

Annex to the Draft Report

Country Summaries

The following country summaries are presented to provide illustrations of developments in a few selected countries relating to ICT Convergence policy and regulation and Multisector Utility policy and regulation. The summaries are not intended to be comprehensive or necessarily representative of all countries. Rather they illustrate a range of activities in some countries that have initiated significant structural changes in response to ICT Convergence and/or Multisector Utility developments. They provide the necessary backdrop of real developments that has informed the research and the draft report.

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1. Austria

CONVERGENCE LEGISLATION IN AUSTRIA

Introduction

In Austria, institutional convergence legislation was already introduced in 2001, while coherent substance provisions are expected to come in 2002. In this respect, a ministerial draft will be discussed by parliament in autumn of 2002. The draft seeks to implement the new European Framework for Communications platforms. Primarily, it provides for changes in the substance of convergence legislation, while institutional framework and procedures remain largely the same.

Besides the discussion about new substance regulation, there are also proposals - which are not included in the draft - to establish a multi-sector utility authority overseeing network industries (e.g. energy and railroads). Additionally, the “Digital Platform Austria” initiative¹ will support regulatory authorities by fostering discussion about the switch from analogue to digital transmission and other convergence related issues.

Substance Convergence Legislation

Until today, telecom and broadcasting legislation has largely been separated and sector-specific. While the Telecom Act of 1997 is pertinent to the telecom sector, the Private TV, Private Radio Act and the Act on the Austrian Broadcasting Corporation ORF of 2001² are applicable to the broadcasting sector.

The ministerial draft takes convergence into account by focusing on functions rather than technologies, thus treating different platforms alike. Following the EU-Directives, the draft regulates horizontally only, thus leaving aside content issues.³ Importantly, it also reduces sector-specific regulation in favor of the application of general competition law by specialized authorities.

Institutional Convergence Legislation

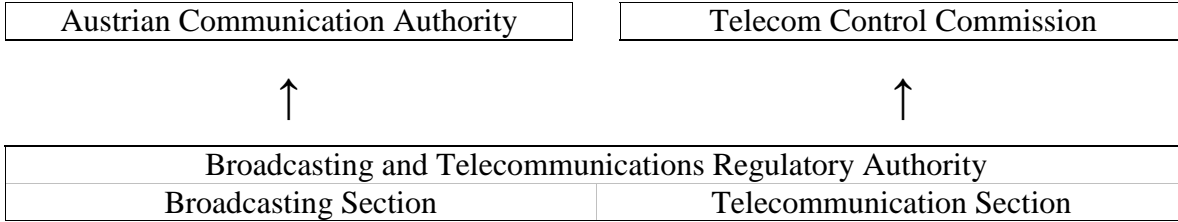
The most important legislation regarding the institutional regulatory aspect of Convergence is the law on the Austrian Communication Authority (KOG) of 2001.⁴ It established the Communications Authority (KommAustria) and the Broadcasting and Telecommunications Regulatory Authority (RTR). The third regulatory authority responsible for convergence related issues is the Telecom Control Commission (TCC), which was founded in 1997 on basis of the Telecom Act. True convergence issues are handled by the RTR, while the KommAustria is responsible for the broadcasting, and the TCC for the telecom sector.

¹ The initiative was introduced with the law on Private TV in 2001, and is being overseen by the KommAustria and the RTR.

² English translation: <http://www.bka.gv.at/bka/medien/orfg-eng.pdf>.

³ The draft expressly excludes broadcasting services in its definition of “communication services”.

⁴ Published in BGBl. I Nr. 32/2001. (For an English version: <http://www.bka.gv.at/bka/medien/kogeng.pdf>).



a. Austrian Communication Authority (KommAustria)⁵

The KommAustria was established for the purpose of leading the administration of regulatory activities in broadcasting, which encompasses powers to determine - to a certain degree - also content offered through broadcasting networks. Among its tasks is the issuance of broadcasting licenses allowing KommAustria to require a level of content quality. In contrast to the TCC, the KommAustria reports to the Federal Chancellor and is bound by its decisions.

b. Telecom Control Commission (TCC)⁶

The TCC is an authority with powers equivalent to a (competition law) court. Inter alia, the TCC determines undertakings with significant market power, defines markets and decides on network access conditions. Thus, its members⁷ are independent, and there is no legal recourse against its decisions.⁸ The TCC bases its decisions on the expertise of RTR's staff and closely co-operates with the RTR.

c. Broadcasting and Telecommunications Regulatory Authority (RTR)⁹

RTR is a convergence regulator in that it acts as the operative arm of the KommAustria and the TCC. Furthermore, it has established a center dedicated to convergence issues. The RTR is assigned operative duties under the Telecom Act of 1997,¹⁰ acts as a contact bureau of the KommAustria and TCC, takes over some management functions of both authorities, administers numbering plans, defines payment rates for the right to use land for telecommunications lines, monitors the performance of special coverage duties and carries out procedures under the Television Signal Act (access entitlement systems; issuing of permits/approvals for manufacturers and receiving devices).¹¹

d. Ministerial Draft of 2002

Initially, the separation of the KommAustria and TCC will be maintained. Most importantly, the draft does not introduce a faster appeal procedure against decisions taken by the TCC, but merely a mandatory arbitration proceeding.¹²

⁵ <http://www.rtr.at/web.nsf/englisch/Ueber+Uns-KommAustria>

⁶ <http://www.rtr.at/web.nsf/englisch/Ueber+Uns-TKK>.

