

New Technologies, New Thinking: ICT Regulation in a Changing World How the ICT Regulation toolkit can help

Sunday 3 December 2006: Break-out Session D: Legal and Institutional Framework Module

Handout for Participants

Purpose of the Simulation Exercise

This exercise is intended to provide an opportunity to explore various aspects of regulation in a convergent information and communications technologies (ICT) environment. Participants will be provided with the following hypothetical factual scenario that presents issues related to, among others, the regulator's organisational structure and authority, licensing of convergent services, foreign ownership restrictions, as well as with actual, or slightly modified, texts of telecommunications laws and regulations taken from various countries around the world.

The general objective is for participants to creatively address the issues at hand applying the hypothetical regulatory framework provided herein and, as the case may be, to identify any possible shortcomings resulting from the legal texts provided.

Every group that participates will probably take a different direction and end up with different results. No one result or solution is expected, and it is likely that there will be multiple workable solutions for any given issue. The point is to improve understanding of current regulatory challenges faced by regulators in the converging ICT environment.

This exercise seeks to help participants get better acquainted with using the Legal and Institutional Framework Module, which is part of the *infoDev*-ITU ICT Regulatory Toolkit (<http://www.ictregulationtoolkit.org>). The Toolkit is a valuable resource of information that can be easily accessed on-line regarding examples of best practices in telecommunications regulations from around the world to address day-to-day regulatory activities.

Factual scenario: The Republic of Maipie

Background

Maipie's Communications Law, which was enacted in the early 1990s, sets forth a framework for regulating the telecommunications sector based on strict differentiation between end services. Service licences are awarded by different authorities depending on the category of the service, primarily relying on the regulatory split between telecommunications and television services. The Maipie Telecommunications Authority (MTA) has endeavoured for the last 4 years to push structural reforms in the sector, but has been unsuccessful due to lack of political will and agreement within the legislative branch, as well as intense lobbying by existing service providers. The statutory relationship between the Communications Ministry and MTA also creates tension regarding the authority of the MTA to effectively regulate the sector, particularly in the area of licensing responsibilities. The Ministry is responsible for issuing service and spectrum licenses under the Telecommunications Law.

Television services are regulated under the Television Law, which created the National Television Commission (NTV) and granted it authority to regulate and licence TV services in Maipie. The provisions of this law define television services in a very broad fashion, and its interpretation has resulted in differing opinions between the NTV and the MTA.

The MTA issued a consultation on the regulation of IP-based services in March of this year, but has not yet issued a policy statement or any kind of regulation on this issue.

Finally, it is worth noting that Maipie became a member of the World Trade Organisation (WTO) in 2003 and included commitments to liberalize its telecommunications internal market starting the following year, as well as signing on to the WTO Reference Paper. In its specific schedule of commitments, however, Maipie excluded radio broadcasting.

Petitions Pending Before the MTA

Petition No. 1 – Maicomm’s Request for Licence to Offer IP-TV Services

The incumbent fixed service provider, Maicomm, was privatised by the government in 2004, when controlling interest was sold to a national private equity investment group. At that time, no exclusivity period was granted. Maicomm holds a “basic telephone service” licence that allows it to provide local switched voice services. It also holds a “value added” licence that allows it to provide broadband internet access services. Due to developments in the ICT market worldwide, Maicomm has developed a business plan to upgrade its core network to provide “triple play” services. Thus, it has filed a petition before MTA seeking a licence that would allow it to provide IP-TV to users on a subscription basis over its existing infrastructure.

Petition No. 2 – Payvision Request for Licence for IP-based Voice Services

Payvision is the leading cable television provider in Maipie serving 85% of the market. Over the years it has secured from the NTV the licences required to provide its subscription-based services on a national basis. Payvision also provides broadband internet access services over its coaxial network under a national “value added” licence from the Ministry. Payvision now intends to launch a “triple play” offer to compete with Maicomm in a converged market and has therefore recently filed for a licence before MTA in order to provide IP-based voice service over its broadband network.

Petitions No. 3 and 4 – IPcom Request for Approval of Acquisition of Mimobil; IPcom Request for Service Licence to Offer Fixed and Mobile IP-based Voice, Video and Broadband Internet Access Services

IPcom, is a joint venture between Mr. Digi Tahl, a Maipien citizen who is the brother-in-law of the head of MTA, and ForeignCO, a foreign-owned corporation. Mr. Digi Tahl has a 49% equity stake in IPcom while ForeignCO holds a 51% interest in the company. IPcom has approached the MTA and indicated its intention to enter the Maipie telecommunications market. Therefore, IPcom wishes to acquire a controlling interest in Mimobil, a competitive mobile provider that holds spectrum licences in the 800 MHz and 3.5 GHz bands. In addition, IPcom filed for a service licence to provide fixed and mobile IP-based voice, video and broadband internet access services in Maipie on a national basis. IPcom has indicated that it wishes to roll-out a wireless

broadband access network in order to provide “quadruple play” services. For this purpose, the use of the 2.4 GHz band (ISM band), which are usually unlicensed around the world, is key to its project.

