treatment of the regulatory initiative. Similarly, Hong Kong's (SAR) Office of the Telecommunications Authority (OFTA) has formed various advisory committees composed of members of the public, industry professionals and representatives of other government departments, from whom it can seek opinions during public consultations. Additionally, OFTA will also form ad hoc work groups and committees to discuss specific issues from time to time that fall outside of the purview of the advisory committees.²

Many regulators find the written consultation process to be the most efficient means of conducting a public consultation. The U.K. regulator, The Office of Communications (Ofcom), will usually engage in a formal consultation process to seek written views of the public. However, recognizing that formal consultation has its limits in reaching smaller businesses or community groups or individuals who lack time and specialist skills, Ofcom supplements the formal written consultation with other methods of gathering information, such as running road shows, open meetings, online bulletin boards, or organizing focused discussion groups.³

Box 7-5: Objectives of a Public Consultation

1. To obtain input, information and feedback from persons affected by the proposed decision, other stakeholders and the public so as to ensure that consumers have the best telecommunication services possible in terms of choice, quality and value for their money.
2. To acquire substantive information and knowledge from stakeholders, regulatory and industry professionals and other regulatory institutions so as to effect an orderly transition to a fully liberalized and competitive marketplace.
3. To ensure that the Commission has investigated all aspects of an issue; and
4. To ensure transparency of decisions of the Commission.

Source: Anguilla, Administrative Procedures Regulation, 2004.

The general public consultation process is based on a three-stage process, which can incorporate both informal and formal procedures depending on the nature of the proceeding.⁴ (See Figure 7-D.) In the first stage, an issue is identified and the regulator issues a formal consultation document soliciting public comment. This is followed by a comment period in the second stage. In addition to the receipt of written comments, the regulator may use the comment period to engage in informal consultations as well, such as public hearings, to gather additional information or clarify information that it receives. In the last stage, the regulator makes a decision based on public policy and the information received.

1. Public Notice of Consultations

In the first stage, the regulator issues a formal consultation paper after identifying and formulating an issue. The decision-making process is typically initiated by either the regulator or by an interested person requesting a formal consultation.⁵ For example, in the United States, the Federal Communications Commission (FCC) allows interested members of the public to file a Petition for Rulemaking requesting the FCC to amend an existing rule or to develop a new rule.⁶

The regulator can use this initial stage to conduct informal consultations on more complex issues to help it formulate the issue for the finalized consultation document. For example, in Hong Kong (SAR), prior to the OFTA consultation proceeding on the Interconnection and Related Competition Issues, OFTA provided written notice to all local fixed network operators informing them of its intent to initiate the review and inviting them to raise additional issues related to interconnection so that they could all be resolved in a single proceeding. Only after reviewing the responses received did OFTA issue a formal consultation paper outlining the specific issues and its own preliminary views on the issues.⁷ In the United Kingdom, Ofcom may hold informal talks with individuals and organizations before announcing a formal consultation. If Ofcom does not have enough time for the informal talks, it may hold an open meeting to explain its proposal and gather comments before announcing the consultation.⁸ The FCC in the United States sometimes initiates a Notice of Inquiry (NOI) to invite public comments and information about specific topics when it is interested in a particular issue but has not formulated a specific rule change proposal. NOIs are used by the FCC to gather information about a broad subject or as a means of generating ideas on a specific issue.

Publication of the Consultation Notice

Today, most regulators post consultation documents on their websites, in addition to publishing them in a government gazette or other official publication, or disseminating the documents through other forms of media such as newspapers, television or radio. In South Africa, the Telecommunications Act requires a three month's notice of the proposed adoption of a regulation, which must be published in the national Gazette.⁹ In Bahrain, the TRA publishes public consultation documents on its website, and may use other means to keep the public informed of ongoing consultations, including publication in the national or international media and/or sending individual notices to potentially interested parties.¹⁰ Some regulators, such as the Canadian Radio-television and Telecommunications Commission (CRTC), also maintain a

mailing list of individuals who wish to be contacted when certain activities occur, such as when licence applications are filed. The regulator will inform those on the mailing list where they can inspect the filings and submit comments.¹¹ Box 7-6 provides an example from the CRTC illustrating the different methods that regulators use to inform stakeholders regarding public consultation proceedings.

Box 7-6: Finding Out about Canadian Radio-television and Telecommunications Commission Public Processes

The different ways that one can find out about CRTC public proceedings are:

1. **Official CRTC announcement** – These are available from any CRTC office and the CRTC website. Official announcements about broadcasting applications or issues also appear in the Canada Gazette.
2. **Information sheets** – The CRTC sends these to target groups and, in rural communities, ensures they are posted in rural post offices.
3. **Newspaper advertisements** – In affected communities, the CRTC places advertisements in newspapers of general circulation as well as community papers.
4. **Public Service Announcements** – These are made on the cable community channel serving the affected area.
5. **Billing Inserts** – These allow telephone companies to inform subscribers about CRTC public processes that involve them.
6. **Tariff Notices** – These are filed by telephone companies and are available from any CRTC office and the CRTC website.

Source: Adapted from the Canadian Radio-television and Telecommunications Commission. Content of the Consultation Document.

At a minimum, the public consultation document should contain the following information: (a) purpose of the consultation and substance of the proposed decision or description of the subjects and issues involved; (b) consultation timeframe and deadline for submitting comments; (c) contact name and details of how and where to submit comments; (d) reference to the authority under which the consultation matter is proposed; and (e) information on the regulator's next steps following the consultation and/or where and how to obtain further information.

For example, in the United States, the FCC is required to provide the following information in a Notice of Proposed Rulemaking (NPRM): (a) statement of the time, nature, and place of any public rulemaking proceeding to be held; (b) reference to the authority under which the issuance, amendment or repeal of a rule is proposed; (c) either the terms or substance of proposed rule or a description of subjects and issues involved; (d) docket number assigned to the proceeding; and (e) statement of the time for filing comments and replies.¹² The FCC requirements are typical of the contents of a consultation document issued by regulators worldwide.

2. Consultation Period

In the second stage, interested parties submit comments on the issue under consultation. The regulator's goal is to gather as much relevant information as possible so that it can make an informed decision, taking into account the information provided by interested parties. To make the consultation more efficient, the regulator should establish a schedule for submissions of comments in the consultation document. Timeframes for submission of comments can vary depending on the complexity or urgency of the issue, and the overall effect of the proposal on the market. For instance, in Bahrain, parties are allowed at least 28 days from the date of publication of the consultation to submit comments. In Portugal, the comment period cannot be less than 20 days. In the United Kingdom, 10 weeks are usually allowed for responses on more complex issues and five weeks for shorter consultations. If Ofcom conducts shorter consultations, it will issue an explanation (e.g., the issue or community involved is small or only affects a particular group, the proposal is a limited amendment to existing policy, an issue requires urgent review, or it is the second consultation on the same issue.)¹³

When deciding how long a consultation period should last, regulators should balance the need to deal with an issue as quickly as possible with the need to allow enough time for the public to prepare and their responses. If the consultation period is too short, the public may not have enough time to prepare their submissions. On the other hand, if the consultation period is too long, the relevant market may have changed significantly from the time the issue under consultation was identified.

Some regulators, such as the TRA in Bahrain, will not accept unsolicited comments. They will only accept comments in response to a notice of consultation. In the absence of a notice of consultation, however, an interested party may submit comments where such party can show that the particular measure that forms the subject matter of the comments will have a material effect on a particular telecommunications market.¹⁴ In addition to initial comments, some regulators, such as the FCC in the United States and the NTRC in St. Vincent and the Grenadines, specifically allow for reply comments¹⁵ while other regulators, such as the TRA in Bahrain usually only invite a single round of comments per consultation.¹⁶ The benefits of allowing replies to comments are that it allows interested parties to challenge the comments made by others, and also provides the regulator with additional information regarding the issue under consultation.

Submission of Comments

The goal of the consultation process is to gather as much information as possible; therefore, the regulator should make it easy for the

public to submit their comments. Most regulators encourage the use of the Internet for electronic submissions, as well as submissions in writing by fax and standard mail.¹⁷ Some regulators specify the particular format for written submissions.

Publication and Confidentiality of Information

To maintain transparency throughout the consultation process, regulators should publish comments so that they are publicly accessible either online or at the regulator's office. This assures the public that their submissions have been received and allows them to view the comments of other parties. It also facilitates "buy-in" or "consensus building" within the industry, thereby facilitating compliance with the proposed rule.¹⁸ In Brazil, Anatel's consultation documents and related public comments are available on the regulator's website, where it maintains a virtual library of all of its regulatory proceedings.

Regulators, however, need to maintain a just balance between the requirement for a transparent public record and the need to respect confidential information from parties. Most regulators will post public comments received in a consultation process, or summaries of such comments on their websites, omitting any confidential information. Recognizing that companies may be reluctant to submit information considered commercially confidential, most regulators, including [Singapore¹⁹](#) and [Bahrain²⁰](#), have implemented regulations regarding treatment of confidential information. Usually, regulators will require persons requesting confidential treatment of information to submit an abridged version to be circulated publicly. In some cases, such as the NTRC in St. Vincent and the Grenadines, the regulator will allow for anonymous respondents, provided that such persons employ the services of a lawyer to respond on their behalf.

Many regulators also have rules regarding *ex parte* (private) communications during a pending proceeding. Regulators should maintain transparency and fairness in the regulatory proceedings by giving equal access to all stakeholders and preventing any one single person from having an advantage in influencing the regulator's decision through secret or private contacts. *Ex parte* rules can ensure transparency in the decision-making process by requiring all communication made by the public to the regulator to be published and accessible to other stakeholders, and ensuring that all stakeholders are informed whenever one party has an undisclosed meeting with the regulator. Regulators also may exempt certain communication from *ex parte* rules, such as inquiries about the status of a decision (as opposed to arguments for or against a certain action or decision), inquiries about procedural rules (so long as the rules are not themselves the subject of the proceeding) and statements that are inadvertently or casually made about a pending issue.²¹

Public Hearings

During the consultation period, the regulator has the flexibility to use other informal means of gathering additional information or clarifying the information it receives, such as seminars and workshops, visits by or to representative groups and interested parties, Internet discussions, surveys, and public hearings. A common informal consultation procedure is the public hearing, which is open to all interested parties so that they may express their views in person. The CRTC in Canada generally relies on the public hearing process when dealing with applications for new broadcasting licences and when considering a major policy issue or amendment to its regulations.²²

Before holding a public hearing, the regulator should make the details of such meetings publicly available on their website or published in a newspaper, or announced on television or radio. In addition, in order to enhance transparency in the consultation procedure, if possible, public hearings should be recorded and transcribed so that they are publicly available. Brazil's regulator, Anatel, and the FCC in the United States both post the agendas, schedules and subsequent minutes of public hearings on their websites. The FCC also "webcasts" its hearings and meetings on the Internet. On the other hand, the Telecommunications Authority of Turkey does not usually keep the minutes of the public hearings because "it causes a formal mood preventing a sincere and efficient discussion."²³

In Peru, OSIPTEL organizes public hearings before adopting normative and regulatory decisions. The procedure for public hearings is summarized as follows:²⁴

- The discussion time lasts a maximum of two hours.
- Participants must register before entering the meeting, providing their company name or the institution that they are representing.
- The participants speak according to the order on the registration list. Each participant has a maximum of three minutes to speak. In the case of companies or associations, only one representative (the first registered participant) is allowed to speak, unless the moderator permits additional representatives to do so and sufficient time is available.
- The number of rounds or times that participants are allowed to speak depends on the number of participants who have registered.
- Comments or objections must address the specific subject of discussion.
- The moderator has the right to preserve the orderly development of the discussion, and may interrupt a participant if the commentary is not related to the topic of discussion or the participant's time has passed.
- The public hearing is filmed and transcribed.
- The public hearing concludes once all registered participants have spoken or the scheduled time has expired.

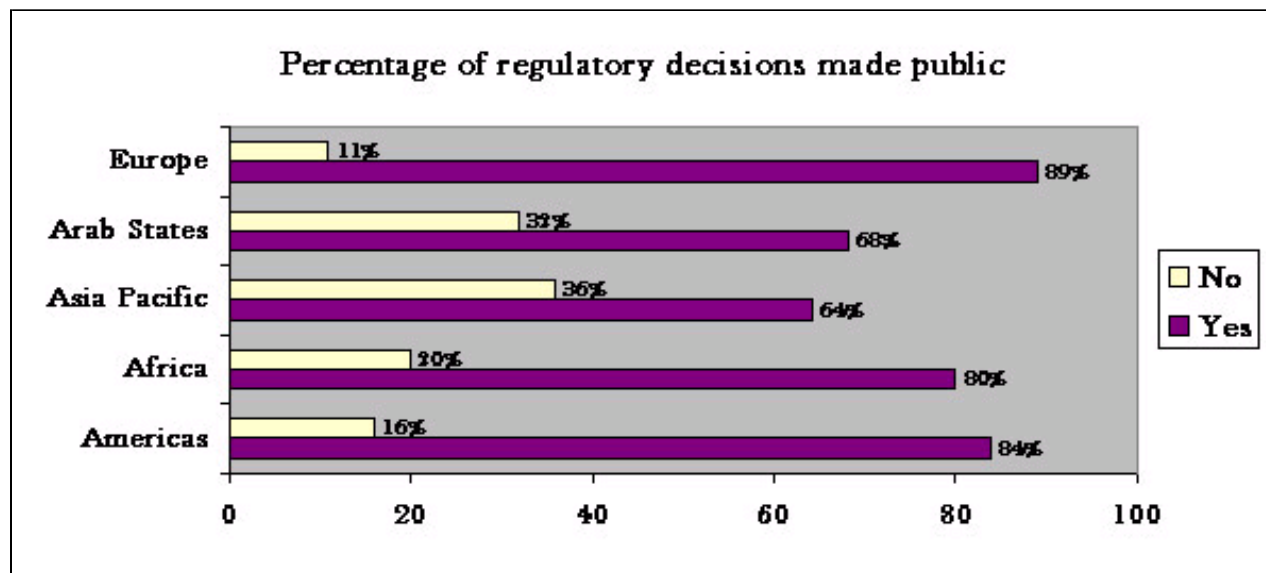
3. Publication of Final Decision

After the conclusion of the consultation period, the regulator should publish a final decision. As shown in Figure 7-C, the majority of regulators worldwide publish their regulatory decisions. It is important that a final decision is issued within a reasonable period of time upon conclusion of the consultation period to ensure credibility and effectiveness of the decision-making process. An important measure of a truly transparent decision-making process is the publication of the regulator's justification for its decision, as well as a summary and response to the comments and reply comments received during the consultation proceeding. This demonstrates to the public that the regulator has taken into account the input received during the public consultation process. For example, in the United Kingdom, Ofcom will

provide reasons for its decisions and give an account of how the view of the interested parties shaped their decisions.²⁵ Furthermore, requiring that the regulator provide reasons for their decisions forces them to engage in rational decision-making, gives parties the ability to analyse the decision and decide whether there may be grounds for review or appeal, and ensures the legitimacy and accountability of the regulator.

