ANNEX 2

Adapting the EU Regulatory Framework to the Developing Multimedia Environment

A Study for the European Commission
(Directorate General XIII)

Squire, Sanders & Dempsey
L.L.P.

Analysys

ANNEX II

EU MEMBER STATE REGULATORY REPORTS

Study on Adapting the EU Telecommunications Regulatory Framework to the Developing Multimedia Environment

A Study for the European Commission (Directorate-General XIII)

Contract No. 48415

Prepared by

Squire, Sanders & Dempsey
L.L.P.

in conjunction with

selected national correspondents

The opinions expressed in this Study are those of the authors and do not necessarily reflect the views of the European Commission.

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ANNEX II to the Study on Adapting the EU Telecommunications Regulatory Framework to the Developing Multimedia Environment

LIST OF NATIONAL REPORTS

PART A

1. AUSTRIA
2. BELGIUM
3. DENMARK
4. FINLAND
5. FRANCE

PART B

6. GERMANY
7. GREECE
8. IRELAND
9. ITALY
10. LUXEMBOURG

PART C

11. THE NETHERLANDS
12. PORTUGAL
13. SPAIN
14. SWEDEN
15. UNITED KINGDOM

ANNEX II to the Study on Adapting the EU Telecommunications Regulatory Framework to the Developing Multimedia Environment

NATIONAL REPORTS

The individual national reports reflect the law as it stood at 1 October 1997 in each of the respective jurisdictions. Every effort has been made to present the reports in the same format in order to facilitate a comparative legal and regulatory analysis as between Member States.

The national reports should be read in conjunction with the comparative overview set forth in Annex I to this Study.

The reports which follow have been prepared by, and are the responsibility of, the national correspondents named at the beginning of each report. The correspondents have sought, insofar as has been possible, to verify the accuracy of their reports with the National Regulatory Authority of the respective Member States. All information contained in this Annex has been assembled in good faith and to the best of the ability of the correspondents.

The information and views expressed do not constitute a legal opinion, and they should not be acted upon without independent confirmation and professional advice. The national correspondents cannot accept any responsibility for loss arising from decisions based upon the national reports.

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TABLE OF CONTENTS - ANNEX II (PART A)

AUSTRIA 1

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 2
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/ BROADCASTING/PUBLISHING 5
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES 11
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 12
E. APPROVALS AND LICENSING REQUIREMENTS 18
F. PRICING AND TARIFFING 25
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 26
H. "RESOURCE" ISSUES 29
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 33

BELGIUM 36

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 37
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/ BROADCASTING/PUBLISHING 42
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES 46
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 47
E. APPROVALS AND LICENSING REQUIREMENTS 50
F. PRICING AND TARIFFING 53
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 55
H. "RESOURCE" ISSUES 56
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 61

DENMARK 63

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 64
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/BROADCASTING/ PUBLISHING 65
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES 71
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 73
E. APPROVALS AND LICENSING REQUIREMENTS 76
F. PRICING AND TARIFFING 83
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 86
H. "RESOURCE" ISSUES 94
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 105

FINLAND 107

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 108
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/BROADCASTING/PUBLISHING 110
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES 114
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 115
E. APPROVALS AND LICENSING REQUIREMENTS 118
F. PRICING AND TARIFFING 123
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 125
H. "RESOURCE" ISSUES 129
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 134

FRANCE 137

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 138
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/BROADCASTING/PUBLISHING 140
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES 145
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 147
E. APPROVALS AND LICENSING REQUIREMENTS 152
F. PRICING AND TARIFFING 158
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 161
H. "RESOURCE" ISSUES 166
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 175

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Status of the law as at: 1 October 1997

A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

"Telecommunications" is defined by the *Telecommunications Law 1997*[1] as "the technical process of transmitting, transferring and receiving messages of any nature in the form of text, speech, images or tones by means of appropriate technical equipment".

"Telecommunications service" is defined as "a commercial service that comprises the transmission and/or forwarding of signals *via* telecommunications networks, including the provision of leased lines; it does not include, in particular, the simple resale of (trade in) telecommunications services or the transmission of radio and television by owners of community antenna systems (cable network operators)".

"Broadcasting" is defined by the *Federal Constitutional Act* to secure the independence of broadcasting ("*BVG-Rundfunk*")[2] as "any transmissions of all kinds of presentations in text or sound or picture by electric oscillation through wire or non-wire intended for reception by the public as well as the operation of technical facilities which serve this purpose".[3]

The incumbent TO ("TO"), Post und Telekom Austria AG ("PTA") can provide all forms of telecommunications services. There are no general restrictions on the PTA carrying out broadcasting activities.

1 Federal Law Relating to Telecommunications.

2 § 1 (1) of the Federal Constitutional Act on the protection of the independence of broadcasting (Bundesverfassungsgesetz vom 10.7.1974 über die Sicherung der Unabhängigkeit des Rundfunks - BVG - Rundfunk).

3 The *BVG-Rundfunk*, BGBI 396/1974 (*Broadcasting Regulation (Verordnung über Errichtung und den Betrieb von Rundfunk und Fernschrundfunk-Rundfunkverordnung, BGBI.* No. 33/1965 as amended by BGBI. No. 507/1993).

(2) Regulatory distinctions between different types of telecommunications and broadcasting services.

(i) Telecommunications

Reserved services

Reserved services are not defined in the *1997 Telecommunications Law*. Nevertheless, the provision of a public voice telephony service *via* a fixed network is reserved until 31 December 1997 to PTA.

The installation and operation of infrastructure and networks/services

The installation and operation of infrastructure and networks for the purposes of telecommunications are unrestricted and not subject to a licence requirement. By way of contrast, the provision of certain telecommunications services, especially voice telephony services, must be licensed (see *infra* point E.).

(ii) Broadcasting

Pursuant to Article I, para 2 of the *BVG-Rundfunk*, broadcasting is governed by specific Federal Acts. To date, five key Acts have been adopted in the broadcasting sector:

- The Federal Act Relating to the Tasks and the Establishment of the Austrian Broadcasting Company (*Broadcasting Act*, BGBI No. 379/1984, as amended by BGBI No. 505/1993), defines the duties and institutional aspects of the sole independent public broadcaster Österreichischer Rundfunk ("ORF");

- The *Broadcast Radio Decree* (BGB1 No. 333/1965, as amended by the BGB1.I No. 43/1997 and by the *Telecommunications Law 1997*), governs the installation and operation of broadcast radio and television receiving equipment;

- The *Regional Radio Broadcasting Act* (BGBI No. 506/1993), governs the broadcasting by private programme carriers of regional and local radio terrestrial programmes. As some provisions were overruled by the Constitutional Court in September 1995, the *Regional Radio Broadcasting Act* was amended in March 1997 (BGBI No. 41./1997);

- The *Cable and Satellite Broadcasting Act* (BGB1.I No. 42/1997, as amended by the *Telecommunications Law 1997*), governs the dissemination of radio and television programmes by cable networks and

satellite. This law provides for the first time for private "active cable broadcasting"; and

- The *Broadcasting Ordinance* (BGBl No. 333/1965, as amended by the BGBl.I No. 43/1997 and the *1997 Telecommunications Law*), governs the installation and operation of broadcast radio and television receiving equipment.

Passive cable broadcasting is understood in the broadcasting laws as mere re-distribution *via* cable networks of domestic and foreign programmes transmitted by conventional methods or *via* satellite. This is the only legal definition with respect to passive broadcasting; it does not qualify as "broadcasting" within the meaning of the *BVG-Rundfunk*, provided that the further distribution was effected on an "integral basis", namely, simultaneously with the transmission and without change;[4] it was on this basis that passive cable broadcasting was allowed and practised for a number of years.

Active broadcasting on a terrestrial basis is currently reserved to the ORF (see *infra* point D.1). A draft law concerning private terrestrial television is currently under preparation.

There are no regulatory distinctions drawn between data and voice communications or between the provision of services and the operation of networks in the broadcasting sector.

(3) Regulation of Internet services and other on-line services.

Internet services and other on-line services are not currently specifically regulated in *Austria*. These services do not fall within the definition of "active broadcasting". More appropriately, they should be considered to be value-added services. Internet Service Providers are not subject to a licence, but only to a notification procedure. Discussions are currently taking place, at the political level, to determine the best means by which Internet Services Providers should be regulated.

(4) Regulation of new digitalised services such as Video-on-Demand and Near-Video-on-Demand.

New digitalised services such as Video-on-Demand and Near-Video-on-Demand are not currently specifically regulated in *Austria*. With the exception of Near-Video-on Demand, these services do not fall within the definition of active broadcasting. Consequently, these services are not within ORF's monopoly and can be freely

[4] Refer to Article 20, para 2, second sentence of the *BVG-Rundfunk*.

delivered. However, it seems that currently many cable networks cannot technically provide such services.

The *Cable and Satellite Broadcasting Law* does not regard Video-on-Demand as dissemination of programmes to the “general public” in a legal sense. Thus, the requirement for a licence to provide such services does not seem likely in the near future.

B. Regulatory Authorities in telecommunications/ broadcasting/Publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

(i) Telecommunications

The Federal legislature regulates telecommunications.[5] Under the new *1997 Telecommunications Law*, the following regulatory authorities share competence in the telecommunications sector:

- The Federal Minister of Science and Transport ("MST"), which is the highest telecommunications authority;
- The Telekom Control Commission, an independent regulatory authority created under the *1997 Telecommunications Law* (see point(2) below), and which commenced operations on 1 November 1997;
- The Telecommunications Offices (Fernmeldebüros), which are subordinate to the MST. There are four Telecommunications Offices, located: (1) in Graz for the Steiermark and Kärnten provinces; (2) in Innsbruck for the Tirol and Vorarlberg provinces; (3) in Linz for the Upper *Austria* and Salzburg provinces; and (4) in Vienna for the Vienna, Lower *Austria* and Burgenland provinces;
- The Approvals Office, which is subordinate to the MST; and
- The Telecommunications Advisory Board, which will be set up by the MST.

Finally, regulatory competence for content controls is split between the MST and the Ministry of Justice.

[5] Refer to Article 10, para 1, alinea, of the *BVG-Rundfunk*.

There is no specific procedure to resolve jurisdictional disputes in the event of conflicting claims to jurisdiction.

(ii) Broadcasting

The Austrian Constitution entrusts the Federal legislature with the regulation of broadcasting.[6]

Regulatory competence in the broadcasting sector vests in a large number of regulatory authorities:

- The MST is responsible for frequency allocation in the broadcasting sector, as well as for the approval of systems and devices that are used in the broadcasting sector such as radio systems (including satellite radio systems and television receiving equipment);

- The newly created Authority on Regional Radio and Cable Broadcasting ("Regionalradio und Kabelrundfunkbehorde") grants the licences required for terrestrial radio broadcasting and satellite broadcasting, and examines the notification of cable programmes;

- The Commission for the application of the broadcasting law and the Commission for the application of the law on regional broadcasting are responsible for the supervision of the application of the law on cable and satellite broadcasting; and

- The Federal Chancellery, which is responsible for sectoral policy in the broadcasting sector. The Chancellery is competent in the broadcasting sector insofar as the MST is not competent.[7]

(iii) Publishing

The Federal legislature regulates publishing,[8] with the Federal Chancellery being politically competent for policy development media matters.[9] The only competence of the Federal Chancellery in the publishing sector is with respect to the granting of subsidies for newspapers and other publications. The administrative parts of the media law (Mediengesetz) are executed by the Ministry for Internal Affairs. The media law provides only for rules of disclosure by editors, voucher copies, advertising, and so forth. Content controls fall under the general responsibility of the Minister of Justice (criminal law).

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6 Refer to Article I of the *BVG*, BGBI No. 396/1974.
7 Refer to the *Law on Federal Ministries*, BGBI No. 820/1995.
8 Refer to Article 10, par 1, of the *BVG*.
9 Refer to the *Law on Federal Ministries*, BGBI No. 820/1995.

(2) *Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.*

(i) Telecommunications

The *1997 Telecommunications Law* provides for the establishment of a national regulatory body responsible for telecommunications matters. Under the *1997 Telecommunications Law*, a non-profit-making entity with limited liability and a share capital of ATS 50 million will be created. The entity will have its headquarters in Vienna. This entity will in turn manage a company under the name of "Telekom-Control Österreichische Gesellschaft für Telekommunikationsregulierung mit beschränkter Haftung" ("Telekom-Control GmbH"), all of the shares of which will be held in their entirety by the Federal Government. In exercising its right of supervision, the MST may issue reasonable instructions in writing to Telekom-Control GmbH.

Telekom-Control GmbH will in turn establish and manage a so-called Telekom Control Commission. The Telekom Control Commission will consist of three members appointed by the Federal Government for a period of five years. These members are independent of the Federal Government in the performance of their tasks. One member should have relevant technical knowledge and that the other two should have relevant legal and economic expertise. Members of the Federal Government or a regional government cannot be members of the Telekom Control Commission.

Telekom-Control GmbH must perform all the functions assigned to it under the *1997 Telecommunications Law* and its implementing legislation. In particular, it will be responsible to:

- Issue, withdraw and revoke telecommunications licences and concessions;
- Approve the business conditions and tariffs of holders of telecommunications licences;
- Define the financial compensation to be paid for providers of universal service;
- Decide which supplier is to be considered as having significant market power on the Austrian market; and
- Define the conditions for interconnection in the event of a dispute between the parties.

(ii) Broadcasting

The ORF, which continues to have a monopoly for terrestrial broadcasting, is monitored by an independent Commission which examines whether the terms of the *Broadcasting Act* are being satisfied (Kommission zur Wahrung des Rundfunkgesetzes). This Broadcasting Commission deals only with alleged violations of the *Broadcasting Act* in the event of complaints being lodged.

The *Regional Radio Broadcasting Act* has established a similar independent Commission. The legal supervision of terrestrial radio broadcasters is therefore the responsibility of the Commission for the Observance of the *Regional Radio Act*. ("Kommission zur Wahrung des Regionalradiogesetzes"). This Commission is now (according to the *Cable and Satellite Broadcasting Act*) also competent for the legal supervision of cable and satellite broadcasters. The Commission shall take decisions regarding violations of the provisions of the *Regional Radio Broadcasting Act* and the *Cable and Satellite Broadcasting Act* upon complaints being lodged.

The competent authority to grant licences for regional (and local) terrestrial radio and satellite broadcasting and to examine the notification of cable programmes is the so-called "Regionalradio und Kabelrundfunkbehorde" (see also point B.1. above).

(iii) Publishing

There is no independent national authority to regulate publishing, with all regulation in this sector being *ex poste* in nature where infringement of the civil or penal codes occur. There are no plans to establish an independent regulatory authority.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority (NCA) and its powers.

The national rules that limit anti-competitive behaviour both in the fields of telecommunications and broadcasting are the general competition rules. In addition, there are more specific rules in the telecommunications sector. Of particular importance is the *Cartel Act*,[10] which contains detailed provisions (similar in terms to Articles 85 and 86 of the EC Treaty) prohibiting collusive practices and agreements, the abuse of a dominant position and anti-competitive mergers. In particular, mergers or acquisitions of a controlling interest in a media

[10] Federal Act on rules concerning cartels and other restrictions of competition (Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen, BGBI 1988/600, as amended).

enterprise by another media enterprise must be notified to the Cartel Court ("Kartellgericht"). The merger will be examined according to its effect on the relevant market. If the Cartel Court finds that through a merger a dominant market position has been created or reinforced, it can order the prohibition of the merger/acquisition. The *Cartel Act* does not apply in full to the telecommunications sector. For example, State monopolies are exempted insofar as they provide reserved services and/or insofar as these services are between *Austria* and non-Community countries.[11]

Jurisdiction over the enforcement of Austrian competition law is shared between the criminal courts, and the specialised Cartel Court in Vienna. A Joint Committee ("Paritatischer Ausschuß") of representatives of the Austrian Chamber of Commerce, the Austrian Chamber of Labour and the Agricultural Chamber, delivers expert opinions to the Cartel Court on technical and economic issues. Appeals against decisions of the Cartel Court lie to the Supreme Court, acting as the Superior Cartel Court ("Kartellobergericht").

The *1997 Telecommunications Law* also contains certain specific competition rules for the telecommunications sector, additional to the general competition laws, and entrusts the Telekom Control Commission with the power to take the following regulatory measures: (i) to ensure equality of opportunity and fair competition on the telecommunications market; (ii) to encourage new suppliers to enter the market; (iii) to prevent the abuse of a dominant position on the market and other abuses; (iv) to ensure compliance with the principles of open network access based on ONP principles; (v) to implement the sector-specific competition regulations of the Community; and (vi) to resolve disputes between market actors and between market actors and users.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

(i) Telecommunications

The MST is responsible for:

- Issuing general instructions regarding the activities of the Telekom Control Commission;
- Issuing and processing the regulations necessary for performing international contracts, particularly with regard to the use of the frequency spectrum; and

[11] See § 5 (3) and § 7 (1) of the *Cartel Act*.

- Deciding on appeals against official notifications of the Telecommunications Offices and the Approvals Office, unless an independent administration body assumes responsibility.

The MST may impose penalties for breaches of applicable legislation or regulatory provisions.

The Telecommunications Offices are primarily responsible for the implementation of the *1997 Telecommunications Law* (together with the Telekom Control Commission). They are, in particular, responsible for the award of licences for radio equipment, the distribution of radio frequencies, the supervision of telecommunications networks as well as the prosecution of administrative offences.

The Approvals Office is responsible for:

- Deciding on applications for type approval for radio systems;

- Deciding on applications for type approval of terminal equipment; and

- Revoking approvals and type approvals.

The Telecommunications Advisory Board advises the MST and the Telekom Control Commission in particular with regard to the principles of competition, the effects on the Austrian economy, the needs of consumers, and the further development of universal service.

(ii) Broadcasting

The ORF has been created by law and is not the subject of any licensing selection procedure. The Regional Radio and Cable Broadcasting Authority has the competence to grant licences for regional (or local) radio broadcasters and satellite broadcasters; it also monitors the notifications of cable programmes.

Control over the different kinds of programme providers, which are created by special laws (ORF, regional (and local) radios, cable and satellite broadcasters), are also subject to the above mentioned independent monitoring bodies (*e.g.*, Broadcasting Commission) which are created under those same laws. In the case of serious offences against these regulations, the licences for private broadcasters can be revoked or the further dissemination of cable programmes can be prohibited. For certain types of offences committed by private broadcasters, the legislation provides for the imposition of penalties.

(iii) Publishing

As publishing is not regulated in *Austria*, this sector is only subject to civil and criminal law.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

Neither the *1997 Telecommunications Law*, nor the respective broadcasting laws, provide explicitly for the exchange of information or cooperation between the telecommunications authorities and other national authorities (such as the national competition authorities) or authorities responsible for telecommunications or broadcasting matters in other Member States or the institutions of the European Community. The issue of exchange of information and cooperation in the context of telecommunications matters may be addressed in a foreseen amendment of the *1997 Telecommunications Law*. In the broadcasting context, contacts with other national authorities are carried out by the competent department for media affairs within the Federal Chancellery.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(i) Telecommunications

In 1996, the former telecommunications monopoly Österreichischer Post und Telegraphenverwaltung (ÖPTV) was privatised, becoming a stock company called Post und Telekom Austria AG ("PTA"). Also during that year, as a first step in liberalising the Austrian telecommunications market, a second licence for mobile voice telephony (GSM) was granted following a public tender. The MST awarded a third licence to a public mobile telephone operator (for DCS-1800) in August 1997. It is anticipated that this new operator will be operational by the middle of 1998.

Most of the provisions of the *1997 Telecommunications Law* entered into force on 1 August 1997. However, the *1997 Telecommunications Law* leaves many of the issues it addresses open to further legislative or regulatory action which will refine the rules established therein.

(ii) Broadcasting

Following the ruling of the Austrian Constitutional Court allowing cable operators to engage in active cable broadcasting, the *Cable and Satellite Broadcasting Law* was adopted in the beginning of 1997. This Law introduces a new regulatory framework for active cable and satellite television and radio broadcasting. Under this Law, satellite broadcasting is permitted, subject only to the satisfaction of a licensing regime, with both active and passive cable broadcasting being only subject to notification requirement. The *Cable and Satellite Broadcasting Law* was further amended by the new *1997 Telecommunications Law*, which introduced the general principle that the installation and operation of infrastructure facilities and networks for the purposes of telecommunications are exempt from the licensing procedure. This means that telecommunications network systems are no longer subject to licensing; it is our understanding that this liberalisation measure also cover certain cable TV networks and radio systems.

(iii) Publishing

There is currently no proposal to adopt new laws in the field of publishing.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs. (see also section E below).

(i) Telecommunications

Both the *Telecommunications Law 1993* and the 1997 amendments were adopted with the aim of opening up the Austrian telecommunications sector and developing a competitive market structure.

Despite these liberalising measures, the following regulatory restrictions on new entrants can be identified:

- The *1997 Telecommunications Law* reserves the right to provide a public voice telephony service *via* a fixed network without a licence to PTA until 31 December 1997.[12] It should be noted, however, that the MST can currently grant, on application, an "exceptional licence" for the provision of a (reserved) telecommunications service for the purposes of technical

[12] Article 125(7) of the *Telecommunications Law.*

or commercial testing, under certain conditions.[13] As from 1 January 1998, the above right will be available to others under a telecommunications licence;

- The right to use telecommunications networks to provide a public voice telephony service *via* a fixed network is permitted as from 1 January 1998; and

- There are currently two operators for GSM mobile communications in *Austria*: Mobilkom[14] and Max Mobil.[15] The MST announced in March 1997 a tender for a third *mobile telecommunication licence* using DCS 1800 technology, which resulted in "Connect Austria" being awarded a third licence in August 1997. It seems that no decision has yet been taken as to whether the number of licences for mobile communications will be limited to three. This decision will probably depend upon the availability of frequencies.

(ii) Broadcasting

The *BVG-Rundfunk* provides that active broadcasting services can only be delivered on the basis of a law or within the framework of a law establishing a licensing regime. The *BVG-Rundfunk* and the inaction of the Austrian Parliament had, until recently, the effect of reserving to ORF a monopoly on most forms of active broadcasting (terrestrial, cable or satellite). In the meantime, new laws have been issued which open the market in this sector. Terrestrial television is still subject to ORF's monopoly, but there is a draft law under preparation which would liberalise the sector.

It should be noted that the monopoly of ORF covers only "active" broadcasting services as defined by Austrian broadcasting laws, and is therefore limited to the classical forms of broadcasting (*i.e.,* transmissions aimed at an anonymous and dispersed public). In particular, it is considered that the transmission of film programmes in response to individual demand does not fall within the notion of active broadcasting (provided that the transmission and reception of the programmes are restricted to the demander of the programme). Also, according to a practice of the MST, the notion of broadcasting is not fulfilled if a radio programme is transmitted *via* satellite in encrypted form to a chain of supermarket stores where this broadcasting can be heard by anyone entering the store.

13 Article 4(1) of the *1997 Telecommunications Law*.

14 A subsidiary of the State-owned telecommunications company Post und Telekom Austria AG.

15 A private consortium.

The changes which have occurred thus far to this monopoly situation are:

1. Since 1993, private FM-radio broadcasters were allowed to operate in closely defined regional and local services areas.[16] The law was subsequently overruled by the Constitutional Court and has been issued recently in an amended version;

2. The *Broadcasting Ordinance* was revised in 1993 to allow cable television operators (hereinafter cable TV operators) to offer cable text services (*i.e.*, the display of photographs, still-video and information in written and graphical form). Commercial advertising was prohibited for a short period of time for cable text services. These provisions were overruled by the Constitutional Court recently;

3. The prohibition on active cable broadcasting was challenged successfully in the Austrian Constitutional Court. In a ruling on 27 September 1995, the Austrian Constitutional Court declared that, if no legislation is introduced, cable TV operators should be able to engage in active cable broadcasting after 31 July 1996. The Austrian Constitutional Court, however, did not - for procedural reasons - lift the prohibition of advertising on cable networks at the same time (but did so in a later judgment). In the meantime, the new *Cable and Satellite Broadcasting Law* was introduced. As a result of this new Law, since August 1997, cable TV operators are authorised to engage in active cable broadcasting (only subject to a notification requirement) and satellite television and radio broadcasting under a licence;

4. Cable TV operators can use their cable infrastructure for the delivery of telecommunications services; and

5. The installation and operation of infrastructure facilities and networks for the purposes of telecommunications are exempt from the licensing procedure, which means that the setting up of cable TV networks and radio systems is free.

The new *Cable and Satellite Broadcasting Law* has put an end to the prohibition of private broadcasting, but only for cable and satellite TV. This Law states in § 1 that terrestrial broadcasting will be regulated in a forthcoming law, which is currently under preparation.

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16 Regional Radio Broadcasting Law (Bundesgesetz mit Regelungen über regionalen und lokalen Hörfunk erlassen werden - Regionalradiogesetz - RRG 1993).

It should be noted that private terrestrial television broadcasting is not regulated in *Austria*, but the Constitutional Court has already ruled that private terrestrial television broadcasting is not lawful. In particular, the Constitutional Court held in 1994 that it could take no action to require the legislature to establish a regulatory framework for private broadcasting.[17] The lack of a regulatory regime for private broadcasting might be considered a violation of freedom of expression, as set out in the *European Convention on Human Rights*. Indeed, cases on the prohibition of private terrestrial broadcasting in *Austria* are pending before the European Court of Human Rights in Strasbourg.

(iii) Publishing

There are no regulatory restrictions on new entrants in the publishing sector.

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

(i) Telecommunications

PTA has, in principle, an exclusive right to use telecommunications networks to provide a public voice telephony service *via* a fixed network until 31 December 1997. PTA no longer has an exclusive right to offer leased lines ("Mietleitungen"), and it is possible to offer leased lines which are part of the private telecommunications infrastructure.

Special rights exist with respect to the two existing GSM licences and the recently granted DCS-1800 licence, but only on the grounds of a lack of sufficient spectrum availability.

(ii) Broadcasting

The broadcasting laws do not grant to ORF exclusive or special rights to provide broadcasting services. However, ORF has, had a *de facto* monopoly over all forms of active broadcasting. In the meantime, regulations have been issued which have opened the market in this sector. Private regional TV stations are already engaged in active cable broadcasting (*e.g.*, Vienna: W1) (see *supra* point D.1).

(iii) Publishing

There are no special or exclusive rights granted with respect to the provision of publishing services.

[17] Case VfGH 5.3 1990 B 267/94.

(3) ***Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.***

(i) Telecommunications

The following differences in regulatory treatment between the PTA and new entrants can be identified:

- PTA has an obligation to offer a minimum set of leased lines to the public (telephone lines, telex lines, digital lines (2 MB, 8 MB, 34 MB, 140 MB, *i.e.*; 55 MB), digital switched data network (1,2 KB, 2.4 KB, 4.8 KB, 9.6 KB, 19.2 KB, 48 KB, 64 KB, 128 KB) and local digital lines (synchronous and a synchronous)) with harmonised technical characteristics across the telecommunications infrastructure;
- PTA is bound to provide for a modern and balanced telecommunications infrastructure with regard to technical developments as well as macro-economic concerns, regional and societal factors;
- PTA must provide universal service according to the terms of the Poststrukturgesetz, until the necessary requirements for an invitation to tender are satisfied;
- PTA must fulfill special national supply requirements for a period of three years after 1 August 1997; and
- PTA is subject to certain obligations as a TO with a significant market power such as the obligation to provide interconnection in accordance with harmonised Community ONP rules, to allow access to its network, and the prohibition to cross-subsidise earnings from telecommunications services with earnings from other activities.

Under the "Poststrukturgesetz", PTA is allowed to provide services other than telecommunications services to third persons, if this is not detrimental to its statutory obligations.

(ii) Broadcasting

There is no difference between the extent to which ORF and private cable operators are allowed to undertake broadcasting/audiovisual (including programming) activities and to provide cable TV services.

(4) Accounting and structural separation safeguards (current or planned).

(i) Telecommunications

Under the *1997 Telecommunication Law*, companies that have a dominant position on markets other than the telecommunications market, or that exercise special or exclusive rights in other areas, must not cross-subsidise the tariffs for their telecommunications services from those areas in which they hold special or exclusive rights. Companies that have a dominant position on a telecommunications market must in turn not cross-subsidise telecommunications services in these markets and other telecommunications services.

In addition, providers of public telecommunications services which have a dominant position on markets (other than the telecommunications market) or which exercise special or exclusive rights in other areas must have adequate separation mechanisms in place at the organisational or accounting levels. They must ensure transparency in the flow of payments and benefits between their business activities in the telecommunications sector and their other business activities.

Finally, suppliers of public telecommunications services which have a position of significant market power on the telecommunications market are obliged to operate a cost accounting system in compliance with *ONP Directives* that assigns costs and cost elements to all the services and service elements and permits subsequent auditing at those elements.

(ii) Broadcasting

Not applicable.

(iii) Publishing

Not applicable.

(5) Policy basis for the regulation of incumbent carrier's services.

(i) Telecommunications

As a result of the adoption of Community directives, the activities of the PTA are to be regulated primarily because of its "significant market power" in a number of telecommunications markets.

(ii) Broadcasting

The services of the incumbent broadcaster, ORF, are regulated on the basis that it should comply with "basic public requirements".

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

An individual licence is required for the following:

1. The provision of a mobile voice telephony service and other public mobile communications services by means of mobile communications networks that the provider operates itself. However, a licence is not required for a public mobile communications service, if the service is to be provided by means of satellite radio or if there are sufficient frequencies available for all interested parties both now and in the near future.

2. The provision of the following telecommunications services:

   - Public voice telephony service by means of a fixed telecommunications network that the provider operates itself; and

   - The public offer of leased lines by means of fixed telecommunications networks that the provider operates itself.

It should be noted that the installation and operation of infrastructure and networks for the purposes of telecommunications are exempt from licensing requirements.

Radio licences are required for telecommunications services which use frequency spectrum, with licence applicants being required to satisfy the basic conditions deemed necessary to provide the licensed service (*i.e.*, necessary technical expertise, conformity with all legal requirements, conformity of service over the licence period).

Other types of telecommunications services are, in principle, subject to the need to file a notification with the Telekom Control Commission, prior to the

commencement of operations. Telecommunications services that consist of simple resale of such services are exempt from the notification requirement.

Finally, for the provision of public mobile communications services, frequencies are allocated by means of a licensing procedure based on a public tender.

(ii) Broadcasting

Terrestrial television

Since ORF has a monopoly over terrestrial broadcasting services, there is at present no licensing regime in operation. As an exception, private FM-radio broadcasters are allowed to operate in closely defined regional and local areas under a licence on the legal basis of the new *Regional Radio Broadcasting Act.*

Cable TV

To provide cable broadcasting services, one or more of the following licences may be required:

1. The notification to the Regionalradio und Kabelrundfunkbehorde may be required to operate active cable television broadcasting;

2. The so-called "community antenna" licence may be required to operate passive cable television broadcasting;[18] and

3. A licence may be required to install and operate a cable TV network.[19]

Cable TV operators can also apply for a separate licence: to: (i) use their cable TV network for the transmission of non-reserved telecommunications services; or (ii) link their separate installations to operate a new cable system under a special licence (licence for interconnection).

Satellite

In the satellite broadcasting sector, there is a licence granted by the "Regionalradio und Kabelrundfunkbehorde" required to operate active satellite broadcasting.

All frequencies used for broadcasting are subject to a licensing procedure.

[18] The Telekom Control Commission may take the view that such a licence is no longer required in a liberalised telecommunications environment.

[19] Ibid.

(iii) Publishing

The *Austrian Constitution* guarantees the freedom of expression. No special licence or permit or authorisation is required in the publishing sector.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

All future **individual licences** for the provision of telecommunications services will be granted by the Telekom Control Commission. Between 1 August 1997 and 1 November 1997, this function will be performed by the MST.

The required **notifications** must be sent to the Telekom Control GmbH as soon as this Commission commences its operations.

Applications for the approval for terminal equipment are decided by the Approvals Office.

The licence required to put into operation each required frequency is granted by the MST.

(ii) Broadcasting

The licences required to operate satellite broadcasting are granted by the new Authority on Regional Radio and Cable TV.

The "community antenna" licence, the licence required to install and operate a cable TV network and the separate licence for cable TV operators are granted by the MST. Other types of licences or authorisations are granted by the MST.

Applications for the approval of radio systems are decided by the regional Telecommunications Office in whose local sphere of influence the radio system is to be operated.

The allocation of frequencies for the operation of radio systems is the responsibility of the MST.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

Whereas the installation and operation of infrastructure and networks for the purposes of telecommunications is free and not subject to a licence, the provision of certain telecommunications requires a licence. The Austrian railways have sought to take advantage of their existing ability to provide transmission services, by installing a fiber optic network along their tracks to enable them to provide network capacity for liberalised services (and long distance voice services after 1 January 1998).

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

PTA is allowed to provide broadcasting services, including cable TV services.

The *Cable and Satellite Broadcasting Law* prohibits legal entities established under public law and corporations which are owned by such legal entities, from engaging in broadcasting. They are only allowed to do so if they broadcast for no more than 120 minutes per day (excluding repeats).

ORF, by way of contrast, is not legally prohibited from providing telecommunications services, including mobile telephony services (although in practice it has not done so).

Cable TV operators are not prevented from obtaining a licence to provide telecommunications services.

The PTA is free to provide multimedia services unless they fall within the definition of "active broadcasting" (see *supra* point A.1).

The PTA is free to provide mobile voice telephony services.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

(i) Telecommunications

There are no specific restrictions in telecommunications laws on PTA providing or producing its own programming. However, it is generally considered that, since

PTA is a public institution, it is probably prohibited from doing so. This situation might change if PTA is privatised.

(ii) Broadcasting

Until recently, cable TV operators were not allowed to produce or provide their own programming. The Constitutional Court ruled, however, that cable operators should be able to produce or buy-in their own programming after 31 July 1996 (see *supra* point D.1). The new *Cable and Satellite Broadcasting Law* has amended the regulatory situation to reflect this judgment of the Constitutional Court.

(6) Typical licence conditions.

(i) Telecommunications

- An individual licence for the provision of telecommunications services is granted in response to a written application. The application is assessed within six weeks, unless there exist special circumstances that delay the procedure. The application for the granting of a licence shall contain details of the type of service to be provided, the area to be covered and the organisational, financial and technical requirements relating to the operation by the applicant.

- The licence must be granted if the applicant: (1) meets the technical standards; and (2) there is no reason to assume that the applicant will not provide the relevant service in accordance with the conditions of the licence, (particularly the quality and supply obligations). The financial strength of the applicant, its experience in the telecommunications sector and related sectors, and its overall expertise are all factors taken into consideration. The granting of a licence to provide public mobile communications services is subject to certain additional conditions.

- The Telekom Control Commission can place a time-limit on the licence for services insofar as this may be necessary in view of the scarcity or allocation of the available frequencies.

- The licence may be restricted to certain geographic areas and to certain types of telecommunications services if an appropriate application is made or if the scarcity or allocation of the available frequencies makes this necessary.

- The licence may include certain specific conditions, in particular, with a view to ensuring compliance with Community law.

- The licence may not be transferred in whole or in part without the express consent of the Telekom Control Commission.
- The licence can expire in the following circumstances: (1) expiration of the term; or (2) revocation.

- The licence must be revoked if the conditions of the licence are no longer satisfied, if the licensee is in gross or repeated violation of its obligations or if it is bankrupt.

- When a notification is required to provide certain telecommunications services, the service provider must give notice to the Telekom Control Commission of its intention to provide, changes in its operation or cessation of the service prior to the start of operation, changes or cessation. Notice must be given in writing, together with details of the type of service in question and its technical and operational features.

(ii) Broadcasting

Terrestrial television

The licence required to operate private FM-radio broadcasting is subject to the following conditions:

- The geographic area of the regional and local FM-radio broadcasters is fixed by the "Regionalradio und Kabelrundfunkbehorde", according to the list of available frequencies under the *Regional Radio Broadcasting Act*. Within two years of the entry into force of the 1997 amendments, a frequency plan is due to be issued;

- There is no limitation on the number of subscribers;

- A licence must not be granted to foreigners (except to nationals of EEA countries) or entities in which foreigners hold no more than 25% of the shares;

- A licence cannot be granted to public bodies or political parties;

- Newspaper owners (dailies and weeklies) and radio broadcasters are limited in their participation in private FM-radio stations to a maximum of 26% of the total shares; and

- The duration of the licence is limited to seven years.

Cable TV

The licences required to operate active or passive cable television broadcasting are subject to the general conditions required for the operation of telecommunications facilities and services (see *supra*). A licence can only be refused on the grounds that the operation of the telecommunications facilities seriously disturbs the economic interests of Post und Telekom Austria AG in fulfilling its public service obligations or if the planned transmission could also be realised with sufficient security and speed by using the public infrastructure of Post und Telekom Austria AG. It is generally understood that the competent authorities cannot, on the basis of these provisions, refuse the application of a cable TV operator for a licence to use its infrastructure for the delivery of any type of non-reserved service. Finally, as mentioned above, it is planned that active radio, cable or satellite broadcasting will be permissible under a licence and that passive broadcasting will be permitted subject to a notification (see *supra* point D.1).

The licence required to install and operate a cable TV network is subject to the following conditions:

- It can be refused on the grounds that the operation of the planned facility seriously disturbs the economic interests of Post und Telekom Austria AG or if the transmission could also be achieved with sufficient security and speed using the public infrastructure of Post und Telekom Austria AG;
- The licensee must carry ORF; and
- There is no obligation to provide access for third parties to CATV networks (except under a limited range of conditions listed in § 11 of the *Cable and Satellite Broadcasting Act*).

Other types of licence required in the broadcasting sector are subject to general conditions.

(iii) Publishing

No special licences or permits or authorisations are required for publishers.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

The *1997 Telecommunications Law* provides that, for the business conditions and telecommunications tariffs of suppliers with significant market power, the MST will adopt the framework conditions, including the principles for the structuring of tariffs and the basis on which the tariffs are to be calculated. All licensees must create a "General Terms and Conditions of Business and Charges" document, which describes the services to be provided and the charges for these services.

(2) New pricing principles for the competitive market environment.

The *1997 Telecommunications Law* contains specific provisions on tariffs. In particular, any holder of a telecommunications licence is required to draw up business conditions which set out the relevant tariffs. Prior approval of the tariffs by Telekom Control GmbH is required in the case of suppliers of voice telephony services and leased lines who are in a position of significant market power. Otherwise, the business conditions and the tariffs must simply be filed with Telekom Control GmbH. Once approval has been granted, further approvals are necessary only if there is a permanent change in the tariff structure. Telekom Control GmbH, which approves certain telecommunications tariffs, can approve tariffs subject to price capping and can specify special tariffs.

(3) Control of tariff packages which can be offered to customers.

The General Standard Terms and Conditions of PTA provides that discounted tariffs for leased lines must be based on annual turnover (3% for ATS 10 million, 5% for ATS 25 million, 10% for ATS 50 million). A new scheme is currently under consideration.

(4) Tariff basis - usage time or flat rate off-peak rates; and other relevant pricing practices which increase pricing flexibility.

Telecommunications tariffs are based on actual usage time, with different charging levels for usage during non-peak periods.

(5) ***Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulated Internet access and on-line services.***

The PTA has published special prices for Internet access, which came into force on 1 November 1997, and provide for access to the Internet at prices which depend on the time of the day and which are significantly lower than voice telephony charges.

G. Network Interconnection and Access to Service Providers

(1) ***Interconnect arrangements and charges - express regulation or individual negotiation.***

(i) Telecommunications

Access and interconnection arrangements are subject to commercial negotiations by the parties, subject to the specific rules on access and interconnection laid down in the *1997 Telecommunications Law* (see *infra*).

In the cable television sector, since cable television licences are regional, cable TV licensees have a right to link their separate installations to operate a new cable system.[20]

(2) ***Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".***

As mentioned above, there are specific requirements for access and interconnection applicable to operators with significant market power. An operator has significant market power within the meaning of the *1997 Telecommunications Law* if, as a supplier or user of telecommunications services on the relevant technical or geographical market: (1) it is exposed to little or no competition; or (2) it has an overwhelming position on the market in comparison to its competitors because of its ability to influence market conditions, its turnover in proportion to the size of the market, its control over access to end users, its access to financial resources or its experience in providing products and services.

The Telekom Control Commission must decide which operators are considered to have significant market power on the Austrian market. It is assumed that an operator has such power if it has a share of more than 25% of the relevant product or geographical market. However, the Telekom Control Commission

20 See § 3 (2) and (3) of the *1997 Telecommunications Law*.

can stipulate that an operator with either more or less than 25% of the relevant market has, or does not have, significant market power.

The Telekom Control Commission will publish annually a list of the relevant "markets" with respect to which it will assess whether an operator has significant market power. Any concerned entity may ask the Telekom Control Commission to decide as to whether or not it has significant market power on a particular market(s). An operator with significant market power must provide interconnection on terms which are cost-oriented, transparent and non-discriminatory.

In the cable television sector, regulatory intervention is not limited to the networks of operators with significant market power.

(3) Precise obligations currently placed on interconnecting operators.

- An operator with significant market power on a relevant market, in accordance with the principle of non-discrimination, must provide competitors on this market with services of equivalent conditions and of the same quality that it offers on the market or that it provides for its own services or for services of its associated companies. In particular, it may restrict access only insofar as this is compatible with the basic requirements of Community law.

- Operators with significant market power and operators obliged to provide universal service are required to offer interfaces on the basis of harmonised principles, as well as a minimum number of leased lines with uniform technical features, in accordance with Community law.

- An operator of a telecommunications network which offers telecommunications services for the public and which has significant market power, shall allow other users to access its network or unbundled parts of its network, except in circumstances decided by the Telekom Control Commission. In particular, such an operator shall allow its network to be interconnected with the public telecommunications networks of other operators. Access shall be granted using connections that are generally available on the market (*i.e.*, general network access). It can also be granted over special connections (*i.e.*, Special Network Access, or SNA) if the user so wishes. The operator may restrict network access and interconnection only for reasons based on "essential requirements", in accordance with Community law.

- Interconnection must include at least the following services:
  - Safeguarding of access by users of a supplier with significant market power to the network of a new supplier through pre-programmed network selection or the dialling of selection codes according to a numbering plan;
  - Provision of the necessary traffic data of the relevant connection to the interconnecting supplier;
  - Switching of calls to users of other interconnecting operators; and
  - Provision of accounting data in a suitable form for the interconnecting supplier.
- More detailed provisions relating to interconnection will be defined by the MST in a forthcoming Decree. In addition, the MST must define by decree a minimum range of unbundled network elements.
- The operator may restrict network access and interconnection only for reasons based on essential requirements, in accordance with Community law.
- If a user requires SNA, this must be provided if it is technically feasible and the user is willing to bear the costs. The Telekom Control Commission must specify the way in which SNA, in particular for interconnection, is to be provided, in accordance with Community law requirements.
- Each operator of a public telecommunications network is obliged to make an interconnection offer to other operators of such networks on demand. All parties concerned shall aim to enable and improve communications among users of different public telecommunications networks.
- If an agreement on interconnection cannot be reached between an operator of a telecommunications network who offers telecommunications services to the public and another operator of a public telecommunications network within a period of six weeks from the receipt of the request for interconnection, either party involved in the interconnection may request that the Telekom Control Commission resolve the dispute.

- Interconnecting operators are obliged to arrive at an agreement within six weeks of the commencement of their negotiations. Upon the failure of the parties to reach an agreement, the Telekom Control Commission may intercede and resolve the deadlock between the parties on the basis of the documents already submitted by the parties in the negotiations. The Telekom Control Commission must make its decision within eight weeks of referral and, in doing so, must comply with Community law requirements. The Commission's decision must be reasoned. All interconnection agreements are also filed with the Commission and available for review by third parties (subject to the protection of business secrets).
- Operators with significant market power are obliged to produce a list of standard interconnection offers for their networks for which there exists market demand or which are used for services that the company itself provides in competition with others.

H. "Resource" Issues

(1) Frequencies.

(i) Telecommunications

The MST is responsible for managing the frequency spectrum and the Austrian usage rights and orbital positions of satellites, in compliance with international agreements.

The MST must define the frequency ranges allocated to the individual radio services and other applications of electromagnetic waves in a frequency range allocation plan.

The MST must allocate to the Telekom Control Commission at their request or by official Decree parts of the frequency spectrum for economic use. The purpose of use and the technical conditions of use shall be published.

The MST must then prepare a frequency usage plan on the basis of the frequency range allocation plan. The frequency usage plan must divide the frequency ranges into frequency usage and set out the specifications for such usage.

The frequencies are allocated by the Telekom Control Commission, according to the frequency usage plans. Charges must be paid by the licensee for the allocation and use of frequencies used for commercial purposes and for other

work by the Commission in connection with frequency allocation. Fees for spectrum usage are indicated clearly in the licence terms when the radio licence is acquired by means of an election procedure. Monthly or annual fees are also charged, to the extent that they are necessary to cover the administrative costs relating to spectrum management; these administrative charges will be fixed by Statutory Ordinance.

If the plan relating to the use of frequencies as well as the market conditions indicates that some services for the public are suffering from a shortage of frequencies, the right to use a frequency has to be awarded to the supplier which makes the highest bid. It is up to the Federal Minister for Science & Transport to determine whether or not such a frequency shortage exists. In such a case, the frequencies have to be awarded to the applicant who guarantees the most efficient use of the frequency (determined relative to the amount of the user-fee offered).

Frequencies have to be awarded to wireless installations destined for public use on a priority basis as far as this is necessary for the applicant to fulfill its duties.

With respect to the use of frequencies for point-to-point radio transmissions ("Richtfunkstrecken"), the frequency must, if there is a shortage of frequencies, be awarded to the applicant who is (according to § 33) not in a position of significant market power in the relevant market, unless the service is absolutely necessary to provide the universal service.

Frequencies which are destined to be used for liberalised services do not have to be demanded separately, if the concerned broadcasting station benefits from a special or a general licence.

(ii) Broadcasting

The frequencies for the operation of private FM-radio are fixed by a "basic plan" in the *Regional Radio Broadcasting Act*. In the future, they will be fixed under a frequency plan that will be drawn up by the MST.

In the satellite television sector, the frequency management authority is the International Telecommunications Union ("ITU"). *Austria* was assigned by WARC 1977 a satellite position with five frequencies.

(2) Numbering.

The *1997 Telecommunications Law* provides for the adoption of numbering plans. These plans should aim to guarantee equality of opportunity and treatment (*i.e.*, non-discrimination) for all suppliers of public telecommunications services.

The MST must ensure that the necessary preparatory work and measures to introduce number portability for telephone numbers in the form of network operator portability (envisaged originally in the *1994 Law*) are initiated without delay, so that number portability is available at the earliest possible opportunity. An annual fee will be charged for the use of numbers.

(3) Rights-of-Way.

Under the *1997 Telecommunications Law,* all holders of telecommunications licences are authorised to make use, free of charge and without special approval under the terms of this Law, of public property such as roads, footpaths, public areas and the airspace above them, but not including public water facilities, for the installation of telecommunication lines and associated equipment. This also includes the right to install and maintain transmission line support points, switching equipment and other transmission line objects, and the right to operate this equipment.

If the installation of a transmission line or a public pay telephone is in the public interest, and if the exercise of the right-of-way does not achieve the desired objective or achieves the objective only with the use of disproportionate resources, expropriation is permissible.

Anybody who benefits from a right-of-way relating to public property, has to allow the common use of the telecommunications network or parts of it established on such property, unless the use of the public property is neither possible nor feasible, and if the co-use is economically reasonable and technically possible for the owner of the telecommunications network. Fair compensation in monetary form must be awarded with respect to such co-use to the party obliged to accept such co-use. This obligation to accept such co-use also exists for other beneficiaries of easements, especially for easements on private property and for parts of properties which have been expropriated according to § 11.

The *1997 Telecommunications Law* also provides for rights-of-way over private property. If an existing right-of-way on private real estate (for example, an electricity-line) is used for the establishment, the maintenance or the renovation of telecommunications lines, the private owner must accept this, at least insofar as the use of the real estate is not restricted or adversely affected in the long term. The owner or other persons entitled to use the real estate must obtain compensation which is appropriate for the additional services and capacities used. The Telekom Control Commission must determine within six months, and in agreement with the concerned parties, uniform guidelines on a federal scale for the compensation of those parties who are obliged to bear these costs.

Furthermore, the private owner of real estate has to bear the costs of allowing licensees or other suppliers of public telecommunications networks to establish, service, expand or renovate telecommunications lines for the supply of a public telecommunications service, if the utility of the real estate is not or is only insignificantly limited in the long term. In such a case, the owner of the real estate, or the party entitled to use it, must be compensated by a one-off payment.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).
"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

Cable TV operators must carry ORF. ORF is subject, under the broadcasting laws, to the requirement to include a sufficient amount of time for programmes on different subjects, educational programmes, arts, science, family entertainment and sports. The role of churches and religion must also be respected.

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

Under the broadcasting laws, ORF must allocate 10% of its time (or budget) to audiovisual works from independent programmers. (see § 14 of the *Cable and Satellite Broadcasting Act*).

(5) "Gateway" Issues - Technologies for Open Access.

The *Television Standards Directive* has not as yet been adopted.

(6) Internet Domain Names - Preferred regulatory approach.

No particular approach advocated.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal services" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

Universal service is defined as "a minimum range of public telecommunications services to which all users must have access at an affordable price irrespective of their place of residence or work". An affordable price is deemed to be the price as at 1 January 1998.

Universal service comprises the following services:

- Access to the public voice telephony service *via* a fixed network connection, through which a fax machine and modem can also be operated, including the transfer of data at rates compatible with the transmission paths for voice communications;

- Unrestricted access free of charge to emergency services, including the correct processing of emergency calls and the necessary identification of the caller's location;

- Access to directory inquiry services;

- Access to directories of subscribers to public voice telephony services; and

- Full area coverage with public pay telephones at generally accessible locations.

The MST can include other services in universal service if these services are already widespread and contribute significantly to social and economic life.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

PTA is currently the only operator obliged to provide universal service. The provision of universal service obligations may be put out to public tender by the MST. The Austrian authorities have set themselves a period of five years from the adoption of the *1997 Telecommunications Law* in which to determine whether such a tender procedure should be adopted (*i.e.*, 31 July 2002).

(3) *Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).*

As mentioned above, the provision of universal service will be subject to a tender procedure (chosen on the basis of the lowest cost for value on a contract with a ten-year term). Universal service must cover the entire country, must be available at a uniform and affordable price and must meet certain standards in terms of quality which will be further determined by the MST. The Telekom Control Commission may, if necessary, set up and manage a universal service fund. Refunds will be made available for costs incurred over and above the receipts from subscribers, subject to the approval by the Telekom Control Commission of the accounts substantiating such universal service costs (which can be adjusted if the services were not provided in a cost-efficient manner).
With respect to the financial compensation for universal service, the demonstrable costs of providing universal service have to be transferred to the supplier on his demand at the end of the calendar year. The costs have to be calculated in conformity with Annex No. 3 of the *ONP Interconnection Directive*. If the universal service provider has turnover of more than 80% of the relevant market, it is not permitted to request compensation.
In order to finance universal service, a special fund will be installed whenever this is necessary. These funds must be financed by the licence holders which provide public voice telecommunications services through a fixed network or a mobile network and which generate turnover in excess of 250 Million ATS (proportionate to their role in the market). This is calculated in conformity with the proportion of the turnover of the concerned licence holder relative to the total turnover of all the licence holders who are obliged to pay a contribution, and which provide their service on the relevant affected market(s). Operators will need to have reached a 5% market share in their relevant market before being obliged to contribute to a universal service fund.

Finally, licensees for fixed and mobile services are under a legal obligation to furnish information which would allow the creation of a single subscriber directory to be provided by the Telekom Control Commission in both printed and electronic form (in addition to a business directory and a telephone information service). Third parties wishing to create similar or competitive directories can do so since all operators are required to provide them with all relevant subscriber information (for a reasonable fee).

(4) *"Must-carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see sections E & H).*

The Federal Chancellery requires that all broadcasting services comply with requirements on objectivity, impartiality of news, representation of variety of

opinions, balancing of programmes and the independence of the person responsible for broadcasting.

The *BVG - Rundfunk* implements the requirements of the *Television Without Frontiers Directive*. In particular, it sets out the requirements that ORF must include sufficient broadcasting time for information, educational programmes, arts, science, family entertainment and sport. The role of churches and religion must be respected. Also, the main proportion of programmes which are not news, sports, and advertisement must be of European origin.

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

The split in legal responsibility between the federal Belgian State and the various languages communities of *Belgium* is illustrated in the regulatory characterisation of telecommunications and broadcasting matters.

Telecommunications services are defined as "any transfer, transmission or reception of signs, signals, texts, pictures, sounds or data of any nature, by wire, radio-electricity, optical signals or any other electromagnetic system ".[21]

In the *Flemish Community*, broadcasting is defined as "the initial transmission by wire or over-the-air, (including satellite) in uncoded or encoded form, of television programmes intended for reception by the public". The programmes may be for radio, television or another medium. It includes the communication of programmes between undertakings with a view to their being broadcast to the public. It does not include communication services providing information or other messages on individual demand such as telecopying, electronic data banks and other similar services.[22]

In the *French Community*, a broadcasting service is defined as the "service for radio-connection which broadcasts with a view to reaching the public in general, or part of it, directly". The service may consist of sound, television or another means of broadcasting. The expression "with a view to reaching the public in general or part of it" in satellite broadcasting applies to reception through radiodistribution or teledistribution networks, as well as by collective or individual antenna.[23]

In the *German-speaking Community*, a broadcasting service is defined as "the service for radio-connection broadcast with a view to reaching the general public directly". The service may consist of sound, television or another means of broadcasting. The expression "with a view to reaching the public in general or part of it" in satellite broadcasting applies to the reception through radiodistribution or teledistribution networks, as well as by collective or individual antenna.[24]

21 Article 68, 4° of *the Law of March 21, 1991.*

22 Article 2, 1° of the Decree of January 25, 1995 of the *Flemish Community.*

23 Article 1, 6° of the Decree of July 17, 1987 of the *French Community.*

24 Article 1, 9° of the Law of February 6, 1987.

(2) *Regulatory distinctions between different types of telecommunications and broadcasting services.*

(i) Telecommunications

Distinctions under Belgian law are drawn between:

- "public telecommunications infrastructure"[25];
- "voice telephony services"[26];
- "data switching services"[27];
- "leased lines"[28]; and
- "telex services".[29]

In addition, the *Law of 21 March 1991* uses, but does not define, the concepts of "telegraph service", "mobile telephony" and "paging". Finally, "radiocommunication services" are defined in the *Law of 30 July 1979.*

It is anticipated that, by the end of 1997, the *Law of 21 March 1991* will be substantively amended by a *draft law* under consideration by the government at the time of writing ("the *draft law*"). Further distinctions will then be drawn between the above services (and "telecommunications services" in general (*i.e.*, service which partially or wholly consists in transmitting or routing signals over telecommunications networks, excluding radio and television broadcasting services)) and "mobile telephony" (not defined in the draft law amending the *Law of 21 March 1991*), "other mobile services offered to the public" (not defined) and "other mobile services not offered to the public" (not defined).

25 Namely, the entirety of equipment and related means, which cross the public domain and which are intended for telecommunications, with the exception of those intended for the radio broadcasting service and for radio- and teledistribution networks; this ensemble is bordered by connection points, including the connections to foreign telecommunications infrastructures.

26 The telecommunications service intended to directly convey in real time and switch voice signals from and to connection points insofar as it only embraces the functions that are necessary for its operation.

27 The telecommunications service the functions of which are restricted to conveying and switching data by way of packet switching or circuit switching, including the functions that are necessary for its operation.

28 A connection which crosses the public domain and which enables direct telecommunication between, on the one hand, a connection point or a connection to a foreign telecommunications infrastructure, and, on the other hand, one or more connection points or connections to a foreign telecommunications infrastructure, and in relation to which the user cannot influence the realisation or interruption of the connection via his connection point.

29 The telecommunication service intended to directly convey and switch telex messages from and to connection points, insofar as it only comprises the functions that are necessary for its operation.

Finally, the concept "public telecommunications infrastructure" will be replaced by:

- "telecommunications network" (*i.e.*, transmission systems and, if applicable, switching infrastructure and other supporting material enabling the transfer of signals between well-determined connection points via wire connections, radio waves, optic or other electromagnetic means); and

- a "public telecommunications network" (*i.e.*, a telecommunications network that is used partially or completely for the provision of telecommunications services accessible to the public).

The existing regulatory distinctions are used to establish different regulatory structures. "Telex services", "data switching services", "leased lines", "mobile telephony" and "paging" were already removed from the list of "reserved services" with respect to which Belgacom had an exclusive right. Voice telephony services are reserved to Belgacom until 1 January 1998. The universal service regime will apply to voice telephony after 1 January 1998, although the detailed financing regime for universal service will only be implemented at a later stage (probably in the year 2000).

The provision of "data switching services", "mobile telephony", "paging", "radiocommunication services" and "public telecommunications infrastructure" requires individual licensing. However, licences for "public telecommunications infrastructure" can only be given for what is expressed to be "existing infrastructure". In the *draft law* modifying the *Law of 21 March 1991*, the provision of "voice telephony services", "public telecommunications networks", "other mobile services offered to the public" and "mobile services not offered to the public" will also be subject to an individual licensing regime.

"Non public telecommunications infrastructure", "telex services", "leased lines", (Article 89 §2) and all other services which are "not reserved", are only subject to a regime of prior declaration to the BIPT. In the *draft law*, a new "universal access" regime will apply to "leased lines" and "data switching services" (*i.e.*, Belgacom must provide these services over the whole territory of *Belgium*, but the net costs of its provision cannot be financed out of any universal service fund).

	Current law	Draft law[30]
Reserved services	Voice telephony, telegraph service	None
Networks	Public telecommunications infrastructure, mobile telephony, paging	Public telecommunications networks, non-public telecommunications networks
Declaration System	Non-reserved services (including telex, leased lines and data switching services)	Non-public telecommunications networks and both public and non-public telecommunications services for which no licensing requirement exists
Universal service regime	Voice telephony	Voice telephony
Universal access regime	None	Leased lines, data switching services

(ii) *Broadcasting*

The regulatory distinctions drawn by the Flemish and French Communities in the broadcasting sector are similar. In the *Flemish Community*, distinctions are drawn between "public broadcasting", "local radio broadcasting", "private television broadcasting aimed at the whole of the Flemish Community", "regional television broadcasting", "specific audience broadcasting", "pay television" and other types of broadcasting services, (called "television services") (Articles 4, 28 and 41 of the *Decree of the Flemish Community Parliament of 25 January 1995*).

In the *French Community*, distinctions are drawn between "public broadcasting", "private television broadcasting aimed at the whole of the French Community", "local or communal television broadcasting", "pay television", "private radio broadcasting" and "other (new) services" (Articles 2, 15, 19, and 30 of the *Media Decree of the French Community Parliament of 17 July 1987*).

Organisations wishing to offer any of these broadcasting services are subject to specific authorisations by the respective Communities, namely:

- *Flemish Community*: Decrees of the Flemish Government of 5 March 1996 (local radio broadcasting), of 16 September 1987 (private television

30 The *draft law* has been adopted and was published in the Belgian State Gazette on 30 December 1997.

broadcasting), of 27 May 1992 (regional television) and of 24 July 1996 (television services).

- *French Community*: Decrees of the French Community Government of 29 January 1988 (local and communal broadcasting), of 21 December 1987 (French Community broadcasting), of 10 August 1988 (pay-television), of 25 November 1996 (other services) and of 24 July 1997 (private radio broadcasting).

(3) Regulation of Internet services and other on-line services.

Internet services fall within the existing regulatory category of data switching services. However, it should be emphasised that, under Belgian law, universal service will require the provision, at a fair price (with regard to the connection, the costs of the connection and the subscription), of a line with capacity enabling interactivity, with a view to providing access to data networks, in particular the Internet, and meeting the special social needs of hospitals, schools and public libraries.

The *draft law* which will amend the *Law of 21 March 1991* proposes that this requirement become part of the "universal access regime" (to be distinguished from the "universal service regime".[31]

(4) Regulation of new digitalised services such as Video-on-Demand and Near-Video- on-Demand.

These services may be categorised as "television services" (*Flemish Community*) or "other new services" (*French Community*). However, it is not always clear whether Video-on-Demand or Near-Video-on-Demand is subject to telecommunications or broadcasting regulation since the technical medium used to offer these services can be either the "pure" telecommunications networks and equipment in the traditional sense of the words, or the so-called "new" alternative means such as the fibre optic cable. The consensus is that, at least in

[31] Which will include: (1) the availability on the whole territory and to each person requesting so of access to the fixed basic network, enabling the provision of basic voice telephony, communication per fax of the I, II and III-series, concurrent with the ITU-recommendations of the T-series and the transfer of data per speech band via the use of modems with a capacity of at least 2,400 bits/sec. In accordance with the ITU-recommendations of the V-series, the end-user is provided access via one or more numbers of the national numbering plan; (2) the transfer of emergency calls, free of charge; (3) the availability of an emergency service to subscribers; (4) the availability of an information service to subscribers; (5) the permanent provision, in case of non-payment of the telephone invoice, of the following elements of the universal service regarding basic voice telephony: the possibility to be phoned by another subscriber, with the exception of reverse charge calls, and the possibility to dial numbers of the emergency service listed in Article 8 of Annex 1 of this Law; (6) the establishment, maintenance and operation of public pay phones; (7) the publication of the universal telephone directory in case the persons contemplated in Article 113 of this Law do not publish such directory; (8) the availability of a service for basic voice telephony at tariffs which facilitate access to this service for the persons listed in points 1., 2., 3. and 4. of Annex B to Annex 1 of this Law.).

the case of Video-on-Demand, the service provided is governed by 'telecommunications' regulation rather than by broadcasting rules (because of its on-demand nature).

B. Regulatory Authorities in Telecommunications/ Broadcasting/Publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

Telecommunications regulatory competence is vested exclusively in the Federal State, but responsibility for broadcasting and audiovisual regulatory competence has been transferred to the Communities. The Communities also have jurisdiction over subsidies to the print media.

There is an established legal mechanism for resolving jurisdictional disputes. The "Cour d'Arbitrage" acts as a quasi-Constitutional court in such disputes.

(2) Independent national regulatory body(ies) (NRAs) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.

The Belgian Institute for Postal Services and Telecommunications (the "BIPT") is the responsible regulatory body for telecommunications services. The BIPT is subject to the supervision of the Minister of Telecommunications and is thus not totally independent.

The respective Regional Ministries act as regulatory authorities for broadcasting, audiovisual and publishing matters.

In the *French Community*, the Conseil Supérieur de l'Audiovisuel assists the French Community. It has no independent authority, and only advises the French-speaking government. It monitors infringements of legislation and contractual obligations, and imposes the relevant sanctions (*Decree of the French Community Government of 24 July 1997*).

In the *Flemish Community*, the Media Council, assisted by a Committee of Experts, plays a similar role and prepares non-binding opinions for the Government of the Flemish Community. Other advisory bodies are the Council for Local Radio and the Flemish Council for Advertising and Sponsoring on Radio and Television. In the near future, a Commissioner's Office for the Media ("Commissariaat voor de Media") with broader regulatory powers (*e.g.*, licensing and sanctioning) will be established. The Committee of Experts, the Council for Local Radio and the Flemish Council for Advertising and Sponsoring will then be abolished.

The BIPT acts as the frequency management authority, with the Regional Ministers allocating frequencies for broadcasting services within the framework provided by the BIPT.

As the current regulatory regime is very closely linked to the existing federal structure of the Belgian State, further modifications to this regulatory framework are not expected in the near future.

(3) National rules limiting anti-competitive behaviour (sector specific and non sector-specific). National competition authority and its powers.

In *Belgium*, the *Law of 5 August 1991* on the Protection of Economic Competition ("the *Competition Law*") marked an important step in the development of Belgian competition law. The *Competition Law* replaced the *Law of 27 May 1960* on the *Protection Against the Abuse of a Dominant Position*, which was generally considered to be ineffective. The *Competition Law* is modelled on the EC competition rules and on the relevant Treaty provisions. Therefore, one may rely on the case-law developed by the European Court of Justice and the administrative practice of the European Commission for the purpose of interpreting the *Competition Law*. The *Competition Law* entered into force on 1 April 1993.

There are some sector-specific competition rules for the telecommunications sector. They are mostly addressed to the national telecommunications operator, Belgacom, and impose the obligations to use cost-based tariffs, to guarantee equal access to reserved services and to use separate accounting procedures. They also prohibit cross-subsidisation (Chapter X of the *Law of 21 March 1991*). The *Draft Law* modifying the *Law of 21 March 1991* extends these rules to “all organisations with a significant position on the relevant market” (*i.e.*, significant market power).

A number of institutions are responsible for the application and enforcement of the *Competition Law*. The Competition Service is a service within the Ministry of Economic Affairs, and is responsible for investigating cases falling within the *Competition Law* and ensuring that decisions taken under the *Competition Law* are properly enforced. The Competition Service also acts as the secretariat of the Competition Council.

The Competition Council is an administrative tribunal that is responsible for decisions taken under the *Competition Law* (*e.g.*, negative clearances, exemption decisions and decisions relating to concentrations), and has broad advisory powers. It submits an annual report to the Minister of Economic Affairs on the application of the *Competition Law*.

The President of the Competition Council is a magistrate. In addition to his role as President of the Competition Council, he also has specific powers relating to requests for information and may order interim measures in cases being investigated under the *Competition Law*. In exercising both of these powers, the President is authorised to impose periodic penalties.

The Brussels Court of Appeals hears appeals against decisions taken by the Competition Council and its President. It will also give preliminary rulings on issues of law arising out of the *Competition Law* at the request of other courts and tribunals.

The Competition Commission is part of the Central Economic Council. It only has advisory powers, which it may exercise either on its own initiative or at the request of the King, the Minister of Economic Affairs or the Competition Council.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

(i) Telecommunications

The BIPT may, on its own initiative, give a reasoned opinion to the Minister on any matter relating to telecommunications. It also provides advice and opinions to the Minister on strategies for the development of telecommunications and assists the Minister in negotiating with Belgacom over the terms of its management contract. The BIPT also assists the Commissioner of the Government, on his request.

The BIPT is also responsible for assisting the Minister in drawing up the accounting rules that Belgacom must observe to assist in the preservation of fair competition. In addition, the BIPT may be requested to conduct research and studies relating to telecommunications and to study the application and implementation of rules enacted by the European Community that relate to telecommunications. The BIPT assists a Consulting Committee in the execution of its duties by serving as its secretariat, and ensures the publication of common technical specifications promulgated by the European Community. It also gives advice in conflicts which may occur between providers of telecommunications infrastructure or services. This advice will be binding if the parties so agree. Finally, the BIPT publishes an annual report on its activities.

The BIPT may not undertake any commercial activities. With the Minister's consent, it may request the assistance of third parties to carry out its tasks, with the exception of monitoring tasks.

In the case of infringements of telecommunications legislation, the BIPT can impose administrative sanctions such as disconnecting service providers or

withdrawing licences (*e.g.*, licence for the operation of public telecommunications infrastructure). In the *draft law* modifying the *Law of 21 March 1991*, the BIPT is authorised to impose "administrative fines".

In applying the *Law of 30 July 1979* and its implementing regulations, the BIPT is responsible for management of the spectrum and for type approvals of equipment.

(ii) Broadcasting

The Conseil Supérieur de l'Audiovisuel advises on policy and gives non-binding opinions to the government on granting licences for private TV services, pay TV services and cable activities. The substantive authority remains with the French-speaking government. However, the Conseil monitors infringements of legislation and contractual obligations, and imposes sanctions, *e.g.*, withdrawal or suspension of a licence.

The Media Council, the Committee of Experts, the Council for Local Radio and the Flemish Council for Advertising and Sponsoring on Radio and Television advise on policy issues and give non-binding opinions. The Commissioner's Office for the Media ("Commissariaat voor de Media") will have certain powers with respect to licensing and sanctioning.

The regulatory bodies in the media sector essentially have an advisory function. The Conseil Supérieur de l'Audiovisuel can impose sanctions and the new Flemish Commissioner's Office for the Media ("Commissariaat voor de Media") will also be able to impose sanctions.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

The *draft law* modifying the *Law of 21 March 1991* sets out a cooperation procedure for the investigation and prosecution of infringements of competition law in the telecommunications sector. The BIPT will be responsible for investigation and the Competition Council for prosecution.

In relation to radiocommunications, when the Regional Ministers draw up a new frequency allocation table or modify their original frequency allocation table, they are obliged to submit a request for co-ordination with the BIPT. The BIPT then co-ordinates this frequency allocation table with the tables of the other Regions, the Belgian Airports & Airways Agency, and foreign administrations.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

New legislation will be adopted in the near future with regard to telecommunications and, in the *Flemish Community*, with regard to broadcasting.

The federal Council of Ministers meeting, on 30 May 1997, dealt with the following proposals with regard to telecommunications:

- *Draft Law modifying the Law of 21 March 1991.*[32] The proposed modifications will establish the legal basis for the liberalisation of voice telephony, universal service, interconnection and so on, together with a series of changes to existing rules concerning the role of the BIPT, fair competition, consumer protection, sanctioning, an Ombudsman; and

- *Draft Royal Decrees* regarding interconnection, universal service, numbering, directories, satellite networks, the management contract with the incumbent Belgacom, wire-tapping, and paging.

Since the Belgian regulatory framework could not be amended in may respects in accordance with Community law to comply with the liberalisation deadline of 1 January 1998, the BIPT has issued a notice ("*Notice*" or "*Circulaire*") setting out the conditions on which an infrastructure licence and a voice telephony licence can be granted. The conditions mentioned in the *Notice* are the same as those mentioned in the forthcoming draft *Royal Decree* on licensing. The licences granted on the basis of the *Notice* shall permit new entrants to operate their network or their service temporarily, pending the introduction of the regulatory process that will permit the BIPT to issue definitive licences.

The Parliament of the *Flemish Community* will, during 1998, deal with proposals concerning the establishment of the Commissioner's Office for the Media, the legal status of the public broadcasting service, the legal status of local radio broadcasting, the abolition of the monopoly on private television aimed at the whole of the *Flemish Community* and the regulation of television advertising and tele-shopping.

The Belgian government will also be required to adopt appropriate legislation which will address the concerns of the European Commission, which indicated on 5 November 1997[33] that it would bring formal infringement proceedings against *Belgium* on seven different grounds for its failure to comply with obligations under Community law, namely:

32 Refer to Postscript at footnote 30.

33 Commission Press Release, IP/97/954 of 5 November 1997.

1) *Belgium* had failed to enact appropriate legal measures necessary for competitive voice telephony services and networks to be operative by 1 January 1998;

2) the liberalisation only of existing infrastructure (rather than all forms of Infrastructure) was incompatible with Community law;

3) a number of provisions of Directive 95/62/EC (the *ONP Voice Telephony Directive*) had been wrongly transposed into national law;

4) restrictions on GSM operators directly interconnection with other networks situated in other Member States should have been lifted;

5) there was no concerted effort on the part of the Belgian State to ensure that the cost accounting methods adopted by Belgacom identified the proper costing elements necessary to base prohibited interconnection terms and conditions;

6) the proposed method by which financial contributions would be made by new entrants to the financing of the net cost of universal service had not been implemented properly; and

7) the failure of *Belgium* to adopt a timetable for tariff rebalancing (which the incumbent, Belgacom, claims cannot be achieved by the year 2000).

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs. (see also section E below).

Voice telephony services are reserved to Belgacom. However, the *draft law* modifying the *Law of 21 March 1991* provides for liberalisation of voice telephony from 1 January 1998.

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing sectors.

(i) Telecommunications

Voice telephony licences will be of 15 years duration (renewable for a 10 year period), whereas infrastructure licences will be of unlimited duration. Mobile licences currently run for 15 year periods (which will be repeated for DCS-1800 licensees). Providers of value-added services are authorised indefinitely to provide their services.

(ii) Broadcasting

In the *French Community*, cable franchises are granted for nine years, renewable for successive periods of six years. In the *Flemish Community*, cable franchises are granted for 18 years, renewable for periods of nine years. Their geographic scope is specified in the franchise (usually a city or a group of cities).

In the *Flemish Community*, a monopoly has been granted to the Vlaamse Televisie Maatschappij ("VTM") for the provision of private television broadcasting aimed at the whole of the Flemish Community (*Decree of 25 January 1995*, Article 41, 1° and *Decree of the Flemish Community Government of 19 November 1987*). This monopoly was granted for 18 years.

In addition, VTM had an exclusive right to broadcast television advertising throughout the whole of the *Flemish Community* (Article 80 *Decree of the Flemish Community of 25 January 1995* and *Decree of the Flemish Community Government of 11 December 1991*). However, VTM's monopoly was declared incompatible with Articles 52 and 90 of the EC Treaty in the Commission's Decision of 26 June 1997.[34] In relation to the infringement of Article 52 of the EC Treaty, the European Commission considered that VTM's monopoly prevented operators from other Member States from establishing themselves in Flanders with a view to broadcasting television advertisements aimed at the Flemish public. In addition, the Commission considered that VTM's monopoly could not be justified under Article 90(2) of the EC Treaty, as VTM is not entrusted with the operation of a service of general interest. The requirements imposed on VTM over programme content are very general, and do not indicate that the Flemish community has given VTM the task of carrying out one of its cultural policies. Indeed, Belgische Radio en Televisie Nederlandstalig ("BRTN", Vlaamse Radio en Televisie ("VRT") as from 1 January 1998) is the party responsible for acting as a "public television corporation". It has specific public service obligations, requiring it, for example, to carry Flemish government broadcasts and party-political broadcasts. No such obligations apply to VTM.

The national public broadcaster has an exclusive right to broadcast radio advertising throughout the whole of the Belgian territory.

[34] Commission Decision of 26 June 1997 on the exclusive right to broadcast television advertising in Flanders, O.J. (1997) L 244/18 of 6 September 1997.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.

Cable companies are entitled to provide cable TV services and non-reserved telecommunications services. They will be entitled to provide voice telephony after 1 January 1998. In theory, all telecommunications operators can provide cable TV services over their network, even if the activities of the national TO, Belgacom, are expressed to be limited to telecommunications. Indeed, telecommunications is defined as "any transfer, transmission or reception of signs, signals, texts, pictures, sounds or data of any nature, by wire, radio-electricity, optical signals or any other electromagnetic system ".[35] This would appear *prima facie* to include cable TV services.

The provision of cable TV services is only a *de facto* exclusive right. In theory, the *Media Decrees* of the respective Communities establish a licensing regime, rather than confer a legal monopoly. It should be noted, however, that this asymmetry is currently being discussed at official level.

(4) Accounting and structural separation safeguards (current or planned).

Belgian law does not impose structural separation. It does, however, require Belgacom to maintain accounting separation between its reserved and non-reserved services. The same requirement is imposed on organisations which have a significant market position (*i.e.*, accounting separation between activities in which the organisation has a dominant position and other activities) and organisations with special or exclusive rights in another sector (*i.e.*, accounting separation between telecommunications and other activities). However, detailed accounting principles will need to be specified in a forthcoming *Royal Decree*.

(5) Policy basis for the regulation of incumbent carriers' services.

The present regulation is based on the fact that the incumbent operator, Belgacom, has a monopoly over certain services. Future regulation will be based on the premise that the incumbent has a significant market power.

35 Article 68, *Law of 21 March 1991*.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

Data switching services, mobile telephony, paging, radiocommunication services and public telecommunications infrastructure are subject to an individual licensing regime.

Private telecommunications infrastructure, telex services, leased lines and all other services except voice telephony (which is reserved until 1 January 1998) are subject to a regime of prior declaration to the BIPT.

(ii) Broadcasting

In the *French Community*, the licensing authority authorises the operation of local and community television channels and also of private channels.

In the *Flemish Community*, the licensing authority authorises, on favourable advice from the Media Council, private television companies (including regional companies) to broadcast.

(2) Regulatory or governmental authorities competent to award the relevant licences.

The Minister for Telecommunications grants all telecommunications licences, and the BIPT maintains a register of the services which have been notified to it.

In the *French Community*, the Ministère de la Communauté Française de Belgique, Audiovisual Department, grants the broadcasting licences. In the *Flemish Community*, broadcasting licences are granted by the Minister of Culture.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

The provision of both telecommunications networks and services is subject to specific licences. The provision of cable networks and the provision of broadcasting services require separate licences. In the *Flemish Community*, local radio broadcasters receive a separate transmission licence automatically with their approval (Article 38 and 95 *Media Decree of the Flemish Community*). In

the *French Community*, local radio broadcasters do not need a separate transmission licence. Their approval contains the necessary frequencies.

The distinction between ownership and operation is a matter with which the regulatory authorities are not concerned. In regulatory terms, the key concern is whether the identity is the party operating a network.

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

1) The national TO, Belgacom, is constrained by some restrictions, in the sense that its activities are legally limited to telecommunications, as defined (broadly) in Article 68, 10° of the *Law of 21 March 1991* (see discussion above). There are no limits on other telecommunications operators.

2) No restrictions, although GSM operators (including the subsidiary of Belgacom) are prevented from bidding for a DCS-1800 licence.

3) No relevant restrictions.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no restrictions on the entities that can produce content.

(6) ***Typical licence conditions.***

- *Exclusivity and Territoriality*

  Cable TV licences are limited to the region where the company is active; all other licences normally have a national territorial scope.

- *Coverage*

  There are some coverage requirements (*e.g.*, for GSM-networks a roll-out plan is provided in the specifications; the third mobile operator's network needs to cover 40, 50, 55 and 60% of the territory and 80, 85, 88 and 90% of the population in the first, second, third and forth years, respectively).

- *Transferability*

  Transfer of the licence for the operation of public telecommunications infrastructure requires prior Ministerial approval.

- *Bundling*

  The bundling of services is only prohibited under Belgian competition rules where the entity alleged to be bundling holds a dominant position in a relevant telecommunications market.

- *Limits on licences*

  The government has indicated that a maximum of three licences will be granted for the operation of ERMES-paging networks.

- *Public service*

  There are some public service requirements, such as coverage targets for cable TV networks.

- *Foreign ownership*

  There are a number of foreign ownership limits. A licence for GSM-networks can only be granted to enterprises at least 21% owned by EU or EEA enterprises (*Royal Decree of 7 March 1995*); a licence for public telecommunications infrastructure can only be granted to EU or EEA-based enterprises, without prejudice to international treaties liberalising foreign investment. Similar restrictions are likely to apply to voice telephony licences.

- *Cross-ownership*

  In the *French Community*, investment by a cable company in a local TV company is limited to 24% and Belgacom is prohibited from investing in such activities. A public broadcasting company cannot own more than 24% of a private channel. There are no restrictions on other entities investing in a local TV station.

  In the *Flemish Community*, cross-ownership in local TV is forbidden, as local TV stations must be independent of other commercial organisations. VTM must be at least 51% owned by Dutch language press companies. Cross-media concentrations are encouraged between newspapers and private television companies. This is an attempt by the State to regulate the media market in general and to maintain as many companies as possible in the newsprint sector in order to guarantee pluralism. However, publishers who did not participate in the creation of VTM are not entitled to join at a later stage.

Investment by local TV is forbidden, and the stake owned by a cable company must be less than 20%. Belgacom is forbidden to invest. The stake of other telecommunications companies is limited to 49%.

- *Duration*

  See section E (2)

F. Pricing and Tariffing

(1) *Pricing obligations (or restrictions) imposed on the incumbent TO.*

Article 106 of the *Law of 21 March 1991* obliges Belgacom to ensure that its charges are cost-based. Otherwise, Belgacom is allowed to set its prices on a commercial basis, subject only to the general *Price Law*. However, in relation to reserved services, the *Management Contract* concluded between Belgacom and the Belgian State of 19 August 1992 imposes the following pricing obligations:

1) geographical averaging;
2) price cap for a basket of services;
3) peak hour tariffing; and
4) special tariffs for certain customer groups such as disabled persons, elderly persons (under certain conditions), persons with speech disabilities, the blind, war veterans and some political newspapers and magazines.

It is likely that these obligations and restrictions will be maintained in the future universal service regime, although there seems to be scope for geographical diversion (see Article 12 of the *Royal Decree of 28 October 1996* for the list of services to be provided by way of universal service and Article 10 of the draft Annex to the *Law of 21 March 1991* for the technical and financial conditions of the provision of universal service).

(2) *New pricing principles for the competitive market environment.*

The *Draft Law modifying the Law of 21 March 1991* sets out the principle of cost orientation for organisations which have a significant market position in voice telephony, leased lines, interconnection and special access.

(3) *Control of tariff packages which can be offered to customers. Interpretation of the rules (if any) preventing discrimination, bundling and cross-subsidisation interpreted in the light of tariff flexibility.*

The D*raft Law modifying the Law of 21 March 1991* provides that organisations in a significant market position can give volume discounts. Such discounts will

be controlled by the BIPT, but it is not yet clear how this will relate to the rules preventing discrimination, bundling and cross-subsidisation.

Belgacom's special tariffs for business users in 1997 were recently the subject of review by the European Commission in the context of a notification of its tariff package to the European Commission.[36] Belgacom's relationship with a number of Belgian banks for its "Belgacom Calling Card" was also the subject of review by the European Commission in the context of a notification.[37]

In addition, during the course of 1997, the European Commission reached a settlement with Belgacom regarding the publication of telephone directories in response to a complaint launched by ITT Promedia n.v., the Belgian directory publishing subsidiary of the US ITT World Directories company. The company alleged *inter alia* that the conditions which Belgacom intended to apply for access to its subscribers' data for publishing telephone directories were excessive and discriminatory and thus caught by Article 86 of the EC Treaty. The initial price was equal to 34% of the turnover of the directory publishers and 200 BF per line of data (which was, in 1995, brought down to 16% of turnover and 67 BF per line). At the end of 1995, the Commission issued a formal Statement of Objections against Belgacom. In its settlement terms, Belgacom has undertaken to continue its pricing for basic data, with respect to which publishers are dependent on it, following the cost-oriented method agreed for 1995/96. With respect to supplemental data, prices will be determined on a market-oriented basis. Several factors could lead to a change in prices for basic data in the future:

- downward evolution: if, as could be expected in the light of planned software changes or new technologies, the costs entailed in collecting, treating and providing basic data go down (this downward evolution could possibly be limited by an upward evolution if the number of subscriber data increases); or

- changed allocation of the relevant cost base: if the number or scope of publishers using the data changes.[38]

(4) Tariff basis - usage time or flat rate off-peak rates; and other relevant pricing practices which increase pricing flexibility.

Tariffs are based on usage time. Belgacom and the two GSM providers charge off-peak rates. As the universal service provider, Belgacom is obliged to charge off-peak rates.

36 See O.J. (1997) C 110/4 of 10 April 1997.

37 See O.J. (1996) C 378/14 of 13 December 1997.

38 Commission Press Release, IP/97/292 of 11 April 1997.

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulated Internet access and on-line services.

Internet access and other on-line services are unregulated with regard to tariffs. There are no proposals which seek to regulate these services. There is current concern in the market place that Internet Service Providers (ISPs) may become *de facto* accessible only over Belgacom's network because of the attractive rates provided by it to ISPs.

G. Network Interconnection and Access to Service Providers

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

Interconnection arrangements are currently individually negotiated. However, the law modifying the *Law of 21 March 1991* will implement the *ONP Interconnection Directive*.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".

The draft rules on interconnection lay down specific rules with respect to operators with significant market power (*e.g.*, obligations to provide "special access" and to publish a "Reference Interconnection Offer").

"Significant market power" will be defined in accordance with the definition of the *ONP Interconnection Directive* (*i.e.*, market share of 25%, subject to individual assessment).

(3) Precise obligations currently placed on interconnecting operators.

- In the *Draft Rules*, parties are encouraged to interconnect at appropriate points of interconnection (POIs) on the basis of their agreements: there are no mandated POIs. It is unlikely that the BIPT will effectively mandate unbundled access to the local loop.

- According to the *Draft Law* modifying the *Law of 21 March 1991*, operators with significant market share must publish a "reference interconnection offer" which is sufficiently unbundled and which allows interconnecting operators to avoid paying for interconnection services they do not need. The BIPT will assess whether the offer is sufficiently unbundled.

- As regards equal access, *Belgium* is committed to following the timetable which will be set forth at Community level in the revised *ONP Interconnection Directive*.

- In the *Draft Royal Decree on Interconnection*, parties are readily encouraged to agree on this issues of technical requirements and standards and quality of service commitments.

- In the *Draft Law modifying the Law of 21 March 1991*, there is only a requirement of "cost orientation" of certain tariffs, including interconnection tariffs.

  In the draft rules on interconnection, operators with an obligation to publish a "reference interconnection offer" may apply different conditions, including interconnection tariffs, to network operators, voice telephony operators and service providers where this is justified on objective grounds.

- The *Draft Royal Decree on Interconnection* obliges parties to disclose any information useful to the conclusion of an interconnection agreement.

- Under the *Draft Royal Decree on Interconnection*, parties may only use information disclosed by the other party for the purpose of concluding an interconnection agreement. This information cannot be transferred to other departments, or to affiliated enterprises which could use it for other purposes.

H. "Resource" Issues

(1) Frequencies.

The BIPT is the federal frequency management authority. Spectrum allocation is regulated in the *Royal Decree on Radiocommunications of 15 October 1979.* A public frequency allocation table is being prepared. Frequencies are assigned on a first-come, first-served basis. Frequency management is not fully transparent.

The Communities are responsible for assigning the frequencies which are allocated for broadcasting by the Federal authority. The frequencies allocated for telecommunications are assigned by the BIPT.

The BIPT has a specific policy on the integration of fixed and mobile technologies. It sets out the technical norms, controls and sanctions related to the issuing of the frequencies. *Belgium* is one of the most difficult countries to organise the administration of the frequency because it is a small country with a

dense population, surrounded by countries with different frequency management policies.

Belgacom has developed succeeding generations of mobile networks:

(1) the MOB 1-net, in the VHF spectrum with a maximum of 4,000 subscribers (the system was operated from 1977 to May 1994);

(2) the MOB 2-net, also an analogue system, in the UHF spectrum with a maximum of 65,000 subscribers (this network has been operated on the basis of the NMT-nomr (Nordic Mobile Telephone) since 1987);

(3) the digital pan-European GSM-norm based system (Globel System for Mobile Communications; 890-915 MHz (up) & 935-960 (down) : 124 channels of 200 KHz), operational since 1 January 1994 by Proximus (the related spectrum has been used by the Civil Protection Units).

A fourth system, identical to that under (3) has been operated by Mobistar since mid-1996.

A fifth system is planned to be operational in the 1800 MHz spectrum (1710-1785 MHz (up) & 1805-1880 MHz (down) : 374 channels of 200 KHz). It is presently used by the Ministry of Defence. As presently envisaged, operators in the DCS 1800 spectrum will have an opportunity to use the GSM 900 spectrum and vice versa.

The spectrum for the ERMES-paging system (169,4 - 169,825 MHz : 16 channels) is going to be made available by the "Gendarmerie"/"Rijkswacht".

(2) Numbering.

The BIPT is responsible for the administration of the national numbering scheme, in particular for setting out and amending the national numbering plans and the allocation of numbers. The Government can, with respect to the services it indicates, set the principles and the basic structure which the BIPT should take into account when establishing the numbering plans. The Government can set out, on the recommendation of the BIPT, the form and the conditions for the allocation and withdrawal of numbers. The Government must fix the administrative fees to be paid to the BIPT by the applicants for numbers. The Government must also set the annual fees to be paid to the BIPT for the use of numbers. A *draft Royal Decree* sets out these principles and requirements.