Tasks

The MTA must review each of the previous petitions and make a recommendation to the Ministry regarding whether or not to grant the requested licenses.

Starting with Petition No. 1, you must identify and address the relevant legal and regulatory issues that the MTA would present to the Ministry, and, if need be, the shortcomings you observe in the regulatory framework of Maipie and the specific reforms required, if any, to provide an appropriate response.

The materials provided for this exercise are the hypothetical scenario presented above, as well as relevant sections of a Telecommunications Law, Television Law, Foreign Investment Law, and Frequency Allocation Table.

After the introduction of the exercise, each group will have a total of 50 minutes to review each petition, the sections of the attached laws, and frequency allocation table; caucus; and draw up their conclusions. These 50 minutes will be broken down into three segments (petition 1 – 20 minutes; petition 2 – 15 minutes; and petitions 3/4 – 15 minutes). One person from each group will be appointed as rapporteur to report each group’s observations and recommendations. During the last portion of the exercise, each group’s rapporteur will present the group’s results in an interactive exercise, incorporating use of the Regulatory Toolkit.

Important Focus Point: In reviewing the petitions, do not lose sight of the big regulatory picture, as the choices and decisions you make with regards to one petition will most likely affect your options with regards to the others.

Good luck and we hope you have fun doing the exercise!

Relevant Provisions of Legal Texts

RELEVANT PROVISIONS OF TELECOMMUNICATIONS LAW OF 1993

Title I - Administrative Structure and Authority

Article 12. The Ministry of Communications shall determine the form and substance of each Telecommunications Licence granted pursuant to the provisions of Title II of this Telecommunications Law.

Article 13. The application for a Service Licence must be submitted to the Maipie Telecommunications Authority in the form prescribed by the Authority and must fulfil all the conditions set out by the Ministry. The Maipie Telecommunications Authority shall within a maximum period of thirty days from the date of submitting the application, review the application and report its findings and recommendations thereto to the Ministry, notwithstanding its obligations to notify other Administrative Authorities as provided for in applicable laws and regulations.

Article 14. The Ministry shall have the authority to grant or refuse a Service Licence to an applicant. The Ministry's decision in this regard shall be final and binding on the applicant and may not be challenged or appealed in any way whatsoever.

Title II - Telecommunications Services

Article 27. For the purposes of this law telecommunications services are classified as basic services, telematic and value added services and auxiliary and special services. Television services shall be regulated pursuant to the Television Law.

Article 28. Basic services are comprised of carrier and teleservices.

1. Carrier services are those which provide the necessary capabilities for the transmission of signals between two or more defined points of a telecommunications network. These services may be provided both through circuit or packet switched networks, as well as non-switched based networks. Services such as dedicated circuits are included within this category.

2. Teleservices provide complete capacity for communication between users, including the functions of the terminal equipment. Included in this category, among others, are services such as fixed and mobile telephony, telegraph and telex.

Article 29. Value-added services are services that are supported by basic, telematic, broadcasting or any combination thereof, and with them provide the complete capacity for the transmission or exchange of information, adding other services offerings to the support service or satisfying new specific telecommunications needs. Services such as access, transmission, storage, and retrieval of stored information, electronic transmission of funds, videotext, teletext and electronic mail fall within this category. A service may only be considered a value-added service if it can be differentiated from the basic service.¹

Title IV - Basic Telephone Service

¹ Pursuant to Regulation 1515 of 2002, Value -added licencees must pay a yearly fee of 3% of their gross income derived from the provision of such services.

Article 54. Local basic public switched telephone service is the basic service, one of whose objectives is the provision of switched voice over the public switched telephone network, within a municipality. Long distance national and international public switched services are basic services provided between localities within the country or between such localities and localities situated abroad. These services will be provided pursuant to the provision of Title I of this Telecommunications Law.²

Title V – Radiocommunication Services

Article 62. All radiocommunication services require a spectrum license.

² Pursuant to Regulation 1515 of 2002, Basic telephone service licencees must pay a yearly fee of 5% of their gross income derived from the provision of such services.