Today, many regulators post their regulatory instruments on their websites, as well as in the official government publication or gazette. For example, in Brazil, laws, decrees, decisions, regulations and other regulatory instruments related to Anatel's competencies are published in the Official Gazette and posted on its website. In Venezuela, the telecommunications law mandates that the regulator establish and maintain a register of all administrative acts. Additionally, in various countries regulatory decisions are made public in national newspapers, television or radio and through postal mailings or e-mails to parties affected by the decision.²⁶

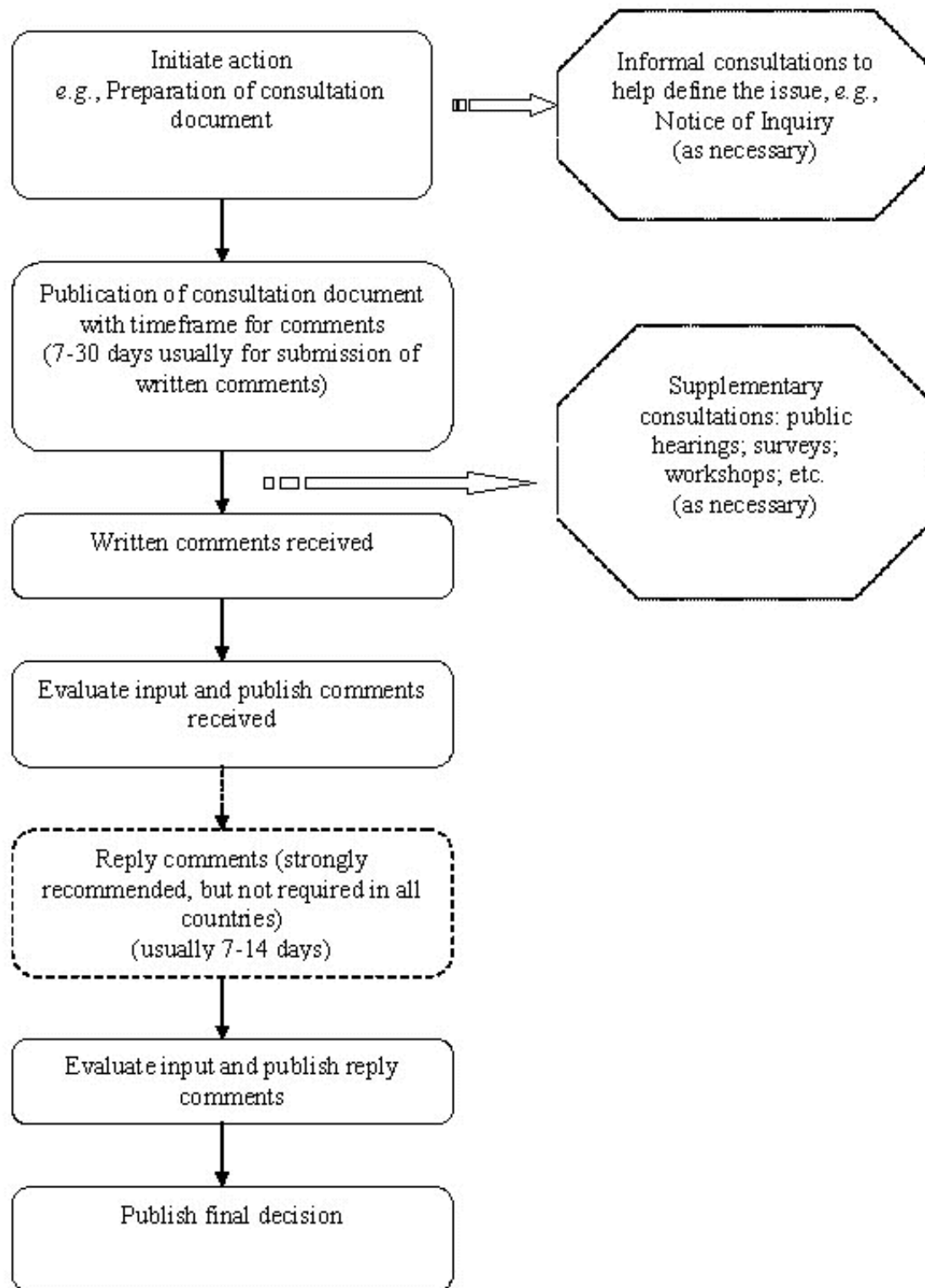
Figure 7-C: Percentage of Regulatory Decisions Made Public Worldwide



Source: ITU World Telecommunication Regulatory Database 2005.²⁷

Figure 7-D

Generic Consultation Process



ENDNOTES

¹ See Cayman Islands Information Communications Technology (ICT) Authority, *The ICT Authority Public Consultation Process*, 12 May

2003, available at [http://www.icta.ky/docs/CD\(2003\)1a%20-%20Public%20Consultation.pdf](http://www.icta.ky/docs/CD(2003)1a%20-%20Public%20Consultation.pdf). See also Anguilla Administrative Procedures Regulation, R.A. 21/2004, Part II (2004) available at http://www.gov.ai/telecommunications/tel_policy.htm.

² ITU Global Regulators Exchange Database, response by Stella Chan of OFTA on 29 November 2004 to the subject "Procedure for conducting open house discussion," posted on 15 September 2004 by the Telecom Regulatory Authority of India.

³ Ofcom, *How will Ofcom Consult? A guide to our consultation process*, available on Ofcom's website at http://www.ofcom.org.uk/consult/consult_method/consult_guide.pdf.

⁴ Irene Wu and Cathleen Xue, *Decision-making procedures ethics rules: The practical enablers of integrity and impartiality in telecommunications regulation*, Part II, 15 August 2002.

⁵ *Id.*

⁶ 47 C.F.R. § 1.401 (2005).

⁷ Irene Wu and Cathleen Xue, *Decision-making procedures ethics rules: The practical enablers of integrity and impartiality in telecommunications regulation*, Part II, 15 August 2002.

⁸ *How will Ofcom Consult? A guide to our consultation process*, at http://www.ofcom.org.uk/consult/consult_method/consult_guide.pdf

⁹ South Africa, Telecommunications Act No. 103 of 1996, November 1996, Art. 96.

¹⁰ Bahrain Telecommunications Regulatory Authority, *Consultation Process Regulation*, 10 August 2003, available at http://www.tra.org.bh/en/pdf/Consultation_Process_ERU_RN_001_v1.0.pdf.

¹¹ Further information on the CRTC mailing lists and instructions on how to register are available on the CRTC website at <http://www.crtc.gc.ca/eng/lists.htm>.

¹² 47 C.F.R. § 1.413 (2005).

¹³ *How will Ofcom Consult? A guide to our consultation process*, at http://www.ofcom.org.uk/consult/consult_method/consult_guide.pdf.

¹⁴ Bahrain Telecommunications Regulatory Authority, *Consultation Process Regulation*, 10 August 2003.

¹⁵ See St. Vincent and the Grenadines National Telecommunications Regulatory Commission, *Guidelines for Conducting Public Consultations*, June 2003.

¹⁶ See Bahrain Telecommunications Regulatory Authority, *Consultation Process Regulation*, 10 August 2003. Under exceptional circumstances, the TRA may, but is not obliged to, invite additional comments, particularly to invite the opinions of other interested parties in relation to the comments received from specific interested parties.

¹⁷ Bahrain Telecommunications Regulatory Authority, *Consultation Process Regulation*, 10 August 2003.

¹⁸ International Telecommunication Union, *Trends in Telecommunication Reform 2002: Effective Regulation*, Chapter 6, Sec. 6.3.3.3 (2002).

¹⁹ Singapore Info-communications Development Authority, Code of Practice for Competition in the Provision of Telecommunication Services, Government Gazette S 87/2005, Article 1.5.1 (2005).

²⁰ Bahrain Telecommunications Regulatory Authority, *Consultation Process Regulation*, 10 August 2003.

²¹ International Telecommunication Union, *Trends in Telecommunication Reform 2002: Effective Regulation*, Chapter 6, (2002).

²² See CRTC Public Process, available at www.crtc.gc.ca.

²³ ITU Global Regulators Exchange Database, response by Handan Karacabey of the Telecommunications Authority of Turkey, on 4 December 2004 to the subject "Procedure for conducting open house discussion," posted on 15 September 2004 by the Telecom Regulatory Authority of India.

²⁴ ITU Global Regulators Exchange Database, response by Carlos Gomez, G-REX advisor, on 29 November 2004 to the subject "Procedure for conducting open house discussion," posted on 15 September 2004 by the Telecom Regulatory Authority of India.

²⁵ *How will Ofcom Consult? A guide to our consultation process*, at http://www.ofcom.org.uk/consult/consult_method/consult_guide.pdf.

²⁶ ITU World Telecommunication Regulatory Database 2005.

²⁷ ITU Survey on Transparency. There was a 100% response rate for each region, out of the 31 countries surveyed in the Americas, 41 in Africa, 28 in Asia Pacific, 19 in the Arab States, and 45 in Europe.

7.2.2 Media Relations

Managing media relations is an important aspect of being a transparent regulator and ensuring that the public is informed about the regulator's activities. Although the development of information and communications technology has made the Internet the prevalent means by which regulators interact with the public, the Internet may not be easily accessible in some developing countries. Therefore, regulators still need to rely on broadcasting and print media, such as newspapers, television and radio to ensure that the public has access to important information. Other means of disseminating information include holding press conferences, issuing press releases, industry briefings, holding seminars and workshops or submitting articles and advertisement directly to trade magazines and newspapers. Some regulators also maintain a press office to manage relations with the media, and ensure that the media reporting of the regulator's activities is accurate.

In Brazil, Anatel has instituted various mechanisms to foster public outreach in addition to publication of its decisions in the Official Gazette and posting on its website. Anatel has created "citizen rooms" throughout the country, which are public spaces equipped with computers, printers, faxes, telephones, scanners, televisions and VCRs that provide a means for the public to interact with Anatel and for Anatel to provide information relating to its activities to the general public. Anyone can conduct online searches of Anatel's regulations and decisions in the citizen rooms, which are also staffed with attendants to answer questions.¹ In addition, Anatel conducts institutional campaigns periodically to inform the general public in specific cases when the society as a whole needs to be made aware of matters of interest to the broader community. In 1999, for example, Anatel sponsored a campaign to educate the public regarding the implementation of new procedures for domestic and international long distance phone calls. As part of the campaign, the Postal Service distributed thousands of brochures explaining the new procedures throughout the country. To complement this, Anatel's chairman and members of the Board of Directors also granted numerous interviews on the subject.²

In Romania, the National Regulatory Authority for Communications (ANRC) relies on the media to communicate with the industry. It has accredited 74 journalists as of 2003, and has dedicated time to educate them regarding its activities. Shortly after its establishment, the ANRC organized a seminar in December 2002 to familiarize journalists with ANRC's specific attributions and competencies. The ANRC held another seminar in October 2003 after the liberalization of the market in the beginning of 2003 to answer specific questions from journalists regarding the liberalization process and the new regulatory framework.³

Use of the media is particularly important for regulators that do not have the staff, resources, or legislative mandate to conduct public decision-making procedures. In Botswana, for example, no rules govern due process or transparency in decision-making, such as public consultation procedures or the publication of decisions in an official gazette. However, in an effort to increase transparency, the Botswana Telecommunications Authority (BTA) has used the media to publicize some of its decisions, such as holding a press conference to announce its mobile licence awards and publishing its leased capacity decision and justifications for it in major Botswana newspapers. As the BTA has increased its staff, it has issued more press releases and conducted more public consultations, which are also posted on the regulator's website.⁴

ENDNOTES

¹ ITU Effective Regulation Case Study: Brazil (2001), available at <http://www.itu.int/osg/spu/casestudies/>.

² "Public Participation in Anatel's Activities Increases," Anatel Magazine, November 2000, at 30-31.

³ Romania, National Regulatory Authority for Communications, Annual Report 2003.

⁴ ITU Effective Regulation Case Study: Botswana (2001), available at <http://www.itu.int/osg/spu/casestudies/>

7.2.3 Brief Summary

As regulators institute public consultations, the following questions can serve as a quick reference for regulators to consider in assessing whether the most appropriate and effective mode of consultation has been adopted. Some of the questions to consider are:

- What resources are available for the consultation?
- Given the regulator's financial and human resources, what form of consultation should be used to achieve the desired outcome? (e.g., formal published documents and written responses, individual meetings between interested parties and the regulator, public hearings, working groups of representatives of service providers and/or consumers to address particular questions, internet discussions on the regulator's website etc.)
- Has sufficient and adequate time been allocated for the public consultation process?
- Is the consultation presented in a language/mode that the targeted stakeholders can readily understand and respond to?
- Does the consultation cover all the issues and questions that need to be addressed for the regulator to make an informed decision?
- Has the consultation been published in the relevant media so that it reaches the widest audience and ensures that all interested parties have access to the consultation?
- Does the consultation provide clear directions regarding submission of comments?
- Does the consultation provide for transparency? (e.g., publication of the consultation document, comments received, and the regulator's final decision with reasoning)

- Has the regulator provided for treatment of submissions that contain confidential information?
- Has the regulator been providing adequate information to the media regarding its activities? (*i.e.*, are stakeholders aware of its activities?)

7.3 Accountability of Regulators and Consumer Protection

Accountability provides legitimacy and credibility to regulatory activities, promotes public confidence in the regulator, and ensures that regulatory decisions can withstand challenges and public and governmental scrutiny.

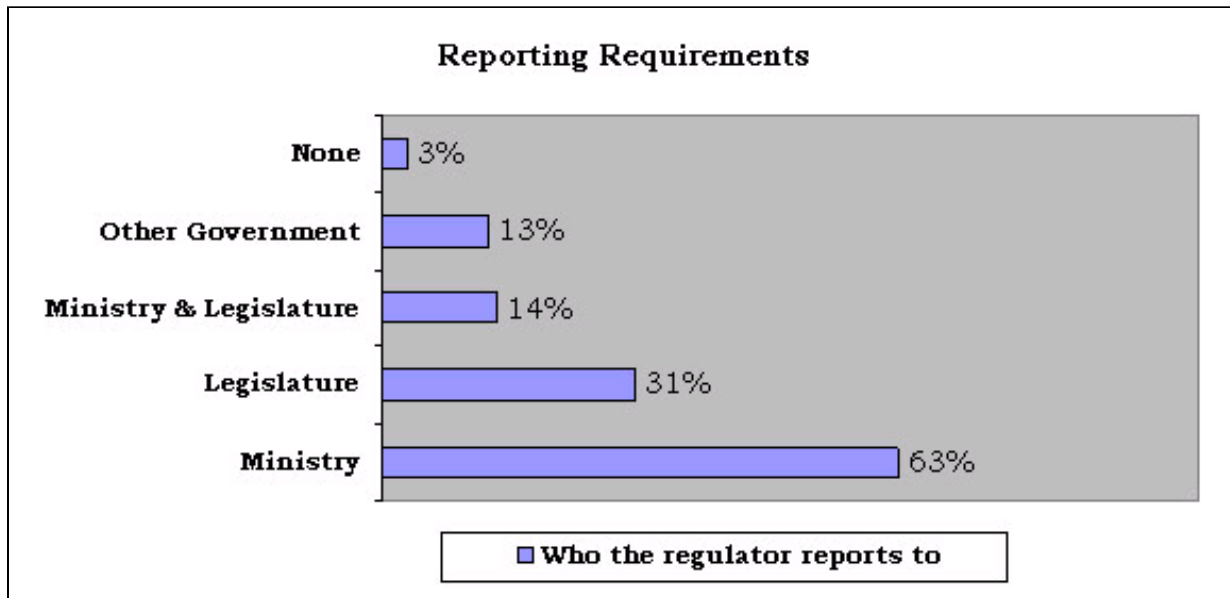
7.3.1 Accountability of Regulators

The accountability of regulators can be monitored by implementing regulatory transparency and reporting regulatory activities to the government. Additionally, the regulator is also accountable to the public whose interests are affected by the regulator's activities, so adequate mechanisms should be implemented to educate and protect consumers, and allow consumers to voice their opinions and concerns with the regulator. This section will provide an overview of different approaches to ensure the accountability of regulators.