The allocation of numbers by the BIPT must be conducted in a selective, transparent and non-discriminatory manner.

An operator characterised by the BIPT as an organisation with significant market power will have to offer carrier selection. From 1 January 1998, a selection must be possible per call and as from 1 January 2000, a pre-selection with the possibility to shift on a call-by-call basis will need to be made available. The BIPT will grant deviations from these principles on technical grounds.

(3) Rights-of-Way.

There are no obligations for infrastructure sharing. In the *draft Royal Decree on Interconnection*, parties are only encouraged to agree on facility sharing. The *Royal Decree on GSM Licences* provides that infrastructure sharing is to be individually negotiated. The *draft Royal Decree on DCS-1800 Licences* gives the DCS-1800 operators a right, under certain conditions, to share antenna-sites with other licensed mobile telephone operators.

Under Article 5 of the *Royal Decree of 28 October 1996* on the liberalisation of existing alternative infrastructure, public network operators have free and automatic rights-of-way.

Rights-of-way are granted by the authority in charge of the particular piece of the public domain affected (respectively municipalities, the provincial authorities and the regions). A similar right is granted over private properties.

In the *Flemish Community*, cable TV operators have free and automatic rights-of-way (Article 110, *Decree of 25 January 1995*). In the *French Community*, there are no free and automatic rights-of-way for cable TV operators. They have to be granted by public authorities or private property holders (Article 8 *Royal Decree of 24 December 1966*).

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

In the *Flemish Community*, the Minister responsible for Culture and the Media is required by statute, to prepare a list before 1 July each year of cultural and sports events which are of major interest to the Flemish public. Local channels and pay-TV channels may not acquire exclusive rights if this makes it impossible for the public or private broadcasters of the Flemish Community to transmit simultaneously to the Flemish audience.

The 1997 list refers to the World and European Championships for all sports, international meetings and tournaments for all sports; national championships for all sports except football (where the pay-TV rights have been ceded to a broadcaster licensed by the Flemish authorities), international sports events

organised in *Belgium* and the Queen Elisabeth Musical Concours (a cultural event).

In the *French Community*, the *Decree of 22 December 1988* governing access to cable makes it compulsory for foreign broadcasters to undertake not to acquire exclusive or priority rights, with regard to cable retransmission in the *French Community* of sports events or events of major public interest which take place outside *Belgium*. Moreover, foreign broadcasters may not acquire exclusive rights for sports events which take place in *Belgium* without the prior consent of the regulatory authority.

Licensing requirements for certain types of content that may restrict market entrants.

There are no restrictions on entrants to markets for "content" other than the rules relating to major sporting and cultural events (see above).

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

In the *Flemish Community*, cable TV companies have must carry obligations for the following radio and television programmes:

- the *Flemish Community* public broadcasting service;
- private broadcasters, authorised by the *Flemish Community*, who address Flanders in Dutch language programmes;
- regional broadcasters, authorised by the *Flemish Community*, as far as their broadcasting area is concerned and the programmes are in the Dutch language; and
- the public broadcasting services of the *French* and *German Communities* in *Belgium*, authorised and regulated in those communities and which address their respective communities, as far as the cable TV companies in those communities carry the programmes of the Flemish public broadcasting service.

In the *French Community*, cable TV companies must carry obligations for the following radio and television programmes:

- the *French Community* public broadcasting service;
- regional broadcasters;

- international broadcasters in which the *French Community* public broadcaster participates and which are designated by the *French Community* Government;

- private broadcasters, authorised by the *French Community*;

- the public broadcasters of the *Flemish* and *German Communities* of *Belgium*, as far as cable TV companies in those communities must carry the programmes of the *French Community* public broadcaster;

- pay television broadcasters, authorised by the *French Community*; and

- the radio programmes of the *French Community* public broadcaster, transmitted in FM frequencies (Article 23, *Decree of the French Community of 17 July 1987*).

Regional broadcasters are also subject to a number of must carry obligations.

In the *Flemish Community*, in addition to transmitting programmes of broadcasters, cable operators may transmit up to two recorded programmes of their own provided they comprise uninterrupted music.

In the *French Community*, public broadcasting services have no quantified obligations. However, the RTBF must give priority to presenting the cultural heritage of the French speaking community and, in particular, must set aside an equitable amount of programming for the works of artists and others belonging to that community.

At least 20% of the programming of a private television station must be its own production. Similarly, at least 5% of the programming of a pay television network must be its own production and at least 33% of the programming of a local or community television station must be its own production. All of those programmes must also highlight the cultural heritage of the *French Community* and, in particular, its regional aspects.

There are no quantified obligations for private radio stations.

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

"Local content" and "independent content" obligations are imposed on cable TV operators. These obligations will be covered in their licences: *e.g.*, messages of public interest.

(5) ***"Gateway " Issues - Technologies for Open Access.***

There are no such mandated standards.

(6) ***Internet Domain Names - Preferred regulatory approach.***

Parliament has left the management of Internet domain names to the Computer Sciences Department of Leuven University and has, thus far, not revealed plans to alter this management. The Department of Leuven University has adopted a specific national policy with respect to the registration of Internet domain names.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) ***The definition of "universal service" at the national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.***

The Belgian definition of universal service includes not only the universal service elements set out in the draft *ONP Voice Telephony Directive*, but also free access to emergency services, the installation of a help desk and the delivery of some service elements in case of non-payment of bills.

The *Royal Decree of 28 October 1996* contains the list of services to be provided by way of universal service, mention is made of an obligation to provide, at a fair price (with regard to the connection, the costs of the connections and the subscription), a line with capacity for interactivity, with a view to providing access to data networks, in particular Internet, and meeting the special social needs of hospitals, schools and public libraries. However, in the recent draft law modifying the *Law of 21 March 1991*, the Belgian Parliament introduced a distinction between universal service and universal access (the provision of a line with capacity for interactivity to hospitals, schools and public libraries being part of the latter). In addition, the provision of such a line is not necessarily the same as the provision of an interactive service or Internet access.

It is proposed that the list of entities obliged to contribute to the universal service fund is not limited to public network operators and providers of publicly available telephone services. Other organisations providing publicly available telecommunications services will also have to contribute, as will publishers of directories. The scope of this group of entities will depend on how the concept of "other organisations providing publicly available telecommunications services" is interpreted (*e.g.*, Internet access providers and video-on-demand providers).

(2) ***Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.***

Only Belgacom is obliged to provide universal service. Other operators are free to provide elements of universal service, but it is not yet clear whether the net cost of their supply will also be financed out of a universal service fund.

(3) ***Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).***

Public network operators, organisations providing publicly available telephone services, organisations providing other publicly available telecommunications services and publishers of directories are obliged to contribute to the costs of universal service. Any contribution to the net cost of universal service will be made to the future universal service fund, in proportion to the operator's turnover in the telecommunications sector.

(4) ***"Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).***

Cable TV companies: see H. 4. above.

Broadcasters are obliged to include a certain amount of locally produced content (European Union or the appropriate language community in *Belgium*) and a certain amount of independently produced content. Programmes must also contain a balance of culture, information, education, entertainment and sport. BRTN must carry Flemish government broadcasts and party-political broadcasts.

(5) ***Other public service specifications affecting the content or information provided to subscribers.***

In both language Communities, there are rules prohibiting discrimination, and protecting minors and public decency (*e.g.*, against pornography or violence on television).

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DENMARK

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

A distinction is drawn between telecommunications and broadcasting services.

Telecommunications services are defined as: "*any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems*".

Broadcasting services are defined as: "*a radiocommunication service in which the transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmission*".

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

Danish legislation does not distinguish between the various categories of services, with all telecommunications services being provided under the general class licence, except for Premium Rate Services which are commonly identified as "Service 900". There is, however, a difference between operating mobile telecommunications networks and operating fixed networks, since operating mobile telecommunications requires the allocation of frequencies.

(3) Regulation of Internet services and on-line services.

There is no specific legislation covering Internet and other on-line services, which do not require a licence.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

There is no specific legislation on digital broadcasting in *Denmark*. It is assumed that Video-on-Demand constitutes a 'telecommunications' service. The two digital terrestrial channels (allocated to Radio Danmark and TV2) are regulated in the same way as other terrestrial channels.

B. Regulatory Authorities in telecommunications/broadcasting/ publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

(i) Telecommunications

The Ministry of Research & Information Technology is responsible for telecommunications policies, while the National Telecom Agency (NTA) is responsible for the administration of non-policy tasks and assignments within the field of telecommunications, including all technical aspects. This division of power between the Minister of Research and the NTA is laid out in the *Frequency Act*, and the Minister cannot interfere in the decision-making process of the NTA.

(ii) Broadcasting

The Ministry of Culture is the government department responsible for broadcasting policy. The National Telecom Agency allocates the frequencies to the broadcasters and also advises the Ministry of Culture.

(iii) Publishing

The Prime Minister's Office is officially in charge of the press. The Ministry of Justice appoints the Press Council and is responsible for legislation on publishing.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.

(i) Telecommunications

Only recently, has the NTA has only recently been made independent. While the Ministry of Research & Information Technology is responsible for telecommunications legislation and political decisions, the NTA is responsible for the daily administration and regulation of the telecommunications sector.

The NTA's powers include the following:

- supervising telecommunications activities;
- issuing all licences;
- resolving disputes between operators;

- conducting international negotiations for setting international standards;
- allocating national frequency spectrum;
- issuing type approvals; and
- monitoring frequencies.

(ii) Broadcasting

Ministry of Culture

The Ministry of Culture is the government department responsible for broadcasting policy. The NTA allocates certain parts of the frequency band to broadcasters but does not otherwise interfere with either the use of the frequencies or broadcasting licensing policy. The NTA must ensure that the licence complies with technical specifications, and the NTA decisions on these matters can be brought before the Telecommunications Complaints Board or the Telecommunications Consumer Board. The decisions of the Minister of Culture or of any other boards or committees established in pursuance of the Danish *Radio and Television Act* cannot be appealed to the NTA.

The Satellite and Cable Board

A company wishing to broadcast services via satellite or cable in an area larger than one local area must apply to the Satellite and Cable Board, an independent body whose members are appointed by the Minister of Culture. It is composed of five members who have legal, technical, economic and media expertise and are appointed for five years. The Board has power to grant licences for programme services for areas larger than one local area.

The Satellite and Cable Board also has the power to withdraw licences if they are not used for a one year period.

The Satellite and Cable Board has an on-going supervisory role in relation to infringements concerning identification, programming and the duration of advertisements.

The Satellite and Cable Board adopts final administrative decision in cases concerning the programme services provided by Denmark's Radio and TV 2 by means of the terrestrial broadcasting network. In this connection, the Board may protest any infringement of the regulations of the *Act* or of any provisions issued pursuant to the *Act*. The Board may also require the temporary or final suspension of the programme services in the event of significant or repeated infringements.

The Satellite and Cable Board also awards licences to provide satellite television.

The Local Radio and Television Boards

The Local Radio and Television Boards are set up by the local councils. These Boards are composed of an unequal number of members, with a minimum of five members.

The Boards license programme services for their respective local areas and have the power to withdraw licences if the licensee infringes broadcasting legislation or does not fulfill its obligations. The Board must inform the Local Radio and Television Committee if it becomes aware of matters which fall within the competence of the Committee.

The Local Radio and Television Committee

The Local Radio and Television Committee is established by the Ministry of Culture. It is composed of five members which have legal, technical and media expertise. The Committee is established for consecutive terms of four years.

The Local Radio and Television Committee may direct the Local Radio and Television Boards and licensees to submit information of significance on the matters being considered by the Committee. The Committee shall decide on complaints concerning a Local Radio and Television Board's decisions to:

- reject applications for licences to provide local programme services; and
- revoke licences to provide local programme services.

The Committee decides on complaints concerning licensees' independent provision of programme services, such as:

- those which cover several local areas; or
- those concerning radio or television broadcasters which provide programme service on a basis other than under a licence for local radio or television programme services.

The Committee decides on complaints concerning programmes broadcast simultaneously by several licensees or broadcast pursuant to permanent cooperation on programme services with other radio and television companies.

After consultation with the NTA, the Committee decides on cases concerning the location of transmission stations in local areas, paying due regard for the frequencies available.

The Committee's decisions may not be reviewed by any other administrative authority.

The Radio and Television Advertisements Board

The Danish *Broadcasting Act* contains the rules regulating advertising.

The Radio and Television Advertisement Board was set up by the Minister of Culture. The Board is composed of three members, appointed by the Minister for a period of four years. The Minister also lays down the rules on the composition and activities of the Board.

The Board adopts final administrative decisions in relation to the content of broadcasting advertisements. It ensures there is no infringement of the *Broadcasting Act* and may order TV 2 Reklame A/S or other licensees to make its decision publicly available. The Board is authorised to decide on the form of this communiqué.

The Board is authorised to adopt final administrative decisions concerning the right of reply in connection with information of a factual nature broadcast in advertisements. The Board is authorised to order TV2 Reklame A/S or a licensee to broadcast a reply. The Board will decide on the content, structure and scheduling of the reply.

Complaints concerning the content of advertisements are lodged before the Board within four weeks of the broadcast of the advertisement concerned.

Ministry of Research

Technical aspects of broadcasting, such as the use of the public telecommunications network, directions on access to cable systems, and the use of decoders which convert encrypted signals into TV signals which can be immediately reproduced by TV sets, are addressed by the Minister of Research.

The NTA supervises compliance with these technical decisions. The Minister of Research may not compel the NTA to exercise its official authority in a particular way in any particular case.

Complaints against the decision of the NTA concerning compliance licence conditions and any NTA direction issued in pursuance of the *Broadcasting Act* (section 5(2)) may be brought before the Telecommunications Consumer Board.

Complaints against decisions by the NTA concerning compliance with the directions issued in pursuance of the *Broadcasting Act* (section 5 and 5a) may be brought before Telecommunications Complaint Board.

(iii) Publishing

The Press Council is a non-governmental body made up of publishers and interested parties, which acts as a self-regulation body for the sector.

(3) National rules limiting anti-competition behaviour (sector specific and non-sector-specific). National competition authority and its powers.

There is no sector-specific competition regulation. On 30 May 1997, the Danish Parliament adopted a new *Competition Act* which will dramatically change Danish law from 1 January 1998 and bring it closer in line with EC competition rules.

The existing Competition Act (the "*Competition Act 1989*") is based on a principle of controlling abuses: anti-competitive behaviour is basically allowed on the basis that it is an inherent part of commercial activities. However, the effects of anti-competitive activities must be transparent on the market, and the Competition Council can take measures against the harmful effects of any anti-competitive activities on a case-by-case basis.

By way of contrast, the new *Competition Act*, which comes into force on 1 January 1998, is modelled on EC competition rules. It includes a general prohibition against agreements, decisions and concerted practices which, directly or indirectly, have the object or effect of restricting competition. The general prohibition does not apply to agreements of minor importance. Moreover, it does not apply where competition is restricted by the cumulative effects of networks of similar agreements.

The new *Competition Act* provides for the Minister of Business and Commerce to issue block exemptions in the form of Ministerial Orders. The criteria for obtaining exemptions are similar to those set out in Article 85(3) of the EC Treaty.

The new *Competition Act* also introduces a general prohibition against the abuse by one or more undertakings of a dominant position in the Danish market or any part of it. Again, this provision has been modelled on EC competition rules. The concepts of "dominance" and "abuse" are to be interpreted in accordance with the practice of the European Commission and the European Court of Justice.

There continues to be no merger control regime in *Denmark*, but the new *Competition Act* introduces a notification requirement to enable the Competition Council to monitor developments. The Minister of Business and Industry will lay down detailed rules on the obligation to notify for monitoring purposes. These rules are expected to address issues such as triggering events, time-limits, and the form of the notification.

The Competition Council will have no powers to interfere with or prohibit mergers or acquisitions. However, fines may be imposed for failure to notify. The

Council has no power to suspend or declare void the transaction, nor to introduce procedural time-limits for decisions or appeals, since its role is not strictly speaking one of merger control.

Anybody who is affected in some way by an anti-competitive agreement or practice may complain to the Competition Council. The Council will investigate agreements or practices upon receipt of a complaint or may start an investigation itself. It has the power to order disclosure of any information including accounts, business records and electronic data considered necessary for deciding whether the provisions of the *Competition Act* apply to an agreement. It may also obtain a court order to conduct on-the-spot investigations when it finds that investigation is necessary in the circumstances of the case. Fines may be imposed for the breach of the prohibition against anti-competitive agreements and concerted practices. Fines will be set according to the actual or contemplated economic gain behind the action, since it would be contrary to Danish criminal law traditions to adopt the Community legal regime where fines depend on turnover.

The Competition Council can also issue orders requiring companies to cease any abusive conduct. These orders may include specific terms to be fulfilled by the companies concerned; for example, to amend its general conditions of sale and delivery or to begin supplying a specific customer on defined terms. In contrast to EC competition rules, the first violation of the prohibition of abuse of dominance is not subject to fines. However, breach of an order from the Competition Council to cease the abuse is subject to fines if not respected.

The Competition Council

The Competition Council consists of a chairman and eighteen members appointed by the Minister of Business & Industry. The chairman and eight of the members are independent of the remaining ten members, nine of which are nominated by various organisations representing commercial interests and one by a consumer organisation.

Ultimate responsibility for competition matters rests with the Minister of Business & Industry. However, both the Competition Council and the Competition Agency are independent bodies, and the Minister cannot influence the way they handle cases or change or repeal their decisions.

The Council is the principle authority responsible for administering the *Competition Act* and any secondary legislation issued pursuant to it. It is intended that the Council will deal with matters of principle and complex matters, and the Competition Agency with day-to-day administration. The Council is also responsible for cases involving the business activities of control of approval by public authorities.

Finally, the Council is entitled to express an opinion in connection with the Minister's adoption of secondary legislation and the issuing of interpreting notices.

The Competition Agency

The Competition Agency is the secretariat of the Competition Council. It is a new body in the sense that, before the *1997 Competition Act*, it did not have its own name and was often referred to as the Competition Council, which led to considerable confusion.

The Agency is currently divided into eight departments, each dealing with different areas of business and industry. It is staffed by approximately one hundred case-handlers and administrative personnel.

The Competition Appeals Tribunal

Appeals against decisions of the Competition Council lie to the Competition Appeals Tribunal, which is composed of a Supreme Court Judge and two experts, in economics and law respectively.

The Appeals Tribunal forms part of the administration and its decisions are in turn subject to appeals before the ordinary courts of law.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

The NTA may impose sanctions on service providers who breach their General Class Licence. It may also issue orders if a service or network is provided in violation of a provision of the General Class Licence. It may impose daily penalties if there is non-compliance with the orders. A penalty is also payable if a breach is considered to be significant. As regards enforcement power exercised by the Competition Council and its related advisory bodies, refer to discussion above at point (3).

(5) Rules or practices regarding cooperation between regulatory institutions their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

There are no formal rules or practices regarding the means of cooperation between the respective regulatory institutions.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(i) Telecommunications

Telecommunications legislation has been amended in the last two years and will continue to be revised up to 1998. The objective of this revision has been to

liberalise and deregulate the market and to update current legislation in compliance with Community regulation.

On 10 June 1997 the Danish Parliament passed the following Acts representing the final implementation of the agreement in principle on total liberalisation of the telecommunications sector in *Denmark*:

- *Act No. 391 Amending the Act on Competitive Conditions and Interconnection in the Telecommunications Sector* (Calculation of Interconnection Tariffs etc.).
- *Act No. 392 on Assignment and Use of Numbering Resources etc.*
- *Act No. 393 on Cable Laying Access and Expropriation etc. for Telecommunications Purposes.*
- *Act No. 394 on Radiocommunications and Assignment of Radio Frequencies.*
- *Act No. 395 on the National Telecom Agency.*
- *Act No. 396 Amending the Act on Public Mobile Communications (Amendment due to the Act on Radiocommunications and Assignment of Radio Frequencies).*
- *Act No. 397 Amending the Act on Universal Service Obligation and Certain Consumer Interests within the Telecommunications Sector (Nationwide Directory Enquiry Service etc.).*
- *Act No. 398 Amending the Act on Certain Conditions in the Telecommunications Field (Amendments due to Stage 2b of the Telecommunications Liberalisation etc.).*
- *Act No. 399 Amending the Act on Radio and Television Activities and the Act on Standards for Transmission of TV Signals etc. (Amendments due to the Act on the National Telecom Agency).*

Regulations providing more specific provisions to the above legislation are currently being drafted. The following telecommunications Bills are currently being considered:

- Bill on Interconnect Tariffs;
- Bill on Frequencies;
- Bill on Shared Facilities; and
- Bill on Number Regulation.

(ii) Broadcasting

The *Broadcasting Act 1994* has been amended in order to be consistent with the new telecommunications legislation. Decisions taken by the NTA concerning technical issues in the broadcasting sector can now be brought before the Telecommunications Complaints Board and the Telecommunications Consumer Board.

One can ask whether or not the broadcasting sector should also be administered by the NTA, but there are no plans to modify this situation at present. Further, it should be noted that the two main broadcasters are allowed to offer audiovisual activities. This represents the liberalisation of the audiovisual sector, as previously Danmark Radio and TV2 were not allowed to offer these services.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

The incumbent has no special rights or privileges, nor is a new operator given special rights or privileges. For example: the four DCS 1800 licences have just been awarded to two new operators (France Telecom and Telia) and the two existing licences awarded to GSM operators. These GSM operators were allowed to participate in the tender procedure on the same terms as everyone else (GSM operators have a natural advantage, as around 60 % of their antenna positions can be re-used on DCS 1800 systems).

If a service requires the use of frequencies, a frequency licence must be obtained from the NTA. If the service requires numbers, the numbers must be assigned to the operator. The Ministry of Research will outline provisions concerning premium-rate service and the 900 service in a new Order (expected to be adopted before the end of 1997). The order will concern the protection of the individual consumer concerning unreasonable use of the service for which the consumer cannot afford. A 900 committee is to be appointed by the Ministry of Research. The committee supervise compliance with the 900 service regulation, and can terminate a 900 service if regulation is infringed.

The Ministry of Research stipulates provisions outlining which considerations must be taken into account when offering either a service or a network:

- access to vital public services, including writing and text-services and the public alarm system;
- access to vital public security, alarm and military situations without expenses for the State in areas not covered by ordinary alarm systems;

- security and stability of the network, and service integrity including the interconnection access between the network and the service;
- the security of personal information and protection of personal privacy in connection with telephony;
- the secrecy of telecommunications; and
- compliance with international agreements signed by *Denmark*.

The NTA supervises compliance with the Regulation and can fine operators who infringe the Regulation.

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

Tele Danmark and SONOFON are the only GSM operators in *Denmark*. SONOFON was selected through a tender process, while Tele Danmak was pre-selected.

During the summer of 1997, four DCS1800 licences were awarded through a tender procedure. Tele Danmark, SONOFON, Telia and Mobilix were each awarded a DCS1800 licence. The licences are individual in nature and provide the operators with the right to operate a DCS1800 system.

Tele Danmark was given the exclusive right to operate the NMT 450 and NMT 900 networks but, as the number of NMT-users decreases, the NMT 450-frequencies will be handed over to the NTA for re-use.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.

Danish legislation requires that operators with significant market power respect certain obligations. At the beginning of the liberalisation process in 1995, the ex-monopolist Tele Danmark, was identified as a fixed network operator with a dominant market position, which meant that it was subject to different rules than other operators.

The *Interconnect Act*, for example, states that providers of public telecommunications networks or telecommunications services which have a significant market position must meet all reasonable requests for establishing or modifying agreements on switched interconnection within the following areas:

- telephony networks and basic telephony services;

- data communications networks and basic data communications services;
- mobile communications networks and basic communications services; and
- other cable or radio-based telecommunications infrastructure, except satellite communications.

Providers of public telecommunications networks or telecommunications services which have a significant market position must also meet all reasonable requests for the leasing of infrastructure capacity in telephony networks, data communications networks and other cable-based infrastructure irrespective of the services for which the leased infrastructure capacity is used.

Providers of public telecommunications networks or telecommunications services are presumed to have significant market power when they have a share of more than 25% of a telecommunications activity in the geographical areas in which they are providing telecommunications networks or telecommunications services.

Providers of public telecommunications networks or telecommunications services which have significant market power in the total market for fixed network and mobile communications, in the market for leased lines or in the fixed networks market, must provide access to interconnection at prices based on the Long Run Average Incremental Cost (LRAIC) method, with the addition of a reasonable profit. By way of contrast, operators not holding significant market power may enter interconnection agreements on market conditions.

As Tele Denmark was identified as the only operator with a market share of more than 50% it was selected as a universal service provider.

Aside from these obligations, Tele Danmark is treated no differently to other operators. For example, Tele Danmark has a mobile subsidiary which was allowed to submit an application for the DCS1800 tender, and was awarded a licence with no restrictions. Further, Tele Danmark can now provide activities like Video-on-Demand and Near-Video-on-Demand with no restrictions and Tele Danmark is the main supplier of such services. Consequently, it can be said that Tele Danmark can offer telecommunications activities as any other operator.

(4) Accounting and structural separation safeguards (current or planned).

Providers of public telecommunications networks or telecommunications services which have significant market power must keep separate accounts for their individual lines of business.

Thus, the enterprises, municipalities and municipal joint ventures, and other public institutions such as enterprises within the railway sector, public utilities within the gas, water heating and electricity sectors, must also arrange for separate accounts to be kept in respect of their provisions of telecommunications networks or telecommunications services.

The Minister of Research may provide more specific rules on the following:

- the date on which the separation of accounts must be completed;
- submission of accounts to the NTA;
- the organisation and content of the accounts, including the lines of business for which separate accounts have to be kept, to ensure, among other things, effective competition and transparency regarding interconnection; and
- cooperation procedures between the NTA and the Competition Council regarding compliance with the rules, with respect to which rules shall be established following discussion with the Minister of Research.

(5) Policy basis for regulation of incumbent carrier's services.

When an operator has a market share of at least 50%, it may be selected as a universal service provider. Tele Danmark has also been identified as an operator with significant market power (*i.e.*, over 25% market share).

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

The licensing regime for telecommunications services and networks is subject to the following regime:

- bearer data services: General Class Licence;
- liberalised services including voice: General Class Licence;
- Premium Rate Services: Registration;[39]

39 The establishment and operation of Premium Rate Services implies that the service provider has previously notified the service 900 Board (see *Executive Order No.917 of 18 October 1996*). The provision of these services also implies that the service provider has entered into a negotiation agreement with a telecommunications network or service provider.

- services not provided to the public: General Class Licence;
- fixed networks operators: No Licence Requirement.

(ii) Broadcasting

There are four groups of broadcasters who may provide sound and television programmes in *Denmark*:

- Danmarks Radio (former monopolist) (no advertisements);
- TV 2 (advertisements);
- broadcasters licensed by the Satellite and Cable Board to provide programme services via satellite or cable to areas exceeding a single local area; and
- companies, associations and municipalities licensed by the Local Radio and Television Boards to provide programme services within a single local area.

The right to provide sound and television programmes comprises the following activities:

- broadcasting of programmes to the general public by means of radio equipment; and
- distribution via cable of programmes which are not also broadcast as mentioned previously.

The only commercial terrestrial television in *Denmark* is local television.

Danmarks Radio

Danmarks Radio is an independent public institution which provides radio and television programme services comprised of news, general information, entertainment and art to the general public. Programmes may be broadcast by means of radio equipment, satellite, or cable networks. In addition, Danmarks Radio may carry out other activities, including telecommunications activities, in connection with its programme services or use its technical equipment, special expertise, and so on.

The *Broadcasting Act* allows Danmarks Radio to follow the technical developments and to compete in the telecommunications market. The policy position is that it should be allowed to compete in future media markets, when the borders between the traditional broadcasting and other media activities

dissolve. The regulation gives Danmarks Radio, the opportunity to supply the market with broadcasting services with a wider scope such as video-on-demand, interactive games, different business services, and so on (but does not include ordinary telephony services).

Danmarks Radio may establish new companies or contribute to the capital of existing companies in order to carry out these other activities, including programme services, or in order to cooperate in media-related activities with other enterprises. It is financed by its share of licence fees and from income derived from the sale of programmes and other services, sponsorships, dividends, profit shares, and so on. Danmarks Radio may also raise loans on ordinary market terms to finance its investments, provided that such borrowing does not exceed 4% of its revenues. Further, loans are subject to the approval of the Minister of Culture.

Danmarks Radio is managed by a Board of eleven members, appointed by the Minister of Culture. One member, the Chairman, is appointed by the Minister of Culture and nine members are appointed by Folketinget (the Danish Parliament). The permanent staff of Danmarks Radio appoints one member.

The Minister of Culture is responsible for the establishment of a Programme Council. Members are appointed for four years. The Programme Council is an advisory body concerned with the programme services offered by Danmarks Radio, and submits an opinion to the Board and general management. Rules and regulations governing the composition and activities of the Council are laid down in the statutes of Danmarks Radio.

According to county council regulations, a Programme Council is established for each county and one joint Programme Council is set up for the municipalities of Copenhagen and Frederiksberg (the other part of Copenhagen). The Programme Councils are advisory bodies which monitor Danmarks Radio's regional programme services. They may submit their opinion to the Programme Council. Rules and regulations governing the activities of the county Programme Council are embodied in the statues of Danmarks Radio.

TV2

TV 2 is an independent institution which provides and distributes national and regional television programmes using radio equipment, satellite, or cable. Quality, versatility and variety are crucial considerations for programme approval. Regional affinities shall also be given priority in the planning of programmes for the regional TV 2 stations. The Minister of Culture may issue rules concerning TV 2's public service obligations.

TV 2 produces news and current affairs programmes. Other programmes are primarily purchased from other producers.

TV 2 may carry out other activities, including telecommunications activities, in connection with its programme services or use the institutions technical equipment or special expertise.

The *Act* allows TV 2 to respond to technical developments, so as to allow it to be in a position to compete in future media markets, when the borders between traditional broadcasting and the other media activities dissolve. The objective of the regulation is to give TV 2 the opportunity to supply the market with broadcast-related services such as video-on-demand, interactive games, different businesses service, but does not include ordinary telephony services. TV 2 may establish new companies or contribute to the capital of existing companies in order to carry out these other activities, or cooperate on media-related activities with other enterprises.[40]

Advertising

The Minister of Culture has established a limited liability company which on a commercial basis sells advertising time on TV 2 (TV 2 Reklame A/S). The State is the sole shareholder of the company. The Minister shall approve its articles of association and any amendments thereof.

Programme services provided by a television company not under the jurisdiction of a Member State using either frequency or satellite capacity authorised by the Danish authorities, or depending on a radio uplink from *Denmark* to a satellite, are also subject to licensing. However, this does not apply to television broadcasters under the jurisdiction of an EFTA country.

To meet *Denmark*'s international commitments, the Minister of Culture has produced further rules that make the provision of programme services by an operator who otherwise has affiliations to *Denmark* likewise subject to licensing.

Application

An application for a licence must provide an overall picture of the activities planned, and show that it is probable that the necessary financial means are available to do so. Information concerning programme plans, ownership and the financial basis for the planned services must be provided in the application.

Programmes

The Minister of Culture must regulate programme services, including rules for the proportion of programme types. The licensee must ensure compliance with the rules concerning advertisements. However, advertisements may not be

40 The Minister of Culture sets up a Programme Council whose members are appointed for terms of four years. The Programme Council is an advisory body to discuss the activities and which any submit an opinion to the board and the General Manager. The Minister must provide the necessary rules for the composition and activities of the Council. A regional Board of Representatives shall act as Programme Council for the regional station.

included in programmes broadcast via cable networks in areas exceeding one local area.

The provision of programme services over radio equipment or cable networks within a local area (more than 25 connections in one building or group of adjacent buildings) is subject to a licence granted by the Local Radio and Television Board.

Local licences for local commercial television may be granted to companies, associations and so on, provided that the following conditions have been fulfilled:

- a majority of the members of the board of the company, association or similar must reside within the area;
- the sole object of the company, association, or similar is to provide radio or television services; and
- the controlling influence in any such company must not be exerted by commercial undertakings except if they are daily newspapers or district papers (for licences to be granted to companies in which national daily or local newspapers have a decisive influence, it is a pre-condition that the local radio or station functions as a forum for wide-ranging local debate).

Should the applicant, in addition to fulfilling the conditions set out in *the Act* represent a wide variety of business and cultural interests in the local area, a permit to broadcast television programmes by means of radio waves must be issued.

A licence may be limited by transmission time, and is granted for a fixed period not exceeding five years for radio and seven years for television. The Minister of Culture may lay down rules concerning the award of licences.

A programme service may not include programmes transmitted simultaneously by other radio or television broadcasters. The same applies to programmes transmitted with a small time lag. However, it may include programmes transmitted simultaneously by another holder of a licence to broadcast local programmes, if this is justifiable in view of local conditions in the individual area.

Irrespective of a possible time lag, the programme service may not include programmes transmitted by other radio or television broadcasters pursuant to permanent cooperation on programme services, either among stations or between stations and other undertakings.

It is the responsibility of the licensee to ensure that the rules on advertising, programme sponsorship and sale of transmission time comply with the provisions on advertisement contained in *the Act*.

(iii) Publishing

Publishing is not regulated in *Denmark*.

(2) Regulatory or governmental authorities competent to award the relevant licences.

The NTA awards the telecommunications licences. It also assigns the frequencies used for broadcasting.

The Ministry of Culture awards national broadcasting licences. Local television is licensed by the local Radio and Television Boards.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

Mobile service providers do not require frequencies and therefore do not need a licence. In contrast, a mobile network operator will need to obtain a frequency licence. A fixed network service provider may have restrictions imposed to control numbering, but will otherwise be unrestricted.

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

All such restrictions have been lifted by the 1997 amendments.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no restrictions on the types of entities which can produce content.

(6) Typical licence conditions.

(i) Telecommunications

When a licence is granted through a public tender procedure, the Ministry of Research will lay down more specific rules for the tender, including a general timetable for each individual tender procedure and rules indicating the extent to which the conditions for tender should be submitted to the Ministry of Research for approval.

The Ministry of Research stipulates more specific rules on the framework for preparation of tender documents and the general criteria for selecting licence holders. These rules may include the following:

- the type of licences to be included in the invitation to tender;
- licence holder's provision of services to consumers or to other network and service providers, including a framework for comparison;
- the technical arrangement and quality of licence holders' network and possible requirements for the geographical coverage of these, including possible timescales for extension;
- evaluation and mutual prioritising of tenders;
- whether the tender has a significant financial basis and the appropriate telecommunications technology to operate the telecommunications networks and services in question, and is able to demonstrate that the tender could be satisfied; and
- the extent to which the public invitation to tender rendered should include all radio frequencies allocated for the service.

The licences (and associated terms) issued under the *Act on Public Mobile Communications* (GSM Mobile Network), continue until 1 March 1997 irrespective of the repeal of that *Act*. The terms stipulated for Tele Danmark A/S's provision of OPS, NMT450 and NMT900 networks (with the associated basic services) under the *Act on Certain Conditions in the Telecommunications Field* shall continue, until licences for these networks with the associated basic services have been issued. Until licences have been issued, the assignment of number series and addresses for OPS, NMT450 and NMT900 and payment for them shall be governed by rules issued under of the *Act on Certain Conditions in the Telecommunications Field.*

The issue of new licences to providers of GSM mobile networks with effect from 1 March 1997 and the issue of a licence to Tele Danmark A/S in the ERMES field did not require a public tender. The new licences to the providers of GSM mobile networks to be issued with effect from 1 March 1997 and licences to Tele Danmark A/S concerning the OPS, NMT450 and NMT900 networks, were issued for five years with effect from 1 March 1997. The duration of subsequent licences shall be 10 years.

Service provider's rights are contained in the general telecommunications regulations and are not necessarily included in the General Class Licences. The following obligations are imposed on network and service providers:

- security of network operations;
- maintenance of network integrity;

- interoperability of services; and
- protection of data.

(ii) Broadcasting

Refer to discussion in section E (1) above.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

As a matter of principle, market conditions determine the tariffs. Nevertheless, access to a basic range of telecommunications services must be provided at pre-determined, cost-based and non-discriminatory maximum prices from operators with significant market power. Accordingly, operators must not discriminate between comparable clients in their tariffs. All agreements between an operator and a client must be transparent and available to the public and the NTA.

(2) New pricing principles for the competitive market environment.

The Minister of Research shall lay down rules for continuation of parts of the terms applicable to the present GSM mobile licences regarding tariff principles, tariff fixing and the associated subscription terms from 1 March 1997 until 1 March 1999. The Minister of Research shall lay down similar rules for continuing parts of the terms applicable to the present regulation of tariff principles, tariff fixing and the associated subscription terms for NMT450, NMT900 and OPS.

The NTA supervises compliance with the terms of these licences.

The *Order of 4 August 1997* outlines the provisions concerning maximum tariffs for certain public mobile communications services and covers GSM, NMT 450,- NMT 900 for any POCSAG technologies.

Subscriber tariffs for mobile communications including basic services may not exceed these prices:

	NMT 450	NMT 900	GSM	OPS
Fixed tariffs in DKK.				
Initiating a new subscriber	700	700	700	700.
Quarterly instalment Fee	240	240	240	240
Reconnecting of subscriber[41]	200	200	200	200
	From a mobile network		Towards OPS	
Tariffs in DKK.				
Pr minute, in peak hours	2.35	2.35	2.35	0.60
Pr. minute, in off peak hours	1.175	1.175	1.175	0.60
Connecting attempt	0.25	0.25	0.25	0.80

The tariffs outlined as maximum tariffs can be charged by an operator of basic services. Regarding other tariff provisions, these are outlined in the Executive order on the provision of telecommunications networks and services.

This order does not apply to:

- telecommunications services which require the provision of payphones;
- code 900 services (*i.e.* premium rate service); and
- public mobile communications networks and services.

In connection with the provision of public telecommunications networks or services, providers shall ensure the following:

- prices and terms for access to and use of public telecommunications networks or services are independent of the purpose for which the customer is using the networks or services in question, unless the purpose of application requires modified or supplementary services or facilities;

- prices and terms for access to and use of public telecommunications networks or services are arranged in such a manner that the customer is not compelled to accept or pay for services, facilities or other offerings that are not necessary for the services requested;

41 For example, if the telephone is closed because a subscriber fails to pay his bills.

- if customers' agreements include conditions under which security has to be provided, there shall be open, objective and non-discriminatory criteria for making such a claim in relation to the customer; and

- if customers' agreements include conditions on access to the provider's telecommunications network or services include conditions under which the agreement is non-terminable for a period of more than six months, the customer shall be entitled at any time after six months to terminate the agreement without further costs to the customer.

These rules shall only apply to customer agreements corresponding to consumer transactions according to the *Danish Sale of Goods Act.*

Providers of public telecommunications networks or services must ensure that the charging, billing and invoicing systems associated with the provision, as well as the providers' investigation and case administration in connection with complaints about bills are certified according to the ISO 9002 standard or similar recognised standards.

Tariffs/Universal service obligations

The maximum prices charged by the universal service provider (*i.e.*, Tele Danmark) for universal services are to be fixed by the NTA on the basis of proposals from the universal service provider. The requirements imposed by the NTA for the maximum prices charged by the universal service provider may differ from those contained in the proposal from the universal service provider. The fixing of maximum prices shall include price caps for certain groups of universal services, to be defined more precisely. The maximum prices fixed must be available at any time for consultation for the subsequent two-year period.

The Minister of Research must lay down more specific rules on the framework for fixing the maximum prices for the purpose of ensuring that maximum prices for universal services are cost-based, objective and non-discriminatory. This may include specific rules to the effect that in connection with the fixing of maximum prices, real prices are required to fall by a certain percentage during the tariff period considered. For universal services such as a telenetwork and the basic services, ISDN lines and basic services, fixed network and certain groups (*e.g.*, the handicapped), it may also be required that maximum prices should be fixed on the basis of international prices for similar services in comparable countries with cost-based tariff systems.[42]

Requests to be compensated for deficits shall be submitted to the NTA. The NTA will decide whether the documentation presented is sufficient to establish that there is a deficit. Before compensation for a documented deficit can be

[42] The Minister of Research shall lay down more specific rules as to what technical requirements for presentation of accounts and documentation of deficits may be made, including requirements for the universal service provider to substantiate that provision of the universal services involves a deficit.

paid, a public tender procedure must be initiated at the same time for the purpose of appointing one or more alternative universal service providers.

When it has been proved that the provision of universal services involves a deficit, the NTA will collect, for the purpose of compensation, a contribution from providers providing telecommunications networks or services corresponding to the universal services, including a contribution from the universal service provider to the extent that he is providing similar services beyond the universal services. The contribution will be collected on the basis of the providers' total revenues attributable to the provision of the universal services in question.

(3) Control of tariff packages which can be offered to customers.

Recently, a number of volume related, loyalty and multi-service tariffs have been introduced. Interestingly, Tele Danmark is offering tariffs bundling fixed and mobile services. However, it does so through arms-length arrangements with its mobile arm, supplying fixed services on terms that are available to other mobile operators. Other mobile operators, seeking to match Tele Danmark's offer, appear to be charging below cost (*i.e.*, at less than the interconnect rate) for fixed services.

(4) Basis of tariffs.

Tariffs are based on usage time and it is possible to charge off-peak rates.

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.

Internet and on-line services are not regulated in *Denmark*.

G. Network Interconnection and Access to Service Providers

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

The regulatory framework on interconnection has been developed under the so-called Step 2a and Step 2b liberalisation reforms.

Step 2a

Initially, interconnection and special access were regulated by *Act No. 467 of 12 June 1996* and by the Act on competition and interconnection in the sector of telecommunications ("the *Interconnection Act*") and the *Executive Order No. 712 of 25 July 1996* on interconnection agreements within the sector of telecommunications ("the *Interconnection Order*").

Article 1(3) of the *Interconnection Act* defines interconnection broadly, including both interconnection of telecommunications network and services and access on special conditions. The scope of the *Act* has thus been made considerably broader than the traditional definition related to traffic interchange of two or more interconnected networks.

The European Commission's Directive on interconnection and universal service obligations defines interconnection in accordance with common international understanding. Article 2(a) provides:

"interconnection" means the physical and logical linking of telecommunications networks used by the same or different organisations in order to allow the users of one organisation to communicate with users of the same or another organization, or to access services provided by another organisation."

The *Danish Act* defines interconnection differently. This difference causes problems for market participants. Particular problems arise from the expansion of the concept of interconnection in Articles 1(3) of the Act ("...., including access on special terms") and 2(2(4)) ("other cable or radio-based infrastructure of telecommunications, except satellite communication"). The Danish legislation is broader in relation to special access, including so-called "shared infrastructure", a term which is widely used. The *Interconnection Act* defines various types of interconnection.

First, the *Act* includes the common concept of interconnection, in which subscribers in a network communicate with subscribers in other networks using interconnected telecommunications networks and services. Under the *Act*, this type of interconnection includes three fundamentally different elements, *i.e.*, interconnection between fixed networks, between fixed and mobile networks, and between mobile networks. It is important to note that interconnection includes only switched interconnection. In principle, satellite communications could also be included.

Second, the *Act* uses a concept of "shared infrastructure". It focuses on the sharing of infrastructure, and in this connection, no switching is likely to take place. In addition, the *Interconnection Act* allows the parties to reduce the effects of bottlenecks through infrastructure sharing and also to reduce the costs of switched interconnection. Consequently, shared infrastructure might be considered to be a political and organisational means to reduce the parties' overall interconnection costs and thereby to reduce end-user tariffs. One example of infrastructure sharing is access by new network and service providers to the access network to the extent that the incumbent has capacity. Another example is the provision of transmission capacity, whether it be access to handle traffic in free frequency bands in the fixed subscriber loops, or access to alternative infrastructure or other types of transmission capacity other than the supply of leased lines regulated by *Act No. 466 of 12 June 1996*. Finally, the *Interconnection Act* and the *Executive Order* will allow the network and service providers to physically collocate their equipment.

The inclusion of shared infrastructure in the Danish *Interconnection Act* represents an expansion of the scope of the Community Directive, which only includes specific types of transmission capacity, specific services and collocation.

It appears from the *Interconnection Act* and the *Executive Order* that providers of public telecommunications networks or telecommunications services have both the right and duty to negotiate interconnect agreements with one another. It also appears that providers of public telecommunications networks or services with significant market power must meet all reasonable requests for interconnection agreements. Providers with significant market power must also provide interconnection at direct cost plus a reasonable profit. Furthermore, these providers must allow interconnection on conditions that are objective, transparent and non-discriminatory.

Providers without significant market power also have a right and duty to negotiate agreements concerning interconnection; however, the Step 2a regulation does not impose sanctions for the breach of this duty. Consequently, those providers are not generally required to provide interconnection on objective, transparent and non discriminatory conditions or prohibited from including either packet solutions or bundling. Whenever a provider without significant market power requests that a provider with significant market power provide interconnection, the arrangements will be within the regulations concerning objectivity, transparency, non-discrimination, cost related price calculation and prohibiting bundling (Article 2(1(1)) of the *Executive Order* on interconnection.

The *Executive Order* on interconnection sets out the cases when requests for interconnection can be rejected. Providers with significant market power may, in special circumstances, refrain from meeting such requests. These circumstances are based on issues of reliability, integrity, interoperability, data protection, personal information, confidential information and the right to privacy. Furthermore, requests for interconnection might be rejected when an interconnection agreement would require geographical capacity or functional expansions which would cause major technical or economic difficulties for the provider.

Furthermore, the *Interconnection Act* obliges providers with significant market power to establish separate accounts for different business sectors to ensure that the requirements of objectivity, transparency, non-discrimination and price calculation on the basis of direct costs plus a reasonable profit are met. These requirements are set out in *Executive Order No. 714 of 25 July 1996.*

The Step 2a regulation of interconnection also includes the possibility of special access to the network. Accordingly, parties might be obliged to negotiate individually on numbers and points of interconnection.

Finally, neither the *Interconnection Act* nor the *Executive Order* on interconnection identify definitively who has the right to request interconnection. Accordingly, any service provider and, in practice, the large account holders will have the right to

request interconnection. This situation is an expansion of the conditions mentioned in the draft of the *Executive Order* on interconnection which imposes the duty and confers the right to interconnect on network providers. Furthermore, the EU's *ONP Interconnection Directive* distinguishes between the rights and duties of providers of fixed network services and mobile networks services respectively, while the *Interconnection Act* regulates the various types of market participants symmetrically.

Step 2b

In a number of areas, the Step 2a legislation assumed that the Step 2b legislation would provide further legislation; therefore, the step 2b reform package completes the regulatory scheme. A number of more precise definitions have been adopted. In particular, it is stated explicitly that the *Act* covers "*...Lease of infrastructure capacity, including leased lines and access on special terms and conditions*". However, only market participants with significant market power have an obligation to "lease infrastructure".

The legislation on interconnection under Step 2b offers a comparatively clear statement of the cost calculation method. Market participants with significant market power are to adhere to the following:

- prices to be based on the long-run incremental costs ("LRAIC") including a reasonable profit in accordance with specific rules laid down by the Minister;
- best practices to be adopted; and
- standard offers should be published.[43]

In the period before these calculation principles come into force by (1 January 1999), a special formula has been adopted taking both historical and future costs into account (although still based on some of the principles of the LRAIC model). The formula applies to both switched interconnect traffic and with some modifications shared infrastructure. In addition, the NTA has been granted the right to concurrently benchmark concluded agreements with international best practices. The *Act* applies to agreements on interconnection between telecommunications networks or telecommunications services, as well as agreements for the lease of infrastructure capacity. The *Act* defined interconnection as follows:

"Physical and logical interconnection of telecommunications networks for the purpose of giving the end-users of a provider the capability of communicating with other end-users of the same provider or with the end-users of another provider, or

43 According to the European Commission, *Denmark* has failed to ensure that Tele Danmark published standard terms and conditions by 1 July 1997. See Commission Press Release, IP/97/954 of 5 November 1997.

for the purpose of giving end-users access to telecommunications services provided by another provider (switched interconnection)."

Railway services, public utilities (*i.e.*, gas, water, heating and electricity), municipalities and municipal joint ventures, and other public institutions providing public telecommunications networks or telecommunications services fall within the *Act* to the extent that they provide public telecommunications networks or telecommunications services.

Obligations of the operators

Providers of public telecommunications networks or telecommunications services have a right and an obligation to negotiate agreements on switched interconnection with one another for the purpose of ensuring mutual access to their telecommunications networks or telecommunications services.

Dominant operator

The *Act* provides that providers of public telecommunications networks or telecommunications services which have significant market power must meet all reasonable requests for establishing or modifying agreements on switched interconnection within the following areas:

- telephony networks and basic telephony services;
- data communications networks and basic data communications services;
- mobile communications networks and basic communications services; and
- other cable or radio-based telecommunications infrastructure, except satellite communications.

Providers of public telecommunications networks or telecommunications services with significant market power must meet all reasonable requests for the leasing of infrastructure capacity in telephony networks, data communications networks and other cable-based infrastructure, irrespective of the services for which the leased infrastructure capacity is used.

Significant market power

Providers of public telecommunications networks or telecommunications services are presumed to have significant market power when they have a share of more than 25% of a telecommunications activity in the geographical areas in which they are providing telecommunications networks or telecommunications services. Notwithstanding this, the NTA may decide that providers of public telecommunications networks or telecommunications services with a market share of 25% or less have significant market power in particular circumstances, and that providers of telecommunications networks or telecommunications services with a

market share of more than 25% may not have significant market power. In making decisions of this nature, the NTA shall take into account the provider's ability to influence market conditions, the provider's turnover relative to the size of the market, the provider's control of the means of access to end-users, the provider's access to financial resources, and the provider's experience in providing telecommunications services.

The NTA may decide that providers of public telecommunications networks or telecommunications services who control access to end-users that have been assigned independent subscriber numbers in the Danish numbering plan, and who take advantage of this to deny other service providers access to end-users, are obliged to meet all reasonable requests for interconnection, on the same terms as providers with significant market power. The Minister of Research may prescribe more specific rules on interconnection agreements regarding access to numbers with special tariff conditions, short codes and directory enquiry services.

Interconnection agreements between providers of public telecommunications networks or telecommunications services and providers of telecommunications networks or telecommunications services which have a significant market power must provide access to interconnection on objective, transparent and non-discriminatory terms. Providers of public telecommunications networks or telecommunications services which have significant market power must make all necessary information and specifications available on request to providers who consider entering into an interconnection agreement. The information shall include changes planned to be made to the network during the next six months, unless the NTA agrees that such information need not be disclosed.

(2) Regulatory intervention regarding interconnection issues in relation to the networks of "dominant" operators or operators with "significant market power".

Refer to response to point (1) above.

(3) Precise obligations currently placed on interconnecting operators.

- ***Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated).***

  Points of interconnect are not mandated.

- ***Unbundled access to internal network functions.***

  Unbundled access to internal network functions is not mandated.

- ***Unbundled access to the local loop.***

  Unregulated access to local loop is not mandated.

- ***Equal Access.***

  Refer to discussion on numbering in section H.2.

- ***Technical requirements and standards.***

  Technical requirements and standards are not prescribed.

- ***Quality of service commitments required.***

  Standards are set and supervised by the NTA.

- ***Interconnect tariffs.***

  A *draft Bill* suggests that interconnect access by 1 January 1999 should be priced at Long Run Average Incremental Cost (LRAIC), with the addition of a reasonable profit. Until this method is introduced, interconnection tariffs will be fixed on the basis of a specific cost formula.

- ***Information disclosure obligations.***

  The NTA supervises interconnection agreements where at least one of the parties has significant market power and must ensure that the agreements are objective, transparent and non-discriminatory, and the tariffs are cost-based. In some cases the NTA may require modification of an agreement. If the parties cannot reach agreement within three months of the request for an agreement, one or more of the parties may request the NTA to act as conciliator. If conciliation is unsuccessful, the NTA may be asked to decide whether the request for an agreement was reasonable and, if so, to lay down the terms of the agreement.

The Ministry may give the NTA powers to request information from providers of public telecommunications networks and services to determine whether a provider should be regarded as having significant market power.

The NTA may require the parties to provide the necessary information for it to carry out its supervision, conciliation or decision-making powers, and substantiation of the existence of concrete conditions which made it reasonable to reject a request for an interconnection agreement.

The Telecommunications Complaints Board may ask the parties and the NTA to provide the necessary information for it to adopt its decisions.

Providers of public telecommunications networks or telecommunications services which have significant market power must arrange for separate accounts to be kept for their individual lines of business.

- ***Protection of customer information.***

If any one of the parties to an interconnection agreement has significant market power, the interconnection agreement must be submitted to the NTA. Also, even in agreements where only part of the agreement relates to interconnection, all relevant additional agreements fall within the *Act* and have to be sent to the NTA. If a party to an interconnection agreement made before the *Act* came into force requests modifications of the agreement (after the *Act* has fall into force), the entire interconnection agreement will come within the rules of the *Act*.

The interconnection agreements sent to the NTA will be made available to the public by the NTA. The intention is not to have actual announcement in official publications such as the Official Gazette. However, the provision does not preclude copies of interconnection agreements from being sent to interested parties, on request.

In deciding which parts of an interconnection agreement may be exempted from the publicity requirement, the NTA will start from, but not be bound by, requests for exemption from one or more of the parties to the agreement. It should be noted that a proposal for exemption should be sent together with the agreement.

Following the principle of free access to public records, the exemption rules of the *Open Administration Act* will not be applicable, and the parties will not be able to invoke these in connection with the submission of interconnection agreements or delivery of other material to the NTA or to the Telecommunications Complaints Board.

The *Act* gives the Minister of Research the right to stipulate regulations which exempt international interconnection agreements from being made available to the public, so as not to place Danish providers of telecommunications networks and services at a competitive disadvantage compared to providers in other countries which do not require such publication. However, making interconnection agreements available to the public is considered to be so significant that the policy of other countries will be followed closely, to ensure that *Denmark* is at the forefront with regard to requiring disclosure for international agreements.

Rejection of request

The Minister of Research provides rules indicating the extent to which requests for the establishment or modification of interconnection agreements with the holder of significant market power may be rejected, by referring to the following essential considerations:

- preservation of the integrity and interoperability of the affected telecommunications networks and services;

- protection of the internal data of services and networks;
- protection of personal data; and
- protection of telecommunications networks and services under special conditions.

The Minister of Research also provides rules indicating the circumstances in which it is justifiable to intervene in interconnection agreements, including rules stipulating that in exceptional cases, interconnection may be interrupted directly without prior consultation with the NTA. The NTA decides whether it is justifiable to reject requests for the establishment or modification of interconnection agreements where at least one of the parties has a dominant market position and to intervene in interconnection agreements.

Information received by a provider in connection with a request for an interconnection agreement may only be used in that connection and may not be passed on to other departments, subsidiaries, partners *etc.* who would make other use of the information.

The purpose of indicating a number of essential points to be considered in establishing or modifying of interconnection agreements is to make it clear that interconnection agreements must not result in breakdown of networks or services or have other significant consequences, for example making personal data available to unauthorised persons.

Protection of telecommunications networks and services under special conditions refers to war, strikes, fire, and so on.

Generally, a party to an interconnection agreement who believes that the activities of another party involve significant negative consequences, for example to the network used jointly, should contact the NTA about the matter. But in certain situations, exclusion of the other party may be so urgent that it is only possible to involve the NTA later.

H. "Resource" Issues

(1) Frequencies.

The *Act on Radiocommunications and Assignment of Radio* Frequencies of 10 June 1997 has the following two objectives:

- to ensure efficient use of the frequency overall through active frequency administration; and
- to contribute to ensuring a clear, objective and non-discriminatory framework for competition.

The NTA is responsible for the day-to-day administration of frequencies, including the allocation of the frequencies in accordance with the guidelines issued by the Minister. Its role and powers are set out in detail in the *Act on the National Telecom Agency* of 10 June 1997.

The main political objective behind liberalisation was to be able to provide Danish consumers with the best and cheapest telephony possible -- "world's best and cheapest". In line with this policy, and in line with general Danish policy, it was decided that frequencies were to be offered to all operators free of charge. Operators are therefore only charged administrative fees which are based on the actual costs of the administrative authorities, and are valued every year by the NTA.

Every second year, the Minister of Research & Information Technology lays down the framework for usage and prioritisation of the spectrum for the next five years. The NTA submits a proposal for this framework to the Minister of Research and Information Technology. The proposal of the NTA comprises:

- proposed objectives for *Denmark*'s participation in international negotiations and entering into agreements on frequency allocation. The proposal includes a recommendation for mutual prioritising of frequency allocation for various purposes, including services and systems;

- proposal for a frequency allocation and usage plan (frequency plan) for the next five years; and

- any proposals for using frequency administration methods within specific parts of the frequency plan.

The Minister of Research & Information Technology may lay down more specific rules on the content of these proposals.

When laying down the framework for the usage of spectrum, the Minister of Research & Information Technology may depart from the proposal submitted by the NTA. Each year the NTA submits to the Minister of Research & Information Technology a survey indicating the extent to which there are frequency resources available within parts of the frequency plan. For those years where the NTA also submits a proposal, the survey is submitted at the same time. After the Minister has made a decision, the NTA publishes the frequency plan.

The Minister may prescribe the supplementary information which must be included in the published frequency plan.

Frequencies are a limited resource and, in order to allow for the most flexible frequency planning, the following administrative methods are used:

- public tendering;
- administrative redistribution;
- requirements for migration to more effective methods of use or technology;
- administrative withdrawal;
- increased frequency fees; and
- increased administrative pricing.

The Minister of Research & Information Technology specifies which of these methods will be used and will ensure that the methods adopted are no more radical than necessary, given frequency scarcity.

The Minister of Research & Information Technology may prescribe the administrative methods to the individual parts of the frequency plan and geographic areas that should be applied separately or in combination.

Civil and military use of frequencies

The military are allocated certain parts of the frequency spectrum in accordance with international agreements. If they need more frequencies than allocated in accordance with international agreements, they will have to submit an application to the NTA for more spectrum. The NTA does not interfere with the military's use of frequencies, but if the military applies for more spectrum, the NTA will require information on the current use of the spectrum.

Every year the Ministries, the broadcasters and the NTA agree on the spectrum to be allocated to broadcasting services. Once allocated, the NTA does not interfere in the utilisation of the broadcasting frequencies or in the national, regional or local licensing policy. The NTA supervises compliance with the legislation.

The frequency band up to 3 GHz is approximately shared as follows:

Military	Broadcasting	Tele/civil
app. 10-15%	app. 30-40%	app. 45-60%

Radio frequencies may also be used on the basis of individual licences granted by the NTA. The NTA specifies general and individual terms for such licences.

Terms may include:

- radio engineering requirements, including limitations with regard to emitted power, height of antenna, direction of antenna, etc.;

- requirements with the aim of fulfilling international commitments in the radio frequency field, including agreements on international frequency coordination;

- requirements for the use of type-approved radio equipment;

- requirements for the use of radio equipment where documentation is available to verify compliance with previously specified technical requirements in the form of manufacturers' declarations;

- requirements for the use of approved quality systems;

- requirements to the effect that the user of the radio frequencies in question must have passed prescribed tests;

- restrictions regarding the geographical extension of application areas for the frequencies assigned;

- compliance with the frequency plan and the rules specified therein for using the frequencies assigned;

- conditions regarding interference; and

- requirements regarding payment of fees and charges due.

Licences may be issued to individual users of frequencies or to groups of users. Requests for the award of individual licences to use frequencies will be met to the extent that is possible (within the framework of the frequency plan) and so that, taking an overall assessment on a clear, objective and non-discriminatory basis, allocation ensures optimal use of spectrum.

(2) Numbering.

The objectives of the *Act on Assignment and Use of Numbering Resources* are:

- to provide a clear and non-discriminatory framework for the administration and assignment of the numbers covered by the Danish numbering plan;

- to ensure unimpeded call capacity between public telecommunications networks or telecommunications services both within *Denmark* and internationally on the basis of common numbering and addressing plans to be used for providing telecommunications networks and telecommunications services; and

- to give end-users the option of retaining their subscriber numbers when changing providers or when using several providers simultaneously.

Administration and assignment of numbering resources

The Danish numbering plan comprises numbers, number series and addresses in connection with the provision of telecommunications networks or telecommunications services. It does not cover data communications networks and services which do not use numbering plans or addresses in the International Telecommunication Union's Recommendations. The numbering plan is drawn up by the NTA within the following framework.

- Rules for distributing and giving priorities to all numbering resources, including numbers that may be used in connection with the provision of general public standard subscriptions; numbers that may be used for public telecommunications services with special tariff conditions; numbers that may be used in connection with the provision of dedicated telecommunications networks or telecommunications services; short codes for the purposes mentioned below; and reservation of numbers to be used at a later date, including numbers reserved for the purpose of rearranging the numbering plan.

- Timetable and possible transitional schemes for the withdrawal of existing numbers where their use is in conflict with the rules specified in the numbering plan.

- Framework for a possible re-arrangement of the overall numbering plan in the form of an extension of the total number of digits in individual telephone numbers.

- Framework and possible transitional schemes for changing numbers already assigned.

Short codes in the telephony, ISDN and mobile parts of the numbering plan may only be used for:

- public emergency services;

- provision of universal service and provision of special services essential to the public comparable with the universal service of directory enquiry service;

- ensuring that end-users can pre-select a provider of telecommunications networks or telecommunications services for telephony, ISDN services and mobile communications;

- ensuring that end-users in networks for telephony, ISDN and mobile communications services can access providers of public data communications services; and

- provision of directory enquiry services.

The NTA draws up specific rules on:

- internal numbering and addressing in telecommunications networks; and

- relations between the overall Danish numbering plan and common international numbering and addressing plans, with the aim of ensuring unimpeded call capability and interconnection between public telecommunications networks or services within *Denmark* and internationally.

Administration of the overall Danish numbering plan, including the assignment, modification and withdrawal of numbers, number series and addresses, is the responsibility of the NTA.

Fees

The NTA receives fees from providers of telecommunications networks or telecommunications services in exchange for numbers, number series or addresses. The fees are calculated on the basis of the quantity of numbers, number series or addresses that have been assigned. The amount of the fee is fixed annually in the *Finance Act* and is announced by the NTA. The Minister of Research prescribes how the NTA handles the fees.

Carrier Pre-Selection

Providers of public telecommunications networks or services who have significant market power shall meet all reasonable requests for interconnection, to facilitate carrier pre-selection and fixed carrier selection.

Providers of public telecommunications networks or services shall be presumed to have significant market power when they have a market share of more than 25% of a telecommunications activity in the geographical areas in which they are providing telecommunications networks or telecommunications services, (refer back to discussion in section G.1.). The Minister of Research may prescribe specific rules on identifying the relevant market(s) for determination of a provider's market share.

The *Act on Competitive Conditions and Interconnection in the Telecommunications Sector* (and administrative regulations issued under it) applies to interconnection agreements.

Interconnection agreements allow end-users to pre-select their carrier on non-discriminatory terms. A provider with significant market power must allow pre-selection within three months of the date on which an interconnection agreement has been concluded.

End-users cannot be charged for the establishment of carrier pre-selection by the provider currently supplying the end-user.

The obligation to set up interconnection agreements to allow carrier selection covers carrier selection applicable to:

- the total volume of international traffic generated by the individual end-user;
- the total volume of domestic traffic generated by the individual end-user; or
- the total volume of domestic and international traffic generated by the individual end-user.

The Minister of Research may prescribe rules providing that the costs of upgrading telecommunications infrastructure to allow fixed carrier selection to be implemented shall be paid by the individual provider of public telecommunications networks and services. The Minister of Research will specify dates by which fixed carrier selection must be possible.

The Minister of Research may lay down more specific rules for mutual accounting for numbers that may be used for telecommunications services with special tariff conditions between providers of public telecommunications networks or services and end-user(s) to whom a number has been assigned.

Number portability

Facilities will be established to allow end-users to retain their subscriber numbers when changing providers of public telecommunications networks or services. Number portability is dealt with in the framework laid down in the numbering plan for use of individual number categories.

Number portability will be established in two stages:

- end-users shall have the ability to retain their subscriber numbers when changing providers of public telecommunications networks or telephony and ISDN services, provided that there is no relocation beyond the geographical area of the exchange to which the end-user is connected; and

- end-users shall have the ability to retain their subscriber numbers when changing providers of public telecommunications networks or telephony, ISDN and public mobile services.

The Minister of Research shall specify dates by which number portability shall be available in all public telecommunications networks or services.

When number portability is introduced, the Minister of Research may require providers of public telecommunications networks or services to indicate whether a call is to a mobile or a fixed-network number, and to inform end-users about the provider's charges for calls to such numbers.

He or she may also prescribe how the costs of upgrading telecommunications infrastructure (to enable the provision of number portability) are to be paid by the providers of telecommunications networks or services. Providers of telecommunications networks or services must meet all reasonable requests for the establishment or modification of interconnection agreements aiming to implement number portability.

The *Act on Competitive Conditions and Interconnection in the Telecommunications Sector* (and administrative regulations issued under it) apply to interconnection agreements to the extent that they are made with providers of public telecommunications networks or services with significant market power.

Notwithstanding the timescale for introducing number portability, providers of public telecommunications networks or telecommunications services who have significant market power must meet all reasonable requests for interconnection for the purpose of allowing access to number portability. Interconnection agreements shall allow end-user customers of the parties to interconnection agreements to port numbers on non-discriminatory terms. Providers of public telecommunications networks and services shall allow end-user porting within three months of the date on which an interconnection agreement to that effect has been concluded.

End-users who wish to port a number shall not be charged for this facility by the provider currently supplying the end- user. Tariffs for calls to numbers that have been retained by end-users on the basis of the rules on number portability shall not exceed the tariffs charged by the provider in question for similar calls to numbers that have not been ported.

The NTA shall prescribe rules about the extent to which providers of public telecommunications networks or services must forward calls from foreign providers of public telecommunications networks and services to numbers that have been ported.

(3) Rights-of-Way.

All operators are allowed to establish a network. However, certain conditions set out in the *Act on Cable Laying Access and Expropriation etc. for*

Telecommunications Purposes must be met. When required by the common good, the NTA may allow the resumption of land under the rules of the *Act on Expropriation Procedures regarding Real Property for the purpose of laying telecommunications cables and setting up the associated amplifier and distribution cabinets included in public telecommunications networks.* Resumption may be made for new plant, extension and modification of underground telecommunications cables and the associated amplifier and distribution cabinets. Requests for resumption may be submitted to the NTA by providers of public telecommunications networks.

When taking a decision on resumption, the NTA ensures, among other things, that:

- it occurs only where there are no other reasonable possibilities for installing the cables mentioned; and

- it occurs only where the cables are essential to the provision of public telecommunications networks or services.

The costs of resumption are borne by the party which has made the request.

The Expropriation Committee may impose terms providing that underground telecommunications cables with associated amplifier and distribution cabinets should be removed, rearranged or protected at the request of the owner concerned if it is demonstrated that such removal, rearrangement or protection is necessary because of the use that the owner intends to make of the site. If the owner and the provider of public telecommunications network disagree as to whether removal, rearrangement or protection of buried telecommunications cables is required, the resumption committee will settle the issue.

Providers of public telecommunications networks may agree with the rights holder on the acquisition of rights over an area for the purpose of burying telecommunications cables and setting up the associated amplifier and distribution cabinets. Where agreement has been reached but there is no agreement on compensation, a court of arbitration will determine the compensation. If the arbitrators cannot agree, an award will be made by an umpire appointed by the president of the relevant High Court.

Telecommunications cables with associated amplifier and distribution cabinets shall be entered in the land register (including sketch maps for the properties affected).

The Act on cable laying access and expropriation in connection with the establishment of cable-based telecommunications infrastructure is part of a legislative package which aims to promote competition in the telecommunications sector. It is intended to ensure that new and existing providers of public telecommunications networks get limited rights to use resumption as a tool for the purpose of installing telecommunications infrastructure.

Thus, the *Act* gives all providers of public telecommunications networks, (*i.e.*, networks used as a basis for providing publicly available telecommunications services), the right to ask the NTA to initiate resumption to facilitate the installation of telecommunications facilities. The NTA will make an assessment as to whether it believes resumption is justified. If the NTA finds that the request should be processed to the Ministry of Transport, the case is passed on, and the Expropriation Committee takes a decision on the implementation of the expropriation, and determines the compensation to be paid. Implementation of the Expropriation Committee's decision is made in accordance with the provisions of the *Expropriation Proceedings Act*.

In those situations where agreement has been reached with the rights holders over access to built cables, and there is a dispute over compensation, it is proposed to implement a simplified procedure for fixing compensation via arbitration (similar to the system used for power cables). In certain aspects, the procedure corresponds to the cable access rules under the *1897 Act*.

It is unclear the extent to which new providers of public telecommunications networks might wish to establish their own cable-based telecommunications infrastructure, in such a way which primarily makes use of existing alternative networks (*e.g.*, owned by DSB (the Danish State Railways, the National Railway Agency, power companies, independent community antenna systems), will use radio-based infrastructure, or will lease infrastructure from Tele Danmark. However, the *Act* will give the parties the same rights to build cables as Tele Danmark currently has. In all circumstances, this right will contribute to strengthening the negotiating position of the parties in connection with negotiations for the use of existing infrastructure.

At the same time, the framework in the *Act* is intended to ensure that resumption will only be used to a very limited extent, where there are no other ways to establish the infrastructure concerned and where establishment is necessary (in the general interest of the community).

Finally, the *Act* presumes that decisions on resumption in the telecommunications sector will have a clear and logical legal basis. The NTA has been given a key regulatory function, in acting as the first instance judge of whether requests for resumption should be passed to the Expropriation Committee.

Compared with the previous law, the present *Act* gives more limited rights to establish telecommunications installations through resumption. There is no continuation of the previous, rather liberal framework for running cables across a third party's land. Access to resumption may only be used as a basis for laying cables and setting up the associated amplifier and distribution cabinets and not for the additional purpose of establishing structures such as minor buildings.

The restrictions on the use of resumption are a consequence of the fact that liberalisation involves a shift from a monopoly situation to a competitive environment where a number of telecommunications providers are competing and

where competitive considerations may lead to more providers wishing to establish their own cable-based infrastructure. With a broad power to resume, it is likely that there would be increased use of the power, in situations where there had not been an appropriate evaluation of general community interests.

To ensure that providers of cable-based telecommunications networks have the right to establish infrastructure, despite the proposed restrictions on access to resumption, the Minister of Research intends to amend the regulation to ensure that providers of public telecommunications networks have access to areas owned by public authorities, utility companies operating on the basis of special rights etc., *e.g.*, road authorities, the National Railway Agency or DSB (the Danish State Railways), as well as power and gas companies, for the purpose of building cables and to ensure non-discriminatory access to existing cable routes and paths. The regulations may also include rules on the joint utilisation of telecommunications cable routes and the sharing of costs in connection with this use. At the same time the Minister will investigate whether there is any need to introduce specific rules for access to existing and new cable paths in buildings, including any constructional requirements stipulating that new buildings should have cable paths which will make it possible for several telecommunications companies to supply telecommunications services to different groups of the private or business residents of the buildings.

(4) Access to Content.

Broadcasting content is regulated by the *Broadcasting Act*. The national broadcasters have certain obligations as to the structure of their programmes and what they must cover.

If a cable operator carries more than eight channels it must also carry the two national public service channels and one local channel.

The *Television Without Frontiers Directive No. 97/36/EC* of 30 June 1997 has been implemented in *Denmark*, although additional secondary legislation has yet to be implemented. The sports events which have been designated as not being subject to exclusive rights are:

- The Olympic Games;
- Men's Football World Championship;
- Men's Football European Championship, including the quarter and semi-finals;
- Handball World Championship (men and women);
- Men's International qualification games in Football; and
- International qualification games in handball (men and women).

(5) ***"Gateway" Issues - Technologies for Open Access.***

The *Television Standards Directive No. 95/47/EC* was implemented into Danish law on 12 June 1996. The implementing legislation is *Act No. 471* on "standards for the transmission of TV - signals etc.".

Act No. 471 repeats the wording of *Directive No. 95/47/EC*, almost *verbatim*. In addition, the Minister is empowered to enact secondary legislation.

(6) ***Internet Domain Names - Preferred regulatory approach.***

There is no specific preferred national approach to the regulation of Internet domain names.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) ***The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.***

There is no definition of universal service in the *Act on Universal Service Obligation*. However, the providers of universal services must provide the following:

- a telephony network and an associated telephone service;
- an ISDN network and the associated ISDN services;
- leased lines, except broadband lines;
- special universal services for certain groups of handicapped persons or special universal service terms and prices for these groups; and
- a directory enquiry service (both national and international).

(2) ***Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.***

The NTA may appoint one or more operators as universal service providers if these operators have a national wide market share of at least 50% of one or more telecommunications services included in the universal service list referred to above in Section (I).

For the universal services referred to above in the first bullet point, providers of telecommunications networks or services available to the public may, if they have a market share of at least 50% in a particular region or local area be appointed as universal service providers for that regional or local area.

On the basis of proposals made by the nominated providers, the NTA will provide instructions to the providers on how they should handle their universal service

obligations. The Minister of Research may decide that the NTA should appoint one or more universal service providers using a public tender procedure.

The Minister of Research shall prescribe the framework for the tender procedures, including guidelines on how the NTA should handle the tender procedure, which universal services should be tendered, and minimum price requirements for the universal services.

If a universal service provider cannot be appointed in accordance through tender, the Minister of Research may appoint one or more providers of public telecommunications networks or services. Currently, only Tele Danmark is a universal service provider.

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

There is no specific legal distinction under Finnish law between telecommunications services and broadcasting or audiovisual services. The definition for telecommunications services is set forth in *Finland*'s *1997 Telecommunications Market Act* (1997/396, the "*TMA*") and includes not only traditional telecommunications services but also, for example, audiovisual services that do not constitute public broadcast services. The definition of public broadcast services, however, is contained in *Finland*'s *1927 Radio Equipment Act* (1927/8 as amended, the "*REA*"), the *1987 Cable Broadcasting Activities Act* (1987/307 as amended, the "*CBAA*"), the *Oy Yleisradio Ab Act* (1993/1380, the "*YLEA*"), and the many specific decisions and licences issued by the Finnish Council of State (the "Council") and the Ministry of Transport & Communications (the "Ministry"). In a strict legal sense, public broadcast services are the audiovisual services publicly broadcast by the 99.9% government owned nation-wide broadcaster, Oy Yleisradio Ab ("YLE"), over YLE's airwaves and cable TV channels, as well as material publicly broadcast over the airwaves by a broadcaster licensed under the REA. This legalistic demarcation is designed to serve the public interest by ensuring, on the one hand, political plurality in public broadcasting and, on the other hand, a competitive market for a broad range of telecommunications services.

The Ministry initiated in March of 1997 a public consultation with the aim of drafting a Bill for an Electronic Mass Media Law with general application across both sectors. The intention behind the Bill is the repeal of the *REA* and the *CBAA*. The reform work has been prompted by, among others, the comments given by the Parliamentary Constitutional Law Committee in connection with the 1993 legislation of the *YLEA* and the opinion of the Chancellor of Justice given in 1997 to the Committee on the Freedom of Speech. The Ministry's discussion paper of March of 1997 focuses, *inter alia*, on the potential unconstitutionality of imposing non-transparent licensing requirements and terms and non-statutory public service fees on public broadcast operators other than YLE. The Ministry also recognises in its paper the need to implement the *Television Without Frontiers Directive* (89/552/EEC) and its amending Directive (97/36/EC) by law and not simply by administrative decision and licensing.

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

(i) Telecommunications

A structural distinction is made in the *TMA* between network services and telecommunications services. Network services are defined as the provision of a telecommunications network for telecommunications services, which in turn are defined as the provision of exchange and routing services. This distinction is used, for instance, in defining network operators' excess capacity assignment and leasing obligations towards service operators; it also serves as the demarcation between an operator's various business activities when complying with the accounting separation requirements (network operators and service operators are referred to collectively as "TOs"). Telecommunications services are distinguishable from resale and VAN services, which are not subject to the licensing and notifications requirements of the TMA. This distribution is prompted by the fact that resellers and VAN service providers do not possess the legal right nor the actual ability to connect and disconnect subscribers from the services they market.

(ii) Broadcasting

Broadcast services can in theory be divided into two groups: public broadcast services, and other broadcast services. The definition for public broadcast services is circumscribed by the provisions of the *CBAA*, the *REA*, and the *YLEA*.

The *REA* imposes general licensing requirements on public broadcasting services, without defining them. Under the *CBAA*, a public broadcast is defined, arguably too broadly, as a radio-signal transmission that is intended to be received directly by the public. For the purposes of the must-carry rules in the *CBAA*, public broadcast is distinguished from cable broadcast activities, which are defined as the transmission of programming primarily over a telecommunications network made up largely of cables and which transmission is intended for reception by the public.

The *YLEA*, a specific Act that sets forth the guiding principles for the operations of YLE, provides that YLE is entitled to engage in public broadcasting activities without an *REA* licence on the channels and frequencies allocated to it. The *CBAA* also exempts YLE from the cable TV broadcaster licensing requirements.

(3) Regulations of Internet services and other on-line services.

Internet services are not regulated specifically. There is no licensing requirement for the provision of such services. The *TMA* and its implementing legislation does not apply to Internet services. The supply of voice over the Internet is considered to be a liberalised service.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

Two new provisions were adopted in the *TMA* relating to Video-on-Demand services. The first provision empowers the Telecommunications Administration Center ("TAC") to set forth regulations standardising television signals, consumer reception devices, and the technical characteristics of Video-on-Demand systems. These regulations are to comply with relevant Community legislation. The second specific provision requires that public Video-on-Demand service providers offer to public broadcast operators such technical services on fair, reasonable, and non-discriminatory terms so as to allow end users with the service provider's decoding devices to be able to view the broadcast operator's digital public broadcasts. Video-on-Demand service providers are required to separate the accounts for these services from their other operations. Public broadcast operators are required to publicise price lists for their encoded broadcasts that indicate whether the necessary decoding devices are included in the viewer subscription agreements.

B. Regulatory Authorities in telecommunications/broadcasting/publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

(i) Telecommunications

The *TMA* provides that the Ministry is responsible for telecommunications policy generally and licensing and notifications specifically. Some of these responsibilities have been further delegated to the Communications Department of the Ministry. The Ministry can also delegate its powers of enforcement under the *TMA* to the TAC, within certain limits. The TAC is also separately empowered to administer, *inter alia*, frequency and telephone number allocation, domain name registration, equipment type approval and other telecommunications related standardisation, public television and radio reception licences, and international representation in telecommunications regulatory and administration matters. The powers and duties of the Ministry and the TAC are clearly defined, thereby minimising jurisdictional disputes (the Ministry may overrule decisions of the TAC).

(ii) Broadcasting

The following authorities have separate fields of competence in the broadcasting sector: (1) the Council; (2) the Ministry; (3) TAC; (4) the Ministry of Education and Culture; and (5) the Ministry of Commerce & Industry.

In addition, the following administrative bodies have some authority in the broadcasting sector: (1) the Information Council; (2) the Ombudsman; (3) the National Agency for the Control of Health Products and Well-Being; and (4) the Office for the Supervision of Advertising. There is no formal legal mechanism for resolving jurisdictional disputes between these bodies.

(iii) Publishing

The Ministry of Justice is entrusted with ensuring that the provisions of *Finland*'s *Act on the Freedom of the Press* (1919/1 as amended, the "*FPA*") are complied with and that publishers have effected the applicable registration and properly submitted the required copies of published works.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.

(i) Telecommunications

The Ministry and the TAC, the independent regulator, share competence in telecommunications matters. There exist obligatory procedural rules as to how potential conflicts of interest are to be handled within the Ministry.

The TAC was established to serve as the national regulatory body responsible for the telecommunications sector. It is essentially an independent body (albeit reporting to the Ministry) which is self-funded by fees collected from operators and other customers, radio subscriptions and type approvals. The management board of the TAC has seven members and a secretary. Four of the members and the chairperson are appointed by the Ministry. Of the Ministry's appointments, one must represent the Ministry, one must represent equipment manufacturers, and two must represent operators. The remaining three members of the board are the head of TAC (appointed by the President of the Finnish Republic) and two people from the TAC.

The complete independence of TAC has been questioned by some operators in *Finland*, given that Telecom Finland Oy, one of *Finland*'s incumbent operators, is 100% owned by the government. Partially in response to these concerns, the Ministry is currently seeking permission from *Finland*'s Parliament to privatise Telecom *Finland* in stages.

(ii) Broadcasting

Finland, in contrast with other Nordic countries, has not created an independent national regulatory body responsible for the broadcasting sector.

(iii) Publishing

The larger publishing, journalist, and broadcasting organisations have established a self-regulating entity known as the Council for Mass Media (the "Mass Media Council"). The task of the Mass Media Council is to set standards for good journalism and to define the moral rights and obligations of journalists. As general practice, mass media entities that have been censured by the Mass Media Council publish the censure motion and correct their actions accordingly. The Mass Media Council receives financial support from the government, amounting to roughly 50% of its total expenses.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.

Finland's telecommunications, broadcasting and publishing markets are subject to the general *ex post* competition rules promulgated under the *Competition Act* (1992/480 as amended, the "*CA*") and the fair business practices codified under the *Unfair Business Practices Act* (1978/1061, the "*UBPA*"). The *CA* covers horizontal and vertical restraints on competition, as well as abuses of a dominant market position.

The Ministry, when handling a matter that potentially involves these Acts, may refer the matter to the appropriate authorities. The *TMA* also vests in the Ministry powers with regard to various aspects of the competitiveness of *Finland*'s market. These powers enable the Ministry to oversee market developments to ensure that the purposes of the *TMA* are not jeopardised.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

(i) Telecommunications

The Ministry is generally responsible for telecommunications policy. It has the following regulatory powers:

- to lay down the general principles governing the terms and conditions for the provision of telecommunications networks and services;
- to adopt detailed provisions and guidelines on specific telecommunications issues;
- to grant telecommunications licences; and
- to act as an arbitrator in the settlement of telecommunications disputes.

The *TMA* and its implementing legislation confer on the TAC the following regulatory powers:

- to supervise, on delegation by the Ministry, the technical enforcement of the Act;

- to settle, in conjunction with the Ministry, disputes between telecommunications operators;
- to determine the technical requirements of telecommunications networks, telecommunications terminal equipment and other telecommunications equipment;
- to determine the terms and procedures for granting authorisations for the construction and maintenance of certain telecommunications networks;
- to determine the conditions for the import, sale and marketing of telecommunications terminal equipment intended to be connected to a public telecommunications network;
- to administer domain name registration for all .fi IANA designations;
- to grant permission for the use of decoding systems; and
- to administer the allocation of radio frequency spectrum and telephone numbers.

The TAC also has certain responsibilities in the broadcasting sector. It issues:

- standards relating to television signals and their transmission;

- technical specifications for television receivers and other consumer equipment for the reception of television signals; and

- technical specifications for on-demand television systems. The TAC additionally administers and enforces the public television and radio reception licence system from which YLE receives most of its funding.

(i) Broadcasting

The Council is primarily responsible for the regulation of the broadcasting sector. It is responsible for: drafting broadcasting regulations; granting broadcasting licences and their terms; and fixing of fees for broadcast reception licences.

YLE operates as a company under the Ministry. The supervisory board of YLE is appointed by the Finnish Parliament. A representative from the Ministry is entitled to sit in on board meetings but is not entitled to participate in board decisions regarding programming content.

The Ministry is also empowered to issue licences for temporary public radio licences under the *REA* (three months maximum) and to monitor compliance with the CBAA. In this respect, the Ministry may draft the relevant regulations and control compliance with licence obligations. The Ministry also has the power to issue warnings in cases of infringement of the rules on the diffusion of programmes and to adopt sanctions in the case of serious infringements.

The Ministry of Education & Culture must ensure compliance with the rules on the promotion of national programmes. It participates in international negotiations on this issue.

The Ministry of Commerce & Industry collaborates with the Ministry of Education & Culture regarding technical aspects of broadcasting regulation.

The Information Council issues ethical rules for the broadcasting sector.

The Ombudsman deals with complaints relating to broadcasting issues.

The National Agency for the Control of Health Products and Well-Being controls compliance with the rules on advertising for tobacco and alcohol.

The Office for the Supervision of Advertising is an industry body which regulates the advertising industry in general, including its role in the context of broadcasting.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

Aside from the matters discussed above, there are specific rules and administrative practices for cooperation between Ministries and administrative bodies with authority in the telecommunications and broadcasting sectors and their counterparts in other Member States and Community institutions.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(i) Telecommunications

The *TMA* came into force on 1 June 1997. Most of the regulations implementing it have been adopted and are in force.

(ii) Broadcasting

The Finnish government has been reforming the broadcasting sector since 1994. It has: adopted a specific legal status for YLE; promoted the development of private broadcasters, including the granting of a licence to a new national terrestrial broadcaster (*Ruutunelonen Oy*); and granted the first national private radio licence (*Uutisradio*).

As described above in section A(1), the Ministry initiated, during the spring of 1997, a public consultation with the aim of drafting a *Bill for a new Electronic Mass Media act*. The Ministry indicated in its very open-ended discussion paper

that *Finland*'s present broadcasting legislation dating from 1927 was inadequate in the context of the convergence of telecommunications and broadcasting technologies. The Ministry also opened up for public scrutiny the manner in which the broadcasting industry is regulated through non-transparent Ministerial decisions and licences. There is justified concern that this form of regulation is not in keeping with the freedom of speech protected by *Finland*'s *Constitution Act* (1919 as amended), the *European Human Rights Convention*, and the *Television Without Frontiers Directive*, as amended in 1997. Additionally, the public service fee, which is presently imposed on public broadcasters for the benefit of YLE, has raised competition law concerns, particularly when the fee requirement is not prescribed by law, but by contract and administrative practice.

A Bill for an *Electronic Mass Media Law* is currently being drafted. There is no expectation as to when the Bill will be ready nor when it will be submitted to the Finnish Parliament. As the reform is bound to engage politically and socially sensitive questions on the freedom of speech, political plurality, and its effect on public revenues, the passage of any such Bill will not be without its pitfalls.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) *Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).*

(i) Telecommunications

Save for frequency requirements applicable to all operators, there are no regulatory restrictions on new entrants for the provision of telecommunications networks and services.

(ii) Broadcasting

New entrants in the broadcasting sector are required to pay a public services fee to YLE in addition to any charges required by YLE for the use of its transmission network. Additionally, the Council imposes on broadcasters in their public broadcast licences requirements that derive from both the *Television Without Frontier Directive* and social policy.

(iii) Publishing

There are no regulatory restrictions placed on new entrants in the publishing sector, save for a registration requirement.

(2) *Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.*

(i) Telecommunications

There are no special or exclusive rights granted with respect to the provision of telecommunications networks and services.

(ii) Broadcasting

Under the *YA* and the *CBAA*, YLE has the right to engage in public broadcast activities without the need for any licence. YLE, which is not permitted to broadcast advertising, enjoys special rights to collect its revenue through a licence fee administered by the TAC on the reception of public broadcasts. The revenue collected through this reception licensing fee scheme amounts to approximately 80% of YLE's operating budget. The remaining portion of YLE's budget is obtained *inter alia* through the public service fees and other charges imposed on the other two national broadcasters.

(iii) Publishing

There are no special or exclusive rights granted in the publishing sector.

(3) *Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulations, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.*

(i) Telecommunications

There are no differences in the regulatory treatment of the incumbent TO as compared to new entrants. However, under the *TMA* and its implementing legislation, specific obligations have been imposed on TOs with significant market power (defined as 25% of the relevant market). Due to the complexities of *Finland*'s telecommunications market, the Ministry has named (see decision 51) operators possessing significant market power. The obligations imposed on these qualifying operators include an obligation to accept all reasonable interconnection requests, provide specified advanced facilities (if a wireless operator), transparency, reasonableness of actions, publication obligations, and non-discriminatory obligations with respect to telecommunications fees, the calculation of interconnection fees, and accounting separation requirements.