⁷ The presiding member is a judge experienced in competition law.

⁸ It is possible to file an extraordinary (slow) appeal to the Supreme Constitutional and/or Administrative Court. See section 3d.

⁹ RTR is a private non-profit company and 100 percent owned by the Austrian federal government.

<http://www.rtr.at/web.nsf/englisch/Ueber+Uns-RTR>.

¹⁰ All tasks in the Act that are not expressly assigned to the TCC, are taken over by the RTR.

¹¹ <http://www.tkc.at/web.nsf/englisch/Ueber+Uns-RTR-Aktivitaeten+Aufgaben>.

¹² See section 3b.

2. Brazil

CONVERGENCE LEGISLATION IN BRAZIL

Introduction

Despite Brazil's brief history of telecom liberalization,¹³ the country is rapidly catching up. The driving force in this process and in fostering modern convergence regulation is ANATEL, the national telecom regulator.

Substance Convergence Legislation

Already in 1999, ANATEL made mass communication service infrastructures accessible to providers of value added services.¹⁴ In particular, the cable, satellite and MMDS networks had to grant access on fair, reasonable and economic terms. Furthermore, a separate parent-subsidiary structure of the network owner and provider of VAS is prescribed. The prime goal of Resolution 190/1999 was to facilitate interconnection between these infrastructures and the Internet.

In August of 2001, ANATEL further developed the Brazilian multi-media landscape by facilitating authorization requirements for the building of communications infrastructure¹⁵ and delivering multi-media services (SCM- Serviço de Comunicação Multimídia).¹⁶ One objective of Regulation 272/2001 was to allow companies to offer Internet services less bureaucratically.¹⁷ Additionally, this regulation gives SCM providers the right to access the network of public telephone companies and *vice versa*.

As regards the content of the services, in principle, SCM providers can transmit any data, voice audio and video signals. However, ANATEL clarified that live TV and radio broadcasting, and public switched fixed telephone services cannot be delivered. Regarding this content issue, Art. 67 of regulation 272/2001 was challenged by TV operators before federal courts. This provision enables SCM operators to transmit audio and video signals of either (1) certain events, or (2) on basis of a contractual relationship or (3) in form of pay-per-view. National broadcasters challenged this rule arguing it violates their exclusive right to broadcast to the public. However, the courts of appeal rejected this argument and upheld art 67 of regulation 272/2001.

Currently, there are different regulations for the provision of pay TV over cable, satellite and MMDS. ANATEL seeks to streamline these rules and intends to introduce a technologically neutral regulation applicable to all platforms.

Institutional Convergence Legislation

In 1997, ANATEL was founded and separated as an independent regulatory authority from the ministry of Communications in order to facilitate the transition from monopoly to full

¹³ Effective liberalization began with the establishment of the regulator ANATEL (Agência Nacional de Telecomunicações) in 1997.

¹⁴ Internet access is an example of such a value added service.

¹⁵ The physical transmission will primarily take place over Multipoint Distribution/Communications Systems.

¹⁶ "Serviço de Comunicação Multimídia" (SCM) was introduced in August 2001 by regulation 272/2001. As of August 8, 2002 25 companies have obtained permissions, while further 45 are waiting for approval.

¹⁷ Prior to the introduction of SCM, there has existed a variety of "specialized limited services" each of which required a special authorization.

competition in the telecom sector. From the beginning, it was entrusted with a broad range of duties and powers.

ANATEL's assigned tasks consist *inter alia* of granting and canceling of licenses to broadcasting and telecom companies, setting of tariffs and standards in the telecom and broadcasting sector, conducting spectrum auctions for both sectors, overseeing of business practices and applying sanctions, and monitoring radio wave and satellite usage.

In the light of technological convergence, ANATEL seeks to fulfill its various duties by currently adapting its internal structure. At present, it is composed of six departments, one of which is the department for Mass Communications Services¹⁸. It is responsible for electronic mass communications, which are services provided under the private regime in the collective interest, including the various types of pay-TV services, as well as all of the technical matters connected with TV and radio broadcasting.

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¹⁸ The other five departments are responsible for (1) Private and (2) Public Services, (3) Radio Frequencies and Oversight, (4) Universal Service Issues, and (5) General Administration of the agency.

3. India

CONVERGED REGULATION IN INDIA

Introduction

During the 1990s, the Government of India embarked on new economic policies within the telecommunication sector, where the main objectives were the privatization of public sector enterprises, liberalization of monopolies in order to increase competition and open up markets, openness concerning international trade and foreign investments, and finally deregulation in order to increase efficiency and innovation¹⁹.