Parliamentary oversight and judicial review

The accountability of regulators is determined by various factors, but principally by the organizational structure of the regulator and its place within the governmental structure. In many cases, telecommunications regulators report administratively to sector ministries or other governmental agencies.¹ (See Figure 7-E below on Reporting Requirements.) Accountability can be facilitated if regulators adopt internal procedures to guarantee transparency in their activities (such as ensuring an open and participatory decision-making process through public consultations, as discussed in Section 7.2) and staff accountability, and by fulfilling obligations to report to the legislature which provides external control. Additionally, most telecommunications regulators have the obligation to provide annual reports to Parliament or other executive branch entities such as ministries. According to a recent ITU survey of 138 countries, 126 have reporting requirements to the sector ministry and/or the legislature.² Only four countries, Brazil, Bahrain, Ecuador and Pakistan, have no reporting requirements.³

Figure 7-E: Reporting Requirements by Regulators



Source: ITU World Telecommunication Regulatory Database 2005.

The Canadian Radio-television and Telecommunications Commission (CRTC), which was established by Parliament in 1968, is a typical example of an independent public authority that reports to Parliament, in this case, through the Minister of Canadian Heritage. The accountability of the CRTC is addressed by various mechanisms. The CRTC must submit annual Departmental Performance Reports (DPR) to Parliament. These reports are based on specific principles contained in the DPR Preparation Guide and must reflect a comprehensive, balanced, and transparent picture of the organization's performance for each fiscal year. This report is made available on the CRTC's website.⁴ The CRTC also must prepare and publish its financial results in accordance with Treasury Board Guidelines and submit an annual report to the Standing Committee on Justice and Human Rights.

Additionally, Canada has implemented a "Proactive Disclosure" public policy so that all Canadians are better able to hold Parliament, their

government, and public sector officials accountable. Under this policy, there is a requirement of mandatory publication on departmental websites of travel and hospitality expenses for selected government officials, contracts entered into by the Government of Canada, and reclassification of positions.

Procedures to overturn regulatory decisions

Another mechanism to ensure the accountability of regulators is to allow for appeals of regulatory decisions to a higher level in the regulatory and institutional framework. The legal framework for individual countries is of paramount importance when considering what mechanisms are available for appealing or overturning regulatory decisions. The effectiveness of the regulator can be undermined if the appeal process is closely linked to the executive branch, if regulatory decisions are put on hold or “stayed” during the appeal process, or if the appeal process is easily manipulated for the benefit of particular stakeholders.

In the first instance, the country’s telecommunications law usually articulates the general process for appeals or reconsiderations of the regulator’s decisions, and then the regulatory authority implements detailed internal procedures for reviewing and appealing administrative decisions. Clear and transparent appeal procedures enhance the independent regulator’s credibility and give operators and other stakeholders, including consumers, a sense of stability in the regulatory process.

(a) To whom regulatory decisions are appealed

Typically, regulatory decisions may be appealed to the regulatory authority itself as an initial step.⁵ After reconsideration by the regulator, the decision usually may be appealed to a higher authority, such as the sector ministry, or to a court. In the Philippines, for example, appeals of the National Telecommunications Commission Board’s decisions, rulings, orders, and resolutions can be filed with the Supreme Court.⁶ In many countries, including Malaysia and Nigeria, the regulator may require that all other remedies for review and appeal provided under the telecommunications law be exhausted before a person can seek judicial review.⁷ Sometimes regulatory decisions may be appealed to a specialized body established within the regulatory agency itself, such as an Appeal Tribunal or Appeal Board. For example, Hong Kong (SAR)’s OFTA has established an Appeal Board comprised of a chairman and deputy chairman that are “eligible to be appointed a judge of the High Court” and panel members who are not public officers. The decision of the Appeal Board is final.⁸ In Kenya, the Communications Act established an Appeals Tribunal with powers to adjudicate matters between the regulator and consumers, with powers of the High Court.⁹

When the appeal to the judiciary concerns policy matters or technical issues, the trend is for courts to defer to the specialized regulatory authority. Rather than making a decision on policy or technical matters, courts will often “remand” or refer a decision back to the authority for further review and action, sometimes indicating the scope of the further review.¹⁰

The ITU World Telecommunication Regulatory Database indicates that the judiciary has the authority to overturn a decision of the regulatory authority in almost two-thirds of the countries responding to the survey. Only 14 per cent of the respondents stated that the sector ministry had ultimate authority to overturn the regulator’s decisions. Appeals to other government authorities also may be possible. For example, in the Maldives, parties who believe that a decision by the regulator, the Telecommunications Authority of Maldives (TAM), adversely affects their interests may first appeal to the minister charged with the responsibility of telecommunications, and if the aggrieved party remains dissatisfied with the decision of the minister, then a petition of appeal may be presented to the President of the Maldives.¹¹ The President’s decision is final and binding on the aggrieved person.

(b) Timeframe for an appeal to be filed and decided

The timeframe for aggrieved parties to file an appeal varies from 10 days, such as in the Dominican Republic,¹² to 30 days, as in the United States.¹³ Countries such as Singapore, and the Philippines have deadlines of 14-15 days for filing an appeal against the regulator.¹⁴

The timeframe for resolving an appeal can range from under a month (e.g., 10 days from filing the appeal with the Dominican Republic regulator, Instituto Dominicano de las Telecomunicaciones (Indotel), to no specific timeframe (e.g., the United States). Most countries responding to the 2005 ITU World Telecommunication Regulatory Database indicated that they did not have a defined timeframe for resolving an appeal; among those which did have a timeframe, it was usually one to six months.

(c) Reasons for filing an appeal

An aggrieved party may file an appeal of a decision made by the regulatory authority in specific instances usually set forth in the telecommunications law. The reasons can be quite broad (any decision made by the regulator) or more narrowly focused to allow only procedural appeals. In New Zealand, for example, appeals from the Telecommunications Commission to the High Court are limited to questions of law.¹⁵ On the other hand, in the Philippines, the authority to appeal a decision is very broadly defined, where “a party adversely affected by a decision, order, ruling or resolution may, within 15 days from receipt of a copy thereof, file a motion for reconsideration.”¹⁶ In Hong Kong (SAR), the scope of an acceptable appeal is more carefully defined as:

(1) Any person aggrieved by:

(a) an opinion, determination, direction or decision of the Authority relating to:

- (i) anticompetitive practices, abuse of position, misleading or deceptive conduct, and non-discrimination, or**
- (ii) any licence condition relating to any such section; or**

(b) any sanction or remedy imposed or to be imposed under this Ordinance by the Authority in consequence of a breach of any such section or any such licence condition, may appeal to the Appeal Board against the opinion, determination, direction, decision, sanction or remedy, as the case may be, to the extent to which it relates to any such section or any such licence condition, as the case may be.¹⁷

(d) Effect of an appeal on a regulatory decision

The question of what happens to a regulatory decision during the appeal process can have a serious effect on the regulator's ability to enforce its decisions. If decisions can easily be appealed and are stayed or put on hold, then parties have an incentive to appeal every decision of the regulator to delay the implementation process of new rules and regulations that might affect them. This is particularly true of incumbent operators when faced with new rules dealing with the introduction of new licensing regimes or competition.

When asked about the effect of an appeal on a regulatory decision in the 2005 ITU World Telecommunication Regulatory Database, the vast majority of responding countries reported that they either: (i) allowed a regulatory decision to remain in force while it is under appeal; or (ii) depending on the merits of the particular case, either permitted suspension of the decision (or a stay) or allowed a choice between putting the decision on hold or allowing the regulation to remain in force. Hong Kong (SAR) is an example of the latter case, where it is the subject matter of the appeal that determines whether the appeal suspends the operation of the decision.¹⁸ A much smaller number of countries, about ten per cent of those responding, automatically stay a regulation when it is undergoing an appeal process.¹⁹

ENDNOTES

¹ITU World Telecommunication Regulatory Database 2005.

² *Id.*

³ *Id.*

⁴ For the Fiscal Year 2003-2004 Departmental Performance Report see <http://www.crtc.gc.ca/eng/publications/reports.htm>.

⁵ According to the 2005 ITU World Telecommunication Regulatory Database, of the 71 responding countries, 70 responded that appeals were allowed to the regulatory authority (94 countries did not respond to the question).

⁶ See Part VII of the NTC Practices and Procedures Manual, available at <http://portal.ntc.gov.ph/>

⁷ See Malaysia Communications and Multimedia Act of 1998, Sec. 121. See also Nigerian Communications Act 2003, Art. 88 (3).

⁸ See Hong Kong (SAR) Telecommunications Ordinance, Gazette No. 26, Sec. 32M and 32Q (2000).

⁹ Kenya Communications Act 1998, Second Schedule.

¹⁰ Robert R. Bruce, Rory Macmillan, Timothy St. J. Ellam, Hank Intven and Theresa Miedema, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*, World Bank/International Telecommunication Union, October 2004 [hereinafter WB/ITU, *Dispute Resolution in the Telecommunications Sector*].

¹¹ Maldives Telecommunications Regulation, Art. 17 (2003), available at <http://www.tam.gov.mv>.

¹² Dominican Republic General Telecommunications Law No. 153-98, Art. 96.1 (1998), available at [http://www.indotel.org.do/\(mwdsynvni4l2o255jolhyna5\)/ley_153-98.aspx](http://www.indotel.org.do/(mwdsynvni4l2o255jolhyna5)/ley_153-98.aspx).

¹³ 47 C.F.R. § 1.276(a)(1) (2004).

¹⁴ See Hong Kong (SAR), OFTA Telecommunications Ordinance No. 36 of 2000, as amended by Ordinance No. 30 of 2003. See also Singapore, IDA Code of Practice for Competition in the Provision of Telecommunication Services 2005 (Telecom Competition Code), No. S87/2005, and Philippines, NTC Practices and Procedures Manual, Part VII, 1 May 1992.

¹⁵ New Zealand Telecommunications Act 2001, Art. 60, available at <http://www.comcom.govt.nz/TheLegislation/Overview.aspx>

¹⁶ NTC Practices and Procedures Manual, at 129, 1 May 1992, available at <http://www.ntc.gov.ph>.

¹⁷ Section 32N of the Hong Kong (SAR) Telecommunications Ordinance, Gazette No. L.N. 98 of 2004, available at http://www.legislation.gov.hk/blis_ind.nsf/CurAllengDoc?OpenView&Start=106&Count=25&Expand=106#106.

¹⁸ *Id.*

¹⁹ It should be noted that 45 countries chose not to respond to this survey question so the conclusions were based on 120 responses.

7.3.2 Accountability for Consumers

Regulatory accountability also involves regulators having appropriate procedures to channel consumer inquiries or claims, to educate consumers regarding their rights, and to protect consumers in case of market failures. In a majority of countries, regulators assume responsibility for handling consumer complaints.¹ The particular mechanisms developed and instituted for consumer protection in each country may differ and require tailoring to the needs of the country depending on the country's particular legal and institutional systems and culture. For instance, certain mechanisms, such as ombudsmen, tend to work best in countries with a long history of consumer activism.²

Mechanisms for consumer protection

Telecommunications regulators have implemented different methods to make themselves accessible to the public and to facilitate the handling of consumer complaints. Some countries have administrative offices outside the regulator, while others have utilized internal offices of consumer affairs. As telecommunications markets become more competitive, regulators continue to take a proactive role to protect consumer rights through consumer protection legislation, licence conditions, consumer education and information, and encouragement of industry self-regulation through industry codes. For example, many regulators have published consumer information fact sheets, guides and brochures on their websites. Most telecommunications legislation and related regulations contain provisions on quality of service standards, telecommunications fraud, number portability, carrier selection, and universal service. In many countries, consumers have more than one avenue to file complaints with the regulator so the regulator is better able to handle consumer concerns in a competitive market. Usually, consumers can file complaints in several ways: (i) in writing, (ii) by e-mail; (iii) by telephone, (iv) by fax, or (v) in person at the regulator's offices, in consumer centers/call centers or in a Consumer Parliament (e.g., Nigeria). The procedures for filing complaints with the regulator are generally simple in order to facilitate their submission, and are published on the regulator's website, in official publications and available at the regulator's offices.

In some countries, such as Australia, Hong Kong (SAR) and Malaysia, the regulators place significant emphasis on industry self-regulation and on codes that are developed by industry and approved and registered with the regulator, covering issues such as billing, number portability, pricing information, and complaint handling by operators.³ Other regulators have also established consumer advisory committees and forums to provide the regulator with advice on consumer concerns, promote consumer input into policies and regulations and to ensure that the consumers' interests are taken into account during the regulator's decision-making process. In Australia, the regulator is required by legislation to establish a consumer forum.⁴ Australia has also created an independent Telecommunications Industry Ombudsman to investigate complaints about the provision of telephone or Internet services and to help parties settle disputes regarding such services.⁵

In Canada, the Governor in Council issued [Order requiring the CRTC to report to the Governor in Council on consumer complaints](#), which required the creation of an independent telecommunications consumer agency. Pursuant to the terms of the Order, telecommunications service providers are required to participate in and contribute to the financing of this independent agency. The Canadian regulator, the Canadian Radio-television and Telecommunications Commission (CRTC) was charged with approving the structure and mandate of such an agency. The CRTC subsequently gave provisional approval to the structure and mandate of the Commissioner for Complaints for Telecommunications Services (CCTS). The CCTS has been operating since the summer of 2007, although the CRTC has made a number of changes to its structure and mandate in order to ensure its effectiveness and its independence from the telecommunications industry.

Many regulators, particularly in developing and less competitive markets cannot rely on industry self-regulation and must assume a larger role in consumer empowerment and protection. Some regulators, such as Anatel in Brazil and the Nigerian Communications Commission (NCC) have created innovative ways for addressing consumer complaints. (See Box 7-7 below for example of Brazil.) The NCC has established a Consumer Affairs Bureau to serve as the industry watchdog for educating, informing, and protecting consumers. Additionally, the NCC has published a Consumer Bill of Rights recognizing the inalienable rights that every consumer should have, including: (i) the right to be informed; (ii) the right to safety; (iii) the right to choice; and (iv) the right to be heard. The NCC also instituted a Consumer Parliament, which brings all stakeholders, consumers, operators, and the regulator together and provides a live broadcast, public forum where the regulator can educate the public and consumers can ask questions and voice their grievances.⁶

Box 7-7: Brazil - Consumer Protection Entities

In Brazil, three entities work with Anatel to assist with consumer complaints: the Office of Consumer Affairs, Anatel's Citizen Rooms, and the Committee for the Protection of Telecommunications Service Users.

Office of Consumer Affairs

The Office of Consumer Affairs within Anatel accepts consumer complaints sent to Anatel by e-mail, letters, or through Anatel Call Centers. Complaints about service providers must be sent first to the relevant service provider, which is required to contact the consumer within five days. Complaints about Anatel are sent to the specific department within Anatel that is subject of the complaint. The Office of Consumer Affairs has the following functions: (i) advise Anatel on matters of consumer rights; (ii) receive, respond, and channel internally and externally, complaints, requests or comments of consumers; (iii) implement and expand methods and procedures for the relationship between Anatel and consumers; and (iv) manage Anatel's Call Centers.⁷

Citizen Rooms

Anatel's Citizen Rooms also provide a communication channel between Anatel and the public. Interested parties can use the Citizen Rooms to submit licence requests for the provision of a variety of services, and file complaints regarding services. The Citizen Rooms provide access to Anatel's

public database and are equipped with computers, printers, fax, scanners, telephones, VCR, as well as attendants to provide information related to Anatel's activities. Any party can conduct online searches of Anatel's reports, contracts, decrees, resolutions, standards, and have access to telecommunications legislation.⁸

Committee for the Protection of Telecommunications Service Users

Anatel has also created several strategic external committees, which are intended to develop studies, proposals and recommendations on specific matters. The committees act as advisory bodies to the Board of Directors. The Committee for the Protection of Telecommunications Service Users advises the Board of Directors regarding consumer protection. The Committee is comprised of members of different Anatel offices, a representative of the Department of Consumer Protection of the Secretary of Economy, a representative of users of fixed telephony services; a representative of users of mobile services, a representative of users of mass media services, a representative of users of other telecommunications services, and entities representing telecommunications service providers. The Committee has the following functions: (i) advise Anatel's Board regarding its relationship with the National System of Consumer Defense; (ii) provide Anatel's Board with directives regarding consumer rights; (iii) develop procedures for prevention of violation of consumer rights; and (iv) advise the Board regarding dispute resolution mechanisms for consumer disputes.