See also G.2 below.

(ii) Broadcasting

Under the *YA* and the *CBAA*, YLE is not required to obtain a licence for terrestrial radio and television and cable transmission. In contrast, all private terrestrial radio and television operators must be licensed.

The frequencies which are necessary for YLE to operate are granted by law. Other operators must apply to receive the necessary frequencies.

YLE is required to offer specific services to minorities and specific groups.

There are certain differences in the way the new television broadcaster (*Ruutunelonen Oy*) is funded in comparison with other terrestrial broadcasters such as *MTV 3*. Ruutunelonen Oy was required under its licence to pay a public service fee to YLE that was appreciably less than the public service fee *MTV 3* was required to pay to YLE by contract. These differences have been the subject of a complaint by *MTV 3*. The issue was resolved in favor of *MTV 3* and, the difference has been abolished.

(4) Accounting and structural separation safeguards (current or planned).

The *TMA* requires all TOs, except for those with a turnover of less than 5% of the combined national telecommunications market, to separate their network services, telecommunications services and other business activities accounts. TOs with significant market power are additionally required to differentiate their accounting for each separate operation within their network and telecommunications services. TOs must compile differentiated income statements for each financial period and, in the case of network service operations, a balance sheet. The income statement and the balance sheet, which must be similar to the accounts of other companies, must be drawn up in accordance with the *Accounting Act*.

The *TMA* also empowers the Ministry to adopt specific provisions about the differentiation and preparation of income statements and balance sheets. Accordingly, the Ministry requires TOs to use cost accounting systems showing the main costs categories as well as the rules used for their allocation. The costs must be divided into direct and common costs. In addition, TOs must submit their cost accounting descriptions to the Ministry. The Ministry is deemed to have approved the cost accounting system if it has not notified the TO otherwise within one month.

(5) Policy basis for regulation of incumbent carrier's services.

The purpose of the *TMA* is to promote the efficiency of telecommunications markets in *Finland* and to ensure the availability of telecommunications, in an environment where TOs compete. It is noted in the *TMA* that, to achieve this purpose, service and infrastructure competition must both be promoted.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

Only the provision of telecommunications network services in a public mobile wireless network (*i.e.*, the provision of public mobile wireless network infrastructure for telecommunications service offerings) is subject to an individual licensing requirement. Public mobile wireless network service licences ("Mobile Network Licence") are granted by the Ministry's Communications Department. Provided the statutory requirements are met, Mobile Network Licences are granted for maximum five year periods and are network-specific. The discretion exercised by the Ministry in granting licences is bound by statute, and adverse decisions may be appealed. Frequency allocation is subject to either transmitter licensing or frequency licensing, as described below in section H(1).

All other telecommunications services and network services covered by the *TMA* (save for those listed below) must be notified to the Ministry before the commencement of operations. The Ministry provides a standard form for such notifications on its Internet website. However, no notification is required in the case of telecommunications services which have been exempted by the Ministry from notification requirements. The Ministry has exempted the following telecommunications services from the duty to notify:

- establishing a fixed radio connection, as well as VSAT and SNG connections via satellite;
- operation of a telecommunications service over leased lines;
- public telecommunications in a radio network established mainly as a separate network or for the provision of taxi or other transport services; and
- public telecommunications in a telecommunications network with under 500 subscribers (it should be noted that TOs exempted from the notification requirement may file a notification in any event in order to enjoy certain rights granted under the *TMA)*.

In addition, licensing requirements under the *TMA* are generally not applicable to the following services:

- internal telecommunications;
- the use of radio equipment for public broadcasting services;

- the resale of telecommunications networks and services;

- switched data communications and image transmission in data transmission networks; and

- telecommunications of "minor importance" (this includes certain data transmission networks, telecommunications for certain Closed User Groups and certain specific TOs, and the temporary transmission of public broadcasting programmes).

The Ministry may in individual cases waive the application of the *TMA* to other telecommunications services.

Foreign operators are not required to establish a Finnish corporation or branch office in order to engage in telecommunications activities in *Finland*. Foreign operators may obtain a public mobile wireless network service licence or submit a notification in their own name.

(ii) Broadcasting

Terrestrial Television

YLE is not required to obtain a licence for terrestrial radio and television. In contrast, all private terrestrial radio and television operators must be licensed. *MTV Finland* has a five year national licence which is valid until December 1999. *PTV 4 Ruutunelonen Oy* has a four year national licence which expires in the year 2001. A number of regional or local public broadcasting companies in the private sector have licences which run until the new millennium.

Cable Television

Finnish companies and Finnish registered branches of foreign enterprises are entitled to engage in cable broadcasting activities, provided they have obtained a cable broadcasting licence from the Council. Exempted from this requirement are voice telephony services on a telecommunications network, picture and text transmission on information search systems, broadcasts which are solely musical in nature, public broadcast distribution on SMATV systems, the distribution of broadcasts solely to such defined social institutions as hospitals and schools and such public places as hotels and retail stores, minor cable broadcasting activities as held by the Ministry. YLE is entitled to engage in cable broadcasting activities without a cable broadcasting licence.

Satellite Television

To operate a satellite transmission network, a transmitter licence for the uplink or feeder station is required under the *RA*. If the transmission network is used for the

provision of public telecommunications services, a notification could be required. Downlink stations and satellite reception dishes are not subject to licensing under the *RA*.

Radio

A public radio broadcast licence is required for parties wishing to engage in public radio broadcasting. The new five year licences for radio public broadcast services became effective in July 1994 and are granted by the Council. Temporary radio broadcast licences for periods not more than three months in length are granted by the Ministry.

Publishing

No licences are required in order to provide publishing services. Publishers are, however, required to register with the Ministry of Justice.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

The Ministry is the competent authority for telecommunications notifications and Mobile Network Licences. The *TAC* is responsible for frequency licensing.

(ii) Broadcasting

The Council is the broadcasting licensing authority. Temporary licences can be issued by the Ministry.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

(i) Telecommunications

As discussed above, a distinction is drawn in the *TMA* between network services and telecommunications services. Under the *TMA,* the ownership of a telecommunications network does not necessarily trigger an obligation to notify the Ministry or to obtain a licence. To be subject to the notification and licensing requirements, the owner of a telecommunications network must directly make the network available for the provision of telecommunications services.

(ii) Broadcasting

There is no distinction between transmission facilities and service provision in the public broadcasting field. In theory, the ownership of transmission facilities could be distinct from the operation of such facilities.

Cable broadcast transmission facilities are distinguished under the *CBAA* and the *TMA* from cable broadcast services. Additionally, the ownership of a cable network is distinguished from the operation of such a network. The excess capacity assignment obligation imposed under the *TMA* on telecommunications network owners applies equally to cable network owners that permit the provision of telecommunications services on their network. Interestingly, the majority of cable TV networks in *Finland* are owned by the TOs.

(4) Line-of-business restrictions under national law preventing: (i) TOs providing cable TV services or "multimedia" services (and vice versa); (ii) TOs providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

There are no line-of-business restrictions which affect the provision of multimedia, telecommunications, or broadcasting services (aside from general competition law considerations raised on a case-by-case basis).

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no restrictions on the parties which can be involved in the production of content (but see the description of broadcasters' liabilities below in section I(5)).

(6) Types of licence conditions.

(i) Telecommunications

Mobile Network Licences specify the geographic operating area of the TO. The only conditions that the Ministry may impose in a Mobile Network Licence are those regarding essential requirements. "Essential requirements" are matters of public interest, other than economic reasons, upon which the access to public telecommunications networks and public telecommunications services can be restricted, such as the safety of the network operations, the maintenance of the operability of the network, the assurance of the compatibility of the services and data protection.

An application for a licence must contain evidence of compliance with the relevant provisions and regulations. It is noted in the *TMA* that the licence must be granted by the Ministry if it is clear that the applicant has the necessary financial resources, complies with the provisions and regulations on telecommunications, and the necessary radio frequencies are available. Mobile Network Licences are granted for up to 20 year terms.

The telecommunications notification must contain the following information:

- the contact details of the notifying party;

- extracts from the Trade Register or equivalent information;
- information on the ownership structure of the notifying TO;
- a description of the services provided;
- a description of the operational area;
- a description of the network;
- a description of the interconnection plan;
- an estimate of the investments required by the envisaged operations; and
- a five-year business plan.

There is no fee for Mobile Network Licences or telecommunications notifications. Frequency allocation is subject to the administrative charges required by TAC (as discussed below in section H(1)). Mobile Network Licences are not transferable.

Under the *TMA,* the Ministry may revoke a licence if the operator fails to comply with the relevant regulations or does not comply with the terms and conditions of the licence.

There are no ownership restrictions, subscriber limitations or public service specifications, save for those imposed on wireline network operators with significant market power and the general provisions regarding State of Emergency, emergency telephone calling, and interconnection.

(ii) Broadcasting

Terrestrial Television

In general, broadcasting licences are granted for a term of five years. There is no fee for broadcasting licences, except for the frequencies issued and the public service fees discussed above.

There are no specific rules on cross-media ownership and participation in the broadcasting sector. However, the general competition rules apply, and the Council has the power to limit participation in the broadcasting companies to ensure pluralism and diversity. In addition, half of the founders and the members of the Board of Directors of YLE, plus the Managing Director, must be permanent residents of the European Economic Area.

Public broadcasting licences are not transferable and may be revoked by the Council.

Cable Television

The area of operation in which cable broadcast activities may be conducted is stipulated in each cable broadcasting licence. While a cable operator 's activities are restricted to a specified geographic area, the operator is not granted exclusive rights in that area. Licences are granted for up to five-year terms. A licence expires if activity is not commenced within two years of the date of its validity.

The discretion of the Council and the Ministry is governed by statute. There is no tender or auction procedure. A licence will be granted provided that the applicant has sufficient financial resources and it is apparent that the applicant will be able to engage in regular cable broadcasting activities as well as comply with the *CBAA* and the resolutions and regulations issued thereunder. Before the Council makes its decision a statement must be obtained from the municipal or community governments of the areas where the broadcasting is to occur. The Council may revoke a licence if the licensee has violated the *CBAA* or its licence or where it has broadcast illegal content. The Ministry can also prohibit a licensed operator from broadcasting.

Satellite Television

Under the *RA,* a satellite uplink transmitter requires a transmitter licence issued by the TAC. The permits are granted for maximum 10 year terms. These licences require that the persons operating the transmitter are competent. The TAC may include conditions in the licence and may amend the conditions of an existing licence as a result of changes in national or international frequency spectrum plans, international obligations, radio interference, or similar reasons. Radio frequency allocation is addressed in greater detail below in section H(1).

Radio

Radio licensees must broadcast between 6 a.m. and 6 p.m. from Monday to Saturday, must broadcast a minimum number of hours of local news, and must promote national culture.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

The *TMA* provides that the tariffs of TOs with significant market power must be non-discriminatory and must be oriented towards the costs of providing the service. These tariffs may provide for a reasonable return on investment.

The TMA allows the Ministry to adopt detailed requirements for tariffs, particularly in the case of TOs with significant market power. The Ministry has adopted a decision requiring that tariffs for the wireline public telephone network services comply with general open network provision (ONP) rules (*e.g.*, they must be transparent and non-discriminatory). In addition, tariffs must be cost-oriented. The tariffs must, where possible, identify initial charges, periodic rentals and usage charges.

(2) New pricing principles for the competitive market environment.

The *1992 Act on Restrictions on Competition* and the *1978 Consumer Protection Act* apply to the determination of telecommunications tariffs.

(3) Control of tariff packages which can be offered to customers.

There is significant flexibility regarding tariff packages in *Finland*. As an example, the decision adopted by the Ministry specifically allows for bulk discounts for fixed public telephone network services. In principle, TOs are permitted great flexibility in arranging tariffs in so far as they abide by the general regulations under the *1978 Consumer Protection Act* and the *1992 Act on Restrictions on Competition*.

The basis for tariffs must be stated in each TO's general terms, which must be submitted to the Ministry two weeks before implementation. General terms of delivery must be submitted for review to the Consumer Ombudsman, if they are directed at households.

The *TMA* contains some specific provisions which restrict the tariff practices of TOs. For instance, the sale of mobile telephone services may not be tied to the sale of a mobile telephone. TOs are also required to itemise telephone bills so that end users may without difficulty discern the amounts for local, long-distance, international, and mobile telephone calls, and the network compensation for these calls, as well as for services other than telecommunications services. Wireline TOs with significant market power are required to use cost accounting systems which show the main cost categories and the rules for cost allocation. The costs shall be divided into direct costs and common costs.

As illustrated by the legislative history of the *TMA*, the Ministry intends to refrain from interfering with the operation of market forces. However, it may intervene in the event that the tariff policy of a TO with significant market power or general industry tariff practice threatens the attainment of the objectives of the *TMA*. It can also intervene if required to do so by Community legislation.

The adoption of the accounting separation requirements is expected to make telecommunications business operations more transparent and thereby facilitate scrutiny of possible cross-subsidisation practices.

(4) *Tariff basis - usage time or flat rate off peak rates; and other relevant pricing practices which increase pricing flexibility.*

See the comments given above in section F(3). Tariffs may be based on usage time or on a flat rate basis, and off-peak rates are permitted.

(5) *Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulated Internet access and on-line services.*

Internet access services are not regulated specifically and can be freely provided.

G. Network Interconnection and Access to Service Providers

(1) *Interconnect arrangements and charges - express regulation or individual negotiation.*

Interconnection

Public networks that fulfill the essential requirements concerning network safety, interoperability, compatibility, and data protection must be interconnected unless Ministerial provisions provide otherwise. Interconnection must be provided as soon as technically feasible after a request for interconnection.

Service operators are entitled to connect their exchanges and other necessary equipment to all public networks, both mobile wireless and wireline, as prescribed by the TAC. In interconnecting service operators to a mobile wireless public network, the network operator must provide the service operator with the technical possibility to open, manage, and close its users' mobile connections. The TAC has prescribed interface specifications and codes and technical standards to be used when service operators are interconnecting with public networks. In interconnecting networks and services, care must be taken to ensure that the essential requirements concerning network safety, operability, compatibility, and data protection are not jeopardised.

All TOs, both network and, to the extent applicable, service operators, are saddled with the joint and several responsibilities of ensuring interconnection of their networks and services. TOs are not required to interconnect with every operator, as long as interconnection is arranged by some means, for example, through mutual interconnection with a third TO. Likewise, service operators need not provide their telecommunications services over all networks.

Provided that their interconnection obligations are in order, TOs without significant market power are subject only to a general obligation to negotiate in

good faith. TOs that possess significant market power, however, must approve all reasonable demands for interconnection.

TOs with significant market power are required to publish and make available to TOs requesting interconnection their itemised terms of interconnection. Interconnection contracts are to be submitted to the Ministry. The submitted contracts are to be made available to the public, save for those parts deemed by the Ministry to contain confidential business information.

The TO that concludes the subscriber contract is required to collect the telecommunications charges due to other TOs for services used through the subscriber in question. Alternatively, the TO that has concluded the subscriber contract may list for those other TOs the types of services being provided, with sufficient information for the subscriber to be billed. TOs are also at liberty to agree among themselves on other means of invoicing.

Costs

As a general rule, TOs in *Finland* are free to set interconnection charges among themselves in accordance with market forces. TOs are also entitled to require payment security from a TO requesting interconnection.

The *TMA* requires that TOs with significant market power publicise and itemise their interconnection charges. These charges must be reasonable with regard to the costs incurred, taking into account a reasonable profit on invested capital. TOs with significant market power are also required to formulate a basis for calculating interconnection charges. A description of this cost calculation basis, along with the standards for costs and the accounting system employed, must be submitted to the Ministry for approval. The calculation is deemed to be approved if the Ministry does not respond within one month of its submission. Approved descriptions are available to the public.

Additionally, TOs with significant market power are required to offer all service operators interconnection on non-discriminatory terms and at a reasonable price, bearing in mind the costs of providing interconnection. When interconnection between service operators and network operators requires equipment or software changes, the parties to the interconnection must agree on the changes required and the compensation of costs incurred in effecting them.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators with "significant market power".

Under the *TMA*, a TO has significant market power if it can exercise significant influence on the operational conditions of relevant telecommunications markets taking into consideration, among other things, the extent of its business and its market share in the geographical area in question, the control of access by users of telecommunications networks, its financial resources and its experience in the provision of telecommunications services. The Ministry has identified 51

operators possessing significant market power. (Refer to the discussion in section G(1)).

(3) ***Precise obligations currently placed on interconnecting operators.***

- There are no specific points in the network at which interconnection is mandated. The point of interconnection for public networks must be provided at the point indicated by the operator requesting interconnection. Refer to the discussion in section G(1).

- TOs must provide the internal network functions set forth in the regulations issued by the TAC. Additionally, wireline TOs with significant market power must offer access to and use of the following advanced facilities:

  . dual-tone multifrequency operation ("DTMF");
  . direct dialing-in or facilities offering equivalent functionality;
  . call forwarding; and
  . calling-line identification ("CLI").

  TOs are also required to provide billing information if technically possible when routing telephone calls. Since *Finland*'s networks are almost 100% digitalised, technical capacity is unlikely to be a defence to not providing billing information.

  Network owners and operators that allow the provision of telecommunications services on their telecommunications networks are required to assign to all requesting telecommunications service operators excess network capacity. This requirement applies to all networks, including cable TV networks, electricity networks, and mobile wireless networks, which are not owned by the owner of the property on which they are located. The terms for assignment must be reasonable and non-discriminatory. The Ministry may issue resolutions as to what factors may be taken into account in evaluating what is reasonable and non-discrimination. Charges must cover the costs of providing the service as well as a reasonable profit on invested capital.

  Pursuant to the *TMA*, TOs are entitled to lease subscriber lines or leased lines from network operators at any interconnection point they indicate. Network operators are required to lease such connections regardless of the intended end use, provided the request is within the transmission capacity of their network. Pursuant to a 1997 Ministerial Decision on wireline networks, network operators are required to respond in writing to any requests for subscriber or leased lines within two weeks and, in the event that a network operator decides that it is not required to fulfill the request, it must state the grounds for its decision. In certain cases the network operator is entitled to charge a fee corresponding to its actual costs for responding.

- Network operators are required to maintain a list of charges for leasing subscriber lines. Quantity discounts are permitted if they are non-discriminatory and reasonable bearing in mind the costs of provision. Both parties to a lease agreement are required to pay special attention to connection solutions in order to maintain network security.

- A network operator is required to offer for lease all of its TO lines that it offers to any other given TO or end-user and in the event that there is more than one line available, TOs may select lines.

- The TAC has set forth by regulation the interface specifications of the public telecommunications network. In addition, the TAC has issued technical specifications on: the inspection and approval of the equipment of a TO; the operational conditions which are necessary for ensuring the quality of the equipment, the reliability of operations and the quality of the transmitted telecommunications; the codes of TOs; and the technical codes of telecommunications networks.

- Aside from the ONP leased line quality requirements implemented by the Ministry, there are no specific quality requirements in the TMA. However, when interconnecting, TOs must ensure that telecommunications are technically advanced, of good quality, and functionally reliable and secure. Additionally, they must respect strict confidentiality obligations. These requirements must be taken into consideration by TOs when interconnecting networks and services.

- Interconnection charges of TOs with significant market power must be publicly available, sufficiently unbundled and reasonable with regard to the costs incurred. The interconnection charges may also include a reasonable profit on invested capital. The TOs must introduce a calculation method for showing the cost base of interconnection charges (to be approved by the Ministry). The Ministry has announced to TOs with significant market power that it intends to follow the European Commission's recommended LRAIC pricing formula (long run average incremental cost) and that TOs seeking to deviate from this must justify their basis for cost calculation. The Ministry has requested TOs with significant market power to submit their cost calculation descriptions by 31 December 1997 (the Ministry will inform individual TOs by 31 January 1998 whether it has accepted their submissions).

- TOs with significant market power must publish and make available the terms for interconnection. In addition, TOs requesting interconnection must be informed of any amendments to the terms of interconnection. Subject to certain exceptions, TOs must also publish the dates for the introduction of the advanced facilities to be made available.

All TOs must publish the interface specifications for the termination points of the fixed public telephone network including, where appropriate, references to national and international standards. Finally, TOs must publish a description of their basic telephony services indicating the composition of the subscription charge and the periodic rental charge.

- Interconnection contracts must be submitted to the Ministry and be made available to the public, subject to certain exceptions determined by the Ministry (*e.g.*, business secrets).

H. "Resource" Issues

(1) Frequencies.

The construction and operation of any wireless network, whether or not subject to a public mobile wireless network service licence, requires, pursuant to the *1988 Radio Act* (1988/517, the "*RA*"), a radio frequency allocation for which the TAC issues a transmitter-specific permit (the permit is called a transmitter permit and not a frequency permit) which is valid for up to 10 years or, in the case of user frequencies for public mobile networks, a frequency licence.

A transmitter permit is required for each wireless link in a network (except for transmitters that have been excluded from such requirements, *e.g.*, type-approved mobile handsets that operate at specified collective frequencies). Transmitter permits are subject to a nominal annual fee that covers the publicised administrative costs of the TAC. The amount of the fee depends on whether the frequency subject to the application is required to be internationally coordinated. Radio frequencies that require international coordination cost FIM 880 in 1996 and such coordination work may require at least six months to complete. Frequencies that require international coordination cost FIM 360 in 1996 and, if available, are issued within a few days.

In general, radio frequency licences are a new form of administrative licensing required for the user frequencies of public mobile networks such as NMT, GSM, and DCS 1800 networks. This form of licensing reflects current international trends in the administration of equitable frequency allocation. Frequency licences in *Finland* are subject to an annual frequency licence fee based on the amount of bandwidth and frequencies required. These annual fees are calculated on the basis of the TAC's actual operational costs and, since the administration of additional public mobile network frequencies should not incur any significant additional expenses on the part of the TAC's, it is likely that individual frequency fees will decrease in proportion to the increase in licences. It should be pointed out that the TAC is a non-profit agency; therefore, its fees must be calculated annually to avoid a profit-making situation. For the year 1997, GSM operators, which operate in the most expensive frequencies, were

charged FIM 1,134 during their first operational year for each 25 KHz channel in the 960-3000 MHz band. These fees are increased over the first five years of operation to equal in the sixth year FIM 9,450 per 25 KHz channel.

(2) ***Numbering.***

TOs are entitled to the operator identification prefixes and subscriber numbers necessary for their operations. The TAC handles the allocation and administration of these numbers, and TOs are required to pay an annual fee for their use. The fee is determined on the basis of how many digits are in the number: the shorter the number, the higher the annual fee. For example, the three-digit long-distance and international prefixes used by the dominant operators cost approximately FIM 565,000 per prefix in 1996. The TAC is required to issue numbers on a transparent and non-discriminatory basis. The TAC must also publish and maintain the directories for telecommunications networks.

TOs are required to inform users effectively and in good time of numbering changes. Subscribers must be notified of a numbering change no less than six months prior to the change becoming effective.

Dialling parity is imposed as an interconnection obligation on TOs. TOs must provide households with the possibility to select a long-distance or international telecommunications service on a call-by-call basis. TOs may only offer selection-barring services that do not discriminate against competing TOs. TOs may provide a service that automatically selects an agreed long-distance service in the event that no service or TO prefix is dialled. Such a service may be offered to households provided the household is able to select the long-distance service also on a call-by-call basis. According to a new decision adopted by the Ministry, TOs are required to make the necessary changes in their exchanges requested by end users or their appointees for routing their long-distance and international calls. The measures taken by TOs to implement such requests must be non-discriminatory.

Since summer of 1997, the TAC also administers a number portability system implemented for private persons and business entities.

TOs must ensure that all users can access the public emergency number 112, and the emergency police number 10022. The public emergency number must provide access to all the emergency services prescribed by the TAC. The use of other service numbers must be arranged as TAC prescribes.

(3) ***Rights-of-Way.***

Pole Attachments and Conduits

TOs are required to lease to requesting TOs excess space in cable housings they have constructed and available antenna platforms on radio masts belonging to a

public telecommunications network if the construction of parallel infrastructure is not expedient due to environmental protection or zoning reasons. TOs are not required to lease cable housings or antenna platforms if they can demonstrate that the facilities will be required within two years to fulfill the needs of their own customers. TOs are required to offer their cable housing and antenna platform facilities at reasonable leasing rates. If an agreement cannot be reached within two months between operators over such leases, either party may submit the matter to the Ministry for resolution.

TOs that undertake to construct cable housing or radio masts must take into account in their plans the reasonable needs of other operators that have submitted written requests. Interestingly, this requirement promotes the long-term fiber-optic lease-exchange arrangements used by most Finnish network operators and the electricity and railroad companies in the last decade.

Rights-of-Way

TOs are entitled to place cables and antennae on private land by agreement with the land owner or, if such placement is for the benefit of the community or specific property, by application of the general laws in *Finland* concerning the resumption of land. Additionally, TOs may obtain the right under the TMA to place cables and other necessary network infrastructure on the basis of an approved routing plan.

Routing plans take into account existing zoning plans and environmental and landscaping considerations. A plan is made public in the municipalities to be effected by it by a notice in the Official Gazette, as well as in the local newspaper. Property owners and others whose rights will be affected by the plan are to receive a copy of it. Interested third parties are entitled to lodge, with the municipal building board, an objection against the plan within 30 days of its publication. Unresolved disputes between the TO and objecting parties are to be resolved by the municipal building board. Construction in accordance with a routing plan may be initiated once the plan is enforceable by law.

TOs are entitled to use road areas and other public areas free of charge. TOs are required to restore the area to its original condition.

Private property owners are entitled to full compensation for any loss or damage caused by the placement of cables and minor infrastructure, as well as the felling of trees and plants which is necessary. A claim for compensation must be submitted to the TO within one year of the loss or damage.

In the event that no agreement is reached as to the compensation, the matter must be submitted to the competent Office of the Surveyor for resolution pursuant to *Finland*'s *Act on the Redemption of Real Property and Special Rights*. Qualifying entitlements to construct a network on private property that go beyond the placement of cable and other minor infrastructure are also to be resolved pursuant to the terms of that Act.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

Freedom of speech is guaranteed as a constitutional right in the *1919 Constitution Act* (1919/94A, the "CA") and includes the right to express and receive information, opinions, and messages unhindered in advance by anyone. Permissible encroachment on this constitutional right may be set out in a law.

Finnish law does not recognise "event rights" as such. Inconclusive protection may possibly be offered through copyright protection. For example, first performance rights for works, movie and record producers, and rights to broadcast are protected under *Finland*'s *1961 Copyright Act* (1961/404 as amended) as neighbouring rights. Works subject to these rights may not be broadcast without the consent of the performer, producer, or broadcaster concerned. Furthermore, press reports produced on a contractual basis by foreign press agencies or by correspondents located abroad may not be communicated to the public through newsprint or broadcasting without the consent of the recipient of the report until 12 hours have elapsed from its publication in *Finland*.

Licensing requirements for certain types of content that may restrict market entrants.

The practice of granting exclusive geographic licences for the public dissemination of content can serve as a barrier to market entry. Due to the wealth of media for disseminating content, however, it is difficult to grant exclusive geographic licences that would completely restrict all parallel dissemination. For example, national exclusive TV broadcast licences for sporting events have been circumvented in the past by satellite broadcasts.

The concentration of royalty collection in the hands of a few collection societies and the compulsory licensing schemes set forth in the *Copyright Act* has been claimed to restrict market entry and competition in *Finland*.

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

National and local cable operators must carry public television broadcasts intended for national reception and YLE broadcasts intended for reception in the cable operator's territory. If several cable operators use the same network, they may jointly comply with these obligations. The diffusion of satellite channels must take place in real time.

Additionally, cable operators are required to reserve one channel or broadcast time for local programming. Cable operators are also required to relinquish excess

capacity for the use of others engaged in programming. YLE's operating guidelines in the *YLEA* loosely set forth the type of content that YLE must provide.

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

Refer to the discussion above. Additionally, cable operators are required to promote national, area, and local culture. This obligation requires cable operators to ensure that there is a sufficient amount of programming originating from *Finland*, and that it takes account of the language circumstances of the operator's broadcasting area. The operating permits prescribe specific amounts of domestic programming (*i.e.*, not less than 15% nor greater than 50% of the operator's total programming time during a one year period). Advertisements, non-news text TV, tuning or test pictures, and screen fillers do not constitute "programming" for the purpose of calculating total programming time.

(5) "Gateway" Issues - Technologies for Open Access.

The TMA provides that it is illegal to possess, use, manufacture, import, market and promote a decoding system for a protective code. A decoding system is defined as any equipment, part of equipment or another system whose purpose is to decode a protective code through specific technical means from a message conveyed over the telecoms network. It also provides that the TAC may permit the use of a decoding system.

(6) Internet Domain Names - Preferred regulatory approach.

The registration of domain names that have come into use since 1 June 1997 with the IANA designation ".fi" is administered by the TAC. The written TAC also maintains the central register for all domain names with the IANA designation .fi.

The TAC assigns the right to use a .fi domain name following application or application over the Internet (in the approved form). The assignment of a .fi domain name confers only the right to use the domain name. Unless pressing grounds exist, the TAC may assign .fi domain name rights only to Finnish government organisations and duly registered Finnish businesses, associations, funds, and Finnish branch offices of foreign business entities. Only one domain name may be assigned to an applicant unless pressing grounds exist. The TAC charges a cost-based fee for the handling of applications, registration amendments, name transfers, and annual register upkeep.

In the event that more than one application is submitted for the same .fi domain name and the distinctiveness of this domain name with respect to each applicant is essentially the same, the first application prevails.

To be registrable, a domain name must be unambiguous and function as an address that distinguishes the applicant. As a basic premise, the registration of a domain name may not unreasonably restrict another's rights to a domain name that functions as a distinguishable address. The use of a domain name may not infringe on another's rights to a name; company, business, or trade name; secondary business name; trademark; secondary designation; identifier; abbreviation; network address; copyrighted work; or other matter subject to similar protection. Additionally, the use of a domain name may not cause confusion with subject matter protected by any of the aforementioned rights nor may it be deceptive or contrary to good custom.

Irrespective of the likelihood of confusion, companies, associations, and funds that are duly registered are entitled to use their registered business name as a .fi domain name insofar as this name complies with the technical requirements set forth in the Regulation. The registration of a domain name may not deprive a government organisation from using its name or an abbreviation of it.

The TAC is empowered to terminate the right to use a .fi domain name in the event that, *inter alia*, the rightholder fails to pay the TAC's fees; a court of law or other competent authority has prohibited the use of the domain name, as a result of, for example, a name change; it would otherwise be contrary to the Regulation; or there exists especially pressing reasons relating to domain name administration which require its termination. The TAC's adverse decisions concerning the administration and assignment of .fi domain names may be appealed to an administrative court. The right to use a domain name that has been terminated may not be assigned within three months of the termination.

The transfer or alteration of a domain name must be effected through the same application process for the initial registration of rights. The rightholder of a changed domain name is entitled to use the former name for a maximum of three months after the change has been approved. Rightholders are required to notify the TAC of any changes affecting their rights to a domain name.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

The *TMA* does not contain a specific definition for universal service. While the *TMA* contains general rules on the duties of TOs and owners of telecommunications networks, it does not mandate universal service obligations. Under the general rules, a TO must ensure the availability of basic telecommunications services for users; interconnection of its network and services with other networks and services; and minimum interference.

Additional requirements in this respect have been adopted by two Ministerial Decisions implementing some of the provisions of the *ONP Voice Telephony Directive* (advanced facilities provision) and the *ONP Leased Lines Directive.*

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

The Ministry is empowered under the *TMA* to impose universal service obligations on TOs with significant market power. Since November 1997, the Ministry has not imposed specific universal service obligations.

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

See the description given above in section I(2).

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).

National and local cable operators must carry public national television programmes. (See the description given above in section H(4)).

(5) Other public service specifications affecting the content or information provided to subscribers.

General rules on obscenity and the protection of minors are set out (in addition to the *Television Without Frontiers Directive* binding on public broadcasters), in the *CBAA*, the *1927 Act on Preventing the Distribution of Obscene Materials* (1927/23, the "*APDOM*"), and the *1965 Act on Movie Censorship* (1965/299, the "*AMC*"). These general rules are enforced on private broadcasters as a result of the programming liabilities imposed on them in the *CBAA* and the *1971 Act on Radio Liability* (1971/219 as amended, the "*ARL*"). Many issues related to broadcasting content are subject to self-regulation. For instance, it is generally accepted that all programmes not designed for children must be broadcast during night hours (after 9 p.m.). There are also criminal sanctions for the broadcast of violent and pornographic material.

The *ARL* establishes broadcaster liability for programme content. Similar rules are found in the *CBAA* applying to cable TV operators. Under the *ARL*, a broadcaster must appoint a programme director for each broadcast programme. The *ARL* stipulates the qualifications a programme director must have. It is the duty of the programme director to supervise the contents of the broadcast programme and ensure that no broadcast violates Finnish law. The programme director is jointly and severally liable, along with the broadcasting operator and the culpably responsible party, for any damage caused by an illegal programme that was broadcast through his or her negligence. The programme director is also criminally accountable for his or her negligence. If the broadcast operator

has not appointed a programme director, the broadcast operator is presumed to be the programme director.

The *CBAA* also contains a specific prohibition against the broadcasting of programmes containing gratuitous violence material damaging to one's mental health or obscenity.

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasters and audiovisual services.

French law distinguishes between audiovisual and telecommunications services, by concentrating on the nature of the act which takes place, rather than on the specific transmission means used to transmit the signal.

Audiovisual services are defined in Article L.112.2 of the *French Law on Intellectual Property* as *"any work consisting of sequences of moving images, with or without sound"*. Under the *Law of 30 September 1986 (Freedom of Communications Act*, the "*FCA*"), audiovisual communication is defined as *"the transmission for the public (or for certain categories of the public), by telecommunications transmission means, of any signs, signals, text, images, sounds or information of any nature which do not constitute private correspondence"*. In turn, private correspondence has been defined by the Prime Minister in an Order of 18 February 1988 as existing when *"the message is expressly designed for reception by one or several determined and identifiable, either physical or legal, persons"*.

Telecommunications services are defined by Law of 29 December 1990 the (as amended by *Telecommunications Law No. 96/659 of 26 July 1996*, *"the Act"*)[44] as *"a service including the transmission or routing of signals or a combination of these functions using telecommunications processes"*. *"Telecommunications"* is defined as *"any form of transmission or reception of signs, signals, text, image, sound or other information, by wire, optical fibre, radio or other electromagnetic means"*. Audiovisual services are expressly excluded from the scope of *the Act*.

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

(i) Audiovisual

The main characteristic of all audiovisual services (as defined by the *FCA*) is that they are intended for reception by an indeterminate category of people ("the public"). However, a distinction is drawn by the FCA between: radio and television broadcasting services; and the remaining types of audiovisual services. While radio and TV services may not be provided without authorisation, the

[44] References to the *French Postal Code* must be understood to include amendments introduced by the *Act*. The reform introduced by the *Act* is intended to adapt the French telecommunications regulatory framework to the workings of competitive forces.

remaining services are subject only to a declaration procedure. In addition, if they convey alphanumeric signals only (*i.e.*, not sounds or images), they are not subject to content control obligations.

A Law of 10 April 1996 treats "new services" (in which images or sounds are transmitted over digital technology or MMDS) similarly to audiovisual services, thereby requiring an individual licence (namely, they are treated in the same way as radio and television broadcasting).

“Pubic” and “private” broadcasters are regulated differently.

(ii) Telecommunications

Article L.32 of the *French Postal Code* distinguishes between telecommunications services and telecommunications network infrastructure. More stringent licensing requirements are applied to the provision of facilities-based services. The approach to interconnection, universal service and numbering also differs when services are provided over the operator’s own infrastructure. (It should be noted that the regulatory distinction is not based on the mere establishment of network infrastructure, rather its operation).

(3) Regulation of Internet services and other on-line services.

On-line services are not specifically regulated. Indeed, Internet Access Providers are not subject to any licensing or authorisation requirements. However, notification to the independent regulator, the ART, is required when Internet services are provided over a cable network.

Minitel services are subject to an agreement between FT and the service provider.[45] The Conseil Supérieur de la Télématique monitors moral and decency standards. The Ministry for Posts & Telecommunications also monitors decency and moral standards under the supervision of the Council of State, for services using telecommunications frequencies.

During 1997, the ART arbitrated a dispute between France Télécom (FT) and Lyonnaise Cable and CGV-Teleservice. The latter entities sought to develop Internet serviced on FT-owned networks. The ART determination set out the technical and financial conditions under which cable TV operators will be able to provide Internet access.

During the course of 1998, the ART intends to analyse the implications of voice services over the Internet and the pricing of Internet access.

45 And are also subject to the declaration of sites to the Procureur de la République.

(4) *Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.*

Pay-Per-View has been regulated as a cable TV service, and therefore is regulated by the Conseil supérieur de l'Audiovisuel (the "CSA"). However, the *Law of 10 April 1996* established a special authorisation regime for the provision of innovative services (*"new services"*), including: on-demand services; digital terrestrial radio or television broadcasting; and services provided using MMDS outside the area covered by a cable TV network. These new services are deemed to be "audiovisual services", and within the scope of the *FCA*. However, due to their innovative nature, the *Law of 10 April 1996* has deemed it inappropriate to apply all of the unmodified provisions of the *FCA* to them.

Internet services are not specifically regulated. The CSA takes the view that the regulatory treatment of Video-on-Demand or Pay-Per-View should not be automatically extended to Internet services, in the light of its specific nature.

B. Regulatory Authorities in telecommunications/broadcasting/publishing

(1) *Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.*

(i) Audiovisual

Legislative and regulatory competence in the audiovisual field is split, at a national level, between the Prime Minister (with overall responsibility for public broadcasters), and an independent authority, the CSA, with regulatory, interpretative and enforcement powers over private broadcasters offering national general entertainment network channels.

Regional authorities have jurisdiction over the licensing of audiovisual networks.

(ii) Telecommunications

Regulation of the telecommunications sector is carried out, on behalf of the Government, by the Minister in charge of Post & Telecommunications ("the Ministry"). Since 1 January 1997, the Ministry has been assisted in the day-to-day regulation of the sector by a new Telecommunications Authority (Autorité de Régulation des Télécommunications, "ART"). The ART is an independent body with extensive powers in relation to interconnection, licensing and the allocation of physical resources.

There is no specific institutional procedure established to resolve potential jurisdictional overlaps between the CSA and the ART.

(2) *Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory powers and proposals for revision of the current regime.*

(i) Audiovisual

The CSA is an independent authority with extensive powers in audiovisual matters. It was created by the *Law of 17 January 1989*. It has nine members, nominated in the same way as the *Conseil Constitutionnel* (*i.e.*, one-third of its members are appointed by the Head of State of the Republic, one-third by the President of the Parliament, and one-third by the President of the Senate).

The powers conferred on the CSA are the:

- management and allocation of frequencies to private broadcasters for the provision of audiovisual services;
- granting of authorisations to private broadcasters;
- determination of the terms of private broadcasters' licences; and
- enforcement of the obligations on private broadcasters, particularly with respect to decency standards. In this respect, the CSA may suspend the transmission of a programme, suspend, limit or withdraw the authorisation to use a given frequency, and impose fines for illegal broadcasting.

In relation to public broadcasting channels, the CSA is obliged to guarantee the plurality of opinion. It has the power to require the head of a public broadcasting company to remedy a serious breach of its programming obligations within a fixed time. It can also dismiss, by majority vote, the President of the public broadcasting company. It is also required to give published advice to the government on the public broadcaster's *cahier des charges* (the documents setting out programme standards).

However, it has no regulatory power over advertising or sponsorship matters on either public or private channels. Furthermore, it cannot ban particular programmes, and it has no control over the financing of public broadcasters. The CSA has thus less regulatory powers than it predecessor. It may only issue general rules in the context of election broadcasts, the right of reply to government announcements and "access rights". In all other circumstances, rule-making power is vested in the government.

(ii) Telecommunications

The ART was established on 1 January 1997. It has five members, each appointed for a term of six years. The chairman and two members are appointed by Decree of the Government, while the other two members are appointed by Parliament.

The powers and responsibilities of the ART are to:

- process licence applications (particularly licences for public telecommunications networks and for basic voice telephony providers);
- assume responsibility for approving standard interconnection offers and price lists proposed by public network operators with significant market power;
- settle referred disputes over interconnection and facility sharing, and the use of cable TV networks;[46]
- allocate numbers and frequencies;
- submit proposals regarding universal service (in particular, the financial scheme for the funding of universal service);
- intervene in disputes regarding the competitive conditions in the marketplace;
- be responsible for the type approval of telecommunications terminal equipment; and
- ensure that operators licensed to provide services internationally are treated equally abroad (*i.e.*, reciprocal treatment).

The ART may be consulted on draft legislation and regulations and may participate, at the request of the Ministry for Telecommunications, on international and Community negotiations on telecommunications issues.

The Ministry for Telecommunications has retained general regulatory powers and the enforcement and control of the "public service" duties imposed on FT. It also represents *France* at an international level.

The ART has, in a decision of July 1997, asserted jurisdiction over the conditions for Internet access provision by ErasTVcable over cable TV networks in Paris operated by FT, although recognising that Internet access is a "hybrid" service with both telecommunications and broadcasting components.

46 The ART has three months in which to issue a reasoned decision on these issues (which may be extended to six months in certain circumstances).

(3) ***National rules limiting anti-competitive behaviour (sector specific and non-sector specific). National competition authority and its powers.***

National rules which limit anti-competitive behaviour are not sector-specific. The Competition Council (the Conseil de la Concurrence) is the main enforcement agency of competition rules. *Order No. 86-1243 of 1 December 1986* (as amended) sets out its composition and powers. The Council has seven members (elected former members of the Council of State, the Courts of Accounts, the Court of Cassation or other administrative or judicial authorities), four experts in economics, competition and consumer affairs and five experts from the production, distribution, crafts, services, or professional sectors. Members of the Council are appointed for a renewable term of six years.

The Competition Council's core responsibility is the enforcement of the competition rules, which prohibit anti-competitive behaviour and the abuse of dominance, along similar lines to those contained in the EC Treaty. It may also issue injunctions. In enforcing the competition rules, it may act of its own accord or upon a complaint initiated by a third party.

The Directorate-General for Competition within the Ministry for the Economy has overall responsibility for competition policy, and is represented in the Competition Council. It has sole power to authorise concentrations which are not anti-competitive.

(4) ***Powers of the various regulatory bodies, and the sanctions which they can impose.***

(i) Telecommunications

The Competition Council may order those concerned to put an end to anti-competitive practices by a specific date, or lay down other special conditions. It may impose fines proportionate to the gravity of the offence, the harm caused to the economy and the situation of the offending undertaking. Fines are determined on the facts of each case, with the maximum amount being 5% of the turnover before tax earned in *France* during the previous financial year. If the offending party is not a company, the maximum fine if FRF 10 million. French competition law provides that criminal fines and imprisonment (for not more than six months) may be imposed against individuals whose acts were critical to the conception, organisation and implementation of the prohibited practice (Article 17 of Ordinance of 01.12.1986).

The ART may impose sanctions for infringements of telecommunications legislation. The size of the sanctions will depend on the seriousness of the infringement. Sanctions may involve: the total or partial suspension of the authorisation for up to one month; reduction of the term of the authorisation by up

to one year, or the withdrawal of the authorisation; a fine not exceeding 3% of an operator's annual net turnover (5% of turnover for repeated offences). When there are insufficient operators to use turnover percentages as a realistic guide for the level of the fine, the *Act* foresees maximum limits of 1 million francs and 2 million francs for repeated offences, respectively. The decisions of the ART imposing a sanction are subject to appeal before the State Council. Appeals against economic sanctions have suspensive effect.

The powers vested in the telecommunications authorities (*i.e.*, the Ministry and the ART) are not intended to supersede those of the Competition Council. The *1996 Reform Act* foresees that any abuse of a dominant position or any anti-competitive practice in the telecommunications sector that is brought to the attention of the ART can be referred to the Competition Authority. In turn, the Competition Authority must seek the opinion of the ART when investigating a case on the grounds of French competition law with implications in the field of telecommunications.[47]

Despite the fact that national competition rules are not sector-specific, the Ministry for Posts & Telecommunications has issued guidelines to prevent the anti-competitive behaviour of FT in the newly liberalised environment. There is, however, no formal procedure for enforcing these guidelines, for they only amount to a Code of Conduct. In practice, when a company files a complaint with the Ministry against an alleged infringement by FT of the Code of Conduct, the Ministry may open an investigation.

(ii) Broadcasting

The CSA may impose administrative sanctions on public and private broadcasters for failure to comply with their obligations. However, the CSA must consult with and warn the broadcaster before its takes action against it.

The following sanctions can be imposed, individually or cumulatively:

- suspension of the authorisation (for private channels) or the prohibition of the broadcast of a part of a programme (for all channels) for a maximum period of one month;
- a fine (the amount of the fine will depend on the gravity of the infringement) which cannot, however, be more than 3% of the company's turnover in the previous year); or
- requesting the insertion of a statement in the programmes of the channel giving the details of any other sanction imposed.

47 The ART has jurisdiction over interconnection disputes between operators, including cable operators. It has three months in which to resolve such infrastructure sharing and access issues (subject to an extension of that period).

The decisions of the CSA which impose sanctions can be appealed to the Council of State (the Conseil d'Etat) within two months of their imposition.

The CSA can also dismiss, by majority vote, the Presidents of the public channels.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

Aside from the procedures prescribed under Community legislation, there are no formal procedures established to this effect as between Member States, with the exception of the informal cooperation procedure established between the ART and OFTEL. Generally speaking, the ART is encouraged to cooperate with all other national regulatory authorities both within and outside *France*, especially the CSA.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(1) The national legislative agenda - new rules for the telecommunications/broadcasting/audiovisual/publishing sectors.

The *Act* left many of the issues it addresses open to further legislative or regulatory action. Many measures have been adopted since its enactment. For example:

Interconnection

- *Decree on Interconnection* (adopted on 3 March 1997);
- The approval of FT's *standard interconnection offer* by the ART (the first part of the offer was approved on 9 April 1997, while the second part - which deals with access granted to basic telephony providers and numbering issues - was approved on 30 July 1997); and
- The ART is working to implement by the year 1999 a costing methodology for interconnection based on Long Run Incremental Costs ("LRIC").

Universal service

- A Decree was adopted on 13 May 1997 establishing a Universal Service Fund and the key elements of an Access Deficit Scheme; and
- The ART has specified the amounts which private operators must contribute in 1997 to finance universal service. Figures for 1998 have also been determined recently.[48]

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48 Communiqué de presse, Service Universel 1998, Paris, le 27 Octobre 1997. Refer also to a document entitled "Service Universel L'Autorité détermine les conditions du financement du service universel des télécommunications, November 1997.

Numbering

- The ART's decision of 16 July 1997 establishes the conditions governing the selection of carriers for long-distance and international calls;
- FT's approved second-tier of its standard interconnection offer includes a methodology for implementing number portability by 1998;
- A Decree of 27 December 1996 establishes the fees due for the allocation of numbering resources; and
- The rules governing the allocation of numbers are soon to be determined.

Licensing

- A Decree, which establishes the standard licensing conditions, has been approved; and
- A call for tenders has been published for two national licences to operate a Digital Professional Radiocommunications System; and

Multimedia

- The French Ministry of Industry is currently drafting legislation on digital telecommunications terminal equipment, digital satellite broadcasting, and digital cable television;
- *France* is drafting a new Media Act, which is planned to be presented to the French Parliament during the year 1998; and
- The ART has been called upon to make proposals to the Ministry regarding multimedia trials on a local basis.

Wireless Communications

- The ART has called for tenders for frequencies to build new Wireless Local Loop systems;
- The ART must submit its proposals to the Ministry regarding the provision, by 1 January 1998, of fixed services by GSM and DCS 1800 operators; and
- DECT licences will also be granted upon request.

Rights-of-Way

Decree No. 97 683 of 30 May 1997 on the rights-of-way over highways and on easements pursuant to articles L.47 and L.48 of the *Code des Postes et Télécommunications* entered into force on 15 July 1997.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

(i) Audiovisual

Audiovisual communications are subject to a number of regulatory restrictions, namely:

A priori limitation of the number of operators

Only the following broadcasters are authorised to provide terrestrial television: (i) the European channel "Arte", 50% owned by the French State; (ii) national channels France 2; France 3; la Cinquième; TF1, M6 and Canal Plus; and (iii) local channels TLT, T2S/8 Montblanc, TLM, Acqui-TV and TeleBleu.

Private broadcasters are licensed for 10 years, renewable for two subsequent five year terms. Public broadcasters are licensed for an unlimited period of time. The CSA limited, in 1989, the number of satellite broadcasters to six.

Cross-media ownership restrictions

Authorisations to provide television services by terrestrial hertzian waves or to operate a cable TV network broadcasting television service may not be issued if the applicant already holds two of the following authorisations at a national level:

- an authorisation for broadcasting television services by terrestrial hertzian waves to an area with a population of 4 million;
- an authorisation allowing radio broadcasting over a cable TV network to an area with a population of more than 6 million;
- an authorisation allowing radio broadcasting over an area with a population of at least 30 million; or
- if they control more than 20% of daily newspapers specialising in politics or general information.

On a regional and local level, an authorisation to provide a television service by terrestrial hertzian waves or to operate a cable TV network broadcasting television services will not be issued if the person already holds any two of the following:

- an authorisation (whether or not national) concerning television services broadcast by terrestrial hertzian waves in the area;
- an authorisation concerning the operation of a cable TV network broadcasting television services in the area; or
- an authorisation allowing radio broadcasting for a potential audience of more than 10% in the area.

A television service transmitted by terrestrial hertzian wave which is simultaneously broadcast by satellite is deemed to be one service.

Prohibitions to hold several licences for the same type of service

On a national level, an authorisation to broadcast at a local, regional or national level will not be issued to a company holding an authorisation to broadcast a national terrestrial service. In contrast, a company may hold several regional or local authorisations provided that the areas covered do not have a combined population of more than six million and that the company does not hold more than one authorisation for the same local or regional area (Article 41 of the *FCA*).

If a company holds one or more authorisations to operate a cable TV network television broadcasting services, the company cannot become a holder of a new authorisation for a similar type of service if it increases the number of people in the areas served by the networks to above eight million (Article 41 of the *FCA*).

A company may not hold more than two authorisations to broadcast via sat ellite.

Maximum ownership restrictions

A company may not hold an interest in more than three analogue private broadcasters. In addition, participation in the first channel may not exceed 49% of the common shares or of the voting rights of the company, while participation held in a second and third channel may not exceed 15% and 5% of the shares/voting rights. The number of regional and/or local private broadcasters in which a company may participate is unlimited, provided that each interest held does not exceed 50% of the share or the voting rights in any of them.

A company may not participate in more than three operators authorised to broadcast via satellite. In addition, this participation is restricted to 50% of the shares or the voting rights in one satellite broadcaster, 33.3% in the second broadcaster and 5% in the third.

Foreign ownership restrictions

Foreign ownership is restricted to 20% of the total ownership or voting rights of a company authorised to provide terrestrial television. In contrast, foreign ownership of cable TV networks and of satellite networks is not restricted.

There are no other regulatory restrictions which limit *a priori* the number of new entrants in audiovisual services.

Other regulatory restrictions apply to incumbents only after entry has occurred, in particular: specific authorisation schemes and requirements; the obligation to provide certain programming quotas and restrictions placed on the ownership and/or cross-ownership of media.

(ii) Telecommunications

The *Act* liberalises the provision of telecommunications services and infrastructure. The commercial provision of basic voice telephony services will be unrestricted as of 1 January 1998.[49] The *Act* contains no specific restrictions on new entrants, with the exception that the number of operators licensed to establish a public telecommunications network may be limited on the basis of scarcity of the necessary resources such as frequencies.[50]

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

(i) Audiovisual

Public channels must be broadcast using exclusively the transmission capacity of Télédiffusion de France ("TDF"), a subsidiary of FT. Private channels may use their own capacity or the transmission capacity of third parties.

Cable TV networks are authorised to operate within a defined franchise territory. However, authorisations to operate a cable TV network in a given franchise area are not exclusive. Consequently, there are no limits on the number of cable TV networks that can operate in *France* in a given geographic area, other than on the basis of a scarcity of physical resources (*e.g.*, access to rights-of-way) or designed to avoid the economic results of duplication of costly local access infrastructure.

Public broadcasters have priority in obtaining frequencies for satellite transmission capacity (Article 31 of the *FCA*).

49 See Articles L-32,1, L-32,2 and L-34 of the *French Postal Code*.

50 See Article L-33.1 of the *French Postal Code*.

(ii) Telecommunications

The *Law of 10 April 1996* granted cable TV operators and providers of alternative infrastructure a special right to provide basic voice telephony on a commercial basis before 1 January 1998, subject to some limitations. The provision of these services was considered to be "experimental" and was therefore limited in terms of its geographic scope to areas not exceeding 20,000 inhabitants (or to the cable TV franchise areas). Authorisations have a maximum term of five years. Applications for licences are not restricted in number, with the exception of telecommunications services using scarce frequencies. Existing licences must be modified in order for them to be adopted to the fully liberalised environment of post - 1 January 1998.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV.

(i) Audiovisual

There are no specific restrictions on telecommunications operators operating cable TV networks or otherwise providing audiovisual services. Consequently, companies within the FT group are permitted to supply audiovisual activities, subject to general authorisation requirements.

FT is also currently broadcasting television services using its telecommunications satellite capacity without an authorisation from the CSA.

(ii) Telecommunications

FT retains its monopoly over the provision of basic voice telephony services until 1 January 1998.

The *Act* includes obligations which will apply to all operators with "significant market power". However, until the ART declares otherwise, FT is the only operator currently with these obligations. As a result, only FT had to seek ART's approval of its standard interconnection offer.[51] Similarly, FT is obliged to provide universal service (although other operators must contribute to its financing) and to set interconnect charges using a transparent and cost-based methodology.

In contrast, FT continues to operate a number of licences (under various subsidiaries), for which no licensing fees were due at the time of their grant.

[51] Its offer covers a wide range of services, including call termination at the local exchange, single and double tandem conveyance, call origination, collocation and connection services, outgoing international traffic, number portability and carrier selection services.

(4) *Accounting and structural separation safeguards (current or planned).*

The *Act* requires that Public Network Operators ("PNOs") with annual turnover above the level set by the Telecommunications Ministry and the Ministry for the Economy must keep separate accounts.

PNOs declared by the Competition Authority to be in a dominant position in a sector other than telecommunications may also be required to keep separate accounts for their activities in such markets.

In turn, the *Decree of 3 March 1997 on Interconnection* mandates that all carriers with significant market power (*i.e.*, FT today, and any other carrier as may be so declared in the foreseeable future) must keep separate accounts for their interconnection activities (including interconnection provided at arm's length to the dominant operator's services arm).[52] However, if cable TV operators can maintain structural separation between infrastructure and service provision, the existence of cable TV infrastructure need not result in them being declared to have significant market power in a relevant telecommunications market.

Accounts of dominant carriers must be audited "on a regular basis" (not further specified) for compliance with the accounting principles set by the ART. Although auditing costs are to be borne by the operators in question, they may be included in the price paid for interconnection as a "specific interconnection cost".

(5) *Policy basis for regulation of incumbent carriers services.*

(i) Audiovisual

Incumbent carrier's services are subject to different regulatory requirements, depending on whether they are public or private. Public broadcasters fall under the jurisdiction of the Prime Minister, while private broadcasters fall under the jurisdiction of the CSA.

(ii) Telecommunications

Incumbent carriers with "significant market power" are subject to specific regulatory constraints based on the application of competition rules and the implementation of Community directives. The ART is responsible for identifying

52 A precedent for similar accounting separation requirements is found in the field of mobile communications. For example, accounting separation was a condition of the licence granted to FT for GSM mobile communications (R2000 and "Bi-Bop"). Further to a Report of the French Accounts Court released on 17 October 1995 declaring that FT's accounts did not accurately reflect FT's relevant business activities, licences for the provision of a DCS 1800 system in the city of Toulouse and a licence for aeronautical telephony service (TFTS) were granted only to subsidiaries of FT.

operators with significant market power on an annual basis. A market share in excess of 25% of the "relevant market" leads to a presumption of significant market power, unless declared otherwise by the ART.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Audiovisual

Terrestrial Television

For private terrestrial broadcasting, an individual authorisation is required. It is awarded by the *CSA*, following an open tender procedure. Eligible operators are legal entities which comply with the criteria in Article 29 of the *FCA*.

In exceptional cases, the CSA may authorise the use of terrestrial frequencies without a call for tenders. One such situation is the authorised provision of radio or television terrestrial broadcasting using digital or MMDS technology under the *Law of 10 April 1996*.

Public channels operate under the remit of the Prime Minister without authorisation from the CSA. They are authorised by the Prime Minister for an unlimited period of time, provided they comply with the specific conditions set forth by the Prime Minister.

Cable TV

An authorisation is required for the installation of a cable TV network, separate to the authorisation to provide audiovisual services over this network. The authorisations may be held by different companies. The authorisation to establish a cable TV network is granted by individual Municipalities, which may also set out technical requirements (Article 34 of the *FCA* and *Law No. 92.653 of 13 July 1993*).

In contrast, the authorisation to provide audiovisual and related services over a cable TV network is granted by the CSA, further to a proposal made by the relevant municipalities. The service provider must enter a contract with the CSA which covers in detail the number and the nature of the services which will be distributed exclusively via cable. However, programming provided by the national programming companies and European cultural channel ("ARTE") may be transmitted exclusively on cable without being covered by the contract. Audiovisual services over cable TV networks covering less than 100 homes (which only transmit television services already broadcast terrestrially or by satellite in the

area) may be transmitted outside the scope of the contract, upon notification to the CSA (Article 43 of the *FCA*).

Audiovisual services provided internally within the same corporate group need only be notified to the CSA, provided they comply with obligations concerning the broadcast of cinematographic works (*Decree of 1 September 1992*).

Telecommunications services provided over cable TV networks directly related to the supply of television broadcasting services can only be supplied with the approval of the CSA under Article 34 of the *LFC*.

Satellites

Direct-to-Home ("DTH") satellite transmission is subject to audiovisual regulations. Therefore, an authorisation from the CSA is required to operate the necessary frequencies. Authorisations are for a term of 10 years, but are renewable. In contrast, DTH satellites which are not controlled by French nationals or by French companies do not need to be authorised.

Satellites using telecommunications frequencies will be authorised automatically by the CSA to broadcast television signals without needing to sign a specific contract (which normally contains obligations as to content, decency standard, and so forth) to the extent that the channel in question has already been authorised for reception over a cable TV or terrestrial television network.

(ii) Telecommunications

Under the new licensing regime introduced by the *Act*, only the following telecommunications services require individual licensing:

- the provision of facilities-based telecommunications services and services offered to the public using radio spectrum, when: their provision requires the deployment of a new network or changes to a network; or services are provided over a network using radio frequency spectrum allocated by the CSA, subject to its prior approval; and

- the provision of basic voice telephony.

The provision of all other telecommunications services is not subject to any individual licensing requirements, whether they are provided over infrastructure leased from FT or from any other licensed operator.[53]

[53] See Article L-32,1 of the French *Postal Code*.

The following licences have been granted to date:

- seven experimental licences under the *Law of 10 April 1996*;
- seven licences to roll-out alternative infrastructure (for 15 year terms); and
- applications for licences to provide basic voice telephony have already been processed by the ART, with licences expected to be granted in the near future to "Telecom Developpement", "Netco", "Siris" and "Omnicom" respectively.

Telecommunications services over cable TV networks

The provision of telecommunications services over cable TV networks where the purpose of the telecommunications service is not directly related to a TV broadcast service, is subject to the following authorisation requirements:

- individual authorisation by the Minister of Telecommunications after hearing the opinion of the local or regional authorities authorising the cable TV network in question;
- individual authorisation by the Minister for the provision of liberalised telecommunications services to the public using frequencies allocated by the CSA for the provision of audiovisual services; or
- a simple declaration by the ART in all other cases, after informing the local or regional authorities which have authorised the operation of the cable TV network.

Satellite communications

Telecommunications satellites using frequencies assigned by the ART require authorisation by the latter for the provision of services.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Audiovisual

The licensing authority for private broadcasters is the CSA. Public broadcasting falls within the jurisdiction of the Prime Minister. The authorisation to establish a cable TV network falls within the powers of the municipal authorities. (see also E(1) above).

(ii) Telecommunications

The Minister issues all individual telecommunications licences on the recommendation of the ART. Registrations are administered by the ART.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

A distinction is drawn between the establishment and operation of a network and the provision of services over leased infrastructure. The obligation to seek authorisation to install a network rests on the operator of the network, regardless of its ownership. The *Postal Code* defines "operator" as the physical or legal person who is authorised to run a public network or to provide a telecommunications service to the public.

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

No specific line-of-business restrictions have been established.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no regulatory restrictions regarding the types of entities which can be involved in content production. In particular, there are no restrictions on cable TV operators from producing or providing their own programming. Must-carry obligations are detailed below at H(3).

(6) Typical licence conditions.

(i) Audiovisual

Under the *FCA*, radio and television broadcasting requires authorisation by the CSA, while the remaining audiovisual services merely require a declaration procedure.

New services using "digital" or "MMDS transmission in conjunction with cable TV networks"

The authorisation to provide these services is subject to the provisions of the *FCA*, subject to specific exceptions. In particular, content obligations expressed in terms of percentages of transmission time or in relation with a firm's turnover may apply either globally to all services transmitted over the same channel or to certain specific categories of these services.

After an authorisation is granted to provide those new services, the CSA must enter into a contract setting out the terms and conditions for the provision of each specific service. A contract may be concluded on the basis of Article 34 of the

FCA for the digital transmission over cable TV or satellite networks of a collection of radio and/or television broadcasting services, when these services are: both offered to the public; and comprised of elements originating in one of the following sources: a public or private communications service transmitted terrestrially using hertzian waves or over wireline transmission capacity or in the European cultural channel.

On-Demand Services

The contract includes European and French programming obligations, as well as the obligation to contribute to the development of both European and the French cinematographic industry. Advertising is forbidden. It also imposes a delay on the On-Demand release of cinematographic works of long duration until after their first public performance in a cinema theatre (*Article 5 of the Law of 10 April 1996*).

(ii) *Telecommunications*

The licensing framework is based on a system of individual authorisations. Specific conditions will be attached to an individual authorisation. These typically relate to the nature of the service to be provided, the deployment of the network, compliance with essential requirements, and conditions of availability and quality of the service. A fee of up to 300,000 French Francs is payable upon the grant, the amount of which depends on the capacity of the system. Annual fees are also due after the grant.

Duration

Authorisations have been granted for 15 year terms, renewable on request.

Transferability

Individual authorisations may not be transferred to third parties. A new authorisation must be sought by the third party.

Suspension, termination, modification

Authorisations may be suspended, terminated or their term may be reduced by the ART when the authorised operator fails to comply with its obligations under any law or regulations.

The ART must, however, grant the operator an opportunity to satisfy its obligations before its authorisation can be suspended or terminated. In any event, the suspension of the authorisation may not continue for more than one month. Similarly, a reduction in the term of the authorisation may not exceed one year.

In addition, *fines* for infringements may be imposed up to a maximum of 3% of the company's net turnoverduring the financial year prior to the declaration of the infringement. The *Act* does not provide details of the calculation method for the relevant turnover. Fines may only be imposed after the operator has received a Statement of Objections and has been given access to the file.

Status

Authorisations are readily available.

The licensing of a public telecommunications network involves some additional requirements, regarding: minimum network coverage; quality, permanence and availability of the network; customer access to the network, including the installation of public pay-phones; confidentiality of the information transmitted; technical specifications, where applicable; environmental and town-planning objectives; defence and public security concerns; contribution to research and development in the field of telecommunications; use of frequency spectrum and fees due for the allocation of the necessary frequencies; the allocation of numbers; universal service obligations; interconnection; conditions to ensure that competitive conditions in the marketplace prevail; conditions to ensure equality of treatment with operators from third countries; interoperability of services; fees due for the grant; and control of the authorisation process by the Public Authorities.

Authorisations to install and operate a public telecommunications network are subject to restrictions on foreign participation. There is a 20% limitation on foreign participation in the operation of a public telecommunications network using radio spectrum. This restriction applies to companies in which there is participation, either directly or indirectly, by companies established under the laws of a country outside the European Economic Area (subject to reciprocity requirements in international agreements subscribed to by *France*, or by which *France* is bound, *e.g.*, the WTO). As of 1 January 1998, according to *France*'s commitments to the WTO, this restriction will only apply to the acquisition of direct foreign equity stakes.

Authorisation to establish a public telecommunications network has a 15 year term (renewable upon request).

Experimental basic voice telephony licences

The *Law of 10 April 1996* [54] permits projects considered to be of general interest to obtain an "experimental" licence to provide all telecommunications services, including those not otherwise liberalised before 1 January 1998 (including basic voice to the public between two fixed network termination points). Licences are of

[54] *Loi relative aux expérimentations dans le domaines des technologies et services d'information.* French Official Journal No. 5569 of 11 April 1986.

limited duration which may not exceed five years, and are of limited geographical scope. The scope of "experimental" licences is, according to the *Law of 10 April 1996*: the facilities-based provision of those services to the public, in limited geographic areas and with a maximum coverage of 20,000 subscribers; and the provision of these services over cable TV networks.[55] These licences will be phased out from 1 January 1998.

Satellite Communications

The liberalisation of the provision of satellite communications services (with the exception of basic voice telephony services) commenced in 1991. Approximately 30 licences have been granted by the Ministry of Posts and Telecommunications to operate satellite services, most of which are Very Small Aperture Terminals (VSATs) used by companies for their internal communications needs. However, there are also some satellites for video transmissions and for mobile communications such as *SATELLITE AIRCOM* (an aeronautical passenger service of the FT group).

As a consequence of early liberalisation of this sector, implementation of Community Directives regarding the competitive provision of satellite communications required the publication of a notice in the French Official Journal of 23 September 1995.

VSAT authorisations are granted by the ART, pursuant to the *French Postal Code*. The licensee is authorised to provide a private telecommunications network using satellite transmissions for members of a Closed Used Group. The authorisation also allows the provision of non-reserved international services and the installation of satellite ground stations. For the installation of ground stations outside *France*, the authorisation holder must comply with the authorisation requirements of the other relevant country(ies). Interconnection with other independent networks may not take place without the prior approval of the ART. The service may also be interconnected to the PSTN, provided that network configuration remains "open at one end". Authorisations are granted for renewable 10 year terms.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

FT has pricing policy obligations. The "*Plan Contract*", which is signed between FT and the State, sets forth the tariff objectives to be achieved within a four year period. The Ministry of Telecommunications and the Ministry for the Economy

[55] Although, in practice, it is problematic whether experimental license are likely to be granted for cable TV networks.

are responsible for tariff approval. However, they must consult with the ART before taking a decision on tariff obligations.[56]

Approval of tariffs is only required for those services which are the subject of universal service obligations. Government approval takes the form of a non-opposition procedure. Tariffs for reserved services put forward for approval must conform to the tariff policy set forth in the *Plan Contract*.

A new *Plan Contract* was signed between FT and the French State on 13 April 1995 for the years 1995 - 1998. It provides for a general reduction of prices for reserved services, with a special emphasis on prices for leased lines. FT is obliged to reduce the price for leased lines by an average 10% of the Retail Price (RPI-10%). Until now, the reductions operated by FT on leased lines have focused on analogue lines, while relatively high prices remain for digital high-speed lines.

The *Plan Contract* also obliges FT to diversify its current tariff structure. In particular, it favours volume discounts for the business community and also special tariffs for residential users with low usage patterns or who call only a limited number of parties.

A decision was also adopted by the DGPT on 2 March 1996 to rebalance tariffs for basic voice telephony services. Under this Decision: prices for international and long distance communications will be reduced; and the monthly subscription fee for basic voice telephony services will increase. New tariff objectives have been recently adopted for the forthcoming years.

(2) New pricing principles for the competitive market environment.

The *Act* acknowledges that it is necessary to rebalance tariffs so that they reflect the actual cost of providing services. The *Act* foresees the progressive rebalancing of tariffs by way of general reductions for all categories of users. This process is scheduled to be completed by 31 December 2000. However, the *Act* maintains certain price obligations on the provision of the basic voice telephony service, which are considered to be necessary to ensure the affordability of universal service.

For all services (even those which are liberalised) provided by FT, the *Plan Contract* mandates that tariffs must: be cost oriented; be non-discriminatory; not hinder the development of "fair competition"; and be transparent. These principles are intended to govern FT's pricing policy in the newly-liberalised environment.[57]

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[56] See new Article L-36,7 (5) of the French *Postal Code*.

[57] A "local" area, as defined by the ART, coincides with the territory of a "Departément". Calls made inside this are will be priced at local tariff rates.

(3) Control of tariff package which can be offered to customers. Interpretation of the rules (if any) preventing discrimination, bundling and cross-subsidisation interpreted in the light of tariff flexibility.

The *Framework Scheme* expressly obligates FT to separate, when jointly offered, the conditions of the offer of basic voice telephony services (subject to price constraints) from services which are competitive, with prices being transparent for each category of services.

Other operators are not subject to specific regulatory constraints on their tariffs, subject to the obligation not to discriminate between users.[58]

(4) ***Tariff basis - usage time or flat rate off-peak rates; and other relevant pricing practices which increase pricing flexibility.***

Tariffs for the public telephone service are comprised of a flat monthly rate and a variable rate, based on usage time (subject to peak/off-peak variations).

A tariff reform designed to rebalance tariffs has resulted from the signing of the *New Contract Plan* between FT and the Government on 15 February 1994. This has led to an increase in both the price for the subscription to basic voice telephony service and the price for local communications. (In contrast, the price for long-distance and international communications has been reduced).

The thrust of current and future tariff reforms in *France* is to allow for further "flexibility" in the pricing of basic voice telephony services (*i.e.*, a tariff offer which is better suited to the needs of particular groups of consumers).

The following additional residential modifications are being considered by the Ministry:[59]

- the variation of tariffs on the basis of the volume of communications (*i.e.*, low user schemes);
- tariff variations on the basis of the duration of communications (in the form of a regressive tariff); and
- preferential tariffs for calls to most frequently called parties.

For the business sector, volume discounts will continue to be commercially negotiable.

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58 These connections are commercialised by France Cable et Radio, a subsidiary of FT, acting as an agent for FT.

59 See the DGPT's *Bilan de la réforme tarifaire du 15 février 1994* under Section IV.2.2. These options are based on a Study by Ernst & Young commissioned by the French Ministry for Telecommunications.

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.

Internet services are not specifically regulated. However, since 1996, FT must offer subscribers access to Internet Access Providers at the cost of local basic telephone communications (this offer includes areas where the Internet provider in question does not have an access point).

The ART has recently settled a dispute between a group of cable TV operators which had concluded network operation agreements with FT. The ART has settled a dispute between FT and two cable TV operators over the use of bandwidth in order to allow the provision of Internet Access over cable TV networks. The cable TV operators must finance the cable routing apparatus and FT's costs of carrying out the necessary network upgrades. Maintenance costs will also be charged to the cable TV operators. An annual fee is payable to FT per socket connected.

G. Network Interconnection and Access to Service Providers

The Act provides for the establishment of a new legal regime on interconnection. The regime has been supplemented by a *Decree of 3 March 1997.*

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

"Interconnection" under the *Act* includes both the interconnection of two or more telecommunications networks and access to telecommunications networks by service providers.

Generally, the conditions and terms of interconnection are left to commercial negotiation, subject to a requirement to notifying the terms of the agreement to the ART. The ART may only request the modification of an interconnection agreement to promote competition and the interoperability of services. The ART may order the suspension of an interconnection agreement which seriously harms the functioning of an operator's network or does not comply with essential requirements. The ART has the power to regulate the technical specifications and financial conditions with which all interconnection agreements must comply.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".

Operators declared by the ART to have "significant market power" in a relevant market, have additional interconnection obligations.

Operators with a market share exceeding 25% of the relevant market are presumed to have significant market power, unless the ART declares otherwise. At present, FT is the only operator declared to have significant market power, and therefore additional interconnection obligations established under the *Act*.[60]

Operators with significant market power must publish a standard interconnection offer, subject to approval by the ART. The *Decree of 3 March 1997* has introduced specific requirements for the interconnection offers of dominant carriers. The ART approved the various elements of FT's standard interconnection offer on April 9 (Part I) and July 30 (Part II) of 1997.

The *Decree of 3 March 1997* requires the standard offer of a an operator with significant market power to include the following services available for interconnection with public network operators:

- routing services for switched traffic, offering sufficiently unbundled technical and tariff options;
- supplementary and advanced services and functions;
- the implementation of number portability and carrier selection;
- interconnect links, including a collocation offer; and
- leased lines connection services.

Standard interconnection offers must provide for specific rights and obligations which are not imposed on providers of voice telephony over third-party lines.

A dominant carrier may be required by the ART to modify or add new headings to its standard offer to ensure that it is not discriminating, the orientation of interconnection tariffs is towards costs and that it fulfils its obligation to satisfy all reasonable interconnection requests from public network operators and voice telephony providers.[61]

(3) Precise obligations currently placed on the interconnecting operators.

Public network operators are under an obligation to satisfy "all reasonable interconnection requests" from other public network operators and providers of voice telephony.

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60 See Article L-367 of the *French Postal Code*, as amended by the *1996 Telecommunications Act*.

61 Which is a common obligation on all public network operators.

Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated)

The *Act* does not specify the precise locations at which interconnection is to take place. However, dominant operators may not refuse to negotiate access at points included in their standard offer. In particular, they may not refuse direct access to international switching centres and other international facilities. Operators with significant market power are obliged to allow interconnection with their local exchanges, unless for justified technical reasons. Interconnection at a local switch level must, according to the Decree of 3 March 1997, allow access to all subscribers directly connected to that particular switch or which may be attained from that switch, without having to transit through a higher exchange.

For those local switches at which interconnection is functionally not available, the ART may request that the operator with significant market power offer interconnection at a higher network level, albeit at a price which is equivalent to the price for interconnection at the level of the local exchange. A list of inaccessible local switches and the scheduled date for their opening to interconnect operators must be included in FT's standard interconnection offer.

Unbundled access to internal network components

The *Decree* of 3 March 1997 imposes a generic obligation that the components of the interconnection offer of a carrier with significant market power be "sufficiently unbundled",[62] so that an operator is not required to pay for services other than those strictly requested.

FT's approved standard interconnection offer enables at least the basic telephone service to be provided at the interconnection interface. The support services provided at the interface are 64 K/bits (unrestricted), voice, and 3.1 KHz audio. Once FT and third-party operators have agreed over interface operating rules, the following additional services will be made possible via signalling at the interface:

- identification / non-identification of the calling line;
- call forwarding (subject to specific negotiations between the parties);
- user-to-user signalling, with signal pricing;
- terminal portability; and
- sub-addressing.

[62] The *Decree* also imposes an obligation that the tariff offer for said access be "sufficiently unbundled". Some operators expressed concern during the course of a public consultation offer, that the level of unbundling should be specific for interconnection with FT's network, and that the unbundling which is required should be made to coincide both for the technical and tariff interconnection offer of FT.

An operator who wishes to collocate its transmission equipment in FT's premises may do so, within the limits of the remaining capacity of the site, and under the conditions defined by FT in its approved interconnection offer.

Unbundled access to the local loop

Unbundled access to the local loop is not mandated.[63]

Equal Access

The *Act* obliges dominant operators to offer number portability and carrier selection as part of their standard offer. Refer to H(2) below.

Technical requirements and standards

Technical specifications related to interconnection interfaces are part of the standard interconnection offer of operators with significant market power, which must be approved by the ART.

European technical specifications (when in place) will be preferred, after they are published by the ART. Non-standardised specifications may also be used.

Operators with significant market power must grant interconnection to third-party operators under equivalent technical and financial conditions and with the same quality as those used internally or offered to their services arms, subsidiaries or affiliates.

Quality of service commitments required

Quality specifications are commercially negotiated by the parties. However, the quality of services offered to interconnecting operators may not be less than that provided internally by a dominant operator's services arm, or its subsidiaries or affiliates, unless the difference in treatment can be objectively justified.

Interconnect tariffs

FT must ensure that its interconnection charges are transparent and cost-oriented (*i.e.*, sufficiently unbundled to reflect the costs of the network components used). The *Decree of 3 March 1997* requires prices for interconnection with the network of an operator with significant market power to be based on the effective cost of using the network. Interconnection tariffs must be based on "relevant costs" (*i.e.*, costs directly or indirectly connected to the interconnection services offered).

63 As a general matter, however, FT is not allowed to offer bundled fixed and mobile services because of its market power in the fixed line market (contra Cegetel and Netco, which are permitted to do so).

Tariffs must also take into account network investments based on "best available technologies" to achieve optimal network dimensioning, and international benchmarking standards.

During the transitional period required for the rebalancing of tariffs (*i.e.*, by 31 December 2000), an additional charge is included in interconnection charges to finance the net cost of FT's tariff averaging obligations (relating, on the one hand, to geographical averaging and, on the other hand, to the unbalanced tariff structure). Once rebalancing is completed, only the part of this additional charge relating to geographic averaging may be levied.

At present, interconnection with FT is on the basis of "forecast relevant average historic costs", including a Rate of Return on Capital Employed, which has been set by the ART at 11.75%.

From 1999, LRAIC will be used for interconnection tariffs. The ART is currently working on the conditions and the implementation of this new cost-based formula. In the interim, if "historic costs" cannot be determined, it is possible to look at the approaches taken by other countries and follow the same cost-based formula.

The *Decree of 3 March 1997* imposes an obligation on carriers with significant market power to adjust their standard offer to reflect the specific rights and obligations of basic telephony providers. Indeed, FT has, with the approval of the ART, established interconnection tariffs for the routing of switched traffic of basic telephony service providers which are different to those applicable to interconnection with other public network operators. This differentiation is justified on the basis of the flexibility afforded to operators over the pricing of their interconnection offers, found in the *ONP Interconnection Directive 1997.*

Interconnection tariffs are subject to peak/off-peak variations. There are some restrictions on volume discounts by dominant operators.

Information disclosure obligations

The standard offer of carriers with significant market power must provide information about the carrier's facilities. The *Decree of 3 March 1997* requires that changes in a dominant carrier's interconnection offer be notified to other operators at least six months before the modification actually occurs (unless the ART decides otherwise). This information must be made available on the same conditions on which it is offered to that operator's services arms or to its subsidiaries or affiliates.

When that operator wishes to use an interface which does not appear in its standard offer, or to supplement an interface, it must notify the ART. The ART may publish these new specifications to ensure that no discrimination occurs, or where there is general interest in the publication.

All parties to a commercial interconnection agreement must inform the other parties of any network changes at least one year before their implementation, when these changes necessitate a modification in the other operator's facilities.

H. "Resource" Issues

(1) Frequencies.

Since 1997, the ART has been responsible for frequency allocation for telecommunications services (prior to this date, the Ministry for Telecommunications was responsible).

Under the *Act*, a new Agency has been created with advisory and general co-ordination powers over frequency allocation (the Frequency Agency). In a converged environment, the Agency will no doubt be confronted with the importance of re-allocating spectrum in light of the existing low utilisation of the total available spectrum for telecommunications usage (approximately 25%) as compared to civil, military and broadcasting uses. The Agency is governed by a Council comprising representatives of all the authorities responsible for frequency allocation. The tasks of this Agency are:

- ensuring that radio spectrum is managed in a way which is forward-looking and efficient;
- making proposals to the Prime Minister on the design of the National Frequency Plan;
- preparing the French position in international negotiations;
- co-ordinating the establishment of radioelectric stations on French territory with a view to maximising existing sites;
- providing a one-stop-shop for monitoring frequency use and, particularly, the avoidance of radioelectric interference; and
- promoting the better use of frequencies.

The use of frequencies for telecommunications purposes is conditional on the payment of an annual fee. Allocation of frequencies to mobile operators has always been made pursuant to a public call for tender.

The National Frequency Plan currently in place dates from 10 August 1995. A re-allocation of hertzian frequencies (historically used on the PSTN) is proposed for the near future. This re-allocation process is a result of changes in the review of

the configuration of the public telephone network in *France*. It is designed to free up frequencies to be used by GSM operators, primarily.[64] However, other operators may also benefit from access to these frequencies. For fixed hertzian systems, additional frequencies are already available within the range of the 1,5 GHz to 13 GHz. Allocations are also planned in the 23,6 GHz band.

In June 1997, the ART submitted a series of proposals to the Ministry for:

- organising a tender procedure for the grant of several point-to-multipoint national licences;
- the promotion of wireless technologies (DECT, in particular); and
- the offer of fixed services by licensed operators for GSM and DCS 1800 as of 1 January 1998.

On 2 July 1997, the ART called for tenders for the grant of nationwide Digital Professional Mobile Radiocommunications Systems for use within Closed User Groups. Licences are scheduled to be granted by November 1998. The scarcity of frequency resources has led to only two licences being the subject of a tender. Frequencies allocated are in the 418-419 MHz/428-429,4 MHz duplex band. Additional frequencies may be made available, in the future, within the 414,8-418 MHz/424,8-428 MHz and 419,4-420 MHz/429,4-430 MHz duplex bands.

The decision of the ART of 27 July 1997 expressly states that licences for Private Digital Radioelectric Networks, with a more restricted scope, may be granted in the future provided that frequencies currently available for analogue radioelectric networks are released.

Wireless in the Local Loop (WLL)

The ART appears to favour the introduction of wireless technologies to serve customers in the local loop, therefore allowing for the integration of fixed and mobile technologies as a means of promoting competition in the final link to the customer and reducing the cost of universal service. A consultation procedure for the introduction of WLL services in early 1998 was completed in 1997.[65]

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64 The licence conditions of Bouygues Telecom and SFR were modified by Order of 12 September 1995. Similarly, the conditions for the provision of a GSM service by FT were modified on 27 December 1995. These modifications allow operators of Digital Cellular Mobile Communications to have access to hertzian frequencies as may be progressively released by FT from use on the PSTN.

65 The ART intends to grant licences for national point-multipoint systems (in the 3.4 - 3.6 GHz and in the 27.5 - 29.5 GHz range) and for local multipoint distribution systems in the 27.5 - 29.5 GHz range. Prior to the actual grant of a definitive licence, operators may be permitted to trial these new technologies for a limited period of time and in a defined geographic territory.

WLL applications are likely to be the subject of a competitive tender process. There is the possibility that there may exist different licensing mechanisms and spectrum allocations for the provision of fixed and mobile services by WLL. The type of frequency bands released for WLL use may vary in line with the usage plan for the licence.

UMTS

The ART is in the process of defining a future regulatory framework which can accommodate UMTS, the convergence aspects of which will involve the allocation of new frequency bands and the possible sharing of such bands.

(2) Numbering.

A new 10-digit Numbering Plan came into force on 18 October 1996, pursuant to a decision of the DGPT taken on 2 May 1995. The decision to move to a “closed” 10-digit scheme (zero plus nine dialled digits) was taken in the light of the congestion of the 1985 Numbering Plan. Under the new Plan, all geographic numbers acquired two figures, depending on the region in which they are located, namely:

- 01 for Paris;
- 02 for the North-West;
- 03 for the North-East;
- 04 for the South-East; or
- 05 for the South-West;

All mobile numbers use "06" codes. National non-geographic numbers, mainly used for premium rate or free-phone services, will use the "08" code.

Under the *Act*, the ART has the power to design and monitor the National Numbering Plan, and to allocate prefixes, individual numbers and numbering blocks pursuant to an objective, transparent and non-discriminatory procedure.

Operators are due to pay an annual fee for the numbers which have been allocated to them consisting of the number of available numbers, multiplied by a basic value which may not exceed 0.15 French Francs. (Fees are also payable for the initial grant).

Carrier selection

The ART decided, on 16 July 1997, on the procedure for implementing carrier selection from 1 January 1998. Selection is planned for long-distance national and international calls. Consumers will be able to select carriers on a call-by-call basis. On 1 January 2000, permanent pre-selection will be available, subject to call-by-call override. In the absence of pre-selection by the customer, the local access

operator will select the long-distance and/or international carrier. Inside the "local" area, calls will be carried by the local access operator, with carrier selection being available only on outgoing calls.

Due to the scarcity of numbering resources (only seven one-digit prefixes are available), the ART has limited the number of eligible operators to those licensed to operate a national public telecommunications network for the provision of basic telephony, and which comply with certain network coverage requirements. In addition to one-digit prefixes, four-digit prefixes of the "16XY" type have also been made available to ensure dialling parity.

Prefixes are allocated as part of the licensing process, or as a modification of an existing licence. A prefix my be reserved for three months (renewable), up to the completion of the licensing process, subject to a fee. Prefixes are allocated for a period of five years (tacitly renewable up to ten years) and are not transferable. They may be withdrawn for lack of effective use or due to changes in the National Numbering Plan. Five one-digit prefixes have already been allocated.

An annual fee is due for the allocation, which amounts to either:

- two million French francs, multiplied by a value (to be determined jointly by the Ministry of Telecommunications and the Ministry of the Economy, and which may not exceed 0.15 French francs) for a four-digit prefix; or

- 20 million French francs, multiplied by the same basic value, for a one-digit prefix.

Three one-digit prefixes have already been allocated ("8" to FT; "9" to Netco; "2" to SIRIS; "5" to ONICOM; and "7" to Telecom Development). The prefix "0" is reserved for the local access operator. Prefixes "4" and "6" are still available for allocation. Prefix "1" is reserved for special numbers, while prefix "3" is reserved for "short numbers".

Number portability

The *Act* contemplates that service provider portability will become available after 1 January 1998 (*i.e.*, subscribers will be able to change local operators while retaining their telephone number).

The second part of FT's standard interconnection offer (approved by the ART on 30 July 1997), includes the gradual introduction of service number portability. After 1 January 1998, portability will be available, using existing mechanisms such as temporary call forwarding or redirection, which were not designed for portability. By 1 January 1998, only 10% of subscribers connected to any exchange will be able to have their numbers ported to a different service provider. By 1 March 1998, FT will begin to deploy "subscriber managed redirection with

prefixed number". This service will be available over the whole country by 15 December 1998. Even with subscriber managed re-direction, portability will only be offered to subscribers connected to the exchanges that are functionally open to interconnection with other operators at a future given date.

The charges relating to service number portability can be broken down into:

- charges for processing the application to modify the forwarding or re-direction of numbers;
- charges for implementing specific portability re-directions; and
- call transfer charges.

Under FT's approved standard offer, the termination of calls on the third-party network will be charged by the third-party operator to FT, under the same conditions as those laid down for calls routed to a non-directed number. The costs for transferred numbers of the annual fee for the use of the numbers will be added if the volume of transferred numbers is significant.

The *Act* also provides subscribers obtaining a number from operators which they may retain even if they change both geographical locations and operators, after 1 January 2001.

Portability between mobile operators and between mobile and wireline operators is not expressly contemplated by the *Act*.

(3) Rights-of-Way.

According to the *Act*, Operators of Public Network are entitled to a right of way over public highways and private property. *Decree No. 97-683 of 30 May 1997*[66] of the State Council provides details of the rules governing rights-of-way.