In order to succeed in implementing these objectives, the Indian Government is providing the necessary legal and regulatory framework stepwise, where the first major step was the 1994 National Telecom Policy. Here, the main objectives were telecommunication for all and telecommunication within reach of all. Furthermore, the objectives were to provide availability of telephone on demand, provision of world class services at reasonable prices, and availability of basic telecom services to all villages²⁰.

Telecom Regulatory Authority of India Act 1997 was the next step in achieving a more liberalized and competitive telecommunication market in India. With this act, the Indian Government provided the necessary legal framework for the establishment of the Telecom Regulatory Authority of India, which overview and regulate the telecommunication sector and matters connected hereto²¹.

In 1999, the 1997 National Telecom Policy Act was reviewed due to the fact that some of the objectives from 1997 were not being fulfilled and, furthermore, due to the technological developments seen in the telecom and IT industry worldwide and the general convergence of markets and technologies. The objectives of the 1999 National Telecom policy was based on the above and India's vision of developing a world class telecom infrastructure in the country. Provision of services is based on licensing. For Basic Telecom Services (BTS), e.g. 33 licenses are issued but in the National Telecom Policy 1999, it is envisaged that basic telecom services shall be open without restriction on the number of licenses.

Some of the most important points of the 1999 National Telecom Policy are availability and affordability of effective communications for all, promotion of competition and increased tele-density. Another main goal is to provide the foundation for creating a world class telecommunication infrastructure, which takes into account the convergence of telecom, IT and media²².

An additional important step for India on the way to implementing a new economic policy within telecommunication was taken as the communication convergence Bill 2000 was initiated, which is supposed to be ready for implementation during the second half of 2002.

The Convergence Bill takes into consideration the convergence of the different communication sectors (telecom, broadcasting and Internet) and is foreseen to set up a single super regulator –

¹⁹ <http://www.law.mcgill.ca/institutes/csri/paper-jakhu-analysis.php3?printversion=1>

²⁰ <http://www.dotindia.com/ntp/ntp1994.htm>

²¹ <http://www.trai.gov.in/gazette.htm>

²² http://www.trai.gov.in/ord_00.html

The Communication Commission of India, which will work and regulate independently of the Indian Government. The current regulator, the Telecom Regulatory Authority of India is proposed to be subsumed into the new super regulator.

The main aim of the Convergence Bill is to establish a regulatory framework for carriage and content of communication in the scenario of convergence of broadcasting, data communications, multi-media and other related technologies and services. In addition to this, the law provides for the establishment of a Communication Appellate Tribunal to hear appeals against orders passed by the Communication Commission of India.

In addition, the Convergence Bill also seeks to change the licensing regime by limiting the number of license categories to five, which will replace the current sector specific licenses. It is expected that this flexible licensing regime will optimize the use of resources and encourage faster development of infrastructure. The five broad license categories are described below:

1. Provision or owning of network infrastructure facilities. This includes earth stations, cables, towers and pits.
2. Provision of network services. Includes bandwidth services, fixed links and mobile links.
3. Provision of network application services such as switched telephony, cellular services, global satellite based phones, Internet based telephony, radio paging, data services and broadcasting.
4. Provision of content application services. These include satellite broadcasting, subscription broadcasting, free to air TV and radio broadcasting.
5. Provision of value added network application services such as Internet services and unified messaging services²³.

The new Convergence Bill will repeal five existing laws: The Indian Telegraph Act from 1885, the Cable TV Network Act from 1995, the Indian Wireless Telegraph Act from 1933, the Telegraph Wires Act from 1950 and the Telecom Regulatory Authority of India Act from 1997.

²³ <http://www.hinduonnet.com/thehindu/2001/09/06/stories/0606000g.htm>

4. Jamaica

ESTABLISHING A MULTI-SECTOR REGULATOR IN JAMAICA²⁴

Introduction

The OUR Act (1995) established the OUR as a multisector (telecom, energy, water, public transport by rail, road and ferry) regulatory agency. When the agency became operational in 1997 it had limited authority to regulate the provision of utility services as service providers were under no obligation to give heed to its instructions or opinions. The Telecommunications Act of 2000 was the first piece of legislation which not only assigned specific duties to OUR with respect to telecommunications but also conferred on it the powers in law to effectively discharge those duties. (The accompanying OUR Amendment Act (2000) empowered the agency with respect to other utilities.) Under the old legislation the main activities were monitoring, analyzing and evaluating the technical, economic and financial performance as well as the organizational efficiencies of the regulated companies. The new legislation sets out the plan for liberalization, the mandate and scope of the powers of the regulator, provides for rules and regulations to be formulated in several areas to complement the Act in providing an efficient regulatory framework for telecom carriers and service providers. With regard to telecommunications the OUR is expected to regulate telecommunications services in accordance with the Telecommunications Act. Specific functions in this regard include promoting competition among carriers and service providers; advising the minister on matters relating to the provision of telecommunication services, making available to the public information concerning matters relating to the telecommunications industry.