Some countries have specialized tribunals to assist consumers with adjudicating their claims against operators. In Peru, the Administrative Tribunal for the Settlement of Users Claims (TRASU)⁹ adjudicates claims filed by users of public telecommunications services. TRASU is part of OSIPTEL but is fully independent in its rulings and is the last administrative review for users' claims. The six members of TRASU are elected by OSIPTEL's Board of Directors based on a recommendation submitted by OSIPTEL's Chairman, and are remunerated for their services. TRASU can be part of OSIPTEL's staff, or professional experts. Its functions are to: (i) resolve claims and appeals submitted for its consideration; (ii) propose to OSIPTEL's Managing Council the modification of the procedures to deal with users' claims, and those related to violations and sanctions; (iii) approve the content of forms and other materials to be used, to allow the expeditious resolution of claims and appeals submitted for its consideration; and (iv) engage in other matters entrusted to it by OSIPTEL's Managing Council.¹⁰ TRASU has jurisdiction over:

1. revision of decisions concerning users claims issued by telecommunications operators;
2. claims or appeals against decisions issued by the operators in connection with claims filed against the operator's administrative procedures; and
3. appeals against decisions related to quality of service problems.

Colombia has taken a different approach to consumer complaints. While one of the regulator's functions is to provide information to customers regarding telecommunications services, the authority to adjudicate disputes between telecommunications operators and customers has been delegated to the Superintendencia de Servicios Públicos Domiciliarios (Superintendency of Domestic Public Services - SSPD).¹¹ This is a multi-sectoral administrative body independent from the telecommunications regulator, created by the Colombian Constitution in 1991, to exercise the functions of supervision, inspection, and oversight of entities providing public services such as energy, gas, and telecommunications services. The SSPD receives appeals filed by users and subscribers after they have been filed directly with the telecommunications operator. The SSPD can impose sanctions on public service providers.

The United Kingdom has adopted an interesting approach to handle consumer complaints concerning telecommunications services. In January 2003, the Office of the Telecommunications Ombudsman (Otel) was established as a voluntary dispute resolution service, independent from the regulator Ofcom. Otel reviews and seeks to resolve consumer complaints against companies that are members.¹² Otel's current members cover more than 96 per cent of the fixed line telephone market, over 55 per cent of the mobile telephone market and 33 per cent of the ISP market. Otel is composed of an Ombudsman, two senior managers, a board composed of seven members (five nominated by member companies and two appointed from the independent council members), and a Council whose main role is to appoint the Ombudsman and manage Otel's services. Otel's terms of reference detail the range of telecommunications services that are covered, and what Otel can and cannot do.¹³ Otel considers complaints against member companies where the complainant and the company have been unable to reach an agreement, and determine whether the member company must take any action for the consumer's benefit.

With the development of the Internet, many countries are also in the process of drafting and adopting guidelines and regulations for protection of consumers involved in online activities, such as data protection laws, cyber-crime laws, and anti-spam laws. The approach to consumer protection in the ICT environment varies among countries, with some countries, such as the United States, adopting a more hands-off approach and others, such as the EU, adopting a stricter regulatory approach.¹⁴ Because of the variations in laws among countries, and the need to coordinate international efforts in handling the flow of Internet data and cyber-crimes, there is a movement to harmonize standards in ICT-related laws among countries. Further discussion on such ICT-related laws can be found in Chapter 4.

Consumer complaints against operators

The majority of consumer complaints relate to the conduct of telecommunications operators and service providers. Regulators have created specific standards and filing requirements for telecommunications operators to protect consumer interests. Regulations often require companies to establish procedures to handle consumer complaints. In addition, in some instances, the regulations also include a requirement that the company have customer service personnel available 24 hours to handle consumer inquiries, and that any information

concerning the procedures and the right to submit claims should be publicly available and located conspicuously at the company's offices and/or on its website. Further, operators are sometimes required to create special forms designed to facilitate consumer claims, to keep registers of consumers' claims, and to establish specific timeframes for resolving consumer complaints or applying specific rules, such as the positive administrative silence rule used in civil law countries.¹⁵

Generally, primary responsibility for handling consumer complaints against telecommunications operators resides with the company providing the service, since the operator has all the relevant information concerning the service and therefore is better able to address the claims. The company's procedures dealing with the consumer complaint set the framework for the initial administrative review of the user's claim, before intervention by the regulator. The regulator generally intervenes only after the consumer is unable to resolve the issue directly with the operator or service provider, or if the consumer complaint involves a breach of the telecommunications law and regulations or licence provisions. In Hong Kong, OFTA states clearly that its powers and functions regarding consumer complaints against an operator are limited to the conduct and practices of the operators regulated under the telecommunications laws and licence conditions, and OFTA does not have any power to adjudicate contractual disputes between individual consumers and operators.¹⁶ Contractual disputes between consumers and operators can often be resolved through dispute resolution mechanisms, as described in Section 7.4.1.

Additionally, depending on the nature of the complaint and whether the complaint is outside of the regulator's scope of authority, consumers may seek recourse with the courts or other consumer organizations or agencies. In Ireland, for example, consumers can address complaints to the Small Claims Court, the European Consumer Center, Regtel (the independent regulator for content and promotion of premium rate telecommunications services), the Office of the Data Protection Commissioner, the Advertising Standards Authority for Ireland, and the Office of the Director of Consumer Affairs.¹⁷ The intervention of an attorney for consumer claims generally is not required because this would oblige the consumer to incur further expenses and discourage claims. The consumer, however, usually has discretion to use an attorney if desired.

ENDNOTES

¹ ITU World Telecommunication Regulatory Database 2005. 120 out of 124 countries surveyed (83%) state that the regulatory authority is responsible for handling consumer complaints.

² See comment by Mr. Ewan Sutherland at the China-ITU Seminar on Universal Service and Consumer Rights Protection, Summary Report, Session 7 Panel Discussion, August 2005, available at <http://www.itu.int/ITU-D/treg/Events/Seminars/2005/China/Documents/16-SummaryReport.pdf>.

³ Dr. Bob Horton, *Telecommunications Consumer Protection in the Asia-Pacific Region*, Report to the ITU Global Symposium for Regulators, December 2002.

⁴ The Consumer Consultative Forum was established under the Australian Communications Authority Act of 1997 and continues in existence under the Australian Communications and Multimedia Act 2005. See Australian Communications and Multimedia Act 2006, Sec. 59.

⁵ The role and powers of the Ombudsman is described in the Telecommunications (Consumer Protection and Service Standards Act) 1999, as amended, Part 6.

⁶ See Nigerian Communications Commission website at <http://www.ncc.gov.ng/consumeraffairsbureau.htm>.

⁷ Article 132 of Anatel's Internal Regulations, approved by Resolution No. 270 of 19 July 2001.

⁸ See www.anatel.gov.br.

⁹ Created by Resolution No. 013-95 CD/OSIPTEL.

¹⁰ Resolution 010-2002 CD/OSIPTEL, 21 April, 2002.

¹¹ See <http://www.superservicios.gov.co/>

¹² Any Public Communications Providers (PCP) can be a member of Oteló. A PCP is any company that provides an electronic communications network or service to the public such as fixed voice telephony, mobile voice telephony, fax and associated or supplementary services including voice mail and call forwarding as well as services and/or products provided to the disabled community, including access to text relay services and free directory services.

¹³ See Terms of Reference, Council of Telecommunications Ombudsman Service, United Kingdom, <http://www.otelo.org.uk>. The specificity of what the Ombudsman can and cannot do is detailed in the Terms of Reference, noting further that the Ombudsman has an absolute discretion to decide whether a complaint is within the Ombudsman's jurisdiction.

¹⁴ Boutheina Guermazi and David Satola, *Creating the "Right" Enabling Environment for ICT*, Chapter 2 in e-Development: From Excitement to Efficiency, The World Bank (2005), at 24.

¹⁵ The positive administrative silence rule in civil law countries specifies that the silence or lack of response of an administrative agency is interpreted in favour of the person who requests the action. For example, if the regulator does not grant a licence in a determined timeframe and there is no indication about the issuance of the licence from the regulator, then the licence is considered to be granted.

[16](#) OFTA Fact Sheet, *Know More About How OFTA Handles Your Complaint Against a Telecommunications Operator*, available at www.ofta.gov.hk.

[17](#) Commission for Communications Regulation, Information Notice, *ComReg's Approach to Consumer Issues in the Irish Communications Market*, Doc. No. 03/20, 18 February 2003.

7.4 Dispute Resolution and Enforcement

In addition to having transparent, open and participatory procedures, an effective regulator needs the power to resolve disputes and enforce its decisions and laws. As the telecommunications sector develops and matures, the ability of the regulator to maintain order in the sector is paramount to promoting growth and attracting investment in the sector. The first part of this section describes the different resolution techniques countries have engaged in to solve sector disputes. The second part describes the enforcement practices and procedures generally used to settle conflicts and enforce sector policy and regulation. As the telecommunications sector continues to develop and liberalize and new technologies are deployed, more regulators are encouraging parties to voluntarily resolve their disputes, and relying on alternative dispute resolution approaches. However, the regulator's involvement and intervention to resolve conflicts and enforce compliance with decisions, rules, and regulations are still critical and necessary for maintaining an effective regulatory regime.

7.4.1 Dispute Resolution

As the telecommunications sector continues to undergo changes caused by privatization, liberalization, and convergence, it becomes increasingly important for countries and regulators to have an effective and efficient dispute resolution system¹. The failure to resolve disputes quickly can limit competition, cause delays in the introduction of new services and infrastructures, block or reduce investment in the sector, and impede liberalization and development of the sector.² The appropriate dispute resolution mechanisms, however, vary depending on the stage of a country's telecommunications market and regulatory development, regulatory framework and approaches, as well as general business culture.

The following sections review the various dispute resolutions mechanisms employed in the telecommunications sector, with particular emphasis on regulatory adjudications and the various mechanisms of alternative dispute resolution. In addition, Section 7.4.1.3 tracks the systems of dispute resolution available to foreign telecommunications operators, mainly international investment disputes and trade dispute arbitrations.

Overview of the main types of disputes in the telecommunications sector

Disputes in the telecommunications sector generally arise out of various circumstances. However, disputes with the greatest impact on telecommunications investment and growth typically relate to: (i) interconnection; (ii) relations between service providers and with consumers; (iii) liberalization; (iv) foreign investment and trade; and (v) radio frequency use.

Interconnection disputes are the most prevalent type of disputes between service providers, as operators of all different types of access networks (e.g., fixed-mobile, wire line-wireless) must be able to interconnect with each another. (See [Box 7-8](#).) Many aspects of the interconnection relationship involve key policy considerations for the telecommunications sector; therefore, most regulators consider it important to maintain some form of regulatory oversight of the negotiation and implementation of interconnection arrangements. In recent years, for example, an increasing issue regarding mobile interconnection has been the often high rates charged by mobile providers to terminate traffic on their networks. As a result, many regulators have made determinations that mobile providers have a monopoly over their networks and should be regulated. Regulators have opted between various mechanisms in order to strike an appropriate balance between the need to protect the interests of new market entrants while also leaving room for parties to negotiate agreements on their own. Among such approaches are: (i) prescribing interconnection arrangements on an *ex ante* basis; (ii) establishing interconnection guidelines; (iii) approving reference interconnection offers (RIOs) or model interconnection agreements; (iv) policing operators with significant market power; and (v) generally overseeing the interconnection process.

Disputes between service providers and consumers are also common and occur in every jurisdiction. These conflicts principally stem from the consumer's lack of bargaining power or the absence of competitive options to the incumbent operator. The main type of disputes arising between consumers and service providers derive from the following causes: (i) service charges; (ii) billing; (iii) payment of charges; (iv) "slamming";³ (v) quality and terms of service; (vi) violation of privacy; and (vii) false or deceptive advertising.⁴ To ensure effective resolution of consumer disputes, regulators are using a variety of mechanisms, ranging from requiring service providers and consumers to initially resolve disputes themselves (the case of the United States and Botswana); using ombudsmen type institutions (as the telecommunications industry Ombudsman in Australia); and even employing the broadcast media (as is the case of the Nigerian "Consumer Parliament" evidences). For a further description of these consumer protection mechanisms see section 7.3.2.

In addition, disputes also may arise as a consequence of introducing competition into the telecommunications market. The liberalization process often undermines the established financial and business interests of incumbent network operators. These liberalization-related disputes generally derive from the incumbent's desire to protect and maintain its dominant position in the market. Similarly, investment and

trade disputes often occur where regulatory reforms or actions diminish the value of private-sector interests. These types of disputes have the potential to *internationalize* disputes arising between regulators and foreign investors in the telecommunications sector. Investment disputes typically stem from complaints by investors, operators, and service providers about early termination of exclusive rights, licensing of new competitors, new rate-setting structures and changes to licences. Current trends indicate a recent rise in international investment disputes within the telecommunications sector, based primarily on provisions of bilateral investment treaties. Trade disputes in the context of the WTO, on the other hand, are instituted by member states against other member states primarily due to lack of compliance with obligations assumed under the GATS and related documents.

Finally, radio frequency allocation and assignment disputes are dealt with internationally through mechanisms available through the ITU, particularly the Radiocommunications Bureau (ITU-R). Domestically, disputes may arise from interference, licence conditions, and pricing.

Approaches towards dispute resolution

Dispute resolution can be addressed from two separate approaches, namely through official and non-official mechanisms. Governmental authorities, statutory bodies and courts commonly discharge official functions in dispute resolution, their authority deriving principally from the constitutional, legislative and regulatory framework applicable to the telecommunications sector. Non-official dispute resolution – or alternative dispute resolution (ADR) – consists of mechanisms such as arbitration, mediation, and negotiation, where the individuals associated with these processes do not discharge any executive or judicial duties.

A well-resourced “official” sector, utilizing regulatory adjudication and the courts, is crucial to a successful dispute resolution environment. Alternative approaches, however, are often useful to deal with the lack of available regulatory or judicial resources, or where less formal techniques offer particular advantages.⁵ Therefore, it is important to identify those circumstances in which the use of each mechanism is more appropriate.

ADR mechanisms, such as arbitration and mediation, traditionally have been associated with solving private and commercial disputes, while regulatory adjudication has been understood as best suited for public policy issues. This compartmentalization may be too strict. As the case of interconnection disputes in the United States and Jordan evidence, regulators are increasingly using arbitration tools, either informally or formally. Moreover, in light of the rapid changes in the telecommunications sector, countries such as Saudi Arabia have instituted highly flexible approaches to determine which mechanisms (*i.e.*, mediation, arbitration, or regulatory adjudication) to adopt for resolving specific disputes.⁶

From a different perspective, other countries, as is the case of the United Kingdom, take the position that ADR techniques can be employed where disputing parties have similar levels of market power, since in that case parties are more likely to negotiate solutions that meet their mutual or on-going needs.⁷ In such cases, regulatory intervention is more often considered necessary where disparities of market power mean that one party effectively requires the protection of the official sector from abuse of process by the other.⁸

Thus, when designing and evaluating the role of the official sector in dispute resolution processes, the concern should be:

- *Less* about rigid lines between official and non-official sectors, and
- *More* about seeking the roles in which the official sector can best use its efforts and presence to assist in the speedy resolution of disputes – and in a manner consistent with regulatory policy, the rule of law, and due process.⁹

As will be seen in the Sections 7.4.1.1 and 7.4.1.2, due to differences in social, legal, and commercial traditions the approach for selecting a method of dispute resolution varies considerably between jurisdictions; even with regard to similar types of disputes. The following are certain elements to consider when making such a determination:¹⁰

- *Drawing on “non-official” resources*

The commercial world’s extensive experience with arbitration and other ADR techniques can help policy-makers and regulators encourage the use of non-official dispute resolution approaches in a regulated industry. Commercial arbitration illustrates how regulators can keep control over important policy issues and also ensure the usefulness of their dispute resolution systems – while easing their workload burdens.