Authorities responsible for managing public land (other than roads) may conclude agreements with operators to grant access, insofar as such occupation is not incompatible with the purpose of the property or with available capacity. There is no absolute legal obligation to grant access to the public domain other than roads; however, if such access is granted it must respect the principles of transparency and non-discrimination. Agreements may not interfere with commercial operating conditions. Access may be subject to the payment of a fee, which must be reasonable and proportionate to the use requested.

Public Network Operators have a right to occupy public roads if the occupation is not incompatible with the purpose of the highway, in accordance with the applicable highway regulations. Use is subject to the payment of a fee. The competent authorities must authorise the use before occupation. This authorisation

[66] Décret No. 97-683 du 30 mai 1997 relatif aux droits de passage sur le domaine public routier et aux servitudes prévues par les articles L.47 et L.48 du code des postes et télécommunications.

may define installation and operating specifications designed to preserve the utility of highways. Access may only be refused to ensure compliance with essential requirements.

The sharing of existing sites may take place, with the encouragement of the ART, if the parties can reach commercial agreement. In this case, the owner of the original facilities will be responsible for maintaining the infrastructure and equipment installed in the premises, in return for the payment of a fee. The ART may be called upon to settle disputes connected with the sharing of telecommunications infrastructure.

Rights-of-way over private property allow installation and operation of network infrastructure in the communal parts of apartment buildings and estates, and above and below the ground of unbuilt sites. Authorisation from the City Mayor is required, after the co-owners (or, in the case of condominium, the householders' association) have been informed and invited to comment.

The sharing of sites established over private property will also be encouraged (but cannot be mandated), subject to the payment of a charge to the operator owning the sites. Sharing occurs only if the parties reach a commercial agreement.

Easements over private property operate without prejudice to the right of the owners to demolish, repair, alter or close their property, subject to the obligation to inform the operators concerned at least three months before such works occur. The beneficiary of an easement over private property is liable for any material damage which arises directly from the existence, installation, maintenance, or operation of equipment and/or infrastructure.

Public Network Operators have easement rights over properties adjacent to radio transmission stations, in order to ensure the proper propagation of radio waves. For this purpose, a protection plan must be designed which defines the frequency easements for each transmitter, the sites to which the easements apply, and the specific obligations designed to keep the sites in good order. This plan must be submitted to the Frequency Agency, and be subject to public consultation. Approval of the plan rests with the regional authorities, considering the opinion of the municipal authorities concerned, and after the owners of the properties submit their observations. The owners of land and properties are entitled to compensation for any material damage which arises directly or indirectly from these activities.

Public Network Operators are also granted easements for the protection of telecommunications networks from radio inference, pursuant to a Protection Plan. This right includes the prohibition of installation of any equipment in an area surrounding the infrastructure sites that is capable of interfering with the reception of signals. The owners of the property which is subject to an easement are entitled to compensation for any material damage arising directly from the easement.

In all instances, the installation of equipment which takes place under the authority of Public Network Operators must be carried out in a way which respects the environment and the aesthetic quality of the site, and with the least possible damage to private property and the public domain.

Rights-of-Way Decree

The specific conditions for the application of the above principles are contained in *Decree No. 97-683*, issued by the Council of State on 30 May 1997.

This Decree provides that the rights-of-way over public property such as motorways and national roads are granted by the Prefect, rights-of-way over secondary roads by the President of the General Council, and rights-of-way over local roads by the local Mayor. These rights-of-way are awarded on a transparent and non-discriminatory basis. The competent authority will decide whether to award a right-of-way within two months of receipt of the application.

The grant of a right-of-way means that the operator will have rights over the public highway. The competent authority will grant the authorisation on the condition that steps are taken to allow for future sharing of the infrastructure.

If the competent authority realises that the right-of-way requested by the operator can be secured by the use of existing infrastructure, it will invite the parties to reach an agreement to share the existing infrastructure.

The request for the grant of an easement over private property is made to the Mayor of the area where the property is situated. The Mayor will contact the property owner within one month of the receipt of the request, to encourage the parties to reach agreement. If no agreement is reached, the Mayor, acting on behalf of the State, may grant the easement. The decision of the Mayor to establish an easement will expire automatically if the works to establish the infrastructure are not undertaken within 12 months of the publication of the Mayor's decision.

The annual fees for the award of the rights-of-way may not exceed the following:

- for each underground pipe or cable, the maximum fee, expressed in linear kilometres, is 20,000 FF for motorways in the mountain area and 10,000 FF for other motorways;

- for national roads, secondary roads and local roads, the maximum fee is 150 FF per linear kilometre for each cable;

- for the establishment of radio-electrical stations, the maximum fee for an installation of over 12 metres is 1,000 FF for antennas and 2,000 FF for each pylon; or

- for the establishment of other installations, the maximum fee is 100 FF per square metre.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

In the licence granted by the CSA to Canal Plus, the latter has accepted the obligation not to acquire the exclusive rights to broadcast the following events listed in the licence:

- The Olympic Winter Games, Olympic Summer Games, Tour de France;
- World Cup Football matches, European Cup Football matches and Five Nations Rugby matches in which the French national team takes part; and
- The Final of French Football Cup.

Canal Plus has a statutory monopoly for the provision of terrestrial pay-TV services in *France*. Moreover, *Law No. 92-652 of 13 July 1992* (amending *Law No. 84-610 of 16 July 1984*) guarantees the availability of highlights and outlaws the practice of "freezing rights".

(5) "Must carry" obligations (on local cable TV companies, broadcasters or TOs which provide entertainment services).

(i) Audiovisual

Terrestrial television

Broadcasters (regardless of whether they are public or private) must allocate 3% of their turnover to cinematographic works produced by independent programmers.

Both private and public channels must allocate 1.5% of their turnover to production of French audiovisual works and 20% to European audiovisual works from independent programmers or, alternatively, 15% of their turnover to French audiovisual works and broadcast a minimum of 120 hours of "European" or French audiovisual works during prime time viewing periods.

Canal Plus must allocate 25% of its turnover to acquiring transmission rights for cinematographic works from independent programmers, 69% of which must be "European". By the year 2000, Canal Plus must have allocated 45% of its turnover to French/European audiovisual works.

Cable TV

A cable TV operator must carry the terrestrial television services broadcast in its area.

Cable TV service providers which broadcast cinematographic or audiovisual works must also spend 10% of their turnover on European works from independent programmers.

(6) "Local content" or "independent content" obligations on cable TV operators (see also section E above).

Terrestrial television

Broadcasters are under a stringent obligation to allocate 40% of their broadcasting time to audiovisual works made in French by French nationals.

Other specific content obligations for private broadcasters, including obligations regarding advertising, decency issues and so forth may be imposed in the contract entered into by private broadcasters with the CSA. In the case of public broadcasters, these obligations are determined directly by the Government.

Cable TV

The CSA may impose obligations that a minimum broadcasting time be allocated to specific types of programmes or to retransmit terrestrial TV services (Article 34 of *FCA*). The use of the French language in advertising is compulsory (Article 20-1 of *LFC*).

Maximum advertising time has been set by *Decree 27/03/1992*, along the following lines:

- for national channels: an average of 12 min/hour with a maximum of 15 min/hour;
- for local/regional channels: average of 9 min/hour with a maximum of 12 min/hour; and
- for channels dedicated to the broadcasting of cinematographic works: advertising is forbidden (see Decree No. 92-882 of 01/09/1992).

For new On-Demand services falling under the scope of the *Law of 10 April 1996*, "catalogue quotas", to be determined in the specific agreement which is signed with the CSA, must be met.

(7) "Gateway" Issues - Technologies for Open Access.

The French government began to implement the *Television Standards Directive 95/47/EC*. However, following the election of a new government during 1997, the original proposed legislation has been dropped. *France* now intends to implemented the technical part of the *Television Standards Directive 95/47/EC* by three legislative acts on digital telecommunications terminal equipment, digital satellite broadcasting, and digital cable television. The legislative part of the Directive will be implemented by a future Media Act, which is planned to be presented to the French Parliament during the year 1998.

(8) Internet Domain Names - Preferred regulatory approach.

The administration of the national Top-Level Internet Domain Names (".fr") is the exclusive responsibility of a service called NIC France. NIC France is part of the Institut National de Recherche en Informatique et en Automatique ("INRIA"), a public body.

France is generally supportive of initiatives aimed at granting to all persons the possibility to obtain an individual Internet Domain Name.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

Universal service is defined by the *Act* as the provision of quality telephone services at an affordable price. It includes: the conveyance of calls to and from network termination points; the provision of a telephone directory service in both printed and electronic form; the national provision of public payphones installed in the public domain; and the conveyance of emergency calls, free of charge.

The French *Act* provides for the revision of the scope of universal service at least every four years (*i.e.*, the first review will occur in 2000), to adapt it to market developments.

There is no indication that, for the time being, universal service will be extended to cover audiovisual or new services. However, cable TV operators must contribute to the financing of universal service insofar as they provide basic voice telephony (after 1 January 1998), and before that date under conditions to be defined if they provide basic voice telephony under the *Law of 10 April 1996*.

(2) ***Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.***

Initially, only FT must provide universal service. However, all providers of public voice telephony services must route emergency calls, free of charge. In the future, other public network operators may also be responsible for universal service. Mobile operators do not, at present contribute to the cost of universal service. It is possible that, in the future, mobile operators and/or operators that benefit from UMTS convergence may be subject to universal service contributions.

(3) ***Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).***

A *Decree of 13 May 1997* establishes the basis for the calculation of industry contributions to universal service and the conditions for their implementation.

The ART has estimated the cost of providing universal service for 1997, using the following cost elements:

- the costs due to unbalanced tariffs;
- the cost of the geographic averaging of tariffs;
- the cost of public payphones and directories; and
- the cost of special tariff schemes.

After making a cost-benefit analysis, the ART has made a determination of the contributions to be paid by operators in 1998.

The total cost of universal service obligations ("USO") and Access Deficit Charges ("ADCs") is calculated to be 6.043 billion French francs (3.8 billion French francs net of ADCs), which is approximately four times the cost of USO in the *United Kingdom* (although justified in part by factors such as geographic scope, population spread, etc.).[67]

The cost of both USO and ADCs have been calculated on the basis of minutes terminated on the network in *France*, regardless of whether the traffic originates outside of *France*. This methodology appears to be *prima facie* contrary to the terms of the Commission's *Costing and Financing of Universal Service Communication of November 1996*, which takes the view that calculations based on minutes of terminating traffic may have a distortive and discriminatory effect (and promote subsidisation of domestic USO by foreign operators - as is occurring (in the *United States*).

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67 Competing operators' contributions to financing this are estimated to be on average 95 million French francs. However, these figures are only estimates which are to be confirmed in 1999.

Costs due to unbalanced tariffs

Contributions to these costs can be required from operators of public telecoms networks providing basic voice telephony services (including FT, but not including mobile operators) in proportion to their telephone traffic. These charges are levied in addition to interconnection charges, on a uniform per-minute basis. Once tariff rebalancing is completed (by 31 December 2000), this charge may no longer be levied. Mobile operators have been exempted by the ART from contributing to this cost in exchange for network coverage commitments which will apply from 1 January 2001.

Cost of geographic averaging

Operators of public fixed networks providing basic telephony may have to contribute to the cost of geographic averaging, in proportion to their voice traffic.

Contributions are calculated on a standard per-minute basis.

Cost of public payphones and special tariff schemes

Contributions to the net cost of providing payphones and the cost of special tariff schemes are collected through a Fund, from mobile operators and all operators of public networks (whether or not they provide basic voice telephony services). Contributions are on the basis of the overall telecommunications traffic of an operator (*i.e.*, not limited to basic telephony traffic).

The *Decree of 13 May 1997 on Universal Service and Access Deficit Contributions* provides for a special funding scheme for "socially disadvantaged" users. A subsidy is paid to operators approved to serve these users. Reimbursement is by way of a reference value per customer served, which is set annually by the Minister. This compensation may not exceed 0.8% of FT's revenues from publicly available services. It is not clear whether these subsidies will be contributed by the industry. Insofar as these calculations may not be based on a net incremental cost analysis, new entrants argue that they should not be required to fund them.

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see also section E & H).

See section H 4 above.

(5) Other public service specifications affecting the content of information provided to subscribers.

None.

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TABLE OF CONTENTS - ANNEX II (PART B)

GERMANY 181

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 182
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/ BROADCASTING / PUBLISHING 186
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES 194
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 195
E. APPROVALS AND LICENSING REQUIREMENTS 200
F. PRICING AND TARIFFING 206
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 208
H. "RESOURCE" ISSUES 215
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 219

GREECE 221

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 222
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/BROADCASTING /PUBLISHING 224
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES230
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 230
E. APPROVALS AND LICENSING REQUIREMENTS 233
F. PRICING AND TARIFFING 237
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 240
H. "RESOURCE" ISSUES 245
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 249

IRELAND 251

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 252
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS / BROADCASTING / PUBLISHING 253
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES257
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 258
E. APPROVALS AND LICENSING REQUIREMENTS 262
F. PRICING AND TARIFFING 267
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 268
H. "RESOURCE" ISSUES 270
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 273

ITALY 275

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 276
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS/ BROADCASTING/PUBLISHING 277
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES 287
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 288
E. APPROVALS AND LICENSING REQUIREMENTS 293
F. PRICING AND TARIFFING 298
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE 300
H. "RESOURCE" ISSUES 304
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 306

LUXEMBOURG 310

A. EXISTING REGULATORY DEFINITIONS OF SERVICE OFFERINGS 311
B. REGULATORY AUTHORITIES IN TELECOMMUNICATIONS / BROADCASTING / PUBLISHING 312
C. CURRENT STATUS AND ROLL-OUT OF TELECOMMUNICATIONS, BROADCASTING AND AUDIOVISUAL RULES316
D. SERVICE TYPES PERMITTED, SPECIAL AND EXCLUSIVE RIGHTS (RESERVED SERVICES), AND LINE-OF-BUSINESS RESTRICTIONS 317
E. APPROVALS AND LICENSING REQUIREMENTS 319
F. PRICING AND TARIFFING 324
G. NETWORK INTERCONNECTION AND ACCESS TO SERVICE PROVIDERS 325
H. "RESOURCE" ISSUES 327
I. UNIVERSAL SERVICE OBLIGATIONS AND PUBLIC SERVICE/PUBLIC INTEREST REQUIREMENTS 329

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasters and audiovisual services.

"Telecommunications services" are defined in the new *1996 Telecommunications Act*, which entered into force on 1 August 1996, (the "*1996 Act*") as the "... *commercial provision of telecommunications, including transmission lines, offered to third parties*".[1] The offer need not be made to the public.

"Broadcasting" is a general term encompassing both "television" and "radio". The *German Constitution* affords comprehensive protection to broadcasting, without defining the term. It is defined in the Agreement on Broadcasting ("*AOB*")[2] *as "... the provision and transmission for the general public of presentations of all kinds of speech, sound and picture, using electrical oscillations without junction lines or along or by means of a conductor"*. The *AOB* adds that this definition includes encoded programmes or those received on payment. The digital transmission of programmes also falls within this definition. The definitional situation is far less clear for services such as Video-on-Demand and Near-Video-on-Demand.

"Teleservices" are electromagnetic information and communication services provided for individual use over telecommunications networks, including telebanking, telemedicine services, individual information offers, Internet browsers, telegames and interactive teleshopping. They are regulated by the *Information and Communications Act* ("*Teleservices Act*") *1997.*

The importance of the definitions stems from the fact that broadcasting generally falls within the jurisdiction of individual states, the Länder, while all matters relating to telecommunications fall within the exclusive jurisdiction of the Federal legislature.

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1 §3 No. 18 of the *1996 Act*.

2 Since the Länder only have jurisdiction in their individual States, it was necessary to provide for a system of arrangements between individual Länder, whereby they could enter into inter-State treaties. The *Agreement on Broadcasting between the Federal States in United Germany*, dated 31 August 1991, is particularly important, in this context. This agreement was amended in 1994 and in 1996. Hereinafter "the *AOB Agreement*".

(2) *Regulatory distinctions between types of telecommunications and broadcasting services.*

(i) *Telecommunications*

There is a distinction drawn between the provision of services and infrastructure.[3] A licence to supply voice telephony services over a self-operated telecommunications network does not include the right to operate transmission lines and vice versa.

(ii) *Broadcasting*

In the broadcasting sector, there is a distinction drawn between the technical aspects of the broadcasting transmission and all other matters. Since telecommunications matters are under the exclusive competence of the Federal authorities, technical transmission issues such as licences/approvals for terrestrial transmission and frequency allocation of television and radio programmes fall within the jurisdiction of their authorities. All other matters relating to broadcasting content are within the responsibility of the Länder.

The regulation of public and private broadcasting services differs. Public broadcasters are established under public laws and are not heavily regulated. Private broadcasters are regulated by the conditions of their licences and the various *Media Acts* of the respective Länder.

There is also a distinction drawn between television and radio broadcasting. However, a private operator may operate both TV stations and radio stations, under separate licences. Radio programmes are generally regional in nature. Many TV programmes are broadcasted nationally. However, there are a number of regional and local TV programmes.

(3) *Regulation of Internet services and other on-line services.*

It is generally accepted that the Federal Government has jurisdiction over (interactive) teleservices, while jurisdiction over Media Services is vested in the Länder.

Internet services and other on-line services - insofar as their main characteristic features do not amount to broadcasting transmissions - are regulated by the "*Teleservices Act*"[4] which establishes the general conditions for the provision of information and communication services, including provisions on liability, data protection and digital signatures. This law will apply to all electronic information and communication services designed for individuals to use. This law also

3 See §6 II No. 1 a-c and No. 2.

4 Entered into force on 1 August 1997.

combines data such as characters, images or sounds that are based on transmission by means of telecommunications ("teleservices"). This includes services providing access to the Internet and other on-line networks, individual communications services (*e.g.*, telebanking), services offered for information or communication unless they emphasise editorial content designed to influence public opinion (*e.g.*, services providing traffic, weather, and stock exchange data), and services offering access to telegames and teleshopping.

The Federal law provides that "teleservices" are free from any specific licensing or registration requirements. However, service providers are responsible for content issues. They are in general not responsible for third-party content, unless they have knowledge of such content and preventing its use is both technically feasible and can reasonably be expected to occur. The law intends to hold the service provider liable for intentional dissemination of illegal content. Liability does not accrue if the service provider is negligently unaware of the content. Finally, service providers must display certain information in their commercial offers.

The Länder have legislative competence over "media services". Accordingly, they have entered into an interstate agreement[5] regarding such media services. Media services are aimed at the general public; their main characteristics are related to broadcasting emissions rather than (interactive) teleservices. A list in the interstate agreement identifies the following examples of media services: online news, teleshopping, Video-on-Demand and Near-Video-on-Demand. The governments of the Länder and the Federal Government have agreed on similar rules with respect to a number of issues such as data protection. Accordingly, the Treaty contains rules which are very similar to those proposed under the Federal law. Both the Treaty and the Federal law contain a list of services which are within their scopes. However, there are likely to be further disputes between the Länder and the Federal Government when new specific services are added to the scope of either the Treaty or the Federal law.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

Video-on-Demand and Near-Video-on-Demand are not specifically regulated. It was decided that these services should be classed as media services for the general public, and therefore within the scope of the Treaty on media services (see *supra* point A.3). They are generally not covered by broadcasting provisions of the Länder. However, the *AOB* agreement provides that media services may be covered by broadcasting rules if the broadcasting offices of all Länder agree that a specific media service is to be classified as broadcasting.

Digital television is also not specifically regulated. The *Media Acts* of many of the Länder allow for the launch of pilot projects (*i.e.*, the trials currently taking

[5] Entered into force on 1 August 1997.

place, including the launch of digital television DF1). However, conditions are not uniform.

A conference of the directors of the regulatory authorities of the Länder has concluded that a new treaty between the Länder is necessary. The directors reached an agreement on ten criteria for the introduction of digital broadcasting including equal access to broadcasting, non-discrimination in the provision of services for operators, open access for users and uniform standards for digitalisation. They recommended that these criteria should form the basis of a new Treaty. The following (at least partly diverging) interests are to be balanced: public broadcasters seek access to the digital platform on a non-discriminatory basis; private broadcasters wish to transmit throughout the entire German territory; Deutsche Telecom (DT) seeks to rent out its cable network. No real progress has been made recently on this issue.

There are a few examples of digital TV expansion. DF1 has concluded a contract under public law with the "Landesmedienanstalt" of Bavaria for the trial and development of digital broadcasting via the Bavarian cable TV network and the ASTRA-satellites. The contract incorporates the principles of the *Bavarian Media Act* including the relevant provisions on licence fees, but expires on 31 July 1998, or earlier if digital programmes are supplied on the basis of an ordinary media licence. There are other stations which offer digitalised transmission, such as "Premiere" and "Multithematik" in the private sector and ARD and ZDF in the public sector. Due to the lack of uniform national reception facilities for digital broadcasting (*e.g.*, satellite dishes) and the low level of public awareness of digital broadcasting, it is expected that it will be at least another five years until digital broadcasting achieves market acceptance. The first applications for regular media licences for digital TV programmes have been filed recently. In the meantime, "Premiere" announced that it expected a loss of 120 million DM due to investment into digital TV.

B. Regulatory Authorities in telecommunications/ broadcasting / Publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

(i) Telecommunications

Telecommunications legislation is federal law. Under Article 73(7) of the *German Constitution*,[6] the Federal legislature has exclusive competence over telecommunications. Article 87f. II of the *Constitution* provides that the Federal Government is responsible for telecommunications administration. This is currently carried out by the Federal Ministry for Post & Telecommunications (hereinafter "BMPT"). The BMPT is to be replaced partly by the regulatory authority (NRA) established under the 1996 Act at the beginning of 1998, which will exercise its functions through a Regulatory Council and the Independent Decision-Making Chambers ("Beschlußkammer" or "Chambers"). Part of the BMPT's functions will be carried out by other Ministries.

The BMPT is currently responsible for issuing detailed telecommunications regulations. Technical issues, such as the allocation of numbers, are handled by the Federal Office for Post & Telecommunications ("Bundesamt für Post und Telekommunication", "BAPT"). The powers to issue Ordinances will be vested in the Ministry for Economic Affairs from the beginning of 1998.

The Independent Decision-Making "Chambers" within the BMPT make decisions on specific matters and supervise compliance with regulations.[7] The President and the assessors of the Chambers are civil servants appointed for life, qualified to be judges or higher civil servants.

The "Regulatory Council" was established as the NRA on 1 January 1995. It is constituted by an equal number of representatives from the Länder and from the Parliament (Bundestag). Meetings of the Council take place at least four times a year. The BMPT may disregard the advice of the Council, subject to the Federal Legislator's final decision on the matter, for reasons of the public interest.

Administrative acts are subject to the judicial review of the Administrative Court.

6 See Article 87(f) and Article 143(a) of the *German Constitution*.
7 See 73 et seq. 1996 Act.

(ii) Broadcasting

Articles 5(1) and 5(2) of the *Constitution* guarantee free reporting by broadcasting. A regulatory framework has been developed by the Federal Constitutional Court. In a series of decisions, the Court has made clear that legislative jurisdiction over broadcasting is vested in the Länder. This power includes the organisational structure and financing of the public broadcasting sector, the licensing of private television broadcasters, and the regulation of programming content. Broadcasting regulations are contained in the AOB and in the *Media Acts* of the Länder, and cover licensing and programming requirements for private broadcasters as well as programme monitoring rules.

"Public broadcasters" are public corporations. They have formed a national association, the "Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands"[8] ("ARD"). They have also formed "Zweites Deutsches Fernsehen"[9] ("ZDF") by an agreement between all the Länder.

The public corporations are structured under two models: the "parliamentary" model and the "corporate" model. Most public corporations are organised under the "corporate" model where the corporation is governed by the Rundfunkrat (Broadcasting Council). The Rundfunkrat is composed of representatives of important social groups as well as the Government and political parties. Under the "parliamentary" model, members of the Rundfunkrat are chosen by the parliament of the Länder. The Rundfunkrat shares responsibility for the control of the broadcasting corporation with two other organs, the Verwaltungsrat (Administrative Board) and the Intendant (Director-General). It is not required to meet more than a few times a year, and for this reason practical control is limited. The Administrative Board is responsible for the administration of the broadcasting corporation, for its financial plans and budget (subject to the consent of the Rundfunkrat) and for the preparation of the annual report and accounts. It is not generally involved with programming matters. These are the responsibility of the Intendant, an officer appointed by the Rundfunkrat. He also represents the institution, appoints its principal officers, and prepares the programming schedules and financial plans.

"Private broadcasters" are regulated by public institutions with a pluralistic structure (*i.e.*, "Landesmedienantalt", "Landesrundfunkanstalt" or "Landesmedienzentrale", hereinafter "Landesmedienantalten") which are responsible in almost all the Länder for issuing licences for private terrestrial and satellite television services and controlling programmes. They decide which licensed programmes are granted access to the cable TV network. The Landesmedienantalten are independent regulatory and licensing authorities. Their

[8] The Association of Public Broadcasting Corporations of *Germany*, an amalgen of 11 public corporations which is responsible for programmes broadcast terrestrially, by cable and by satellite throughout the country.

[9] The second German television station, a corporation established and operated jointly by all the Länder.

decisions are administrative acts and can therefore be judicially reviewed by the administrative courts. The Landesmedienantalten are composed of two bodies: a State Broadcasting Commission and a smaller directorate. The Broadcasting Commission is generally involved in major decisions such as the grant and the withdrawal of licences. It is composed of 40 or more members, chosen by specified organisations, such as the Churches, trade unions, Chambers of Commerce and employers' bodies, sports, educational, cultural, and women's associations. Political parties may nominate a member, but often members of a legislature are ineligible. The directorate is concerned with financial and daily administrative matters. Governors of the Länder agree upon and appoint a "Commission for the Determination of Concentration in the Media Sector" (UEU, as per its German initials) consisting of six independent experts on the field of broadcasting law and commercial law. Furthermore, the "Conference of Directors of the Landesmedienanstalten" ("KDLM", as per its German initials) has been established. Both entities have specific powers over licensing and the safeguarding of plurality for TV programmes broadcast throughout *Germany*.

Despite the above, licensing of terrestrial and cable television infrastructure and satellite earth station equipment are the only responsibilities of the Federal legislator. These issues are regulated by the *1996 Act*. The licensing of frequencies is also regulated by national authorities. However, there is a dispute between the Federal legislature and the Länder over spectrum. Allocation and supervision of frequencies for broadcasting services is the general responsibility of the Federal legislator. However, issues relating to the use of these frequencies are regulated by the *AOB* and the *Media Acts* of the Länder.

(iii) Publishing

The Länder regulate matters in the publishing sector, subject to the need to comply with the provisions of the *Constitution* on the freedom of the press. Accordingly, there are Press Laws in all Länder. The Federal legislator has adopted the "Verlagsgesetz", regulating the basic relationship between author and editor. Under the *Constitution*, the Federal legislator may draft framework laws for publishing. It has never used this power.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory powers and proposals for revision of the current regime.

(i) Telecommunications

The *1996 Act* established an independent NRA that is accountable to the Federal Ministry for Economics, with the power to monitor telecommunications markets. It is due to become operative by 1 January 1998. Its functions are being carried out in the interim by the BMPT and the BAPT. The NRA will be headed by a President and two vice-presidents who will be nominated by the Federal legislator,

based on recommendations of the Regulatory Council. The Länder will exercise their influence through the administrative Council (see above).

(ii) Broadcasting

See section B.(1) above.

(iii) Publishing

There is no independent national regulatory body for publishing, nor are there are any plans to establish such a national body. However, press and broadcasting councils (Presserat) have a long-standing tradition in *Germany*. They are independent bodies consisting of members of the profession. They control the industry on a voluntary basis. The Press Council was recognised by the European Court of Justice as a competent body to implement Community directives.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.

The basic law governing competition is the "Gesetz gegen Wettbewerbsbeschränkungen" ("*GWB*"). It lays down the rules for the assessment of the legality of cartel agreements, information exchange contracts, abuses of market dominance[10] and the market-based assessment of mergers and concentrations. The *GWB* applies with equal force to the telecommunications, broadcasting and publishing sectors.

The following Competition Authorities are responsible for applying the *GWB*:

- the Federal Minister for Economic Affairs;
- the Bundeskartellamt (Federal Cartel Office); and
- the individual Cartel authorities of the Länder.

Under Article 44 of the *GWB*, the Federal Minister for Economic Affairs may only intervene in specific cases to determine the powers of those authorities. For example, he or she may overrule (on public interest grounds) the decision of the Federal Cartel Office to prohibit a concentration (a power which is seldom used).

10 Article 22(1) of the *GWB* defines a dominant company as a supplier or buyer who is not exposed to any substantial competition or has a market position which allows it to behave independently of its competitors for certain types of goods or services. Article 22(3) of the GWM presumes that dominance exists where firms have market shares in excess of one-third of the relevant market for goods or services. The Federal Cartel Office must intervene when the abuse of such market dominance is deemed to have taken place, in particular where the terms and conditions of trade have been imposed which differ from those which would apply under normal conditions of workable competition.

The Federal Cartel Office is an independent body, accountable to the Federal Minister of Economic Affairs. It has narrowly defined powers to deal with certain cartels, agreements and mergers and has exclusive jurisdiction to deal with cases where the influence on the market of restrictive or discriminatory conduct extends beyond the one Länder. The decisions of the Federal Cartel Office are taken by the division responsible for the industrial sector.

The Federal Cartel Office receives general or specific instructions from the Federal Minister of Economic Affairs. However, these instructions may not interfere with or be designed to influence the outcome of a case pending before the Federal Cartel Office. Article 44(1)(e) of the *GWB* grants the Federal Cartel Office exclusive jurisdiction over all cases involving the incumbent Public Telecommunications Operator. The cartel authorities of the Länder have residual jurisdiction over matters not falling within the jurisdiction of the Federal Cartel Office.

The Federal Cartel Office may object to anti-competitive agreements and practices and request that modifications be made. Orders for the termination of certain agreements and/or market practices may be accompanied by fines. The Federal Cartel Office has extensive investigative powers under the *GWB*, including the power to request information about economic relationships and the power to carry out on-site inspections under judicial warrant.

Under Article 35(1) of the *GWB*, orders for damages for the infringement of German competition rules may be granted. However, this only applies to the violation of those provisions which are considered to be designed to protect individuals. Case law suggests that the general prohibition of horizontal agreements may be used to sustain damage claims when the effect of the agreement is to foreclose market access. The amount of damages due is equal to the amount of lost profits. Damages for illegal refusal to supply, for example, may be expected to be measured in terms of lost profits.

Article 62 of *GWB* grants a right of appeal to the German courts against decisions of the Cartel Offices. The courts are organised as follows:

- the cartel section of the Federal Supreme Court ("Bundesgerichtshof");
- the cartel sections of the Court of Appeal of the Länder ("Oberlandesgericht"); and
- the District Courts ("Landgerichte") (which have in principle jurisdiction for civil actions, including actions for damages).

Appeals from the Federal Cartel Office lie to the Federal Supreme Court. The cartel sections of the Courts of Appeal of the Länder act as courts of first instance for appeals from decisions of the Länder cartel authorities, and as court of appeal for decisions of the District Courts. Appeals from the cartel section of the Court of Appeal lie to the Federal Supreme Court on points of law.

The “Commission for the Determination of the Concentration on the Media Market” ("KEK" - see B.1), in cooperation with the Landesmedienanstalten, has certain interventionist powers (see B.4) if TV programmes of a single operator which are broadcast nation-wide reach a threshold of 30% of market share. However, these powers are not designed to ensure competition per se, rather to ensure plurality of opinion in the media.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

(i) Telecommunications

The powers of the NRA under the *1996 Act* are both regulatory and supervisory. The NRAs powers include:

- requesting information and conducting on-site inspections of financial and business records of companies active on any given telecommunications market;
- adopting the national frequency use plan on the basis of the spectrum allocation plan and determining the terms of frequency allocation;
- awarding licences, setting the terms, and conducting the award proceedings, of licences; and
- requesting modifications to regulations.

Under Article 73 of the *1996 Act*, the Regulatory Council has the following advisory powers:

- proposal of the director to be nominated by the legislator;
- proposal of and application for measures concerning universal services and the safeguarding of general regulatory aims (such as the elimination of restraints on competition by cross-subsidies or the liberalisation of the telecoms sector);
- consent to certain decisions of the decision-making chamber concerning the award of licences (and frequencies) in case of scarcity of frequencies;
- right to be heard before the adoption of the frequency use plan under Article 46 of the 1996 Act;
- right to request information from the NRA; and
- advise on the annual report.

Under Article 73 of the *1996 Act*, the role of the Independent Decision-Making Chambers ("Beschlußkammern") within the NRA is to make the following decisions:

- award licences for scarce frequencies (Article 11 of the *1996 Act*);
- authorise fee structures and general terms of contact (Article 23);
- provision of universal services (Article 19 *et seq*);
- network access and interconnection (Article 33 *et seq.*); and
- allocation of frequencies, if there is more than one applicant.

Users can complain to the Independent Decision-Making Chambers, and the Chambers may initiate investigations and may seize evidence on these issues. Decisions must clearly articulate their reasons. Chambers can adopt interim measures. The Chambers may terminate the administrative procedure by an administrative decision. Some Chamber decisions require the consent of the Regulatory Council.

(ii) Broadcasting

The powers of the Federal Administration in the broadcasting sector include:

- checking the emissions of any radio transmitting station for compliance with international and national technical and operational provisions;
- closing down unauthorised radio transmitting station which may be a threat to the operation of licensed radio stations; and
- dealing with cases of harmful interference.

The Länders' "Landesmedienanstalten" grant broadcasting service licences and monitor (before and after the grant of a licence) whether or not the programme operator complies with the relevant provisions.

Specific functions are carried out by the KEK, mostly with respect to TV programmes which are broadcast throughout *Germany*. With respect to the licensing of such programmes, the Landesmedienanstalten refer questions about plurality of opinion to KEK. KEK's decision is binding, and can only be overruled by the KDLM upon request of the "Landesmedienanstalt" in charge of issuing the licence.

With respect to the control of influence on public opinion and accordingly to the control of a participating interest (see E.6) the KEK proposes to the broadcaster

concerned on behalf of the Landesmedienanstalt in charge certain measures to restore compliance with respect to provisions on consumer shares. In particular, the KEK may suggest that a TV broadcaster relinquishes a participating interest in other broadcast companies, or that it reduces its market position on related markets or that it initiates measures by the operators accountable to it (*e.g.*, accepting the obligation to broadcast "window-programmes" by independent third parties or to establish an Advisory Council consisting of representatives of different social groups). If an agreement in this respect is not reached or not carried out, licences must be withdrawn insofar as a predominant influence can no longer be justified.

For the purpose of carrying out these functions, the powers of the KEK include:

- requests for information, including sworn documents and files;
- hearing of the parties, of witnesses and experts; and
- on-site inspections upon judicial warrant.

Furthermore, the KEK drafts a report on concentration in the media sector, which is published by the Landesmedienanstalten either every three years or upon the request of the Länder. The KEK compiles a list of programmes which are to be published annually. The KEK also monitors the TV market shares of all public and private programmes on behalf of the Landesmedienanstalten.

(iii) Publishing

Most Länder have incorporated provisions into their press laws which refer to the Criminal Code. Public prosecutors must initiate criminal procedures if, by means of a printed publication, the criminal code is infringed. There are criminal sanctions against editors and publishers who intentionally or through gross negligence fail to keep the publication free of "criminal content".

There are also criminal sanctions if certain conditions, which refer to the personal profile of the editor in charge (the responsible editor) are disregarded.

Administrative fines can be set by the public order authority if requirements are not met which concern:

- certain particulars of the editor and the publishers;
- the marking/identification of advertisements;
- corrective answers (counter-representations); and
- deliverance of obligatory items to certain public libraries.

The list is not designed to be comprehensive, since the elements of the offences differ as between Länder in both scope and number.

(5) *Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).*

(i) Telecommunications

The *1996 Act* provides in Article 82 for close cooperation between the NRA and the Federal Cartel Office, in particular for the exchange of information, the definition of operators with dominance or significant market power, and initial consultation. Article 83 also proposes cooperation with foreign regulatory authorities and international organisations (including the exchange of information).

(ii) Broadcasting

Over many years, the Länder have developed means to collaborate with each other over broadcasting issues. To provide similar conditions in all Länder, they enter into *Interstate Agreements*. Examples of such Agreements include:

- the *AOB Agreement* (see above); and
- the *Interstate Agreement on Media Services*, which came into force on 1 August 1997 (see above).

Every Landesmedienanstalt may complain to the Landesmedienanstalt in charge of licensing a programme to be broadcast nationally that the programme does not comply with the requirements of the *AOB*. The Landesmedienanstalt to receiving the complaint must inform the complainant of the measures taken.

Also, the Länder collaborate directly with other Member States and international organisations on broadcasting issues.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(i) Telecommunications

Following the adoption of the *1996 Act, Germany* had to adopt a series of Ordinances[11] implementing certain aspects of the *1996 Act*. The Ordinance on *Special Network Access* and the *Ordinance on Price Regulation* were adopted on 1 October 1996. The *Ordinance on Universal Services* was adopted on 7 February 1997. An *Ordinance on Consumer Protection* remains to be adopted. It will impose obligations on dominant operators (and will replace the current Ordinance referring mainly to DT) and is currently under discussion and is likely to be adopted by Spring 1998. Cabinet discussions are currently taking place about the exact composition of the NRA.

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11 *Telecommunication Service Provider Data Protection Ordinance.*
Telecommunication Traffic Surveillance Ordinance.
Telecommunication Consumer Protection Ordinance, which regulates specific obligations of DT.

(ii) Broadcasting

DT currently owns most of the CATV infrastructure in *Germany* and would like to extend its activities in the cable television sector. It would like to act not only as a distributor but also as a packager, to provide conditional access, decoders and user administration services. Certain broadcasters consider that DT should not be allowed to engage in these activities and this issue is currently under debate. The *AOB* was amended in 1996 to allow ARD and ZDF to broadcast thematic channels. Current discussions are taking place as to whether these public broadcasters should be allowed to offer Pay-TV and Pay-Per-View services.

The issue of new rules on media concentration is also high on the agenda. The *AOB* has been amended to introduce new rules on cross-media ownership. Under these new rules, an audience-share of 30% would trigger the application of rules limiting media concentration. The *AOB* amendments also establish a new Commission which serves as the review body to help taking decisions on media concentration (see also Chapter B.4).

There is also a proposal to create a new body which will monitor all licence applications for nationally distributed television programmes.

The *Media Acts* of the Länder contain rules relating to the use of the frequencies (see B.(1)), allowing the Länder to exercise control over broadcasting content. Discussions are currently taking place as to whether there is a need to provide more flexibility, in particular, by imposing a "must carry" obligation. This could be done by amending the *AOB*.

(iii) Publishing

The *Inter-State Treaty* on media services has an impact on the publishing sector since it applies to media services aimed at the general public such as electronic press. In addition, certain Länder have changed or are changing their rules on media concentration to allow the publishing sector easier access to the broadcasting sector.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

(i) Telecommunications

After the *1996 Act*, all dominant operators have the same obligations, except to the extent that voice telephony remains a reserved service until 1 January 1998. In

addition, both voice and data mobile communications services could be provided by the same operator, if it complies with the terms of the individual licences. The number of providers of mobile communications services is limited, mainly due to scarcity of spectrum.

(ii) Broadcasting

In the 1980s all the Länder adopted a "dual broadcasting system", whereby private broadcasters operate alongside established public broadcasting corporations. The *Media Acts* of the Länder grant private broadcasters a right to receive a broadcasting licence if they meet the eligibility conditions. In addition, television programmes are prioritised by the Landesmedienantalten on the basis of the *Media Acts* of the respective Länder. Public broadcasters have the right to access high priority programmes first.

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

(i) Telecommunications

Under the *1996 Act*, all telecommunications services other than public voice telephony are liberalised, including the operation of transmission lines[12] for the provision of telecommunication services to the public. Public voice telephony will be liberalised by 1 January 1998.

The *1996 Act* imposes the same obligations on all operators with significant market power, except to the extent that public voice telephony remained reserved until 1 January 1998.

(ii) Broadcasting

DT's legal predecessor was authorised under the *Telecommunications Act of 1983* to build and operate the cable television infrastructure. This Act granted a priority right to install infrastructure in each new franchise area. In fact, local operators have established networks in those areas where DT declined to install infrastructure. Subsequently, DT's rights have been limited. It had to reply to any request for connection within one month and provide the necessary transmission lines within another four months. If these times are not met, any other company may install the necessary cable. The BMPT can also grant rights, after having consulted DT, to enable innovations in telecommunications which would otherwise be delayed. This enables the Federal Authorities to allow projects to the extent that they do not infringe the voice and network priorities of DT. DT's network priority will end on 1 January 1998.

12 Namely, telecommunications infrastructure based on cable or radio links, either point-to-point or point-to-multipoint, with a given bandwidth or bit rate.

Because of the obligation on public broadcasters to reach all users, they have a special right to access frequencies, if there is a shortage of capacity in the terrestrial or cable television sectors (see H(1)).

Finally, programmes must be prioritised in the order determined by the Landesdienantalten. Public broadcasters have a special right to access high priority programmes first.

(iii) Publishing

Publishing is unregulated.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV.

(i) Telecommunications

While it appears that DT will simply perform its functions according to the terms of its current licence, other operators must acquire individual authorisations and licences. However, to promote competition, dominant operators are subject to a number of specific obligations, such as network access and pricing requirements. These requirements amount to practical discrimination against DT, since DT is currently the only dominant operator. Furthermore, DT is obligated to fulfill universal service obligations. (see D(2).

(ii) Broadcasting

The following differences exist between the regulatory treatment of incumbent broadcasters (public broadcasters) and new entrants (private broadcasters):

- public broadcasters do not require a specific licence, whereas private broadcasters must be licensed, and are regulated by their licence conditions;

- public broadcasters do not broadcast for a fixed "term"; while private broadcasters' licences are for terms of between two and 10 years (these licences can be extended for up to five years);

- public broadcasters must "meet basic public requirements"(*e.g.*, ensure that viewers and listeners receive a wide range of programmes, information and news);

- public broadcasters cannot provide pay-TV services or pay-per-view services;

- public broadcasters are scrutinised by independent bodies to ensure that they comply with their legal obligations, whereas private broadcasters are controlled by the "Landesmedienanstalt" of the Land where they are licensed;

- the main source of income for public broadcasters is the broadcasting user/receiver fee[13] (approximately 80%), note the other source of income being advertising (most private broadcasters are financed entirely by advertising; while few are also financed by viewer subscriptions);

- public broadcasters are restricted in relation to the amount of permitted advertising (*e.g.*, ZDF may advertise for 20 minutes per day, not after 8.00 PM); in contrast, advertising by private broadcasters must not exceed 20% of the daily emission time; spot advertising must not exceed 15% (see, for example, Article *22b of LandesrundfunkG North Rhine-Westphalia*);

- new private cable operators must negotiate with companies involved in the "packaging" of programmes or supplying decoders to provide their services economically;

- public broadcasters cannot provide teleshopping; and

- satellite broadcasting by public broadcasters is strictly regulated.

(4) Accounting and structural separation safeguards (current or planned).

(i) Telecommunications

Only operators with significant market power are subject to accounting obligations. They must implement an accounting system which is *appropriate* to ensure compliance with the interconnection costing principles (see *supra* at G).

Under Article 14 II of the *1996 Act*, appropriate obligations may be imposed by the NRA to ensure transparency, with a view to avoiding cross-subsidisation by DT. Transparency must be ensured between telecommunications services which both require a licence and are provided by an operator considered to be dominant, and other telecommunications services. Otherwise, there are no accounting separation requirements.

In cases where an operator holds a dominant position in a market other than the telecommunications market(s) in which it provides services, Article 14 I of the *1996 Act* requires the structural separation of its telecommunications activities. DT announced in early December 1997 that it would operate its cable activities through a structurally separate entity.

13 Licence fees are to be paid by everyone who possesses a serviceable radio or television set, irrespective of whether the set is actually utilised.

(ii) Broadcasting

There is no mandated structural separation in the broadcasting sector.

(iii) Publishing

There is no mandated structural separation in the publishing sector.

(5) Policy basis for regulation of incumbent carrier's services.

(i) Telecommunications

The *1996 Act* does not identify the policy basis for the regulation of DT. Under the *Telecommunication Consumer Protection Ordinance of 1995*, some principles can be identified, such as strict rules on restraints of competition, provision of equal opportunities and unbundled offers of monopoly services. More recently, the "significant market power" of DT is becoming the key criterion governing its regulation.

(ii) Broadcasting

The provisions of the *Constitution* guaranteeing free reporting by broadcasters are interpreted as requiring public broadcasters to "meet basic public requirements" ("Grundversorgung"), to offer basic television services to all citizens and to contribute to their integration with the German nation. Programmes should defend the democratic order.

There are provisions which require plurality of opinion to be safeguarded. No programme must exclusively represent or endorse one point of view, party, interest group, religious belief or ideology. Political and social groups must have adequate leave to speak in every full range programme. Minority interests are to be accommodated. Controversial issues of common interest should be dealt with.

(iii) Publishing

Publishing is not regulated.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

The *1996 Act* establishes a licensing regime with the following four classes:

1. Licences for the operation of transmission lines for mobile radio services for the public by the licensee or other parties (Licence Class 1: Mobile Radio Licence);

2. Licences for the operation of transmission lines for satellite services for the public by the licensee or other parties (Licence Class 2: satellite Licence);

3. Licences for the operation[14] of transmission lines for telecommunications services (which are not mobile or satellite services) for the public by the licensee or other parties (Licence Class 3); and

4. Licences for voice telephony[15] supplied over self-operated telecommunications networks (Licence Class 4).

The licence for the provision of voice telephony services does not include an authorisation to establish the necessary infrastructure to provide such services; a separate licence is required for this purpose, unless otherwise decided by the NRA.

(ii) Broadcasting

Under Article 19(1) of the *AOB* private operators must be licensed to broadcast programmes under the laws of the Länder. The details for licensing are set out in the *Media Acts* of the Länder. Media services are in general not subject to the broadcasting provisions. However, as outlined earlier (section A.4), there are certain exceptions.

In the television broadcasting sector, there is no difference between terrestrial, cable and satellite services for the purpose of the licensing frameworks. Individual licences must be obtained from the "Landesmedienanstalten" by private operators, irrespective of whether the programme is to be broadcast

[14] See Article 2 of the *Services Directive*.

[15] Voice telephony is defined as the commercial provision for the public of the direct transport and switching of voice in real-time to and from the network termination points of the public switched network so that any user can use the terminal equipment connected to such network termination point to communicate with another network termination point.

regionally of nationally.[16] The grant of licence depends on the availability of transmission capacity. Licensees are granted capacity either for an individual type of programme (*e.g.*, a licence for a children's programme, a licence for a thematic programme), or for a full range of programmes. However, it is understood that under the *1996 Act* (Article 47 III) the Federal Administration grants specific frequency licences once the media licence is issued. (Certain regional differences exist. For instance, in Westphalia, there are no licences issued exclusively to cable broadcasters).

(iii) Publishing

No permits are required in the publishing sector.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

Individual licences will be granted by the NRA (currently the BMPT).

(ii) Broadcasting

The Landesmedienanstalten grant licences for private terrestrial and satellite broadcasting services (public broadcasters are not licensed). The licence to operate broadcasting station transmission facilities for private operators or a cable TV network is currently granted by the BMPT and will be granted by the NRA as from 1998 (DT is licensed under the *Telecommunications Act of 1983*).

(iii) Publishing

Publishing is not licensed.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

(i) Telecommunications

A licence to provide voice telephony services does not include an authorisation to establish the necessary infrastructure and use it (or to allow third parties to use it); a separate licence is required for this purpose, unless otherwise decided by the NRA upon request.

[16] If the programme is to be broadcast nationwide, the applicant must negotiate the availability of frequency with every single Land. Frequency licences are granted separately by the federal authorities. However, the licence to operate the programme is granted by one Land only. Satellite frequencies are - by way of contrast - distributed nationwide, upon coordination between the Länder.

(ii) Broadcasting

The licence for the provision of terrestrial, cable and satellite broadcasting services does not authorise construction and operation of a private television broadcasting station or CATV network.

(4) Line-of-business restrictions under national law preventing: (i) Tos from providing cable TV services of "multimedia" services (and vice versa); (ii) Tos from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

There are no restrictions on the provision of cable TV services by DT. On the contrary, DT currently controls a large share of the cable market (*i.e.*, is the dominant operator), while the remainder is shared between very small operators. It announced in December 1997 that it would transfer its cable operations to a subsidiary in an attempt to establish some structural separation. DT currently distributes and broadcasts 36 TV programmes and 30 radio programmes on its cable TV network. DT's partial privatisation did not lead to the imposition of additional restrictions on its broadcasting services.

Satellite operators are unable to provide telecommunications services unless they can establish that the service will not undermine DT's voice and network monopolies.

There are no restrictions on provision of mobile telephony by DT. DT operates a system from Analogue Cellular Mobile Communications as well as the so-called "first" Licence (D-1) for GSM Mobile Communications via its structurally separate subsidiary, Telekom Mobile GmbH. DT's public voice telephony monopoly until 1 January 1998, preludes mobile operators from providing fixed services until then.

Utilities such as electricity producers, gas suppliers and waterworks are not subject to any particular restrictions on providing telecommunications services or cable TV services over alternative infrastructure. If they are dominant operators in markets other than telecommunications, they must maintain structural separation of their telecommunications operations.

(5) Regulatory restrictions on the type of entities which can be involved in content production.

There are no restrictions on DT or other telecommunications operators producing or distributing their own programming.

The *AOB* does not restrict holdings in broadcasting companies by press enterprises. Mergers between press enterprises and broadcasting operators are subject to general competition rules, including the provisions on merger control. The *AOB* also contains strict provisions for maintaining plurality of opinion and

avoiding media concentration. In addition, cross-ownership between broadcasting companies and the press is restricted by the *Media Acts* of most Länder,[17] as far as it threatens to create a "double monopoly"[18] at local or regional level. Concentration provisions prohibit press enterprises from acquiring a dominant position on the media market through shares in broadcasters.

Taking the *Media Act* of North Rhine-Westphalia as an example, the following entities must not be granted a service licence:

- moral persons established under public law (with the exception of churches and other religious communities and Jewish cultural communities);
- entities which are legal representatives for or associated with entities under the above bullet point;
- operators of which members of a Länder legislature or the federal legislature are representatives, or of which members of employees of public broadcasters are members;
- political parties and voter associations; and
- entities dependent on a moral person or a political party or voter association.

(6) Typical licence conditions.

(i) Telecommunications

Under the *1996 Act*, licences are granted on written request. However, a licence must not be granted if there is reasonable doubt concerning the applicant's efficiency, reliability or his specialised knowledge, if it would threaten the public order or if the NRA does not allot the necessary Radio Frequencies.

Under the *1996 Act*, there are no exclusive licences, since exclusivity would threaten the introduction of competition. Network coverage must be specified in the application (there is a distinction between line licences and area licences). Licences are transferable, subject to the NRA's prior approval.

Changes in the licensee's corporate structure have to be notified to the NRA. The number of licences can be limited in the case of scarcity of frequencies.

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17 The exceptions are the Länder of Hesse, Lower Saxony and Schlesweg-Holstein.

18 The idea is to avoid that a company which holds a dominant position in the daily press in a given area could, by exerting a controlling influence over programme broadcast in the same area, acquire a dominant position in the area of formation of public opinion.

Service licences are unbundled, as far as they require different types of licences as outlined under E1. However, different kinds of licences can be awarded to one operator.

There are obligations on voice telephony service providers to disclose subscriber data to other voice telephony operators for the purpose of offering inquiry services. Voice telephony operators must provide emergency call facilities to subscribers, free. Licences are of unlimited duration. The licence may be withdrawn if the licensee does not comply with his licence obligations or obligations under the *1996 Act* or if an assignee does not comply with efficiency, reliability or specialised knowledge or public order criteria.

There are no foreign ownership or cross-media ownership restrictions. However, operators who are dominant in a market other than a telecommunications market must provide for structural separation.

(ii) Broadcasting

Television

The *AOB* and the *Media Acts* of the Länder contain provisions about admission conditions (who may apply), procedures for grant, licence conditions, conditions of revocation and the types of licences available. The provisions of the different *Media Acts* are comparable in this respect. As outlined above, media services which are offered on-line are generally not subject to the broadcasting provisions.

The Landesmedienanstalten can refuse to grant licences, *inter alia*, on the grounds of lack of capacity, the fact that the structure of the applicant does not meet certain minimum requirements or that its solvency falls below certain minimum levels. The licences are not assignable.

Private television broadcasters pay a small administrative fee on filing an application (between 2,000 and 10,000 DM)[19] and, in some of the Länder, a small annual contribution to the costs of the Landesmedienstalten. The duration of the licence for private television broadcasters varies between four and 10 years. Licences can be extended in practice, by up to five years. Licences in the satellite television sector are granted virtually on demand if the applicant meets the necessary objective conditions. Priorities for content over cable are set by the Landesmediensanstalten, to ensure that plurality requirements are met. However, fees for the use of the cable TV network and for transmission facilities are negotiated between the facility operator and service provider.

Fees for the use of the cable TV network are based on the level of investment involved. This depends on the number of customers which can be reached.

19 The level of administration fees is currently being reviewed. The "Landesmedienanstalten" have proposed to their respective Legislators to mandate an up-front fee up to 200,000 DM.

Access to the cable TV network can be terminated by the Landesmediananstalt under certain conditions for the sake of a higher degree of plurality (if that would result from different programmes).

The *AOB* contains provisions to ensure plurality of opinion by fixing limits in media concentration. Under the latest amendment, specific requirements are set out for TV programmes which are broadcast throughout *Germany*. Irrespective of their legal form, broadcasters have to present an annual financial statement and an annual report that accord with the rules under the *Commercial Code* which refer to "large moral companies". Television programmes which are broadcast terrestrially throughout *Germany* include "window-programmes" according to the *Media Acts* of the Länder.

A single undertaking may by itself or through undertakings which are accountable to it operate an indefinite number of TV programmes which are broadcast throughout *Germany* unless the undertaking achieves a "predominant influence on public opinion". A predominant influence on public opinion is assumed to result if the programmes accountable[20] to a single operator reach a market share of 30% or more or (if the customer share is slightly below this threshold) the undertaking's activities on a "relevant media and related markets", together with its TV activities, amount to a predominant influence on public opinion. If an undertaking is deemed to exercise a predominant influence on public opinion:

- no further TV licence must be granted to it; and
- measures are sketched out under section B.4 are to be taken by the KEK in order to provide for compliance with the "public opinion required".

Envisaged changes in participating interests or in other influences are to be notified to the Landesmedienanstalt granting the licence. If such changes are carried out prior to notification and if they can not be approved, the licence must be withdrawn. Not all of the Länder have adopted amendments to the *Media Acts* in accordance with the *AOB* amendments. It is understood that there is a discussion[21] within the Länder Parliaments whether (and how) rules equivalent to those contained in the *AOB* for national television should also be adopted for regional and local television. Currently, there are rules in the *Media Acts* of the Länder[22] which diverge from the principles of the *AOB*.

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20 Programmes are accountable to an undertaking, as far as they are operated by the undertaking or by a third party to which the undertaking holds participating interests or voting rights of at least 25%. Also programmes from third parties to which the undertaking holds only indirect interests can be accountable under certain circumstances. Programmes can become accountable if the undertaking exercises decisive influence on the programme structure or if the undertaking contributes to the programme by pre-manufactured emissions to a large extent. Influence exercised due to relationships between relatives is to be taken into account as well. Enterprises based outside of *Germany* have to be taken into account.

21 A final decision is not expected before 1998 in Northshine - Westphalia.

22 According to those rules, a broadcaster cannot transmit nationally more than two programmes on both sound radio and television and, in each case, only one "full programme" or one

There are no foreign ownership limitations, except that a licensee must have an establishment in *Germany*. A public station which broadcasts regionally can only invest in similar business (*i.e.*, other broadcasters or industries which employ related technologies).

Licences in the cable television sector are granted for a franchise area. The licensee can apply to the BMPT for an extension of the geographic coverage of the licence.

Radio

Individual licences, including those for private satellite communications networks, are subject to a licence fee (7,000-18,000 DM up-front fee in case of North Rhine-Westphalia).

General licences for terminal equipment are granted if the probability of generating radio interference is very low and compliance with production technical standards can be guaranteed by type approval and production control. General licences are issued without charge.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Under the *Telecommunications Act for the Reorganisation of the Postal Sector* of 14 September 1994 (which is in force until 31 December 1997), DT's tariffs for the provision of services within the monopoly area must be approved by the NRA.[23] It must base its decisions on the need to achieve certain goals in relation to the relevant monopolised services. Failure on the part of the NRA to make a decision within three weeks of the date of the filing results in automatic approval of the tariffs. Those approvals are valid until 31 December 2002, at the latest. After expiry of the approval, the *1996 Act* will apply.

In addition, the draft Consumer Protection Ordinance obliges DT to include in its contractual terms information to enable a user to determine which rates apply to given "parts" of a service. This provision is designed to ensure the transparency of DT's rates.

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information-oriented specialised programme. Licences for "full programmes" may only be granted to a broadcaster with a pluralistic structure (i.e. the share of each shareholder is less than 50%). If a person holds more than 25% of the shares of a "full programme" or of an information-oriented specialised programme but less than 50% (or is able to exert major influence in any other way) he may hold an interest in no more than two other broadcasters of such programmes.

23 Namely, prices for the provision of telecommunications transmission lines and basic public voice telephony.

The NRA must approve the specific tariffs for the provision of transmission capacity and voice telephony services offered by a dominant operator.[24] Regulatory approval of these tariffs is on the basis of the costs incurred for the efficient provision of the services in question or, alternatively, is measured against the average price for a bundle of telecommunications services (established by Orders of the Federal Legislature). A decision must be taken by the NRA within six weeks of the referral (with the possibility of extending this period for an additional four weeks). The dominant operator is obliged to file detailed information on its tariffs and service prices.

In addition, the *1996 Act* provides for the residual application of German competition rules. The NRA may, therefore, at any time take action against a dominant operator for tariffs reflecting market dominance, illegal discounts or discriminatory charges.[25] This occurred during 1996-1997, with successful challenges being brought against DT's discriminatory business tariffs, both before the European Commission and the German Cartel Office.

(2) New pricing principles for the competitive market environment.

Under the 1996 Act, charges for the provision of transmission capacity and voice telephony services offered by a dominant operator are subject to regulatory approval.

The basic principle is that charges for licensed services must not reflect market dominance, illegal discounts or discrimination. Dominant operators are obliged to price licensed services on the basis of cost orientation in the efficient provision of the service. The NRA is at any time entitled to review any charges which do not comply with these principles. Any individual contract containing rates other than the approved rates may be declared by the NRA to be unenforceable; this should not, in principle, prevent any operator from granting negotiated discounts to large users insofar as, and to the extent that, they do not prejudice the competitive opportunities of other companies in the market.

Mobile operators (both for voice and data mobile communications) are obliged to publish their tariffs and inform the NRA prior to their application or modification.

(3) Control of tariff packages which can be offered to customers. Interpretation of the rules (if any) preventing discrimination, bundling and cross-subsidisation interpreted in the light of tariff flexibility.

Service providers, other than dominant operators offering a basic voice telephony, are free to set their own prices (subject to the competition rules).

24 See Article 25 of the *1996 Act*.

25 See articles 24 and 30 of the *1996 Act*. In addition, an action brought against a dominant operator may result in the complainant invoking the terms of Article 86 of the EC Treaty, which is directly applicable before the German courts.

(4) *Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.*

There are no specific regulations applicable to tariff packages for Internet access. The Federal law on information and communication services amends the Price Indication Act to ensure that the provisions of this Act requiring indication of prices charged apply. Prices for the ongoing use of a service on the Internet have to be made available to the user, free of charge. The law on information and communication services does not regulate the tariffs for Internet access services.

G. Network Interconnection and Access to Service Providers

(1) *Interconnect arrangements and charges - express regulation or individual negotiation.*

Under the 1996 Act, terms and conditions for interconnection are commercially negotiated by the parties. Articles 36 and 37 of the 1996 Act impose a general obligation on operators of public telecommunications networks to negotiate in good faith, interconnection agreements with other network operators. Each party can call upon the NRA to resolve a dispute, if agreement cannot be reached. The NRA must direct the network operator to grant the requested interconnection on appropriate terms, while taking into account the interests of users and the freedom of each carrier to configure its own network. The NRA cannot intervene on its own initiative, except where there is an abuse of a dominant position.

(2) *Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".*

Special obligations are placed on dominant operators of public telecommunications networks. The test of dominance is in Article 22 of the GWB, as interpreted by the Federal Cartel Office (see B.3). A dominant operator of a public telecommunications network must grant any competitor non-discriminatory access to its network (Article 35 (I) of the 1996 Act), or to parts thereof. However, access may be refused "when objectively justified" (*e.g.*, because of non-compliance with essential requirements).

In cases where Special Network Access ("SNA") exceeding the conditions of the standard offer[26] is requested, and the parties are not capable of reaching an agreement, the NRA may act as a broker between hem. If the parties still do not reach agreement the NRA may, on request, adopt a decision within six weeks of the referral (with the possibility of a four week extension). If SNA is denied on

[26] In Article 1 of the *Ordinance on Special Network Access*, interconnection is mentioned as an example of SNA.

the basis of "essential requirements", the intervention of the NRA may be requested to ensure that the claim is objectively justifiable.

Dominant operators of public telecommunications networks are also obliged to submit their standard offers for access to their networks to the NRA.

(3) Precise obligations currently placed on the interconnecting operators.

Conceptually, issues of interconnection and network access are on the whole treated identically. Consequently, "interconnection" goes well beyond mere interconnection of telecommunications networks ("any-to-any interconnection"). Under the *1996 Act* (Article 3, No. 24), "interconnection" means network access establishing the physical and logical connection of telecommunications networks to allow users connected to different networks to communicate directly or indirectly. This includes the interconnection of private corporate networks to public telecommunications networks, the interconnection of public networks and access to service providers to public telecommunications networks. Current discussions center on the type of services that should be subject to interconnection rules.

The interconnection of mobile networks, although subject to the principles under the *1996 Act*, is subject to sector-specific interconnection principles. Prior to the *1996 Act*, a limited number of licences were granted for the provision of mobile communications services. Provisions on interconnection were included in the licence conditions and their implementation was made subject to regulatory intervention, if the parties were not able to reach agreement.

Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated).

The *1996 Act* and accompanying Ordinances do not specify where interconnection is to be made in the network hierarchy. However, a dominant operator is implicitly required to provide interconnection (including unbundled interconnection) at any requested point in its network hierarchy if the failure to do so cannot be objectively justified or where it would result in discrimination against the party requesting interconnection.[27]

It is understood, from Ministry representatives, that the obligation to grant unbundled services includes the right to access a specific point of interconnection.

[27] Article 3 of the *Ordinance on Special Network Access* ("*SNA Ordinance*") mandates that a dominant operator has to offer the service which is asked for at an appropriate interface on the condition that he would award to himself with respect to the service in question. The operator must grant physical access to the necessary facilities on his premises.

Unbundled access to internal network functions.

Dominant operators must grant unbundled access to internal network functions so that no unrequired services have to be accepted. Unbundled access must be granted to all parts of the network, including access to end user access facilities. The obligation to grant access is excluded if the operator proves that the refusal is objectively justified (*e.g.*, the requesting party has failed to comply with essential requirements, as defined in the EU *ONP Framework Directive*).[28] Moreover, DT must offer its monopoly services unbundled, on market demand (Article 7 *TKV*) .[29]

Dominant telecommunications operators are also obliged to grant SNA upon request. DT and other telecommunications operators are currently disputing the types of services that should be subject to rules on SNA. Although SNA is not defined in the regulations,[30] it is understood that the concept applies to services which aim to offer the use of transmission facilities per se and certain services, (*e.g.*, "0800" numbers).[31]

The onus of proof is on the party requesting SNA to prove its reliability and to show that it is technically able to provide the services for which access is requested. However, operators licensed for the provision of telecommunications services do not bear this burden of proof.

Unbundled access to the local loop.

According to officials within the NRA, DT was obliged to provide access to the local loop even under the previous regulatory regime. The *Network Access Ordinance* requires that access should be granted on equal economic, technical and operational conditions. One element of that access is access to the local loop.

Equal Access.

The *1996 Act* contains elements which can be considered to establish a framework which is conducive to the provision of equal access[32] in light of the following factors:

- the obligation on dominant operators to grant interconnection at the requested points of network hierarchy with the degree of unbundling

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28 Articles 33(1) and 35 of the *1996 Act* and Article 5 of the *SNA Ordinance.*

29 *Telecommunication Consumer Protection Ordinance* (Article 7 *TKV*).

30 According to Article 1 II *SNA Ordinance*, SNA awards the use of transmission lines by users who ask for the SNA service as providers of telecommunications services or network operators for the purpose of offering telecommunications services

31 Article 8 of the *SNA Ordinance.*

32 This regulatory framework still requires a significant amount of implementing legislation and practical experience in order that the implementation of these regulatory principles for equal access could be regarded as being, at least partially, achieve.

requested, provided that the conditions of Articles 33 and 35 of the *1996 Act* are complied with;

- the prohibition against dominant operators discriminating against parties seeking network access, unless it is "objectively justified";

- the fact that the NRA manages the National Numbering Plan and ensures that sufficient numbering space is available to new operators within the practical limitations flowing from the fact that numbers are a scarce resource;[33] and

- the obligation on dominant operators of public telecommunications networks to ensure that users may select their network operator on non-discriminatory conditions, in particular by specifying in advance the carriers to which they wish their calls to be routinely directed (pre-subscription) or by dialling an access code.

Technical requirements and standards.

Interconnection interfaces and services must comply with "European standards". In addition, dominant operators must comply with the compulsory standards set under Article 10 of the *ONP Framework Directive*.[34]

The *TKV* (Telecommunications customer protection Ordinance), obliges DT to provide state-of-the-art transmission lines for leased lines. Transmission lines must also comply with European technical standards. DT is also obligated to provide certain types of transmission lines.[35]

No distinction is drawn between public and private networks or between fixed, mobile or satellite networks in regard to points of interconnection.[36] In all cases, dominant operators are obliged to provide access on the basis of European standards, as defined in Article 10 of the *ONP Framework Directive*. Where there are no European standards, access to interfaces conform to German public standards or any other relevant standards. In any event, access may not be restricted for purposes other than ensuring compliance with "essential requirements".

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33 If a network operator provides only a long-distance service, relying on the Public Telecommunications Operator's local network at both the originating and terminating end of the call, then access to numbers is not an issue.

34 This provision of the *1996 Act* should be regarded as being designed to facilitate service inter-operability and interconnection to other networks.

35 Article 23 of the *TKV Ordinance*.

36 See Articles 33, 34 and 35 of the *1996 Act*.

Quality of service commitments required.

Quality of service is a matter for commercial negotiation between the parties, subject to the intervention of the NRA if the parties cannot reach agreement. It is also governed by the general principle of non-discrimination, a concept drawn from the 1996 Act. DT must allow physical collocation with its interfaces to facilitate offering unbundled services on the conditions on which it supplies itself. It can be argued that these requirements also refer to quality standards.

DT's leased transmission line quality must comply with state-of-the-art technical requirements.[37] DT may not discriminate against a third party in relation to the quality or the technical performance of services.

Is there a preferred formula or charging standard which is prescribed under national law for interconnection charges? If so, are there any particular methods by which these charges are calculated? Can interconnection charges differ according to whether or not interconnection is sought from a network operator or service provider?

Under the existing legal regime, charges for interconnection to DT's network are based on the costs of providing efficient service. However, DT is prevented from including any Access Deficit Charge for the provision of a Universal Service in the price for transmission capacity (including a switched connection to the PSTN).

The 1996 Act and the Price Regulation Ordinance oblige dominant operators to price interconnection on costs incurred in the efficient provision of the service. Costing should be based on Long Run Average Incremental Costs ("LRAIC") plus an appropriate mark-up for "common costs" (as far as these costs are necessary for the service) and a reasonable return on investment. There is no price cap on interconnect services which are provided with other kinds of service. Different interconnection services should not be covered by a price cap before 1 January 2000.

Regulatory approval by the NRA of the standard terms and conditions for interconnection with dominant operators includes the approval of interconnection charges. This is intended to prevent the distortion of interconnection charges, as is the residual application of general competition rules.

Information disclosure obligations.

Under the 1996 Act, this is a matter for the commercial negotiation of the parties. Regulatory intervention is possible in certain circumstances. The requirement to provide non-discriminatory access to the network of a dominant operator would appear to include the necessary disclosure of information, subject to the protection of confidentiality. Moreover, dominant operators must, on request, provide those seeking SNA with information on the use of network and service offering.

37 According to section 23 of the *TKV Ordinance*.

Article 14 of the TKV Ordinance requires DT to publish specified amounts of information to customers about leased lines. The TKV Ordinance also requires customers to be allowed to obtain complete information on technical interfaces, standards and any other technical information necessary to connect to the PSTN.

The NRA's Official Journal indicates where and when the user can examine an SNA agreement. However, parties may make specific provisions (*i.e.* in those that contain business secrets) unavailable to the public. The NRA publishes in its Official Journal provisions which are likely to appear in a number of SNA agreements. A dominant operator must incorporate those provisions into its general terms.

The regulatory framework for the protection of personal data is established under the 1996 Act and the Data Protection Ordinance. The 1996 Act sets out the general principle that the content and detailed circumstances of telecommunications, including whether or not a person has been involved in any given transmission, are to be kept confidential. This confidentiality extends also to unsuccessful call attempts. Confidentiality and data protection obligations are imposed on those who provide or assist in the commercial provision of telecommunications services, even after the communication occurs. An exception exists for disclosure that is strictly necessary for the commercial provision of the services.

In addition, operators of telecommunications systems[38] for the commercial provision of telecommunications services are obliged to adopt technical measures to ensure the adequate protection and secrecy of telecommunications and personal data. Companies and persons commercially providing, or contributing to the provision of, telecommunications services may collect, process and use personal data to the extent that this is necessary for:

- the operation of the commercial telecommunications services[39] (Article 89 II No. 1 *1996 Act*);
- structuring of telecommunications services, provided that calling access data is used only with the access holder's consent and is de-personalised without undue delay (Article 89 II no. 2, *1996 Act*), or
- at the written request of a user, to keep account of user facilities and to identify users in cases of nuisance calls (Article 89 ii No. 3, *1996 Act*).

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38 Understood to mean any technical equipment of systems capable of sending, transmitting, switching, receiving, steering or controlling as messages identifiable electromagnetic or optical signals.

39 Understood to include the establishment of a contractual relation with the user, the establishment of a particular connection, verification of rates, identification and removal of faults, the prevention of unlawful use of the networks and/or any other facilities.

Even in these circumstances, only data which relates to the detailed circumstances of the telecommunications connection in question may be collected, processed or used. Any other message content may only be collected, processed or used when it is necessary for:

- the commercial provision of telecommunications services, when the processing of message content is a constituent part, for technical reasons, of the telecommunications service in question (Article 89 III/IV, *1996 Act*); or

- for the purposes of advertising, customer consulting or market research, if the customer has consented. This consent is deemed to have been granted if the customer does not object after being adequately informed (Article 89 VII of the *1996 Act*).

These principles are set out in detail under the *Data Protection Ordinance* which provides that only personal data <u>necessary</u> for the purposes of providing telecommunications services may be collected and processed. This information may include the numbers of the completed call number and the originating call number, access codes, and smart-card numbers when used. Operators are obliged to inform the customer accurately of the manner in which this information is to be used. Customer information <u>must</u> be deleted within one year of termination of the contract to provide the telecommunications services.

In addition, the following information may be collected on the connections established for the provision of interconnection services (Article 6 Abs. 6):

- the type of service provided;
- the duration of a given connection;
- the volume of traffic carried insofar as this is relevant for the fixing of interconnection prices; and
- the date on which any given call occurred.

Date relating to the establishment of a connection must be deleted when that connection is terminated, unless this information is necessary for the re-activation of the connection. Information necessary for the production of invoices may also be collected and processed.

Under the *Data Protection Ordinance*, operators may collect and process personal data that is necessary for the provision of telecommunications services, including the disclosure of this information to other operators in the context of interconnection. Users must be aware that their personal data is being processed. In addition, Article 9(1) of the *Data Protection Ordinance* provides that the service provider originating a call must provide to his subscriber (free of charge) the following caller ID alternatives:

- permanently excluding reference to his caller ID;

- always permitting his caller ID to be indicated (on a per-line basis); or
- where technically possible, the ability to determine on a call-by-call basis whether his caller ID should be indicated.

If a subscriber has indicated that his number should not appear in a telephone directory, it is presumed that the originating caller's ID must not be indicated.[40]

A revised *Data Protection Ordinance* is expected to be adopted during 1998. Requirements of the forthcoming *ISDN Data Protection Ordinance* are intended to be incorporated into the new legislation.

H. "Resource" Issues

(1) Frequencies.

(i) Telecommunications

Under the *1996 Act*, the Federal Legislature may stipulate the frequency band allocation in a table of frequency allocation (Article 45 of the *1996 Act*). The table contains the frequency bands allocated and a determination of the usage. The NRA can draw up a frequency usage plan (Article 46 of the *1996 Act*) on the basis of the table of frequency allocation. Licences for the operation of transmission lines do not include the right to use spectrum. Under Article 47 of the *1996 Act*, the NRA must formally decide to allocate specific frequencies to any given operator. Spectrum will be allocated if sufficient frequencies are available from the prescribed part of the table of frequency allocation (and possibly subject to a fee and annual contributions).

In contrast, if the number of licences within a specific class is limited *a priori* because of scarcity of frequencies, the procedures for the grant of the licence will include the allocation of the necessary spectrum following a public bidding procedure.

(ii) Broadcasting

Television

The *AOB* provides that the Länder are responsible for the assignment of broadcast service licences, for available frequencies. Service licences are granted only for available frequencies. Frequencies are ultimately allocated by the NRA. The *AOB* and the *Media Acts* of the Länder prescribe the use to be made of the frequencies allocated. In particular, these laws confer the right on ARD and ZDF to be allocated satellite channels. If there is sufficient capacity to meet demand, all applications for satellite channels should be granted. If there is

40 Article 9(2) of the *Data Protection Ordinance*.

a shortage of capacity, the Länder must seek a compromise between the parties or allocate the satellite channels on certain specific criteria. The *Media Acts* of the Länder also contain specific rules about the order of priority for the allocation of cable channels. Generally, public broadcasters have a priority right to receive cable capacity.

Radio

The BMPT is assisted in radio frequency matters by the BAPT. The allocation of frequency bands to the different radio services is contained in the table of frequency allocations. The current table was revised to take account of WARC 92 decisions. Changes of allocations to the individual users are discussed by the national frequency committee and proposed to the BMPT/BAPT for decision. All qualified parties interested in a frequency band are represented in the Frequency Committee and participate in the decision-making process.

(2) Numbering.

Numbers are allocated on a case-by-case basis by the NRA in accordance with the national numbering plan, and are subject to the payment of a fee. In addition, the NRA may make access to numbering resources conditional. The numbering regulations should be compatible with the general aims of telecommunications regulation in article 2 of the *1996 Act*, in that they should ensure equal opportunity and workable competition. Therefore, any numbering access rules should be non-discriminatory, and should facilitate dialling parity.

Operators of public telecommunications networks are obligated to ensure number portability by Article 43(5) of the *1996 Act*, in furtherance of CCITT Recommendation No. E 164 and in conformity with Community policy. However, the NRA can postpone the enforcement of this obligation where it cannot be fulfilled for technical reasons.

The number architecture is based on a CCITT Recommendation of 1964. Since 1 January 1997, the CCITT Recommendation allows a maximum of 15 digits, comprising two digits for the country code and another 13 digits for the area code and subscriber number. The numbering architecture follows an "open numbering-system".[41] National numbers usually have seven to 10 digits, with some exceptions. There are different systems of allocation for:

- connection to network operators' numbers;
- toll-free value-added services;
- international virtual private networks;
- inquiry services; and
- user groups.

[41] Namely, a separate national destination code (NDC) as well as a separate subscriber's number (SN) exist, which allows subscribers within one city to call one another without having to dial the NDC.

(3) Rights-of-Way.

At present, DT has automatic access to rights-of-way, the cost of which is borne by the consumer through taxation. Under the 1996 Act, operators of public networks may be granted the use of rights-of-way within the public domain free of charge in their individual licences. This provision is currently being challenged before the national Constitutional Court, since the Länder consider their constitutional right to self determination in local matters to be affected by it. It is generally understood that initial up-front fees may be payable to the local authorities, but that their ability to exact periodic payment thereafter will be prohibited.

Articles 50 to 58 of the 1996 Act deal with the use of public rights-of-way by licensed operators of telecommunications transmission lines. However, once a licence has been granted, an agreement must be reached with the affected municipal authorities for the day-to-day running of the transmission lines which may affect the interests of urban development. Changes must be made, at the operator's expense, if the installations interfere with the public domain.

The operation of telecommunications infrastructure must not cause disturbances to "special facilities" which may be used to carry traffic for the provision of telecommunications services (*e.g.*, canals, water and gas lines, electrical transmission lines). Re-location or modification of these facilities may only be requested in certain conditions (see Article 55 II of the 1996 Act), at the operator's cost.

On the other hand, special facilities must be installed if they do not disturb the operation of existing telecommunications infrastructure. Existing infrastructure may be modified, where necessary. The 1996 Act provides that, when modification of infrastructure is in the public interest, the operator must pay for the re-location or modification. The provisions on rights-of-way are the result of an internal jurisdictional compromise and, as a result, their application in practice may be unpredictable.

The owners of private property may not, under the 1996 Act, oppose the establishment and operation of telecommunications infrastructure if it does not limit or impair land use. Owners may, in certain circumstances, claim compensation.

Under the 1996 Act, the shared use of infrastructure may be mandated when installation of new infrastructure would either be impossible or disproportionately expensive, and if sharing is economically reasonable. In addition, any sharing of facilities must conform with the competition rules.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

The Bundesgerichtshof has held that an exclusive agreement between the two public broadcasters (ARD and ZDF) and the Deutsche Sportbund contravened the German competition rules.[42]

Licensing requirements for certain types of content that may restrict market entrants.

There are no current licensing practices which are considered to restrict market entry.

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

Terrestrial, cable and satellite operators must carry the programmes of ARD and ZDF. They must also carry programmes designated to be for the general public (the *AOB* or the *Media Acts* of the Länder are the sources of designation). Certain "must-carry" obligations apply. For the purpose of preventing the withdrawal of licences for certain programmes (see section B.4. above), the TV operator may accept the obligation to offer "window-programmes" to independent parties. Operators of full range programmes and information channels with an average of 10% of market share over one year must offer broadcasting time slots to independent parties. Operators of full range programmes broadcast throughout *Germany* or throughout a Land must provide, on the payment of a fee, appropriate broadcasting slots to:

- Protestant and Catholic churches, as well as to Jewish communities for the purpose of transmitting religious content; and
- political parties for the purpose of conducting campaigns with respect to elections to the German and the European Parliaments.

All broadcasters are under an obligation to provide transmission time for official governmental announcements. Political and social groups must be given adequate leave to speak in every full range programme.

Broadcasting operators must also keep programmes in the ranking orders determined by the Landesmedienanstalten.

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42 BGH in BGH2 110, at p. 371.

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

The content rules for CATV operators are contained in the Media Acts of the Länder. They often contain "local content" or "independent content" obligations. There is currently a debate about whether it is necessary to introduce more flexibility by allowing operators to partially select content, on economic criteria.

(5) "Gateway" Issues - Technologies for Open Access.

Equal and non-discriminatory access to services which control access to TV services through decoders is mandated by Article 53 of the *AOB Agreement*.

(6) Internet Domain Names - Preferred regulatory approach.

Representatives of the BMPT attended the Geneva 28 February 1997 meeting during which a Memorandum of Understanding (MoU) on the generic top level Internet domain names was signed. The BMPT did not sign the MoU. In general, it takes the view that the regulation of Internet domain names present too many unresolved legal questions, which means that they are not readily susceptible to international agreement at this stage. However, case law makes it clear that Internet domain names should be treated in the same way as individuals' names. They are protected by civil laws. Internet domain names could only be regulated by legislation passed by the Federal Parliament.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

Under the 1996 Act, the following services fall within the definition of "universal service":

- Basic voice telephony with ISDN capabilities, based on a digital network, and with local-loop capacity of 3.1 kHz. The *Universal Service Ordinance* provides that universal service will also comprise services which are ancillary to core telephony, and which are provided on a fully liberalised basis (*i.e.*, that they are not subject to a licence requirement), including:
  - the provision of subscriber information, but only where it is relevant to the provision of voice telephony services, and where the subscriber has not opposed its dissemination;

  - the publication of telephone directories, where the information is available and the subscriber has not opposed its publication; and
  - the provision of public telephones.

- The provision of a minimum set of leased lines as defined in Annex II to the ONP Leased Lines Directive. The publication of information on supply conditions established by Article 4 of this Directive forms part of this service when the information includes:
  - the ordering procedure; and
  - the typical delivery period.

The price charged for the provision of these services must be reasonable and based on the actual cost of their efficient provision. Universal service should, in all instances, be provided at an "affordable price". Affordability is measured against the average cost to a household outside a Central Business Districts.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

Under the present regime, DT is obliged to provide (and bear the financial burden of) a national universal telephony service. Under the 1996 Act, the system for the provision of universal service after 1 January 1998 has been fundamentally re-oriented. The general principle established under the 1996 Act is that no operator will be under an absolute legal obligation to provide universal service. However, it is presumed that universal service will still be provided by DT in the future.

The 1996 Act presumes that the identity of the universal service provider should be determined by market forces. The provision of universal service by a particular operator is only mandated where the NRA considers that there has been a "market failure" or believes that universal services will not be adequately provided in a given geographical and product market, and no operator declares itself willing to provide the services. Only in these circumstances can the NRA initiate an open tender procedure, under which it invites offers for the provision of the relevant services in a geographic area. If no suitable offers are forthcoming, the NRA may impose the obligation to provide the services on dominant operators. In principle, operators obliged (or selected) to provide universal service must bear the financial burden of its provision unless they can prove that it results in a loss (which the operator cannot afford). Compensation for the deficit will only be provided after an assessment of the cost of provision, based on set financial criteria.

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GREECE

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

A regulatory distinction is drawn between these services in *Law 2246* of 1994 regarding the organisation and operation of the telecommunications sector ("*Law 2246*"). It defines "telecommunications" as follows:

"*the switching, transmission or reception of marks, signals, text, images, sounds or information of any kind, which is effected through wired, optical, radio-electric or other electromagnetic systems*".

Law 2246 defines "telecommunications services" as those services which comprise, totally or partially, the transmission and routing of signals in a telecommunications network through telecommunication procedures, excluding radio and TV emissions.

Broadcasting and audiovisual services are distinguished clearly from telecommunications services in the broadcasting laws and regulations.

In *Law 1730* of 1987 regarding Hellenic Radio Television S.A. ("ERT"), ("Law 1730"), the Greek State conferred on ERT an exclusive "radio-television (broadcasting) privilege". This privilege includes transmission of any sounds and images from any point on Greek territory (land, sea and air), using broadcasting methods, intended for reception, either by the public or through special closed (wired or any other type), circuits. The privilege extends to the installation of broadcasting and television stations (*i.e.*, transmitters, transmitter masts, terrestrial relay stations via satellite, wire circuits, cable transmission by any method and applications of technology for transmission of sound and images).

Furthermore, Article 2 of *P.D. 236/1992*, implementing Council Directive 89/552/EC, replicates the definition of the term "TV broadcasting".

There is no proposal to alter the current legal regime.

(2) *Regulatory distinctions between types of telecommunications and broadcasting services.*

A distinction is drawn between the provision of services and the operation of networks by *Law 2246*. For example, the provision of services is distinguished from the operation of networks in fixed link and satellite communications. The operation of networks is subject to stricter regulatory requirements, such as the limits on the number of operators, line-of-business restrictions, and so forth.

Law 2246 defines voice and data communications as follows :

"Voice telephony services" are the commercial exploitation of the direct transmission and switching of voice in real time from and to terminal points of a public switched network, which enables each user to use his terminal equipment and is connected to the network in order to communicate with another terminal point.

"Data services" (by switching packets of data or circuits) are the provision, on a commercial basis to the public at large, of the direct transmission and switching of data through one or more switched public networks, which connects to terminal equipment connected to a termination point of a telecommunications network and communicates with other terminal equipment connected to another termination point of the telecommunications network.

Fixed-link voice telephony and mobile telephony (both GSM and DCS-1800 systems) are reserved to a limited number of operators. Voice telephony is reserved to the Greek PTO ("OTE") until 2001. GSM mobile services are reserved to the two private operators (PANAFON and TELESTET) and DCS-1800 to COSMOTE, a joint venture subsidiary of OTE, with a minority shareholding (30%) by the Norwegian operator Telnor. In contrast, data communications are liberalised and may be freely provided, subject to regulatory requirements.

(3) *Regulations of Internet services and other on-line services.*

Internet and other on-line services are not specifically regulated. They fall within the existing telecommunications regulatory scheme. Following the abolition of the restriction on the capacity of leased lines by *Law 2465* of 1997 ("*Law 2465*"), services including (but not limited to) e-mail, audiotext, access to data base services and general information services must be authorised by the telecommunication authorities, but need not be licensed. Additional administrative approvals may be required for other reasons (*e.g.*, for the use of radio-frequencies or satellite communications).

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

See A(3) above. New digitalised services also fall within the existing regulatory definition.

B. Regulatory Authorities in telecommunications/broadcasting /publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

As *Greece* is not a federal state, all legislation and implementation occurs at the national level.

The Ministry of Transport & Communications ("MTC") is responsible for telecommunications legislation. The Ministry of Press and Mass Media ("MPMM") is responsible for the broadcasting legislation. The relevant legislation reserves to the NRAs the initiative in proposing new legislation/regulations.

In addition to *Law 2246* and *Law 1730*, other legislation is also relevant. For example, *Law 2225* of 1994 (related to the establishment of the National Committee for the Protection of the Secrecy of Communications) applies in the context of violations of secrecy requirements.

There is no formal mechanism for dealing with jurisdictional disputes in the event of conflicting claims to jurisdiction. It remains to be seen how the authorities will interact where there is an overlap of powers or competencies.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.

NRAs have been established in the telecommunications and broadcasting/audiovisual sectors, but not in the self-regulated publishing sector. The National Telecommunications Commission ("EET") was re-established in 1994 by *Law 2246*. EET has wide ranging powers and responsibilities, including decision making powers (*e.g.*, granting of authorisations, approval of terminal equipment), advisory powers (*e.g.*, licensing, proposals for new legislation and amendment of existing legislation), enforcement powers (*e.g.*, violation of telecommunications regulations, anti-trust matters) and mediation powers (*i.e.*, it may serve as dispute-resolution forum). EET also liaises and acts as a contact point with the European Commission in Brussels for telecommunications matters.

The National Council of Radio and Television ("NCRT") was established in 1989 by *Law 1866 of 1989* ("*Law 1866*"), as subsequently amended by *Laws 2173 of 1993 and 2328 of 1995* ("*Law 2328*").

NCRT's broadcasting powers are as follows:

- it supervises the radio and TV sectors to ensure compliance with the general principles established by the Greek Constitution;
- it issues codes of conduct for the operators in the broadcasting/audiovisual sectors;
- it considers the award of television and radio station licences. The licences are issued by MPMM, but only after the consenting opinion of NCRT; and
- it has enforcement powers over the respective operators and may impose fines for violations of the applicable regulations.

No change in the current regime is foreseen in the near future.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.