The establishment of an independent regulatory authority has contributed directly and significantly towards sector reform. A regulatory authority comprising of sector specific expertise is a necessary condition for the implementation of fair, transparent and competitively neutral regulatory measures - particularly those intended to achieve greater connectivity. Major activities of the OUR have included: the issuing of recommendations for licenses, the facilitation of interconnection agreements, establishing the terms and conditions for a fair and competitive environment and enforcing bypass restrictions. Other work with regard to advancing the process of sector liberalization includes: assessing the Reference Interconnection Offer submitted by C&WJ, implementing a Price Cap regime, consulting on the approach to declaring a carrier or service provider dominant, consulting on accounting separation for a dominant service provider and consultation on establishing quality of service standards. The OUR is also active in investigating and granting terms and conditions to C&WJ to disconnect entities proven to be engaging transiting traffic which bypasses C&WJ's international network. A major regulatory activity carried out by the OUR to enable liberalization is the assessment of the Reference Interconnect Offer of C&WJ. The active role played by the OUR facilitated the entry of the two new mobile operators CDJ and Digicel and the overall growth in subscription to cellular services has been substantial.

The creation of the multisector regulatory agency with its regulatory supervision of the incumbent and the terms and conditions for new entrants has been fundamental to the feasibility of competition occurring and thus new service options and providers have been established.

²⁴ Taken from a forthcoming WDR Paper on innovative policy and regulatory initiative called "Increasing access to ICT Infrastructures: The Jamaican Case"

Recommending new licenses, with minimal entry criteria has contributed directly to the market entry of numerous potential operators but open entry licensing does not necessarily translate into more competitors in the market. The OUR, has also been instrumental in fostering competition through its work on interconnection terms for new entrants. With regards to its universal service responsibilities, the agency monitored the rollout of 105,439 (2000/2001) as part of its license obligations. It was less effective, however, in ensuring that the issuing of licenses resulted in actual operations, and in assuming overall responsibility for universal service. The agency's forthcoming commitment to deploying a Universal Service Plan will be critical to the future of connectivity for Jamaicans and is a priority for the forthcoming regulatory reform agenda. A conundrum faced by the regulator is that although it is recognized that VOIP services offer a cheaper alternative for international voice traffic and that the major Internet service providers in the country would like to offer such services to their customers, the regulator, under the current legislation, must forbid such services. ISP's are required to use C&WJ's facilities for international voice traffic until March 2003.

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5. Malaysia

CONVERGENCE REGULATION IN MALAYSIA

Introduction

During the late 1990s, the Malaysian Government reviewed its existing telecommunication regulation regime in order to reconstruct the regulation to better deal with the technology developments and convergence trends. After a comprehensive revision of the regulation regime, two new converged legislation acts were implemented. The Communication and Multimedia Act (CMA), which addresses the convergence of different industries within the communication industry, and the Malaysian Communication and Multimedia Commission Act (MCMCA), which establishes the foundation for the new Commission. The two acts are based on and designed to be transparent.

The MCMCA came into effect on November 1st 1998 and the CMA on April 1st 1999, which also meant a repeal of the Telecommunication Act 1950 and the Broadcasting Act 1988²⁵.

Before April 1st 1999 the telecommunications industry was regulated by the Telecommunications Department, while the Ministry of Information regulated the broadcasting industry. After April 1st 1999 the regulation of the telecommunication and broadcasting industry was transferred to the newly formed Malaysia Communication and Multimedia Commission. In addition the Commission is also responsible for overseeing the IT industry and regulation of online services.

The main policy objectives of the Malaysian Government to change the regulation regime are listed below and, furthermore, included in the CMA act. The objectives illustrate that the primary concern of the Malaysian Government is with the industrial policy aspects and the social and end-user aspects.

- to establish Malaysia as a major global centre and hub for communications and multimedia information and content services
- to promote a civil society where information based services will provide the basis of continuing enhancements to quality of work and life;
- to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;
- to regulate for the long-term benefit of the end user;
- to promote a high level of consumer confidence in service delivery from the industry;
- to ensure an equitable provision of affordable services over ubiquitous national infrastructure;
- to create a robust applications environment for end users;
- to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;
- to promote the development of capabilities and skills within Malaysia's convergence industries; and
- to ensure information security and network reliability and integrity²⁶.

²⁵ See <http://www.cmc.gov.my>

²⁶ <http://www.cmc.gov.my/legislationframe.htm>

The Commission and Multimedia Act 1998 (CMA) is based on the principles of transparency, more competition and, furthermore, on more self-regulation within the industry. The act provides a regulatory framework based on generic definitions of markets and services and is, furthermore, restricted to only networked services and activities.