- *Quality control over official and non-official processes*

The type of dispute resolution process that is chosen influences what role regulators and courts will play in dispute resolution. Regulatory adjudication and arbitration require court oversight of procedures, because the parties have relinquished control over the outcome to the adjudicator or arbitrator. Regulatory adjudication also may be subject to various levels of “internal” agency and “external” court review for substantive appeal. It is important, however, not to undermine the credibility or timeliness of regulatory adjudication through over-use of review procedures.

The success of voluntary negotiated processes, including mediation, depends on their freedom from official review. Even where doubts exist about the efficacy of voluntary negotiations, regulators may be able to provide incentives for good faith engagement in negotiations instead of imposing substantive decisions.

- *Confidence factors in relying on non-official approaches*

There are several important factors in gauging whether non-official dispute resolution approaches are as mature and suitable as regulatory adjudication or court action in any given setting. These factors include how professional the arbitration and mediation boards are, how well

developed the arbitration and mediation institutions are, and the effective use of the oversight procedures.

Regulatory Adjudication

Regulatory adjudication refers to the legal powers exercised by regulators pursuant to the resolution of the disputes brought before them. Currently, regulatory adjudication is recognized as the cornerstone of dispute resolution in telecommunications sector. However, regulatory adjudication is a relatively new mechanism since until recently, with the exception of a few countries, regulatory and policy-making responsibilities were concentrated in a single governmental structure. With liberalization and the introduction of competition in the telecommunications market, these functions were separated and regulatory authorities were created and charged with responsibility for overseeing and regulating the telecommunications sector.

In the United States, a country with long-developed administrative tradition, the FCC interprets, coordinates, and adjudicates policy issues, as well as disputes arising out of them. The FCC's internal processes for dispute resolution include a final decision handed out by a Commissioner or a panel of Commissioners. Such decisions may be subject to internal review by the agency within a prescribed period, and can also be appealed before the U.S. Court of Appeals. In Canada, the CRTC follows court-like dispute settlement procedures. An Industry Committee consisting of parties and experts also has been established to resolve most telecommunications issues. Recourse to the CRTC is taken only when consensus cannot be reached by the Committee. In the United Kingdom, Ofcom follows a methodology for dispute settlement that involves the placing of evidence into a complaint before initiating a formal investigation. Investigation into the complaint involves clear identification of a relevant obligation or abuse under the Competition Act and deadlines are given for settlement of a complaint or dispute.

Many countries with newer regulatory authorities also have empowered such agencies to consider and adjudicate disputes among telecommunications market players. In Morocco, for example, the regulator has been given broad power over interconnection dispute resolution ([Box 7-9](#)).

Advantages and disadvantages of regulatory adjudication

When effectively and efficiently applied, regulatory adjudication has certain distinct advantages.

- It can draw upon the legitimacy of the official sector, as well as the benefits of its enforcement mechanisms;
- A well-staffed regulatory agency can access staff resources with different expertise (e.g., technical, economic, and legal) to provide input into decisions;[11](#)
- The adjudication process can give the public a channel to provide input into the decision-making process.

However, the potential drawbacks to regulatory adjudication can be significant, and thus warrant paying close attention to the alternative approaches of dispute resolution. Some of these disadvantages are the following:

- It can result in lengthy and cumbersome procedures;
- Possibility of misuse of regulatory intervention by market-players, particularly incumbent operators, as part of a strategic response in order to hinder competitive conditions;
- Legislative mandates dealing with issues of sector development, such as convergence, can reduce the regulator's flexibility in confronting significant disputes and sector issues; and
- A tendency of regulatory bodies to fragment or compartmentalize decisions into separate proceedings, as regulatory adjudication is the response of a single regulatory body, based on a narrow jurisdictional mandate and limited enforcement powers, to individual claims defined by parties on specific legal grounds.

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) encompasses different processes and procedures directed at settling disputes by means other than litigation and administrative adjudication. ADR methods include arbitration and mediation, and several other hybrids and variations.[12](#)

ADR is based on the general premise that, where possible, it is more beneficial for private parties to settle disputes by private process and negotiated agreement as opposed to contentious litigation or regulatory adjudication. These methods have the benefit of preserving and, in some cases even enhancing, business relations that otherwise may be negatively affected by an adversarial process.[13](#) Moreover, ADR can aid in saving costs associated with litigation. ADR procedures may either take the place of formal adjudication or complement adjudication and litigation by producing settlements within those fields. Flexibility is thus another principal advantage of ADR, as it usually allows parties to address different kinds of disputes through different procedures and approaches.

These mechanisms also may serve to alleviate the burden on official institutions in charge of settling disputes, by redirecting many types of disputes away from traditional courts and regulatory authorities. In Europe, for instance, the EU Framework Directive explicitly contemplates that national regulatory authorities should encourage the use of ADR mechanisms, such as mediation, where they are available.[14](#) Pursuant to such initiatives, the Office of the Telecommunications Adjudicator was created in the United Kingdom to facilitate swift implementation of the processes necessary to enable competitors to gain access to the local loop. The Telecommunications Adjudicator also has the function of bringing all parties together to find prompt, mediated resolution of working-level implementation disputes. The scheme is a private contractual mechanism for dispute resolution agreed between the parties, and in this respect is similar to arbitration.[15](#)

ADR procedures fall into three primary categories: (i) negotiation; (ii) mediation and conciliation; and (iii) arbitration.

Negotiation

Negotiation is the premise upon which all consensual ADR activity is based. It is a consensual process designed to allow parties to arrive at a mutually agreeable solution. Negotiations are usually held on a confidential basis, and “without prejudice” to any legal recourse to which the parties may have a right. Negotiation differs from mediation because no third-party facilitator is usually involved. This provides additional flexibility because parties can generally schedule the process of negotiations on their own, avoiding adversarial processes present in other ADR mechanisms.

Mediation and Conciliation

Mediation is a consensual process involving a neutral third party whose role is to facilitate resolution of the dispute. Both regulators and private individuals not involved in the regulatory process may act as mediators.

In discharging its duties, the mediator must initially solicit the views of the parties on the nature of the dispute and its key issues. The objective here is to seek potential points of agreement between the parties and propose constructive “win-win” solutions. The mediator often serves as a neutral third party that conveys views of the dispute between the parties to facilitate communication, and potentially develop a direct negotiation. At the appropriate time in the mediation process, the mediator may be able to suggest potential solutions or views of the underlying issues to both sides. For example, in Japan, mediation is used to resolve interconnection disputes.

Conciliation is closely related to mediation, but involves more formal procedures. Here, the parties do not meet together, as the conciliator assumes the roll of an intermediary or liaison. The conciliator's primary function is to communicate each disputant's position to the other, relay settlement options, and sometimes offer nonbinding advice in an effort to bring the sides closer to settlement.[16](#)

The United Nations has long encouraged conciliation and mediation to resolve disputes among states, and has recently recognized that mediation and arbitration are becoming common in commercial practice. On 19 November 2002, the United Nations General Assembly adopted a resolution encouraging all member states to give due consideration to enacting the Model Law on International Commercial Conciliation, which had been completed and adopted by the United Nations Commission on International Trade Law (UNCITRAL). See [Box 7-10](#) below for the UNCITRAL Model on International Commercial Conciliation.

Advantages and disadvantages of mediation

Mediation has many benefits. These include the following:[17](#)

- It may preserve long-term relationships upon which the telecommunications industry is based;
- Mediation costs are usually lower than adjudication or litigation;
- Parties can select a compatible mediator, usually without regulatory intervention;
- Mediation processes are more structured than negotiation (specific rules and procedures are available);
- Professional organizations are available to assist;
- Mediation allows the selection of a mediator with specific technical experience on the issue;
- Mediation facilitates resolution without public adversarial processes; and
- In addition to regulatory support, the benefits of mediation have led to judicial support for established mediation services and institutions.

Notwithstanding such benefits, mediation has certain drawbacks:

- The success of this method depends on the willingness of the parties to work together in good faith; and
- Mediation can also be subject to abuse by parties seeking to protract a dispute or obtain information that may be relevant at another stage of a dispute resolution process.

Factors for success

Various factors can contribute to the success of mediation:

- The parties involved should be committed to arriving at an agreeable outcome;
- Mediators and the parties must be able to establish a successful rapport;
- While the parties have ultimate control over their participation in the process, the mediators' management of the discussion makes it more structured than negotiation;
- By diplomatic “reality checking” on the positions and assumptions of the parties, the mediator can enable parties to ease back from rigid, embedded, and unrealistic positions;
- The mediator plays a critical role by focusing parties on their underlying interests rather than the abstract merits of their positions; and
- Good mediators demonstrate patience, insight, and psychological finesse to convince parties to modify their entrenched positions.

Successful mediation in the regulatory context can depend on the role of regulatory officials. Involving regulatory staff as mediators, or having a neutral mediator report to the regulator, can discourage disputing parties from taking unreasonable positions during the mediation process. In some cases, however, involvement of regulatory staff may compromise the confidentiality of the dispute resolution process. Such confidentiality is a key element in the success of mediation because parties may wish to avoid potentially self-damaging

consequences of changing their positions on important regulatory issues. In these cases, it may be preferable to use an outside neutral mediator, who can be trusted by both parties to maintain the confidentiality of the mediation process.[18](#)

Arbitration

Arbitration is a dispute resolution method that takes the place of conventional litigation. Through this consensual process, parties agree to submit a dispute to a neutral third party arbitrator or panel of arbitrators for resolution. The commitment to arbitrate may arise at the outset of commercial agreements through arbitration clauses that bind parties to seek arbitration for future disputes or it may derive from legal instruments or international agreements. Arbitration may also be chosen as an alternative to litigation or regulatory adjudication when a dispute arises.

Arbitration is of particular importance in the international context, since arbitral awards are enforceable in a large number of different countries under the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Agreements and Awards.[19](#)

Advantages and disadvantages of arbitration

Arbitration has several advantages. First, since it is generally a private or non-official procedure, it can better assure privacy and secrecy, protecting against disclosure of a party's confidential business information. Parties can agree on the confidentiality of the information and documents disclosed during arbitration proceedings. In addition, the fear of a negative precedent may be reduced due to the private nature of ADR mechanisms.

The flexibility of ADR mechanisms allows parties to combine arbitration with informal negotiations or mediation, thus resolving their dispute in a manner similar to an assisted negotiation. This helps foster a continuing working relationship which is valuable if the parties' dealings require ongoing interaction.

Arbitrations can sometimes take less time than conventional litigation or regulatory adjudication because of several factors, including the following:

- ability to design and schedule the steps needed at an early stage of the proceedings;
- ability to reduce steps that are otherwise mandatory in conventional litigation; and
- increased availability and flexibility of arbitrators.

From industry's perspective, the potential shorter timeframe offers commercial advantages, including reduced interference with business objectives. In the case of international arbitration, a considerable advantage is the availability of more neutral forums for adjudicators than parties would find in either party's national courts.[20](#)

Among some of the potential drawbacks of arbitration are the following:

- Arbitration is an essentially adversarial process, thus when used in isolation, it generally does not create "win-win" solutions or improve relationships;
- Arbitration may be more expensive than litigation when the issues in dispute are complex and a considerable amount of time is required to hear the dispute; and
- Arbitration proceedings cannot be consolidated into one action without the consent of all the parties, thus they create a risk of contradictory decisions on closely related issues.

Using arbitration in telecommunications disputes

Although arbitration as a dispute resolution tool is generally agreed upon by the parties involved in a specific contractual relation, in certain instances arbitration is compulsory or encouraged either by regulatory policy or legislation. For example, in certain countries internal regulation require interconnection disputes to be resolved through arbitration. Such is the case in Brazil, where disputes pertaining to the application and interpretation of the regulations during interconnection contract negotiations must be resolved by Anatel through arbitration, which is conducted by an Arbitration Council composed of three members appointed by the President of Anatel. The arbitration process begins when a party submits a petition to the President of the Council. The petitioning party then must submit all relevant information and documentation within the next 10 days. The Council is required to arbitrate the interconnection conditions within 15 days.[21](#)

In some countries, the regulatory framework adopts a more flexible approach and allows disputants to select the type of dispute resolution method. This is the case of interconnection dispute resolution in Jordan, where after a dispute continues 20 working days after the parties have begun negotiating a solution, the parties may either: (i) ask the regulator to intervene; or (ii) seek the assistance of an arbitrator. The consent of both parties is necessary to send a dispute to arbitration, while a dispute may be referred to the regulator for resolution on the request of only one party. The Jordanian interconnection dispute resolution process also explicitly provides that referring a dispute to arbitration, or to the regulator for resolution, does not prejudice the rights of the parties to seek remedies through the courts.[22](#)

In addition, arbitration is also used in the context of consumer disputes in the telecommunications sector. For example, some privately-run ADR bodies have created specific programs resolving such disputes. This is the case of the [The American Arbitration Association \(AAA\)](#) Wireless Industry Arbitration Rules.[23](#)

Factors for success

Numerous issues arise out of the use of arbitration mechanisms in the telecommunications regulatory context, including: (i) the role of the regulatory authority in the arbitration process; (ii) whether the arbitrators will be regulatory officials or independent persons approved or appointed by the regulatory authority; and (iii) whether the results of the arbitration proceeding will be subject to public comment and ultimately approved by the regulatory authority.

Because of this, the use of arbitration techniques and tools in the telecommunications sector requires addressing several important public policy concerns such as:²⁴

- potential limitations in the scope of proceedings (*i.e.*, dealing with the precedent-related aspects of a dispute or with implications for related issues);
- potential concerns about the enforceability of proceedings and about initiatives of the regulator to protect the integrity of its own jurisdiction at the expense of the credibility of the arbitration process;
- concerns about the expertise and experience of the arbitrator(s);
- concerns about the potential for conducting protracted proceedings in a quasi-judicial context without taking full advantage of opportunities for procedural streamlining;
- concerns about confidentiality-related considerations versus the interest in transparency that is usually characteristic of public decision-making;
- concerns about the legitimacy of a private dispute resolution process as a venue for resolution of issues affecting public policy and government interests;
- concerns about costs (which can be similar to concerns about litigation); and
- concerns with respect to a party's limited rights of appeal.

Where these concerns are successfully addressed, it may be possible to structure credible, efficient, and effective alternatives to regulatory agency adjudication through arbitration, thus possibly improving the overall quality of dispute resolution in the telecommunications sector.²⁴

Disputes Involving Foreign Operators

The privatization and liberalization trends that have characterized telecommunications regulations in the past decade have introduced a steady flow of foreign investment into the telecommunications sectors of many countries. However, such processes also may give rise to disputes between investors of telecommunications companies and regulatory agencies or ministries responsible for regulatory reform.

This section addresses two specific types of disputes resolution regimes directly related to foreign investment in the telecommunications sector, namely: (i) international investment disputes; and (ii) international trade disputes.

Investment disputes

Investment disputes tend to arise when the process of regulatory reform negatively affects the value of foreign investors' stakes in the sector. Among the examples of such regulatory changes are: (i) the termination of an incumbent operator's monopoly; (ii) rate rebalancing; (iii) mandatory interconnection; (iv) the introduction of a new rate-setting structure; and (v) changes in the terms and conditions of concessions or licences.²⁵

The legal basis on which investors may initiate a claim against the government varies from jurisdiction to jurisdiction. An investor may argue that a government's actions constitute an unlawful seizure of property or diminish the value of their property rights. Furthermore, investors may claim that the government has not complied with existing legislation or its statutory obligations (*e.g.*, in a rate-setting case, an investor may argue that the government did not take into account certain statutorily required criteria). Such a claim has been made in various cases recently instituted against the Government of Argentina due to price-freezes associated with the emergency economic measures taken in the wake of the 2001 financial crisis.