Greece is a party to the International Treaty of Paris, which assures nationals of other signatories (who have their residence or actual establishment in *Greece*) of the same protection against unfair competition practices, as that provided to Greek citizens. Bilateral treaties with *France*, *Germany*, *Austria* and the *USA* provide additional protection for nationals of these countries.

Protection against unfair competition is based on the general principle laid down by the *Commercial Code* (CC) that any act violating morality and used for competitive purposes in industrial, commercial or agricultural transactions is "unfair competition". More specifically, unfair competitive practices are regulated by *Law 146* of 1914 ("*Law 146*") concerning unfair competition. Anti-monopoly legislation is contained in *Law 703* of 1977 ("*Law 703*"), which deals with the control of monopolies and oligopolies and the protection of free competition. *Law 703* was amended by *Laws 1934 and 2000 of 1991* and *2296 of 1994.*

Under *Law 146*, the tort of unfair competition which, under certain conditions, may constitute a crime, can be committed by the following acts: (a) false advertisements; (b) public announcements that goods are sold below cost because of bankruptcy or winding-up, when there is no bankruptcy or winding-up; (c) defamation of competitor(s) for the purpose of competition; (d) use of a name, distinctive title or trademark of another firm; or (e) the abuse of a trade or industrial secret.

The anti-trust provisions of *Law 703* prohibit any agreement between undertakings or decision by an association of undertakings of any kind, which would result in

the prevention, restriction or distortion of competition. *Law 703* identifies the following as acts violating the anti-trust provision: direct or indirect fixing of purchase or sale prices or of other business terms; sharing of markets or sources of supplies; restriction or control of investments, products, markets or technical development; application of differential trading terms impeding competition; or tie-in arrangements (*i.e.*, contracts dependent on the acceptance of supplemental obligations by a contracting party).

Greek competition legislation was drafted to reproduce Community legislation and practice (*e.g.*, Articles 85 and 86 of the EC Treaty and associated Regulations), even before the accession of *Greece* in 1981 into the European Community.

The Competition Commission is the NRA responsible for the supervision and implementation of competition rules (applicable to both public and private enterprises).

Law 2246 specifically incorporates many of the enforcement powers of *Law 703* in the field of anti-trust (free competition) regulations. For example, EET officials have auditing and inspection powers over operators similar to those of the Competition Commission officials. In addition, the EET is responsible for the provision of all necessary information to the European Commission in Brussels for its annual report on competition. However, the language imposing this responsibility is ambiguous, raising some doubt as to whether such powers may be exercised to the exclusion of the national Competition Commission. It would be prudent to interpret the Law as requiring the authorities to cooperate, whilst the Competition Commission is ultimately responsible for sanctioning any violation of the competition rules. This potential conflict has not been tested to date.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

(i) The *EET*

EET's powers are summarised below.

Procedural:

- allocation of numbers or blocks of numbers to service providers and operators;
- allocation of frequencies to operators of radio-electric networks or radio-communication stations pursuant to the MTC's allocation and management plan;
- accept statements for the provision of certain telecommunications services; and

- grant type-approvals for terminal equipment and determines the procedures for issuing approvals, testing and accreditation.

Consultative:

- deliver opinions and makes proposals to the MTC for the grant, renewal, amendment, extension or revocation of licences or approvals under *Law 2246*;

- deliver opinions on the introduction or modification of telecommunication regulations on various matters (*e.g.*, public networks, licensing, compliance, internal functioning of EET, codes of conduct); and

- make proposals to any competent authority or person about telecommunications matters and makes public its opinion on any issue related to its operation and competence.

Control and Enforcement:

- check and assures the compliance of operators and service providers with the relevant laws. Broad powers include technical aspects of the provision of services, use of frequency spectrum, quality of services offered, competition regulation, reasonableness of tariffs, consumer protection and non-discriminatory treatment of users and telecommunications enterprises;

- check compliance of the telecommunications operators with the terms and conditions contained in their licences, concessions or statements of approval, as well as type-approvals for terminal or other equipment; and

- ensure the compliance of operators with competition law provisions; to this end, EET may order the infringing party to cease infringement and impose fines, which are pecuniary penalties of an administrative (not penal) nature. EET officials may raid the business premises of any telecommunications enterprise, audit their books and data and examine employees and other witnesses (officials have powers equivalent to a tax auditor); if EET officials discover the commission of a crime or any violation of the legislation subject to the control of a judicial body or another public authority, the EET may refer the matter to the attention of the relevant authority, to allow it to take necessary legal action.

Miscellaneous:

- the EET must report to the Commission any draft of national legislation setting technical features and specifications for interconnecting public networks and it must also provide the information for the drafting of the Commission's annual report on competition in the telecommunications markets; and

- the EET may offer its services for resolving disputes between operators, between operators and the State and between operators and users. EET has recently acted as mediator to a dispute between the fixed-line incumbent operator, OTE, and the GSM operators over interconnection fees.

Law 2246 establishes a two-tier system of penalties for violations. Penal sanctions are imposed for two sets of violations:

- provision of telecommunication services without the necessary licence, approval or statement. Offenders are subject to penalties of between 50 million Drs and 500 million (160,000 ECU to 1,600,000); and

- violation of the obligation to respect confidentiality, privacy, secrecy and intellectual property rights. The offender may be imprisoned for at least two years, and a penalty of between 5 million Drs to 20 million (16,000 ECU to 64,000) may be imposed. If the offender is an employee of a telecommunication enterprise, the minimum term of imprisonment will be three years and the fine at least 10 million Drs (32,000 ECU).

In addition, equipment can be confiscated. Proceeds from its liquidation belong to EET. EET also receives fines imposed on individuals or entities that are collected by other authorities or Courts for offences under *Law 2246*.

Administrative fines are imposed for the infringement of the applicable legislation or the terms and conditions of a licence, statement or approval. The fines are imposed after a hearing of the interested parties and a fully reasoned decision of EET. The fines range between Drs 10 million to 50 million (32,000 ECU to 160,000). EET decisions imposing fines are subject to judicial review and an appellant may file a petition in the administrative courts to that effect.

(ii) The NCTR

NCRT has the following powers and obligations:

- exercise direct control on behalf of the Greek State over the entire broadcasting sector to ensure impartiality, equal treatment and quality of the programmes pursuant to Article 15.2 of the *Greek Constitution*;

- issue Codes of Conduct;

- ensure operator compliance and enforce the relevant regulations issuing recommendations and/or by imposing fines on infringes;

- make proposals to the Minister about the members of the Board of ERT SA;

- provide opinions about licences for radio and TV stations by MPMM (*i.e.*, its approval is required for the Minister to issue the licence); and

- issue its own internal Regulations.

Under *Law 1866*, the NCRT has the authority to:

- make recommendations or issue compliance warnings;

- impose fines ranging from 100,000 Drs to 50,000,000 (320,000 ECU to 160,000); or

- temporarily suspend the licences of a TV/radio station for up to three months

where there has been a violation of either *the Law* or any technical obligations laid down by MTC or any duties otherwise imposed or the terms of the concession agreements. In all of these cases, the NCRT has to issue a fully reasoned opinion. Fines are collected using the same procedure as that set out for the recovery of State revenues under the *Code of Collection of Public Revenue* ("KEDE").

Law 2328 made the following changes to NCRT's powers:

- the fines have been adjusted to range between 5.0 million and 500 million, (16,000 ECU to 1,600,000);

- the repeal of a licence of radio/TV station was added to the list of penalties;

- a more comprehensive listing of the various violations was introduced, including explicit reference to violations of the Community legislation and or international law, and violations concerning intellectual property;

- factors for evaluation of the significance of the violation were introduced, (*e.g.*, gravity of the infringement, size of the station, intention, etc.); and

- sanctions and fines are imposed by decision of MPMM (with the approval of NCRT) following a hearing of the interested party or parties. However, for the imposition of a temporary suspension, repeal of a licence or a fine exceeding 100,000,000 Drs (320,000 ECU), the opinion of NCRT must have been adopted by 2/3rds majority at least.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

A new Secretariat-General for Communications was established in the MTC (under *Law 2246*) to act as the national "Administration", as required by the 1982 National ITU Convention.

EET acts as liaison with the European Commission in Brussels and provides the information to it for its annual report on competition in the telecommunication markets. EET also notifies the European Commission of drafts of new legislation on technical aspects of interconnection with public networks.

The Competition Commission and the tax authorities may request information from other NRAs, where persons or entities from those countries are involved.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

New legislation on satellite communications was enacted in September 1997, *i.e.*, *P.D. 212/1997*, implementing Directive 94/46/EC, although the draft Regulations on satellite communications (which were prepared by EET) have been with the MTC level for over a year and are still pending.

There will also be a need for new legislation providing for full liberalisation of voice telephony and the abolition of OTE's exclusive rights in this respect (now scheduled for 2001, rather than 2003).

A reshuffling of TV broadcasting licences was recently announced. It appears that the Government intends to rationalise frequency allocation and reduce the number of national TV stations. However, no legislative time-frame for these measures has been made public. However, it appears that the new legislation on satellite communications will not be significantly delayed (*i.e.*, very early 1998). The other proposed changes may take significantly longer.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

In principle, telecommunications services that are liberalised in the Community may be provided by all operators, subject to the regulatory requirements laid down in the relevant legislation (which does not distinguish between new entrants

or the TO and its subsidiaries). New entrants are prevented from providing services that are reserved to OTE.

However, certain requirements may in practice work to the detriment of (foreign) new entrants. For example, there are "local establishment" requirements and a 25% foreign (non-EU) participation restriction in radio and TV enterprises.

The following restrictions on the provision of telecommunications services have been abolished:

- under previous legislation, the authorities authorising the provision of (liberalised) services had to consider whether such services were "compatible" with the "proper fulfilment of OTE's role", a condition designed solely to protect OTE's exclusive rights;
- the shares of the telecommunication company had to be registered;
- the local establishment requirement applied to entities established within the European Union, unless they had a local legal representative; and
- there was a narrow band limit of 2 x 64 Kbs for leased lines, with operators requiring a licence wherever that limit was exceeded, although the services *per se* may have needed only to be notified, not licensed.

Services that remain reserved to OTE are: voice telephony; public networks; leased lines; telegraphy and telex; certain mobile satellite services, including mobile marine services; and (vi) ISDN.

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

Under the licence awarded to OTE by *Presidential Decree 473 of 1995* ("*P.D. 473*") OTE retains exclusive rights for certain services (see (1)).

Some of these services (*e.g.*, satellite communications) are expected to be liberalised in the near future. Voice telephony and infrastructure (public network) will be liberalised by the year 2001, following negotiations between the Greek Government and the European Commission[43] (although this makes *Greece* the last country in the European Union to liberalise these services, it is earlier than initially planned, *i.e.*, 2003).

Hellenic Radio Television ("ERT") has exclusive rights to provide cable television. OTE has the right to carry the signals of the various TV and radio

43 Commission Decision of 18 June 1997 concerning the granting of additional implementation periods to *Greece* for the implementation of Commission Directives 90/388/EEC and 96/2/EC as regard full competition in the telecommunications markets, O.J. (1997) L 245/6 of 9 September 1997.

programmes over its network. However, cable television is underdeveloped in *Greece*. Currently, in addition to some minor local cable projects, there is only one pay TV station ("FILMNET") broadcasting nationally (using frequencies otherwise assigned to ERT under an agreement with the latter). The signal is encoded and requires the use of a decoder, which the subscriber has to buy.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulations, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.

There are no differences in regulatory treatment, in relation to services that are already liberalised.

Under *Law 2246*, radio and TV enterprises, whether public or private, may not provide voice telephony services over their networks. Telecommunications enterprises that provide services under a licence (*e.g.*, mobile operators, voice telephony) must be exclusively engaged in the supply of telecommunications. This "exclusivity" requirement, and the restrictions in *Law 2246*, create a clear-cut legal separation between telecommunication and broadcasting operators.

The exclusivity requirement does not prejudice OTE's special right to carry radio and TV signals. This right is expressed under the existing legislation, but will eventually be abolished as part of the European liberalisation process.

(4) Accounting and structural separation safeguards (current or planned).

The OTE concession requires OTE to keep separate accounts for each service provided. These accounts must satisfy the General Accounting Plan of the Ministry of Finance and the accounts must be submitted (along with the relevant auditors' reports) to the EET on an annual basis.

(5) Policy basis for regulation of incumbent carrier's services.

Consistent with Community legislation to this effect, the regulation of the incumbent telecommunications operator's actions will depend on whether it enjoys "significant market power" in affected markets. Currently, OTE is primarily regulated on the basis of its monopoly rights in certain sectors.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

Under *Law 2246* an individual licence is required for any telecommunications activity related to the establishment, operation and exploitation of a telecommunication or radio-electric network, as well as for the provision of voice telephony services, mobile services, satellite network and communication services and local radio networks of fixed links (between two local points) serving the needs of private operators, even if not connected with a public network. The provision of any other telecommunications service requires the submission of a declaration. The declaration is an announcement which a telecommunication enterprise files with the EET. This is required for data and Internet services and value added services (audiotext, e-mail, etc.). *Decision No. 74631* of 18 July 1995 of the Minister of Transport and Communications sets the procedural requirements and criteria for the acceptance of such statement by EET.

The provision of telecommunication services other than voice telephony to the public at large using radio-frequencies requires prior approval of the MTC (on consultation with the EET).

TV stations must be licensed. Licences are divided into three categories depending on territorial coverage: national, regional and local. Local radio stations which transmit over the FM band (87,5-107,7 MHz) must also be licensed.

No permits or authorisations are required for publishers.

(2) Regulatory or governmental authorities competent to award the relevant licences.

Telecommunications licences and approvals are granted by the MTC, following proposal by and consultation with the NTC. Statement are filed with the NTC. Broadcasting (TV and radio station) licences are granted by MPMM, with the consent of the NCRT.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

Article 1 para. 4 of *Law 2246* distinguishes between the following types of telecommunications activities:

- the establishment, operation and exploitation of the public telecommunications network; and

- the provision of any kind of telecommunication services.

The establishment and operation of a public network requires a licence. The provision of telecommunications services may require a licence or a statement, as mentioned above under (1).

A distinction is drawn between the ownership and operation of those facilities. MTC licences cannot be leased, transferred or co-exploited with third parties, without the prior approval of MTC. A similar restriction applies to material changes in the shareholding of the company and a change in control.

(4) Line-of-business restrictions under national law preventing: (i) TOs providing cable TV services or "multimedia" services (and vice versa); (ii) TOs providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

- Under *Law 2246,* telecommunications operators must only provide telecommunications services. Radio and TV broadcasters may not provide voice telephony services over their network. Currently, there is no cable operator in *Greece*. Cable TV services are provided exclusively by OTE and ERT, possibly contrary to Community legislation. *Greece* has promised to comply with Community regulations. Accordingly, new legislation can be expected. MTC's latest schedule identifies May 1998 as the date for compliance, but this may be extended further.

- OTE provides mobile telephony services (it is the holder of the only DCS-1800 licence). The two GSM operators may not provide fixed link voice telephony, but may provide other services, like value-added-services.

- The Government failed to adopt any national measures on alternative networks by 1st October 1997. However, public statements by the government suggest that the provision of these network services is now liberalised. Therefore, utilities may in theory use their networks to provide telecommunication services.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

Under Article 1.12 of *Law 2328*, an enterprise with a TV station licence (including a local station licence) may not assign responsibility for more than 30% of the whole of part of its monthly programme production or management. However, it may assign programming to independent producers.

(6) Typical licence conditions.

(i) Telecommunications

Article 3 para 4(b) of *Law 2246* imposes the following conditions on holders of telecommunications licences:

- the type, features, geographical coverage and adequacy of the telecommunication service provided ;
- the use of the assigned frequencies ;
- the rules and specifications of the operation of the telecommunication network and services ;
- the conditions for the quality, availability and stability for provision of the telecommunication services ;
- the terms of interconnection of the terminal equipment to the public network;
- the terms of access to and use of the public telecommunications network and of interoperability of the service with services already provided ;
- the requirements of national defence and public security;
- the duration of the licence ;
- the terms and conditions for the renewal, modification, suspension, revocation and termination of the licence ;
- the amount and the conditions of the guarantees to be paid by the holder for performance under the licence ;
- the obligation of the licence holder to provide assistance under the principles of Article 1 para 4 (j) (concerning universal service requirements) ;
- contributions to R&D, importation of know-how and training ;
- numbering issues ; and
- the obligation to publish tariffs.

Licences are personal and non-transferable. However, transfer may be effected with prior approval of the MTC, following a favourable opinion from the EET. There are no foreign ownership limitations on telecommunications activities, but

any material change in shareholding or change of control must be pre-approved by MTC. A transfer of shares representing 5% or more of the capital of a company must be announced to EET within 30 days of transfer.

A licence is granted only to an enterprise that is a *société anonyme,* has as its exclusive object the provision of telecommunication services, is established in a Member State of the European Union and has a legal representative in *Greece.* The members of the board of directors, the managing directors and senior executives must not have criminal records.

Similar conditions and restrictions have been imposed on the two GSM operators, which were awarded their licences under the legal regime before 1994, which was replaced by *Law 2246.* For example, the GSM operators undertook to provide national GSM coverage within a specific time frame (outlined in detail in their licences). Any change of substantial ownership or control is prohibited, without the prior approval of the EET. The sale, transfer or assignment of significant tangible assets, which are not within the ordinary course of business is also prohibited. The licences are for 20 year renewable terms.

The OTE licence, awarded by *PD 437/1995*, contains a number of conditions. As a result of *Law 2257* of 1994, the Hellenic Republic may not hold less than 75 % of OTE's capital. It currently holds about 82 %, following the listing of the company on the Athens Stock Exchange. Other conditions imposed on OTE include the following:

- Open Network Provision;
- minimum quality standards;
- services to handicapped persons;
- conditions related to national defence, public security and special needs;
- emergency calls;
- numbering;
- tariffing procedures for exclusive and non-exclusive telecommunications services; and
- programmes related to research and development, training of the personnel and informing users of technological developments.

(ii) Broadcasting

OTE's licence has a 25 year term, renewable under the provisions of *Law 2246.* It has a number of provisions which impose certain conditions and minimum

requirements that OTE most fulfill in relation to leased lines, development of the public network, ISDN and a numbering plan. OTE has exclusive rights for voice telephony, leased lines and ISDN services.

Law 2328 contains the basic conditions for the granting and renewal of licences for TV stations (Article 1) and local radio stations (Article 6). The licences must be awarded to Greek or Member States nationals, which must be legal entities operating in the form of a *société anonyme* and having registered shares. Foreign (non-Community) ownership is limited to 25%. However, under strict conditions, foreign companies may hold 15% of the total capital in unregistered shares. There is also a 1.0 billion Drs (4 million ECU) minimum capitalisation requirement for companies with TV station licences.

Media and cross-media ownership restrictions are limited. One company may hold one TV or radio licence and any individual shareholder may participate in only one licensee, holding company or its parent company up to 25%. The same principle of "one person - one post", applies to directors, administrators, senior executives and members of their families. Participation in more than two different media companies is prohibited. Under *Law 2328*, media companies are divided in three categories: television, radio and newspapers. Transfer of the company in its entirety or shares representing 2.5% (or more) of the capital, formation of new companies in which it participates and any amendment of its articles of association must be notified to NRTC within 10 days. Loans from shareholders of an amount exceeding 5% of the capital are prohibited. Transparency requirements exist for other financial dealings, such as a pledge of shares or third party borrowings.

The licence holders must pledge a performance bond (the amount varies depending on the nature of the licence - *i.e.*, national, regional and local). The bond is forfeited after a decision of by MPMM (with NRTC's concurrence) that the licensee has not fulfilled its obligations under the licence.

Broadcasters may not provide voice telephony services over their facilities and networks. Other conditions imposed by both TV and radio licences protect personality and privacy, minors and children and the correct use of the Greek language.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Under *Law 2246* (Article 3 paragraph 9) and the *Code of Practice for the Provision of Telecommunication Services* (*Ministerial Decision No. 68141 of 1995*, O.J. Bulletin B 581/4-7-1995, Article B) tariffs must meet the following criteria:

"*tariffs applied by both the incumbent TO (OTE) and by the other telecommunication companies should:*

a. *be cost-oriented, especially in sectors with special or exclusive rights;*

b. *fulfill rules of fair competition;*

c. *not create any distinctions and ensure non-discriminatory treatment between operators;*

d. *be transparent and published;*

e. *be based on objective criteria;*

f. *be based on the specific features of the service provided;*

g. *be based on equal contribution to the general cost of facilities used to provide services as well as on the need to redeem realised investments; and*

h. *be based on the progressive removal of cross-subsidisation between services".*

The same principles apply to interconnection of independent or private networks with the public network run by OTE (*Law 2246,* art. 3 paragraph E).

(2) New pricing principles for the competitive market environment.

Law 2246 incorporates Annexes 1, 2, 3 of EU Directive 90/387/EEC on the provision of ONP and its tariffing principles. Annex 2 states that:

"Tariff principles must be consistent with the principles set out in Article 3(1) of the Directive. These principles imply, in particular, that:

- *tariffs must be based on objective criteria and especially in the case of services and areas subject to special or exclusive rights must in principle be cost-oriented, on the understanding that the fixing of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provision conditions. When these tariffs are determined, one of the aims should be the definition of efficient tariff principles throughout the Community while ensuring a general service for all;*

- *tariffs must be transparent and must be properly published;*

- *in order to leave users a choice between the individual service elements and where technology so permits), tariffs must be sufficiently unbundled in accordance with the competition rules of the Treaty. In particular, additional features introduced to provide certain specific extra services must, as a general rule, be charged independently of the inclusive features and transportation as such; and*

- *tariffs must be non-discriminatory and guarantee equality of treatment. Any charge for access to network resources or services must comply with the principles set out above and with the competition rules of the Treaty and must also take into account the principle of fair sharing of the global cost of the resources used and the need for a reasonable level of return on investments."*

(3) Control of tariff packages which can be offered to customers.

Under *Law 2246* (Annex 2, Article 5, paragraph 4), *"there may be different tariffs, in particular to take account of excess traffic during peak periods and lack of traffic during off-periods, provided that the tariff differentials are commercially justifiable...".*

In cases of discrimination, bundling and cross-subsidisation competing operators or customers may appeal for mediation and remedies to EET. EET is also entitled to intervene *ipso jure* to protect competition, under *Laws 1934/1991* and *2000/1991* (Article 3, paragraph C of *Law 2246*).

(4) Tariff basis - usage time or flat rate off peak rates; and other relevant pricing practices which increase pricing flexibility.

Tariffs vary according to the type of services offered. Through *Decision No. 2477/22* of 22 October 1996 (published in the O.J., Bulletin B 985/30 October 1996) OTE's Board has designed tariffs reflecting the types of services offered.

Generally, most services offered by OTE (voice telephony, telex, data networks, mailbox, fax switching, radio-electric communications, special radio-links, satellite services, teleconference, ISDN and so on) or even services offered by mobile cellular operators, combine access charges or connection fees, charges for use and maintenance of facilities, and flat monthly rates with usage time (depending on duration, speed or volume of communications). Other services are based on the payment of a **flat rate** independent of the volume of traffic, especially those using leased equipment and facilities (*e.g.*, leased lines, circuits or mobile terminals, dial-up Internet connection, frame relay services) or on **usage time** (*e.g.*, "kiosk type" services, pre-paid cards, videotext, audiotext, premium rate services).

OTE's voice telephony tariffs are set by its Board of Directors (subject o administrative control and approval by the Ministers of National Economy and Transport & Communications). They must also be published in the Official Journal. Until 21 December 1997, the OTE Board may increase the average tariffs by the CPI Rate. In view of the imminent opening up of the market and the need for cost-orientated charges OTE is in the process of re-balancing its tariffs (increasing tariffs for urban calls and decreasing tariffs for long distance calls).

For a number of years mobile tariffs were characterised by parallel price changes, in a duopoly situation (*e.g.*, simultaneous tariff increases in similar services). The competing operators now apply flexible tariff packages linked to customer and

usage type (Panafon a la Carte, B-Free, etc.). Competition has been introduced in the terminal equipment market as well as in the air-time market.

Some of the tariff packages available include:

- ‘‘economic package" - monthly flat rate of 6,000 - 6,500 GRD;
- charging of 166 - 180 GRD per minute in peak time (7.00 - 22.00 from Monday to Friday, 7.00 - 15.00 on Saturday);
- charging of 68 - 88 GRD per minute in off-peak time;
- "Professional package" - monthly flat rate of 12,000 GRD;
- charging of 102 GRD per minute in peak time; and
- charging of 68 GRD per minute in off-peak time.

(5) ***Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulated Internet access and on-line services.***

Tariff packages for Internet access are unregulated. Each provider can set its own pricing policy according to its commercial objectives.

In the absence of specific targeted legal provisions, Internet access and on-line services are covered by general legal provisions on telecommunications, broadcasting, competition, consumer protection, intellectual property and privacy.

G. Network Interconnection and Access to Service Providers

(1) ***Interconnect arrangements and charges - express regulation or individual negotiation.***

Law 22446 defines general principles to be considered in negotiating bilateral commercial interconnection agreements between operators. The terms and charges are negotiated individually between operators (*e.g.*, fixed OTE network to the mobile GSM networks, "peering agreements" signed between Internet access providers).

Law 2246, Article 1 and *Ministerial Decision 68141/1995,* Article 6, *P.D. 40/1996* on the "Application of ONP to leased lines” define the general interconnect framework, as follows:

- abolition of unnecessary limitation (technical or other), whilst maintaining "essential requirements" (*e.g.*, network security and integrity,

interoperability of services, date protection) (Article 4 paragraph 3 P.D. 40/1996);

- protection of network customers and users from injuries and damages;
- protection of interconnecting networks from damage or deterioration of service quality;
- requiring new entrants to pay the interconnecting network operator interconnection charges; and
- obliging the network operator to not reduce the quality of services offered over the interconnecting networks.

For instance, general interconnection guidelines, contained both in the *Law 2246* and in the GSM licences, have been translated into specific interconnection agreements between OTE and the two mobile operators, which are private commercial documents (and are not published). However, under Article 4 of the respective GSM licences (O.J., Bulletin B, 586 of 30 September 1992), the interconnecting operators were awarded the right to connect their GSM networks to the basic, public switched telephone network *"on reasonable terms and conditions that promote the efficient use of both the GSM and PSTN networks and do not discriminate between the (two licensed) GSM cellular networks"*.

The PSTN operator was also required *"to provide interconnection at those points which would permit the most efficient provision of service to the public at rates that reflect the reasonable costs of interconnection"*.

In a dispute, the network operators may apply to EET for remedies. To date, OTE has filed a petition with EET for the review of interconnection charges with the two mobile operators, claiming they are too low with regard to the effective interconnection costs borne by it. It is anticipated the dispute will be resolved through negotiation between the parties, rather than regulatory intervention, within the next few months.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators with "significant market power".

The general competition law (*Laws 146 of 1914, 703 of 1977, 1934 of 1991, 2000 of 1991*, and *2296 of 1995* etc.), prohibits behaviour by companies with significant market power which may be an abuse of their position and distort fair competition. Several criteria are used to determine dominance or significant market power in telecommunications markets (*e.g.*, market shares, turnover, network growth, subscriber numbers). OTE is the incumbent operator, with more than five million voice telephony subscribers (the two mobile operators together have approximately 450,000 subscribers). The determination of dominance or market power could become a significant regulatory issue in *Greece*, when infrastructure competition is introduced. The Government has examined the

possibility of licensing DEH (Public Power Company), which has an electricity network potentially as important as the PSTN. In addition, OSE (Rail Network Operator) has another, smaller network that could be used (after modernisation) for the supply of telecommunications services. The issue is also likely to be raised in relation to the mobile cellular services market (*e.g.*, COSM-OTE's DCS-1800 joint venture is due to compete with the GSM operators by February 1998).

There are several regulatory safeguards designed to hinder abuse of market power or significant market power by the incumbent operator. For instance, OTE is prohibited from bundling exclusive and liberalised services. *Law 2246* also requires OTE to use cost-based interconnection charges, both to stimulate OTE's efficiency and to promote competition. In addition, EET's regulation is aimed at assuring equal treatment of, and a fair balance between, interconnecting operators.

However, the implementation of these competitive principles in the market environment is a very delicate process. For instance, OTE's accounting system (*i.e.*, the basis for its pricing decisions) uses Fully Distributed Costs (FDC), which is more appropriate for monopoly markets. Accordingly, effective cost-based interconnection charges will over time require the review and adaptation of OTE's accounting system.

In addition, the *Law 2246* does not clearly distinguish between operators with significant market power (*i.e.*, OTE) and new entrants. The regulatory regime appears to be symmetrical, so that the same principles apply to all operators. In this respect, some provisions of the law may require amendment.

(3) Precise obligations currently placed on interconnecting operators.

- An operator must deal with all interconnecting operators on equivalent economic terms and conditions, provide the same quality of service, and offer the same level of network services. The *Law 2246* does not prescribe the point of interconnect ("POI") or the structure of interconnection (*e.g.*, physical network or system independent structure). In the absence of specific legislation on interconnection, OTE is obliged by its concession to provide interconnection to the PSTN within a "reasonable time".

  The general European interconnect principles require each operator to offer a reasonable number of points of interconnection, according to the technical features, structure and functions of the interconnecting networks. Technical aspects of interconnection (*e.g.*, type of transmission links, transmission speeds, ownership of multiplexing equipment, arrangements for physical redundancy, alternative routing, signalling standards, one-way or two-way traffic routes) are set out in bilateral agreements between the interconnecting operators. Network operators may apply to EET for mediation and remedies in interconnect disputes.

  The European Commission notified its intention in November 1997 to take action against *Greece* for its failure to introduce an open interconnection

regime, since mobile network operators were obliged to use OTE's fixed network to interconnect with foreign carriers for roaming agreements, and for failing to take the regulatory steps for effectively liberalising alternative networks.[44]

- The principle of equal access and non-discrimination is mandated by both the law and the licences granted to various operators. For example, the GSM licences provide that *"the Grantees will establish and assure equal access to their GSM networks and will not deny reasonable requests for service, nor unreasonably discriminate among similarly situated subscribers or potential subscribers. The same requirement applies to any agents, dealers or independent resellers the Grantees might make use of"*.

  Interconnecting operators may not engage in monopolistic or other anti-competitive practices, whether relating to interconnection, pricing or other areas of business, that undermine fair competition with other service providers. EET is responsible for overseeing the equal access principles (*i.e.*, equal, fair and non discriminatory subscriber access and pre-select/ dialling parity on a call-by-call basis).

- The law requires each interconnecting party to comply with international, European and national standards and specifications (*e.g.*, ETSI standards, ITU-T recommendations) on electrical, physical, transmission and signalling interfaces.

  Interconnecting operators are obliged to ensure that only terminal equipment that complies with EET regulations and conforms to ETSI Common Technical Regulations and CEPT, ITU-TSB and CCIR recommendations is connected to the network. Network operators are prohibited from demanding that equipment to be interconnected meets standards which exceed those in the regulations and recommendations. The EET may adopt standards to comply with Community requirements to maintain service quality and worker safety.

- Network operators must design their networks to comply with the technical requirements of the national or European standards and technical specifications. They are obliged to use modern technical facilities, to assure quality of services offered, and to adopt procedures for customers complaints about installation, operation, repair and billing (Article 7, *Code of Practice for the Provision of Telecommunications Services*).

  The GSM licences require the operators to *"assure sufficient capacity on their GSM networks to satisfy the reasonable demand of their customers*

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44 Commission Press Release, IP/97/954 of 5 November 1997. More specifically, the claims against the Greek government will relate to the fact that Greek: (i) does not allow GSM operators interconnection to their networks directly with non-Greek fixed or mobile networks without going through OTE's PSTN; and (ii) does not ensure that GSM operators can have access to necessary POIs to the PSTN.

and of interconnecting network operators pursuant to the terms and conditions of their licence and the relevant contracts" and not to " *affect adversely or otherwise unreasonably interfere with the provision of services by interconnected networks and equipment".*

- The law does not provide a preferred formula or standard for interconnection charges. They are set in negotiations by operators, according to network and service features. The agreements between the PSTN and GSM networks illustrate the charging mechanism currently in use: *"for the first eight years of operation each Grantee shall pay to the PSTN operator a net interconnection fee equal to 5% of its revenues coming out from the air-time of its mobile services calculated on the higher of the two amounts:*

- *the amount calculated by subtracting (1) revenue from all calls between mobile subscribers that do not interconnect to the PSTN (2) charges for installation or interconnection (3) monthly subscription and access fees and (4) charges for international calls and enhanced services provided by the grantee's network and for equipment sales or leases from grantee's total cellular operating revenue from service provided in Greece; or*

- *the amount corresponding to 67% of the gross revenues of the grantee coming out from the provision of cellular telecommunications and roaming services in Greece".*

  After the eight year term, charges will be set in bilateral negotiations. If, during the eight year term, the PSTN operator is obliged to introduce a billing system based on real interconnection costs, the fees may be adjusted (through negotiation), if the PSTN operator justifies its position by reference to comparative costs from other countries.

  The process of negotiating charges is clearly open to abuse by dominant network operators. However, OTE has argued that government intervention in negotiations (to favour new entrants) may lead to unbalanced agreements (at least in the context of its interconnection tariffs with GSM operators).

- Cooperation between competitors requires them to communicate information about their general operations, including traffic details and proprietary network information. Interconnecting operators must respect the commercial secrets and technical information of the other party to which they have access for interconnection. Greek law does not specifically deal with this issue. Disputes to date have been settled through the application of national civil, commercial and competition law, Articles 85 and 86 of the EC Treaty and the *ONP Interconnection Directive* .

- *Laws 2246* and *2225* of 1994 on the secrecy of communications require telecommunications operators to respect the secrecy of communications

and to avoid interference with or interception of messages conveyed through the telecommunications network, unless this is expressly authorised or is required for maintenance purposes.

A special Commission for the Protection of Secrecy of Communications has been created to protect the privacy of communications. It includes the Vice President of the Parliament, Deputies of the political parties in the Parliament and Communication technical experts. A similar role is being exercised by the National Authority for Privacy Protection, established by the Privacy and Data Protection Act. (see H(2)). In addition, the *Privacy and Data Protection Act* prevents operators from using or communicating to third parties (*e.g.*, direct mail or advertising companies) customer information for purposes other than service provision, unless they obtain the customer's written consent.

H. "Resource" Issues

(1) Frequencies.

Spectrum use is relied on in *Greece* as the key criterion used to distinguish services requiring individual licences (*i.e.*, those using spectrum) and those merely requiring declarations (*i.e.*, those not using spectrum).[45] Frequency management and allocation in accordance with national requirements and the ITU's international radio-communication regulations is the responsibility of the General Secretariat for Communication of Ministry of Transport & Communication (*Law 2246*, Article 2 para. 8). *Law 2246* allows EET to select (with the Directorate of Communications of the Ministry of Transport & Communications) the procedure for spectrum allocation (*e.g.*, auctioning, bidding, or "beauty contests").

The *Radio Frequencies Regulation*, prescribes the services to be provided on particular frequency bands, in accordance with the ITU radio-communications regulations. It was ratified by the *Ministerial Decision of Ministers of Defence and Transport & Communication No. 58980/* 8 March 1994 (Government Gazette, Bulletin B, No. 157/1994). In practice, frequency allocation between types of services (*e.g.*, telecommunications, broadcasting and military) is neither transparent nor coherent. Decisions to allocate frequencies are the subject of joint decision making by both ministries. This creates significant problems for frequency management, interference and jamming.

Every operator (including OTE) using spectrum must obtain a licence from the EET, for a fee. The amount of the licence fee is set by the Minister of Transport & Communication as a percentage of the operator's yearly gross revenues generated by the provision of the licensed networks and services (Articles 2 and 4

45 Both the use of the frequency spectrum and geostationary orbits requires an individual licence prior to such activities being affected.

of *Ministerial Decision Number 524999* of 1997, Government Gazette Bulletin A 84/ 11 February 1997).

In the light of technological convergence (between media and telecommunications), and the integration of fixed and mobile technologies, new methods of frequency management and digital use of frequencies, there is a pressing need to re-structure the current frequency allocation system.

(2) ***Numbering.***

The National Numbering Scheme ("NNS") was traditionally managed by OTE. However, liberalisation required numbers to be managed by an independent regulatory authority. Responsibility for the NNS was vested in EET. It is responsible for:

- granting numbers or blocks of numbers to the telecommunications service providers; and
- giving advice on the National Numbering Plan.

The NNS is not yet complete. Accordingly, OTE continues to play a significant role in the allocation of numbers and prefixes. The existing NNS conforms to CCITT Recommendations, and has the following characteristics:

- it is a closed 8 digit numbering scheme with geographic distribution of prefixes ("01" to "08") for approximately 5 million customers;
- switching at the local level uses the fifth to seventh digits, depending on the subscriber capacity of the local area;
- switching beyond the local area requires all eight digits and the toll prefix "0";
- emergency and special numbers are defined with three digits of the form "1XX" and commercial applications use four digits; and
- the prefix "09" is currently used for services such as paging and Mobile Telephony (093 for TELESTET, 094 for PANAFON, and 090 for audiotext).

Law 2246 provides that operators (including OTE) must pay the EET for number groups. The NNS must be published by the EET and be available to any organisation involved in the telecommunications business. Numbers and national prefixes must be allocated equitably. Operators are liable for penalties if they make improper or inadequate use of numbers.

EET must prepare the NSS in accordance with international and European standards. As all networks will be interconnected, information embedded in numbers for routing and tariffing must be regulated by EET, to guarantee network operation. Numbering and privacy issues will be dealt with by EET in co-operation with the National Authority for Privacy Protection, established by the *Data Protection and Privacy Act* (*Law 2472 of 1997*).

OTE, in co-operation with the EET, has conducted a preliminary study into number portability, in the light of future moves to full liberalisation. In addition, significant amendments to the NNS will be required to ensure dialling parity.

(3) Rights-of-Way.

Historically, OTE had an almost unrestricted right of access to ducts, conduits and rights-of-way. The only restrictions arose from environmental concerns and traffic congestion. The *Constitution* of 1975 provides, in Article 17 paragraph 7, that to perform public works of common interest, public companies, public utilities and municipalities may create underground ducts, without compensating the owner, if this does not hinder the normal use of the land.

Accordingly, OTE owns an extensive network of underground tunnels and ducts, and is not obliged to provide access to competitors. Together with OTE's right to maintain and restore this infrastructure this right could create a significant "bottleneck" and a major competitive disadvantage for third party local loop competition. There is no mechanism (or entity with authority) to resolve disputes over access to ducts or access pricing.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

Licensing requirements for certain types of content that may restrict market entrants.

Some decoder-based subscriber channels (*e.g.*, FILMNET, SUPERSPORT), using the ERT S.A. (public broadcaster) UHF frequencies, have contracted with the Greek Football Federation ("EPO") and the Union of Football Stock Companies ("EPAE") for the exclusive rights to transmit live certain events (*e.g.*, football games) until the year 2000. The exclusive rights, coupled with an aggressive marketing campaign, has allowed these broadcasters to acquire a significant subscriber base (*i.e.*, in excess of 200,000). ERT re-transmits these events as delayed broadcasts.

However, the 1989 *Television without Frontiers Directive* seeks to compel the Member States to ensure that major sporting events (as well as cultural or religious events) are available on non-encrypted, free to air channels. Although the Commission does not want to impose legal obligations on Member States in

this area, exclusive rights may in the future be challenged by other market actors or interest groups on the grounds of freedom of access to information and non-discriminatory access to content.

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

There are no apparent restrictions on providers of content. There are no "must carry" obligations on broadcasters providing entertainment services (including cable TV companies) nor "local content". "European quota" obligations provided by the *Television Without Frontiers Directive* have been implemented by P.D. 236/1992 and P.D. 231/1995. Furthermore, cable penetration in *Greece* is very low, limited to particular regions. There is therefore no specific regulatory scheme for cable TV. The only regulation is contained in the *Law 2328 of 1995*.

(5) "Gateway" Issues - Technologies for Open Access.

Control of "gateways" and conditional access systems (navigation tools for multimedia services, operating systems etc.) is an essential component of the regulatory framework for converging audiovisual and telecommunications services. Controllers of gateways are in a position similar to dominant infrastructure providers, since they will be able to distort competition in new markets.

Set-top boxes and decoders are considered to be telecommunications terminal equipment. The *Regulation for Certification of Telecommunications Terminal Equipment* (*Ministerial Decision No. 51477* of 19 January 1996) sets out the national certification procedure (which conforms with European Directive 91/263/EEC (as modified by Directive 93/68/EEC). Article 1.2 of the Regulation provides that it applies to any terminal equipment to be connected to the public network based on cable, radio waves, optical or electro-magnetic technology. Although set-top boxes and decoders are not explicitly mentioned, the scope of the Regulation indicates that the EET is responsible for type-examinations and approvals of equipment. Manufacturers of set-top boxes, converters and similar equipment should apply to EET by completing the "Application for a type examination" describing all technical features of the equipment.

(6) Internet Domain Names - Preferred regulatory approach.

There is no preferred national approach to the regulation of Internet domain names. The industry is essentially self-regulated. Domain names (*i.e.*, "gr.") are currently managed by I.T.E (Foundation of Research and Technology, FORTH as per its English initials) which is an independent research centre located in Heraklion Crete. This task was assigned to I.T.E by INTERNIC. It was initially

assisted by FORTHNET S.A., an Internet service provider in which I.T.E is a 40% shareholder (its stake is to be reduced by January 1998).

The whole system of regulation of Internet domain names is currently being revised. There are discussions about defining the top level domain names, registration rules and policies, fees, service quality, and customer satisfaction. There is a proposal to authorise the EET to appoint a legal person (I.T.E or another entity) to regulate the Internet, for a specific period.

Some disputes over some top level Internet domain names have already been settled extra-judicially (*e.g.*, reservation of the domain name "OTE.Net" by an individual who refused to transfer it to OTE, requests for the reservation of 'hotel.gr' by several tourist businesses).

To promote the Internet market, which is growing rapidly in *Greece*, providers who had not installed high-speed lines (*i.e.*, were carrying their messages over international nodes in *Greece*) have decided to install a common high-speed node situated in OTE's premises. The EET has invited the major Internet Providers to sign "peering agreements", either on a commercial or "zero settlement" basis.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

The definition of universal service reflects the European concept of the State's social duty to ensure access to essential telecommunications facilities for all citizens, irrespective of financial circumstances, geographic location or disability. The universal service must cover those who cannot afford essential telecommunications services on cost-based prices. In addition, OTE is obliged by law not to terminate subscribers for non-payment until 30 days after notification of the debt. It is almost unanimously accepted that universal service should be limited to the provision of minimum voice telephony services. There is no suggestion that interactive or audiovisual services are to be included, due to both market uncertainties and the targeting of these services at the business sector rather than individuals. However, under the terms of its concession, OTE is also under a general, yet imprecise, obligation to provide adequate services to citizens with "special needs". OTE must also improve its annual installation rate by a set percentage (*i.e.*, 0.5%). Finally, OTE is obliged to issue business and residential directories free of charge, but may charge for electronic versions.

(2) *Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.*

OTE is currently obliged to provide voice telephony (over which it has exclusive rights until 2001). However, in view of the full liberalisation of the market, discussions about affordability, tariffing and public access are occurring.

(3) *Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).*

OTE stresses the need to establish a fund to finance the universal service obligation, to be administered by the EET or an independent body (see OTE Position Paper on the 1995 Green Paper on the liberalisation of telecommunications infrastructure and cable television networks). There is a need to identify the other operators (*e.g.*; mobile operators interconnecting to the PSTN) which might be required to contribute to funding the universal service. Moreover, it is necessary to introduce principles for cost evaluation, procedures for safeguarding the essential requirements and State aid in particular circumstances (*e.g.*, universal service funds, aid to users, public access through terminals in schools, libraries, hospitals).

(4) *"Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).*

There are no such obligations in *Greece*.

(5) *Other public service specifications affecting the content or information provided to subscribers.*

There are no public service specifications affecting the content of information provided.

* * * * *

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

The *1988 Radio and Television Act* (the "RTA") defines sound broadcasting service as "a broadcasting service which transmits, relays or distributes, by wireless telegraphy, communications, sounds, signs or signals intended for direct reception by the general public whether such communications, sounds, signs or signals are actually received or not". Television programme services are defined as "services which comprise a compilation of audio-visual programme material of any description and is transmitted or relayed by means of wireless telegraphy directly or indirectly for reception by the general public".

The *1983 Postal and Telecommunications Services Act*, (as amended) (the "PTSA") does not expressly define telecommunications services. However, the telecommunications company's exclusive privilege in Section 87 is to offer, provide and maintain telecommunications services for transmitting, receiving, collecting and delivering voice telephony and telex services within *Ireland* up to (and including) a connection point in the premises of a subscriber.

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

The PSTA establishes separate licensing for the provision of:

- fixed telecommunications services other than voice telephony;
- mobile cellular telephony services;
- other radio-based services; and
- telecommunications infrastructure.

Basic data services and value-added services through the use of leased lines, plus simple-end resale of voice services, are liberalised and subject to a form of class licence regime, similar to that of the *United Kingdom*.

Licences will also be required under the *Wireless Telegraphy Acts* where radio technology is employed as part of a telecommunications network.

The provision of the public telecommunications network and voice telephony (as defined in Community law) are reserved to Telecom Eireann until 1 January 2000.[46]

(3) Regulation of Internet services and other on-line services.

These services are not regulated specifically. Internet Service Providers ("ISPs") are licensed in the same manner as all other value-added service providers (subject to the fulfilment of a standard set of licence terms to which all ISPs are subject.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

The *1988 Broadcasting and Wireless Telegraphy Act* ("BWTA") governs cable television, while the *1960 Broadcasting Authority Act* ("BAA") and the *1988 Radio and Television Act* govern terrestrial television. Video-on-Demand and Near-Video-on-Demand are not regulated specifically in *Ireland*. Although the issue of its regulation has not yet arisen, it is generally understood that Video-on-Demand services are likely to fall within the sphere of broadcasting regulation (with Near-Video-on-Demand clearly falling within that category).

B. Regulatory Authorities in telecommunications / broadcasting / publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

(i) Telecommunications

In *Ireland*, primary legislation is enacted by the Oireachtas (*i.e.*, the Parliament). Primary legislation gives the Ministers of the government the power to adopt secondary legislation (usually referred to as "Statutory Instruments") for purposes stated in the primary legislation.

The principle statutes in the telecommunications sector are the *Telegraph Acts 1863 to 1916*, the *Postal and Telecommunications Services Acts, 1983 and 1984*, telecommunications (Miscellaneous Provisions) Act 1996 and the *Wireless Telegraphy Acts, 1926 to 1988.*

46 Commission Decision of 27 November 1996 concerning the additional implementation periods requested by Ireland for the implementation of Commission Directive 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets, EC O.J. (1997) L 41/8.

The *European Communities (Telecommunications and Services) Regulations 1992*[47] gave effect to Council Directive 90/387/EEC on the establishment of the internal market for telecommunications services through the implementation of Open Network Provision (ONP) and the Commission Directive on competition in the market for telecommunications services. The *European Communities (Application of Open Network Provision to Leased Lines) Regulations, 1994* gave legal effect to Council Directive 92/44/EEC.[48]

The *European Communities Telecommunications Services (Appeals) Regulations 1994* set out a prescribed procedure to be followed in an appeal to the District Court where an application to the National Regulatory Authority under Section III (2 A) of the *1983 Postal and Telecommunications Service Act* (as amended) is refused or a licence granted under that section by the National Regulatory Authority is suspended or revoked.

The *European Communities (Mobile and Personal Communications) Regulations 1996*[49] liberalised the mobile communications sector pursuant to the terms of the Commission Mobile Directive 96/2/EC. Most recently, the *European Communities (Telecommunications Infrastructure) Regulations 1997* [50] liberalised the provision of alternative infrastructure and established the key conditions for the licensing of infrastructure and services in accordance with Commission Directives 95/51/EC and 96/19/EC.

(ii) Broadcasting

There are two key pieces of legislation in the broadcasting sector: the *1960 Broadcasting Authority Act*, amended by the *1976 Broadcasting Authority Act* and the *1988 Radio and Television Act*.

There is no mechanism for resolving jurisdictional overlaps, if any, between the broadcasting and telecommunications regulatory systems.

(iii) Publishing

There is no specific legislation regulating book publishing in *Ireland*.

47 Statutory Instrument (SI)45 of 1992.
48 Statutory Instrument (SI) 328 of 1994.
49 Statutory Instrument (SI) 123 of 1996.
50 Statutory Instrument (SI) 338 of 1997.

(2) *Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.*

(i) Telecommunications

An independent Office of the Director of Telecommunications Regulation ("ODTR") was established pursuant to the *Telecommunications (Miscellaneous Provisions) Act 1996.* The formal transfer of functions to the Director took place on the 30 June 1997.

The functions of the Director are prescribed in detail in the Act. Her responsibilities can be summarised as the:

- regulatory functions addressed to National Regulatory Authorities in EU telecommunications legislation;
- licensing of wireless telegraphy, cable TV operators, telecommunications services and networks and monitoring compliance with licence conditions;
- management of frequency spectrum and the national numbering plan; and
- approving customer premises equipment to national specifications in the absence of applicable EC standards.

The Office employs approximately 50 officers and staff, most of which have been transferred from the Ministry of Post and Telegraph.

(ii) Broadcasting

The Minister for Arts, Heritage, Gaeltacht & the Islands is responsible for broadcasting policy.

Under the *1960 Broadcasting Authority Act*, RTE is responsible for implementing the regulatory system laid out in the Act (*i.e.*, the system is self-regulating).

The Independent Radio and Television Commission ("IRTC") is responsible for developing commercial independent services at national, local and community levels. The members are appointed by the Minister of Arts, Heritage, Gaeltacht & the Islands. The IRTC awards commercial licences by competitive tender pursuant to the *1988 Television and Radio Act*. The IRTC selects the commercial licensees. The National Regulatory Authority actually grants the licence to the IRTC, which then enters into a "Service Contract" with the private operator conveying the benefits of the licence. The IRTC has the power to levy the successful applicant and the duration of the licence will be as specified in the Service Contract.

The IRTC has power to :

- enter into contract for sound broadcasting services (including a national sound broadcasting service);
- enter into a contract for one commercial TV broadcasting service;
- investigate the affairs of broadcasters;
- ensure that a television broadcaster is responsive to the interests/concerns of the community and to uphold democratic values enshrined in the constitution; and
- have regard to the need for public awareness/understanding of the values and traditions of countries other than the State (including in particular other EC Member States).

The Broadcasting Complaints Commission is a body with quasi-legal powers. The Commission is responsible for receiving complaints against RTE and the independent broadcasters over issues including the failure to observe regulations, failure to uphold principles of impartiality and objectivity and failure to respect privacy. It has powers of investigation but no disciplinary powers.

(iii) Publishing

There is no independent National Regulatory Authority for publishing.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.

The 1991 Competition Act came into force on 1 October 1991 and is modelled on EC competition rules. Section 4 of the Act prohibits all agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition in trade of goods or services. Section 5 of the Act prohibits any abuse by one or more undertakings of a dominant position in trade of goods or services.

The *Mergers,* and *Take-Overs (Control) Act* (as amended) grants the Minister for Enterprise & Employment the power to prohibit mergers or take-overs in the public interest.

The IRTC may also act to prevent the over-concentration of TV and radio ownership.

The Irish Competition Authority's function is vetting notified agreements for anti-competitive effects. The Authority may grant:

- certificates (similar to negative clearances) and licences (which correspond to individual exemptions under Article 85(3)); or

- category licences (similar to EC block exemptions) and category certificates (which have no EC equivalent).

While the Competition Authority has been vested with the power to rule on notified agreements, it does not have general powers to enforce the provisions of the *Competition Act*. It has no right to pursue restrictive agreements or abuses of dominant positions before the courts.

Violation of the Competition Act is a criminal offence. The Authority has wide ranging powers of enforcement and prosecution. The Competition Authority has stated publicly that it regards itself as being exclusively competent to deal with all aspects of competition law relating to telecommunications (with the remit of the Office of the Director of Telecommunications Regulation not extending beyond regulatory issues).

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

See B(2) above.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

There are no formal rules or practices regarding the means of cooperation between the regulatory institutions in *Ireland*.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(i) Telecommunications

New arrangements for the management of the frequency spectrum were put in place in July 1997 for point-to-point links (including new procedures and standard applications). Applications for point-to-point links (in contrast to point-to-multipoint) will be objectively assessed, and frequencies will be allocated on a first-come first-served basis (subject to spectrum planning constraints for long haul

link bands). A fee structure designed to promote efficient use of the spectrum will also be introduced. However, the ODTR is relatively under-resourced at present. Consequently, it would appear that the new two-stage allocation process is (at least in the short term) more onerous and time-consuming than under the previous procedure.

The ODTR has also indicated that it will undertake a complete review of spectrum management policy in 1998.

The Departments of Public Enterprise and the Environment are discussing the adoption of new procedures to be followed when access to public property is requested for the construction of new networks. These new procedures, designed to facilitate infrastructure development, are the flow-on result of recent infrastructure liberalisation measures.

(ii) Broadcasting

Recently, a proposal to adopt legislation on new broadcasting structures was considered. However, with the change of government in 1997, there may be delays in adopting this new piece of legislation. It should be adopted during the course of 1998.

(iii) Publishing

The *Copyright Act 1963* is under revision and a new *Copyright Bill* is being considered.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

Legislative changes to Telecom Eireann's exclusive privilege to provide telecommunications services, in the period 1992-1997, have withdrawn from it the exclusive provision of:

- fixed telecommunications services (other than voice telephony);
- mobile and personal telecommunications services and networks;
- satellite services; and
- fixed telecommunications infrastructure (which is not identified to the end-user by means of a number and thereby does not constitute a public telecommunications network).

Under section 87 of the *1983 Postal and Telecommunications Services Act*, Telecom Eireann has the exclusive right to provide within *Ireland* the public telecommunications network, voice telephony services and telex services. Section 89 of the PTSA provides that Telecom Eireann may, with Ministerial consent, grant a licence to a person to provide a telecommunications service that is within its exclusive privileges conferred under section 87. However, it is unlikely that such a licence will be granted prior to 1 January 2000, by which time all services (other than telex) will be liberalised.

Ireland has obtained a number of derogations from the deadlines for liberalisation provided in the various EC telecommunications liberalisation directives. Voice telephony will not be liberalised until 1 January 2000. The provision of alternative infrastructure was liberalised from 1 July 1997.

Following liberalisation of the right to establish telecommunications networks, service providers can install cable to route traffic directly from Communications Premises Equipment ("CPE"). However, in recognition of the derogation granted to Telecom Eireann to provide the public telecommunications network, numbers from the national numbering plan will not be given to alternative fixed line operators prior to 1 January, 2000. Therefore, until that time, alternative networks will continue to concentrate on outbound traffic.

Direct international interconnection of mobile networks will be possible from 1 January 1999.

Although the provision of satellite services has been withdrawn from Telecom Eireann's privilege, a licensing scheme has not yet been published. Publication of such a scheme is expected shortly. In the meantime, individual applications are considered on an *ad hoc* basis, with applicants operating under "permits".

(2) *Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.*

(i) Telecommunications

As noted above, Telecom Eireann will retain its monopoly over the provision of the public telecommunications network and voice telephony services until 1 January 2000.

Competition in the Irish market has tended to concentrate on the business market for long distance and international traffic. Service providers typically connect CPE via leased lines. National trunk traffic is routed via a trunk network within the State for handover to Telecom Eireann in the local loop indirectly via DDI/DDO circuits. International traffic is bridged to international circuits and delivered directly or by agreement with an operator abroad.

The ODTR has recently confirmed its view that the use of auto-diallers and routers intrigues Telecom Eireann's monopoly in respect of voice telephony. A "SwitchLink" service has been introduced.

(ii) Broadcasting

Cable television licences, under the *1988 Broadcasting and Wireless Telegraphy Act*, are awarded for specific geographic areas and expressed to confer exclusive rights within the area. The duration of the licences is open-ended. However, they may be terminated on two months notice after the first seven years (and may be terminated without notice for breach of licence conditions).

Section 16 of the *1960 Broadcasting Authority Act*, as amended, confers on RTE the right to establish and maintain a national television and sound broadcasting service. RTE is the exclusive public broadcaster.

Part II of the *1988 Radio and Television Act* establishes the IRTC, and obliges it to provide sound broadcasting services and one television programme service. The television programme service licences are awarded by the Minister for Transport, Energy & Communications on the basis of a competitive tender. The IRTC then enters into a service contract with the operator. Accordingly, only licensees can provide commercial television programme services.

(iii) Publishing

There are no special or exclusive rights granted with respect to the provision of publishing services.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services).

Telecom Eireann retains the monopoly rights set out in D(2) above. There are no ownership restrictions under the *1988 Broadcasting and Wireless Telegraphy Act* on licences for cable television. The cable operators cannot provide telecommunications services over their networks (indeed, Telecom Eireann owns over 75% of the largest cable TV operator in *Ireland*). However, the Statutory Instrument effecting infrastructure liberalisation from 1 July 1997 allows the use of existing and future television transmission and retransmission networks for the provision of liberalised telecommunications services (*i.e.*, not voice telephony). There is no asymmetric regulation to the detriment of Telecom Eireann. Telecom Eireann is not currently subject to regulation by ODTR.

(4) Accounting and structural separation safeguards (current or planned).

(i) Telecommunications

The *1997 Telecommunications Infrastructure Regulations* require that, in order to ensure transparency, Telecom Eireann must operate separate financial accounts with respect to its activities as a provider of telecommunications services and as a provider of cable TV services/networks.

Consequently, accounting separation is provided to the ODTR in relation to Telecom Eireann's fixed network, leased lines service, mobile network and cable TV operations. To this end, the ODTR is overseeing Telecom Eireann's establishment of a revised cost accounting system established for the purposes of fulfilling obligations in EC telecommunications law, namely: cost-oriented tariffs; unbundled and cost-oriented interconnection rates; and determining any universal service deficit.

(ii) Broadcasting

The IRTC may require that the commercial licensees keep their accounts structurally separate.

(5) Policy basis for regulation of incumbent carrier's services.

The general duties of Telecom Eireann are detailed in sections 14 and 15 of the *1983 Postal and Telecommunications Services Act*. The principle objects of Telecom Eireann are: to provide a national telecommunications service within *Ireland* and between *Ireland* and places outside *Ireland*; and to meet the industrial, commercial, social and household needs of the State for comprehensive and efficient telecommunications services.

Telecom Eireann must ensure that charges for services are kept at the minimum rates consistent with meeting approved financial targets. There is no clear legislative basis for regulating affairs of Telecom Eireann because of the fact that it is not licensed (conversely, the powers of compulsion do exist with respect to all operators which are licensed). Powers exist under the 1983 PTSA for the Minister to compel Telecom Eireann to carry out its directions.

Further to the implementation in *Ireland* of EC Directives, Telecom Eireann will become increasingly regulated on the basis of its "significant market power" in most telecommunications markets in *Ireland*.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

It is necessary to obtain a licence or a notification to provide a liberalised telecommunications service. The licensing scheme is administered by the ODTR. There are no restrictions on the number of licences granted for liberalised telecommunications services, except for mobile telephony

Value-added and mobile services and the infrastructure for the provision of mobile services is liberalised and subject to licensing from the ODTR.

Cellular mobile telephony, personal communications networks and mobile data services are also licensed under section 111 of the *1983 Postal and Telecommunications Services Act*.

The *1926 Wireless Telegraphy Act* and the Regulations adopted under the *Act* provide that holders of radio equipment must obtain licences.

Section 5 of the *1869 Telegraphy Act*, as amended by section 8 of the *1983 Postal and Telecommunications Services Act*, provides that it is an offence to operate a telecommunications network in *Ireland* without an appropriate licence.

(ii) Broadcasting

Terrestrial Television

It is necessary to obtain a licence to provide terrestrial television services in *Ireland*. The licence is issued by the ODTR, through the IRTC, which enters into Service Contracts with private operators.

Cable television

The ODTR has the power to issue licences for cable television. The licensees are granted exclusive rights to operate over a specific geographic area. The duration of the licence is open-ended; however, it can be terminated by notice of not less than two months once the licence has run for seven years or more, and is subject to termination without notice in the event of a breach of the licence conditions.

Satellite television

Satellite television services are not licensed in *Ireland.*

(iii) Publishing

No special permits or authorisations are required for publishing in *Ireland.*

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

Section 111 of the *1983 Postal and Telecommunications Services Act* (as amended) provides for the granting of licences by the Director of Telecommunications Regulation for the provision of liberalised telecommunications services and infrastructure under separate schemes.

The Director may not reject any application to provide liberalised services without stating her reasons. Any rejection can be appealed to the Courts.

(ii) Broadcasting

Terrestrial television licences are issued by the ODTR through the IRTC, which enters into Service Contracts with private operators.

RTE is not licensed (similar to the situation in which Telecom Eireann finds itself in the telecommunications sector). Its rights are conferred directly by the *1960 Broadcasting Authority Act.*

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

A regulatory distinction is drawn between the licensing of infrastructure and services. The liberalisation of services (other than voice telephony) occurred before infrastructure liberalisation. Infrastructure liberalisation (other than for the public telecommunications network) occurred on 1 July 1997. The liberalisation of voice telephony and public telecommunications network liberalisation for voice services will occur simultaneously. The *1997 Telecommunications Infrastructure Regulations* allows a "telecommunications network" [51] to be established in *Ireland*

[51] Defined as: "the transmission equipment and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by

under an individual licence to the extent that the network is not a public network. [52] The licence may be subject to terms and conditions imposed by the ODTR. A reasoned opinion must be given by the ODTR if it decides to refuse, revoke, suspend or amend a network licence (which is subject to an appeal to the District Court). The *1997 Telecommunications Infrastructure Regulations* amended the *Wireless Telegraphy (Wired Broadcast relay Licence) Regulations* 1974 to provide that a cable TV licensee may use the wires forming part of its network to provide telecommunications services.

Although the liberalisation of alternative infrastructure was not effective by 1 July 1997 (the date specified under Community law), the ODTR announced on 8 August 1997 that it would receive applications for alternative infrastructure licences, with application forms being available as from August 15th. Two utility groups are expected to receive such licences with a view to providing nation-wide originating telephony services (*i.e.*, Esat Telecom with the Irish railways, and BT with the electricity supply company).

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

Until 1 July 1997, cable operators were unable to provide liberalised telecommunications services. As stated above, Telecom Eireann owns 75% in *Ireland*'s largest cable TV operator (Cablelink).

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no specific restrictions on content production. However, the IRTC can use its power to control over-concentration of broadcast ownership and can refuse to enter into a service contract for the supply of television programme services, effectively controlling the identity of the content provider. IRTC's Service Contract with TV3 contains a provision whereby TV3 must broadcast a certain number of Community-origin programmes and Irish-produced programmes.

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optical, by radio or by other electromagnetic means".

52 The licensing of alternative infrastructure will permit licensees to build a telecommunications network and to provide network capacity to third parties. However, the provision of voice telephony is not permitted until after 1 January 2000, by which time licensees will be issued with sufficient numbers.

(6) Typical licence conditions.

(i) Telecommunications

Section 90 of the *1983 Postal and Telecommunications Services Act* entitles Telecom Eireann to set the terms and conditions for supply. In effect, Telecom Eireann has the power to write its own terms and conditions.

Telecommunications services licences are provisionally valid from the date of issue until 30 June 1999, with the fee being £1,000 IR per licence. This date was settled as a matter of administrative efficiency and is without prejudice to the general right established in Community law to provide telecommunications services (after that point, new licences will be issued upon Telecom Eireann's monopoly over voice services expiring on 1 January 2000). A licence is not transferable without the prior written consent of the ODTR.

The Ministry has indicated that it intends to publish detailed licensing conditions in its Iris Oifiguiúil , which are to include:[53]

- description of service categories requiring licensing;
- information on licensing conditions (*i.e.*, individual licences, registrations and so forth);
- duration and review procedures for licences;
- ONP-related obligations on uses of leased lines; and
- quality commitments and universal service obligations.

The licence may be suspended or revoked by the Director if she is satisfied that:

- the licensee has breached any of the conditions of the licence or any provisions of the telecommunications legislation; or
- the licensee has made any false declaration in relation to the application for the licence; or
- it is in the national interest to revoke the licence; or
- the licensee has ceased to provide public telecommunications services; or
- the telecommunications services provided by the licensee no longer fulfill the "essential requirements" as defined in Commission Directive 90/388/EEC of 28 June 1990; or

[53] As listed in Annex I to Statutory Instrument (SI) 328 of 1994.

- a receiving order for bankruptcy has been made in respect of the estate of the licensee.

Three mobile licences have been awarded in the telecommunications sector, namely:

- Eircell, a 100% owned Telecom Eireann subsidiary operating an analogue TACS licence (not subject to a licence fee);
- a GSM licence issued to Eircell (licence fee of £10 million IR); and
- ESAT Digifone, awarded the second GSM licence (licence fee of £15 million IR).

A third mobile operator is due to be licensed in early 1998 in the 900/1800 frequency bands. It was announced in early December 1997 that the third licence would also include the use of the 900 MHz spectrum, which had not been identified as a policy consideration during the course of the public consultation on the third licence held earlier in the summer of 1997. There is also a plan to give existing GSM operators access to 1800 MHz spectrum in the year 2000.

In the mobile sector, the second GSM operator was obliged to satisfy an 80% population coverage and a 57% geographic coverage requirement within nine months of receiving the licence (and fined £1 million IR for failing to do so). In its second roll-out phase (over 18 months), it must cover 95% of the population and 90% of the country.

Candidates for a mobile or a paging licence have a 21-day right of reply where they are given notice that the licence is unlikely to be granted; a further 28-day period is allowed in which to bring appeals to the High Court if the application is refused definitively.

(ii) Broadcasting

- Cable TV licences are granted for a specific geographic area. The terrestrial television licence covers the 26 counties of the *Republic of Ireland*. The IRTC can appoint one national television service;
- There are no "roll-out" obligations on cable TV operators. RTE is not subject to any geographic coverage obligations;
- Licences are not transferable without the prior approval of the IRTC . The IRTC must consider the public interest in allowing any person, group or entity to control or own any interest in a particular media operator;

- In emergency situations, the RTE must broadcast the information provided by the government;

- Foreign ownership limitations are as follows:
  - Radio: up to 25%
  - TV: up to 45%; and

- Cross-media ownership limitations are as follows:
  - Radio: up to 27%
  - TV: up to 45%.

It is necessary to obtain the approval of the IRTC. The IRTC must consider the public interest in allowing any person, group or entity to control or own any interest in a particular media operator. It may take the necessary measures to prevent the over-concentration of TV and radio ownership.

Conditions on duration, suspension, termination and modification of the licence are set by the IRTC in the Service Contract. Usually, licences are granted for 10 year terms, with the possibility of renewal for another ten years.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Telecom Eireann tariffs are capped pursuant to the *Telecommunications Tariff Regulation Order, 1996*. In summary, a basket of telecommunications services must reduce by CPI-6% in each of the next three years and no individual tariff can increase by more than CPI+2%.

Since 1990, all charges (including rentals and local calls) have fallen significantly in real terms. However, Telecom Eireann still maintains a relatively high end-user telephony tariff, and certain prices appear not to reflect costs.

Ireland is proceeding with a general and flexible approach to tariff rebalancing, while maintaining safeguards for consumers in terms of price and quality of service. Due to the price-cap regime, Telecom Eireann needs about five years (*i.e.*, until the year 2000) to implement the increases of local calls (*i.e.*, rebalancing is constrained under the current price cap mechanism).

So far, Telecom Eireann has made little progress in rebalancing local charges, and will need additional time to decrease trunk and international charges, although in relative terms, tariffs are more rebalanced than the European average. Telecom Eireann has committed itself to complete the rebalancing process by reducing trunk and international tariffs by the year 2000.

Tariffs of other fixed operators are not regulated.

(2) New pricing principles for the competitive market environment.

See F (1) above.

(3) Control of tariff packages which can be offered to customers.

The Director's monitoring role, and the residual competition law jurisdiction, are the only means to prevent discriminatory tariffing practices. Indeed, Telecom Eireann continues to have the power to issue its own Statutory Instruments.

(4) Tariff basis - usage time or flat rate off-peak rates; and other relevant pricing practices which increase pricing flexibility.

Tariffs are based on usage time. Prices are different depending on whether the call is made during a peak or an off-peak period.

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.

Internet access and Internet pricing issues, remain unregulated.

G. Network Interconnection and Access to Service Providers

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

Telecom Eireann, however, is not obliged to conclude network interconnection arrangements at this time. Interconnection agreements are in place between Telecom Eireann and Esat Digifone, and Eircell and Telecom Eireann (plus 'indirect' interconnection agreements with a number of value added service providers). The terms of these arrangements are not in the public domain. Indeed, only mobile operators have the legal right to obtain interconnection from Telecom Eireann.[54] Where an interconnection agreement cannot be concluded, the Minister may intervene and mandate interconnection terms (subject to the right of renegotiations). Telecom Eireann's individually negotiated interconnection

54 Pursuant to the terms of Statutory Instrument (SI) 123 of 1996.

agreements were reviewed by the European Commission's Competition Directorate ("DGIV") as a result of a complaint lodged by a competitor, ESAT Telecom, in April 1996, when Telecom Eireann failed to offer volume discounts for its tariffs. The complaint has evolved over time into a more general examination of Telecom Eireann's interconnection practices, and especially whether competition law rules entitle competitors of Telecom Eireann to interconnect.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".

Draft legislation which transposes the *ONP Interconnection Directive* into Irish law is being reviewed, with a public commitment by the government to having it adopted as soon as possible.

(3) Precise obligations currently placed on interconnecting operators.

- ***Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated).***

The obligations contained in the Article 90 *Mobile Communications Directive* and the *ONP Interconnection Directive* that interconnection is to be provided at all points in the network where interconnection is technically feasible, is already happening in practice in the context of mobile communications.

- ***Unbundled access to internal network functions.***

Not mandated.

- ***Unbundled access to the local loop.***

Not mandated.

- ***Equal Access.***

The government is committed to following the timetable prescribed in Community legislation.

- ***Technical requirements and standards.***

Not mandated, but relevant Community standards are satisfied in practice.

- ***Quality of service commitments required.***

Not mandated, but general industry standards are satisfied in practice.

- ***Interconnect tariffs.***

Telecom Eireann uses historical costs as its charging basis, although fixed to mobile interconnection charges have been negotiated commercially on better terms. There is no regulatory statement as to the legal or economic standards to be used for interconnection charges.

- ***Information disclosure obligations.***

Ireland has a derogation until 1 April 1999 for the publication of all interconnection charges. A statement on interconnection rights for inbound international traffic and fixed-mobile/mobile-fixed traffic within *Ireland* is expected shortly.

- ***Protection of interconnecting carrier's or service provider's customer information.***

Thus far, such information has been protected for mobile operators by virtue of the directly enforceable provisions contained in the Article 90 *Mobile Communications Directive*.

H. "Resource" Issues

(1) Frequencies.

The ODTR is responsible for the radio frequency management policy and the allocation of frequencies in *Ireland*. It is primarily responsible for the civil use of radio frequency spectrum. The IRTC is responsible for authorising, non-public service sound and television broadcasting contractors.

Radio frequencies are assigned under a licence granted by the Minister pursuant to section 5 of the *1926 Wireless Telegraphy Act*. An application for radio frequency may be made directly to ODTR for an assignment of any radio frequency save in the case of a frequency for broadcasting, where the application must be made to the IRTC.

Frequency bands have been reserved exclusively for a public pan-European cellular digital communication service. No decision has yet been made regarding the assignment of spectrum to particular operators. An assignment of 2x 15 MHz

is immediately available for GSM use. Four protected priority channels in the 169.4 to 169.8 MHz range have been designated for the pan-European public radio paging services. Frequency band 1880-1900 MHz has been designated for digital European cordless telecommunications, with priority over other services in the same band (see also discussion in section C).

Frequencies are by and large allocated on a first-come, first-served basis, although pressures for a different policy approach will mount as 1 January 2000 approaches.

(2) Numbering.

Numbering is now managed and controlled by the ODTR. Responsibility for the national numbering plan was recently transferred to it from Telecom Eireann. A revised national numbering plan will be published in the near future. Access codes are allocated to mobile service providers (*i.e.*, the GSM operators), but number portability on fixed networks is not yet a regulatory issue in practice due to the fact there is no competition for the incumbent fixed wire telephony operator. The valuation of numbers is not allowed; operators are currently not allowed to charge customers for numbers.

The 1997 Statutory Instrument liberalising infrastructure provision does not allow providers of new networks to access numbers from the national numbering plan, as the government considers that such access by competing network providers would effectively make the networks substitutable for Telecom Eireann's public network (bearing in mind that the public network monopoly extends until the year 2000) and the absence of numbering rights is deemed to be the substantive distinction between the public telecommunications network and other (liberalised) networks.

On 28 November 1997, the Dublin High Court ordered Telecom Eireann to restore eight choice phonenames and allocate a further 270 such numbers to the Zockoll Group.

Phonenames, where letters are used to describe a telephone address, are well established in the *United States*. Anticipating the development of a market for phonenames in *Ireland* (as well as the *United Kingdom*), Zockoll acquired eight freephone generic phonenames from Telecom Eireann in 1995. The Zockoll Group intended to franchise the use of the numbers to selected participants. In November 1995, Telecom Eireann notified Zockoll that it was withdrawing the company's use of all eight phonenames and was also rejecting Zockroll's application for a further 270 such numbers.

In its judgment, the Dublin High Court found in favour of the Zockoll Group. It dismissed Telecom Eirerann's allegation that Zockoll was acting simply as a broker and was satisfied that Zockoll had a *bona fide* plan for franchising

phonenames. The Court held that Telecom Eireann was in breach of contract in withdrawing the phonenames from Zockoll and for refusing to grant its request for a further 270 phonenames. Although claims were also brought under competition rules, the Court did not rule whether Telecom Eireann's conduct was in breach of the competition rules.

(3) Rights-of-Way.

Section 95(1) of the *1983 Postal and Telecommunications Services Act* provides that the Minister for Public Enterprise may, after consultation with the Minister for the Environment, make regulations requiring persons engaged in the provision of housing and industrial estates and other building developments (including developments by local authorities) to provide such facilities as would enable telecommunications services to be provided in those buildings in the most expeditious and efficient manner. Telecom Eireann (and other providers of telecommunications networks) are required to negotiate with both local authorities and private landowners to install ducts, attachments, and so forth. Telecom Eireann and all State bodies are subject to similar planning ordinances.

The two Departments are currently reviewing their procedures relating to access to public property for the construction of new networks. The primary aim of the review is to facilitate development of alternative telecommunications infrastructure. It is understood that a policy of mandatory site-sharing is being considered. The need for inter-Ministry cooperation on rights-of-way issues was demonstrated by the proceedings involving Esat Digifone, where the second GSM operator was denied a planning exemption and was obliged to obtain many of its rights-of way from Telecom Eireann. The full rigours of the planning laws in *Ireland* are cumbersome to satisfy. Third parties can appeal against the sites where poles are erected (resulting in possible delays of six months). The inability of Esat Digifone to obtain all its necessary rights-of-way under this system resulted in it being fined £1 million IR in 1996 because it could not satisfy its network roll-out obligations.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

Licensing requirements for certain types of content that may restrict market entrants. National standards for exclusivity (for example, two year periods subject to renegotiation).

There are no legal rules granting exclusive rights to certain operators for the broadcast of major sporting events. However, the Ministry of Sports has set up a Working Group to examine whether any legal intervention might be appropriate to

prevent broadcasters from outside *Ireland* acquiring exclusive rights to transmit major sports events taking place in *Ireland*.

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

Cable TV operators must carry RTE's programmes. It is anticipated that they will also be required to carry commercial operators' programmes.

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

None.

(5) "Gateway" Issues - Technologies for Open Access.

None, aside from the eventual implementation of the EC *Television Standards Directive*.

(6) Internet Domain Names - preferred regulatory approach.

There is no preferred national approach to the issue of the regulation of Internet domain names.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

There is as yet no legal definition of "universal service" in Irish legislation.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

Telecom Eireann is the only universal service provider. It is only obliged to satisfy user needs insofar as requests are "reasonably practicable". Mobile operators are subject to mandated universal service obligations to the extent that they are required to satisfy very stringent minimum geographic and population

coverage requirements as part of their licence grants. The two alternative network providers (*i.e.*, the groups run by Esat Telecom and BT respectively) will not be permitted to provide universal service or to be allocated numbers until the expiration of the monopoly over voice on 1 January 2000.

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

There is no contribution scheme or fund planned at present.

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).

The cable TV operators must carry RTE radio and television programmes, and it is likely that they will be required to carry the new commercial stations' programmes.

(5) Other public service specifications affecting the content or information provided to subscribers.

Section 5 of the *1990 Broadcasting Act* requires broadcasters to comply with the European independent production requirements. Section 17 of the *1960 Broadcasting Authority Act* requires RTE to promote the Irish language and to preserve and develop the national culture. In addition, section 18 of the *1990 Broadcasting Act* imposes a duty of impartiality on RTE.

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ITALY

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

A distinction is drawn between telecommunications and broadcasting services. However, the dividing lines between the two sectors seem to be fading in recently adopted laws and regulations. D.P.R. No. 318 of 19 September 1997 ("*the Decree*") defines "telecommunications services" as "a service consisting, in all or in part, in the transmission and the routing of signals over telecommunications networks, including also interactive services related to audiovisual products, but excluding the transmission of radio and television programmes".

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

A clear distinction is drawn under *the Decree* between basic voice telephony services offered to the public, and all other telecommunications services. The former category may not be provided without an individual licence, while the latter simply require a licence with the competent regulatory authority. However, prior to the adoption of *the Decree*, regulations drew a distinction between the provision of value added services using leased line capacity (which were subject to an individual licensing requirement), and those requiring only a switched connection to the PSTN (subject to a simple notification procedure). Packet and circuit-switched data services, the simple resale of capacity to the public and the provision of voice services to Closed User Groups were also, under prior legislation, subject to the previous authorisation of the former licensing authority, the Ministry of Posts & Telecommunications.

Mobile communications services, which require the use of radio spectrum, are subject to an individual licensing requirement, due to the constraints imposed on the number of available licences because of the scarcity of frequencies.

Current legislation also draws a distinction between telecommunications networks which are made available for the provision of services to the public at large or for uses other than voice telephony (until the approval of *the Decree*, the provision of public wireline networks was not open to competition in Italy).

Satellite network services and satellite communications services are subject to separate individual licences under the legislative Decree of March 1997 No. 55 ("*The Satellite Decree*").

(3) Regulation of Internet services and on-line services.

Internet services are not the object of specific regulation. In *Italy*, Internet Service Providers are considered to be value-added service providers which are subject to an individual authorisation requirement, even where they use leased lines with switched access to the PSTN.

The Italian Competition Authority ("Competition Authority"), which acts as the enforcement agency for the purposes of *Legislative Decree 74/92* (which implements *Directive 84/450/EEC* on misleading advertising), has asserted its jurisdiction over advertising also on the Internet. The Competition Authority opened its investigation regarding a message carried by Lloyd 1885, an insurance company directly marketing insurance policies on its Website. The company claimed in its defence that a message conveyed through the Internet was "information" and not "advertising", and thus should not fall under the jurisdiction of the Competition Authority.

In its ruling of 22 May 1997, the Competition Authority stated that the Internet was a medium which could be used for advertising purposes and that the wording of Article 2 (a) of *Legislative Decree 74/92*, which defines the concept of advertising, is sufficiently broad to cover activities carried over the Internet.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

Video-on-Demand is currently treated under Italian regulation as a "telecommunications" service, whereas Near Video-on-Demand is considered to fall within the sphere of broadcasting regulation (the matter is now somewhat moot in light of the merger of the two previously separate regulatory functions in to the hands of the CA).

There is no legislation on digital broadcasting. There is a Bill currently before the Italian Parliament concerning Pay-Per-View services.

B. Regulatory Authorities in telecommunications/ broadcasting/publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

(i) Telecommunications

General legislative competence in the field of telecommunications lies with the national Parliament. The Ministry of Communications, acting on behalf of the Government, has overall responsibility for determining general policy goals and issuing regulations in this field.

(ii) Broadcasting

Parliament telecom authority to substitute the "Garante per la Radiodiffusione e l'Editoria".

The legislation governing broadcasting activities is:

- *Post & Telecommunications Code of 29 March 1973* No. 156;
- *Broadcasting Law No. 223 of 1990* (the so-called "*Mammi Law*"; named after the Minister who presented the Bill to Parliament); and
- *Presidential Decree No. 225 of 1992*, as amended by *Law No. 422 of 1993.*

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.

(i) Telecommunications

An independent regulatory authority with broad competence over telecommunications and broadcasting issues ("Communications Authority", or "CA") has been established by the *Law No. 249/97* of 31 July 1997, although its members have not as yet been appointed.[55] Its seat is to be in Naples. Until such time as the CA is operational, its functions will be carried out by the Ministry on an interim basis.[56]

The CA is comprised of eight commissioners appointed by the Parliament (four Commissioners are appointed by the Congress and four by the Senate), and a Chairman appointed by the President of the Italian Republic on a proposal of the Prime Minister, acting in cooperation with the Minister of Communications.

The CA will conduct its work through two Commissions (the "Services Commission" and the "Networks Commission") and a Council. Each Commission is formed by the Chairman and four Commissioners. The Council is constituted by the Chairman of the CA and its Commissioners. The Council has decision-making powers regarding the internal organisation and the workings of the CA, which are shared in part with the two Commissions.

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55 The Chairman of the CA, Mr Enzo Cheli, was appointed in December 1997.

56 For this reason, references to the competence of the CA, until it is fully operational at some stage in 1998, should be read as referring to the Ministry acting on an interim basis.

Powers attributed to the CA

Law No. 249/97 of 31 July 1997 has established the Autorità Garante per le Communicazioni ("the Communications Authority", or "CA"), which has the status of an independent regulatory body. The objective of this new piece of legislation is to establish a body structured to operate in a converged environment. The CA has competence over the full range of both broadcasting and telecommunications matters. The Ministry of Posts & Telecommunications, which has been renamed the Ministry of Communications, retains some residual licensing powers.

Law No. 249/97 also abolishes the "Garante per l'Editoria", the independent authority formerly competent with respect to both competition law issues and the assurance of plurality of information sources in the areas of television and the press. Jurisdiction over competition law (mergers, restrictive practices and abuse of dominant position) in these areas now passes to the Competition Authority, while the new Communications Authority is competent with respect to regulatory control of dominant positions in order to ensure the plurality of information sources in the media.

(i) Telecommunications

The powers attributed to the CA are as follows:

General competence

- identifying operators enjoying significant market power within the terms of *Law No. 249/97* of 31 July 1997 (this determination has consequences of specific regulatory importance with regards to interconnection obligations);
- regulate the relations between operators of fixed or mobile networks and resellers;
- the promotion of convergence;
- the protection of communications and the avoidance of harmful interferences;
- the protection of users' rights (in particular, in cases of disconnection of the service);
- the creation of a register of licensed operators of telecommunications networks and services; and
- the determination of economic conditions for a given service offer (*i.e.*, the setting of tariffs, when appropriate).

The award of licences

- the grant of individual licences for the provision of telecommunications networks and services and the determination of specific licence conditions for the licence grant (including the payment of licence fees); and

- deciding on the suspension or termination of general authorisations and/or individual licences.

Universal Service

- the determination of universal service obligations and the contributions which may be required from the industry to support their provision.

Quality requirements and standards

- determining minimum service quality requirements; and

- the establishment of standards for de-coders.

Scarce resources

- the definition of criteria governing the allocation of numbers according to the National Frequency Plan; and

- the approval of the National Frequency Plan, with the exclusion of those frequencies which are for exclusive military use.

Penalties

- the imposition of penalties for the failure to provide the information as may be requested by the CA may result in the CA imposing a fine which may range between one and two hundred million lire (the provision of false information is subject to the penalties foreseen in the *Italian Civil Code* and imposed by the ordinary courts); and

- failure to comply with the decision of the CA may result in the CA imposing a fine which may range between 20 to 500 million lire; fines for the infringement of rules regarding operators with significant market power may result in a fine between 2 and 5% of the turnover of the company charged with the infringement.

Interconnection

- the definition of criteria applying to the establishment of interconnection or the grant of access to telecommunications networks which are objective, transparent and non-discriminatory;

- the definition of a cost-based formula for pricing interconnection which is based on Long Run Incremental Costs ("LRIC"), plus a reasonable return on capital; the CA must set the deadline for determining this formula by January 1999 at the latest;

- the CA may mandate interconnection upon the operators which have an obligation to provide it and it may establish the conditions for such interconnection; the CA may establish interconnection conditions in advance of the agreement being negotiated, in the following areas: publication and access to interconnection agreements; equal access and number portability; the sharing of sites; essential requirements; allocation and use of numbers; the end-to-end quality of service; the determination of the cost of USO which may be added to interconnection charges; other technical and economic conditions, conditions of supply and use, compliance with the rules, compliance with essential requirements, protection of the environment and the protection of effective competition;

- mandate a time within which interconnection negotiations must be completed;

- mandate that a given interconnection agreement be modified, once concluded, but only in exceptional circumstances and after hearing the views of the national Competition Authority;

- exceptionally, when it is considered to be within the public interest, mandate that two or more operators of public telecommunications networks and services interconnect their facilities under specific conditions, subject to the principle of proportionality;

- allow operators which are in principle obliged to provide Special Network Access ("SNA") to limit the scope of this obligation and to ensure, otherwise, that the conditions for SNA which are established under *the Decree* are fulfilled; and

- the resolution of interconnection or access disputes, either acting of its own accord or at the request of one of the parties; the CA must take a decision within 90 days of being called upon to resolve an interconnection dispute.

(ii) Broadcasting

In the field of broadcasting, the CA has the power to:

- oversee advertising and publicity (transmitted over any means);
- ensure compliance with the minimum waiting times before an audiovisual work may be distributed through the various distribution channels as may exist after the date of its first publication;
- issue regulations in the field of publicity and telemarketing;
- regulate the relations between network operators and users regarding the protection of users' information;
- the protection of minors and of recognised language minorities;
- submit to the Ministry the draft convention containing the conditions of the public broadcasting concession;
- grant of private broadcasting licences;
- ensure that radio and television ratings are conducted in a proper manner and, in particular, that they comply with the criteria of random sampling and universality;
- monitor radio and television transmissions;
- authorise the transfer of assets of the companies operating in the radio and television sectors;
- determine the existence of a position of dominance in the radio and television broadcasting sectors, respectively; and
- exercise the powers formerly held by the Radiobroadcasting and Publishing Authority ("*Garante per la Radiodiffusione e l'Editoria*").

All the CA decisions must be reasoned and made public. The decisions of the CA may be appealed to the administrative courts.

A number of Regional Communications Committees are created by *Law 249/97* of 31 July 1997, which will be functionally independent of the CA and will act under CA's delegated authority.

At a regional level, for public television only (*i.e.*, RAI), responsibility rests with the Regional Committees for Radio and Television Services ("Comitato per i servizi radiotelevisi VI").

Previous Regulatory Structure

Prior to the adoption of *Law 249/97* of 31 July 1997 and the creation of the CA, the legal competence for broadcasting issues was divided along the following issues:

Public broadcasting

The administrative and regulatory body for public broadcasting was a joint committee of the two chambers of Parliament, the "Commissione parlementare per l'indirizzo generale e la vigilenza dei servizi televisi". The Parliamentary Commission was composed of 40 members, chosen by the Presidents of the two chambers from all the groups represented in Parliament.