The following generic entities are regulated under the CMA act:

- Network facility providers
- Network service providers
- Applications service providers
- Content application service providers

The Malaysian Communication and Multimedia Commission Act 1998 (MCMCA), provides for the establishment of the Malaysian Communication and Multimedia Commission. The purpose and power of MCMCA is to supervise and regulate activities within communication and multimedia in Malaysia. The act is divided into 5 main areas, which are described below²⁷:

Part I is the preliminary part, which states that this Act and the Communications and Multimedia Act 1998 includes any subsidiary legislation made under those laws, and any other written law under which the Commission is to exercise any function;

Part II addresses the establishment of the Commission with regard to membership, terms of office, and establishment of any committee that the Commission considers necessary to assist in the performance of its functions under communications and multimedia laws.

It is stated that the Minister appoints and has the power to revoke the appointment of the chairman, whereas the Commission may set up and close down any committee that is considered necessary to assist the Commission and further more appoint and revoke appointments of all members of the committee.

Part III stipulates the powers and functions of the Commission, establishes the relationship between the Minister and Commission, as well as provides for the requirement to furnish reports, accounts and information to the Minister, amongst others.

The main functions and powers of the Commission are to advice and inform the Minister on all matters concerning national policy objectives for communication and multimedia activities. In addition to this the commission shall implement, enforce, regulate, recommend and monitor communication and multimedia activities, based on the powers allocated to the commission based on the act. The commission shall be responsible to the Minister.

Part IV covers the rules that govern the employees of the Commission as regards appointment, conditions of service and discipline.

Part V governs financial matters of the Commissions, including the establishment of the Malaysian Communications and Multimedia Commission Fund (successor to Telecommunications Fund which was dissolved with the repeal of the Telecommunications Act 1950), as well as the budget and accounts of the Commission.

²⁷ <http://www.cmc.gov.my/legis-acts-frame.htm>

The income of the commission comes mainly from three sources; parliament, all or any part of license fees and administration charges or other charges imposed by or payable to the Commission and finally money earned form consultancy and advisory services and other services provide by the Commission.

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6. South Africa

ESTABLISHING A CONVERGENCE REGULATOR IN SOUTH AFRICA²⁸

Introduction

A major initiative undertaken by the South African government was the setting up of a converged regulator as a means of ensuring economic, social and technical regulation. The Independent Communications Authority of South Africa (ICASA) was established in terms of the Independent Communications Authority of South Africa Act of 2000 to regulate the telecom and broadcasting industry. ICASA was established to merge the previously independent broadcasting and telecom authorities and to regulate the sector as a technology converged sector. In terms of its mandate ICASA grants licenses in the telecom and broadcasting industries and sets the terms and conditions of every license granted²⁹. In terms of its scope, ICASA makes rules and regulations that governs the two sectors as well as monitors the activities of licenses to enforce compliance with these rules. ICASA fulfills its functions primarily through the preparation of regulations in relation to matters specified in the Act that is approved by the Minister and published in the Government Gazette. Seven Councilors (including one chairperson) were appointed by the President on recommendation of Parliament following a public nomination process.

Significance of creating a converged regulator

The decision to merge the regulators of the broadcasting and telecom sectors on the basis of technology convergence was considered innovative given that at the time the WTO preferred sector specific regulators. It also provided an opportunity to accomplish economies of regulation. The actual proclamation by the President came into effect on 11 May 2000 after an initial decision by the Cabinet as early as in July 1997. The process itself was preceded by an enabling Act of Parliament and the working together of a joint task team comprising of officials from the two regulatory agencies and the Department of Communications.

Effect on the opening up of the policy space

One of the key roles of the regulatory authority was to license competitors and thereby open up the space for other players to provide services. When the mobile duopoly of Vodacom and MTN was set to end in 1998, the regulator, after having completed a viability assessment, decided to stagger the issuing of new licenses. It issued a tender for a third mobile license in June 1999 and after almost a year announced its recommendation to the Minister. However, in June 2001, after a court case and much controversy the license was awarded to Cell C – some two and a half years later than expected. In May 2002 two additional licenses was awarded; a multimedia and carriers-carrier (Sentech). The licensing of the Second Network Operator that was scheduled for 7 May 2002 (after the completion of Telkom's period of exclusivity) is now scheduled for the end of 2002. Other licenses that ICASA is mandated to issue in terms of the Telecom Acts include the under-serviced area licenses for small business.

Affect on increasing access to ICT infrastructures

One of the key mandates of the regulatory authority is the prompting of universal service and access by means of license requirements. This it had done with the inclusion of universal service

²⁸ Based on a forthcoming WDR Paper on innovative policy and regulatory initiative called "Increasing access to ICT Infrastructures: The South African Case"

²⁹ Types of licenses includes frequency license, telecom services licenses and broadcasting licenses.

obligations (52,000 community lines over seven years) in Cell C’s operating license. One of the areas it had neglected though, was the effective monitoring and re-negotiation of the universal service obligations of both the incumbent PSTN and the two mobile operators, when it became necessary to do so. A second responsibility in terms of its mandate was to ensure that licensees contributed to the Universal Service Fund. Of the R20 million per annum expected from the three operators only R30 million of the anticipated R40 million was collected. The decision to spread the universal service responsibilities across two agencies also hampered the regulators effectiveness in this regard. While the regulatory agency was responsible for making regulations, it was influenced by the effectiveness of the universal service agency (business plans or publicly available audits), as well as the Minister defining universal service with the Agency’s guidance.