Claims also may derive from an alleged breach of contract between the investor and the government. In such cases, failure to comply with contractual commitments to conduct regulation of the telecommunications sector in a certain way may serve as a basis for an investor's compensation claims. These types of disputes may arise in the case of privatization of publicly-owned telecommunications companies, where it is not uncommon for contracts governing the sale of a government-owned stake in a telecommunications operator, to include an exclusivity period and a minimum rate of return, as well as to allow an increase in rates within a certain timeframe.

As an increasing number of countries have dropped foreign investment restrictions, sometimes in conjunction with commitments to open market access under the WTO GATS, it has become common for local operators, including incumbents, to be owned in whole or in part by foreign investors. Disputes arising in this context often become more complicated because they may raise issues of international law, the application of bilateral and multilateral treaties, conflicts between laws in different jurisdictions, and whether the laws of the parent company's home jurisdiction apply to the dispute.

International investment disputes

International investment disputes (*i.e.*, disputes between states and nationals of different states), may be referred for resolution to the World Bank Group's [International Centre for Settlement of Investment Disputes](#) (ICSID), as well as other centers such as the International Chamber of Commerce (ICC). This may be achieved through: (i) provisions in contracts between governments of member countries and investors from other member countries; and (ii) the operation of local investment laws and bilateral investment treaties.

A vast majority of the claims currently pending before the ICSID were brought pursuant to bilateral investment treaties. This reflects a trend whereby the ICSID caseload has shifted in recent years away from disputes brought pursuant to individual investment contracts toward cases invoking an international investment treaty.²⁶

Relevant aspects of bilateral investment treaty based disputes²⁷

Investment treaties typically provide foreign investors with the ability to bypass local and national legal systems, in favour of international arbitration, as they rarely require investors to exhaust their domestic legal remedies as a prerequisite to pursuing an international claim. This holds true even where contracts between an investor and a state expressly limit recourse to local dispute settlement options. For example, in the dispute between the Government of Ghana and Malaysia Telekom (further developed in [Box 7-12](#)) the arbitral tribunal upheld its jurisdiction to hear *treaty* claims, notwithstanding the fact that the contract in question provided for different means of dispute resolution.

Thus, once concluded, investment treaties containing open offers to investor-state arbitration open the door for foreign investors to take their claims out of the local legal system. Proponents of such mechanisms often describe them as safety valves that operate in the event that foreign investors may not be able to receive a fair hearing in a host government's courts.

In addition, investment treaty arbitration also insulates proceedings from extensive review by local court systems. Arbitrations under ICSID rules, for example, are exempt from the supervision of local courts, with awards subject only to an internal annulment process. Meanwhile, arbitrations under other sets of rules may be subject to limited challenge in domestic courts. This is evidenced in a case instituted by France Telecom against Lebanon where appeals were brought before the Swiss courts. Such review will typically be circumscribed by laws designed for ordinary commercial arbitrations, which, as a result, may accord a higher degree of deference to the findings of the arbitral tribunal.

Furthermore, investment arbitration can be plagued by lack of consistency in the interpretation of the substantive provisions of investment treaties from one case to the next. Thus, tribunals can, and have, reached widely divergent conclusions in parallel cases.²⁸ Governments can take steps during treaty drafting to minimize some of these problems, by including rules for the consolidation of related claims under the jurisdiction of a single tribunal, thus reducing the risk that parallel proceedings will lead to divergent rulings.

Hence, governments acceding to investment treaties should be aware that these agreements may serve to *internationalize* disputes that arise between regulators and foreign investors in sensitive sectors, including telecommunications. In such cases, foreign investors may bypass domestic legal systems in favour of international dispute resolution forums.

International investment disputes in the telecommunications sector

The number of international investment disputes has increased in the past years, including telecommunications disputes.²⁹ Prior to August 2004, merely one telecommunications-related arbitration proceeding had been instituted before ICSID.³⁰ In the last year alone, four separate disputes between telecommunications sector participants and various States have been registered before ICSID.³¹

Out of these five telecommunications-related cases currently before the ICSID, three were brought against the Argentine Government,³² based on claims that the foreign investors are entitled to compensation for losses derived from emergency measures adopted during the 2001 financial crisis, mainly related to price freezes. For example, in the case of *Telefónica S.A. v. Argentine Republic*, investors are alleging that the emergency measures amounted to the expropriation of their investments, and are seeking monetary compensation for their damages. These cases evidence the risk, noted above, of similar disputes being resolved by separate tribunals operating in parallel, thus raising the prospect of a succession of different rulings.

The following Box 7-11 provides a short summary of certain telecommunications-related investment disputes before the ICSID.

Box 7-11: Telecommunications-related Investment Disputes Currently Before the ICSID

- ***Telefónica S.A. v. Argentine Republic.*** Telefónica S.A., which provides basic telephone and long-distance service in Argentina, filed a claim alleging that the Argentine Government partially expropriated its investment following the imposition of emergency measures during the recent Argentine financial crisis.³³ Telefónica S.A. asserts that a freeze in service tariffs imposed by the Argentine Government, coupled with the 70 percent currency devaluation, cost the company US\$3.8 billion.³⁴ As of September 15, 2005 no decision had been issued in this dispute.
- ***Telenor Mobile Communications v. Hungarian Government.*** The Norwegian firm Telenor Mobile Communications has registered a claim against the Hungarian Government in relation to Telenor's subsidiary Pannon GSM, which has a cellular telephone concession in the eastern European state. Telenor's ICSID claim was brought pursuant to the Norway-Hungary bilateral investment treaty and seeks to challenge regulatory rate-setting measures imposed on Pannon by the Hungarian Government.

In addition, several other telecommunications-related investment disputes have been brought to arbitration outside the scope of ICSID. As of April 2004, at least four telecommunications-related claims had been conducted outside of ICSID, based upon provisions in bilateral investment treaties in force between the host and investor's countries. These cases include *Ameritech v. Polish Government*; *Telekom Malaysia v. Government of Ghana*; *France Telecom v. Lebanon*; and *William Nagel v. Czech Republic*. These proceedings involve claims of

expropriation of investments, as in the cases against Lebanon and the Government of Ghana, as well as violations of contractual obligations related to the award of licences (*i.e.*, the cases against the Government of Poland and the Czech Republic).

The following Box 7-12 highlights these proceedings.

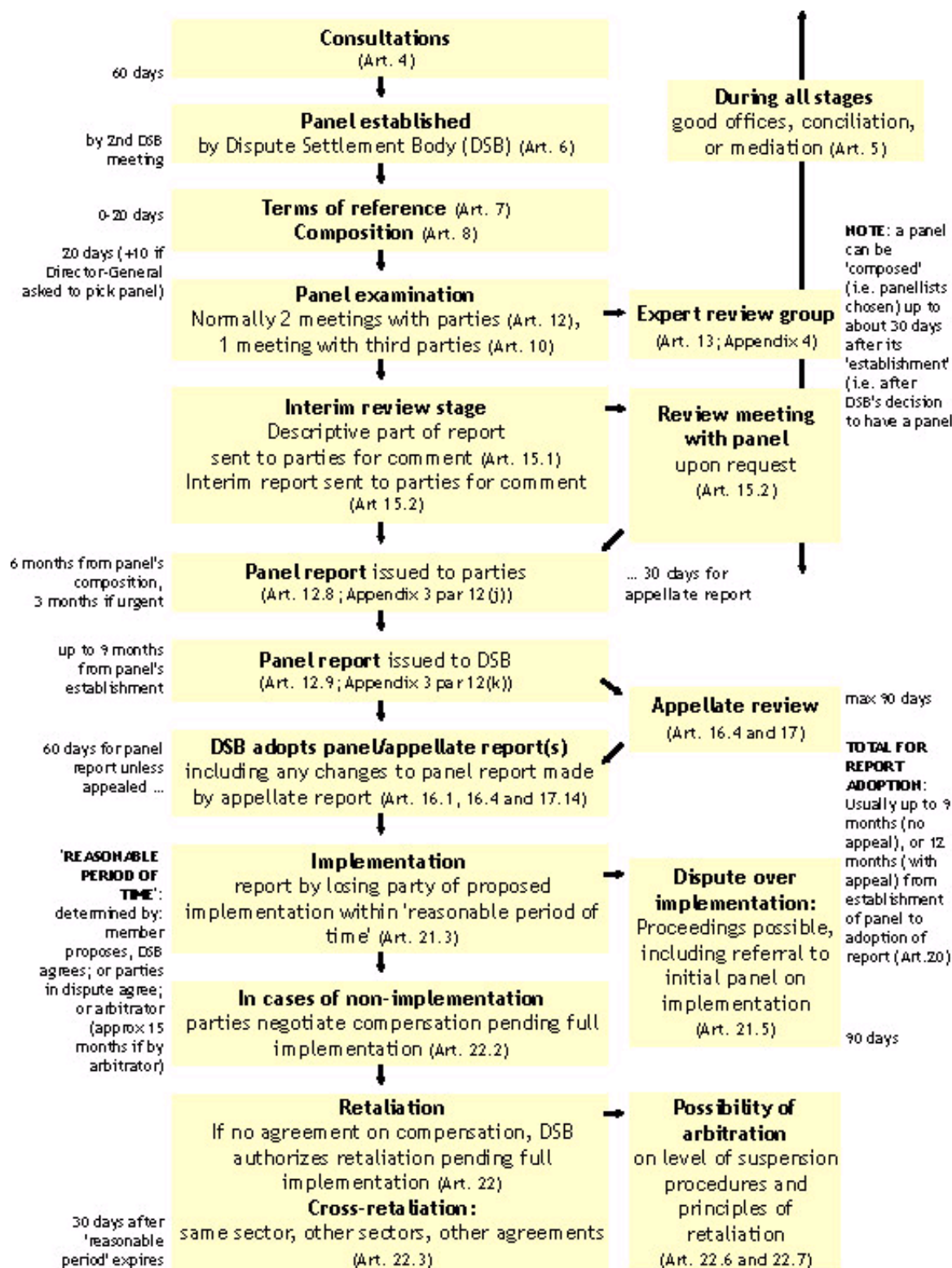
Disputes related to international trade: WTO dispute settlement

International trade law is applicable, under certain situations, to disputes within a country's telecommunications sector. The WTO's GATS is the principal multilateral trade agreement affecting the provision of telecommunications services. In addition, a series of related documents contain specific commitments pertaining to the opening and regulation of telecommunications markets: (i) the Fourth Protocol to the GATS Agreement; (ii) the Schedules of Specific Commitments of Individual GATS Signatories; and (iii) the WTO Reference Paper, which was included in the commitments of most signatories.

In many cases, these obligations are applicable to telecommunications disputes arising in GATS signatory countries. An international trade dispute arises when one country adopts a trade policy measure or takes some action (*e.g.*, interconnection rate regulation) that one or more WTO members consider to be in breach of pre-existing WTO agreements, or to be a failure to comply with validly acquired obligations. In such cases, WTO members have agreed to use the multilateral system of dispute settlement, rather than take unilateral action.

The following Figure 7-F is a diagram of the dispute resolution procedure before the WTO:

Figure 7-F: WTO Dispute Resolution Procedure



Source: WTO available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/disps2_e.htm

The main objective of WTO dispute resolution proceedings is to settle disputes, through consultation if possible.³⁵ To date, only one telecommunications case has been before a WTO Dispute Settlement Body (DSB) for resolution, the U.S.-Mexico case. In that case, the United States argued that Mexico had failed to comply with its commitments and obligations under the GATS, specifically it had failed to: (i) ensure that Telmex provided interconnection to U.S. cross-border basic telecommunications suppliers on reasonable rates, terms and conditions; (ii) ensure reasonable and non-discriminatory access to, and use of, public telecommunications networks and services for U.S. basic telecommunications suppliers; and (iii) provide national treatment to U.S.-owned commercial agencies. The panel's report on "Mexico – Measures Affecting Telecommunications Services", later adopted by the DSB on 1 June 2004, principally sided with the U.S. position. Nevertheless, following its adoption the parties notified the DSB that they had arrived at a mutually agreed solution to the conflict by which

Mexico would, within a 13 month period: (i) adopt revised International Long Distance Rules eliminating the “uniform settlement rate” and “proportional return” systems in force at the time; and (ii) implement a regulation to allow the resale of international long distance public switched telecommunications service.³⁶ For further detail on this case see Chapter 3, Section 3.2.

Other telecommunications-related disputes between WTO Members have been under discussion and at least two cases have nearly come to the WTO but have been settled through purely bilateral channels, including: (i) a dispute between the United States and Japan on interconnection; and (ii) a dispute between the United States and the European Communities on standards for licensing mobile services.

Under WTO rules, individual service providers lack “standing” to seek remedies through the GATS dispute resolution procedures. As such, typically, the service provider’s country of origin puts pressure on another country’s government to comply with its GATS obligations. These mechanisms have the potential of turning what could initially be characterized as a domestic dispute (e.g., about licensing or interconnection) into an international trade law dispute.

ENDNOTES

¹ This section follows closely the discussion contained in the comprehensive report prepared by Robert R. Bruce, Rory Macmillan, Timothy St. J. Ellam, Hank Intven and Theresa Miedema, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*, World Bank/International Telecommunication Union, October 2004 [hereinafter WB/ITU, *Dispute Resolution in the Telecommunications Sector*].

² WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at v.

³ Slamming is the practice of changing a consumer’s service provider without the consumer’s authorization. In other words, slamming is when one service provider “steals” a customer from another service provider, without asking the customer.

⁴ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at 40.

⁵ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at viii.

⁶ *Id.* at 49. In deciding whether to accept a request for consensual resolution or to proceed by way of a rulemaking proceeding, the Saudi regulator must take into account: (i) whether the dispute will have regulatory or precedent-setting value, and whether a consensual proceeding likely will be accepted as an adequately authoritative precedent; (ii) whether the dispute raises policy issues that extend beyond the interests of the parties involved and that may require additional comment from other concerned parties before a final resolution may be made; and (iii) whether the dispute might have a material effect on persons who are not parties (Saudi Telecommunications Bylaw, Article 45.8).

⁷ Similarly, in Nigeria, when the regulator receives an appeal from an operator involved in interconnection negotiations, the regulator must intervene in the negotiations if no agreement has been reached within 90 days of the commencement of negotiations. This requirement only applies, however, when at least one of the negotiating parties is a dominant operator. Where none of the parties are dominant operators, the regulator may decline to intervene, even if a party requests it.

⁸ Nevertheless, some regulators will intervene in interconnection negotiation disputes between non-dominant suppliers. Such is the case of Bolivia and Venezuela, where either party in an interconnection negotiation may submit a dispute to the regulator for adjudication.

⁹ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at 65.

¹⁰ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at viii.

¹¹ Where a regulator lacks such internal expertise to analyse technical, economic, and legal issues, it may retain external consultants to supplement its analytical capabilities. The Botswana Telecommunications Authority’s experience regarding interconnection dispute resolution illustrates this point. See Robert Bruce and Rory Macmillan, Botswana Mini-Case Study 2003, *Recent Experience in Interconnection Disputes*, ITU, available at http://www.itu.int/ITU-D/treg/Case_Studies/Disp-Resolution/Botswana.pdf.

¹² It should be noted that in certain jurisdictions arbitration is excluded from a strict conception of ADR mechanisms as it is seen as a system of adjudication under a defined process.

¹³ This does not imply that ADR procedures are not contentious. Their distinctive characteristic is that they offer parties greater control over the procedures that will apply, and over the choice of adjudicators.

¹⁴ Article 20 (2) of the EU Framework Directive provides that: “Member state may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner.”