The Parliamentary Commission had a variety of functions. One of these, which decided which groups are entitled to exercise rights of access, could be classified as being quasi-judicial in nature. Second, it laid down general guidelines for the achievement of objectivity and impartiality standards. It could also formulate rules with regard to advertising controls. Third, it appointed the members of the Administrative Council. The Council was responsible for the financial management and planning of the public broadcaster RAI and supervised compliance with the Commission's programme guidelines.

The power to nominate the Director-General lay with the shareholders of RAI (and previously with the Parliamentary Commission). The Director-General was responsible to the Administrative Council for broadcasting services, with supervisory powers over the directors of each channel.

Private broadcasting

Regulatory powers over private broadcasting have in the past been entrusted to the *Garante per la radiodiffusione e l'editoria.* He was appointed for three years, renewable once, by the state President upon the joint nomination of the Presidents of the Chamber of Deputies and the Senate. He was chosen from a range of candidates made up of former judges of the Constitutional Court, presiding judges of sections of the Court of Cassation, or representatives from the universities or from the mass communications industries regarded as having comparable stature.

His principle functions were to keep a national registrar of broadcasting companies (and the press), to examine the accounts of broadcasting companies (where necessary) of programme producers, distributors and advertising agents, to monitor the ratings systems, and to apply a range of administrative sanctions for breach by the broadcasters of their programming duties. Together with the ordinary courts, he also had the power to enforce rights of reply.

(3) National rules limiting anti- competition behaviour (specific and non-sector-specific). National competition authority and its powers.

The *1990 Competition and Fair Trading Law* is modelled on the Community's competition rules under Authority 85 and 86 of the EC Treaty. Section 2 of the Law is similar to Article 85 of the EC Treaty. It prohibits agreements between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it.

Prohibited agreements are null and void. However, consistent with the terms of Article 85(3) of the EC Treaty, it is possible to obtain an individual exemption, for a limited period of time, from the Autorità Garante della Concorrenza e del Mercato (the "Competition Authority"). In order to qualify for this exemption, the companies concerned must show that the agreements improve supply conditions on the market, that the limitations on competition are absolutely necessary in order to obtain these positive effects and that the improved conditions of supply bring a substantial benefit to consumers (for example, by reducing prices or providing a good or a service which would not otherwise be available).

The *1990 Competition and Fair Trading Law* also provides for the notification of concentrations which exceed a certain threshold.

Section 3 of the Act is similar to the terms of Article 86 of the EC Treaty. It is prohibited for one or more undertakings to abuse a dominant position on the national market or a substantial part of it. Again, the main examples of abuse are the charging of unfair prices or imposing terms and conditions which are unjustifiably burdensome, or acting in such a way as to impede market access by other competitors or to induce them to abandon their operations.

The Competition Authority was instituted by the *1990 Competition and Fair Trading Law*. It is an independent body and has the status of a public agency. It is responsible for enforcing the *1990 Competition and Fair Trading Law*. In addition, it is empowered to enforce the provisions of *Decree No. 74 of 1992* on misleading advertising.

The Authority acts as a collegiate body. Several members take their decisions by a majority vote. It has a Chairman and four members which are appointed jointly by the Speakers of the Senate and the Chamber of Deputies. These five members remain in office for a seven year, non-renewable term.

Decisions of the Authority may be appealed before the Lazio Regional Administrative Tribunal. Further appeals can be filed with the Supreme Administrative Court, the "Council of State".

In addition, Article 2 of Law 249/97 provides that the CA may intervene to eliminate or prevent the creation of a position of market dominance in the broadcasting sector.

(4) *Powers of the various regulatory bodies, and the sanctions which they can impose.*

(i) The new Communications Authority (CA)

The CA may impose sanctions for infringements of telecommunications laws and regulations. The *Law 31 July 1997* (establishing the CA) provides that companies which provide incorrect information regarding their activities are fined under Article 2621 of the *Italian Civil Code*.

Companies which do not provide the necessary information to the CA within the time limit prescribed will be fined. The fine will be between one million to 200 million lire. Companies which do not follow the instructions or warnings of the CA will be fined. The fine will be between 20 million lire and 500 million lire. If the infringement is with respect to legislative obligations or the abuse of a dominant position, the fine imposed will be between 2% and 5% of the company turnover in the financial year prior to the notification of the infringement.

If, in all the above cases, the infringement is particularly serious or is repeated, the CA may order the suspension of the activity, for a maximum period of six months, or may withdraw the licence.

(ii) The Competition Authority

The Antitrust Authority may impose sanctions and fines for the infringement of the competition rules, depending on the seriousness of the offence. The amount of the fine is set on the basis of the gross turnover of the companies involved, calculated in terms of the products or services which are the subject-matter of the infringement. If the Authority finds that an offence has been committed under the *Competition Law*, and the party concerned fails to desist after the decision has been taken by the Authority, further fines may be imposed and, in the event of repeated offences, the Authority may order the company to cease operations for a period up to 30 days.

There are also fines for companies that fail to notify the Authority before mergers and acquisitions, and for companies which proceed with such operations after they have been prohibited. In the case of mergers and acquisitions that have already taken place and which the Authority considers to restrict competition, the parties concerned may be ordered to adopt the necessary measures to restore the pre-merger situation.

Once the Authority has received a complaint or has collected information regarding the possible infringement of Italian competition law, the case is assigned to the Directorate responsible on the basis of the subject-matter the

subject of the abusive conduct. The Directorate carries out a preliminary examination and then advises the Authority whether to carry out a full investigation. If the Authority investigates, the parties directly concerned are notified. They are entitled to make representations and examine any documents relating to the investigation which are not confidential in nature. On completion of the investigation, they are summoned to attend the final hearing, during which the findings of the investigation are discussed jointly with all the members of the Authority. The parties receive a Statement of Objections before the final hearing; the parties may make written submissions throughout the investigation and for a short period after the final hearing.

During the course of the investigation all the information required to assess the case properly is collected. In some cases, the Authority may decide to carry out on-site inspections in order to make copies of company documents.

In its appraisal of acquisitions and mergers, the Authority has a statutory deadline of 30 days to decide whether to initiate investigations, and 45 days in which to complete them. In the case of investigations dealing with restrictive agreements and abuses of a dominant position, the Authority itself generally sets appropriate review deadlines.

On 6 November 1997, the Antitrust Authority decided to fine Telecom Italia ITL 950 million for abuse of a dominant position. The Antitrust Authority found that Telecom Italia had adopted a policy of supplying leased data circuits of 64 Kbps to 2 Mbps so as to obstruct market entry to competitors in data services, by not allowing them adequate capacity for providing services. In addition, Telecom Italia supplied leased lines with a capacity higher than 2 Mbps only to its clients, without adequately disclosing the availability of these lines to competitors. The Antitrust Authority issued a cease and desist order, and fined Telecom Italia for its policy of offering liberalised data services to its clients through D-channel ISDN as a low price alternative, while keeping leased lines at a high price, and not disclosing the availability of D-channel ISDN to competitors. In compliance with the cease and desist order, Telecom Italia announced a policy of transparency and publicity in its supply conditions and reductions of up to 60% on the price of leased lines to competitors.

The most notable case involving the Competition Authority was its decision in 1994 compelling Telecom Italia to provide Telesystem, the independent operator based in Milan, with leased lines for the provision of its value-added services.[57]

57 The appeal of Telecom Italia was rejected in March 1995, and decree 103/95 formally liberalised the sale of leased line capacity for liberalised services.

(5) *Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).*

Co-operation is promoted between the CA and National Regulatory Authorities ("NRAs") of different Member States for the resolution of cross-border interconnection disputes.

Also, the CA and the national Competition Authority are obliged, according to *Law 249/97*, to act in close co-operation to ensure that the conditions for effective competition prevail in the marketplace. The opinion of the CA must be sought by the Competition Authority before taking a decision about a telecommunications issue. The CA must issue an opinion within 30 days of the request, but the opinion is not binding. The Competition Authority may adopt a decision if the CA does not issue an opinion within the time limit.

In light of the impetus given in the past by the Italian Competition Authority to the effective application of Community liberalisation measures in *Italy*, co-operation between the CA and the Competition Authority may be expected to lead to a significant improvement in the effective conditions of competition existing in Italian telecommunications markets.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

Some provisions of *the Decree* require the further adoption of implementing regulations during December 1997/January 1998, namely, those regarding:

- specific individual licence conditions for those services which require a licence;[58]
- interconnection;
- universal service;
- cost and tariffs for telecom entities; and
- numbering plan.

New legislation will also need to address the concerns of the European Commission, raised in the its statement of 5 November 1997, regarding the failure of *Italy* to ensure full liberalisation of the establishment of new and the use of existing infrastructure by 1 July 1996.[59] The Commission has also taken the view that Italy has failed to specify the future expected contributions of new entrants to the provision of universal service.

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[58] Postscript: the *Licensing Decree* of 25 November 1997 was published on 4 December 1997 in the Official Gazette (General Series No. 283).

[59] Notice of the Commission to initiate formal infringement procedure against *Italy*: Commission Press Release, IP/97/954 of 5 November 1997.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

(i) Telecommunications

New entrants are not subject to any specific regulatory **restrictions** regarding the provision of telecommunications services. Certain specific constraints apply, however, to the provision of services by operators which enjoy a position of significant market power in a relevant telecommunications market (as defined by the CA). On the other hand, Telecom Italia will continue to hold a monopoly over basic voice telephony until 1 January 1998.

(ii) Broadcasting

The *Broadcasting Law of 1990* provides that the majority of the shares (or a controlling shareholding) of a company holding a broadcasting licence or a company having direct or indirect control of broadcasting licensees cannot belong or in any way be registered in the name of individuals, companies or partnerships of foreign citizenship or nationality. Licences are therefore granted only to companies or entities registered in *Italy*. This restriction, however, does not apply to companies registered in EU Member States or in States which grant reciprocity to *Italy*.

Under the *Broadcasting Law of 1990*, one person may control up to 25% of the national television or radio licences (of the total available on the national plan) or three such licences, provided the 25% limit is not exceeded. However, operators may not hold national and local licences at the same time, whether for radio or television. In addition, operators may not hold more than one local television or radio licence in any zone, or more than three local television or seven radio licences altogether (serving a population of not more than 10 million inhabitants in total).

Precise cross-media ownership rules are fixed by the *1990 Broadcasting Law*. Nobody may hold a national television licence if they control a company which publishes daily newspapers, the circulation of which exceeds 16% of the total daily circulation in *Italy*, or two licences if the newspaper's circulation exceeds 8%. Finally, nobody may hold three licences if they also own a national newspaper, irrespective of its circulation.

These provisions do not apply to the cross-ownership of radio and daily newspapers nor to the broadcasting media and weekly periodicals. Nor is there a rule restricting ownership of local television stations and newspapers. There is,

however, a provision annulling all future transactions which would lead to a media company acquiring more than 20% of all media resources, or to a multi-sector conglomerate (a body with two-thirds of its resources deriving from the mass media) acquiring more than 25% of such resources further specified by L.249/97. The definition of "media resources" for the purposes of the concentration rules includes also press, TV, and radio, omits the resources obtained from book publishing, the production and distribution of films and television programmes.

(2) *Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.*

(i) Telecommunications

Law 249/97 has lifted the following restrictions which formerly applied to the offer of telecommunications networks and services in *Italy*:

Cable TV

The *Decree* lifts all existing restrictions on the use of cable TV networks for the provision of liberalised telecommunications services.

Mobile Communications

The *Decree* lifts all the remaining restrictions on the use by Mobile Communications Systems of own and third-party infrastructure and the sharing of sites.

Mobile operators are also granted the right to interconnect their systems to the PSTN. The number of points of interconnection and the technical interconnection interfaces must be those which are the least restrictive for the operation of Mobile Communications Systems.

At least one DCS 1800 system should have been licensed by 1 January 1998.[60] DECT systems must also be allowed to provide local radio access technology to mobile and/or fixed telecommunications networks.

Alternative networks

The *Decree* liberalises the installation of public and private telecommunications infrastructure and the provision of telecommunications services via third-party or self-owned infrastructure.

Special rights which limit the number of undertakings authorised to install telecommunications networks or to provide telecommunications services to the

60 Although delays in the adoption of the necessary rules and regulations means that the DCS-1800 licence is more likely to be granted by mid-1998.

public may only exist on the basis of objective, proportionate and non-discriminatory conditions.

The provision of basic voice telephony and of its underlying infrastructure will only be open to competition as of 1 January 1998. Before that date, it is foreseen that provisional licences may be granted for carrying out service trials (the conditions for these interim licences have not as yet been defined).[61]

(ii) Broadcasting

Law 249/97 applies only to the liberalisation of telecommunications activities. The liberalisation of broadcasting activities and programming content are areas which clearly remain outside its scope of application and subject to a different set of rules under Italian law.

Measures adopted by a company or by one of its subsidiaries which have as their object or effect the establishment or maintenance of a dominant position are prohibited in the broadcasting sector. Any such measures will be annulled. Broadcasting companies are obliged to notify the CA and the Competition Authority the agreements and concentrations to which they are parties to allow these Authorities to carry out their functions. The CA must adopt the necessary measures to eliminate or prevent the establishment of a dominant position. If it believes a company holds a dominant position, it will investigate.

It is not possible to award concessions or authorisations which will cover more than 20% respectively of analogue television or radio broadcasting and television programmes or digital radio broadcasting, at a national level, transmitted over terrestrial frequencies according to the frequency distribution plan. The CA may grant a period of transition during which the limitations described above will not be applicable. The CA may prescribe for the transmission of broadcasting at national level a percentage greater than 20%.

In the national frequency plan, the CA fixes the number of networks and programmes at national and local level.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV.

No asymmetry of regulatory conditions has been foreseen by *Law 249/97*, which does not distinguish between the regulatory treatment afforded to Telecom Italia, as opposed to new entrants. In particular, there are no restrictions on Telecom Italia's ability to enter into the cable TV business or other lines of business. On the contrary, the grant of a national DECT-CTM licence to Telecom Italia,

[61] Conditions for trial licences have now been defined in the *Licensing Decree* of 25 November 1997.

effectively in advance of the adoption of any licensing regime, suggests that the incumbent, Telecom Italia, is advantaged in its position of such services vis à vis other competitors.[62]

However, in the past, the grant of a second GSM licence to the consortium Omnitel Pronto Italia for 750 billion lire gave rise to the European Commission addressing the issue of the asymmetry of licence conditions in Italy. The dispute arose because Omnitel had been required to pay a substantial licence fee which the incumbent's subsidiary (Telecom Italia Mobile, the holder of both analogue and a GSM mobile communications licence) was not required to pay. The Commission required the Italian Government to redress the competitive imbalance created by this payment by adopting corrective measures which consisted, in essence, of granting Omnitel privileged interconnection rates and other market entry benefits or to require Telecom Italia Mobile an identical fee.[63] After much controversy surrounding the implementation of these corrective measures, the Minister of Communications has ordered the STET group (the holding company of Telecom Italia and Telcom Italia Mobile) to repay the Italian State 1,120 million lire for the GSM licence of the latter.

Rather than being prevented from providing DCS-1800 mobile services, both Telecom Italia Mobile and Omnitel Pronto Italia have been granted the automatic right to obtain DCS-1800 licences, but may not commence operations until the third independent licence has been granted in 1998. Pursuant to Law-Decree of 21 December 1997, both GSM operators have been allowed to commence trials of DCS-1800 systems as of 1 January 1998 (even though the third licensee may be announced as late as mid-1998).

(4) Accounting and structural separation safeguards (current or planned).

Operators of public telecommunications networks are under a general obligation to keep an accounting system which provides sufficient detail as to their respective cost structures.

Some operators are subject to special accounting separation requirements. For example:

- Operators with significant market power are under an obligation to keep separate accounts for the following activities: interconnection (including interconnection which is offered to their own service arms); the deployment and operation of networks; and each type of service which they provide. This accounting separation requirement does not apply if

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62 Refer to Article 5 of the *Licensing Decree*, "Limits and Obligations for Telecom Italia - DECT", which requires that Telecom Italia adopt accounts separation prior to the adoption of the DECT standard. After six months of the DECT standard being adopted, a report will be presented to the CA which will afford it the opportunity of requiring that Telecom Italia's DECT operations be provided by a structurally separate entity.

63 Commission Decision of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in *Italy*, O.J. (1997) L 280/49 of 23 November 1995.

the telecommunications turnover of a dominant operator is less than 30 million lire in *Italy*;

- Operators which are required to provide universal service, regarding their net costs;

- Operators which directly or indirectly, operate public telecommunications networks or provide telecommunications services to the public, and which hold (in *Italy* or in another Member State) special or exclusive rights which are national in scope.

An appropriate cost-accounting system must be implemented which allows for the implementation of the cost principles of *Law 249/97*. The system proposed by *the Decree* is based on the direct and indirect allocation of costs. However, other systems (on the basis, for example, of LRIC) may also be acceptable where justified.

Telecommunications operators with significant market power must keep separate accounts for each type of telecommunications activity which they carry out or, in the alternative, set up a structurally separate legal entities. Operators with a national turnover of less than 75 million lire derived from their telecommunications activities in the relevant national territory are not subject to these accounting separation obligations.

- Cable TV operators holding exclusive rights to deploy cable infrastructure in a given geographic area must keep their telecommunications activities (*i.e.*, excluding the distribution of television programmes) under separate accounts. This obligation does not apply to cable TV operators whose turnover arising from telecommunications services is less than 75 million lire in the area over which their special rights are held.

Compliance with these accounting separation requirements is conducted by an independent agency which reports to the CA. The costs of monitoring these accounting obligations may be included as part of the licence fees of the operators in question. In addition, operators subject to accounting obligations must disclose any relevant information on the economic and financial aspects of the management of networks and of services to the CA, subject to the protection of confidentiality of business secrets.

(5) Policy basis for regulation of incumbent carrier's services.

Telecom Italia, as the incumbent national telecommunications operator, has been expressly declared by the Decree to enjoy "significant market power" over the Italian national telephony market. Therefore, it is subject to additional obligations regarding interconnection and universal service obligations.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

A new licensing regime is established under *Law 249/97* and D.P.R. 318/97, replacing the previous licensing system which was heavily reliant upon the granting of individual licences. The details of that licensing regime have been amplified in the *Licensing Decree* of 25 November 1997. The new licensing system will rely mainly on the granting of general authorisations.

However, individual licences are still required to conduct the following activities:

- the provision of basic voice telephony;
- the deployment and the operation of public telecommunications networks (including those using radio frequencies, enabling access via DECT and cable);
- the provision of mobile and personal communications;[64]
  the provision of services requiring the use of scarce resources (*i.e.*, frequencies, rights of way and numbers); and
- services whose provision is subject to specific obligations (*e.g.*, universal service obligations, requirements arising from ONP rules, or specific regulatory constraints imposed on operators with significant market power).

(It is understood that a specific licence may be required for long distance telephony operators, including conditions relating to infrastructure roll-out, geographic limitations, investment criteria, and so on).

Also, satellite network and communications services require two separate licences.

The term of most forms of licence is nine years, with mobile communications licensed for 15 years. Fees for the grant of general authorisations and individual licences are determined by the CA with a view to covering the costs of processing the file, the cost of monitoring the conditions of operation of the service and the continued compliance with the authorisation conditions. The exact level of fees has yet to be determined.

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64 Pursuant to a "beauty contest" procedure, the second GSM licence was granted in 1994 to Omnitel Pronto Italia for a fee of 750 billion lire, for a 15-year term. The first licence had been granted earlier to the Telecom Italia mobile subsidiary at no cost. The forthcoming DCS-1800 licence is likely to be granted in an auction procedure.

Fees may also be required by the CA for the use of scarce resources. These fees must be oriented towards maximising the efficient use of the resources required, while at the same time reflecting their commercial value. Fees imposed must not, in any event, lead to discriminatory results.

General licences and individual authorisations are personal in nature and may not be transferred to third parties.

Licensing procedures are administered by the CA and must be objective, transparent and non-discriminatory. Decisions must be taken within reasonable time limits (*e.g.*, between six to 16 weeks).

Authorised providers of telecommunications networks and/or services must be registered in a Public Registry kept by the CA. The *Licensing Decree* of 25 November 1997 will specify the types of licensing conditions and obligations required of all licence applicants and those requiring registrations.

(ii) Broadcasting

Terrestrial television

Article 16 of the *1990 Broadcasting Law* sets out the threshold conditions for broadcasting licences, whether national or local, television or radio. Licences are granted according to a national frequency distribution plan, determined according to factors such as region, population, and social conditions.

Only Italian and Community undertakings may be granted national licences. Individual citizens of any Member State and Italian and Community undertakings are eligible to apply for local licences. Applicants must have a minimum capital holding (*e.g.*, three billion lire for a national television channel and not less than 300 million lire to obtain a local licence). These requirements are designed to ensure financial stability and continuity in service provision. Finally, licences can only be granted to undertakings dedicated to broadcasting, publishing or entertainment services. They cannot be granted to undertakings primarily or significantly interested in other services, public enterprises, or undertakings which have engaged in illegal broadcasting.

According to the *1990 Broadcasting Law*, the duration of licences is 20 years for the State-owned public broadcaster RAI under its Convention, and six years for other national private channels.

RAI is the public service broadcaster which operates three public channels. Private national channels operating in *Italy* include: 3 RTI channels (Fininvest); 2 Telepiu channels (encrypted); TV Internazionale TMC (Tele Monte Carlo); Video Music and ReteA.

Other channels such as Telepiu 3 (unencrypted), Rete Capri TV, Elefante and Retemia have no licence, but are authorised to operate, the duration for which authorisation is still subject to debate in Parliament. There are approximately 600 local channels.

Cable television

There is no cable distribution nor cable penetration in *Italy*. There is, however, a specific decree on cable networks: *Decree No. 73 of 22 February 1991*. The Ministry of Posts & Telecommunications has recently been asked to adopt more specific regulations applicable to the cable sector.

The installation of networks for public use is reserved to the State, directly or through licensees. According to an agreement with Telecom Italia, a joint-company, Stream, has been incorporated and is authorised to provide multimedia services, including Video-on-Demand, and has an exclusive right to operate cable until 2012. It is the only company authorised to install and operate cable systems. It is possible that Stream may be privatised in the near future. Telecom Italia is currently installing a nation-wide coaxial fibre-optical cable network for Stream. In the near future, Stream will coordinate the market and the services related to cable television.

Cable television service providers must require authorisation (which will be in the form of a *Decree*) from the Ministry of Posts & Telecommunications, and must, when providing their services, use the public network. The authorisation is to provide services for a local area; however, there is no definition of "local", as the specific regulations have yet to be adopted.

Satellite television

The satellite television sector has not been specifically regulated. In the absence of specific legislation, the *1990 Broadcasting Law* is also interpreted as referring to the satellite sector. As well as specific legislation on satellite services and infrastructure, D.55/97. Thus, all the limits and restrictions set up for terrestrial television apply with equal force to satellite broadcasting services.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

The new licensing authority is the CA. The Ministry retains some very limited functions in the licensing context (*e.g.*, forwarding the proposal for the establishment of a committee in the case of a bidding procedure to the President of the Council of Ministers).

(ii) Broadcasting

The Minister of Posts & Telecommunications awards terrestrial television licences. The *1990 Broadcasting Law* lists a number of objective criteria to be considered when awarding licences, especially the applicants' financial resources and their programming and technical plans. For existing licensees, their presence in the market, the quality of their programmes, the proportion of self-produced entertainment and information material broadcast and levels of viewership are also relevant criteria. The *1990 Broadcasting Law* makes it clear that for the first licence allocation, other things being equal, existing broadcasters are preferred if they satisfy the conditions set out in *the 1990 Law*.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

Conceptually, there is still a regulatory difference drawn between the operation of networks and the provision of services over those networks. Indeed, *Law 249/97* requires that a licence be granted for the operation of public telecommunications networks, and also for the provision of basic voice telephony (or other services using scarce resources). A single licence is required for the deployment of a public telecommunications network if it is for the provision of voice telephony.[65]

The relevant regulatory criteria regarding the licensing of transmission facilities is the party responsible for their deployment and operation, regardless of the actual ownership of the physical assets.

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa), (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

There are no such regulatory restrictions. Indeed, Telecom Italia operates analogue and digital GSM mobile services through its wholly-owned subsidiary, Telecom Italia Mobile. Also, Stream (Telecom Italia's multimedia service provider) has announced plans to enter into the cable TV market. To this end, Telecom Italia signed a Memorandum of Understanding in the summer of 1997 with Italy's three main television groups (Rai, Mediaset and cecchi Gori) with a view to jointly taking a stake in Italy's pay-TV operator, Telepiu.

It should be noted that the interplay of competition rules may prevent the provision of certain services by the incumbent. For example, Telecom Italia is under scrutiny by the Competition Authority over its planned provision of DECT services throughout *Italy*, for its alleged abuse of market power, compounded by Telecom Italia providing certain automatic call-forwarding

65 Article 2.3 of the *Licensing Decree*.

services between its fixed and its DECT networks and charging excessively high interconnection rates to mobile competitors. Resolution of these issues is pending.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no such restrictions under Italian Law.

(6) Typical licence conditions.

(i) Telecommunications

General authorisations

The specific conditions which may be imposed on general authorisations are specifically listed in *Law 249/97* and the *Licensing Decree*. Any conditions imposed must be objectively justified in relation with the services which are the subject-matter of the authorisation. In addition, licence conditions must ensure compliance with essential requirements in the least onerous manner possible. The CA may introduce modifications to licence conditions on a case-by-case basis, where justified.

In the event that an operator considers that it complies with the requirements of a general authorisation, it must notify the CA prior to supplying the service (a maximum notice period is not established under *Law 249/97*). The CA must be given all the necessary information to verify that the service conforms with the authorisation requirements. After four weeks of the date of notification, and unless a negative decision is expressly taken by the CA, the operator can start providing the service. In some cases, determined by the CA, this non-opposition procedure need not be followed.

If the conditions for the provision of the service under the general authorisation scheme are not met, the operator must be given one month to remedy irregularities. The CA must decide whether the proposed service conforms within two months of the initial request.

Individual licences

The eligibility criteria for individual licences may include a requirement that the applicant be an incorporated company under the laws of Italy or a Member State, a citizen or a national of Italy or a Member State, and that control of the company remains within the European Union. Control of an applicant by a non-EU company, citizen or national may be authorised, subject to reciprocity conditions. However, *Law 249/97* and the D.P.R. 318/97 seems to extend eligibility for individual licences to companies from WTO signatory countries. In addition, applicants for an individual licence will be required to meet certain minimum capital requirements.

The timeframe for the grant of an individual licence is between six weeks to four months, commencing from the date of the official request by the applicant. The duration of a public call for tenders may be extended until eight months.

The number of available individual licences may only be limited *a priori* by the CA for reasons of scarcity of frequencies. These resources must in any event be made available according to the principles of proportionality, non-discrimination and transparency.

Individual licences for voice telephony services have an initial duration of 15 years (renewable). Individual licences may not be transferred or assigned to a third party unless with the consent of the CA.

New services

In conformity with the 1997 *Licensing Directive,* when a request is filed for an authorisation to provide a "new telecommunications service" (new services are not defined in the *Decree* itself or the 1997 *Licensing Directive*) which is not covered by the general authorisation procedure, the CA must adopt interim conditions to allow provision of the service within six weeks of the date of application, or deny the grant of an authorisation within that period, on the basis of a reasoned decision.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Tariffs for local calls appear to be heavily subsidised by prices in the long-distance and international segments. Telecom Italia's local tariff is 180 lire, while tariffs for international calls are 1,143 lire (measured at peak time for a three minute call).[66] Under its Community obligations, Italy faces a major rebalancing task. To control the increase in the prices for local calls, the Government has announced plans to introduce a price-cap formula as soon as possible, to apply until the end of 1999. The price basket has not been set, but is expected to allow sufficient flexibility to make the necessary tariff adjustments and to permit tariff discounts under certain specific conditions.

(2) New pricing principles for the competitive market environment.

The CA is granted the power to take decisions about tariffs, while considering affordability of universal service. The tariff structure should, ultimately, reflect the actual costs of providing the services in question. Tariffs for the basic telephone service should be rebalanced before 1 January 1998. Failing to

[66] Refer to "The Tariff Review" of March 1997, which resulted I the reduction of telephone 'sectors' in Italy for tariffing purposes.

achieve tariff rebalancing by that date, and on the basis of Telecom Italia's estimates of its access deficit, the CA may establish an access deficit scheme to which other operators are required to contribute. Access deficit schemes may only be in place until 31 December 1999, by which time the task of tariff rebalancing must be completed.

The calculation of the access deficit is subject to the control of an independent agency which reports to the CA. On the basis of this calculation, the CA decides on the method of distribution, whereby some (eligible) operators (or groups of operators) may be required to contribute a percentage of such costs. Access deficit charges will be calculated on the basis of the effective use of the PSTN and may be collected as an additional (albeit unbundled) charge to interconnection charges.

Moreover, any access deficit scheme which may be implemented in Italy must be kept separate from the contributions to the cost of universal service as may be made to it by industry. It must be based upon objective, transparent, non-discriminatory and proportional criteria and must clearly identify each deficit declared.

(3) Control of tariff packages which can be offered to customers. Interpretation of the rules (if any) preventing discrimination, bundling and cross-subsidisation interpreted in the light of tariff flexibility.

Tariffs for use of the PSTN must be independent of the type of usage, unless access to additional facilities is provided (which may be priced separately). In principle, it is for the network operator originating the call to set the retail tariffs. The CA will determine, before 1 January 1999, who bears responsibility for tariffs for calls originating on the PSTN and terminating on a mobile network.

The economic conditions for access to facilities which may be qualified as "additional", with respect to the mere provision of a connection to the PSTN and the provision of a basic voice telephony service, must be unbundled so as to allow the user to pay only for the services/facilities requested.

The CA may authorise discount schemes for high volume customers and may approve special economic conditions for the provision of social interest services, and services for low users or groups with special needs.

Changes in tariff conditions must be published sufficiently in advance and notified to the CA before they may be implemented.

(4) Basis of tariffs.

End-user tariffs are based on usage time, subject to off-peak pricing.

(5) ***Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet and on-line services.***

On November 1997, the Ministry of Communications announced a scheme of price rebates on metered phone calls for access to the Internet via the public switched telephone service (PTSS). In accordance with the scheme devised by the Ministry, consumers, schools and non-profit entities wishing to access the Internet may request a meter rate of half the local call rate to the phone number of their Internet Service Provider.

A similar scheme will apply to long-distance phone calls for users who do not have access to an Internet Service Provider in their telephone district.

According to the Ministry of Communications, the scheme, which will not apply to businesses and professional users of the PTSN, should be in operation from 1 January 1998.[67]

G. Network Interconnection and Access to Service

(1) ***Interconnect arrangements and charges - express regulation or individual negotiation.***

Interconnection is a matter for negotiation by the parties. However, the CA has been granted extensive powers to determine conditions in advance and/or to intervene to request the modification of conditions in interconnection agreements and to solve interconnection disputes (see above).

(2) ***Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".***

Operators declared by the CA to *enjoy a position of significant market power* in the national market are under special interconnection obligations (*Decree 249/97* presumes that *a position of significant market power* exists for market shares in excess of 25% of the relevant market, unless the CA declares otherwise).

The following operators have been deemed to be obliged to negotiate interconnection:

- public network operators (including operators of public mobile communications networks) which offer telecommunications services to the public and which control the physical link to the end-user;
- providers of leased lines;

67 The November 1997 scheme will also apply to phone calls for users declaring their "most frequently/preferred call numbers".

- operators authorised to interconnect with each other; and
- operators granted special rights to provide international circuits from the national territory.

The CA may limit this obligation to interconnect (which is incumbent upon the above operators) when there are other viable alternatives from a technical and economical viewpoint to the interconnection requested, and the request exceeds the resources available for the transmission of interconnect traffic (reasons must be stated for such a decision, and the decision must be published).

There is a general obligation to offer interconnection in a sufficiently unbundled form, so that an operator is required to pay only for the specific interconnection services and/or components requested.

(3) Precise obligations currently placed on the interconnecting operators.

Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated)

Operators with significant market power must allow interconnection on conditions which are no less favourable than those offered to: their own service arms internally; affiliate companies; or regular commercial partners. They are also required to grant reasonable requests for Special Network Access (*i.e.*, access at points other than network termination points), unless the CA authorises otherwise. The specific Points of Interconnection ("POIs") at which interconnection must be granted are not mandated by *the Decree*.

Mobile operators are accorded a right under *Law 249/97* to interconnect with the PSTN at the requested POI, where interconnection is technically available, and at the least restrictive interfaces.

Unbundled access to internal network functions

Not mandated.

Unbundled access to the local loop

Not mandated.

Equal Access

Call-by-call carrier selection is due to be implemented by 1 January 1998. Carrier selection will occur through the use of an "easy access call-by-call" mechanism with the prefix 10XY (10 digits will be used). Full equal access is scheduled to occur by 1 January 2000.

Technical requirements and standards

Public network operators and providers of basic voice telephony are obliged to comply with European harmonised technical interfaces, ONP rules, rules regarding access to networks, interconnection and interoperability. In the absence of European norms, they may follow:

- ETSI, CEN or CENELEC standards;
- ITU, ISO or CEI Recommendations; or
- National specifications.

Quality of service commitments required

Providers of public telecommunications services are under an obligation to provide the additional facilities listed in Annex I of *the Decree*, to conform with the obligations established under the proposed *ONP Voice Telephony Directive.*[68]

A minimum service offer is imposed on providers of basic voice telephony which, in essence, coincides with the minimum services required to be provided by the proposed *ONP Voice Telephony Directive*. The individual service features which are part of this minimum offer are listed in Annex I of *Decree 249/97.*[69]

Customers or potential customers must be given a minimum amount of information in advance regarding a particular service offer. Offers must be kept in place for a reasonable period of time and modifications thereto may only be introduced after notice has been given in advance to users (the period of advanced notice is to be determined in the future by the CA). In particular, user contracts must include provisions on indemnification for failure to provide the required level of service quality. The CA may introduce modifications to clauses in consumer contracts about indemnification and the recovery of damages.

Interconnect tariffs

Operators enjoying significant market power are under an obligation to set interconnection prices on the basis of "effective costs", plus a reasonable return on investment (the economic conditions for interconnection must be "sufficiently unbundled", so that the party requesting interconnection may ascertain that it is paying only for the interconnection services required). Before 1 January 1999, the CA is to determine the timeframe for introducing a LRIC pricing formula as the basis for interconnection pricing. The CA will also, at such time as it may decide, establish what constitutes a "fair return" on investment, based on the

68 The proposed *ONP Voice Telephony Directive* requires NRAs to encourage the provision of additional facilities on operators (other than providers of voice telephony, with respect to which a clear obligation exists under the proposed Directive to provide certain additional facilities).

69 Although *Law 249/97* does not require that providers of basic voice telephony must be declared to enjoy significant market power before being obliged to provide this minimum service offer, we presume that this must be the appropriate interpretation of the *Decree* in light of the provisions to this effect which are included in the proposed *ONP Voice Telephony Directive*.

average capital investment of the operator offering interconnection and that of a new entrant in the telecommunications or high technology sectors.

Today, interconnection tariffs are calculated on the basis of fully-allocated historic costs. (Telecom Italia's competitors are charged an interconnection rate of Lire 29,6 per minute for peak-time local calls and Lire 16,8 per minute for off-peak local calls. The rate for peak-time long-distance calls is Lire 48,4 per minute and the rate for off-peak long-distance calls if Lire 27,4 per minute).

Information disclosure obligations

Operators enjoying significant market power must:

- make available, upon request, all the necessary information to allow interested parties to negotiate an interconnection/access agreement with their facilities, including any relevant modifications scheduled to take place within six months of the date of the request;

- notify the interconnection agreements to the CA, and must also be made available, upon request, to interested parties, minus business secrets regarding the parties' commercial strategy, (however, interested parties must be given all the relevant details regarding tariffs, terms and conditions upon which interconnection is granted and universal service charges are calculated)

- publish a "standard interconnection offer" (the minimum scope of this standard offer is not established under the terms of *the Decree*); the standard offer must be unbundled into its different disaggregated components, with the degree of unbundling required depending on "market needs"; different conditions can be foreseen for different categories of operators when this is objectively justified on the basis of the different licence conditions which apply to operators seeking interconnection (in this respect, the CA may, after consulting with the Competition Authority, take action in order to ensure that no discrimination results from the application of different interconnection conditions).

The CA may impose conditions or request modifications to the standard offer, even with retroactive implementation of the changes introduced at its request. Mobile operators are not under an obligation to publish a standard interconnection offer.

Protection of the interconnecting carrier's or service provider's customer information

Operator's information which is communicated with a view to establishing interconnection must be protected and used solely for this purpose. It may not be transmitted to other divisions of the company and/or third parties, affiliates

and/or business partners which might gain a competitive advantage by obtaining such information.

Legislation was also adopted on 31 December 1996 which reformed *Italy*'s data protection regime. This law sets forth the following principles:

- any person who intends to use personal data must notify the CA in advance and indicate the use it intends to make of such data;
- the prior consent of the individual is required before personal data regarding him may be used (with some exceptions) ;
- users must be granted access to their own personal data;
- handling sensitive data requires the prior consent of both the user concerned and the CA;
- the transfer of data outside of Italy is forbidden unless the country to which the data is transferred grants a similar level of protection (and, in any event, after notifying the CA); and
- the CA may adopt any measures necessary to protect the rights of the users concerned to request information and to obtain access to databases.

The above provisions came into force in May 1997.

H. "Resource" Issues

(1) Frequencies.

The CA has competence over the allocation of frequencies. The Decree suggests that a major restructuring may take place regarding the National Frequency Plan, which is the basis for specific allocations. It also establishes that mobile operators may be required to pay an indemnity to the Ministry of Defence, if they are allocated frequencies which are currently used by the military.

The police use of frequency, which would otherwise be available for new DCS-1800 operators, has created a situation which may compel *Italy* to value the spectrum in a manner reflecting its commercial worth.

(2) Numbering.

Numbers are to be allocated by the CA. The decision to allocate certain blocks of numbers will be attached to the decision awarding an authorisation. Fees may be required for the number allocation (apart from any licence fees as may be required) in order to cover the cost of administering the national numbering scheme. The basis for calculating numbering fees must be determined by the NRA within three months of the date of entry into force of *Law 249/97* and D.P.R. 318/97.

A transfer of the right to use a particular number (or blocks of numbers) cannot take place without the consent of the CA.

An operator which has been assigned a specific set of numbers cannot use numbers as a way to discriminate in the access granted to other operators' services.

A new Numbering Plan must be defined by the CA and implemented before 31 December 1999.

(3) *Rights-of-Way.*

Law 249/97 refers to the applicable national laws and regulations on access to rights-of-way, while establishing a general principle that access to rights-of-way must be granted on a non-discriminatory basis by the competent (local or regional) authorities.

When necessary, the CA may allow the sharing of public or private property, subject to the parties agreement. The CA may define the conditions in which such a shared use of property takes place (including the sharing of costs).

(4) *Access to Content.*

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

The CA will determine the events of special importance or general interest which exclusive broadcasting rights cannot be acquired or the broadcast must be live (or, as the case may be, within the following 24 hours) and in unencrypted form.

(5) ***Licensing requirements for certain types of content that may restrict market entrants. National standards for exclusivity (for example, two year periods subject to renegotiation).***

Issues of exclusivity are in principle dealt with on a case-by-case basis under the rules of Italian competition law.

(6) ***"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).***

There are no such obligations under Italian law. However, authority can mandate "infrastructure" must carry obligations.

(7) ***"Local content" or "independent content" obligations on cable TV operators (see also section E above).***

There are no such requirements, (except those expressed in the revised *Television Without Frontiers Directive*).

(8) ***"Gateway" Issues - Technologies for Open Access.***

The regulation of "conditional access" television is the responsibility of the new CA.

(9) ***Internet Domain Names.***

Internet Domain Names - preferred approach to regulation of Internet domain names.

The Registration Authority ("RA") is responsible for the registration of Internet domain names.

Currently, the registration procedure does not provide the possibility of reserving domain names under the Top Level Domain IT ("TLD IT"). Domain names can only be assigned to Italian organisations or to organisations which have an Italian subsidiary. For this reason, it is not possible for a foreign company to have a domain name under the TLD IT. Only one domain name under the TLD IT can be assigned to an organisation. However, service providers listed in the "Public Register" can obtain several domain names under the TLD IT, subject to its availability on the Internet.

The registration and the management of Internet domain names are subject to norms and procedures established by the Registration Authority.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) ***The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.***

The definition of "universal service" includes:

- the basic voice telephony service, understood as the provision of a fixed connection allowing the making and receiving of national and international calls, fax communications of group III on the basis of ITU-T Recommendations, and the transmission of data on the voice band via

a modem at a minimum speed of 2,400 bit/s on the basis of ITU-T Recommendations of the series V;

- free access to emergency numbers;
- the provision of operator assistance services;
- the provision of directory services;
- the provision of public pay-phones;
- the provision of special services and/or options for disabled users or for users with particular social needs; and
- services and connections regarding the protection of national public interests, public security, national defence, the administration of justice and good administration.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

The provision of universal service is the obligation imposed on Telecom Italia, until 1 January 1998. After that time, other operators may be mandated to provide universal service in all or in part of the national territory. *Law 249/97* also allows for individual components of the universal service obligation to be licensed to different operators, upon request.

Regardless of the geographic location of the user, universal service must be provided at an affordable price and under conditions which are non-discriminatory. At least until tariffs are completely rebalanced, operators charged with the provision of universal service are also under certain geographic averaging requirements.

The CA may decide that the net cost of providing universal service represents is an unfair burden for those providing it and that, therefore, it should be shared within the industry. However, the CA has some discretion in deciding not to make other operators eligible to contribute to the cost of universal service when the costs of managing the contributions would outweigh the net cost represented by its provision.

The net cost resulting from the provision of universal service is calculated by taking into account the revenues obtained and the (long run incremental) costs, plus a reasonable return on investment which is used in servicing non-economic customers. However, the following cost elements are expressly excluded from the calculation:

- Access Deficit Charges ("ADCs");

- the cost of itemised billing and other additional services, when there is an obligation to provide them, is also imposed on other operators;

- the cost of services outside the scope of universal service (*e.g.*, the costs incurred in upgrading the network in the normal course of business); and

- services regarding the public interest, social security and so forth.

The actual calculation of the net cost of universal service must be carried out in conformity with rules to be established by the CA. Costs must be the object of an audit conducted by an independent agency reporting to the CA. For this purpose, universal service costs must be kept under separate accounts; in particular, providers of universal service must identify separately the costs of the services which may only be provided at a loss, and the costs related to serving users (groups of users) which, in light of the revenues received therefrom versus the cost of geographic averaging, can only be served at a loss. The costs of auditing universal service costs can be included in the overall calculation of costs.

The system for contributing to the financing of universal service is a two-tiered system:

- before tariff rebalancing has been completed (*i.e.*, in principle before the scheduled date of 31 December 2000) contributions will be made to a special Fund ("the Fund"), with the rules for the establishment of the Fund being in place within three months from the date of *Law 249/97* goes into force;

- after the completion of tariff rebalancing, or before that date, to the extent that the Fund has not been created, universal service charges will be added to interconnection charges.

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

Operators eligible to contribute to the net cost of universal service are:

- operators of public telecommunications networks;

- providers of basic voice telephony; and

- providers of Mobile Communications Systems.

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see also section E & H).

There is no mandated "must carry" obligation under Italian law.

(5) *Other public service specifications affecting the content of information provided to subscribers.*

Law 675/96 on the protection of personal data has been amended by the legislative Decree 255/97. This amendment aims to simplify the procedures for notification of the treatment of data. *Legislative Decree 255/97* also postpones the coming into force of compulsory notification of personal data treatment to 1 January 1998. It also establishes an independent regulatory authority, the Garante per la tutela dei dati personali, with inspection powers and concurrent judicial protection available for the individual in the context of civil and criminal law.

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LUXEMBOURG

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

A distinction is drawn between telecommunications and broadcasting or audiovisual services. Telecommunications services are "any service consisting, wholly or partially, in the transmission and dispatch of signals on a telecommunications network by telecommunications processes, excluding all public broadcasting services"[70] (as defined by the *Telecommunications Law of 21 March 1997*).

Broadcasting and audiovisual services have not been defined by any legislative measure. The *1991 Law on Electronic Media* covers programmes whether these are broadcast via cable, satellite or over-the-air but does not define "programme".

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

The *1997 Telecommunications Law* lists five categories of networks and services which must be licensed. Each of these networks and services will be subject to different regulations. All other services must be notified Thus, the *1997 Telecommunications Law* distinguishes between different types of services (refer to section E.1).

(3) Regulation of Internet services and other on-line services.

There is no legislation which applies specifically to Internet and other on-line services. They fall within the general definition of "telecommunications services".

It is necessary to obtain an authorisation from the "Ministère des Classes Moyennes" in order to offer Internet services in *Luxembourg*, to the extent that lines are leased from the incumbent operator, P&T Luxembourg. However, where Internet Service Providers are providing Internet access over their self-owned or third-party infrastructure, they will be subject to an individual licence.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

There is no legislation which applies specifically to subscription or Pay-Per-View services, Video-on Demand or Near-Video-on Demand. Since *the Television*

70 This is an unofficial translation.

Without Frontiers Directive[71] covers Near-Video-on-Demand and the *Law on Electronic Media 1991* implements that Directive, these services fall within the scope of the *1991 Electronic Media Law*.

B. Regulatory Authorities in telecommunications / broadcasting / publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

Legislative jurisdiction over telecommunications is vested in the Ministry of Communications, which is responsible for *Luxembourg*'s telecommunications policy. The Ministry is represented on the Supervisory Board of the incumbent, P&T Luxembourg. The day-to-day management of P&T Luxembourg is carried out by P&T's Board of Directors.

The Prime Minister is responsible for both the broadcasting and publishing sectors.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.

(i) Telecommunications

The *1997 Telecommunications Law* provides for establishing an independent regulatory authority. The "Institut Luxembourgeois des Télécommunications"("ILT") took up its activities on 2 June 1997. ILT is an independent public institution and its mission is to regulate, administer, monitor and conciliate over activities in the *Luxembourg* telecommunications market. However, it remains under the administrative and financial supervision of the Minister. The ILT is headed by a director and two deputy directors, who are public servants and are appointed for renewable six year terms.

ILT has the following powers:

- assists the Minister of Communications in regulating the following telecommunications issues:
  - adoption of conditions for each class of licence;
  - protection of end-users;
  - preparation of the selection procedure for selecting applicants to be granted a licence; and

[71] Council Directive 89/552 EEC of 3 October 1989, O.J. (1989) L 298/23 of 17 October 1989.

- drawing up of all proposals required by the *1997 Telecommunications Law*;

- ensures application of telecommunications legislation and supervises telecommunications operators and service providers;

- responsible for the management of the telecommunications sector, in particular:

  - production, management and application of the numbering scheme;
  - management of the frequency spectrum;
  - grant of authorisations for the provision of services subject to a notification requirement;
  - management of rights-of-way;
  - establishment and management of a universal service fund; and
  - settlement of disputes between telecommunications operators or between operators and end-users; and

- publishes an annual report on its activities.

The ILT is run by a Council of five members who are appointed for renewable terms of three years. Three candidates are nominated by the Minister, one by the telecommunications industry and one by end-users. The President and the Vice-president are selected by the government. The Council's responsibilities are as follows:

- presentation of a budget and the annual accounts to the government;

- advising on fees charged to operators, with a view to recovering personnel and operating costs;

- nominating an auditor; and

- advising on all matters related to the development and supervision of the telecommunications sector.

(ii) Broadcasting

Regulatory competence in the broadcasting sector is shared between four institutions:

The Media and Audiovisual Service

The Media and Audiovisual Service is an administrative department of the Ministry in charge of Media which assists the Minister to define and execute

media policy, promote the development of programming plurality, and promote the Grand-Duchy as a European Centre for collaborative production of audio-visual services.

The Commission on Radio Broadcasting (also in charge of TV broadcasting)

The Commission on Radio Broadcasting is an independent authority which authorises and supervises programmes broadcast by low-powered transmitters. It also advises the Government on authorisations for other radio programmes and the withdrawal of these authorisations.

The National Council for Programmes

The National Council for Programmes advises the Government on content and the supervision of radio programmes broadcast by high-powered transmitters as well as television and teletext programmes transmitted to a national audience. It also monitors compliance with legal, regulatory and other provisions relating to the content of programmes. The National Council also advises the Minister on general policy issues.

The Consultative Media Commission

This consultative body represents the interests of the undertakings, associations and trade unions operating in the media sector. The Minister may consult this body on any issue of media policy. The Commissions may on its own initiative, submit proposals to the Ministry. An opinion of the Consultative Media Commission is not binding.

(iii) Publishing

The Conseil de Presse was established by the *Law of 20 December 1979*. It comprises of an equal number of publishers and journalists. Its members - proposed by the various professional groups - are appointed by the Grand-Duc. The Conseil de Presse controls who is entitled to call themselves a "journalist". The Conseil's decisions can be appealed before a "Commission d'Appel", which is composed of one magistrate and others representing the interests of publishers and journalists.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.

Competition is regulated by the *Competition Act* of 17 June 1970 which deals with commercially restrictive practices and by the *Competition Act* of 27 November 1986 (as amended), which deals with unfair competition.

There is no separate national competition authority. The "Service de la Concurrence des Prix et de la Protection des Consommateurs", a department within the Ministry of Economy, has the power to conduct investigations in competition cases. Moreover, the Minister has the discretionary power to request the "Commission des Pratiques Restrictives" to open an investigation. The Minister must make such a request if it has been advised to do so by the "Procureur d'Etat".

The Commission des Pratiques Restrictives has the official power to conduct investigations when requested to do so. It is an *ad hoc* independent administrative authority, but includes among its members officials representing the Minister of the Economy, the Minister of Justice, and the "Ministère des Classes Moyennes". In practice, the "Service de la Concurrence" conducts investigations on behalf of the Commission des Pratiques Restrictives.

Officials carrying out an investigation must have a written order of the Minister to conduct on-site inspections. They have the authority to check all on-site documents they want. An imprisonment between eight days and one year and a fine of between LF 10,000 and 1 million (2,537 - 253,700 ECU) may be imposed for failure to obey an order to cease the infringement of competition rules.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

(i) Telecommunications

The Minister for Communications may withdraw a licence if either the conditions for grant or the conditions of the specifications are no longer met.

In addition, the ILT has important powers to ensure that operators comply with the ONP principles contained in the *1997 Telecommunications Law*. The ILT can impose a fine of up to 1 million LF on operators who infringe telecommunications legislation. Finally, the ILT may prevent certain activities or temporarily suspend one or more individuals working for an operator.

If there is repeated infringement of the legislation, the ILT transmits the file to the Minister, who may temporarily suspend or permanently withdraw the licence.

The ILT's officials have criminal investigation powers for the purpose of identifying potential offences and determining whether they have been committed.

The decisions taken by the ILT or by the Minister may be appealed before the administrative courts.

(ii) Broadcasting

The Commission on Radio Broadcasting may withdraw a licence if the licensee has not complied with its licence conditions or has infringed broadcasting legislation.

If the National Council of Programmes becomes aware that the legislation or the terms and conditions of the licences relating to content are being infringed, it informs the Minister responsible for the Media, who summons the licensee to a meeting, to provide formal notification that an infringement has occurred. If further infringements occur, the Government may withdraw the licence.

(iii) Publishing

Anyone who claims to be a journalist without having been admitted as such by the Conseil de Presse can be fined.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

In addition to participating in the bodies set up under Community legislation, the Institut Luxembourgeois des Télécommunications participates in the work of CEPT. The *Luxembourg* regulatory authorities cooperate between themselves on a regular basis without formal rules governing their conduct.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(1) The national legislative agenda - new rules for the telecommunications/broadcasting/audiovisual/publishing sectors.

(i) Telecommunications

A significant number of Grand-Ducal Regulations are due to be adopted to complement the provisions of the *1997 Telecommunications Law* which came into force on 21 March 1997. The first major Regulation is the Regulation of 25 April 1997, which liberalised *Luxembourg*'s mobile communications sector. The winner of the public tender to construct and operate a second nation-wide integrated GSM/DCS 1800 cellular network was recently announced. Other Regulations, including a Regulation concerning network (infrastructure) licences, are currently before the Conseil d'Etat.

On 5 November 1997, the European Commission announced that it would take infringement procedures against *Luxembourg* on the following grounds:[72]

- failure to liberalise the establishment of new infrastructure for the provision of liberalised services by 1 July 1997;
- failure to notify the key elements of the declaration procedures of its intention to impose on future network providers by 1 July 1997; and
- incorrectly transposed a provision of Community law prohibiting the limiting of the number of licences to be granted to new entrants (except in the case of scarcity of frequencies).

Accordingly, it is likely that legislation to overcome these shortcomings will be enacted in the near future.

(ii) Broadcasting

Legislation will be adopted in the near future to implement the *Television Without Frontiers Directive*. In addition, the government also proposes to adopt legislation on "information society services".

(iii) Publishing

The Government has decided to review the *Law of 20 July 1969 on Publishing*. The Prime Minister's department is currently drafting this new piece of legislation.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

P&T Luxembourg has the exclusive right to provide public telecommunications infrastructure and voice telephony services. It is responsible for the construction, maintenance and operation of all public telecommunications networks.

P&T Luxembourg is also responsible for the provision of leased circuits. Leased circuits may be used for basic data services and value-added services. P&T Luxembourg is also the exclusive provider of analogue radio paging services.

The monopoly currently enjoyed by P&T Luxembourg will be phased out, in accordance with the timetable agreed with the European Commission (see below).

72 Commission Press Release, IP/97/954 of 5 November 1997.

(2) *Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.*

(i) Telecommunications

Luxembourg has been granted a number of derogations from the timetable agreed by the EU on the liberalisation of the telecommunications markets.[73]

P&T Luxembourg's monopoly to provide voice telephony and public telecommunications networks will be abolished by 1 July 1998, rather than 1 January 1998.

Luxembourg was also allowed to postpone, the lifting of restrictions on the provision of liberalised telecommunications services until 1 July 1997 on the following:

- over networks established by the provider of the telecommunications service;
- over infrastructures provided by third parties; and
- using the sharing of networks, facilities and sites.

The European Commission has decided to initiate a formal infringement procedure under Article 169 of the EC Treaty against *Luxembourg* for failure to liberalise the installation of new infrastructure for the provision of liberalised services.[74]

(ii) Broadcasting

"Compagnie Luxembourgeoise de Télédiffusion" ("CLT") has the exclusive right to use a number of frequencies, which restricts the allocation of frequencies to others.

The supply of terminal equipment and terrestrial stations for satellite communications is competitive. Prior technical approval is nevertheless required for equipment which is to be connected to a public telecommunications network.

[73] Commission Decision of 14 May 1997 on the granting of additional implementation periods to *Luxembourg* for the implementation of Directive 90/388/EEC as regards full competition in the telecommunications markets, O.J. (1997) L 234/7 of 26 August 1997.

[74] Commission Press Release, IP/97/954 of 5 November 1997.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services).

There is no difference in the regulatory treatment of P&T Luxembourg and new entrants. P&T Luxembourg is not restrained in any way as a consequence of its exclusive rights.

The conduct of the licensing of the second mobile network is an example of the absence of asymmetric regulation.

(4) Accounting and structural separation safeguards (current or planned).

The *1997 Telecommunications Law* requires for accounting separation of services which are subject to a licensing requirement and services which are subject to a notification requirement. More detailed rules will be provided in the specific Grand-Ducal Regulations on services subject to a licensing requirement.

(5) Policy basis for regulation of incumbent carrier's services.

Luxembourg's telecommunications policy is intended to liberalise its telecommunications sector, in accordance with the timetable set forth in Community legislation. P&T Luxembourg will begin to face competition in every sector of this market and will, in principle, be able to enter and expand in any telecommunications market. Special obligations on P&T Luxembourg will be based in due course on its engagement of "significant market power" on relevant *Luxembourg* telecommunications markets.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

The *1997 Telecommunications Law* distinguishes between telecommunications networks and services which require a licence and those which need only be declared. Operators of a public telecommunications network require licences to supply the following services:

- fixed telecommunications networks with voice telephony services;
- fixed telecommunications networks without voice telephony services;
- voice telephony service, without infrastructure;
- mobile communications services (both cellular and satellite-based); and

- paging services.

Each licence category will have accompanying conditions dealing with the type and geographical scope of the network or service, basic conditions of coverage, quality and service, data protection and privacy, standards, frequencies (if necessary), numbering, fees, interconnection conditions, competition requirement, universal service obligations (as appropriate) and penalties for non-compliance.

Licences are granted by the Minister of Communications in accordance with the provisions of the applicable Regulation. Declarations are made to the ILT, which may object to a declarable service within two months of the declaration. The Minister has a further month in which to confirm the ILT's decision. Objections must be substantiated and may be appealed to the Minister of Communications. Spectrum assignments are carried out within the licensing and declaration regime, and require the explicit approval of the ILT.

The *1997 Telecommunications Law* requires all companies offering cable television and collective antennas to make a declaration to the ILT of details of the geographic coverage of the network, its technical specifications, the services offered, the location of the receiver station, subscriber numbers, methods of tariff calculation and procedures for rights-of-way.

(ii) Broadcasting

The *Law on Electronic Media of 1991* provides that TV and radio broadcasters need to obtain a licence.

(iii) Publishing

A publisher must obtain an authorisation from the "Ministère des Classes Moyennes". A journalist must be admitted as a journalist by the Conseil de Presse.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

A licence may be granted either on the application of the party, or by means of a transparent, objective and non-discriminatory public call for tenders. The selection criteria and their weighting must be published in the Official Gazette. Nevertheless, the *1997 Telecommunications Law* gives the Minister a certain amount of discretionary power, which allows him to award a licence to the candidate of his choice if they meet the published selection criteria.

(ii) Broadcasting

The Prime Minister may grant licences for the terrestrial or satellite networks with significant power or international reach.

The Minister for Telecommunications authorises the operation of a cable network. The authorisation to broadcast over a cable network is granted by the Government on the recommendation of the Minister for Media, after consultation with the Independent Commission for Radio Broadcasting.

Passive broadcasting (*i.e.*, the simultaneous retransmission of programmes already licensed) does not require authorisation from the Minister for Media. However, it is still necessary to be authorised by the "Ministère des Classes Moyennes".

Active broadcasting of programmes not already licensed benefits from the same licensing procedure as terrestrial television.

For radio programmes, it is necessary to distinguish between different types of programmes, namely:

- if it is a national programme, the government, after consultation with the Independent Commission for Radio Broadcasting, grants the licence; and
- if the programme is regional or local, the Independent Commission for Radio Broadcasting awards licences.

To operate a satellite network, it is necessary to obtain an authorisation from the Government on the recommendation of the Minister for Media.

(iii) Publishing

The Ministère des Classes Moyennes grants the necessary authorisations to publishers. The Conseil de Presse is responsible for authorising of journalists.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

Telecommunications licences will be issued both for fixed networks with or without voice telephony services and voice telephony supplied by operators without infrastructure. Accordingly, the licensing regulatory scheme does not treat infrastructure and services differently.

The operation of cable TV networks will be subject to licensing conditions proposed by the ILT, with the approval of the Minister of Communications. It is

also necessary, under Article 23 of the *Law on Electronic Media*, to obtain a concession to broadcast programmes. Thus, there exists a separation of infrastructure and service provision in the context of cable TV.

No distinction is drawn between the ownership and operation of facilities, the concept of ownership is not being used in the *1997 Telecommunications Law*.

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

- To date, there has been no request from P&T Luxembourg to provide cable TV services or "multimedia" services. There is no restriction in the *1991 Law on Electronic Media* on P&T Luxembourg providing such services. The Media and Audiovisual Service's view is that if such a request were made, it would be considered favourably.
- P&T Luxembourg has a licence to provide mobile telephony.
- Utilities can provide cable TV services in *Luxembourg*. However, they cannot currently provide voice telephony services, as P&T Luxembourg maintains its monopoly until 1 July 1998.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

No regulatory restrictions are imposed on the types of entities which can be involved in the production of content.

(6) Typical licence conditions.

(i) Telecommunications

The Minister, on the proposal of the ILT, can determine the conditions which will apply to each licence.

The conditions cover:

- the area covered by the network or service;
- the conditions of quality and availability of services;
- data protection;
- minimum standards and specifications of the network and/or the service;

- the use of the allocated frequencies;
- the numbering plan;
- if appropriate, the fee payable by the operator in return for the right to establish a network and offer the service;
- if appropriate, the fee payable for the use of the spectrum;
- the interconnection conditions and, if appropriate, the financial conditions to be satisfied to have access to the network;
- the duration of the licence;
- the conditions of renewal, withdrawal or transfer of the licence;
- the sanctions that can be imposed for breach of the licence conditions;
- if appropriate, a condition to provide universal service; and
- if appropriate, specific requirements in respect of national defence and public security.

(ii) Broadcasting

The licence is subject to the specifications, which are always issued with the authorisation and which are not published.

The Prime Minister may withdraw licences for terrestrial or satellite networks if the conditions for the grant or the conditions of the specifications are not met.

A licence for terrestrial or satellite networks will be granted for a limited term, but may be renewed.

In principle, there are no ownership restrictions. However, the *1991 Law on Electronic Media* provides that the terms and conditions of the licence may contain ownership restrictions.

The Government considers as essential the inclusion of a licence condition requiring the establishment of the service to be of financial and economic interest to *Luxembourg*. The establishment must create employment in *Luxembourg* and its activities must be physically carried out in *Luxembourg*.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

The tariff policy of P&T Luxembourg is defined by its supervisory board. No tariffs are fixed by regulations or ministerial decrees. However, tariffs of exclusive services must be approved by the government.

P&T Luxembourg currently charges its customers a single, standard rate. However, reform of the tariff structure is planned. The ILT will oversee the process of adjusting charges; it will also be responsible for laying down the accounting rules and the rules for cost-based charging that will apply to P&T Luxembourg.

(2) New pricing principles for the competitive market environment.

The installation charges and subscription fees for public telecommunications services provided by the P&T Luxembourg are fixed in the various Regulations. Ministerial decrees may fix additional charges or fees for connections outside the limits of the city centres or for connections of an extraordinary nature.

Pricing in a competitive environment must accord with the law, particularly in the context of interconnection pricing.

(3) Control of tariff packages which can be offered to customers.

Tariff packaging is a commercial matter left to the discretion of the operators. However, the ILT can intervene, in particular, to ensure that operators comply with the Community's ONP provisions.

(4) Tariff basis - usage time or flat rate off-peak rates; and other relevant pricing practices which increase pricing flexibility.

Tariffs are based on usage time and it is possible to charge off-peak rates. Otherwise, consumer tariffs are a commercial matter and are market-driven.

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.

Internet access is unregulated. At the moment, there is no proposal to regulate Internet access and other on-line services.

G. Network Interconnection and Access to Service Providers

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

The development of a specific regulatory interconnection regime in *Luxembourg* is in its preliminary stages. There are no interconnection agreements as yet, as P&T *Luxembourg* is currently the sole telecommunications operator for fixed services. Following the grant of the second mobile licence, interconnection negotiations between P&T Luxembourg and Millicom Luxembourg are likely to begin in the near future.

The *1997 Telecommunications Law* provides that interconnection arrangements should be individually negotiated, in a transparent and non-discriminatory manner by operators with a prescribed percentage of market share.

The *1997 Telecommunications Law* requires operators with market power to provide access to their networks to all those who request it on reasonable terms. The time limits for granting access and interconnection charges must be approved by the ILT.

The *1997 Telecommunications Law* further provides that the telecommunications network operators must allow and facilitate the interconnection of their networks with other networks. Conditions for access to infrastructure must include details of access, a description of the service, data of initial provision of the service and principles for establishing tariffs. The conditions of interconnection, including the rules for setting tariffs, will be reviewed by the ILT in accordance with Community regulations on the basis of the following principles:

- all parties are free to contract between themselves in a non-discriminatory and transparent manner;
- information and specifications or interconnection are to be made available without undue delay;
- six months notice must be given regarding all modifications to an interconnect agreement;
- tariffs must be set on objective, transparent and cost-oriented criteria, using an appropriate accounting system; and
- a list of all interconnection services and charges must be published.

The operator's offer is submitted to the ILT for review. The ILT has six weeks to review the proposal and provide its opinion. If no reply is provided within six weeks, the operator may offers access on the proposed terms one month later. The operator must publish its access conditions and announce its offer in three daily newspapers and in the Community official gazette.

The terms of interconnection agreements are a matter for negotiation between interconnecting operators subject to the requirements of the regulations which are currently being considered and will be published in accordance with the Community timetable. If the operators cannot reach an agreement, they can consult the ILT which will settle any disputes.

(2) ***Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".***

ONP provisions will be imposed on those operators with significant market power.

(3) ***Precise obligations currently placed on interconnecting operators.***

Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated).

Points of interconnect are not currently mandated.

Unbundled access to internal network functions.

There is no requirement under the current regulatory regime that access to internal network functions be provided.

Unbundled access to the local loop

There is no unbundling requirement in the current regulatory regime.

Is Equal Access mandated?

Luxembourg intends to follow the timetable set forth for equal access in the recent proposed revisions to the ONP Interconnection Directive.

Technical requirements and standards

When interconnection with the public network occurs, the satisfaction of EU or national technical standards is imposed.

Quality of service commitments required

When interconnection with the public network occurs, minimum quality standards must be satisfied.

Is there a preferred formula or charging standard which is prescribed under national law for interconnection charges? If so, are there any particular methods by which these charges are calculated? Can interconnection charges differ

according to whether or not interconnection is sought from a network operator or service provider?

The *1997 Telecommunications Law* provides that interconnection charges will be the subject of individual negotiation between the operators. Service providers do not have an automatic right to interconnection.

Information disclosure obligations

There are no formal information disclosure obligations.

How is the interconnecting carrier's or service provider's information with respect to customers protected?

There are no provisions protecting customer information in an interconnection context.

H. "Resource" Issues

(1) Frequencies.

Access to frequencies, including: spectrum allocation; regulation; future proposals; and policies on the integration of fixed and mobile technologies.

The Minister of Communications allocates the frequencies and regulates the spectrum. In the future, the ILT will assist the Ministry in allocating frequencies. No frequencies will be allocated without the prior approval of the ILT. All costs related to frequency allocations are borne by the organisations using the frequencies.

Where several operators wish to use the same frequencies, the ILT will auction the frequencies. The highest bid will win, as long as the auction is transparent, non-discriminatory and fair. An operator requires a licence, to use a frequency. The ILT must be given two weeks notice of the transfer of a frequency, to allow it to review the transfer.

Frequencies for broadcasting use fall within the scope of the *1991 Electronic Media Act*. However, users of these frequencies must still make a payment towards the ILT's costs of managing the whole spectrum.

Luxembourg's spectrum policy is still being developed. A Grand Ducal Regulation covering frequency allocation and fees will be adopted in the near future.

(2) ***Numbering.***

P&T Luxembourg manages its own numbers. There is no existing numbering plan, but it is proposed to introduce such a scheme in the near future. No fees are currently paid for the use of numbers.

The *1997 Telecommunications Law* provides that the ILT will be competent to maintain the numbering plan, and will allocate numbers on the basis of objective, transparent and non-discriminatory criteria. The *1997 Telecommunications Law* does not impose deadlines for either operator or geographic portability. The costs of numbering, particularly number portability, are the responsibility of the operators.

There is no obligation to ensure dialing parity and number portability, both of which are currently not required in *Luxembourg*.

In the near future, a Grand-Ducal Regulation on access numbering will be adopted. It will remove the monopoly that P&T Luxembourg has on numbering and will also cover dialing parity and number portability.

(3) ***Rights-of-Way.***

There are no obligations for infrastructure sharing.

Cable television services are provided by municipalities and private companies over cable networks owned by the municipalities.

It is necessary to obtain the consent of the property owner to build the cable network. The approval of P&T Luxembourg is also needed.

No authority has competence over the grant of such rights over private property. However, if the owner of the property has refused consent and if the infrastructure is being built in the "public interest", a judge may authorise construction of the cable network.

(4) ***Access to Content.***

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events)

There are currently no rules granting exclusive rights for TV broadcasting of major events.

Licensing requirements for certain types of content that may restrict market entrants. National standards for exclusivity (for example, two year periods subject to renegotiation)

The existing licensing structure does not restrict market entry.

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services)

There are no explicit barriers which prevent P&T Luxembourg from providing entertainment services over its network or from producing the content itself.

"Local content" or "independent content" obligations on cable TV operators (see also section E above)

There are no local, or independent, content obligations.

(5) "Gateway" Issues - Technologies for Open Access.

There are no legal requirements or standards for the regulation of set-top boxes and decoders. Anyone can provide set-top boxes and decoders. The *Television Standards Directive* has yet to be adopted.

(6) Internet Domain Names - Preferred approach to regulation of Internet domain names.

There is no preferred approach to regulation of Internet domain names.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

Universal service is defined in the *1997 Telecommunications Law* as "minimum telecommunications services which must be offered to any user, at a reasonable price, irrespective of his geographical location".[75] This very broad definition allows the government sufficient scope to determine the elements of which universal service will be comprised. For example, the following definition features in the preamble: "basic general-interest service, vital for the economy, but also for social integration".

A draft universal service Regulation is currently under consideration by the Conseil d'Etat. It will lay down the telecommunications services which will form

[75] This is an unofficial translation.

part of the universal service obligation. The services are likely to include directories, minimum service levels and principles for tariff calculation.

There is no indication that new interactive or audiovisual services are to be included in the definition of universal service in the near future.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

The *1997 Telecommunications Law* states that the Minister may require any company which controls more than 25% of the market in question to fulfill universal service obligations. If several companies have sufficient market share, the Minister may decide which company or companies must meet these obligations. The *Law* does not stipulate any criteria to guide the Minister's decision.

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

The funds for the financial assistance to be provided for universal service will be provided by all licensed operators. The amount of the contribution is to be determined by the ILT.

Each operator subject to universal service obligations is eligible for compensation if these obligations constitute an "unfair burden", although the latter is not defined and is open to dispute. The ILT determines the amount each operator is to contribute. To ensure the fair calculation of USO costs, the USO provider(s) must keep separate accounts for universal services, based on ILT procedures. The ILT will set up a USO fund to which all licensed operators must contribute, on the basis of the proportion of their turnover compared to the total turnover of all licensed operators.

Operators wishing to publish directories (or a database) must inform the ILT of their intention to do so. The ILT has not yet specified the conditions on which operators may access subscriber information.

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).

Local cable TV operators have entered into in a "gentleman's agreement" to provide the national broadcaster's services. In cases of national disaster (*e.g.*, war), broadcasters are obliged to transmit information provided by the government.

(5) Other public service specifications affecting the content or information provided to subscribers.

When public security or the defence of the Grand-Duchy requires it, the government may requisition telecommunications networks and/or forbid, entirely or partly, the provision of telecommunications services for a limited period.

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TABLE OF CONTENTS - ANNEX II (PART C)

THE NETHERLANDS 335

A. Existing Regulatory Definitions of Service Offerings 336
B. Regulatory Authorities in telecommunications/ broadcasting / publishing 338
C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules 345
D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions 345
E. Approvals and Licensing Requirements 348
F. Pricing and Tariffing 354
G. Network Interconnection and Access to Service Providers 355
H. "Resource" Issues 358
I. Universal Service Obligations and Public Service/Public Interest Requirements 364

PORTUGAL 366

A. Existing Regulatory Definitions of Service Offerings 367
B. Regulatory Authorities in telecommunications/ broadcasting/ publishing 369
C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules 375
D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions 376
E. Approvals and Licensing Requirements 378
F. Pricing and Tariffing 385
G. Network Interconnection and Access to Service Providers 386
H. "Resource" Issues 389
I. Universal Service Obligations and Public Service/Public Interest Requirements 392

SPAIN 394

A. Existing Regulatory Definitions of Service Offerings 395
B. Regulatory Authorities in Telecommunications/ broadcasting/ publishing 399
C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules 402
D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions 403
E. Approvals and Licensing Requirements 407
F. Pricing and Tariffing 414
G. Network Interconnection and Access to Service Providers 416
H. "Resource" Issues 418
I. Universal Service Obligations and Public Service/Public Interest Requirements 422

SWEDEN **424**

A. Existing Regulatory Definitions of Service Offerings 425
B. Regulatory Authorities In Telecommunications/ Broadcasting/ Publishing 426
C. Current Status And Roll-Out Of Telecommunications, Broadcasting And Audiovisual Rules 432
D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions 432
E. Approvals and Licensing Requirements 434
F. Pricing and Tariffs 439
G. Network Interconnection and Access to Service Providers 441
H. "Resource" Issues 444
I. Universal Service Obligations and Public Service/Public Interest Requirements 447

UNITED KINGDOM **449**

A. Existing Regulatory Definitions of Service Offerings 450
B. Regulatory Authorities in telecommunications/ broadcasting/publishing 453
C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules 456
D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions 457
E. Approvals and Licensing Requirements 460
F. Pricing and Tariffing 464
G. Network Interconnection and Access to Service Providers 466
H. "Resource" Issues 469
I. Universal Service Obligations and Public Service/Public Interest Requirements 472

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

(i) Telecommunications

"Telecommunications" is defined in the draft *Telecommunications Act* ("the *draft TA*")[1] as "*any transmission, emission or reception of signals in any form, by means of cables, radio waves, optical means or other electromagnetic means*".

"Telecommunications service" means a "*service which consists wholly or partly of the transmission or routing of signals on a telecommunications network*".

"Public telecommunications network" means "*a telecommunications network that is used inter alia for the provision of public telecommunications services, or a telecommunications network that provides to the public with the opportunity of transmitting signals between network termination points*".

(ii) Broadcasting

"Broadcasting" is defined in the *draft TA* as "*an electronic media service concerned with the provision and broadcasting of programmes*".

A "broadcasting network" is defined in the *draft TA* as "*technical installations, or parts thereof, that are used to broadcast programmes by means of cables or radio connections between points, to one or more pieces of land, dwellings or non-residential buildings*".

1 *Draft Telecommunications Act*, draft sent to Parliament on 15 September 1997; originally, due to be enacted by 1 January 1998 but, at the time of writing it is not expected to be in force before the middle of 1998. Moreover, amendments have been proposed to the *draft TA*. The *draft TA* includes major modifications of the *Media Act*. Comments on the Dutch regulatory situation reflect the envisaged future regulatory situation, rather than the interim regulatory regime which prevails at the time of writing. The interim regulatory regime reflects the changes brought about by the changes to the *1998 Telecommunications Act* (the *1998 WTV*, or the "Wet op de Telecommunicatievoorzeningen"; the key regulatory instrument in *The Netherlands*) by the *Fixed Telecommunications Licence Act 1996* and the *Fixed Telecommunications Infrastructure Decree 1996*, coupled with five complementary Decrees/Regulation adopted in July 1996. The combined effect of these laws is the creation of an interim regulatory regime which liberalised all infrastructure provision and the provision of leased lines for voice telephony ahead of the Community's regulatory timetable (with a limited number of infrastructure licensees being able to provide voice services as from 1 July 1997, six month ahead of the 1 January 1998 timetable).

(2) *Regulatory distinctions between types of telecommunications and broadcasting services.*

(i) Telecommunications

There are no general regulatory distinctions drawn in the *draft TA* between telecommunications networks and telecommunications services. The installation of a public telecommunications network and the provision of a public telecommunications service both require registration.

The only relevant regulatory distinctions are drawn between:

- data and voice communications, insofar as data communication services have been liberalised since 1993, whereas fixed public voice telephony services have been liberalised since July 1997; and
- mobile and fixed telephony services, insofar as mobile telephony services (GSM) and DCS-1800 will continue to be subject to an individual licensing regime after 1 January 1998.

(ii) Broadcasting

Regulatory distinctions are drawn between broadcasting networks and broadcasting services for the purposes of licensing. The installation of a broadcasting network will need to be registered under the *draft TA*. Broadcasting services are subject to different, more demanding (content-related) licensing requirements under the *Media Act* (see below in section E).

(3) *Regulations of Internet services and other on-line services.*

Currently, under the *draft TA*, there is no specific regulation of Internet and other on-line services. Such services are provided without the need for specific licences. Internet access provision is likely to require registration.

(4) *Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.*

At the moment, there is no specific regulation of Video-on-Demand and Near-Video-on-Demand services. Such services must comply with the general conditions for conditional access systems *(draft TA)* or for a subscription television licence (see below in section E).

B. Regulatory Authorities in telecommunications/ broadcasting / publishing

(1) *Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.*

(i) Telecommunications

The Minister of Transport, Public Works & Water Management ("the Ministry of Transport") has authority to enact and implement telecommunications regulations. The Independent Post & Telecommunications Authority ("*Onafhankelijke post- en telecommunicatieautoriteit*" or "OPTA") has limited jurisdiction in some areas. After 1 January 1998, the Dutch Competition Authority will have jurisdiction over the implementation and the enforcement of the competition rules in all sectors, including telecommunications. (See also section 4 below).

(ii) Broadcasting

Legislative competence for broadcasting issues is shared between the Minister of Transport for technical issues (*i.e.*, frequency allocation) and the Minister of Education, Culture & Science for content-related issues. These two government Ministries share responsibilities in the telecommunications sector with OPTA, the New Regulatory Authority (see below).

(iii) Publishing

Dutch regulation of the press and publishing sectors is a light *ex-post* regime exercised by the public prosecutor and the general courts, in accordance with the constitutional freedom afforded to the printed media.

(2) *Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.*

(i) Telecommunications

OPTA commenced operations on 1 August 1997, having been created by the *OPTA Act 1997.*[2] Under the *draft TA*, its role is to:

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2 "Wet Onafhankelijke Post-en Telecommunicatie Autoriteit" of July 1997.

- supervise compliance with most of the provisions of the *draft TA,* with the exception of frequencies, terminal equipment, and public/state security issues;

- manage telephone numbers;

- administer all issues relating to registration, when required;

- determine various telecommunications issues, including the selection and obligations of operators, particularly those with significant market power;

- settle disputes between market players; and

- adopt policy rules on telecommunications issues.

OPTA staff are civil servants from the former Market Supervision Directorate of the Telecommunications & Post Department ("HDTP") of the Ministry of Transport.

OPTA is a fully independent regulatory body supervised by three members who are appointed by the Cabinet for renewable terms of four years. It has a separate budget and accounting procedures which are approved by the Minister of Transport. It has independent decision-making powers and enforces its rulings. Much of its revenues are obtained for its dispute resolution role among market players.

(ii) Broadcasting

NRA functions in the broadcasting sector are divided among the Minister of Transport (in respect of frequencies), OPTA (for conditional access and other network issues), the Minister of Education, Culture & Science, the Commission for the Media (*Commissariaat voor de Media*), and the National Broadcasting Organisation (*Nederlandse Omroepstichting)* (all responsible for content issues), and the Dutch Competition Authority (also responsible for adjudicating on access issues in cable TV networks after 1 January 1998). (See also section 4 below).

(iii) Publishing

There is no NRA for the printed media. An independent commission sets the public subsidies for newspapers whose existence might otherwise be threatened by competition from other media.

(3) *National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.*

The Netherlands new competition law, namely, the *Competition Act of 1997* was enacted on 22 May 1997. It enters into force on 1 January 1998.

The *Competition Act of 22 May 1997* is non-sector specific. Unlike its predecessor, it is based on the notion of prohibition of agreements affecting competition, along similar lines to the Community competition rules.

It establishes a new Dutch Competition Authority ("*Nederlandse Mededingingsautoriteit*" or "NCA"), which is headed by a Director-General. The Minister of Economic Affairs supervises the NCA and can give instructions in individual cases to the Director-General. However, the NCA enjoys a certain degree of independence from the Minister. Moreover, it is planned that this status of the NCA will be reviewed after a period of about five years.

The NCA will be generally responsible for the administration and the enforcement of the competition rules. It will be responsible, in particular, for examining the applications for individual exemptions from the prohibition of agreements affecting competition and for considering notifications of concentrations (*i.e.*, mergers, take-overs and certain types of joint ventures). The NCA will have the power to issue written questionnaires, hold oral hearings and make on-site inspections. It may impose an order subject to the payment of a penalty or fines up to NLG 1 million or 10% of the annual turnover of the affected undertakings, whichever is the greater. Decisions of the NCA may be appealed to the administrative section of the District Court of Rotterdam and then to the Court of Appeal for Trade & Industry.

The Minister of Economic Affairs has authority to make certain competition decisions. In particular, she may determine the conditions for group exemptions from the prohibition of agreements affecting competition.

(4) *Powers of the various regulatory bodies, and the sanctions which they can impose.*

(i) *Telecommunications*

The regulatory functions in the telecommunications sector are divided between the Minister of Transport and OPTA, both of whom can be considered to exercise the powers of an NRA. The regulatory powers of OPTA have been described above (see point 2). OPTA can impose fines not exceeding NLG 1 million in the event of infringements.

The Minister of Transport is responsible in general for the formulation of telecommunications policy. In addition, Article 14(4) of the *draft TA* provides that the Minister has the following powers in the event of national crises:

- to give general instructions to telecommunications operators (TOs) and providers of telecommunications equipment;
- to provide various derogations from the obligations imposed on TOs and providers of telecommunications equipment by the *draft TA*; and
- to grant compensation in the event that TOs and providers of telecommunications equipment have suffered disproportionate financial damage as a result of complying with regulations.

Other provisions of the *draft TA* grant to the Minister of Transport, *inter alia*, the following specific regulatory powers:

- to require the termination of the registration required to provide public telecommunications networks or services in the interests of State security;
- to issue specific "public service obligations" and to exempt certain TOs from such obligations;
- to grant exemptions from the obligations to comply with provisions on “special network access”, notably in the event of (foreign) traffic disturbing competition;
- to adopt, in agreement with the Minister of Education, Culture & Science, provisions for the regulation of broadcasting of programmes;
- to adopt specific rules on interconnection issues;
- to designate the agencies authorised to certify equipment;
- to rule on the marketing and sale of telecommunications equipment or categories of equipment if the equipment does not comply with the relevant regulations;
- to grant a licence for the installation of radio transmission equipment where the holder is not licensed for radio frequencies; and
- to grant, in agreement with the Minister of the Interior and the Minister of Justice, an exemption from the obligation on telecommunications

providers to ensure that telecommunications services and networks can be wiretapped.

The instructions given by the Minister of Transport are binding. The civil servants appointed by the Minister of Transport to ensure compliance with telecommunications regulations have various powers, including the power to conduct on-site inspections. In the event of infringement of the telecommunications regulations, the Minister of Transport can impose fines not exceeding NLG 1 million. An appeal against a decision of the Ministry of Transport is taken with the District Court of Rotterdam and then to the Court of Appeal for Trade & Industry. It should be noted that the judicial review available is the same as that against decisions of OPTA and the Dutch Competition Authority (but not with respect to the National Broadcasting Commission).

In carrying out his tasks, the Minister of Transport is assisted by the HDTP which has two Directorates:

- the Policy Directorate (with a staff of about 100 people) which drafts telecommunications legislation, including legislation implementing Community law; and

- the Operational Affairs Directorate with a staff of about 350 people, which is organised as a separate agency under Ministerial supervision, to apply telecommunications legislation, allocate and assign frequencies, grant type-approvals for terminal equipment, and control the actual use of frequencies.

The HDTP's future tasks are derived from the *draft TA*. The HDTP is not an independent body, it has been criticised in the past for its dual role as both the NRA and a majority shareholder *via* the Dutch state in the "regulated" incumbent TO, KPN, the broadcasting transmitter monopoly NOZEMA and in certain new entrants in the telecommunications sector (*i.e.*, the Dutch Railways).

In addition, the following advisory and consultative bodies have been established:

- the Council for Transport and Public Works is an advisory body which, at the request of the Minister of Transport or on its own initiative, gives its opinions on policy matters, including telecommunications policy;

- the Consulting Committee for Post & Telecommunications is a representative organisation of interested parties in the sector; and

- the Consultative Committee for PTT matters was established by the concessionaire KPN, comprising markets of organisations representing

various interests (it is likely to cease to exist after the completion of the liberalisation process).

From 1 January 1998, the Dutch Competition Authority will have authority over the implementation and the enforcement of the competition rules, including the telecommunications sector. The Privacy Council deals with general matters of fundamental human rights and freedoms in the area of communications and information. Matters of taste and decency in the telecommunications sector will be assessed by the STIC, a foundation representing (all) free-phone and premium-rate service providers.

(ii) Broadcasting

Regulatory tasks in the broadcasting sector are divided between the Minister of Transport, OPTA, the Minister of Education, Culture & Science, the Commission for the Media, the National Broadcasting Organisation, and the Dutch Competition Authority.

The Minister of Transport grants licences for the use of broadcasting frequencies.

OPTA is the registration body required for the installation or provision of a broadcasting network.

The Minister of Education, Culture & Science has the power to:

- grant concessions to the national public broadcasting associations and allocate broadcasting channels;
- determine the total amount of broadcasting time; and
- set the broadcasting budget.

The Commission for the Media, established in 1985, is the general regulatory authority for broadcasting. It has the power to grant licences for the broadcasting of individual programmes. It also ensures that certain programmes are broadcast and allocates and adjusts airtime. Furthermore, it ensures compliance with, and the implementation of, the *Media Act*. It may impose administrative penalties for the failure to observe relevant regulations, including those related to advertising.

The Commission for the Media also enforces standards of taste and decency, using notifications and sanctions where it considers this to be necessary. In addition, the Ministry of Education, Culture & Science and the Commission for the Media are advised by voluntary bodies about programme content and standards. General provisions on discrimination, the use of inappropriate language and so on are contained in the Criminal Code, and are enforced by the Public Prosecutor.

There is a division of powers between the Ministry of Education, Culture & Science, the Commission for the Media and Parliament. The Minister has the right to supervise and, if necessary, suspend decisions of the Commission for the Media. However, media legislation, seeks to preserve the independence of the Commission for the Media, which is not answerable to any Minister.

The National Broadcasting Organisation coordinates the activities of the different public broadcasting associations. It allocates broadcasting time among the national public broadcasting associations and coordinates their programmes. It is also responsible for broadcasting the daily news, parliamentary coverage, national and annual events, current sporting competitions, other national and international events of a special character (such as State visits) and the daily news for adults, youth and for the hearing impaired.

(iii) Publishing

There are no regulatory bodies in the publishing sector.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

The *draft TA* contains provisions concerning cooperation between the Minister of Transport and other Ministers and with the NCA and OPTA. The latter two are also required to consult with each other over matters relating to the definition of the concept of significant market power. However, neither the *draft TA* nor the *Media Act* contain specific rules about cooperation between the Dutch regulatory institutions and their counterparts in other Member States and the institutions of the Community.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(i) Telecommunications

The *draft TA* was submitted to the Dutch Parliament on 15 September 1997, and is currently passing through the stages of Parliamentary review. The *draft TA* will enter into force at a time set by a special governmental Decree. It will not enter into force by 1 January 1998.

(ii) Broadcasting

Legislation was submitted to the Dutch Parliament on 3 February 1997 amending the provisions of the *Media Act* in connection with the revision of the organisational structure of national public broadcasting. The amendments are now the new *Media Act* of September 1997. In addition, many provisions of the *draft TA* will apply to the broadcasting sector. Moreover, the *draft TA* contains provisions which will amend the *Media Act* of September 1997. In particular, it amends the definitions in the *Media Act*, the provisions on broadcasting licences, and those obligating broadcasters to carry prescribed types of television programmes.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

(i) Telecommunications

Telecommunications networks and services are open to competition in *The Netherlands*. In particular, the provision of data communication services has been liberalised since 1993, the provision of mobile telephony since 1995, the provision of telecommunications infrastructure since 1996, and the provision of public voice telephony services since July 1997. During 1997, KPN was requested by the Government to divest its majority interest in the cable TV operator CASEMA. From 1 January 1998, there will be full liberalisation of telecommunications networks and services. Nevertheless, individual licences will be required to use frequencies, with registration being required in most other cases. (See also at section E.4).