RELEVANT PROVISIONS OF TELEVISION LAW OF 1996

Chapter I – Television Service

Article 1. Television service is a public service subject to control and regulation by the State, and its provision will require prior concession which may be granted to public or private entities pursuant to the relevant legal limitation provided in this and other laws.

Technically, television is a broadcasting service that provides programming directed at the general public or a part of it, and consists of the simultaneous emission, transmission, broadcast, distribution, radiation, and reception of audio and video signals.

Chapter II - Classification of Television Service

Article 18. Rules of Classification

Television service is classified pursuant to the following criteria:

- a) Principal technology for transmission
- b) Service users
- (...)

Each television service will be subject to classification by the National Television Commission pursuant to the criteria set forth in this Chapter. The Commission may establish additional classification criteria or classes of services taking into consideration the developments in the sector and technological advances.

Article 19. Classification Based on Principal Transmission Technology

Classification based on technology depends on the means employed to distribute the television signal to end users. On this basis, the Commission will classify the services as:

- a) Broadcast television:* where the television signal reaches the end user from the transmission station using the radio spectrum, propagating without artificial guide;
- b) Cable and closed television:* where the television signal reaches the end user through a physical means of distribution, destined exclusively to such transmission, or shared for the provision of television services pursuant to the corresponding licences and applicable regulations.

Article 20. Classification Based on Users

Classification of the service based on users depends on the destination of the signals emitted. On this basis, the Commission will classify the services as:

- a) Free Over the Air television:* where the signal may be freely received by any person located in the service area of the station, notwithstanding the fact that, pursuant to applicable regulations issued by the National Television Commission, certain programs may only be destined to certain users.

b) Subscription television: where the signal, independent of the transmission technology used and subject to a single legal regime, is destined to be received only by authorized persons.

Chapter IV - Subscription Television

Article 42. Parameters for Assigning Subscription Television Licences. Licences for the provision of subscription television services, independent of the technology used, will be awarded in public tender proceedings by the National Television Commission.

Article 43. Subscription television licences shall be awarded on a regional or municipal basis, according to the determination of the National Television Commission.

Article 44. Provision of Cable Services and Other Telecommunications Services. Public and private entities that hold licences for value-added and telematic services issued by the Ministry, and that as such are legally authorized to provide telecommunications services, may provide cable television services, with prior authorisation from the National Television Commission, subject to the provision of this law, and must additionally pay the fees established by the Commission for cable subscription television services.³

Chapter V – Free Over the Air Television Licences

Article 46. Issuance of Free Over the Air Television Licences. The licence is the legal act pursuant to which, by decision of the Board of Directors of the National Television Commission, public and private entities are authorized to provide television service and use the radio spectrum allocated for the service.

³ Pursuant to this provision, the Board of Directors of the National Television Commission in its ordinary meeting of October 15, 2002 established a fee payable by subscription television licensees equal to 10% of their gross income derived from the provision of the service.

RELEVANT PROVISIONS OF FOREIGN INVESTMENT LAW OF 2001

Title II - Activities and acquisition subject to specific regulation

Article 6. Broadcasting services and other radio and television services, different from subscription television services are exclusively reserved to citizens of Maipie or to Maipie undertakings. Foreign investors may not participate in the activities enumerated in this article directly, or through trusts, covenants, contracts or any mechanism that would provide them with control of any type of participation, notwithstanding the provisions of Title V of this law.

Article 7. Licences of services regulated pursuant to articles 28 (basic services) and 29 (value-added services) of the Telecommunications Law may be held by companies holding up to a 49% foreign investment. Investment caps provided for in this article may not be surpassed directly, or through trusts, covenants, contracts or any mechanism that would provide them with control of any type of participation higher than that established herein, notwithstanding the provisions of Title V of this law.

Article 8. Prior approval from the National Foreign Investment Commission is required for foreign participation over 49% of the social capital in companies offering mobile telephony services.

MAIPIE NATIONAL FREQUENCY ALLOCATION TABLE

Band	Maipie allocation	ITU allocation
2300-2450 MHz	FIXED Amateur Fixed telephony, Internet access	FIXED MOBILE RADIOLOCATION Amateur
2450-2483.5 MHz	FIXED RADIOLOCATION Fixed telephony, Internet access	FIXED MOBILE RADIOLOCATION
3400-3500 MHz	FIXED WiMAX	FIXED FIXED SATELLITE (Space-earth) Amateur Mobile Radiolocation
3500-3600 MHz	FIXED WiMAX	FIXED FIXED SATELLITE (Space-earth) MOBILE except aeronautical mobile Radiolocation