¹⁵ See the Office of Telecommunications Adjudicator website at <http://www.ofta.org.uk>.

¹⁶ It should be noted that the terms mediation and conciliation are sometimes employed as synonyms. This is true in the case of the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law. It is also the case in Burkina Faso, where the regulator ARTEL is competent to conciliate, as well as to arbitrate, between operators or between operators and their customers in the following circumstances: improper application of an operator’s licence agreement; licence terms and conditions; interconnection agreements; access to telecommunication networks; or infrastructure sharing. Before ARTEL can become involved,

however, the disputing parties first must have attempted to amicably settle the matter. See Contribution of ONATEL to ITU-D Question 18/1, April 1, 2005 at 4.

¹⁷ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at.15-16.

¹⁸ *Id.* at 17.

¹⁹ Available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

²⁰ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at 18.

²¹ *Id.* at 34.

²² *Id.* at 36.

²³ *Id.* at 20-21.

²⁴ *Id.* at 21-22.

²⁵ It is beyond the scope of this report to explore in detail how these issues can be addressed. For a through review of the matter see WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at 63-84.

²⁶ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at 27.

²⁷ Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making*, International Institute for Sustainable Development, November 2004, at 15, available at http://www.iisd.org/pdf/2004/trade_bits.pdf [hereinafter Peterson, *Bilateral Investment Treaties and Development Policy-Making*].

²⁸ *Id.*

²⁹ This was most clearly illustrated in relation to two treaty claims mounted against the Czech Republic—CME v. Czech Republic and Ronald Lauder v. Czech Republic—by a broadcasting firm and its major shareholder. Two separate tribunals examined virtually identical facts in the CME and Lauder arbitrations, yet reached contradictory conclusions as to whether the Czech authorities had violated key investment rules such as those on non-discrimination and expropriation. See Peterson, *Bilateral Investment Treaties and Development Policy-Making*, at 27.

³⁰ For example, cases brought before ICSID have increased from three at year-end 1994 to 106 at year-end 2004. In addition, according to the United Nations Conference on Trade and Development (UNCTAD), there are at least 54 cases (cumulative) outside ICSID, as compared to two at the end of 1994. UNCTAD figures estimate that the cumulative total of all known cases brought under bilateral, regional (e.g., NAFTA) or plurilateral (e.g., Energy Charter Treaty) agreements that contain investment clauses, or international investment agreements, numbered 160 by November 2004. See UNCTAD, *International Investment Disputes on the Rise*, Occasional Note, 29 2004, at 1, available at http://www.unctad.org/sections/dite/ia/docs/webiteit20042_en.pdf. These figures exclude disputes arising from contractual provisions between investors and governments. However, as noted above, the current trend indicates that the majority of international investment disputes arise out of bilateral investment agreements.

³¹ Telefónica S.A. v. Argentine Republic (Case No. ARB/03/20), registered 21 July 2003. See list of pending cases at <http://www.worldbank.org/icsid/cases/pending.htm>.

³² These cases are: (i) Telenor Mobile Communications AS v. Republic of Hungary (Case No. ARB/04/15), registered on 2 August 2004; (ii) France Telecom S.A. v. Argentine Republic (Case No. ARB/04/18), registered on 26 August 2004; (iii) TSA Spectrum de Argentina, S.A. v. Argentine Republic (Case No. ARB/05/5), registered 8 April 2005; and (iv) Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (Case No. ARB/05/16), registered 30 August 2005.

³³ UNCTAD has identified the unprecedented spate of lawsuits against Argentina as one of the factors that has influenced in the recent increase in the number of international investment disputes. See UNCTAD, *International Investment Disputes on the Rise*, at 2. In 2003 alone, 20 transnational corporations filed lawsuits against Argentina, alleging violation of investment treaty guarantees. A further 12 ICSID cases had been launched against Argentina as of 15 September 2005.

³⁴ Luke Eric Peterson, *Investors Looking Beyond ICSID in Investment Treaty Telecoms Cases*, INVEST-SD: Investment Law and Policy Weekly News Bulletin, 13 April 2004, available at http://www.iisd.org/pdf/2004/investment_investsd_april13_2004.pdf [hereinafter Peterson, *Investors Looking Beyond ICSID in Investment Treaty Telecoms Cases*].

³⁵ WB/ITU, *Dispute Resolution in the Telecommunications Sector*, at 29.

³⁶ Luke Eric Peterson, *Norwegian mobile telecoms firm turns to ICSID in tussle with Hungary*, INVEST-SD: Investment Law and Policy Weekly News Bulletin, 14 August 2004, available at http://www.iisd.org/pdf/2004/investment_investsd_aug14_2004.pdf.

³⁷ By May 2003, merely a third of the close to 300 cases instituted had reached the full WTO panel process. Most of the rest have either been notified as settled “out of court” or remain in a prolonged consultation phase — some since as far back as 1995. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

[38](#) For a comprehensive analysis of the procedural aspects as well as the policy implications of this case for international trade of services, both telecommunications and otherwise, see Björn Wellenius, Juan Galarza, and Boutheina Guermazi, *Telecommunications and the WTO: The Case of Mexico*, World Bank, June 2005, at 14-19.

7.4.2 Enforcement

One of the main attributes of effective regulation is the power to enforce compliance with sector policy, laws and regulatory decisions, including dispute resolution decisions. Today, very few regulators do not have enforcement power.[1](#) The differences in market and regulatory maturity, as well as legal and judicial practices, affect the enforcement practices and procedures of individual countries. However, it is generally agreed that an effective enforcement system is essential in any economy in order to give effect to those rules necessary for maintaining order in the sector, maintaining and facilitating stability, growth and development of the sector, deterring wrongdoing, protecting consumers, and maximizing social and corporate welfare.[2](#) In summary, an effective enforcement system should be:[3](#)

- (a) *fast* – enforcement decisions must be made quickly, decisively, and clearly to reduce uncertainty in the market and deter future violations;
- (b) *firm* - penalties must be severe enough to deter violations;
- (c) *fair* – the enforcement system should be perceived as fair and transparent, and decisions for enforcement action must be based on objective facts and evidence and made publicly available; and
- (d) *flexible* – the regulator should have other means aside from formal litigation or regulatory adjudication, such as alternative dispute resolution, to resolve complaints and disputes, as well as a wide variety of enforcement tools to ensure that the severity of the punishment matches the severity of the violation.

Additionally, in order for the regulator to enforce its rules effectively, an enforcement regime should include the following minimum attributes:[4](#)

- (a) adequate resources for carrying out enforcement activities;
- (b) an efficient mechanism for dealing with complaints of non-compliance with rules and regulations;
- (c) a regulator with the authority to conduct investigations and enforce laws, rules, regulations, and decisions;
- (d) transparent procedures for investigations, judgment criteria, sanctions and appeals, as well as options for dispute resolution; and
- (e) an appeal mechanism to appeal a decision to a higher level, whether within the regulatory body or to the court system.

Enforcement Practices and Procedures

Numerous regulators have developed detailed procedures to facilitate and verify compliance of the telecommunications legal framework. Such procedures are generally based on the powers given to regulators under their respective telecommunications laws and related implementing regulations.[5](#) Other regulators, such as the Tanzania Communications Regulatory Authority have included provisions in the licence specifying the power of the regulator to investigate breaches of the terms of the licence or violation of national laws.[6](#) Clear and published enforcement procedures are needed to ensure transparency and accountability, for example, that sanctions are issued after adequate investigation, and that the accused party is provided with proper notice of the alleged violation and an opportunity for defense. Transparency also facilitates and encourages voluntary compliance with rules and regulations, minimizing the need for intervention by the regulator and reducing regulatory costs for the government and industry players.[7](#)

Organization and Resources

To fully exercise their enforcement powers, regulators first must have the necessary organizational infrastructure and resources to support their activities. Enforcement activities require the regulator to have: (i) a sufficient number of skilled staff responsible for monitoring compliance and conducting investigations; (ii) adequate technical capacity such as spectrum management and radio monitoring systems; and (iii) the necessary funds. Regulators often devote a significant amount of their financial resources to support enforcement activities. For example, Anatel in Brazil, spends almost half of its financial and human resources on monitoring and enforcement activities.[8](#) In the United States, approximately 20 per cent of the FCC's staff works on enforcement issues.[9](#) In Lithuania, in 2003, approximately 56 out of the 135 employees at the Communications Regulatory Authority (CRA) staff were involved in enforcement work.[10](#) For new regulators, the resources required for enforcement purposes are sometimes underestimated and require modification. In Uganda, for example, only one person was initially responsible for enforcement. Between 2002 and 2004, the regulator installed a spectrum management system for monitoring spectrum usage and hired engineers and other trained professionals to supplement its staff in undertaking enforcement activities.[11](#)

Regulators, however, must not only have sufficient staff for enforcement, they also need staff with the proper authority and training to perform monitoring and enforcement duties, such as conducting inspections, searches and seizures, inquiries, and requesting the cooperation of police or judicial authorities as necessary. Many regulators have given broad powers to their officers allowing them to perform their enforcement functions appropriately. In Jordan, employees of the Telecommunications Regulatory Commission (TRC) are empowered under Articles 62 to 64 of the Telecommunications Act to act as “judicial police officers” when authorized to conduct searches and seizure of any unlicensed or illegal telecommunications equipment.[12](#) In Singapore, the Telecommunications Act grants the Infocomm Development Authority (IDA) and its officers the power to require information, have full and free access to all buildings and documents and

to inspect, copy and take possession of such documents or equipment, to arrest and search without warrant in respect of certain offenses, and to compound offenses. Furthermore, any person who obstructs IDA officers in the execution of their duties is guilty of an offense.[13](#)

However, due to the intrusiveness of these investigatory powers, in some countries regulatory officials must sometimes obtain judicial warrants before exercising their search and seizure powers. In Jordan, TRC officers must obtain a warrant from the Public Prosecutor before entering private residences.[14](#) In Lithuania, the Communications Regulatory Authority inspectors must obtain a warrant from the Vilnius Regional Administrative Court before inspecting a vehicle, premises or territory.[15](#) In Nigeria, officials and inspectors authorized by the NCC must obtain a warrant from a magistrate or judge before seizing, detaining or sealing off any building or premises when carrying out an investigation.[16](#)

Enforcement Procedure

Enforcement procedures generally include the following stages: (i) initiating enforcement procedures and investigations; (ii) providing notice of the alleged violation; (ii) providing an opportunity to respond; (iii) issuing interim decisions or orders; (iv) imposing sanctions; and (v) providing opportunity for appeals.

1. Initiating the process

There are several ways that a regulator can become aware of an alleged breach or violation of laws and regulations – regulator initiated investigations, consumer complaints, or operator complaints. A regulator-initiated investigation can be started by the regulator for various reasons. For example, routine inspection of licensees' premises may reveal a violation, or a violation can be identified when objections are filed to licence applications. Some licensees also may voluntarily report their violations (*i.e.*, as part of industry self-regulation). In many countries, regulators have the authority to inspect facilities and equipment, and to request the submission of specific information or documentation to ensure compliance with legislation and licence conditions. In the United States, for example, the FCC can request information directly from a licensee through a letter of inquiry or through a legal order, or court-issued subpoena.[17](#) Many regulators also have fixed and/or mobile spectrum monitoring systems to monitor and enforce compliance with spectrum usage and non-interference requirements. In Hong Kong (SAR), OFTA also proactively gathers market information through monitoring media reports, advertisements, and sales literatures.[18](#)

A second mechanism for regulators to become aware of a possible violation is through the receipt of consumer complaints, usually submitted as "informal complaints" via telephone calls, letters or e-mails in order to allow for ease and simplicity in the filing of consumer complaints. In Brazil, consumers can submit complaints directly to Anatel, but also have the option of submitting complaints via Anatel's toll-free call centers.[19](#) Although in many fully liberalized telecommunications markets the operators are given primary responsibility for addressing consumer complaints,[20](#) almost all regulators have some vehicle for consumer complaints, allowing consumers another avenue of redress for complaints that are not resolved directly with the operators. Furthermore, operators are less likely to ignore a consumer complaint knowing that the regulator also may pursue the matter on its own motion. The level of complaints received against a particular operator or service provider also provides the regulator with a good indication on whether to undertake enforcement action.

In addition to consumer complaints, operators and service providers often file complaints with the regulator seeking enforcement action. These complaints often take the form of "formal complaints" and are similar to a lawsuit in the information it requires and in the fact that complainants can also pursue individual relief. Typically, a formal complaint is submitted in writing, and requires, in addition to the name, contact details of the complaining party and allegations of the violation, that the complaining party cite the specific provisions of the law or regulation that is contravened, provide supporting evidence of the allegations made, and submit a signed statement that the facts alleged are true and whether any steps were taken to address the complaint with the party against whom enforcement is sought. See example of the submission requirements for the IDA in Box 7-13. Some regulators, such as the FCC in the United States, also may charge a filing fee for formal complaints.[21](#)

Box 7-13: Submission of a Written Request for Enforcement Action with the IDA

In Singapore, any party that requests the IDA to take enforcement action must submit a Request for Enforcement in writing, citing the specific provisions of the Code of Practice for Competition in the Provision of Telecommunication Services 2005 (Telecom Competition Code) that have been contravened, and attaching any relevant supporting documents to prove the allegations made. The Request for Enforcement must also include a signed statement that:

- (i) the requesting party has used reasonable diligence in collecting the facts;
- (ii) the facts alleged are true to the best of the requesting party's knowledge;
- (iii) the requesting party believes in good faith that the facts alleged, if proven, would constitute a contravention of the provisions of the Telecom Competition Code;
- (iv) describes the manner in which the requesting party has been harmed, or is likely to be harmed by the alleged contravention; and
- (v) the requesting party has made an effort in good faith to resolve the underlying dispute through direct negotiations with the licensee against whom enforcement action is being sought.

To encourage the timely filing of complaints, some regulators have included a statute of limitations within which a complaint can be brought requesting enforcement action. For example, in Singapore, the IDA will not initiate any enforcement action if more than two years have lapsed since the date of occurrence of the action that constitutes the alleged offense.²² In France, the Telecommunications Act of 1996 mandates that “matters dating back more than three years may not be referred to the telecommunications regulatory authority if no action has been taken in view of an inquiry, verification or penalty.”²³

(b) Due process consideration

The enforcement procedure generally provides for a certain degree of due process before sanctions are issued. The regulator usually provides notice of the alleged violation after it receives a complaint or before it undertakes an investigation on its own motion and allows an adequate time period for a party to provide a response or defense. Generally, the notice of alleged violation notifies the parties that a complaint has been filed, specifies the provisions of legislation that have allegedly been breached, and provides details of the regulator's intended actions. Notices may also contain instructions on how the respondent may remedy the situation or provide instructions on how it may present its defense. In the event that an enforcement action is pursuant to a complaint, a copy of the complaint submitted to the regulator is usually sent to the respondent.

Typically, respondents are given an opportunity to file a response to the allegations in the complaint, and regulators consider the response before making a final determination on sanctions. For example, the Malaysian Communications and Multimedia Commission (MCMC) will not make a finding adverse to a complainant or respondent in an investigation unless the parties are given a minimum of 30 days to make submissions in their defense.²⁴ In Brazil, Anatel gives the respondent 15 days to present its defense. In the United Kingdom, Ofcom will inform the complainant within 15 days whether it intends to open an investigation into the complaint, and the respondent is allowed 10 days to respond to Ofcom's notice of investigation.²⁵

Timeliness in enforcement is critical to the promotion of competition and to maintain the credibility of the regulator. Some regulators, such as Ofcom in the United Kingdom, have additional authority under the telecommunications legislation to act urgently when necessary to resolve the complaint. Where Ofcom considers a violation as urgent, it may specify that any action taken by the alleged offender be taken sooner than would otherwise be the case. Generally, a case is regarded as urgent when the contravention has resulted in, or creates an immediate risk of: (i) serious threat to public safety, public health or national security; (ii) serious economic or operational problems for communications providers or providers of associated facilities; or (iii) serious economic or operational problems for users of electronic communications networks, electronic communications services or associated facilities.²⁶

Figure 7-G illustrates a summary of enforcement procedures and timelines for some countries.