(ii) Broadcasting

The number of public broadcasters is not limited by law. However, commercial broadcasters are prohibited from transmitting terrestrial television. Conversely, public broadcasters cannot be involved in other business activities without the consent of the Commission for the Media. (See also below at section E.4).

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

(i) Telecommunications

Since 1 July 1997, there have been no special or exclusive rights for the provision of telecommunications services.(See also below at section E.4).

(ii) Broadcasting

Under the *Radio Broadcasting Transmitters Act 1935*, an exclusive right to construct and exploit transmitters intended for the distribution of Dutch public broadcasting programmes was conferred on the limited liability company NOZEMA, owned by the State, KPN, the National Broadcasting Organisation and associations. There are plans for divestiture and the liberalisation of the national broadcast transmitters, which are increasingly used for commercial purposes such as interactive teletext and narrowcasting.

Under the *1987 Media Act*, cable operators were not allowed to provide their own programming, nor could they provide terrestrial television services. These restrictions were lifted by the *Media Act* of September 1997.

The *Law of 1 July 1997* has removed from cable television the right to exclusivity that they enjoyed under their existing broadcasting licences.

Cable television operators may now provide all telecommunications services, and have the right to interconnect with KPN.

Until the provisions of the *draft TA* relating to licences for the use of frequencies for public broadcasting enter into force, NOZEMA is allowed to use the frequencies for public broadcasting which were allocated to it by the Minister of Transport under the *Radio Broadcasting Transmitter Act 1935*.

(3) *Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulations, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.*

Telecommunications

Under Article 20(1) of the *draft TA*, KPN and the members of its corporate group which provide fixed telecommunications networks and services are, in terms of their role as providers of a fixed public telephony network and services and leased lines, presumed to have "significant market power" throughout *The Netherlands*, for a period of two years (*i.e.*, until the year 2000). As under Community law, the identification of an entity as one having "significant market power" triggers a number of regulatory obligations concerning interconnection, accounts separation and so forth.

In addition, KPN is required to offer all citizens certain universal services (see below at I.2.).

The Dutch TOs are allowed to provide broadcast service and are not prohibited from providing cable TV services. However, KPN was requested in 1997 to divest its majority interest in the cable TV operator CASEMA. Furthermore, KPN will have disposed of its entire interest to France Telecom by the end of December 1997.

(4) *Accounting and structural separation safeguards (current or planned).*

Article 6(6) and (8) of the *draft TA* provide that TOs subject to specific obligations relating to the transparency of interconnection tariffs must establish an OPTA-approved cost accounting system for interconnection. They are obligated to keep separate accounts for their interconnection activities and for their activities.

Article 7(1) of the *draft TA* implements the *1990 ONP Framework Directive* (as amended), in *The Netherlands* and provides that OPTA will designate the TOs which are subject to specific rules on keeping separate accounts. These rules will include the obligation to keep separate accounts for the activities related to the provision of telecommunications services and for other non-telecommunications activities. Article 8(4) of the *draft TA* provides that the provider of a broadcasting network, which also provides a public telecommunications network, must keep separate accounts for these activities.

(5) Policy basis for regulation of incumbent carrier's services.

The *draft TA* aims to establish regulatory principles in an environment where telecommunications networks and services are completely liberalised. The *draft TA* implements the principle that there should be unrestricted access to the Dutch telecommunications market in a properly regulated competitive market. Specific regulatory obligations are imposed where an entity enjoys "significant market power".

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

The *draft TA* adopts the following approach to authorisation of the provision of telecommunications services and the establishment of telecommunications networks:

- no individual licence is required for telecommunications services and networks, except where frequencies are required (*e.g.*, mobile services);
- registration is required for the provision of: a public telecommunications network; leased lines; a broadcasting network; a public telecommunications service; and conditional access systems;
- no registration is required for telecommunications networks or services: for which a licence is required; or that are in a category designated by Decree as being relatively small in size or importance;
- the installation and use of radio transmission equipment is only permitted if the transmitter is licensed for the use of frequencies, except in certain specific cases; and
- numbers can be used only if they are assigned by OPTA.

(ii) Broadcasting

As mentioned above, the *draft TA* requires the provision of a broadcasting network to be registered.

Terrestrial Television

The public broadcasting of television programmes requires an individual public broadcasting licence. The commercial broadcasting of television programmes (*i.e.*, private broadcasting) requires a commercial broadcasting licence.

Cable Television

Up to July 1996, KPN had the exclusive right to construct and maintain the national cable television infrastructure. Municipalities had the right to be a preferred provider of local cable television infrastructure, which were then licensed by the Minister of Transport. The Interim 1996 *Media Act* provided that the Dutch Government should invite applications for licences to build and run cable-based telecommunications networks. Two national licences, and some 1,300 licences of smaller geographical scope, were issued. The *draft TA* proposes to rescind the above licences, replacing them with a registration requirement.

Subscription television services, including Video-on-Demand and Near-Video-on-Demand, require a subscription television licence.

Satellite Television

Since July 1995, there have been no restrictions on the ability of parties to obtain an individual licence to operate Satellite Earth Stations ("SES").

(iii) Publishing

No permit or authorisation is required for publishers.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

The individual licences required for the use of frequencies are granted by the Minister of Transport. OPTA is responsible for registrations for the provision of telecommunications networks and services.

(ii) Broadcasting

National broadcast licences are granted by the Minister of Education, Culture & Science. OPTA is responsible for the registration of broadcasting networks The Cabinet intends to review the existing number of licences and their terms, in its next sitting.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

The *draft TA* sets out the simple registration procedure which will apply in the future for both broadcasting and telecommunications networks. Licensing requirements for the provision of broadcasting services are regulated by specific broadcasting regulations such as the *Media Act*.

Currently under the interim licensing regime, it is only infrastructure licences at a regional or a national level which require an individual licence, with all telecommunications not requiring a licence (with the exception of mobile server).

Licensing requirements for supply of telecommunications services are dealt with in the *draft TA* (refer to point 6 below).

(4) Line-of-business restrictions under national law preventing: (i) TOs providing cable TV services or "multimedia" services (and vice versa); (ii) TOs providing mobile telephony (and vice versa); (iii) utilities from providing cable TV services and telephony (and vice versa).

KPN provides GSM mobile communications data services (through structurally separate subsidiaries). However, both KNP and the second GSM operator, Libertel, have been excluded from the first auction stage for the first (and possibly only) DCS-1800 licence which is due to be granted during early 1998.

Under the old *Media Act*, cable operators were not allowed to offer telecommunications services. This restriction was lifted by the *Media Act* of September 1997.

Although there is no statutory prohibition on KPN entering the cable TV business, KPN has divested its interests in the cable TV operator CASEMA, at the express request of the Government.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no restrictions on KPN producing its own content and entertainment programmes and to transmit them over its own network. It can also supply programmes for third parties. If KPN supplies content, the rules applying to other service providers would also apply to KPN.

Until recently, cable TV providers were prevented from producing their own content. This restriction was lifted by the *Media Act* of September 1997.

(6) Typical licence conditions.

(i) Telecommunications

Under the interim licensing currently in place in *The Netherlands*, individual licences are only approved for infrastructure or network licences on both a regional basis[3] and on a national basis.[4] All types of services can be provided freely under the interim regime (except for mobile services, which require individual licensing). The rights and obligations of current regional and national infrastructure/network licensees are very complex,[5] but overlap in a number of key respects (*i.e.*, they both have: statutory rights of interconnection with KPN; they must publish their interconnection tariffs; they must meet all requests for interconnections; they may interconnect internationally; and, critically, they have 'digging rights').

Registration

Under the *draft TA*, OPTA has the power to specify the information to be submitted by an applicant for registration. An application must include the information deemed to be important by the Government for the security of the State and the maintenance of legal order. OPTA may refuse registration if the required information has not been provided, is incomplete or incorrect.

A registration will be amended or terminated if: the information provided is not accurate; the telecommunications activities are performed in a manner contrary to the provisions of the *draft TA* or other regulations; or on the instructions of the Minister of Transport.

Licence

Licences for frequencies are generally granted on a "first-come first-served" basis, but may be subject to a system of competitive bidding or an auction. Additional rules for the granting, amending and extending of licences will be adopted, to set out licence conditions and their duration.

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3 Granted by the Ministry for periods between 10 to 20 years to over 1,300 applicants, most of them are cable TV operators (over 650 in number).

4 Granted by the Policy Affairs Directorate of the Ministry only two operators, Telfort and Enertel; National infrastructure licensees have the automatic right to obtain radio frequencies for microwave links.

5 It is elaborated in the Regulation on the general obligations of infrastructure licences, "Regeling Algemene Verplichtingen Houders Infrastructuurverginningen" (Official Gazette of 5 July 1996).

The Minister of Transport must refuse to a licence application if: there is a violation of the frequency plan; it is required for efficient use of the spectrum; the security of the State or the public order is endangered; or relevant regulations would be infringed.

The Minister of Transport may refuse to grant a licence if: the applicant has not met the obligations or conditions attached to the licence; the grant would significantly restrict competition on the relevant market; or it is required for compliance with international or Community law.

Article 3(8) of the *draft TA* provides that a licence is not transferable, unless an exemption is granted by the Minister of Transport. There are no restrictions on ownership.

Mobile licences are limited in number because of the need for available frequencies. They are all national in scope. The two existing GSM licences run for 15 year periods, while the existing two ERMES licences run for 10 years. The incumbent operator, KPN, was not required to apply for either of these two forms of licence (which are run by its subsidiaries). Mobile licensees are not obliged to contribute to universal service obligations at present. However, they are subject to a number of network roll-out obligations and are capped in the tariffs they can charge for the first six months of operation. Mobile operators are also accorded an automatic right to interconnection among themselves and KPN and are subject to their own special interconnection regime.[6] They are also permitted to build their own fixed infrastructure in the event that KPN does not provide leased lines adequately or at reasonable prices. The licences can be withdrawn on a number of grounds relating to the failure to comply with licence conditions, bankruptcy or the non-use of the licence. Licences may be transferred with Ministerial approval, which as unlikely to be forthcoming in the event that the transfer will be made to a competitor or a government entity. (See also section I. below).

(ii) Broadcasting

The Minister of Transport must refuse an application if: there is a violation of the frequency plan; it is consistent with efficient use of the spectrum; the security of the State or the public order is in danger; the relevant regulations would be infringed; or the licence has been requested for programmes for which no broadcasting time has been obtained under the *Media Act* or, insofar as a licence under the *Media Act* is required, it has not been granted.

Article 3(8) of the *draft TA* provides that a licence is not transferable, unless the Minister of Transport grants an exemption.

[6] "Richtsnoeren Interconnectie" (Official Gazette No. 189 of 1995).

As the public broadcasters in *The Netherlands* are associations, there are no ownership issues. Similarly, there are no rules about cross-media, cross-channel or foreign ownership. There are few ownership restrictions on cable TV and satellite operators, other than limiting shareholding, or participation, in any daily newspaper publisher to 25%. There are no other restrictions on cross-channel, cross-media, maximum percentage of ownership.

Terrestrial Television

The public broadcasters' licence entitles a public broadcaster to transmit programmes on one of the three national public terrestrial channels established under the *Media Act*. Each public broadcaster can broadcast on one of the three channels. Licences are granted to public broadcasters for between five and ten years, on the condition that the broadcaster is a "Vereniging" (*i.e.*, an association) under Dutch law with at least 150,000 members and that the broadcaster had access to relevant frequencies in the previous year. Regional and local public channels can be licensed for five years.

Cable Television

At a regional level, licences to build cable TV networks were traditionally granted to local municipalities. They have entered into franchise agreements with subsidiaries who generally have private sector minority shareholders. Under the new legislation, they can also provide any liberalised telecommunications service and/or networks.

The provision of television services over a telecommunications cable network is governed by the *Media Act*. A service concession will only be granted where the operator can reach five provinces and its service can be received by at least 30% of the national population. To retain the licence, the operator must reach 60% of the target audience in one year. The duration of the licence is five years. The existing licence only applies to television services. Licences under the new *Media Act* will apply to all telecommunications services.

Satellite Television

The criteria for a licence to operate Satellite Earth Stations ("SES") are the same as those for service providers in the cable TV sector. When applying for an infrastructure licence, an application for a service licence can be filed on the same form. Therefore, there is no strict separation between infrastructure and services in the context of satellite broadcasting. A service licence can be obtained by the actual user of the SES or by a service provider.

There are four categories of licences:

- SG10 VSAT networks (incorporating a hub station in *The Netherlands*);
- SG20 one-way uplinks (data, broadcasting);
- SG30 SNG installations; and
- SG40 miscellaneous licences.

These licences have a one year renewable term.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Since 1989, price caps have applied to the incumbent KPN with respect to only a select "basket of services", which includes voice telephony and leased lines. Overall, KPN has more freedom to set its tariffs than many other European incumbent TOs. Although it is obligated to charge fees which are cost-oriented, non-discriminatory and fair.[7]

Recently, the tariffs of operators with significant market power for voice telephony and leased lines became cost-orientated. Accordingly, the Minister of Transport ordered KPN to reduce its tariffs on leased lines by the end of 1996. In addition, in a 1997 Decision, the Minister of Transport, in a dispute between Telfort Holding N.V. and KPN, decided that KPN's interconnection charges should be cost-based, and should therefore be reduced. On August 1 1997, OPTA took over supervision of compliance with the Community ONP rules in *The Netherlands*. KPN was also prohibited by OPTA during 1997 from cross-subsidising certain types of services to its customers, which it sought to provide, at no charge.

(2) New pricing principles for the competitive market environment.

Article 6(6) and Article 6(8) of the *draft TA* provide that certain operators can be subject to specific obligations relating to tariffs for interconnection and special access.

The new *Media Act* provides that a provider of a broadcasting network may be forced to charge those who are connected to the network a tariff not exceeding the rate set by a government decree.

[7] Conversely, under the current regime, other network licensees are simply required to publish their tariffs in the government Official Gazette. In any event, they are free to set their prices at the upper ranges of their anticipated pricing at least for the first six months of operations.

(3) ***Control of tariff packages which can be offered to customers. Interpretation of the rules (if any) preventing discrimination, bundling and cross-subsidisation interpreted in the light of tariff flexibility.***

There used to be a general flexibility regarding KPN's tariff packages. However, KPN was not allowed to subsidise non-reserved services using the profits of reserved activities. Recently, the European Commission and OPTA have intervened, following complaints from competitors about discounts in packages for business users. The *draft TA* imposes general ONP cost-orientation rules, which OPTA will enforce.

Different tariffs could be imposed for the different categories of broadcasting networks since cable television access prices will be controlled by the Dutch NCA.

(4) ***Tariff basis - usage time or flat rate off peak rates; and other relevant pricing practices which increase pricing flexibility.***

Telephony tariffs are based on usage time subscription fee. Leased lines have flat-rate, distance-dependant tariffs.

(5) ***Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulated Internet access and on-line services.***

Internet access services are not specifically regulated. Cable TV providers are free to offer flat-rate pricing, whilst TOs with significant market power must offer cost-orientated pricing.

G. Network Interconnection and Access to Service Providers

(1) ***Interconnect arrangements and charges - express regulation or individual negotiation.***

(i) Telecommunications

Interconnection and access arrangements are individually negotiated. Whether or not an interconnection agreement has been reached, the *draft TA* allows OPTA to intervene. In addition, the *draft TA* contains general rules on interconnection and provides for the adoption of more specific rules in the future. In May 1997, the Minister of Transport adopted "interconnection guidelines" which provided information on the way the Minister of Transport applied the existing law on interconnection and access. OPTA has announced that it will review these in the light of the *draft TA* in early 1998.

(ii) Broadcasting

Access to cable TV networks was the subject of several decisions in 1996 by the Minister of Economic Affairs in which he concluded that exclusivity clauses are null and void where they prohibit: a television producer from entering into other agreements for distribution of its television programmes; or a cable company from allowing competitors access to the cable TV network.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators with "significant market power".

The *draft TA* contains rules on interconnection which are generally applicable to all telecommunications operators. There are special rules for operators with significant market power. Article 6(4) of the *draft TA* provides that OPTA will designate the operators with "significant market power" (*i.e.*, those with a market share of more than 25% on the relevant product and geographic market). OPTA may derogate from this general rule by accounting for the capacity of the provider to influence market conditions, its turnover relative to the size of the market, its control of access to the end-users, its access to financial resources and its experience in providing products and services on the market.

(3) Precise obligations currently placed on interconnecting operators.

The *draft TA* contains certain general rules on interconnection. The *Interconnection Guidelines,*[8] formulated after a public consultation commencing in April 1997, contain more specific rules. However, they will be revised in the light of the *draft TA* during 1998. The *draft TA* and the *Interconnection Guidelines* provide as follows:

- There are no specific points in the network at which interconnection with KPN is mandated· However, providers with significant market power must comply with all reasonable requests for Special Network Access.

- The *Interconnection Guidelines* have been interpreted as requiring telecommunications operators with significant market power to offer interconnection at the level of number exchanges. However, operators can argue, on technical grounds, that they cannot interconnect at the points requested.

- While access is not mandated down to the level of the local loop, the *Interconnection Guidelines* have been interpreted as requiring operators with significant market power to offer full access at every feasible point in the public network.

8 The "Richtnoeren Interconnectie", *supra*.

- Equal access is not mandated under national law, but in *The Netherlands* carrier preselection will be introduced in due course. In addition, OPTA has ruled that the incumbent should offer unbundled subscriber lines to its competitors on the same terms as for its own use for xDSL.

- A party requesting interconnection may assume that major operators will offer interconnection on terms consistent with international standards. The *Interconnection Guidelines* stipulate that the technical properties of telecommunications infrastructure must, as far as possible, comply with the standards set by international, particularly European, standards-setting organisations.

- Current telecommunications regulations provide that operators must base their interconnection charges on charges for the actual facilities used. This allows for the inclusion of agreed service levels in the interconnection agreement.

- Interconnection charges of operators with significant market power must be transparent, cost-oriented and unbundled. The *Interconnection Guidelines* contain detailed requirements, but do not take a definite position with respect to a formula for interconnection charges. Rather, they note that "*in the process leading to a cost allocation system based on an incremental approach to costs, it may be necessary to examine what constitutes a fair return*". The interconnection framework foresees the distinction between charges for the termination of calls (which should be cost-based) and for call origination (which should be marketplace driven, subject to curbs on market power). This distinction complements the clear distinction drawn between pure "interconnection" arrangements and arrangements for other forms of "access".[9]

  KPN may deviate from the conditions of its published standard interconnection offers. The published conditions are minimum conditions, so that KPN is free to make tailor-made arrangements deals with larger operators.

  As a rule of thumb, interconnection tariffs should not cost in excess of 30-40% of an operator's total costs.

- Interconnection and special access rates in *The Netherlands* must be non-discriminatory and objective (cost-based). Moreover, KPN will be required to pay "any difference between the amount paid on the basis of

[9] Even under the interim regulatory arrangements, the incumbent KPN is obliged to provide its leased lines to other concession holders (i.e., network operators), but is not so obliged with respect to those entities which simply hold permits (service providers).

(the enclosed) rates and the amount that would have been paid on the basis of the rate determined (after completion of a cost oriented study).[10] Accordingly, parties obtaining interconnection or special access to PTT Telecom's network will have access to appropriate rates approved by an OPTA-approved cost orientation study.

- OPTA may instruct certain operators to publish a reference interconnection offer, which will contain a description of what is offered, an itemised account of the components of the offer, tariffs and other terms and conditions.

- Copies of interconnection agreements must be filed with OPTA. OPTA may make the filed agreements (other than company data which it deems to be confidential) available to interested third parties.

H. "Resource" Issues

(1) Frequencies

Article 3(1) of the *draft TA* provides that the Minister of Transport must establish a frequency plan including the distribution of frequencies for particular uses and categories of users. The Minister of Transport must also keep a frequency register containing the different frequencies which have been licensed.

To obtain frequencies, it is necessary to obtain a licence from the Minister of Transport (Operational Affairs Directorate), subject to limited exceptions. Licences may be granted subject to restrictions, especially in relation to the scarcity of the frequencies.

There are special rules for licence sets (or blocks) of frequencies. In particular, for each network licensed under the *Media Act*, at least one licence must allow national reception of the programme. Similarly, at least one licence must be granted for each province for certain radio programmes. In addition, every institution granted local broadcasting time under the *Media Act* must be granted a licence to broadcast its radio programme.

When these special rules for licences do not apply, frequencies are granted: on a "first-come first-served basis"; using a competitive bid; or using an auction. The choice of procedure is made by the Minister of Transport and the Minister of Education, Culture & Science.

10 See *The Minister of Transport and Public Works, Judgment within the meaning of Article 4c, third paragraph, of the Dutch Telecommunications Act, in the dispute between: Telfort Holding N.V. and Koninklijke PTT Nederland N.V., and PTT Telecom B.V.*, HDTP/TMI/1997/1944, 26 June ¶ 3.4.

If more than two bidders apply for the first round of DCS-1800 licences, they will be auctioned with a minimum bid price per licence.

In June 1997, the Ministry decided to allocate extended frequency bands for GSM digital cellular services (*Britain*, *Finland* and *Germany* are expected to follow suit). Two new bands, on either side of the existing 900 MHz band, will be made available. In addition, the ministry intends to adopt a dual band licensing procedure, to allow operators who use GSM 900 technology in rural areas and GSM 1800 in more populated regions.

(2) Numbering

In October 1995, the capacity of available numbers was increased as a result of the implementation of a new numbering scheme.

Article 4(1) of the *draft TA* provides that the Minister of Transport will draft a numbering plan. The plan will be managed and numbers assigned to operators and users by OPTA.[11] OPTA may refuse to assign certain numbers, particularly if it does not reasonably expect that the numbers will be used within a year. Ministerial Regulation may mandate OPTA to designate numbers for certain categories of users. OPTA may reserve numbers for an applicant for up to three years. Assignments or reservations may also be revoked by OPTA on the instruction of the Minister of Transport, in the interests of State security .

OPTA must keep a number register identifying those with assigned or reserved numbers.

There are no specific obligations, to ensure dialling parity. A Decree may be introduced in the near future to oblige TOs to offer number portability, ahead of schedule. Portability rules are currently being drafted and are expected to require portability from January 1999 at the latest (and possibly even during the course of 1998) for fixed telephony, mobile telephony and data services. Carrier pre-selection on a call-by-call basis has been required as from 1 July 1997.

[11] Currently, it is the Ministry which allocates numbers on the basis of the Decree on the Application Procedure for Numbers, of 3 July 1996 (Statute Book 1996 at 376). The request of applications for numbers can occur where it is unlikely that the numbers will be used within 12 months of allocation, bankruptcy proceedings are pending against the applicant, the applicant is not registered under Dutch company law, and the use to which the number are to be put is unjustified.

(3) *Rights-of-Way*

Article 5(1) of the *draft TA* sets out the general right for any party to install, maintain and clear cables for a public telecommunications network or a broadcasting network over public land. However, it has been proposed that railway tracks should not be considered to be part of the "public domain" (making them subject to the more onerous requirements of private domain regulation (see below)).

The municipalities are responsible for the co-ordination of works in the public domain. Operators must notify the relevant municipality and be authorised before commencing any works.

One must permit the installation, maintenance and clearance of regional and international cables on private land, other than closed gardens and grounds forming part of occupied residential premises. In such circumstances, operators must reach an agreement with the affected party. If they cannot agree, the operator must immediately give the affected party a written notification of the work to be carried out, and the affected party may dispute this to the OPTA.

Finally, all parties must allow cables for public telecommunications or broadcasting networks o be installed and maintained over their land, buildings or waters (this is done without attachment or contact) and cables and network termination points to be installed and maintained in and on buildings (as well as in and on integral land) to facilitate connections in those and neighbouring buildings.

These obligations do not affect the right to compensation. Claims for compensation can be brought before the subdistrict court in whose jurisdiction the real property is located. If it is located in more than one subdistrict, the plaintiff should bring its complaint to the subdistrict court of his or her choice. The decision of the subdistrict court may be appealed.

(4) *Access to Content*

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

Generally speaking, the *Media Act* of September 1997 implements in *The Netherlands* the *Television Without Frontiers Directive*, ensuring the availability of certain sport programming to the public broadcasting companies. The *Media Act* stipulates that a commercial broadcaster may only broadcast certain "programme components" including certain sporting events, once certain conditions have been met, *i.e.*, the public broadcasters must be informed of the intention to exclusively broadcast (insofar as they are part of a television programme which may be

distributed in *The Netherlands*). If the public broadcaster wants to include the "programme components" in its programming, the private broadcaster must negotiate. Within the framework of recent discussions on the broadcasting of certain sport events, the Dutch broadcasting authorities have stipulated that public service broadcasters have a right to broadcast these sport events.

Licensing requirements for certain types of content that may restrict market entrants.

Access to content and the market power derived from access to certain types of content has been assessed recently in two contexts.

- *Dutch football rights*

The Dutch Football Association, which had previously sold its rights to public broadcasters, became a partner in a new commercial thematic sports channel ("Sport Seven") in 1996, to which it offered the exclusive rights of all football matches in the Dutch league. Cable operators were in turn requested to pay a set monthly fee to obtain access to these rights (the negotiations were never concluded).

Although the thematic channel collapsed by the end of 1996, with the public broadcasters given access to Dutch football matches for a significantly higher prices, the Competition Authority ruled in 1997 that the rights of the Football Association to all football matches in *The Netherlands* should not be used to exclude public broadcasters (in effect, there could be no absolute exclusivity for such programming). In essence, no TV station will be able to have exclusive rights for sporting events unless those rights have been offered to all other broadcasters, which have declined to broadcast those events.

- *Holland Media Group Case*

The European Commission's Merger Task Force refused to grant clearance to a proposed concentrative joint venture ("Holland Media Group" or "HMG") between Endemol (the largest Dutch TV producer) and a number of independent Dutch TV channels (RTL4, RTL5 and Veronica).[12]

According to the Commission, the creation of the Holland Media Group would lead to the creation of a dominant position on the Dutch market for TV advertising and to a strengthening of an already existing dominant position of Endemol in the market for independent TV production. This analysis was based on five elements:

12 OJ L 134/32 of 5 June 1996.

- the combination of the existing channels RTL4 and RTL5 with the new commercial channel Veronica would lead to a high audience share of HMG in Dutch TV broadcasting;

- the combination of the three channels RTL4, RTL5 and Veronica would enable HMG to coordinate their programme schedules in order to attract a maximum of viewers and to target the most attractive groups for advertisers;

- using RTL5 as a fighting channel, HMG would be able to directly counter-act the programming of competing channels and new entrants on the market, thus leaving no room for new competitors;

- HMG would achieve a market share on the TV advertising market of at least 60%;

- the structural link with the biggest Dutch independent producer resulting from Endemol's participation in HMG would give HMG preferential access to Endemol's very successful productions and therefore a further competitive advantage over other broadcasters.

Through its participation in HMG, Endemol would obtain a structural link which would strengthen significantly Endemol's position on the Dutch production market. This structural link to the former leading broadcaster in *The Netherlands* would give Endemol a large sales base for its productions which would be effectively immune from competitive pressures.

The subsequent removal of Endemol from the concentrative joint venture, and the transformation of RTL5 from a general interest channel to a "news channel" resulted in the Commission granting clearance to the new entity in July 1996.[13]

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services)

Under Article 8(1) of the *draft TA*, providers of broadcasting networks are required to comply with the provisions of the *Media Act* with respect to programmes broadcast by means of a broadcasting network, subject to exemption by OPTA.

NOZEMA and possibly other broadcasters can be obliged, following a decision by the Ministers of Transport and Education, Culture & Science, to broadcast all the programmes of authorised broadcasting institutions.

[13] Case No. IV/M553, Decision of 17 July 1996.

Under the *Media Act* of September 1997, the provider of a private broadcasting (cable) network is required to broadcast at least 15 television programmes for general viewing simultaneously with original broadcasts to all those connected to the broadcasting network, and at least 25 radio programmes for general reception.

There are seven "must carry" programmes which Dutch cable TV operators are obliged to transmit. The "must carry" programmes are: the three Dutch public TV channels, the two Dutch language public channels from the Flemish region of Belgium, one local and one regional channel.

"Local content" or "independent content" obligations on cable TV operators (see also section E above)

Cable and satellite TV operators must ensure that: 50% of their programming content is European; 10% is independently produced (of which half must not be older than five years); and 40% is in the Dutch or Frisian languages.

(5) "Gateway" Issues - Technologies for Open Access

The *draft TA* requires providers of conditional access systems to make the technical facilities necessary for reception available to providers of broadcasting services, on fair, reasonable and non-discriminatory terms.

In addition, the provider of a conditional access system must only supply a system that has the technical facility for a cheap transfer of control. The system must be designed so that the provider of a broadcasting network can have complete control over the services broadcast using the conditional access system.

The *draft TA* provides that more detailed rules about conditional access systems may be adopted in future governmental decrees.

(6) Internet Domain Names - Preferred regulatory approach.

The entity responsible for administration, policy formulation and protection of private sector interests in the context of the national Top-Level Internet Domain Names (".ne") has yet to be identified.

In a recent case, the Court prohibited the use of domain names (registered as trade marks) by the mark holder, because the names infringed the rights of a number of other entities. The mark holder had to transfer the registrations to the other entities.[14]

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14 Order of the President, District Court Amsterdam, 15 May 1997.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

Universal service is not defined in the *draft TA* itself, but will be defined in accordance with Community rules. It is unlikely that interactive services will fall within the universal service obligations. See (3) below. However, KPN is obliged under the terms of its concession to provide basic fixed and mobile telephony services, data transmission facilities, telex and telegraphy (plus related activities and the publication of directories).

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

The KPN group is obliged, under the *draft TA*, to offer everyone certain basic public telecommunications services or facilities at an affordable price and of a certain quality within 12 months of its enactment. The KPN group is also obliged to provide the telex and the telegraph services referred to in the *Mandatory Telecommunications Services Decree.*

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

Article 9(1) of the *draft TA* provides that a governmental decree may designate the categories of public telecommunications services or facilities which must be available to everyone at an affordable price and at a certain quality. The governmental decree may also set the level of price and quality.

In addition, the Minister of Transport has the right to issue a Decree requiring operators with significant market power to provide certain telecommunications services or facilities, in a specific geographical area, for up to five years. Operators without significant market power may apply to be universal service providers.

Operators with universal service obligations may be compensated for the net costs incurred, in certain circumstances. Compensation for the provision of universal services will be funded by contributions paid *pro rata* by each operator with a turnover in excess of the amount set by future Ministerial regulation.

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).

Cable TV operators must carry the following programmes:

- the three national terrestrial channels;
- the two Dutch language public channels from Flanders in areas of "natural overspill";
- local and regional channels; and
- European television programmes aimed at the Dutch public.

(See also H.4 above).

(5) Other public service specifications affecting the content or information provided to subscribers.

Rules relating to the protection of minors from Internet exposure are being discussed in *The Netherlands*.

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

"Telecommunications" is defined as "the transmission, reception or broadcast of signals, representing symbols, writing, pictures, sounds or information of any nature through wires, radio means and optic systems and other electromagnetic systems".[15]

Law No. 91/97 of 1 August 1997 distinguishes between private and public telecommunications activities. Private telecommunications are those provided by an operator for its own use or for use of a limited number of users, and private telecommunications networks are networks that support only private telecommunications services. Pursuant to *Law No. 91/97*, private telecommunications activities no longer need to be conducted on a non-commercial basis. Public telecommunications include all telecommunications and telecommunications services offered to the public, including services offered to specific users and broadcasting services.

"Telecommunications services" are those services requiring an addressing procedure (point-to-point telecommunications); "broadcasting services" are those in which the communication is made in one direction to several reception points without prior addressing (point-to-multi-point communications).

"Broadcasting services" include sound (radio) and television services.

For the time being, no legislation is foreseen to alter the current regime.

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

As regards telecommunications services, the following distinctions can be made:

- "fundamental" services;
- fixed and mobile complementary services and networks; and
- value-added services.

Fundamental services (which include fixed telephony and telex services, as well as a switched data service) are provided exclusively by Portugal Telecom until the year 2000.

15 Article 2 of *Law 91/97* of 1 August 1997.

Complementary services and the correspondent networks used to provide them are based on leased lines and switching or processing equipment not intended to provide fundamental services.

Mobile complementary services (which include cellular telephony, paging and dispatch services) are licensed by the National Regulatory Authority for Telecommunications matters (the Portuguese Institute for Communications, or "ICP") following public tenders under the supervision of the Ministry of Communications.

Fixed complementary services (which include networks to provide data communications services, electronic mail, electronic date interchange, videotext and voice mail box services) are licensed by the ICP on the basis of requests by applicants.

Value-added services, defined as services which use fundamental or complementary services and which do not require the use of their own infrastructure, are fully open to competition and subject only to a registration requirement with the ICP.

Following the full liberalisation of the telecommunications sector as of 1 January 2000,[16] the distinctions between fundamental services and complementary and value-added services will no longer be meaningful.

However, the distinction between fundamental services and complementary and value-added services, as set forth in *Law No. 88/89* and used in various Decree-laws for the issuance of licences and authorisations, will remain in effect until the adoption of further Decree-laws within the framework of *Law No. 91/97.*

"Broadcasting services" are divided into the following sub-categories:

- sound (or radio) broadcasting;
- television; and
- cable television.

With the exception of public service broadcasting, radio broadcasters must be licensed. Operators must have a licence for each of the different types of broadcast services which they transmit. Licences are granted by means of a public invitation to tender.

With the exception of public service broadcasting, television broadcasting must also be licensed. Licences are awarded on the basis of a public invitation to tender.

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16 O.J. (1997) L 133/19 of 24 May 1997.

Cable television licences, which are not subject to public tender, are issued by the ICP and ratified by the Ministry under the *Decree Law No. 241/97* of 18 September 1997.

(3) Regulations of Internet services and other on-line services.

Internet services are categorised as fixed complementary services. As such, they are subject to an individual licence. Other on-line services such as audiotext are value-added services. The obligations and rights of the value-added services operator are specified in *Portaria 160/94*. Value-added services need to be registered with the ICP.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

So-called interactive services such as Video-on-Demand and Pay-Per-View are not regulated specifically. The Portuguese Government recently adopted legislation (*Decree Law No. 241/97* of 18 September 1997) that permits the use of two-way signalling capacity over cable television networks. The ability to transmit and receive signals allows the introduction of Pay-Per-View, home shopping and similar products in *Portugal*.

There is some legislation on digital broadcasting, namely, *Decree-Law No. 305/94* which defines the technical regime of the RDS system. RDS is a system which permits the addition of a non-audible information, under a digital format, over the frequency modulated transmissions of the radio sound broadcast stations; it can be considered as an auxiliary tuning service.

The RDS system is authorised in the radio sound broadcast frequency modulation band (87.5-108.0 MHz), either for stereophonic or monophonic transmissions. It is necessary to obtain a licence from the ICP to operate the RDS system.

B. Regulatory Authorities in telecommunications/ broadcasting/ publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

The legislative competence is vested in the Parliament ("Assembleia da República") and/or the Portuguese Government.

The Portuguese Institute of Communications (the Instituto de Comunicacoes de Portugal, or "ICP") grants all licences and authorisations for the provision of telecommunications services (including satellite services and cable TV).

Television licences are granted following a public tender by the Council of Ministries after consultation with the High Authority for the Media. Sound broadcasting licences are granted by the members of the Government responsible for the communications and media sectors.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.

(i) Telecommunications

Under the *Decree-Law No. 88/89*, the Portuguese State has the obligation to oversee and monitor the telecommunications sector. This includes:

- management of the radio spectrum;
- definition of general policies and overall planning of the sector;
- approval of legislation and regulations for the public use of such services;
- standardisation and type approval for telecommunications materials and equipment and definition of the conditions for its connection to the telecommunications network for public use;
- granting concessions, licences and authorisations for the setting up and operation of telecommunications networks and services;
- monitoring compliance by the telecommunications operators with the legal and regulatory provisions relating to their activities, as well as the application of the respective sanctions; and
- the definition of prices and tariffs for telecommunications services.

The ICP is the regulatory body responsible for the Portuguese telecommunications sector. It was created by *Decree-Law No. 188/81* of 2 July 1981. It is an incorporated public institution with administrative and financial independence, with a staff well in excess of 300. However, it carries out its activities under the supervision of the Ministry of Public Works, Transport & Communications.[17]

[17] The ICP is defined as a "public institute endowed with a legal identity and administrative and financial autonomy... in possession of its own assets, performing its role under the supervision of the Ministry of Public Works, Transport & Communications" (Article 1.2. of *Law No. 283/89*).

The ICP's main function is to support the Government in the coordination, control and planning of telecommunications, as well as the external representation of the telecommunications sector, and the management of the radio spectrum. The ICP is governed by a Board of three persons nominated by the Council of Ministers for three-year terms.

Article 4 of *Decree-Law No. 283/89* (as amended) provides that the ICP's remit is to:

- cooperate actively in the formulation of Portuguese telecommunications policy;
- advise the Government on the exercise of its functions, to which end it must in particular:
- submit draft legislation and regulations necessary for the operation and protection of communications;
- monitor the quality and the price of services provided by the operators of communications for public use;
- monitor the compliance of communications operators with the respective statutes, licences or concession contracts;
- coordinate nationally all matters regarding the execution of treaties, conventions and international agreements relating to communications, and also represent the Portuguese State in the corresponding international organisations;
- grant type-approval for materials and equipment;
- manage the radioelectric spectrum;
- license operators of communications for public use, as well as providers of value-added services; and
- carry out the research necessary for the coordination of the infrastructures of the various civil telecommunications systems, including television broadcasting.

(ii) Broadcasting

The *Law of 7 September 1990* created the High Authority for the Media ("Alta Autoridade para Communicacao Social"), an independent constitutional body which operates alongside the Parliament. The High Authority is composed of

thirteen members, which cannot be removed from office and are appointed for four year terms. The members include:

- a judge appointed by the Higher Council of the Magistrature, who chairs the High Authority;
- five members elected by Parliament;
- three members named by the government; and
- four members, chosen by all the others, which represent a broad spectrum of public opinion, the mass media and cultural groups.

The key responsibilities of the High Authority are to:

- ensure freedom of information and freedom of the press;
- ensure the independence of the media from those with political and economic power;
- safeguard the possibility for different currents of opinion to be expressed and discussed;
- guarantee the right to reply of individuals and collective persons;
- guarantee the right to broadcasting time, the right of reply and the right of political argument; and
- control television broadcast activities.

The High Authority holds ordinary and extraordinary meetings, and examines complaints and requests for intervention, upon which it reaches decisions by an absolute majority of its members. It also takes the following measures:

- draws up recommendations which are compulsorily published in or broadcast by the medium to which they refer;
- draws up directives in the field of broadcasting;
- gives opinions on the licensing of radio and television operators;
- oversees compliance with broadcasting legislation; and
- receives complaints relating to infringements of broadcasting legislation.

The ICP supervises technical conditions and manages frequency allocation in the broadcasting sector.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.

The general competition law in *Portugal* is the *Decree-Law No. 371/93* of 29 October 1993, which is largely based on Articles 85 and 86 of the EC Treaty. Articles 2, 3 and 5 of the Decree are modelled on Articles 85 and 86 of the EC Treaty, but the list of practices caught by the equivalent of Article 85(1) has been extended to include:

- interfering with the determination of prices so as to keep them artificially high or low; and
- refusing to buy or sell goods or services.

The Portuguese equivalent of Article 86 of the EC Treaty provides guidance on what constitutes a dominant position (market shares in excess of 30%), and an oligopoly (three or less companies holding in excess of a 50% market share, or five or less companies holding in excess of 65%). There is a separate provision dealing with the abuse of a position of economic dependence.

Restrictive practices condemned under Article 2 may be exempted by the Competition Council. However, unlike the European Commission, the Competition Council cannot issue block exemptions.

Section III of the *Decree-Law* introduces a system of merger control based on the principles set out in *EC Council Regulation 4064/89.*

Section IV provides that public undertakings must not materially restrict or affect competition on all or part of the Portuguese market. At the request of any individual, the responsible Minister will examine the activities of the public undertaking concerned.

The two principal competition authorities are:

- a Direccao-General de Concorrencia e Precos ("DGCP"); and
- Conselho de Concorrencia ("Competition Council")

The DGCP has authority to:

- identify practices which are susceptible of infringing the competition rules;
- review concentrations under Section III of the *Decree-Law*;

- impose fines in given circumstances;
- exercise the powers of the "competent authority" set out in Article 87 of the EC Treaty and *Council Regulation 4064/89*; and
- participate in the activities organised by international competition agencies.

Following its investigation, the DGCP produces a final report which it submits to the Competition Council for action.

The Competition Council is composed of a President and four or six members nominated by the Prime Minister. On the basis of the final report, the Competition Council may:

- request the DGCP to conduct supplementary proceedings (or undertake them itself);
- order the case to be closed;
- declare the existence of a restrictive practice, and order the parties to take the necessary measures to terminate the restrictive practices within a specified period of time; or
- impose a fine of between ESC 100,00 and 200,000.

Appeals against decisions of the Competition Council are examined by the Lisbon District Court, except for decisions of the Competition Council prohibiting mergers or allowing them subject to certain conditions, which must be appealed to the Supreme Administrative Court.

Law No 88/89 of 11 September 1989, which is the framework law liberalising telecommunications in *Portugal*, also includes rules on competition in the telecommunications sector. Article 14 of *Law No. 88/89* prohibits any discrimination by the public operator regarding the access of private operators to its network. In addition, this Article provides that, while the public operator may offer complementary services (*i.e.*, mobile telephony, paging and PAMR), any practices that would distort competition with private operators are prohibited. Moreover, service providers and network operators cannot acquire in excess of 10% of a competitor. Structural separation of entities operating in different telecommunications sectors is also assured, with basic service operators being required to offer additional "complementary services" through separate corporate entities in which third parties could have financial holdings.[18]

[18] Refer to *Law No. 147/91* and *Regulations Nos. 240/91, 428/91 and 746/91* (as amending *Laws Nos. 246/90 and 329/90*).

(4) *Powers of the various regulatory bodies, and the sanctions which they can impose.*

(i) Telecommunications

Article 33 of *Decree Law No. 40/95* authorises the ICP to impose fines on Portugal Telecom of up to 0.5% of its annual turnover if it is in breach of its obligations set out in its concession. In theory, this Decree requires Portugal Telecom to "comply with the prevailing normal law". If Portugal Telecom failed to comply with the law, ICP could fine Portugal Telecom for a breach of the competition rules (as well as withdrawing its licence to operate complementary services by virtue of Article 16/81 of *Law No. 364/90*). The ICP has significant powers of investigation in order to facilitate its enforcement functions (having been called upon on over 50 occasions to investigate the practices of Portugal Telecom, many of which are consumer-oriented complaints).

(ii) Broadcasting

The High Authority for the Media is the body responsible for receiving complaints of violations of broadcasting legislation. When deemed necessary, the High Authority can take action on its own initiative.

The High Authority's recommendations are published or broadcast. The *Law of 29 August 1994*, which modifies the *Law of 7 September 1990*, provides that fines may be imposed for the failure to publish or broadcast the recommendations of the High Authority.

The Government, through the General Office of Communications, has the power to impose fines for the breach of licence conditions.

(5) *Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).*

There are no specific procedures for such cooperation.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

(i) Telecommunications

New legislation transposing Directives 96/2/EC, 96/19/EC and 97/13/EC are scheduled for enactment during the course of late 1997. In addition, *Portugal* needs to be in conformity with its obligations under Community law regarding the

full liberalisation of alternative infrastructure and the establishment of an effective accounts separation mechanism.

(ii) Broadcasting

New legislation will be enacted in the first half of 1998 with regard to television broadcasting, namely in the field of digital TV and local and regional TV channels.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

(i) Telecommunications

Portugal has been granted a number of derogations from the requirement to liberalise its telecommunications market by 1 January 1998.

Portugal Telecom's monopoly to provide voice telephony and public telecommunications networks will be abolished on 1 January 2000.

Portugal was required to liberalise all forms of alternative infrastructure supporting liberalised telecommunications services by 1 January 1997.

Portugal may postpone until 1 January 1999 the lifting of restrictions on the direct interconnection of mobile telecommunications networks with foreign networks. However, *Portugal* needs to lift all restrictions regarding the establishment of self-provided infrastructure, the use of third party infrastructure or the shared use of infrastructure, in the provision of the services authorised by their licences.

(ii) Broadcasting

The number of operators is restricted; there is one public operator ("RTP") and two private operators ("SIC" and "TVI").

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

On 15 February 1995, Portugal Telecom was granted a 30-year concession to operate the "basic public telecommunications service" in *Portugal* (*Decree-Law No. 40/95*). This involved the grant of exclusivity for as long as the market was not liberalised, in accordance with Community law (Article 4(3)) for the following:

- the establishment, management and operation of telecommunications infrastructure;
- the provision of fixed telephony;
- the provision of leased lines; and
- the provision of telegraphy services.

Portugal Telecom's exclusive rights will come to an end on 1 January 2000, as a result of the European Commission's Decision 97/310/EC of February 1997.[19]

The following have been open to competition since 1996: (i) the provision of voice services to corporate networks and Closed User Groups; (ii) the establishment of infrastructure for satellite-based networks; and (iii) and the provision of satellite-based telecommunications services, except for public switched voice services.

Following the European Commission Decision of February 1997, the Portuguese Government has decided to allow competition in 1997 in the provision of telecommunications infrastructure for already-liberalised telecommunications services. Pursuant to the regulatory measure currently under consideration by the Portuguese Government, licences could be issued to providers of already liberalised services and to operators of cable TV networks, radio and television broadcast networks, and public utility networks. Providers of such services (for instance, mobile telephone services, data communications services and voice services to corporate networks and Closed User Groups) may be able to establish their own infrastructure or use third party networks.

Beginning at an unspecified date in 1998, the Portuguese Government intends to allow providers of mobile telephony services to install their own infrastructure.

In addition, the Portuguese Government intends to permit mobile telephone operators to make direct international connections with other mobile or fixed line telephony operators in other countries at an unspecified date in 1999.

(3) Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulations, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.

There is currently no difference in regulatory treatment. As with other potential new entrants, Portugal Telecom is required to obtain the necessary licences to provide services other than those foreseen in its concession contract with the State. Portugal Telecom provides mobile telephony and paging, data transmission and

[19] Commission Decision of 12 February 1997 concerning the granting of additional implementation of Commission Directives 90/388/EEC and 96/2/EC as regards full competition in the telecommunications markets, O.J. (1997) L 133/19 of 24 May 1997.

cable TV services through separate subsidiaries[20] that are subject to separate financial reporting and licensing requirements and other safeguards to ensure fair competition.

However, Portugal Telecom is restricted under its concession from providing or producing its own entertainment services. Although it can broadcast the programmes of third parties (via its access to the network). In addition, its concession agreement only refers to the management of the "telecommunications infrastructure" or "network", property which belongs to the State.

There are no asymmetric regulatory conditions in *Portugal*. This is due to the fact that all operators, including Portugal Telecom or its subsidiaries, are subject to the same conditions and are required to satisfy the same requirements in order to provide already liberalised services.

(4) Accounting and structural separation safeguards (current or planned).

Portugal Telecom must maintain a separate cost accounting system for the various services it provides. This accounting system must be approved by the ICP.

(5) Policy basis for regulation of incumbent carriers' services.

Portugal Telecom has thus far been regulated primarily through the mechanism of a Concession Contract with the Portuguese State. However, the onset of further liberalisation will mean that Portugal Telecom will be progressively regulated in the future by virtue of its dominance in a particular market or markets (*i.e.*, competition rules) or by virtue of its "significant market power" in those markets (in accordance with legal regulatory requirements under Community law).

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

The structure of the telecommunications licensing regime in *Portugal* is divided into the following three categories:

- "fundamental services" are reserved to those public or private operators which have been granted a government concession;

[20] For example, TMN (GSM), TML and CONTACTEL (paging), TELEPAC (data) and TV CABO (cable TV).

- "complementary network services" are open to competition, subject to the satisfaction of licensing conditions; and

- value-added services are open to competition, subject to the fulfilment of authorisation requirements.

Fundamental Services

Two public companies provide voice telephony services under a concession agreement with the Portuguese government, namely: Portugal Telecom, which provides national services and international services to Europe and to North Africa; and Marconi, which provides international services under a subconcession contract between Portugal Telecom and Marconi, following an authorisation granted by the Portuguese government. Collectively, these parties are referred to as "TOs".

Portugal Telecom's concession grants it the right for a term of 30 years commencing 20 March 1995 (renewable by mutual agreement for subsequent terms of 15 years). Portugal Telecom provides domestic and international public voice telephone services and installs and operates the public telecommunications network infrastructure in *Portugal*. Upon the expiration or termination of Portugal Telecom's concession, all assets held by Portugal Telecom under its concession will revert to the Portuguese Government without compensation.

Complementary Services

Law Decree No. 346/90 of 3 November 1990 provides that operators must be licensed to supply complementary services. All operators may apply for licences to supply fixed complementary services. The number of mobile complementary services licences are limited by the amount of available radioelectric spectrum, and licences must be awarded through a competitive tender process.

Award of a licence to provide complementary services is conditional upon the satisfaction of the criteria of suitability, and technical, economic and financial capacity. More specifically, the legislation provides that the service provider should:

- be legally constituted and registered in *Portugal* and have as its objects the provision of telecommunications activities ;

- be able to rely on qualified personnel;

- have an adequate economic structure, as well as the necessary financial resources for launching the service and providing good management of its own accord (*i.e.*, 25% of the whole investment required should come from its own funds);

- have an up-to-date and regularly organised accounting system; and
- not be a debtor to the State or to the services for Social Security.

Value-Added Services

The *Decree-Law No. 329/90* provides that the supply of value-added services must be authorised by the ICP. In principle, authorisation is granted to private entities (*i.e.*, individuals and commercial entities), provided that individuals are duly registered, and one of the objects of commercial entities is the provision of telecommunications activities. There is no express provision in the legislation or regulations concerning notification of the reasons for any refusal of an authorisation for value-added services and no rights of appeal are provided for by the legislation.

Mobile Communications

Analogue Cellular Mobile Telephony

The public operators, CTT/TLP, have offered "Telemovel", an analogue cellular mobile service, since 1989. There was no selection procedure for this service.

Digital Cellular Mobile Telephony

There are three GSM operators in *Portugal*:

- TMN (a subsidiary of Portugal Telecom);
- TELECEL, which received a licence following a tender procedure; and
- Main Road - Telecommuniçoes, S.A.

Main Road-Telecommunicaçoes S.A is also licensed to provide DCS 1800 mobile services. TMN and Telecel will be authorised to provide services in the 1800 MHz band without a public tender.

The licences include a list of grounds on which it may be revoked and provide for penalties that may vary from 100,000 to 3,000,000 ESC.

The duration of a GSM licence is 15 years.

Analogue Paging

It is necessary to obtain a licence to offer paging services in *Portugal*. The duration of the licence is 15 years.

Satellite

There has been no market penetration of DTH services in *Portugal* to date. It is necessary to obtain a licence to operate a satellite network. The licence is granted by the ICP upon application. Providers of satellite communications services must be authorised by the ICP.

(ii) Broadcasting

Terrestrial television

Public TV Broadcasting

The Radiotelevisao Portuguesa ("RTP") was granted a public concession for 15 years on 31 December 1996. It is sub-divided into two channels: RTP Canal 1 and TV2. In March 1993, a contract was concluded with the State which defines the obligations of these two channels and their mission of public service.

Private TV Broadcasting

To obtain a private TV broadcasting licence, the licence applicant must:

- be a limited company with the exclusive objective of providing television activities; and
- have a capital base of at least PTE 2.5 Million.

No private individual or corporate entity may, directly or indirectly, own more than 25% of the share capital of, or be a shareholder in, more than one licensed television operator. In addition, a foreign investor may not have a shareholding in more than one operator or a share which exceeds 15% of the share capital of any licensed television operator.

Private operator licences are allocated by public tender. The factors taken into account in the allocation of licences include: technical quality, economic resources, programme scheduling (particularly fiction, cultural and informative programming), the proportion of its own programming and that of independent national and European programming, and the commitment to serve the public interest. The licence conditions incorporate constitutional principles such as pluralism, independence and freedom of speech.

The licence is granted, on the advice of the High Authority for the Media, for a 15 year renewable term. The candidate chosen by the government must be one of the candidates pre-selected by the High Authority.

There are currently two private TV channels in *Portugal*: TVi Quatro and Sociedade Independente de Comunicacao ("SIC").

Cable television

Cable television is regulated by the *Decree Law No. 241/97* of 18 September 1997. Cable television licences are issued by the ICP and ratified by the member of the government that is responsible for the communications area. The ICP will supervise the activities of the cable TV operators. The ICP has the authority to impose fines on those cable TV operators which fail to comply with their licence obligations.

The licences of the cable TV operators correspond to municipal boundary limits; however, more than one operator can be licensed per each municipality. Cable TV operators have a right to broadcast third party programming, a right to lease broadcasting capacity to third parties and a right of access to the telecommunications network on fair and reasonable terms.

The licences of the cable TV operators comprise both programme distribution and network operation.

Portugal Telecom provides cable television services through the nine regional subsidiaries of its wholly-owned subsidiary, TV Cabo. TV Cabo, through its regional subsidiaries, holds a total of nine renewable non-exclusive licences, valid until the year 2009, to provide services in seven regions of continental *Portugal* and the *Madeira* and *Azores Islands*.

The cable television infrastructure installed and operated by the cable TV operators, while not classified as being part of the "public domain" during the terms of the licences, may revert to the Portuguese State or be transferred to third parties without compensation upon the expiration or termination of the licences.

The licence will be valid for 15 years and it may be renewed for equal periods of 15 years. Licences are renewable automatically upon the request of the operator, provided that the obligations of the original licence are still being met.

Satellite television

Portugal Telecom has the exclusive right under a Concession Agreement to operate the satellite television broadcasting network. As the concessionaire, it grants access to this network to television and cable operators. It must provide equal access to all licensed television operators. In addition, Portugal Telecom must also provide telecommunications services.

The Concession has a duration of 30 years. The Minister of Social Infrastructure may impose fines for non-compliance with the Concession Agreement by Portugal Telecom.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

The ICP is responsible for granting all telecommunications licences and authorisations.

(ii) Broadcasting

The Council of Ministers authorises, on the advice of the High Authority for Media, private TV broadcasting. The licence can only be revoked by a resolution of the Council of Ministers if:

- there is a modification of the ownership of company shares in violation of the rules in relation to the award of licences; or
- there is a clear violation of the principles of programme scheduling in relation to the coverage of a wide range of subjects to be aimed at all categories of the audience.

Cable television licences are issued by the ICP and ratified by the Ministry under the *Cable Television Decree Law No. 241/97.*

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

Separate licences may be granted to entities which wish to provide programming services for particular municipalities, but there can be no municipal monopolies. Consistent with Community law, licences for networks alone will be available in the future. *Portugal* is the subject of an infringement proceeding brought by the European Commission for *Portugal*'s failure to adequately liberalise alternative infrastructure by 1 July 1997.[21] Despite these delays, interest in taking advantage of such imminent liberalisation has been evidenced in the actions of a number of Portuguese utilities such as EDP (*Portugal*'s national power company), Transgás and Gás de Portugal, plus the national operators for the railways and the motorways. In addition, one of the two independent broadcasters (TVI), may also enter telecommunications markets.[22]

21 Commission Press Release, IP/97/954 of 5 November 1997.

22 Portugal Telecom is prohibited in owning a stake in TVI.

GSM and other mobile operators currently lease lines from the TOs. In accordance with the terms of the Mobile Communications Directive, however they will be authorised to install their own infrastructure in 1998, and be permitted to make direct international connections with other mobile and fixed line operators by 1999.[23]

(4) ***Line-of-business restrictions under national law preventing: (i) TOs providing cable TV services or "multimedia" services (and vice versa); (ii) TOs providing mobile telephony (and vice versa); (iii) utilities from providing cable TV services and telephony (and vice versa).***

There are no relevant line-of-business restrictions under national law. TOs can provide cable TV services as long as they obtain the necessary licence (and vice versa).

Mobile telephony providers will not be able to provide fixed public switched voice telephony until 1 January 2000, at which time they will need to comply with the relevant licensing requirements in operation.

Utilities can provide all of the already liberalised services, subject to a licence or authorisation where appropriate.

(5) ***Regulatory restrictions on the types of entities which can be involved in content production.***

There are no such restrictions imposed on public or private broadcasters. However, Portugal Telecom is not authorised to produce and broadcast its own entertainment programmes because it is restricted under its existing concession agreement to the management of the telecommunications infrastructure (network), which belongs to the Portuguese State.

Portuguese law was only recently amended to allow cable TV operators to produce and distribute their own programming (previously, this was expressly prohibited), although the terms and conditions for the production of programming will be set forth in legislation that is expected to be submitted to the Parliament in the beginning of January 1988.

(6) ***Typical licence conditions.***

The concession of Portugal Telecom is open-ended, although it will no doubt be reviewed upon the full liberalisation of the Portuguese market by 1 January 2000.

23 According to the terms of *Portugal*'s derogation reviewed in Decision 97/310/EC of 12 February 1997, O.J. (1997) L 133/19 of 24 May 19997.

With respect to licensees for complementary networks and services (see also section E.1), the ICP may approve the alteration of licence conditions, but may also cancel a licence by reason of the licensee's failure to abide by the licence conditions.

Licences may not be transferred within the first three years of the licence term, and only subject to the prior approval of the ICP.

Licensees must commence the provision of their licensed services or networks within 18 months of the grant of the licence.

Complementary operators may also seek the expropriation of real estate for the purposes of installing, protecting and maintaining network infrastructure.

Detailed licence provisions for public telecommunications operators will be issued in due course.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Portugal Telecom's tariffs are regulated by means of a Pricing Convention which establishes a price cap regime that allows for a structured programme of rate rebalancing over the three-year period between January 1995 and December 1997. The parties to this Pricing Convention are Portugal Telecom, Marconi, the ICP and the Directorate-General of Competition and Prices (the "DGCP").

A new Pricing Convention was signed on 10 September 1997 for a three-year period from 1 January 1998 to 31 December 2000.

The new Pricing Convention establishes price caps on Portugal Telecom's tariffs for its fixed telephony services (*i.e.*, installation charges, line rental fees and tariffs for domestic and international telephone calls). The Pricing Convention also establishes a framework for determining interconnection rates.[24]

(2) New pricing principles for the competitive market environment.

Portugal Telecom intends to use the period prior to full liberalisation to prepare for increased competition, including significant rebalancing of its current rate structure after the expiration of the Pricing Convention on 31 December 1997.

24 The previous Pricing Convention which covered the period 1995-1997, imposed a price cap system, linked to the costs of inflation, for the following services: (i)fixed telephony - a global cap of 3%; (ii) installation, monthly rental and separated types of traffic; and (iii) leased lines.

Tariff restructuring will include real increases in rates for local calls and line rentals and reductions in tariffs for domestic long distance and international calls.

(3) ***Control of tariff packages which can be offered to customers.***

The new Pricing Convention allows Portugal Telecom to give discounts on its tariffs for fixed telephone services as long, as the discounts are offered on a transparent and non-discriminatory basis.

(4) ***Tariff basis - usage time or flat rate off peak rates; and other relevant pricing practices which increase pricing flexibility.***

Tariffs are based on usage time, and it is possible to charge off-peak rates.

Portugal Telecom's subscribers are charged an installation charge, monthly line rental fees and traffic fees for calls. The installation charge is currently PTE 14,103 and the monthly line rental is currently PTE 1,705 (excluding VAT). The charging system for traffic is based on a fixed rate per pulse, with the duration of each pulse varying according to the destination of the call, the day of the week and the time of day. Under the current charging system, calls are categorised as local, regional (up to four categories, three of which are based on distance) and inter-urban (two categories, based on distance).

(5) ***Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulated Internet access and on-line services.***

There is no legislation on the pricing of Internet access and other on-line services.

G. Network Interconnection and Access to Service Providers

(1) ***Interconnect arrangements and charges - express regulation or individual negotiation.***

Law No. 88/89 guarantees open and non-discriminatory access to the network. It also provides that the incumbent should ensure that access to its network is provided on a non-discriminatory basis. Thus, Portugal Telecom is obliged to lease circuits to those other enterprises which have been duly licensed or authorised to provide telecommunications services. In the case of non-compliance by Portugal Telecom, the providers that are refused access to the network may resort to the ICP, which may then authorise the use of alternative means or infrastructure for the provision of the service.

The Pricing Convention of December 1994 requires Portugal Telecom to enter into negotiations with other operators and service providers to establish charges and other arrangements for the interconnection of complementary and fixed telephony services. The key regulatory principles which should be followed in

interconnection arrangements (based on Community law principles) are those of cost-orientation, non-discrimination and transparency. In the event Portugal Telecom and other operators and service providers are not able to agree within three months of commencing negotiations, the ICP, after consultation with the DGCC, is authorised to set the price ceiling for interconnection.[25] However, a general framework for interconnection, as contemplated by the Community regulations which would supplement such agreements for interconnection, should be established by the end of 1997 and during 1998.

In addition, the major interconnection and settlements relationships for mobile operators are defined prior to the tendering for a mobile licence. These rights include: the right to interconnection; the right to be provided with data on standards and specifications, including signalling; special prices for the use of leased lines for interconnection; and special delivery times for services provided by Portugal Telecom.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators with "significant market power".

There is as yet no specific regulation on the basis of significant market power. This will change when the Community legal requirements with regard to interconnection are implemented into Portuguese law.

(3) Precise obligations currently placed on interconnecting operators.

Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated)

Public TOs are interconnected at digital transit exchanges.

Mobile operators, other complementary service providers and value-added service providers are also connected at digital transit exchanges.

TMN and TP have some collocated equipment; Telecel has not as yet sought collocation.

Unbundled access to internal network functions

Not mandated.

Unbundled access to the local loop

Not mandated.

25 The ICP was called upon to do so on a number of occasions in 1995 and 1996 for both leased lines and interconnection.

Equal Access

There are no specific rules regarding dialling parity which have been introduced into law but the Portuguese authorities will adopt the rules set forth in the revised *ONP Interconnection Directive* as regards both equal access and number portability.

Technical requirements and standards

The ICP must approve all materials and equipment and establish the technical standards and specifications of all such materials and equipment used in the network. The ICP has a duty to elaborate and publish all technical specifications necessary for connection to the network.

Quality of service commitments required

Quality of service commitments are specified in the licence issued by the ICP. Portugal Telecom is required to comply with several quality of service standards and indicators such as satisfying deadlines and availability levels.

Mobile operators are required to comply with a number of service criteria, including the satisfaction of minimum quality standards regarding blocked call rates, network effectiveness and servicing time.

Interconnect tariffs

The principles governing interconnection charges are contained in the three-year Convention between the government, the ICP and the licensed operators. For example, leased line charges for mobile operators are priced on the basis of a two-tiered distance-based tariff, accompanied by distance-related discounts. Charges for the conveyance by TOs of switched traffic interconnected to the mobile operators are based on retail call tariffs, with a 35% discount for call termination at one end of each call.

There are no access charges. However, urban conveyance charges are based on the highest priced distance band, regardless of the location of the caller. This might be considered to be a de facto "interconnection" charge.

Existing costing methods for interconnect are generally considered inadequate to resolve disputes concerning the level of tariffs for leased lines, the related measurement of link distances, and the distribution of mobile calls between urban tariff bands.

Information disclosure obligations

The conditions of access and use of a network and the tariff structures relating thereto should be defined and published in advance.

Protection of the interconnecting carrier's or service provider's customer information

Several general and "horizontal" laws ensure the protection of personal data: the Constitution of the Portuguese Republic regarding the inviolability of communications and the protection of personal data stored in computer files; and a law on the protection of personal data relating to the organisation of databases. All telecommunications operators are bound by these regulations.

H. "Resource" Issues

(1) Frequencies.

Radio spectrum management is the responsibility of the State. The ICP is responsible for spectrum allocation, management and monitoring. Frequencies are allocated in accordance with a National Table of Frequency Allocations established in accordance with the Radio Regulations of the ITU and Community law, in addition to CEPT Recommendations and Decisions. Portuguese law distinguishes between frequencies granted for exclusive, common or collective use.[26]

There is no specific policy development on the integration of fixed and mobile technologies, nor has any policy been developed to date regarding the auctioning of frequencies.

Licences are necessary for all radiocommunications transmitting and receiving equipment. Such licences run for five year renewable periods, and cannot be transmitted to third parties.

(2) Numbering.

The situation regarding numbering is not very clear. The law foresees a National Numbering Plan established by the ICP. However, this plan has not been fully implemented.

The law requires that numbers be allocated in accordance with principles of transparency, equality and non-discrimination.

26 Refer to *Law No. 147/87* (as amended) and especially *Law No. 320/88*. As regards fee structures, refer to *Administrative Rule 772-A/96*.

To date, numbers (prefixes) have been allocated to value-added service providers. No fees have been charged for such allocations.

Number portability is foreseen in the proposed Community Directive revising the *ONP Interconnection Directive* of 1997, which has not been implemented into national law.

(3) Rights-of-Way.

New draft legislation foresees that due to reasons related to essential requirements, such as the protection of the environment and town and country planning, operators may be obliged to share infrastructure. Infrastructure sharing needs to be agreed between the operators in question. In the case of non-agreement, they can submit the dispute to the ICP, which is empowered to decide on the complaint.

Portugal Telecom must give cable TV operators access to its ducts for the installation of their own networks.

The State has the right to exploit public domain assets, including the telecommunications infrastructure of Portugal Telecom. Its Concession enables Portugal Telecom to use public rights-of-way for the construction of telecommunications infrastructure.

Telecommunications operators of "complementary services" are empowered to require, under the terms of the general law, the expropriation of real estate and the creation of public rights-of-way that are indispensable for the installation, protection and maintenance of their telecommunications network infrastructure. The Government is responsible for determining whether public easements and expropriations are required for the establishment of telecommunications infrastructure.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

The *Broadcasting Law* of 1990 prohibits the acquisition of exclusive rights which affect political events of relevant public interest (Article 16). As regards all other event (including sporting events), television operators which obtain exclusive rights must make highlights of those events available to all television stations. These obligations relate to television broadcasting "in the national territory".

Licensing requirements for certain types of content that may restrict market entrants.

There is no acknowledged legal standard for such matters.

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

The public television service operator must broadcast messages requested by the President of the Republic, the President of the Assembly of the Republic or the Prime Minister.

Cable TV operators must carry the programming of the public television services (two public channels). In addition, cable TV operators must also ensure the transmission of an information service either in graphic or alphanumeric format, which might include public utility information, in addition information on the services provided by the operator.

Finally, cable TV operators must reserve up to three channels of the respective network for the distribution of the local or regional coverage television channels and for the distribution of video and/or audio signals supplied by non-profit entities and aiming at, namely, municipal information, experimentation of new products or services and the communication of educational and cultural activities.

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

There are no "local content" or "independent content" obligations on cable TV operators. Cable TV operators are entitled to produce and distribute their own programming.

(5) "Gateway" Issues - Technologies for Open Access.

There are no legal requirements or standards for the regulation of equipment as set-top boxes and decoders. Decoders are freely placed in the market. No judicial actions on the subject are known. The *Television Standards Directive* will be implemented in the next few months, and as a result the situation will change.

(6) Internet Domain Names - Preferred regulatory approach.

This issue is not regulated. In practice, Internet addresses are given to users by the fixed telecommunications operators which provide access to the Internet. However, given the increasing importance of the Internet, the Minister of Science & Technology was empowered by the Cabinet in May 1997 to carry out the regulation of the registration and management of domain names in a manner which is consistent with developing international standards.[27]

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[27] Refer to *Resolution of the Cabinet No.69/97*, Official Gazette, No.103 of 5 May 1997.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

The national definition of universal service is in conformity with the definition used at Community level. Article 8 of *Law No. 91/97* provides that universal service is understood to be "the set of specific duties inherent to the provision of addressed public use telecommunications services, aimed at meeting the communication needs of the population and economic and social activities in all the national territory in an equitable and continuous manner and through appropriate remuneration conditions, bearing in mind the demands of a harmonious and balanced economic and social development" (unofficial translation).

As part of that universal service, Portugal Telecom is obliged for the full term of its 30 year concession (which is renewable for 15 year periods) to provide emergency and directory services, as well as special services for the handicapped and pensioners with incomes below the minimum wage.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

In the present regulatory framework, only Portugal Telecom is required to provide universal service. However, in accordance with the draft legislation being considered by the Portuguese Government, universal service obligations may be imposed upon other operators which:

- are subject to open network provision ("ONP") and interconnection obligations; and
- have "significant market power".

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

Pursuant to *Law No. 91/97*, providers of public networks and public switched telephone services are required to contribute to the costs of Portugal Telecom's universal service obligation for the provision of fixed voice telephony services. Discussions have recently begun in order to determine the precise scope of Portugal Telecom's universal service obligation after full liberalisation of the telecommunications sector, as well as the mechanism for determining the amounts

and timing of contributions by other operators and service providers to the costs of providing universal service.

Currently, compensation to Portugal Telecom for its provision of universal service is considered to be capable of being derived from its current end-user tariffs, a compensation fund, a reduction in its fees payable to the State or by means of a compensatory fund (see *Decree Law No. 40/95*, especially Article 32), although the creation of a special universal service fund is not foreseen prior to the liberalisation of voice telephony services in the year 2000.

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).

See H.4 above.

(5) Other public service specifications affecting the content or information provided to subscribers.

There are no other public service specifications besides those applicable to television and cable TV operators.

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

Under Spanish law (*Law 31/1987 on the Regulation of Telecommunications* ("the *LOT*")), telecommunications services are defined as a general category of service, which includes broadcasting services as a particular sub-category (Article 25.1 of the *LOT*). The broadcasting sub-category is further sub-divided to include television services (Article 25.2 of the *LOT*) and sound radio broadcasting (Article 26 of the *LOT*).

Telecommunications services are defined in Article 1 of the LOT as services of "telecommunications, and any communication by cable and radio-communication". The Annex to the LOT contains the following definitions:

(i) Telecommunication:

All transmission, broadcast or reception of signs, signals, writs, images, sounds or information of any nature by wire, radio-electricity, optical means or other electromagnetic systems.

(ii) Communication:

Transfer of information according to adopted conventions.

(iii) *Radio-communication:*

All telecommunication transmitted by means of radio-electric waves.

"Broadcasting services" are defined in Article 25.1 of the *LOT* as "telecommunications services in which communication is made in one way only simultaneously to several points of reception". Article 25.2 of the *LOT* provides that the regulation of television services is to be effected through specific legislation, currently contained in *Law 4/1980 on the Statute of Radio and Television*, *Law 46/1983 on the Third Television Channel, Law 10/1988 on Private Television, Law 37/1995 on Satellite Telecommunications and Law 42/1995 on Cable Telecommunications.*

"Television" is defined in Article 25.2 of the *LOT* as "the form of telecommunication which makes possible the broadcast or transmission of non-permanent images, by means of electromagnetic waves propagated by cable, by satellite, through space without artificial guide or by any other means".

The proposed new *General Law on Telecommunications*[28] does not distinguish between types of services. The only distinctions made are between public telecommunication networks, publicly available telephony services and networks which use the radio spectrum.

(2) *Regulatory distinction between types of telecommunications and broadcasting services.*

The following distinctions are made between different types of telecommunications services:

Final Services

Providing all facilities and services for communication between users, including terminal equipment (generally including transmission elements). These include:

- basic telephony;
- telex;
- telegram; and
- burofax.

Carrier Services:

Providing network capacity for the transmission of signals between defined termination points of the network. These include:

- leased circuits; and
- carrier of television terrestrial wave signals (monopoly of Retevisión).

Value-added services:

Telecommunication services, other than broadcasting services, using the support of carrier or final telecommunication services, with service providers adding other facilities to the support service or satisfy new particular telecommunications needs) (service providers may resell excess capacity). These include:

- general value-added services;
- value-added services with use of radio spectrum;
- voice telephony for close user groups;
- data switched services by packets or by circuits;
- mobile automatic telephony (GSM and DCS-1800); and
- value-added services provided over their own infrastructure (as an exception to the obligation to use support of authorised carrier or final services).

[28] Still to be passed through the Spanish Parliament.

Broadcasting services:

- television; and
- radio broadcasting.

Satellite Telecommunications and Cable Telecommunications have specific regulations although they may provide some of the services described above.

The regulation of final and carrier services confers a significant advantage on operators providing these services. Operators of final and carrier services are authorised to build and operate the infrastructure to provide these services. Other operators must rely on leased capacity, unless they are cable TV operators or supply value-added services over their own infrastructure (if they can prove that existing final and carrier service suppliers cannot supply the appropriate infrastructure).[29]

Currently, there are only two authorised global operators of final and carrier services, Retevisión and Telefónica de España. Accordingly, they enjoy special and exclusive rights. However, these are subject to the future timetable of liberalisation agreed between the Spanish Government and the European Commission.[30] Grant of a third licence of global operator of final and carrier services is expected at the end of May 1998.[31]

(3) Regulation of Internet services and other on-line services.

Internet services are not specifically regulated, falling within the general category of value-added services. The provision of Internet access through a single connection with the public switched network is, accordingly, only subject to an authorisation requirement. In the case of data switched services, a licence is required under *Royal Decree 804/1993* of May 28. However, in view of the spread of Internet usage and the need of availability of carrier services for such purposes, an *Order of 11 January 1996*, instructs Telefónica (the only authorised carrier at that time) to establish the conditions of access to the public switched network and integrated services digital network by operators of services of access to Internet and operators of data switched services. A further *Resolution of 12 January 1996*, sets the tariffs for access. An *Order of 8 September 1997*, has replaced this *Order of 11 January 1996*, although the CMT may compel Telefónica to continue to provide access under the conditions of this last Order until 1 January 2000. The new *Order of 8 September 1997* establishes a general

29 "Additional Provision Forty-Fourth of Law 66/1997 of December 30, provides a specific licensing regime for terrestrial, digital television and radio broadcasting to be developed by the Government in the future".

30 Commission Decision of 10 June 1997 concerning the granting of additional implementation periods to *Spain* for the implementation of Commission Directives 90/388/EEC and 96/EC as regards full competition in the telecommunications markets, O.J. 51997- L 243/48 of 5 September 1997.

31 Term established in the Order of Ministry of Development dated December 26, 1997.

obligation on operators of basic voice telephony to give special access to public switched networks and integrated services digital networks to operators providing access to the Internet and operators of data switched services.

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

The only definitions of new digitalised services are contained in Article 42 of *Royal Decree 2066/1996* on the *Regulation of Cable Telecommunications*. Article 42 contains the following definitions:

Video-on-Demand:

Distribution of an audiovisual programme in which the user interacts with the network to select the programme and the time of supply.

Near-Video-on-Demand:

Distribution of an audiovisual programme in which the user interacts with the network to select a programme, which is supplied at a time designated by the network/operator.

Value-added services of cable telecommunications:

Any telecommunications service which uses the transmission capacity and processing capability of a cable telecommunications network, and is different from the basic telephony service, television cable broadcasting service, telex service, telegraphy service, leased circuits service and services of Video-on-Demand and Near-Video-on-Demand.

Interactive services:

Cable telecommunication services which allow the user to interact with the service or network management centres using a return channel.

Interactive multimedia services:

Value-added services over a cable telecommunications network consisting of the distribution or exchange of information in the form of images, sounds, texts, graphics (or any combination of these), which require a return channel for their provision.

B. Regulatory Authorities in Telecommunications/ broadcasting/ publishing

(1) Legislative competence and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

The State (national parliament) has exclusive legislative power over communications, mail and telecommunications, air and submarine cables and radio-communications pursuant to the terms of Article 149.1.21 of the *Spanish Constitution*. However, Article 149.1.27 provides that the State's legislative competence over press, radio, television and other media (mostly concerning content), is limited to basic legal framework issues. Autonomous Communities (regional parliaments) are authorised to implement the basic regulations adopted by the State. The only possible jurisdictional conflicts are as follows:

Territory

Conflict over the particular Court to which the jurisdiction rules assign the claim (conflict decided by higher common court).

Subject matter

Conflict over the characterisation of the claim under competence rules (*i.e.*, administrative, civil, criminal) (conflict resolved by a special division of Supreme Court).

Constitutional

There may be a constitutional conflict before the Constitutional Court if the State or an Autonomous Community attempts to legislate beyond the competence conferred upon it by the Constitution.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory powers.

Royal Decree-Law 6/1996 of June 7 created the Telecommunications Market Commission ("Comisión del Mercado de las Telecomunicaciones", or "CMT"). The CMT is currently regulated by *Law 12/1997* of 25 April 1997 on the *Liberalisation of Telecommunications*,[32] *Royal Decree 1994/1996* on the Regulation of the CMT and *Order of 9 April 1997*, setting out the Internal Regulations of the CMT. The object of the CMT is to guarantee, for the benefit of citizens, the conditions of effective competition in the telecommunications and audiovisual, telematic and interactive services market(s), to oversee the setting of tariffs in this market, and to act as the arbitration body for conflicts in this sector.

32 This legislation also introduces other legislative changes and determines the identity of Retevisión, the second national voice telephony operator.

The CMT has the powers to:

- arbitrate in conflicts between service or network operators in the telecommunications sector;
- award licences to provide telecommunications services to third persons, in competitive conditions, except where a licence is awarded by tender;
- monitor free competition in the telecommunications market, addressing discriminatory situations and assigning numbers to operators;
- control the fulfilment of public service obligations;
- issue binding decisions in conflicts between operators over network interconnection if there is not a voluntary agreement (or satisfactory implementation of such an agreement), and in conflicts over access to and use of the radio-electric spectrum;
- adopt necessary measures to protect free competition in the market, particularly in relation to the diversity of services offered, access to the telecommunications network by operators, network interconnection and network supply in open-network conditions, pricing policy and the marketing of services by operators, and all anti-competitive behaviour (it has the power to issue binding orders in these matters, and the power to interpret the licence conditions which protect competition in the telecommunications market);
- control mergers, shareholdings and agreements between operators in the telecommunications market;
- advise on proposed tariffs for exclusive services, services supplied by operators in a dominant position, and any minimum or maximum tariff;
- establish the maximum price of interconnection between operators;
- advise the Government and Ministry of Development (the opinion of the CMT must be requested before the adoption of any regulatory provisions on telecommunications);
- request the intervention of the Ministry of Development to inspect premises;
- exercise disciplinary powers in the event of a decision or order of CMT;
- file complaints with the inspection services of the Ministry of Development concerning breaches of the telecommunications legislation; and
- keep a register of network operators and service providers.

The Government department in charge of telecommunications is the Ministry of Development. Within the Ministry, the General Secretariat of Telecommunications is in charge of preparing regulatory policy with the assistance of the Directorate General of Telecommunications. As far as the management of the radio-electric spectrum is concerned, the National Technical Plan produced by the Ministry of Development must be approved by the Government. Spectrum management and the granting of licences is the responsibility of the Directorate General of Telecommunications.

(3) *National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.*

Law 16/1989 on the Defence of Competition contains principles almost identical to Articles 85 and 86 of the EC Treaty. Spanish competition rules are not sector specific, being enforced by the Competition Service ("Servicio de Defensa de la Competencia") and the Competition Court ("Tribunal de Defensa de la Competencia"). The Competition Service conducts claims and proceedings on anti-competitive behaviour, which are ultimately decided by the Competition Court. The Competition Court has the power to take interim measures, to request information and assistance, to declare the existence of anti-competitive behaviour, to grant individual exemptions and to impose fines and to issue injunctions or impose conditions. However, the Telecommunications Market Commission ("Comisión del Mercado de las Telecomunicaciones") was recently created with the powers to guarantee free competition in the telecommunications sector. It has the power to adopt binding orders on operators in the telecommunications market (Article 1.2.(f) of *Law 12/1997*), to request initiation of a procedure by the Competition Service and to demand that it be heard in all competition proceedings in the telecommunications sector.

(4) *Powers of various regulatory bodies, and the sanctions which they can impose.*

Competition Service

The competition service's responsibilities include supervision and instruction of competition claims, power to request information, assistance and to conduct inspections. It has the authority to fine up to 1 million pesetas for refusal to inform or assist, and up to 150,000 pesetas per day for obstruction of an investigation.

Competition Court

The Court has the authority to make decisions on competition claims, grant individual exemptions, power to request information and to investigate, and to adopt interim measures. The Court may issue injunctions to cease anti-competitive behaviour, impose conditions or obligations, order removal of anti-competitive effects and impose fines. Fines of up to 150 million pesetas or 10% of sales volume may be imposed on undertakings. Fines of up to five million pesetas may be imposed on directors. Fines of up to 150,000 pesetas may be imposed for breach of a cease and desist order.

Telecommunications Market Commission ("CMT")

The CMT has the power to issue orders to safeguard free competition in the telecommunications market. Authority to impose fines of up to 10 million pesetas (with eventual loss or suspension of licence), for breach of its orders. CMT can request initiation of a procedure by the Competition Service and demand to be heard in all competition proceedings in the telecommunications sector.

(5) ***Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).***

Articles 4 to 10 of *Law 30/1992 on the Legal Status of the Public Administration and Common Administrative Procedure* contain the general rules of cooperation within the State Administration, and between the State Administration and Autonomous Communities, Local Administration and the European Communities.

Law 16/1989 on the Defence of Competition grants to both the Competition Service and Competition Court the general power to establish relationships and cooperation with other regulatory bodies and with their counterparts in other countries. In fact, both the Service and the Court have specific departments responsible for such relationships.

Article 28 of the Regulation of the CMT regulates the relationship between CMT and the competition authorities. The CMT may request the Competition Service to open a competition proceeding or inform the Service of mergers in the telecommunications sector. In all competition proceedings in the telecommunications sector, the CMT must be heard by the Service (for anti-competitive practices and exemptions) and by the Court (for mergers and public aids).

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

A new *General Law on Telecommunications* is currently before the Parliament.[33] It will repeal many pieces of existing legislation (including the *LOT*) and will generate new subordinate legislation and regulations (*e.g.*, universal service, numbering, tariffs, value-added services, interconnection and access, the licensing and establishment of infrastructure). Some of the subordinate legislation is expected to deal with the following issues:

- award of a third licence for voice telephony and establishment of public commuted networks;
- award of a new national Private Television channel;
- development of regulation of local television;
- review of digital television and conditional access; and
- assignment of new radio frequencies.

The only published timetable for the proposed legislation is contained in the application for an extension in the time-table of liberalisation made by the Spanish Government to the European Commission, which was granted by the EC

[33] Award of the third licence is already regulated by Royal Decree 1912/1997 of December 19 and Order of Ministry of Development dated December 26, 1997.

Commission in a Decision dated June 10, 1997.[34] According to this decision, the following timetable has been accepted:

End of 1997	Enactment of new *General Law on Telecommunications*[35]
January 1998	Award of third licence for voice telephony and establishment of public telecommunications networks[36]
End July 1998	Legislation for full liberalisation of voice telephony and establishment of public telecommunications networks
December 1988	Award of further licences for voice telephony and establishment of public telecommunications networks

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services reservation of services to the national TOs (see also section E below).

Voice telephony and establishment of public telecommunications network

There are only two authorised voice telephony operators: Telefónica and Retevisión. A third licence is scheduled to be granted on 2 January, 1998 (but is likely to be delayed) and full liberalisation should take place in December 1998, although no liberalising legislation has yet been enacted to this effect.[37] Voice telephony may also be provided by cable operators after 1 January 1998, on condition that the service is provided over infrastructure built by the cable operator.

Carrier of television terrestrial wave signals

Monopoly of Retevisión until the end of 1998.

Provision of liberalised services on own infrastructure

Only Telefónica and Retevisión may unconditionally provide value-added services over their own infrastructure. Other operators may only be granted a licence to provide value-added services over their own infrastructure if they prove that there

[34] Commission Decision of 10 June 1997 concerning the granting of additional implementation periods to *Spain* for the implementation of Commission Directives 90/388/EEC and 96/EC as regards full competition in the telecommunications markets, O.J. (1997) L243/48 of 5 September 1997.

[35] Already delayed, expected in April 1998.

[36] Already delayed, expected at end of May 1998.

[37] *Ibidem.*

is no efficient alternative infrastructure available from Telefónica and Retevisión (Article 23 of the *LOT*). There is no specific Spanish provision implementing the liberalisation of the provision of liberalised telecommunications services over alternative infrastructure (as provided for in Article 2(2) of Directive 90/388/EEC, as amended by Directive 96/19/EC).

Cable operators[38]

Current legislation establishes only two operators for each established geographical area. One potential cable operator is Telefónica (which is not obliged to bid officially),with the other licence being subject to a tender procedure, and may be granted for a maximum of 25 years (renewable for successive periods of five years).

Mobile telephony

There are two GSM operators, Telefónica and Airtel, both licensed for a period of 25 years (ending in 2019), with a possible extension of five years. In January 1998 a tender for one DCS-1800 licence is scheduled to be called. Telefónica and Airtel will be automatically granted DCS-1800 licences on the same licence conditions as those granted to the successful tenderer.

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

See section D.(1) above.

The only geographic restriction on special or exclusive rights holders affect cable TV operators. The geographic scope of cable franchises depends of a procedure involving local, regional and state authorities. A franchise may cover a whole region, one province or one city. The only requirement is that it covers a minimum of 50,000 inhabitants. Telefónica is automatically awarded one of the two cable licences in all franchise areas in the whole territory of *Spain*. Other operators must bid for the remaining licence in each franchise area. Moreover, proposed changes to the *LOT* would remove the national exclusivity which existing cable TV operator would otherwise have in their franchise area (subject to the non-involvement of Telefonica in many franchise areas).

Moreover, no person or company may own shareholdings in cable operators which jointly cover more than 1,500,000 subscribers. This prohibition may be lifted by the Government on the recommendation of the CMT. Telefónica itself is not subject to a similar prohibition (although it does apply to other investors in companies in which Telefónica has an interest).

[38] The cable sector is regulated under the legal framework established by *Law 17/97* of 3 May 1997.

3) ***Differences in the regulatory treatment afforded to the incumbent TO and new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulations, in particular relating to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.***

Voice telephony and establishment of public telecommunications network

The second nation-wide voice telephony licence was awarded to the successful tenderer for the privatised Retevisión. Its bidders were compelled to buy existing infrastructure from the State through a public bid. The successful tender bid involved a significant economic cost which did not equally affect the holder of the first licence, Telefónica.

Cable operators may not provide voice telephony on leased infrastructure before December 1998 (but can do so over self-owned infrastructure by 1 January 1998).

Mobile telephony

Airtel had to make a contribution of 85,000 million pesetas to obtain its licence, unlike Telefónica. The asymmetric conditions in the sector of mobile telephony were only corrected after the intervention of the European Commission. After intervention by the European Commission[39], the Spanish Government implemented a *Royal Decree 1252/1997*, which contains various benefits for Airtel. Some of these benefits actually benefit Telefónica also. For example, Telefónica and Airtel will be automatically granted a DCS-1800 licence without having to tender (the future third licensee will be selected through a competitive tender), while the set-off of interconnection costs with Telefónica encourages Airtel to use the transmission capacity of Telefónica in preference to that of Retevisión.