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7. Sri Lanka

MULTI-SECTOR MULTI-UTILITY REGULATION AND CONVERGENCE

REGULATION IN SRI LANKA

The problem

Sri Lanka has a bloated government bureaucracy, with a ratio of government employees to population that is higher than in comparable countries. Government also does not work very well in Sri Lanka. Telecom services, when provided by government, were characterized by long waiting lists, poor quality of service, and corruption. Electricity, even now provided by government, is priced at levels higher than in comparable countries and is affected by periodic blackouts, in some cases amounting to seven hours a day. The supply of water, transportation and other vital infrastructure services supplied by government are plagued by similar problems. The government has decided to rapidly reform these sectors by allowing the entry of private investment and the withdrawal of government from direct supply as much as possible.

Because these infrastructure industries contain significant nodes of monopoly power and because direct regulation by government would be seen as increasing the regulatory risks of investors, government decided to establish independent regulatory regimes for the industries to be reformed. Given the pragmatics of sector reforms that were driven by sector-defined loans from multilateral agencies and by sector-defined “line” ministries, the early stages of the reforms assumed separate, industry-specific regulatory agencies for each sector. However, a change in government in December 2001 and the centralization of policy development functions under the Prime Minister led to a policy decision to concentrate regulatory functions in a limited number of “multi-industry” or “multi-sector” regulatory agencies.

Sri Lanka’s experience with regulation is not an entirely happy one. In the early 1990s, two regulatory authorities were established, one for inter-provincial bus transportation and the other for telecom. The bus regulator has functioned in an advisory capacity to the executive, with little power, no independence, and an excess of poorly paid and ill-qualified staff. The telecom regulatory authority suffered under similar circumstances until 1997, during which time it still managed to issue a significant number of licenses and prepared the ground for competition. Following legislative amendments in 1996, the Telecom Regulatory Commission was created and given considerable financial resources and a higher degree of independence. The new Commission’s first few years were generally perceived as successful. However, due to government pressure on behalf of the incumbent and bad leadership, the TRC in 1999-2001 tarnished its hitherto good reputation. The good and bad aspects of TRC performance affected policy thinking on the creation of new regulatory organizations. Consultancy studies that proposed the creation of massively staffed regulatory organizations for the sectors to be reformed also highlighted the need to contain the further growth of government.

Multi-sector regulation

As of early 2002 the Telecom Regulatory Commission and the National Transport Commission were going concerns, each with around 150 and 300 employees, respectively. Reforms were contemplated for both these sectors, but the process was at an inchoate stage. The reform processes in electricity and water were at an advanced stage, with draft legislation being approved in principle by government, following years of stakeholder consultations and consultancy inputs. At this point, the government initiated the preparation of legislation for a multi-sector regulatory agency that would, in the first instance, assume the powers envisaged for the electricity and water regulatory authorities, without slowing down those sector reform processes. The question of what other industries would be brought within the purview of the new agency was left open at the start.

It was decided to adopt a modular approach, wherein the constitution, funding and powers of the regulatory authority would be contained in the new legislation, but the industry-specific elements of the regulatory regime would be contained in a series of separate industry reform statutes.

Given the difficulties of absorbing a functioning and relatively large agency into the new organization and the value of having some comparators, it was decided not to bring the telecom sector under the purview of what was named the Public Utilities Commission of Sri Lanka (PUCSL). The government's desire to establish a regulatory regime for broadcasting and cable, which would have fitted very poorly with electricity and water, was also a factor in this decision. It was decided that at least three "multi-sector" agencies with broad coverage would be established in Sri Lanka, one for public utilities, one for financial and banking services, and one for telecom, broadcasting and related communication industries. The bus sector was excluded from the PUCSL primarily because of the complex constitutional issues affecting the sector and the necessity of implementing the multiple reforms quickly, without getting snarled up in court.

Parallel to the infrastructure reforms, legislative reforms were also underway to create a competition and consumer authority, the Consumer Affairs and Fair Trading Authority (CAFTA). Considering the increased regulatory risk that would be created by dual jurisdiction over infrastructure industries, the government decided to give explicit competition and consumer-protection powers to the PUCSL and to exclude industries subject to its jurisdiction from the scope of CAFTA. It was agreed that the PUCSL would enter into a Memorandum of Understanding with CAFTA on organizational cooperation, that it would follow the general competition law principles as developed by CAFTA and that it would consult CAFTA when making tariff decisions.