Figure 7-G: Enforcement procedures and timelines

Country	Notice Provided to Offender	Offender's Defense/Response	Final Decision	Publication of Final Decision
Brazil	yes	15 days	30 days from conclusion of investigation	yes
Malaysia	yes	30 days minimum	not specified	yes, if Minister decides it is in the national interest
Singapore	yes	15 days	60 days	yes
United Kingdom	yes	10 days	4 months for disputes 6-12 months for complaints	yes

Source: Telecommunications Management Group, Inc.

(c) Interim measures

During the course of conducting investigations, some regulators including the FCC in the United States, the IDA in Singapore, and Ofcom in the United Kingdom also have authority to impose interim measures to protect the public interest and prevent any serious or immediate harm that may result from the alleged violation. For example, the IDA has authority under the Telecom Competition Code to issue an interim cease and desist order at any time during an enforcement proceeding if it concludes that: (i) there is prima facie evidence of a contravention; (ii) continuation of the contravention is likely to cause serious harm to other licensees, end users or the general public; (iii) the potential

anticompetitive harm from allowing the licensee to continue its conduct outweighs the burden on the licensee; or (iv) issuance of the order is in the public interest.

(d) Sanctions

Regulators should have a variety of sanctioning tools to enforce compliance, and to ensure that the severity of the sanction matches the severity of the violation. When determining the appropriate sanction to impose, regulators should consider aggravating and mitigating factors such as the severity of the violation, the resulting harm to users and service provision, the benefits that the offender derived from the violation, prior violations, repetition of violations, early admission of the violation, cooperation or refusal to cooperate with the investigation, and the economic and financial situation of the offender.

Almost all regulators impose monetary sanctions, or fines. Most regulators have a specific schedule of fines, while other regulators in Peru, Poland, Portugal, and Turkey levy fines based on a percentage of the offending party's revenues.²⁷ The variety of sanctions available to a regulator may be constrained by the limits on the regulator's authority, in particular with regard to the ability to issue penal (criminal) sanctions. In some countries such as Burkina Faso,²⁸ Egypt,²⁹ Hong Kong (SAR),³⁰ India,³¹ Jordan,³² Malaysia,³³ and the United States,³⁴ the telecommunications legislation allows for criminal sanctions, and the regulators have the authority to impose prison sentences or refer violations for criminal prosecution to the courts or the proper authorities. Other sanctions used for enforcement include issuance of warnings, remedial orders or specific directions to do or refrain from doing specific activities, public apologies, seizure of illegal equipment, and suspension or revocation of licences.

(e) Appeals

To ensure that an enforcement system is fair, parties affected by a dispute resolution or enforcement decision should be able to seek an appeal of the initial decision to a higher level, even after the sanction has been issued. Appeals can be filed within the regulatory body to the next level in the hierarchy, or to outside bodies such as courts or an appropriate Ministry. In Singapore, parties appealing an IDA decision have 14 days to request the IDA to reconsider its decision or direction, or appeal to the Minister within 14 days of the IDA's decision on reconsideration.³⁵ Some regulators, such as the MCMC in Malaysia, also may require parties to first exhaust all other remedies available with the regulator before seeking judicial review.³⁶ An ITU survey on the right of appeal has identified that in a majority of countries (127 countries out of 165 surveyed), parties have the right to appeal regulatory decisions.³⁷

The appeal procedure, however, should not be so extensive as to diminish the effectiveness of the enforcement decision. To this effect, many countries prohibit the parties from raising new arguments during an appeal process. New Zealand, for example, limits appeals of the regulator's decisions to questions of law.³⁸ Generally, appeals procedures do not impede the sanction entering into effect, although in many countries whether an enforcement or dispute decision is stayed or remains in force depends on the particular case.

Industry Self-regulation

As a complement to an enforcement regime, some regulators are encouraging industry self-regulation by requiring the use of alternative dispute resolution to resolve disputes, as discussed in Section 7.4.1 above. Some regulators, particularly in more liberalized and competitive economies, are also engaging in more light-handed regulation and encouraging voluntary compliance with industry codes and standards to minimize the need for regulatory intervention.³⁹ For example, in Malaysia, the MCMC is expressly required under the Malaysian Communications and Multimedia Commission Act to promote and encourage industry self-regulation. The MCMC has acted accordingly by establishing industry self-regulatory bodies, such as the Consumer Forum, Content Forum and Technical Standards Forum, composed of industry and consumer representatives working together to produce voluntary industry codes.⁴⁰ Such voluntary compliance frameworks are not substitutes for regulatory enforcement, as the regulator still may be required to intervene and enforce compliance where parties fail to comply with voluntary rules and where the interests of consumers and competition in the sector are adversely affected.⁴¹

Another aspect of industry self-regulation is the encouragement of self-reporting by operators of possible infractions of telecommunications law and regulations. Self-reporting can be induced by lowering the sanctions for parties that disclose their own infractions. For example, in Hong Kong (SAR), OFTA considers early admission of the breach a mitigating factor in determining sanctions.⁴² Similarly, in the United States and in Singapore, the FCC and the IDA encourage parties to voluntarily disclose any violations, and the regulators may consider such voluntary disclosure when determining the appropriate enforcement action.⁴³

Enforcement of Dispute Resolution Decisions

The enforcement procedure described in the above section is focused on the regulator's authority to enforce its own "official" decisions and the national telecommunications laws. However, as described in Section 7.4.1 above, parties also rely on alternative "non-official" approaches to resolve disputes, such as arbitration and mediation, which may or may not involve the regulator's participation. All dispute resolution processes require some level of enforcement support from the official sector, whether from the regulator or from the courts.⁴⁴ Consensual processes such as mediation and negotiation rely upon courts to enforce settlement agreements. Decisions resulting from regulatory adjudication rely upon the enforcement power of the regulator, and sometimes the courts as well, depending on how enforcement powers have been allocated, and which entity has the ultimate authority to overturn the regulator's decision. Many countries' telecommunications laws give regulators authority to enforce regulatory decisions resolving disputes. In addition, regulators may use their enforcement powers as an alternative to ordinary civil enforcement mechanisms, such as courts and police systems, to support less official dispute resolution initiatives, such as performing functions similar to a court in arbitration cases.⁴⁵ Generally, after parties have started court proceedings and reached a negotiated settlement agreement, the court will stamp the agreement, giving it the force of a court order. Regulators can perform a similar role by giving voluntary settlement agreements the force of a regulatory order, making the

regulator's enforcement powers available to ensure the implementation and compliance with the agreement.⁴⁶

ENDNOTES

¹ According to the survey on enforcement on licensees in the ITU World Telecommunication Regulatory Database 2005, the telecommunications regulators in Colombia and Suriname indicated that they do not have any enforcement power. The Colombian regulator, the Superintendencia de Servicios Públicos, enforces compliance by local and long-distance public telephony operators, and the Superintendencia de Industria y Comercio enforces compliance by mobile operators and Internet service providers. Although the Colombian regulator does not have enforcement power, it does have the authority to require information from licensees, and can impose fines for non-compliance with such order.

² *Domestic Enforcement of Telecommunications Laws: Guidelines for the International Community – Report on ITU-D Question 18/1*, 22 September 2005, at 4.

³ Lima Declaration, adopted in the Sixth APEC Ministerial Meeting on the Telecommunications and Information Industry (Telmin6), June 2005, at Annex C – Compliance and Enforcement Principles, available at <http://www.apecsec.org.sg/>.

⁴ *Id.* See also *Effective Compliance and Enforcement Guidelines and Practices*, APEC Telecommunications and Information Working Group, 31st Meeting, Document no. Telwg31/LSG14, April 2005, at 5, available at <http://www.apectelwg.org/>.

⁵ For example, the Uganda Communications Commission (UCC) has authority under the Uganda Communications Act, licence provisions and UCC regulations to receive, investigate and act on complaints, and to impose fines for violations. The UCC has the power to appoint inspectors to verify compliance with the Uganda Communications Act, and to criminally prosecute offenses pursuant to permission from the Uganda Director of Public Prosecutions. In the United States, the Communications Act of 1934, as amended, gives the FCC broad authority to conduct investigations and take enforcement action. *Domestic Enforcement of Telecommunications Laws: Guidelines for the International Community – Report on ITU-D Question 18/1*, Section I, 22 September 2005.

⁶ The Tanzania Communications Regulatory Authority may initiate investigations where the licensee fails to comply with installation and service requirements, fails to provide information to the TCRA or when there has been a partial or total interruption of services for a continuous period of time. See *Four Steps to Enforcement*, contribution from Tanzania to ITU-D, Question 18/1, 19 September 2002.

⁷ See *Effective Compliance and Enforcement Guidelines and Practices*, APEC Telecommunications and Information Working Group, 31st Meeting, Document no. Telwg31/LSG14, April 2005, at 4-5.

⁸ International Telecommunication Union, *Trends in Telecommunication Reform 2002: Effective Regulation*, 2002, at 46.

⁹ *Domestic Enforcement of Telecommunications Law: Guidelines for the International Community – Report on ITU-D Question 18/1*, International Telecommunication Union, Telecommunication Development Bureau, 22 September 2005, at 43.

¹⁰ Contribution from Lithuania to ITU-D Question 18/1, 10 March 2003 at 2.

¹¹ See *Addendum to Uganda's Contribution on the Enforcement of Laws, Rules and Regulations by National Regulatory Authorities*, Uganda's contribution to ITU-D Question 18/, 12 January 2004. See also *Domestic Enforcement of Telecom Laws and Regulations and the Limitations: Uganda's Experience*, Uganda's contribution to ITU-D Question 18/1, 24 March 2002.

¹² Jordan, Telecommunications Law No. 13, as amended (Telecommunications Law of 1995), Articles 62-64.

¹³ Singapore Telecommunication Act of 1999, Part VIII.

¹⁴ Telecommunications Law No. 13, as amended (Telecommunications Law of 1995), Article 62.

¹⁵ Contribution by Lithuania to ITU-D Question 18/1, 10 March 2003, at 2.

¹⁶ Enforcement Regulations 2004, issued pursuant to the Nigerian Communications Act 2003, (2004).

¹⁷ See *Enforcement of Telecom Laws and Regulation in the United States*, contribution from the United States to ITU-D Question 18/1, 30 August 2002, at 9-10. A letter of inquiry can be used to initiate an investigation into a matter or to determine whether to continue a proceeding beyond the preliminary stage of investigation or to gather more information during an ongoing investigation. The recipient of a letter of inquiry is given a specific time period in which to respond. Under 18 U.S.C. Section 1001, a person who makes a knowing and willful misrepresentation or omission in response to a letter of inquiry is subject to possible criminal penalties. Subpoenas require the recipient to release all information related to a particular matter under investigation. The FCC uses the information obtained through a subpoena as basis for further enforcement action or referral to the U.S. Department of Justice for criminal prosecution.

¹⁸ *Enforcement and Dispute Resolution under the Regulatory Framework in Hong Kong (SAR) for the Telecommunications Sector*, presentation by M H Au, Deputy Director General of OFTA, to the Asia-Pacific Forum on Telecommunications Policy and Regulation, 17 May 2002.

¹⁹ Undertaking monitoring and enforcement activities are costly to the regulator, and recently on 26 August 2005, Anatel had to close its call centers temporarily while waiting for additional funds to maintain operation of the centers. The call centers, which provided 24 hour service, were reopened on September 6, 2005 with diminished hours of operation, operating only between 8 a.m. and 8 p.m. from Monday to Saturday. *Central de Atendimento da Anatel volta a funcionar*, Anatel press release, 6 September 2005, available at

<http://www.anatel.gov.br>.

[20](#) In Hong Kong (SAR), OFTA does not have statutory responsibility for consumer protection since it relies wherever possible on market forces and competition to safeguard consumer interests in a fully liberalized and competitive market. However, OFTA will receive consumer complaints when consumers cannot resolve problems with operators or are not satisfied with the solutions proposed by operators, investigate into a complaint and take regulatory action if there is sufficient evidence to establish a prima facie case of breach of the provisions in the Telecommunications Ordinance. See *Know More About how OFTA Handles your Complaint against a Telecommunications Operator*, OFTA, available at http://www.ofta.gov.hk/en/eng_help/complaints.html.

[21](#) 47 C.F.R. § 1.721.

[22](#) Singapore, Code of Practice for Competition in the Provision of Telecommunication Services 2005 ("Telecom Competition Code"), Section 11.4.6, 4 March 2005.

[23](#) France, Telecommunications Act of 1996, Art. L. 36-11(3).

[24](#) Malaysia Communications and Multimedia Commission Act of 1998, Acts 588 and 589.

[25](#) Ofcom, *Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions under the EU Directives*, July 2004, available at http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf.

[26](#) *Id.* See also Communications Act 2003, Section 98.

[27](#) *Domestic Enforcement of Telecommunications Law: Guidelines for the International Community – Report on ITU-D Question 18/1*, International Telecommunication Union, Telecommunication Development Bureau, 22 September 2005, at 36.

[28](#) *Telecommunication Regulation in Burkina Faso*, contribution by Burkina Faso to ITU-D Question 18/1, 1 April 2005, at 5.

[29](#) Egypt, Telecommunications Regulation Law No. 10/2003, Article 85, February 2003.

[30](#) Hong Kong (SAR), Telecommunications Ordinance (2000), Chapter 106.

[31](#) ITU World Communication Regulatory Database 2005, Survey on Enforcement on licensees.

[32](#) Telecommunications Law No. 13, as amended (Telecommunications Law of 1995), Chapter XI.

[33](#) Malaysia, Communications and Multimedia Act 1998, Part 10, Chapter 2.

[34](#) *Enforcement of Telecom Laws and Regulation in the United States*, contribution from the United States to ITU-D Question 18/1, 30 August 2002, at 8.

[35](#) Singapore, Code of Practice for Competition in the Provision of Telecommunication Services 2005, Section 11.9.

[36](#) Malaysia, Communications and Multimedia Act 1998, Section 121.

[37](#) ITU World Telecommunication Regulatory Database 2005, Survey on Disputes/Appeals. 35 countries did not respond to the survey. The two countries that indicated that appeals of the regulator's decisions are not allowed were Colombia and Bangladesh.

[38](#) New Zealand, Telecommunications Act 2001, Law No. 130, Article 60, 19 December, 2001.

[39](#) *Domestic Enforcement of Telecommunications Law: Guidelines for the International Community – Report on ITU-D Question 18/1*, International Telecommunication Union, Telecommunication Development Bureau, 22 September 2005, at 17-18.

[40](#) Malaysian Communications and Multimedia Commission Act 1998, Act 589, Section 16 (g). See also Ann Buckingham, Camilla Bustani, David Satola, and Tim Schwarz, *Telecommunications Reform in Developing Countries*, in *Telecommunications Law and Regulation* (Ian Walden and John Angel, eds., 2005), at 621.

[41](#) See *Effective Compliance and Enforcement Guidelines and Practices*, APEC Telecommunications and Information Working Group, 31st Meeting, Document no. Telwg31/LSG14, April 2005, at 5.

[42](#) OFTA, *Guidelines on the Imposition of Financial Penalty under Section 36C of the Telecommunications Ordinance*, 15 April 2002.

[43](#) *Enforcement of Telecom Laws and Regulation in the United States*, contribution from the United States to ITU-D Question 18/1, 30 August 2002, at 8. Singapore, Code of Practice for Competition in the Provision of Telecommunication Services 2005, Section 11.4.4.4 (c).

[44](#) WB/ITU, *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*, at 77.

[45](#) *Id.* at 78.

[46](#) *Id.*