Drawing from the consultative processes in the electricity and water sectors, the PUCSL bill included significant improvements regarding independence that measures up to current best practice and constitutes a significant improvement on the provisions in the Telecommunications Act. The five commissioners, who must meet experience and expertise qualifications, are to be appointed by the Minister in charge of the subject of Policy Development (currently the Prime Minister) with the concurrence of the Constitutional Council (a bipartisan entity that was recently created to appoint senior officials such as the head of the Police and the Commissioner of Elections). They are to be appointed to staggered terms and cannot be removed without approval by Parliament on stated grounds. The Commission members are to serve on a part-time basis and are subject to conflict of interest rules. The PUCSL will be funded through license fees, except at inception, and the funds will lie in its own fund. Accountability is to Parliament through an annual report and budget approval. Policy directives may be issued in writing by Cabinet, in

consultation with the “line” minister. The day-to-day business of the Commission is to be conducted by a full-time Director General, who does not have voting powers in the Commission, separating the “proposing” and “disposing” functions and thereby improving the decision-making process.

The decision to create a multi-sector agency also improves the chances of creating a modern, competition-oriented agency that will not be beholden to incumbent operators. The possibility that the regulatory agency will be staffed more or less completely by people who have spent their entire lives in incumbent operators is a very real one, in the case of industry regulators. This was the starting position of the Telecom Regulatory Commission in Sri Lanka. With a multi-sector agency there is no direct path from incumbent to regulatory agency. While some staff may be recruited from an incumbent, they will at least be balanced by staff from another incumbent. Hopefully, the new organization will recruit economists, lawyers and other professionals from the private sector who are not impaired by government monopoly mindsets and who will be capable of balancing the recruits from the restructured incumbents in the various industries. The key to this will of course be the early decisions taken on organizational structure. If an industry-based structure is adopted, not only will it more likely that government-monopoly thinking will predominate, the desired economies of regulation will not be achieved. If a skills-based organization with interdisciplinary teams being constituted for various regulatory tasks, it is more likely that an investor and customer friendly organization which enjoys economies of regulation will emerge.

It is noteworthy that the PUCSL Bill contains no references to the advantages of common regulation of rights of way. The complicated constitutional status of rights of way under Sri Lankan law may have caused the drafters of the legislation to steer clear of an issue with the potential to trigger review under the Constitution.

Convergence regulation

Multiple policy initiatives on the enhancement of the ICT sector pointed to the fact that the telecom sector had become a serious barrier to progress. More specifically, multiple, independently prepared reports concluded that the Telecom Regulatory Commission, as presently constituted, had lost legitimacy because of its short-sighted actions in the past few years. Government, therefore, concluded that a reconstitution of the TRC was necessary. The option of including telecom as one of the industries to be regulated by the PUCSL was considered, but instead, it was decided that a new Commission that would have authority over telecom, Internet services, cable and broadcasting would be created. Of the four subjects, the first two are currently regulated by the Telecom Regulatory Commission. The latter two are currently regulated in a rather cavalier manner (for example, broadcasting licenses are one-page documents that do not even include a term) by the Ministry in charge of the subject of media.

The decision was not taken on the basis of a detailed analysis that considered the benefits of common regulation of “convergent” industries. It was taken more in the sense of creating another multi-sector agency, grouping together subjects that were seen as somewhat related.

Given the considerable progress made in the PUCSL bill in terms of legislative provisions for independence and the regulation of competition, it is likely that these provisions will also appear in the proposed “convergence” Act. If anything, the guidelines set out in a 1997 Supreme Court decision that held a previous media bill to be unconstitutional is likely to ensure that the new convergence commission will have even greater independence than the PUCSL. The challenge

will be how to ensure that it will conduct its business in a professional and accountable manner. Mismanagement and over-recruitment of engineers has also made the reorganization of the current TRC into an efficient organization a challenging task.

In light of abuses of discretionary power by the current Commission and the acceptance in the new national telecom policy of the principle of forbearance from regulation where possible, it is likely that the new Act will constrain regulatory discretion in a number of areas and even eliminate some regulatory functions such as “type approval” of customer-premises equipment. Whether this liberal approach can also be applied to the regulation of broadcasting and cable content remains to be seen.

The policy consultations preceding the drafting of the legislation addressed rights of way issues. However, this was one area where stakeholder’s opinions were sharply polarized, with some vehemently opposed to a stronger role for the regulator in the management of towers and rights of way.

Concluding comments

Policy developments in Sri Lanka in 2002 demonstrate that the importance of country-specific circumstances in regulatory design. The unplanned synchronization of the electricity and water sector reform processes and the creation of a new ministry that concentrated policy development functions within it were the circumstances that led to the possibility of creating a multi-sector regulatory agency. The fact that a large and entrenched regulatory agency for telecom already existed because telecom reform had preceded the electricity and water reforms did not, by itself, prevent the inclusion of telecom within the scope of the multi-sector agency. The organizational difficulties posed by its existence combined with the necessity of regulating cable and broadcast and the concern that one big regulatory agency could pose too great a risk in terms of regulatory failure tipped the decision toward a convergence model. However, the extensive reasoning based on economies of scope and industrial policy that usually underlies convergence regulation were not overtly present in the policy process.

The efficacy of the multi-sector and convergence regulatory agencies in Sri Lanka depends on organizational design, proper recruitment of staff and good leadership. Good legislation can only provide the necessary conditions for efficacy. The unhappy experience with the Telecom Regulatory Commission is likely to shape the evolution of the multi-sector agency as well as the proposed convergence agency.

8. United Kingdom

CONVERGED REGULATION IN THE UK

Introduction

In order to ensure appropriate levels of regulation within telecommunication and broadcasting markets, which are continuously changing and developing, the UK government has launched the Office of Communication (OFCOM) initiative which in the future shall function as a converged regulator in the UK, in order to enable the development of a competitive market for converging services with appropriate consumer protection.

The road to converged regulation was initiated by the UK government, which in December 2000 published the white paper ‘A new future for communications’ which sets out a new framework for regulation of the communication sectors³⁰.

The next step was taken during July 2001, where the UK government published a short Office of Communication Bill, which gave the government the power to appoint a Board whose only function is to prepare for the creation of OFCOM. The Board will have no regulatory powers transferred from existing regulators, before the main Communications Bill becomes law. Furthermore, the temporary Communication Bill also places a duty on the existing regulators entering OFCOM (Office of Telecommunication, the Independent Television Commission, the Broadcasting Standards Commission, the Radiocommunications Agency and the Radio Authority) to co-operate with the Board in establishing OFCOM.

Based on the above, the five existing regulators have created a Regulators’ Steering Group (RSG) together with representatives from the Department of Trade and Industry (DTI) and the Department of Culture, Media and Sport (DCMS), which are working together on all the transitional and planning issues concerning the creation of OFCOM.

In October 2001, RSG published a study report by management consultants Towers Perrin, which sets out a possible template for OFCOM’s high level structure and a transition plan covering the work that needs to be done to get the new organization up and running by the end of 2003³¹.

In May 2002, the draft communications bill was published by Government and is currently undergoing pre-legislative scrutiny by a joint Parliamentary Committee of both the House of Commons and the House of Lords³².

For European countries, most of the framework for regulation of the telecommunication sector is set at the EU level to ensure a consistent approach to regulation across all member states, where the new package of telecom Directives has set a new framework for regulation of all electronic communication networks. Regarding the UK, the convergence of the different communication networks and services has meant that it is no longer appropriate to continue with the separate regulation units for radio, television, telecommunications and radio spectrum, which is the main reason for the creation of OFCOM.

³⁰ See White Paper at <http://www.communicationswhitepaper.gov.uk>

³¹ http://www.ofcom.gov.uk/publications/about_ofcom/2001/towe1001.pdf

³² The text of the draft bill and other explanatory and associated material may be found at <http://www.communicationsbill.gov.uk>

Telecommunication markets are becoming more and more competitive, and at the same time new technology makes it possible to offer the same services over different networks. This general convergence of services has significant implications for regulation, which means that with “one” evolving communication sector, there are advantages of creating one regulatory framework that applies to different kinds of networks and communication systems, e.g. data networks, telecoms, television and radio³³.

The white paper ‘A new future for communications’ lays the foundation for a new British regulation framework, which has three main/important objectives:

- To make the UK home to the most competitive communications and media market in the world;
- To ensure universal access to a choice of diverse services of the highest quality and;
- To ensure that citizens and consumers are safeguarded for overcharging by dominant market players and protected with basic standards of decency and privacy³⁴.

Besides the convergence issue and the continuously changing and developing sector, the fact that competition is vital to sustain and enhance is also one of the reasons for the new regulatory structure. In addition to this the existing regulatory framework for encouraging competition is fragmented and, in a number of ways, inconsistent in its approach. Furthermore, there are several overlapping areas between the five regulatory bodies³⁵.

Regarding the new regulatory structure some new initiatives have been launched, one being an ombudsman initiative and another is more self and co-regulation in general. The ombudsman scheme is being setup in order to resolve disputes between customers and service providers, which has proven to be a effective and fair way for consumers to get their complaints dealt with without having to go to courts, as the ombudsman can order a company to take action in order to resolve a specific problem.

The self- and co-regulation trend is based on the fact that with the higher level of competition in specific markets, there is less need for regulation – instead general competition law is used and regulators can concentrate on less competitive markets.

The above objectives will in the future be delivered by OFCOM, which will be made up from bringing together existing regulators to provide something more than simply the sum of existing regulators. Based on the new converged regulation authority, it should be possible to better ensure a consistent approach to regulation across different communication networks.

³³ http://www.oftel.gov.uk/about/oftel_guide.pdf.htm

³⁴ http://www.oftel.gov.uk/about/oftel_guide.pdf

³⁵ See <http://www.oftel.gov.uk/press/speeches/spee0701>