Cable

Telefónica is automatically granted a licence for all franchises in *Spain*[40]. There are several advantages to this: it does not incur the expenses of the tender procedure and has no limit on subscriber numbers.

Telefónica must announce its intention to operate in a franchise prior to the corresponding tender. However, even if Telefónica announces its intention not to operate in a franchise, it can change its mind after January 1998. Thus, all investment plans are made and obligations undertaken by the bidders on the assumption that Telefónica may decide to enter the market in their franchise area.

39 Commission Decision of 18 December 1996 concerning the conditions imposed on the second operator of GSM radio telephony services in *Spain*, O.J. (1997) L 76/19 of 18 March 1997.

40 It must do so through a structurally separate subsidiary or subsidiaries (refer also to discussion in point 3 below).

Telefónica may not provide cable services in a given franchise for a period of 16 months after the award of the cable licence in the franchise. This 16-month-period does not confer an advantage on the second cable operator, since it is a very short period in which to build sufficient network to break into the market. (Telefónica is not prohibited from installing equipment and building a network, merely from providing services). In light of the requirements of effective competition and the interests of users, this period may be reduced or extended up to 24 months by the Government, on the recommendation of CMT.

(4) Accounting and structural separation safeguards.

Several pieces of legislation contain general principles on the separation of corporate structure or accounts:

- Paragraph 5 of the *Second Additional Provision of the LOT* imposes the obligation on Telefónica to present a separate balance sheet and accounts for activities in competitive markets and activities over which it has a monopoly. The contract between the Spanish Government and Telefónica of 14 January 1992 expressly declares that Telefónica must have a separate balance sheet and accounts for industrial activities, holdings in subsidiaries, activities in competitive markets (value-added services) and monopoly activities.

- Under paragraph 5 of the *Second Additional Provision of the Law on Cable Telecommunications*, Telefónica may only provide cable services through a subsidiary in which it owns more than 50% of the share capital. Such subsidiaries may not provide any service in which Telefónica enjoys an exclusive right.

  Paragraph 4 of the *First Additional Provision of the Regulation on Cable Telecommunications* prevents Telefónica from cross-subsidising cable with its carrier and final services. Separation of accounts must be supported by an annual report, accompanied by an external auditor's report. There must be an accounting distinction between infrastructure and services and, in the case of common infrastructure, there must be objective criteria for the assignment of assets for accounting purposes, such as a percentage of use or assigned capacity.

- Article 25.5. of *Royal Decree 1486/1994*, of July 1, on the Regulation of the Value-Added Service of GSM Mobile Telephony provides that licensees which are also licensees for the supply of final or carrier services (Telefónica) must have separate accounts for both services.

- Article 4 of *Royal Decree 1252/1997*, of July 24, grants GSM licensees the right to acquire a licence for DCS-1800 mobile telephony. Licensees with both licences must file a separate inventory for the DCS-1800 as a different business unit, with separate audited accounts.

- Paragraph 3 (a) of the *Interim Provision of Royal Decree 2031/1995*, of December 22 authorises Telefónica to provide the value-added service of voice telephony to Closed User Groups. If Telefónica does not provide the service through a separate subsidiary, it must have separate accounts which identify net revenues, prices of other services and activities of the company, profit and loss account, assets assigned to the service and changes in accounting principles.

- Article 24 of *Royal Decree 1558/1995*, of September 21, requires cost-accounting by carriers providing leased circuits. Direct and common or indirect cost must be differentiated, and there are some basic principles on the assignment of costs. Article 25 of the same Royal Decree requires the carrier service to maintain separate accounts, and sets out the items to be contained in the accounts (*i.e.*, description of activities, sales and exploitation income with distinction of external customers, profit and loss with distribution of expense, assigned assets and employees, changes of criteria of assignment or distribution).

- Article 7(d) of *Law 17/1997*, of May 3, which implements *Directive 95/47/EC*, requires separate accounting for conditional access services for television broadcasting.

(5) Policy basis for regulation of incumbent carrier's services.

Telefonica has been regulated to date on the basis of its monopoly rights in the provision of voice telephony and some related services, and its special rights with respect to mobile services. In a competitive environment, special obligations will be imposed on it because of its having a position of "significant market power".

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

Individual licences will be required for the following:

- voice telephony and establishment of public telecommunication networks;
- cable telecommunication services;
- satellite telecommunication services. There are several types of authorisations needed:
  - only carrier services;
  - service to third parties in own carrier service, other that television broadcasting;
  - self service on own carrier service;

- service to third parties in not-own carrier services, other than television broadcasting;
- television broadcasting on own or not-own carrier services; and
- digital television broadcasting with conditional access.

- terrestrial television broadcasting;[41]
- carrier Services of terrestrial television broadcasting;
- radio broadcasting;[42]
- leased circuits;
- general value-added services;
- voice telephony in Closed User Groups;
- value-added services in own infrastructure;
- value-added services with use of radio spectrum;
- resale of capacity;
- GSM mobile telephony;
- DCS-1800 mobile telephony; and
- data communication by packets or by circuits.

There are several types of services which require authorisations:

- carrier services only;
- service to third parties of own carrier service, other than television broadcasting;
- self service of own carrier service;
- service to third parties in third party carrier services, other than television broadcasting;
- television broadcasting on own or third party carrier services;
- digital television broadcasting with conditional access;
- value-added services over self-provided infrastructure;
- resale of capacity; and
- data-switched services by packets or circuits.

(2) Regulatory or government authorities competent to award the relevant licences.

The Ministry of Development awards individual licences for which applicable legislation requires an award through a tender. The CMT awards all other licenses and authorisations.

[41] "Additional Provision Forty-Fourth of Law 66/1997 of December 30, provides a specific licensing regime for terrestrial, digital television and radio broadcasting to be developed by the Governmental in the future."

[42] *Ibidem.*

(3) *Distinction between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and the operation of facilities.*

The provision of stand-alone infrastructure has not been liberalised in *Spain*. Unless an express right to install infrastructure is conferred, a licence to provide services only covers service provision, not infrastructure installation. The only operators with the right to establish infrastructure are the following:

- Telefónica;
- Retevisión;
- Airtel for its mobile service, as a result of the settlement reached with the Spanish Government;
- cable TV operators;
- licensees of value-added services falling under Article 23 of the *LOT*, when there is no alternative infrastructure; and
- satellite operators.

(4) *Line-of-business restrictions under national law preventing: (i) TOs providing cable TV services or "multimedia" services (and vice versa); (ii) TOs providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).*

There are no relevant line-of-business restrictions, aside from the requirement that each entity must obtain a corresponding licence for whichever services it wishes to provide. In addition, Telefonica has a moratorium period of 16 months (and possibly up to 24 months) after the completion of the cable TV bidding procedure, in which it cannot provide cable TV services. A Spanish court has also ruled that Telefonica is not permitted to roll-out its network during that period.[43]

(5) *Regulatory restrictions on the types of entities which can be involved in the production of content.*

There are no regulatory restrictions on the provision of content. However, the regulation of terrestrial private TV and cable TV requires a percentage of independent production of content. Nevertheless, the definition of "independent producer" allows wide scope for the avoidance of this requirement.

(6) *Typical licence conditions.*

Outlined below are the licence conditions imposed by particular service licences: exclusivity grants and their territorial scope; network coverage requirements; transferability of licences and affects of changes in corporate structure; whether bundling is prohibited; limitations on subscriber number; public service

[43] The European Commission's Merger Task Force has also refused in 1996 to grant clearance to the proposed concentrative joint venture between Telefónica, Canal Plus and other investors in Cablevisión to serve Cable TV operators, Commission Press Release, IP/96/677 of 22 July 1996.

specifications; foreign ownership limits; cross-media ownership limitations; and duration, supervision, termination, modification of conditions.

(i) Voice telephony and establishment of public telecommunication networks.

(a) duopoly for Telefónica and Retevisión. National in scope;
- (b) equipment to cover whole territory (national);
- (c) not transferable. Transfers of share capital subject to authorisation by Ministry of Development, except for Telefónica's capital listed in stock exchange;
- (d) unbundling imposed under regulation of leased circuits, and arguable under competition rules;
- (e) no;
- (f) yes;
- (g) yes, 25% (including EC as foreign);
- (h) only separation rules;
- (i) 30 years. General rules on management of public services applicable to suspension, termination and modification of conditions.

(ii) Cable telecommunication services

- (a) two operators in each franchise area: the winner of a cable franchise, and possibly Telefónica. Franchise of variable local scope;
- (b) conditions of coverage subject to conditions of each local tender;
- (c) transferability with authorisation of Ministry of Development after 1/5th of its duration. Any agreement on share capital must be authorised by Ministry of Development;
- (d) no;
- (e) 1,500,000 subscribers only for second operators (across all franchises held). Subscriber limit not applicable to Telefónica;
- (f) yes;
- (g) yes, 25% (excluding EC as foreign);
- (h) no, separation rules for Telefónica;
- (i) maximum 25 years, renewable for five years terms. General rules on management of public services applicable to suspension, termination and modification of conditions.

(iii) Satellite telecommunication services

- (a) no;
- (b) no;
- (c) not transferable. No control of corporate structure;
- (d) no;
- (e) no;
- (f) no;
- (g) no;

(h) no;
(i) indefinite duration. General rules on suspension, termination and modification of administrative authorisations.

(iv) Terrestrial television broadcasting

(a) only three national private TV channels. One local TV channel, which may be tendered to the private sector;
(b) whole territory;
(c) not transferable. Changes in share capital and corporate structure subject to authorisation;
(d) no;
(e) no;
(f) yes;
(g) yes, 25% (including EC as foreign);
(h) no;
(i) 10 years, renewable for 10 year periods. General rules on management of public services applicable to suspension, termination and modification of conditions.

(v) Radio broadcasting

(a) AM radio licences have national scope and FM radio licences have local scope;
(b) according to scope of licence;
(c) transfer of licence and changes in share capital are subject to authorisation;
(d) no;
(e) no;
(f) free broadcasting of official announcements;
(g) yes, 25% (including EC as foreign);
(h) no more than one AM radio licence. No more than one FM radio licence with similar local scope, unless if existing licences already guarantee plural radio offer;
(i) 10 years, renewable for similar periods. General rules on suspension, termination and modification of administrative authorisations.

(vi) Leased circuits

Dependant on licence of the corresponding infrastructure.

(vii) General value-added services

(a) no;
(b) no;
(c) not transferable. No control of corporate structure;
(d) no;

(e) no;
(f) no;
(g) no;
(h) no;
(i) indefinite duration. General rules on suspension, termination and modification of administrative authorisations.

(viii) Voice telephony in Closed User Groups

(a) no;
(b) no;
(c) not transferable. No control of corporate structure;
(d) no;
(e) no;
(f) no;
(g) no;
(h) no;
(i) indefinite duration. General rules on suspension, termination and modification of administrative authorisations.

(ix) Value-added services over own infrastructure

(a) no;
(b) no;
(c) not transferable. No control of corporate structure;
(d) no;
(e) no;
(f) yes;
(g) yes, 25% (including EC as foreign);
(h) no;
(i) 10 years, renewable with limit of 30 years. General rules on management of public services applicable to suspension, termination and modification of conditions. Moreover, termination due to establishment of efficient alternative infrastructure which may be used as carrier service for the provision of the licensed services (award of licence is conditional on the lack of alternative carrier services).

(x) Value-added services with use of radio spectrum

(a) no;
(b) no. Territory defined in license;
(c) no;
(d) transfer subject to authorisation, no control of corporate structure;
(e) no;
(f) no;
(g) yes;
(h) no;

(i) no;
(j) 10 years, renewable. General rules on management of public services applicable to suspension, termination and modification of conditions.

(xi) Resale of capacity

Terms and conditions are dependent on the licence of the corresponding service.

(xii) *GSM mobile telephony*

(a) only two licensees. National in scope;
(b) whole territory;
(c) transfer subject to authorisation, transfer of shares of 25% is considered a transfer of licence;
(d) no;
(e) no;
(f) yes;
(g) yes, 25% (excluding EC as foreign);
(h) no;
(i) 25 years, renewable for one five year period, general rules on management of public services applicable to suspension, termination and modification of conditions.

(xiii) DCS-1800 mobile telephony

(a) only three licences anticipated, national in scope;
(b) whole territory;
(c) transfer subject to authorisation, transfer of shares of 25% is considered a transfer of the licence;
(d) no;
(e) no;
(f) yes;
(g) yes, 25% (excluding EC as foreign);
(h) no;
(i) 25 years, renewable for one five year period, general rules on management of public services applicable to suspension, termination and modification of conditions.

(xiv) Data switched services by packets or by circuits

(a) no;
(b) in three years, coverage of at least one Autonomous Community or four neighbouring provinces;
(c) transfer subject to authorisation, no control on corporate structure;
(d) no;
(e) no;
(f) yes;

(g) no (non-EC investment must be made through EC vehicle);
(h) no;
(i) 10 years, renewable up to 30 years, general rules on management of public services applicable to suspension, termination and modification of conditions.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Prices and tariffs are controlled by the Government. Operators with significant market power must inform the Government of its tariffs, which must be authorised and published. The criteria used to assess price and tariffs are designed to encourage competition in corresponding services, control of operators in dominant positions and facilitate access by citizens to telecommunications. Tariff proposals must indicate the potential effect of the tariffs on the market.[44]

(2) New pricing principles for the competitive market environment.

Price and tariffs will not be controlled under the proposed new *General Law on Telecommunications*. There will be three exceptions to this rule:

Universal service obligations

Universal service must be accessible to all citizens at reasonable prices. The Government must establish a method of financing the Universal Service through a national fund. Accordingly, the universal service obligation on Telefonica will be funded by all operators, through the national fund.

Operators with significant market power

Operators with significant market power must set interconnection prices in a transparent manner and on a cost-oriented basis. Transparency and cost accounting practices will be controlled by the CMT.

Transitional period

For a transitional period, the Government may still control prices and tariffs, to ensure that they reflect real costs, promote competition in the provision of services, prevent the abuse of dominant positions and facilitate access of citizens to services at affordable prices.

44 Moreover, Telefónica is bound to respect certain tariff ceilings for its monthly subscription fees and long distance tariffs during 1998 (Interconnection Order of 18 March 1997).

(3) Control of tariff packages which can be offered to customers.

There is flexibility, provided that the type of tariff is accepted by the Government. This will depend on whether the package itself is discriminatory or constitutes an abuse or a cross-subsidy. There are general principles requiring non-discrimination and prohibiting bundling, and cross-subsidies which would be weighed by the Government when deciding whether to refuse any tariff offer. The proposed *General Law on Telecommunications* accepts, for the purposes of interconnection, a distinction between categories of operators, if there is an objective distinction related to the type of requested interconnection or conditions of the licence.

(4) Basis of tariffs.

Tariffs for voice telephony are based on the following concepts:

- initial connection;
- monthly subscription;
- tariffs on calls are composed of a tariff for initial switching, plus a tariff based on usage time. The usage time element can take into account off-peak periods and contemplates three different tariffs for the normal period, peak period and off-peak period;
- other services have specific single tariffs: change of domicile, suspension of service, additional lines and others; and
- services using network intelligence are based on a initial subscription tariff plus a monthly tariff.

Tariffs for the lease of circuits have the following elements:

- initial connection; and
- monthly subscription, which depends on the distance between the end-points, technical characteristics of the circuit, capacity of the circuit and duration of the lease.

Interconnection rates are based on the duration of the communication (in rounded-up minutes), and distinguish between local, provincial and interprovincial traffic, as well as between normal period, peak period and off-peak period.

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.

A Ministerial Order dated 11 January 1996 required Telefónica to establish an information access service for suppliers of information, access or data-switched services. Particular tariffs for this information access service were approved by a Resolution dated 12 January 1996. This Ministerial Order was replaced by a new Order dated 8 September 1997, which regulates access to public networks for suppliers of information, access or data-switched services. Special access

equipments are imposed on dominant operators. However, Telefónica must maintain its information access service until August 1998, with a possible extension until 1 January 2000. The proposed *General Law on Telecommunications* makes no express reference to Internet or on-line services, but specific treatment in the future regulation of interconnection and access cannot be excluded.

G. Network Interconnection and Access to Service Providers

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

Under *Law 20/1997*, of June 19, the Ministry of Development, upon the advice of CMT, shall fix the conditions and tariffs of interconnection until 1 December 1998. A Ministerial Order dated 18 March 1997 (the *"Interconnection Order"*) regulates interconnection to the public telecommunications network managed by Telefónica by other operators of voice telephony (Retevisión and eventually cable operators). (See question F. (5) above with respect to interconnection of operators of information, access or of data-switched services to a public telecommunications network).

Unlike most jurisdictions which leave much of the detail of interconnection to the parties, Spanish law requires that the requesting parties achieve agreement on interconnection with network operators within a period of two months; otherwise, the minimum standard conditions contained in the *Interconnection Order* will be deemed to apply.

Apart from such specific regulation, the *Additional Provision Eleven of the LOT* contains the general principles of interconnection. Interconnection and access must be negotiated between the parties, with the CMT determining disputes between the parties. Interconnection is subject to transparent, non-discriminatory conditions, proportional to those enjoyed by the owner of the network, and prices must be cost-orientated.

(2) Specific regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or those with "significant market power".

Additional Provision Eleven of the LOT provides that particular conditions of interconnection may be imposed on some operators, to reflect their position in the market.

Both the *Interconnection Order* dated 18 March 1997, and the Order dated 8 September 1997 (which have been cited in points F.(5) and G.(1) above) apply only to operators with significant market power. Such an operator is defined in the *Interconnection Order* as any national supplier of voice telephony which has a market share of 25% of the gross income in the sector in the previous year. A similar definition is contained in *Royal Decree 1558/1995 on the Regulation of the*

Lease of Circuits and in the current Project of the new *General Law on Telecommunications*.

(3) *Precise obligations currently placed on interconnecting operators.*

- The *Interconnection Order* requires at least one point of interconnection in each province, to be chosen by the operator which requests access to network of Telefonica.[45] Cable operators whose territory is smaller than a province may request another interconnection point within its territory.

  By means of contrast, providers of information, access or data-switched services are accorded different rights. The Order dated September 8, 1997 contains no particular provision on the location of point of interconnection, but Order dated 11 January 1996 (which applies for a transitional period) requires one interconnection location per province, at a place indicated by Telefónica.[46]

- There is no mandated access down to the level of the local loop, nor the internal network functions of Telefónica.

- *Additional Provision Eleven of the LOT* contemplates the possibility of different access conditions, depending on the regulatory status of operators. In fact, *Order dated 18 March 1997* mandates different treatment for Retevisión and cable operators.

- Interconnection to public telecommunication network by voice telephony operators (Retevisión and cable operators interconnecting with Telefónica) is governed by the Order dated 18 March 1997, which sets out the applicable technical requirements and standards for cases where the parties do not reach agreement.

- Order dated 11 January 1996 establishes technical requirements and standards where interconnection is sought by information, access and data-switched services.

- The general principle is that interconnection charges must be cost oriented. Interconnection rates are based on transmission duration (rounded-up minutes), distinguishing between local, provincial and interprovincial traffic, as well as between normal period, peak period and off-peak period. Initial subscription, monthly rate and calls on the basis of single tariff for usage time are relevant for information, access and data-switched service providers.

[45] For example, Retevisión or the individual cable TV franchises.

[46] Telefónica is required to provide a list of suitable access points within two weeks of receiving a request for interconnection.

- The exchange of identity code of a subscriber for each call, basic information for invoicing and necessary information for public directories must be exchanged. Information procedures should be agreed by interconnecting entities or, in case of absence of agreement within two months, established by the CMT within one month.

Information on the number and duration of terminating calls at points of interconnection must be presented to the CMT at the end of each business year. Information concerning the selection of operators of information, access and of data switched services must be presented to final users in alphabetical order or in a thematic order. The exchange of necessary information for interconnection and invoicing is subject to agreement between operators.

- No specific protection is available for the protection of customer information. The obligation exists to exchange information necessary for invoicing, telephone directories and other information services. Intervention of the CMT is possible where agreement is not reached. Anonymous access by a final user is prohibited, as is the interconnecting carrier storing or processing call information other than for the invoicing and planning of the service.

H. "Resource" Issues

(1) Frequencies.

Frequencies are assigned with the corresponding licence. Allocation is made by the Secretariat General of the Ministry of Development. Currently, frequencies for mobile licensees are issued under a separate frequency licence (which is issued simultaneously). Once the new *General Law on Telecommunications* is passed, the Government will adopt the national plan of frequency allocation, and will follow existing trends in the ITU and within the Community. Responsibility for the efficient use of spectrum passes to the CMT once it has been allocated.

(2) Numbering.

The current numbering scheme was approved by a Decision of the Council of Ministers dated November 14, 1997, which will be fully applicable on April 4, 1998. The numbering scheme contains no regulation on selection of operators or number portability.

Order dated July 18, 1997 imposes on Telefonica the obligation to insert a code which allows the selection of long-distance operators by the subscriber. Preselection is expected by February 1998.

Number portability for basic voice telephony is currently regulated under Order dated August 4, 1997. Number portability must be implemented within six months from demand of first alternative operator. The cost of number portability must be

borne by the operators affected.

The project of General Law on Telecommunication contemplates that the Government will be responsible for approval of the Numbering Plan and CMT will be responsible for its management and allocation. The project contains no particular provision on dial parity, which is considered to fall within the broader principle of equal access to numbering resources in non-discriminatory conditions. A fee will have to be paid to CMT for allocation of numbers (initially 5 pesetas per number). The project contemplates number portability for fixed telephony in other cases.

The regulation of numbering will include equal access on non-discriminatory conditions. Call-by-call preselection was expected by May 1997 (*Interconnection Order of 18 March 1997*). Issues of equal access were considered to fall within the broader issue of "interconnection" issues. A fee will have to be paid to CMT for the allocation of numbers (initially five pesetas per number). The proposed *General Law on Telecommunications* contemplates number portability for fixed telephony at the same physical location, and contemplates the extension of portability to fixed and mobile telephony in other cases.

Number portability between operators was scheduled to be effective by June 1997 (although geographic portability could not be achieved within this time period). The costs of number portability are expected to be borne *pro rata* by all operators affected.

(3) ***Rights-of-Way.***

Presently infrastructure sharing is only contemplated in two cases:

- *Order dated 18 March 1997*, which contemplates access by voice telephony suppliers (Retevisión and cable operators) to the dominant operator's available space or infrastructure capacity; and
- *Law and Regulation on Cable Telecommunications,* which require Telefónica to provide cable operators with access to available infrastructure.

In both cases, the sharing of infrastructure by cable operators is limited by the fact that, until December 1998, cable operators cannot provide voice telephony over shared infrastructure.

Under the proposed *General Law on Telecommunications*, new infrastructure which requires occupation of the public domain or the expropriation of private property may be subjected to a sharing obligation by the Ministry of Development.

Any operator with public service obligations may benefit from rights-of-way in the public domain or over private property. Access requires the technical approval of the Ministry of Development and a corresponding decision by the regional and/or local authorities affected.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

Law 21/1997, of July 3 regulates television and radio broadcasting of certain sporting events (including official professional competitions at national level, events concerning national teams, and any event of special importance). For such events, the existence of any rights, whether exclusive or not exclusive, cannot prevent access to sports installations and transmission (including images) in daily general news programmes, of up to three minutes per competition (without payment). Specialised sports programmes require authorisation from the owner of the broadcast rights, which may be given subject to the payment of economic consideration. If authorisation is given to such specialised sports programmes, access to images or to professional equipment must be given to any interested operator, subject to payment.

At the beginning of each season, the Council of Sport Broadcasting must prepare a catalogue of events of "general interest", which must include one match of each competition day of the national league and the national cup. Events of "general interest" must be broadcast live, open and for the whole territory. If the owner of exploitation rights for the event cannot cover the whole territory (or some of the co-official languages of an Autonomous Community), it may assign the rights to other interested operators in a tender process. Autonomous Communities may also produce a catalogue of local events of "general interest".

Licensing requirements for certain types of content that may restrict market entrants.

The practice of exclusive licensing of films and sport events are a major restriction on market entrants. The acceptability of exclusive licences depends on the application of the general rules of competition. Generally, five years of exclusivity, with sub-license agreements for other operators thereafter is considered to be acceptable.

The issue of the licensing of sporting rights and their compatibility with competition rules has been raised recently in the context of proceedings both before the Spanish authorities and the European Commission:

- On 12 March 1997, Gestión de Derechos Audiovisuales y Deportivos, S.A. (controlled by Sogecable, S.A.), Gestora de Medios Audiovisuales Fútbol, S.L. (controlled by Antena 3TV) and Televisión de Catalunya, S.A. notified a joint

venture agreement to the European Commission.[47] Under the notified agreement, these companies agreed to pool their football television rights for Spanish League and Cup Championships for seasons 1998/1999 to 2002/2003 in a joint venture company, Audivisual Sport, S.L. Pay-Per-View ("PPV") rights have been assigned on an exclusive basis to Canal Satélite Digital (controlled by Sogecable, S.A.), which in turn assigns the right of use of these PPV rights to Audiovisual Sport to be exploited through Canal Satélite. The joint venture is still the subject of the Commission's review.

- In 1993, the Spanish Competition Tribunal held that the National League of Professional Football held a dominant position on the market for the television broadcasting of football.

- In January and February 1997, the Spanish Competition Service requested Sogecable, S.A. and Televisió de Catalunya, S.A. to supply information on their agreements with football clubs regarding TV rights. Both of these parties appealed against the request for information before the Spanish Competition Tribunal. In two decisions dated 9 July 1997, the Competition Tribunal rejected both appeals on the ground that the European Commission had not formally notified the Spanish authorities of the instruction of a proceeding under Article 85 so as to pre-empt its involvement on the same issues.

"Must carry" obligations (on local cable TV companies, broadcasters or Tos which can provide entertainment services).

Article 11 of the *Law on Cable Telecommunications* imposes the obligation to carry the broadcasting services of all national terrestrial TV, TV managed by regional governments within the licensed territory and, on request, local TV within the licensed territory.

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

Cable TV operators are subject to the following obligations:

- 40% of programme material must be produced by independent programmers; however, the language of the Regulation is sufficiently broad to permit wide scope for avoidance of the obligation; and

- *Law 25/1994*, which incorporate *EC Directive 89/552*, applies to channels which reach more than 50% of subscribers of an Autonomous Community or 25% of national subscribers. Operators of these channels must reserve 51% of programme time for European works, 50% of which must be in the Spanish language.

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[47] O.J. C120/5 of 18 April 1997.

(5) "Gateway" Issues - Technologies for Open Access.

Law 17/1997 of May 3 incorporates *Directive 95/47/EC* into domestic law. After an agreement reached with the European Commission after the threat of infringement proceedings,[48] *Law 17/1997* was amended by *Royal Decree-Law 16/1997* of September 13, in order to comply with the Directive. The European Commission has accepted that the amended legislation complies with the requirements of the Directive. The CMT must supervise compliance with the legislation. It proposes to do so through the implementation of a regulatory regime which resembles in many material respects the regime adopted in the *United Kingdom*.

(6) Internet Domain Names - Preferred regulatory approach.

There is yet no preferred national approach to the regulation of Internet domain names.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

Current legislation uses the concept of "public service", which may apply to many obligations imposed by current legislation on operators. The main obligation would be availability of basic voice telephony to all users in all the territory at affordable prices. The current definition of basic voice telephony is similar to the definition of voice telephony under *Directive 90/388*. The only reference to future funding obligations by cable operators is contained in *Interim Provision Four of the Law and Regulation on Cable Telecommunications*, which provide that the Government may impose, by the end of year 2000, public service obligations and the corresponding funding system on cable operators.

The proposed *General Law on Telecommunications* contains a clear definition of obligations of public service, which includes three separate types of obligations: universal service, compulsory services and other obligations of public service. The definition of universal service includes the following services in the whole of *Spain* territory at affordable prices:

- fixed telephony, including national and international calls for voice, fax and data;
- telephone directories;
- public payphones in the public domain; and
- access to fixed telephony by handicapped users.

[48] Commission Press Release, IP/97/564 of 26 June 1997.

The definition may be revised by the Government to reflect technological developments.

(2) Operators obliged to provide universal service and on the basis on which others are excluded from providing universal service.

As voice telephony is still a duopoly in *Spain*, only Telefónica and Retevisión are required to provide basic telephony service to all citizens in all the territory. However, many obligations imposed by legislation and tender conditions on cable TV operators could be interpreted as universal service obligations (coverage, minimum services).

The proposed *General Law on Telecommunications* will establish that operators with significant market power may be nominated to provide universal service (*i.e.*, operators which have obtained in the reference territory a market share of 25% of gross incomes during the previous year for the service). Telefónica will be considered a dominant operator until at least the year 2005. The proposed Act does not exclude other operators from providing universal service, although it does not expressly regulate them at this stage. Universal service obligations are likely to be funded and compensated through a National Fund for the telecommunications universal service obligations, to which all operators will contribute on a *pro rata* basis.

(3) Operators liable to contribute to the provision of universal service (and on the terms and conditions of contributions).

See I. (2) above.

(4) "Must-carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see sections E & H).

See H.(4) above.

(5) Other public service specifications affecting or information provided to subscribers.

None.

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasters and audiovisual services.

"Telecommunications services" means "the conveyance of telecommunications message(s) for the account of a third party".[49] A "telecommunications message" means "sound, text, pictures, data, or other information conveyed by aid of radio transmission or light emission or electromagnetic oscillations utilising especially devised conductors".

"Broadcasting" is defined in the *1996 Radio and Television Act* as transmissions of radio and television programmes which are directed to the general public, and which are intended to be received by technical appliances. A broadcast is directed to the general public if it may be received by its viewers at the same time, and is available for each and every one without any particular request.[50]

Recently, there has been an initiative to analyse the implications of the "convergence" of the telecommunications and broadcasting sectors; however, no draft legislation has been proposed to date.

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

Certain services require notification to the Postal and Telecom Agency ("PTS"), namely, the provision of telephony services (voice, fax and low speed data) to a fixed point within a public network, mobile telecommunications services, any other telecommunications services that require the allocation of numbers from numbering plans (*i.e.*, value-added-services), and services in respect of network capacity. The notification procedure does not entail any material evaluation by the PTS.[51]

For certain other services, the operator will require an individual licence or permit. These services are, if they are to be provided to an extent that is significant with respect to the area, number of users, or for any other reason:

- telephony services (voice, fax and low speed data) to a fixed point within a public network;

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49 Section 1 of the *1993 Telecommunications Act* (as most recently amended by 1997:397).

50 Section 1 of the *1996 Radio and Television Act*.

51 Section 4a of the *1993 Telecommunications Act* (as most recently amended by 1997:397).

- mobile telecommunications services; and
- the provision of network capacity.[52]

(3) Regulation of Internet services and other on-line services.

Internet services fall within the existing regulatory definition of "telecommunications services". Internet infrastructure is currently unregulated. No regulation of data communication is proposed. The security implications of the Internet are currently being investigated by the Agency for Administrative Development (Statskontoret).

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

There is presently no specific regulation which applies to on-line services, nor is there any specific regulation of Video-on-Demand or Near-Video-on-Demand. The issue of whether these services should be specifically regulated has not been debated to any significant extent. Telia is now testing Video-on-Demand on a very limited scale. New digitalised services fall within the existing regulatory definition of "telecommunications services". It is generally understood that Video-on-Demand, because its reception is not "passive", falls outside the concept of broadcasting.

B. Regulatory Authorities In Telecommunications/ Broadcasting/ Publishing

(1) Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.

(i) Telecommunications

The legislation is adopted by the Parliament in the form of specific Acts. Such Acts may, if expressly permitted under such an Act, be conferred greater detail either by an Ordinance of the government or by Regulations issued by the competent authority. As an example, under the *1993 Telecommunications Act* and the *1992 Terminal Equipment Act*, the National Post & Telecoms Agency issued regulations in order to further the principles contained in the respective Acts.

52 Section 5 of the *1993 Telecommunications Act* (as most recently amended by 1997: 397).

Telecommunications activities are regulated by the terms of the *1993 Telecommunications Act*. This Act entered into force on 1 July 1993 and has been the subject of major amendments in 1996 and 1997.

The *1993 Radio Communications Act* requires a licence for the possession or use of radio transmitters.

The *1992 Terminal Equipment Act* fully implements the *EC Terminal Equipment Directive*.

(ii) Broadcasting

Broadcasting activities are regulated primarily by:

- The *Radio and Television Act 1996*, which repealed the *Radio Act 1966*, and entered into force on 1 December 1996. This Act is based on the assumption of freedom to establish operations in the fields of radio and television. However, a licence is required for certain wireless transmissions at frequencies below 1 Ghz;
- *The Cable Act 1991,* if they involve cable network distribution of radio and television programmes over cable networks that reach more than 100 households;
- *The Line Satellite Act 1992,* if they involve the transmission of television programmes via satellite;
- *The Local Radio Act 1993* if they involve local terrestrial distribution of radio by means of electro-magnetic waves; and
- *The Radio Communications Act 1993* governs the ownership and operation of radio installations. It applies to all broadcasting services provided using radio transmitters.

The *Yttrandefrihetsgrundlagen* (the "*YGL*")[53] of 1991 forms part of the *Swedish Constitution*. Section 1 provides that every Swedish citizen is entitled vis-à-vis the government, to exchange opinions and ideas via radio, TV, films, videos and other similar transmissions or recordings. The *YGL* also contains certain provisions with respect to transmission rights. The *1996 Radio and TV Act* has been drafted to conform with the terms of the *YGL*, which in turn has been modelled on another constitutional Act, the *Tryckfrihetsförordringen.*[54]

53 *Act on the Freedom of Speech.*

54 *Ordinance on the Freedom of the Press.*

(iii) Publishing

Publishing activities are regulated by the *Tryckfrihetsförordningen* of 1949. Section 1 provides that every Swedish citizen is entitled to engage in publishing. A person may only be punished for the content of a publication if the publication constitutes a crime, such crime being constituted by, *inter alia*, the publishing of State secrets, the publishing of child pornography and extreme violence, and certain types of slander. In certain cases, a periodical publication must be notified to the Patent and Registration Office; such notification must include information on the identity of the responsible publisher.

There are no specific rules in respect of conflicts of jurisdictional competence.

(2) Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory powers and proposals for revision of the current regime.

(i) Telecommunications

The **National Post & Telecoms Agency** (the "PTS") is the independent regulatory authority responsible for implementing and supervising telecommunications legislation. There is no Ministerial involvement, with the PTS performing all the regulatory functions in the telecommunications sector.

(ii) Broadcasting

The regulatory bodies responsible for broadcasting are:

- **The Radio & Television Authority**, an independent State authority, which supervises compliance with broadcasting legislation other than the rules which relate to broadcasting content.

  The Authority grants licences for commercial local radio and community radio and also appoints non-commercial local cable TV stations. The Authority is also responsible for proposing to the government which companies should be granted licences for digital broadcasting. In addition, the Authority is responsible for the registration of the names and addresses, as well as the registration of persons who are legally responsible for the content of programming services. Finally, fees for commercial local radio, community radio and commercial television are handled by the Authority.

- **The Broadcasting Commission**, a State authority which reviews and monitors radio and television programmes in *Sweden*. It is composed of a Chairman and six other members. The Chairman and Vice-chairman are senior judges. The other members are appointed by the government and

represent various sectors of society (*e.g.*, politicians and representatives of the media and cultural groups).

The Broadcasting Commission supervises the compliance of programme content with the provisions of the laws which regulate broadcasting services and the licences granted by the government. However, the supervision of compliance with programme content rules is effected strictly on an *ex post facto* basis. The Broadcasting Commission also monitors compliance with the rules pertaining to commercial advertising and sponsoring. The Commission acts primarily as a complaints board before which anyone can raise its concerns that a programme has exceeded ethical standards which constitute the definition of public service in broadcasting (including standards of objectivity, impartiality and so forth). In such cases, the Commission restricts its intervention to the issuance of public statements.

(iii) Publishing

There is no independent regulatory body for publishing matters.

(3) National rules limiting anti-competitive behaviour (sector specific and non-sector specific). National competition authority and its powers.

The legislation in *Sweden* governing competition law is the *Competition Act 1993,* which broadly mirrors the Community competition rules. These rules are non sector-specific. The national competition authority is the Swedish Competition Authority.

The Competition Authority is primarily responsible for the enforcement of the *Competition Act*. It has investigatory powers and may order an undertaking to provide information or documents. It may conduct an investigation at the premises of an undertaking, if a decision taken by the Stockholm City Court allows it to do so.

The Competition Authority may grant individual exemptions from the prohibition against anti-competitive agreements or practices. The Competition Authority must take a decision within three months of a formal filing of a notification. It may, on application by the undertakings concerned, grant a negative clearance (*i.e.*, certify that an agreement or concerted practice is not prohibited by the *Act*).

The Competition Authority may order an undertaking to cease infringing the competition rules by issuing a prohibition under penalty of a fine. It may also order the undertaking to pay damages to an aggrieved party. Finally, it can apply to the Stockholm City Court, requesting the latter to impose damages which are to be fixed according to the gravity and duration of the infringement.

The maximum amount is SEK five million or an amount in excess thereof, but not exceeding 10% of the turnover of each of the undertakings participating in the infringement.

The Competition Authority has played a very active role in the application of competition rules to the telecommunications sector, having heard over 60 complaints in the period since its inception in 1993 until 1996.[55] These complaints concerned a wide variety of issues, including interconnection, pricing, leased lines, collocation, pay-per-call services, calling line identification, contract conditions, telephone books, marketing and other miscellaneous matters.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

(i) Telecommunications

The PTS has the following powers:

- issuing licences to telecommunications operators under the 1993 *Telecommunications Act* and under the *1993 Radio Communication Act;*
- ensuring that telecommunications operators comply with the terms of their licences and with Swedish telecommunications legislation, the main elements of which are the *Telecommunications Act 1993* and the *Telecommunications Terminal Equipment Act 1992;*
- monitoring Telia's fulfilment of its obligations under its contract with the Swedish government;
- promoting efficiency and "sound competition";
- monitoring competitive conditions in the telecommunications market and notifying the Competition Authority of *prima facie* cases of abuse of a dominant position, or the restriction of competition as a result of agreements;
- ensuring that interconnection charges and tariffs for leased lines are cost-based;
- ensuring equipment type approval and testing;

55 *1996 Green Paper on a revised Swedish telecommunications regulation.*

- administering the national numbering scheme, allocating numbers (which are owned by the *Kingdom of Sweden*) and ensuring that coordinated directory information is available to customers;

- allocating radio frequencies;

- planning and procuring services for meeting national defence requirements and the needs of the physically disabled;

- representing *Sweden* at international and European telecommunications meetings;

- informing the government of any need for legislative changes in the telecommunications field;

- participating in work on national and international standardisation;

- ensuring technical and economic coordination in accordance with international satellite conventions;

- resolving disputes over the application of telecommunications legislation; and

- revoking licences if licence conditions are not satisfied.

(ii) Broadcasting

The Broadcasting Commission may impose a fine on broadcasters which violate the rules relating to advertising and sponsoring. The fine may be between 5,000 SEK and five million SEK. In cases of repeated violation of the content rules, other than advertising and sponsorship, the Broadcasting Commission may issue an injunction. These injunctions may be appealed to the Administrative Court of Appeal.

In addition, repeated violations of content rules are reported to the government, which may decide to revoke the licences of the companies held to be in violation.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

In order to ensure effective supervision of the telecommunications market by the PTS, it is important that the PTS extends co-operation with other authorities that are of significance in the telecommunications sector. It is proposed that the PTS is given a co-ordinating and unifying function in relation to the Consumer

Agency and the Competition Authority. The PTS shall take the initiative for regular liaison meetings between the authorities and shall also assume responsibility for gathering information and accumulating knowledge concerning developments in the telecommunications sector based on the experiences of all relevant government authorities.

In addition, the revised *1993 Telecommunications Act* provides that the Government or the PTS will notify the European Commission of the undertakings that perform telecommunications operations in *Sweden* which have significant market power.

C. Current Status And Roll-Out Of Telecommunications, Broadcasting And Audiovisual Rules

The latest revisions to the *1993 Telecommunications Act* entered into force on 1 July 1997. No new broadcasting legislation is foreseen in the near future. However, the question of closer co-ordination of the regulation concerning telecommunications and broadcasting operations is currently being considered by a government Commission. This Commission is investigating the need, and the pre-conditions for, the co-ordination of the regulations in the broadcasting and telecommunications sectors.

No new legislation is expected in the field of publishing.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national TOs (see also section E below).

Under Swedish law, restrictions are placed on new entrants for the provision of services. No services have been reserved exclusively to the national telecommunications operator as a matter of law.

(2) Special or exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

No special or exclusive rights are granted with respect to the provision of telecommunications and publishing services. All these services are open to competition.

In the broadcasting sector, a special privilege is granted to Sveriges Television AB, which must comply with certain public service obligations. It has the right to obtain finance through the special tax on the ownership of radio and TV sets.

It is not allowed to rely on advertising for its financing, unlike other broadcasters.

(3) ***Differences in the regulatory treatment of the incumbent TO and new entrants (either to the detriment or to the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV.***

The regulatory treatment accorded to Telia and new entrants is the same, with the exception of the additional obligations which Telia has in the telecommunications sector by reason of its being considered to hold a position of "significant market power" in *Sweden*. The agreement between Telia and the State, which expired on 30 June 1997, meant that Telia undertook obligations within the following fields: tariffs for telephony services (including obligations concerning price caps and low user tariffs); unprofitable pay phones in sparsely populated areas; computation of payments for interconnection arising by reason of special tasks under the licence conditions; transfer of premises networks; and third party service for office exchanges and security protection.

(4) ***Accounting and structural separation safeguards (current or planned).***

The revised *1993 Telecommunications Act* provides that each operator that has notified its business, must also account for the notified parts of its business in accordance with the accounting principles that are adapted to the particular business, and must give the PTS access to such accounts.

In addition, the *Act* provides that all operators with significant market power should keep the accounts of activities related to interconnection separate from other accounts. The *Act*, however, also provides that a party supplying mobile telecommunications services is not required to keep interconnection accounts separate from its other activities.

(5) ***Policy basis for regulation of incumbent carriers services.***

As a matter of law, *Sweden* has always had a liberalised telecommunications market, as Telia AB has never been accorded exclusivity in the provision of its telecommunications services. Its market power stems from its *de facto* dominance, rather than to any particular legal prescription. Telecommunications policy objectives are laid out in the second section of the revised *1993 Telecommunications Act*.

"The primary objective of telecommunications policy should continue to be that individuals, organisations and authorities in different parts of the country shall have access to efficient telecommunications at the lowest possible cost to society. Within the framework of the overall objective, three specific objectives are formulated:

1. *Everyone should, from his or her permanent residence or regular business location, have access to telephony services within a public network at an affordable price.*

2. *Everyone should have access to telecommunications services on equal terms.*

3. *Telecommunications should be sustainable and accessible during periods of crisis and war."*

Competition will in the future be an important means of attaining telecommunications policy objectives. Its role is to promote diversity and choice for users and also to establish cost efficiency in the provision of telecommunications services.

It is consistent policy of the government that regulations should be simple, clear and neutral. In the first instance, intervention should be directed at areas where the market does not function efficiently and also used if there exists a risk that telecommunications policy objectives will not be attained. It is important that the regulations are neutral in relation to the various parties having an interest in the field. Telecommunications policy objectives should therefore be achieved through legislation and its implementation in the form of licensing and supervision pursuant to the terms of licences.

The implementation of Community legal measures has meant that regulation in *Sweden* focuses on the obligations which must be satisfied by entities with "significant market power".

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

(i) Telecommunications

Anyone providing telephony services, mobile telephony services, services requiring number allocation, or network capacity in a public telecommunications network is required to notify the PTS before commencing such activities. Notification does not involve the advance approval of operators.

However, an individual licence is still required, for the provision of fixed telephony services, mobile telephony services, or the provision of network capacity, if "the activity is of such magnitude that it can be considered significant for maintaining efficient telecommunications and competition in

Sweden". It appears that market shares of five to 10% will be considered to be "significant".

A licence may relate to a specific geographic region or to the whole of *Sweden*. The licence is effective until further notice, although mobile telecommunications licences are limited in time for a period of 10 years.

The notification requirement will allow the PTS to monitor operators and determine whether or not an operator requires a licence as its market presence grows. In addition, the new regime also means that a notification obligation is introduced for providers of special network access, such as premium-rate number providers.

(ii) Broadcasting

The new *Radio and Television Act* requires a licence for the transmission of sound radio or television programmes by means of radio waves at a frequency below 3 Ghz.

Anyone who conducts a transmission operation for which a licence is not required must apply to the Radio and Television Authority for registration.

Terrestrial broadcasting is subject to a public service franchise which is awarded by the Government. There are no clear provisions or regulations for the licensing of private commercial broadcasters. Thus far, only one private licence has been awarded, which means that no clear procedure has been developed.

Broadcasting falling under the *Cable Act 1991* and the *Satellite Act 1992* is not subject to licensing requirements.

(iii) Publishing

A periodical publication must be notified to the Patent and Registration Office.

(2) Regulatory or governmental authorities competent to award the relevant licences.

(i) Telecommunications

Telecommunications licences are awarded by the PTS. There is no *a priori* limitation on the number of licensees in *Sweden*. A licence will be granted unless the applicant is not capable of pursuing the activity on a permanent basis and with adequate capacity and quality. However, mobile telecommunications licences are, dealt with through a procedure of a general invitation to apply.

(ii) Broadcasting

Licences to transmit television programmes and licences to transmit sound radio programmes throughout *Sweden* or abroad are granted by the government. Broadcasting companies which currently hold such licences are Swedish Television ("SVT"), Swedish Radio ("SR"), Swedish Educational Broadcasting ("UR") and TV4.

The Radio and Television Authority grants the licences to transmit community and local radio programmes. In addition, it may grant licences to transmit television programmes or sound radio programmes which are not community radio or local radio for a limited period of at most two weeks.

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

As a result of the 1997 amendments to the *1993 Telecommunications Act*, a distinction is drawn between the regulation or licensing of transmission facilities and the provision of services over those facilities. Prior to these amendments, no such distinction had been drawn under Swedish law. Indeed, the provision of networks or infrastructure had not been subject to a licensing regime.

No distinction is drawn between the ownership and operation of facilities.

(4) Line-of-business restrictions under national law preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) and utilities from providing cable TV services and telephony (and vice versa).

(i) No restrictions.
(ii) No restrictions.
(iii) No restrictions.

Moreover, there is no restriction under Swedish law which would prevent a GSM mobile communications operator from providing DCS-1800 mobile services. Indeed, domestic policy encourages the dual provision of such services because of the environmental and cost benefits of being able to share much of the same infrastructure used for mobile services in the 900 or 1800 bands.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

There are no restrictions on the types of entities which can be involved in content production.

(6) Typical licence conditions.

(i) Telecommunications

The following types of conditions may be included in licences awarded under the *Telecommunications Act 1993:*

- to provide, on certain conditions, telephony services to all who request such services;
- to provide network capacity to all who ask for it, considering available capacity, on specified conditions;
- to comply with all international agreements ratified by *Sweden*;
- to consider the needs of disabled persons for special telecommunications services;
- to ensure that telecommunications messages can be conveyed to public emergency services;
- to recognise the needs of the national defence system for telecommunications in situations of intensified military alert;
- to submit annual accounts (reflecting the accounting principles developed for telecommunications operations) for the licensee's activities under the licence, and to make such accounts available to the licensing authority or any responsible party appointed by said authority;
- to provide, on reasonable conditions, to any other licensee such published information on customers to the extent that such information is not subject to any secrecy obligations under section 25 of the *1993 Act;* and
- to publish, on reasonable conditions, a telephone directory, and make publicly available information about the customers, to the extent that this information is not subject to any secrecy obligations.

Licence conditions shall apply for a specified term. In the telecommunications sector, licences are in general terms of indefinite duration, with the exception of both GSM and DCS 1800 licences (10 years). Full geographical coverage is not mandatory for most types of licences. Amendments of licence conditions under a current conditional period may be effected only subject to reservations in conditions issued, or with the consent of the licence holder and upon consultation with other licence holders whose activities are directly affected by the amendment.

(ii) Broadcasting

Certain conditions as to content must be met by national terrestrial broadcasters. The *1996 Radio and Television Act* includes a list of conditions which the Government may impose, namely:

- obligation to transmit programmes throughout *Sweden* or to a certain part of *Sweden*;
- obligation to transmit for a certain minimum time;
- obligation to simultaneously transmit a certain minimum number of programmes in each area;
- obligation to provide space for transmissions especially adapted for persons with visual or hearing impairments;
- obligation to design transmissions in such a way that they become available to persons with visual or hearing impairments;
- obligation to provide space for transmissions which takes place by virtue of government licences;
- obligation to use a certain transmission technique;
- obligation to use certain radio transmitters;
- obligation to transmit rebuttals;
- obligation to respect the privacy of individuals;
- obligation to transmit a varied programme output;
- obligation to regionally transmit and produce programmes;
- obligation to transmit messages free of charge which are of importance to the public if an authority requests it; and
- obligation to provide information to the Broadcasting Commission which is necessary for the Commission's assessment of whether programmes transmitted comply with the conditions imposed in accordance with the *Radio and Television Act*.

The licences granted by the government are limited in time. A licence which has been granted for a period of at least four years can be extended on unaltered

conditions for a further four years, if the licence holder so desires and if the government does not (at least two years prior to the expiry of the licence period) give notice that the licence will not be extended, when the government desires to alter the conditions.

Licences awarded under the *Radio Communications Act 1993* may contain provisions about frequencies allocated, technical requirements for the transmitter, the aerial location, traffic area and other conditions which may be of significance to the efficient use of frequencies.

The *1996 Radio and Television Act* contains provisions which restrict cross-media ownership. Section 4 has recently been discussed pursuant to the Bonnier Group's acquisition of shares in TV4, where the responsible Cabinet member, Ms Ulvskog, argued that the transmission rights of TV4 could be revoked, due to the concentration of media influence in the Bonnier Group (this discussion finally led to the State-owned SVT being granted an extra SEK 0.5 billion, to be used, *inter alia*, to launch a new digital TV channel).

F. Pricing and Tariffs

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

A price cap was imposed on Telia between 1993 and 1996 to protect customers in market segments subject to little or no competition. The price cap was based on the tariffs and fees of a basket of telephony services which were not allowed to increase in excess of the Retail Price Index by less than 1%. The establishment of the price cap was intended to allow Telia to rebalance its tariffs towards a cost-based structure. The tariffs for local and regional calls during the period 1993-1996 doubled, while the tariffs for long-distance calls over the same period were reduced by just over a third. Quarterly subscription charges have, during the same period, increased over 20% for private persons while, in principle, having remained unchanged for commercial customers with direct lines. Tariffs for foreign calls have decreased during these three years by 5-10% per annum for ordinary call prices - a total reduction of almost 30%. Thus, over the period of 1993-1996, substantial re-balancing of prices occurred between foreign and the long-distance calls to local calls and subscription charges.

The agreement between the Government and Telia expired on 30 June 1997 and is now replaced by a price cap in the form of an *Ordinance*. A price cap is now applied to operators with significant market power (*i.e.*, Telia) only with respect to subscription fees for telephony services provided to consumers and small businesses. The price cap means that subscriber charges of operators with significant market power on the relevant market may only be changed in line with price developments, measured in terms of the net price index. The price cap will also apply to the ancillary services linked to the terms of a subscription.

For the time being, the price cap will in practice apply only to Telia. It will, initially, apply for three to four years. During this period, a review of the whole price cap structure will be conducted. The Swedish Government intends to require the PTS to conduct this review. By 1 September 1999, the PTS will have drawn up a report analysing how any rationalisation or technical changes within Telia have influenced the costs of telephony services and the pricing of the company's other non-price regulated services, and how the market has been influenced generally by these changes.

(2) New pricing principles for the competitive market environment.

Aside from the price cap on Telia, there is no regulatory interference with end-user tariff prices. The *1993 Telecommunications Act* provides that tariffs for telephony services delivered to a fixed termination point within a public telecommunications network (*i.e.*, interconnection) and for the provision of network capacity within such a network (*i.e.*, leased lines) must be cost-oriented. The Government may stipulate maximum prices for telephony services supplied to fixed termination points in a public telecommunications network.

The revised *1993 Telecommunications Act* also provides that telephony services should be provided at affordable prices. The assessment of the affordability of services should be viewed from the perspective of the consumer. The Swedish government considers that the requirement of affordable prices implies that some geographical variations ought to be accepted. Reduced tariffs in certain regions should not, however, be directly compensated through the raising tariffs in other regions.

Tariff structures must be transparent and made available to the public.

(3) Control of tariff package which can be offered to customers.

The 1997 amendments to the *1993 Telecommunications Act* provide that the government or the PTS (if authorised by the government) may require a telecommunications licensee in *Sweden* with a dominant position or having significant market power to keep its business accounts on a particular part of the activity affected by the licence separate from its other activities.

In addition, operators which are subject to a notification obligation must account for the notified parts of their businesses and must give the PTS access to such accounts.

(4) Tariff basis - usage time or flat rate off-peak rates; and other relevant pricing practices which increase pricing flexibility.

Tariffs are generally based on usage time, and it is possible to charge off-peak rates. A new operator, offers telephone calls for free to the extent that callers are willing to be interrupted periodically by the transmission of advertisements. Telia is also planning to launch "advertisement telephony services".

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.

Internet service fees are normally based on a "start-up" fee, where the caller/user normally calls the service provider over a so-called "020" number, giving the caller/user the benefit of calling locally only, and hence only being charged the local call fee.

G. Network Interconnection and Access to Service Providers

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

Interconnection and access arrangements are subject to individual negotiation. One of the conditions is that the licensee is obliged to interconnect with all other parties which are subject to a notification obligation.

In some cases, the interconnect negotiations have been very lengthy and cumbersome. The most notable case, which has been the subject of some media attention, is perhaps the Telia/Tele2 negotiations. After the enactment of the *Telecommunications Act* in 1993, Telia and Tele2 were to re-negotiate their interconnect agreement based on the provisions of the new *Act*, but it was not until 1996 that the parties reached a formal agreement. The negotiations involved mediation and opinions on several occasions by the PTS, as well as several decisions by the Competition Authority and the courts.

In the 1997 revisions to the *1993 Telecommunications* Act, the powers of the PTS have been extended so as to facilitate a more speedy resolution of interconnection disputes. Upon request by either operator in ongoing interconnection negotiations, the PTS must set a time-limit within which the negotiations must be concluded. If a final agreement has not been reached within this time-limit, the PTS is required not only to mediate between the parties but also, upon the request of either party, to determine the relevant terms of the agreement. The decision of the PTS may be appealed before a general administrative court.

Finally, if deemed necessary to accommodate a "significant public interest", the PTS may decide that two operators which otherwise do not wish to interconnect must enter into an interconnection agreement. In these cases, the PTS may determine the relevant terms and conditions of such agreements.

Suppliers of telecommunications services other than telephony services with a considerable share of the market (having regard to the areas covered, the number of users and so on) are required to offer interconnection on competitive terms to other licensees and operators required to file reports with the PTS. These suppliers have a corresponding right to interconnect. In exceptional cases, the PTS may exempt operators from interconnecting if the interconnection requested would, to a significant extent, restrict the activity of the party obliged to interconnect. A party providing network capacity for a public telecommunications network must, on the request of another network provider, cooperate in the interconnection of their telecommunications networks.

A very important principle that has been implemented into the revised *1993 Telecommunications Act* is that of non-discrimination. It is explicitly stated that operators must offer equal terms to all parties requesting interconnection. This principle is of particular importance, as new operators will be able to interconnect with the incumbent operator on the same terms as the incumbent applies internally.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".

Special requirements are placed on operators with significant market power. They must, *inter alia*, prove that the interconnection fees are cost-based and satisfy all reasonable demands of interconnection with their own networks, including special requests concerning interconnection points and so-called signalling protocols. The term "significant market power" is intended to have the same meaning as in the *ONP Interconnection Directive 1997.*

(3) Precise obligations currently placed on the interconnecting operators.

Point of Interconnection, Unbundling of internal network functions and unbundling of the local loop

Swedish legislation, because it accounts priority to the free negotiations of the parties, does not mandate matters of such specificity.

Equal Access

Currently, equal access is not mandated in *Sweden*. However, the Council of Ministers has agreed in a 1992 Decision to introduce equal access by 1998.

There is currently dialling parity between Telia and Tele2 only for international calls.

Technical requirements and standards/Quality of service commitments required

In order that interconnection between operators may be able to operate in a satisfactory manner, it is proposed that the PTS is authorised to, as the need arises, prescribe certain standards to apply to the interface between the networks of various operators.

It is necessary to give the PTS notice of technical alterations to the network which affect interconnection. The time for notifying the PTS is to be determined on a case-by-case basis depending on the scope of the intended changes. Thus, the Swedish Government has elected not to set the limit of six months, as is foreseen under the *ONP Interconnection Directive 1997.*

Interconnect tariffs

Operators providing telephony services are required to provide interconnection charges which are "fair and reasonable with regard to the costs for the service" (*i.e.*, cost-based charges). Costs may, to a reasonable extent, include special obligations under a licence (*e.g.*, to provide universal service).The licensee is entitled to charge a price which covers costs and also contains a reasonable return. The PTS has preferred not to favour or to promote any particular cost-based formula to date.

The amended *1993 Telecommunications Act* extends this cost-based requirement to mobile operators with "significant market power" on the national market for interconnection.

Operators of telecommunications services other than voice and mobile telephony may apply interconnect charges which are set at market terms.

The PTS has been given the power to decide upon the interconnect charges applied by operators. If the interconnect charges set out in the operator's price lists which are submitted to the PTS are deemed to be in violation of the *Telecommunications Act*, the PTS may decide that the charges should be changed.

The amended *1993 Telecommunications Act* provides that all operators with significant market power which provide telephony services are obliged to keep the accounts of revenue and expenses for interconnection separate from other accounts.

Information disclosure obligations

The amended *1993 Telecommunications Act* requires organisations with “significant market power” to publish standard unbundled price lists. It provides that the operator must, before negotiations on interconnection occur, ensure that the interconnecting party has all necessary information. In addition, they must submit all interconnect agreements to the PTS. The PTS may require changes in published standard price lists if the tariffs are not in line with the demands made in the revised *1993 Telecommunications Act.* The term “significant market power” is intended to have the same meaning as in the *ONP Interconnection Directive* of 1997.

These obligations, however, do not apply to a party supplying mobile telecommunications services.

Protection of interconnecting carrier's or service provider's customer information

The revised *1993 Telecommunications Act* contains provisions on secrecy and confidentiality. Sections 24 to 29 provide that it is prohibited to wiretap communications traffic, unless it is absolutely necessary in order to provide the service.

Information regarding customers exchanged in the context of interconnection arrangements must not be used in other contexts; to this end, it must not be passed on to the service arms of interconnection parties, to affiliated companies or joint ventures.

H. "Resource" Issues

(1) Frequencies.

The PTS is responsible for the regulation and management of the civil radio frequency spectrum.

When a licence is to be granted to provide new or substantially revised mobile services and it can be expected that there will be insufficient frequencies for all applicants, the applications will be made through a general invitation to tender procedure. The Government or the PTS may set out the objective criteria against which to assess such applications.

Frequency licences are issued separate to the licences otherwise required to provide mobile, radio or satellite communications.

Applications for radio permits may only be refused if the required frequencies are in the bands currently occupied by the military, or if broadcasters have priority. When deemed to be necessary, frequency licences will be issued after a call for tenders.

(2) Numbering.

The PTS controls the numbering plan and allocates numbers. Subscriber numbers are allocated in blocks of three to four significant digits (*i.e.*, blocks of between 10,000 and 1,000,000 individual numbers within a numbering area). There are two large public numbering plans: E. 164 for telephony and X. 121 for public data networks.

A numbering plan was introduced in November 1994. This numbering plan involves a transitional solution in order to be able to provide numbers to the new operators and is based on an adaptation of the former numbering plan of Swedish Telecom (Televerket). It provides dialling prefixes for domestic and international long distance calls. Only Telia has information about the numbers that are available at the local level and, accordingly, retains a significant influence over number allocation.

The PTS does not charge operators for the allocation of numbers. However, operators are not prohibited from charging when making secondary allocations to subscribers. Indeed, numbers are increasingly seen as valuable assets which can be traded.

The PTS has commenced the extensive work of compiling a completely new numbering plan, which is estimated to be completely implemented sometime after the turn of the century.

The Swedish Government intends to introduce number portability between fixed network operators in major urban areas, for digital mobile telephony services and for freephone services no later than January 1, 1999. The PTS is currently investigating various alternative technical solutions and also how the cost may be distributed between the operators affected in order to introduce number portability. The PTS intends to present a document on this issue to the Swedish government in the near future.

(3) Rights-of-Way.

The Cable Act 1991 defines the rights and obligations of all organisations that establish public network infrastructure.

The *1973 Cable Rights Act* provides that the right to use a property for a telecommunication cable (cable right) is granted by the Land Surveying Authority, if the public and private inconvenience is outweighed by the resulting

advantages. Decisions of the Land Surveying Authority may be appealed to the general courts.

Permission from local property owners is also necessary. They will be entitled to some form of compensation. Such compensation is to be based on fair market prices.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

Content is generally considered to be freely available. However, it may be subject to agreements freely concluded between the parties on the market. The matrix of exclusive contracts held by the Pay-Per-View operator Nethold in the Nordic countries has meant that the competing TV 1000 pay television service has been restricted to broadcasting local content (which is arguably less attractive in this geographic market).

There are currently no legal rules granting exclusive rights to certain operators for the broadcast of major events.

The owner or operator of a cable TV network must make available, in each municipality where they have a network, one channel for television programmes originating from one or more local television operators and must carry all terrestrial channels: Kanal 1, TV2 & 4.

Terrestrial television broadcasters must in general provide a variety of programming of sufficiently high quality in the Swedish language. In addition, terrestrial TV broadcasters are obliged to produce at least 50% of their Swedish programming outside the city of Stockholm region.[56] Both satellite and terrestrial TV broadcasters are otherwise subject to the requirement under the *Television Without Frontiers Directive* that 50% of transmission time must consist of programmes of European Union origin.[57] These requirements do not extend to cable TV companies. Local community radio stations often require significant 'local' programming component, and commercial radio stations need to satisfy a one third local content requirement.

(5) "Gateway " Issues - Technologies for Open Access.

There are a few market players striving for the adoption of a future nationwide standard, including Canal+ and TV4.

56 The national radio broadcasters, SR and OUR, are also subject to these rules.

57 *Satellite Act 1992*:1356.

(6) Internet Domain Names - Preferred regulatory approach.

It has been proposed in the Green Paper from the Ministry of Transport and Communications during the summer of 1996, that the PTS should be responsible for the regulation of Internet domain names. Due to an investigation currently being carried out regarding Internet, the government does not at present have any proposals on a unified electronic address database. Responsibility for the allocation and registration of location identification names today rests with an officer at the Royal Technical College, who performs this task on the assignment of Internet Network Information Center ("INIC"), which is the global Internet organisation.

It is currently the subject of debate in *Sweden* whether registered trademarks can be registered as domain names.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

The definition of universal service in *Sweden* only covers traditional telephony services between fixed network termination points. The current definition of telephony services covers transmission facilities for telefax messages and also data communication by low-speed modems. Criticism has been directed at this definition, as it is partly based on specific terminal equipment (telefax, modem), and partly because it does not take account of the rapid development of communications insofar as both telefax and low-speed modems risk becoming obsolete technology very soon. However, the government considers that this definition should remain unchanged for the moment. There is no suggestion that interactive or audiovisual services will be added to the current definition of universal service.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal services.

The provision of telephony as a universal service is currently guaranteed by a condition in Telia's licence.

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

Only Telia is currently under a legal obligation to provide universal service. A study conducted for the Swedish authorities concluded that the net cost of providing telephony services within unprofitable areas has been modest, and is calculated to amount to approximately 1.2% of Telia's turnover for telephony operations. However, this situation could change in the near future; as competition increases, Telia may no longer receive such a great part of the total revenue from the telephony market. In these circumstances, it would no longer be reasonable to expect Telia to bear the whole of the expense of providing universal service. The government has decided to make a proposal for special funding if the burden of providing universal service currently imposed on Telia becomes too significant. According to the government, such a proposal will not involve an obligation for all operators liable to provide notification to pay a fee. The fee should be charged in relation to the operator's turnover or on another similarly objective basis. The basic service should subsequently be made subject to a tender procedure.

The government intends to levy a public fee on operators with significant market power in order to finance measures against serious peacetime disruptions in telecommunications networks. The distribution of the financial burden on operators subject to the levy should be effected in proportion to the turnover of the respective operator. Other defence measures will continue to be provided for through the State budget.

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see also section E & H).

The obligations of terrestrial broadcasters with regard to carrying other programmes are contained in the licences granted by the Government to Swedish TV and TV4. Cable operators carrying broadcasts under a *Radio Act* licence are subject to a "must-carry" obligation. They are legally obliged to transmit the national public service channels (Kanal 1 and TV2), as well as the commercial channel (TV4).

There are no other relevant public service requirements.

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A. Existing Regulatory Definitions of Service Offerings

(1) Regulatory distinctions between telecommunications, broadcasting and audiovisual services.

A regulatory distinction is drawn between telecommunications services and broadcasting services. Under section 4(3) of the *Telecommunications Act* (1984) a "telecommunication service" is defined as:

"(a) a service consisting in the conveyance by means of a telecommunication system of anything within paragraphs (a) to (d) of subsection (1), above;
(b) a directory information service. . .; and
(c) a service consisting in the installation, maintenance, adjustment, repair, alteration, moving, removal or replacement of apparatus which is or is to be connected to a telecommunication system."

In turn, "telecommunication system" is defined in section 4(1) to mean ". . . a system for the conveyance through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, of:

(a) speech, music, and other sounds;
(b) visual images;
(c) signals serving for the importation (whether between persons and persons, things and things, or persons and things) of any matter otherwise than in the form of sounds or visual images; or
(d) signals serving for the actuation or control of machinery or apparatus."

Neither the *Telecommunications Act* nor the *Broadcasting Act 1990* deal with "broadcasting" or "audiovisual" services *per se*. Section 2(4) of the *Broadcasting Act* defines a "television programme service " as follows:

(a) a television broadcast service (as defined by subsection 5);
(b) a non-domestic satellite service (as defined by section 43(2)); or
(c) a licenceable programme service (as defined by section 46(1)).

Under Section 2(5) of the *Broadcasting Act* a "television broadcasting service" means (subject to subsection(6)) "*a service consisting in the broadcasting of television programmes for general reception in, or in any area in, the United Kingdom, including a domestic satellite service.*"

Subsection (6) provides that subsection (5) does not apply to any teletext service or any other service in the case of which the visual images broadcast in the service consist wholly or mainly of non-representational images; namely, visual images

which are neither still pictures nor comprised within sequences of visual images capable of being seen as moving pictures.

Section 46 defines a "licenceable programme service" as a service consisting in the provision by any person of a relevant programme with a view to its being conveyed by means of a telecommunications system:

(a) *for reception in two or more dwelling-houses in the United Kingdom otherwise than for the purpose of being received there by persons who have a business interest in receiving them; or*

(b) *for reception at any place, or for simultaneous reception at two or more places, in the United Kingdom for the purpose of being presented there either to members of the public, a group, or groups of persons some or all of whom do not have a business interest in receiving them,*

whether the telecommunication system is run by the person providing programmes or some other person and whether the programmes are conveyed for simultaneous reception or for reception at different times in response to requests made by different users of the service.

Under Section 46(2), subsection (1) does not apply to a two-way service (namely, images or sounds sent from the place of reception by means of the same telecommunication system for reception by the person providing the service or others receiving it).

The *Broadcasting Act* definitions were not amended in the *1996 Act* and there are no proposals to amend either these or those in the *Telecommunications Act*.

(2) Regulatory distinctions between types of telecommunications and broadcasting services.

There are no distinctions in the *Telecommunications Act* between voice and data. In fact, OFTEL has stated that it does not consider such a distinction to be valid. Its regulatory approach is essentially content neutral in this respect.

However, the *Broadcasting Act* provides that "non-representational images" are not considered to be TV broadcasting services or relevant programmes for the purposes of the licensable programme services definition). Whilst this is not a voice-data distinction, it is content based.

Distinctions are drawn between "service" and "system" in the *Telecommunications Act* (see Sections 4(1) & (3) *Telecommunications Act*, above). Note also that "Systems", rather than "networks", are licensed.

The distinction between services and systems is significant. OFTEL's current approach to interconnect, universal service, numbering and access treats service providers and systems operators differently. For example, compare the interconnect status of those running relevant connectable services (RCSs) and those without "significant infrastructure."

The *Broadcasting Act* envisages only licensing of services. These services are delivered over a telecommunications system (of one type or another). For example, the Independent Television Commission takes the view (General Notes for Guidance of Franchise Applicants) that any system used to deliver LDS will be a "telecommunications system" (under the *Telecommunications Act*). Accordingly, a *Telecommunications Act* licence is required either by the LDO licensee or the firm contracted to run the system.

(3) Regulation of Internet services and other on-line services.

There is no specific regulation. Internet Service Providers ("ISPs") operate under TSL licences (*i.e.*, a class licence). The prudent also have an ISR licence (to cover any international resale that occurs, since such resale is expressly excluded from the TSL).

(4) Regulation of new digitalised services, such as Video-on-Demand and Near-Video-on-Demand.

In its White Paper "*Broadcasting in the '90s: Competition, Choice and Quality*" (88) the Government stated that it had decided against creating a new specific regulatory structure for MVDS. Instead, it established an enabling framework (*Broadcasting Act*, Pt II) to allow operators to design their own technical mix.

BT is restricted (through its licence) from the conveyance of LDS. However, since the Section 72 (*Broadcasting Act*) definition of LDS provides that it must be provided for simultaneous reception in two or more dwelling houses, Video-on-Demand services are outside its scope and BTs may provide Video-on-Demand services.

The DTI Paper "*Creating the Superhighways of the Future: Developing Broadband Communications in the United Kingdom*" (1994) responded to recommendations that the restriction on BT be lifted by concluding that:

"*... the present regulatory framework continues to be the best way of providing a suitable climate for the development of communications technology, infrastructure and services. That regulatory environment will undoubtedly evolve as more infrastructure is established, as technology advances and as the market for broadband services and applications become more competitive...*".

B. Regulatory Authorities in telecommunications/ broadcasting/publishing

(1) *Legislative and regulatory competence for telecommunications, broadcasting, audiovisual and publishing.*

Sections 3 and 4 *of the Broadcasting Act* confer power on the Independent Television Commission (ITC) to license on conditions that they impose, to vary licence conditions and to set tariffs. Sections 6 to 12 set out general controls on licensees (*e.g.*, advertising, codes). Regulations *per se* are not authorised by the Act, or used by the ITC.

Section 73 of the *Broadcasting Act* confers power on the ITC to license LDS, on conditions. Under Sections 79 and 80 the ITC also has the power to regulate programme delivery (either through licence conditions or by issuing directions to the licensee).

Pt V of the *Broadcasting Act* 1996 establishes the Broadcasting Standards Commission as a complaints body. It is also required to prepare and enforce codes about unjust or unfair treatment, unwarranted interference with privacy and broadcasting standards (*e.g.*, violence and sex).

Telecommunications regulation is licence-based. The regime is not designed around regulations or other generally applicable instruments. Under Section 7(6) of the *Telecommunications Act*, individual licensees (but not class licensees) must comply with directions from the Director General, must do or not do things specified in their licences (except to the extent that Director consents otherwise) and may be required to refer questions under their licences to the Director. Section 7(5) of the *Telecommunications Act* provides that licences (*i.e.*, general, class and individual) may include conditions that appear to the *Secretary of State* (or the Director General) to be requisite or expedient. Section 8 sets out additional conditions which are required for a licensee to acquire PTO status. These include interconnect, undue preference and discrimination and publication. Section 10 provides that a licensee whose licence contains section 8 conditions may exercise Code powers (dealing with lad access and related issues). Sections 12 to 15 deal with licence modification, and sections 16 to 18 deal with enforcement of licences.

The *Broadcasting Act* and the *Telecommunications Act* are National legislation. They devolve some aspects of regulatory authority to national regulators.

There are no jurisdictional conflict mechanisms. This has led to some difficulties, largely between same-sector regulators. For example, the ITC and the BSC have considered the same broadcasting complaint in the past (and have reached different conclusions.) The recent decision to vest responsibility for conditional access in

OFTEL was a policy decision, not the result of legislative division of responsibility.

(2) ***Independent national regulatory body(ies) for telecommunications, broadcasting, audiovisual and publishing - the scope of its (their) regulatory power and proposals for revision of the current regime.***

The Director General of Telecommunications has the power to modify and enforce licences (which are granted by the Secretary of State for Trade & Industry). The Director General, essentially operating through OFTEL, is the telecommunications regulatory authority.

The ITC is responsible for broadcasting licensing and for overseeing the conduct of licensees. The Secretary of State assigns frequencies required by broadcasters (Section 65 *Broadcasting Act*). The Broadcasting Standards Commission deals with content-based broadcasting complaints and monitors programme standards.

The MMC has a general remit to control anti-competitive conduct. It also deals with licence modifications referred by OFTEL (*i.e.*, when the licensee has not consented to the proposed amendment).

The Radio Communications Agency allots frequencies, assigns locations for use of frequencies and regulates antenna heights and similar issues.

The Government's pre-election statements indicate that it intends to replace the existing ITC-OFTEL structure with two new bodies:

- Ofcom -- dealing with infrastructure related issues; and
- (a new) ITC -- dealing with all content issues.

(3) ***National rules limiting anti-competitive behaviour (sector specific and non-sector-specific). National competition authority and its powers.***

General Competition Law

The *Fair Trading Act 1973* and the *Competition Act 1980* deal with competition generally. Under Section 50 of the Telecommunications Act the Director General has joint authority to exercise the powers conferred on the DGFT under the FTA regarding investigation and control of monopoly situations in the telecommunications industry. The functions of DGFT under Sections 2 to 10 of the CA are similarly shared in situations involving telecommunications services and apparatus.

The M.M.C. takes monopoly references (from the Director General over apparatus and from the Secretary of State over services) under Sections 47 to 56 of

the FTA and takes references about anti-competitive practices under Sections 2 to 10 of the CA. It may only investigate and report on reference, not on its own initiative. The M.M.C.'s investigative powers are severely circumscribed. The object of its investigation is only to determine whether or not there are effects adverse to the public interest (it has no locus to investigate more broadly). Anti-competitive practices are therefore not *per se* illegal, and no sanction can attach until the whole investigative process is complete.

However, the competition regime will alter significantly when the *Competition Bill* (discussion paper released in August 1997) is enacted.

Broadcasting Competition Law

Under Sections 192-193 of the *Broadcasting Act* the FTA applies to broadcasting services. The Secretary of State may order modifications to network arrangements where it appears appropriate (*e.g.*, where there is a monopoly situation regarding programme provisions for Channel 3 services; where an entity in a merger reference was engaged in the provision of programmes; or where an anti-competitive practice was pursued in connection with programme provision). Under Section 194 of the *Broadcasting Act* the Restrictive Trade Practices Act 1976 does not apply to networking arrangements specified by the Secretary of State.

Telecommunications Competition Law

Under Section 3(2) of the *Telecommunications Act*, the Director General has a duty to promote fair and effective competition. Section 95 of the *Telecommunications Act* provides for revocation or modification of licence conditions (*i.e.*, conditions imposed under section 7) following a monopoly, merger or competition reference where the Secretary of State exercises powers under Schedule 8 of the FTA.

BT's licence condition 18A (effective from 31 Dec 1996) prohibits the abuse of a dominant position and other acts or omissions unfairly preventing, restricting or distorting competition. The condition is modelled on Articles 85 and 86 of the EC Treaty. Twelve licence conditions (dealing with specific anti-competitive practices were deleted following the introduction of condition 18A). The new power is very broad, and confers on OFTEL the widest anti-competitive conduct control powers of all *United Kingdom* competition regulators. OFTEL has included a similar condition in the IFL licences, and intends to add the condition to all other licences over the next 12 months.

The *Competition and Services (Utilities) Act 1992* applies to telecommunications service quality, allowing the Director General to resolve disputes with customers over standards of performance, discrimination and preference. It enables the

Director General to set standards of service (for BT and Kingston) and potentially applies to any PTO with 25% of the voice communication market in an area.

(4) Powers of the various regulatory bodies, and the sanctions which they can impose.

Where conditions in broadcasting licences are breached, the ITC has the power to fine licensees and to shorten licence terms.

OFTEL tends to modify licences to deal with problems. The modification process can either occur with the outset of the licensee of following a report from the M.M.C. in response to a reference from OFTEL. In addition, OFTEL has the power to issue orders (final and interim) directing licensees to remedy breaches. These orders can only be challenged in limited circumstances, as set out in Section 18(1) of the TA. Section 18(3) prohibits challenge on any other grounds. Third parties suffering loss as a result of a breach may sue the licensee following the issue of a final order.

To the extent that the DG of Telecommunications can use the FTA and CA investigative powers, he has a general power to require information, a specific power to require information with respect to monopoly situations (with a view to deciding whether to refer the matter to the M.M.C.), and the power to conduct preliminary investigations of possible anti-competitive practices.

(5) Rules or practices regarding cooperation between regulatory institutions, their counterparts in other Member States and the institutions of the European Community (in addition to procedures in Community legislation).

There are no formal legal procedures in place for such inter-institutional cooperation, although OFTEL and *France*'s ART are in regular contact with one another.

C. Current Status and Roll-Out of Telecommunications, Broadcasting and Audiovisual Rules

The 1996 *Broadcasting Act* introduced changes to the licence accumulation and cross ownership rules, amalgamated the BCC and BSC and made a number of other changes to the broadcasting regime that did not affect the regulatory structure. There are no current proposals for further amendment. Similarly, there are no current proposals for restructuring telecommunications regulation.

Issues like conditional access and digital technology are being dealt with within the existing legislative structure. However, the proposals for the creation of the new OFCOM and ITC indicate that consideration is being given to a content-

carriage division for future regulation. OFTEL anticipates regulatory reform within the next three years.

D. Service Types Permitted, Special and Exclusive Rights (Reserved Services), and Line-of-Business Restrictions

(1) Regulatory restrictions on new entrants for the provision of services and reservation of services to the national Tos (see also section E below).

The *Telecommunications Act* contains no restrictions imposed specifically on "new entrants." Licence applications are considered on their merits. The markets for voice telephony and international services have been fully liberalised. IFLs have been issued since December 1996 and less restrictive rules introduced for ISR licences. However, at this stage, only BT, Hull and Mercury have the right to provide international services under their general PTO licences.

Cable operators are licensed to provide voice services over their networks. Service providers provide voice services under general TSL licences.

(2) Are there exclusive rights granted with respect to the provision of telecommunications/broadcasting/audiovisual/publishing services.

There are no exclusive or special rights, except that Code powers (*e.g.*, powers to access land and facilities to allow the installation of infrastructure) are only conferred on carriers with licences containing Section 8 conditions.

Until January 1997 International Simple Voice and Data Resale services were limited by a "reciprocity" test. This was replaced with a proportion of traffic test.

Cable licences are geographically limited. Only one licence is granted for each franchise area.

(3) Differences may exist in the regulatory treatment afforded to the incumbent TO as compared to new entrants (either to the detriment or to the benefit of the TO) leading to asymmetric regulation, particularly in relation to broadcasting/audiovisual (including programming) activities and the provision of cable TV services.

Universal Service

BT and Hull have USO responsibilities. They must provide voice telephony services and other telecommunication services consisting in the conveyance of messages to every person who requires them. OFTEL interprets this obligation to require the installation and maintenance of all telecommunications apparatus

necessary to provide the services, including all transmission and switching apparatus necessary for delivery. In support of the USO, BT must provide "maintenance services".

BT's retail prices for a basket of main switched services (excluding domestic and international private circuits; maintenance/fault repair services; voice telephony calls forming part of value-added and data services; and charges for voice telephony calls conveyed to customers of another system operator), are controlled by a price cap set at RPI - 4.5%. A separate price cap is in place for private circuits.

Condition 1 of Mercury's Licence provides that it must roll out to specified areas within set periods. It has an ongoing obligation to meet demand from customers who are located within a 10 Km radius of the nearest Mercury node.

LDS licensees nominate their own roll out timetables. This target is then incorporated into the licences. These must pass obligations may be relaxed at the licensee's request, if is justified on the basis that it would be in the interests of sound communication development.

Publication

BT, Hull and Mercury are required to publish their charges at least 28 days in advance. Other PTO licensees (including cable licensees) need only publish when they become "well established" operators (either for the provision of services of a particular description or within a particular location)

Interconnect

The asymmetrical interconnect regime is a result of BT's market position, not the regulatory structure itself. OFTEL has indicated that it intends to regulate BT's interconnect charges after August 1997 using a price cap system similar to that developed for retail supply.

Broadcasting

National PTOs are prohibited from broadcasting entertainment services in their own right before the year 2000. Licence conditions (*e.g.*, BT Schedule 3, Condition 1(b)(1)) authorise only the conveyance of messages. However, the parents, subsidiaries, associates of National PTOs are able to tender for any LDS licences. The Broadcasting (Restrictions on Holding of Licences) Order 91 provided a limited right for national PTOs to apply for LDS licences (if no part of the franchise area is within an existing LDS franchise). Under Pt V of Schedule 2 to the *Broadcasting Act* the Secretary of State may restrict broadcasting licences held by national PTOs or a person controlling or associated with such an operator. National PTOs have an unrestricted right to provide video-on-demand.

PTOs are deliberately excluded from using local loop to compete with new entrants in the provision of entertainment services. Cross-subsidisation controls and accounting separation requirements are considered to be insufficient to offset the adverse impact on the cable industry that the government anticipated would follow the presence of telecommunications operators in the market.

(4) Accounting and structural separation safeguards (current or planned).

PTOs are bound by the Director General's Code (March 87) on international accounting policy to ensure parallel accounting.

BT's licence conditions 20, 21 and 49 require separate accounts for its systems, apparatus support, and supplemental services businesses. Accounting statements must set out the figures for each business and include details of items charged between them. OFTEL has set out the desegregated activities that must be shown in the accounts (*i.e.*, down to identifying specific traffic types). The Director General and BT have agreed to a further breakdown of its business elements (*i.e.*, access, apparatus supply, network, residential, retail system and supplemental services). The accounts must reflect these divisions. The details of the division between the supplemental services business and systems business were further clarified in February 1997 by OFTEL's paper "Promoting Competition in Services over Telecommunication Networks".

Condition 21 required BT to transfer its apparatus production business to a subsidiary, and to ensure that the subsidiary did not engage in the business of running a telecommunications system. The Director General can also require BT not to acquire apparatus from its subsidiary without going through an open tender process.

(5) Policy basis for regulation of incumbent carrier's services.

The original liberalisation measures were designed to constrain BT's behaviour and to encourage the development of competition in the services market as rapidly as possible. It was appreciated by the end of the 1980s that the "duopoly policy" was slowing the development of competition (including infrastructure competition). Accordingly, cable operators were allowed to supply voice services. The introduction of the SR licence reflected a similar incremental move to expand the scope of liberalised services. Price caps, accounting separation and prohibitions on bundling and other anti-competitive practices are all directed at increasing competition. In addition, OFTEL is increasingly focusing on providing access for competitors as close as possible to the end-user. OFTEL attempts to allow commercially negotiated solutions as far as possible, but in reality often becomes involved.

E. Approvals and Licensing Requirements

(1) Licences for broadcasting, telecommunications and audiovisual matters (and permits or authorisations for publishers).

Telecommunications Licences:

Individual: PTO (fixed, mobile); LDS; ISR; IFL

Class: TSL; SPL; Satellite; conditional access (but note obligation to notify OFTEL of supply).

Spectrum Licences:

Issued Under Wireless Telegraphy Act.

Broadcasting Licences:

Programme Service Licence; Non-domestic Satellite Licence; Television Broadcast Services Licence; LDS Licence.

Publishing Licences:

No publishing licences.

(2) Regulatory or governmental authorities competent to award the relevant licences.

Individual Telecommunications Licences are awarded by the Secretary of State (the power to delegate to the Director General has never been exercised). Class licences are also promulgated by the Secretary of State. Radio Communications Agency issues frequency licences. Broadcasting Licences are issued by the ITC (who is also responsible for broadcasting frequency allocation).

(3) Distinctions between the regulation or licensing of transmission facilities (infrastructure) and service provision over those facilities and between ownership and operation of facilities.

(i) Telecommunications

See Sections 4(1) and (3) of the *Telecommunications Act* for the Service - dichotomy System. (See above at A(1)).

Section 5 makes "running" a system without a licence an offence. It is an additional offence (for both the individual running the system and the individual providing the service) if an unlicensed service is provided over the system.

Section 7(1) provides for the issuing of licences for the running of telecommunications systems. Section 7(4) goes on to provide that the Licence may authorise the provision, by means of the telecommunications system to which licence relates, of any telecommunications service specified.

The Act does not define what constitutes "running" a system. However, it is thought that this requires control over the system, not merely day-to-day supervision. Day-to-day supervision may be a significant indicator of "control".

Cable licences clearly contemplate that the telecommunications system may be run by the licensee's nominee, rather than the licensee itself.

(ii) Broadcasting

The ITC approves the programme schedule put together by the Network Scheduler (under Section 39 of the *Broadcasting Act*). The Broadcasting Act does not regulate transmission facilities. It only deals with services.

(4) Line-of-business restrictions under national law which preventing: (i) TOs from providing cable TV services or "multimedia" services (and vice versa); (ii) TOs from providing mobile telephony (and vice versa); and (iii) utilities from providing cable TV services and telephony (and vice versa).

(i) Yes - see D(3) above.

(ii) No (*e.g.*, Mercury's One-2-One business and BT's interest in Cellnet).

(iii) No restrictions. They are able to apply for franchises in the same way as all others.

(5) Regulatory restrictions on the types of entities which can be involved in content production.

The Broadcasting Act prohibits the grant of licences to religious bodies, public funded bodies and advertising agencies. Section 97(2) of the *Broadcasting Act* provides that the ITC can refuse to grant LDS licences if it appears that the service that would be provided would not comply with the Section 6(1) general impartiality requirements (*i.e.*, undue prominence, accuracy and offensive material).

(6) Typical licence conditions.

Territorial Limits

LDS franchises are territorially limited (it is the ITC's policy to issue only one franchise per area). Kingston has the USO for Hull (BT does not supply there).

Coverage

USO (and equivalent) obligations are imposed (see D(3) above) requiring supply. Cable and mobile licences contain roll-out targets.

Transferability

Telecommunications - no sector specific transfer limitations. Licences can be revoked if the transfer is considered to be detrimental to national security.

Broadcasting - ITC has the right to vary the licence, if it considers that the transfer would affect the quality or balance of the service.

Bundling

BT's Licence used to expressly prohibit linked sales (condition 35). The New Fair Trading condition (condition 18A) catches bundling along with all other anti-competitive practices.

Limits on Subscriber Numbers

LDS Licences are effectively allotted for a particular number of subscribers, since they cover an express geographic area. Most LDS licences cover about 100,000 potential viewers. The largest number of subscribers (in a single franchise) is approximately 480,000, in the Northern Ireland franchise.

Public Service Specifications

USO (see D(3) above), including basic maintenance (by BT).
Emergency services - all operators must provide access.
Directory services - all operators must provide access.

Foreign Ownership

Broadcasting Act (Pt II of Schedule 2)

The following are disqualified from holding broadcasting licences:

(a) an individual who is not a citizen of a Member State ordinarily resident in the EC; or (ii) ordinarily resident in the *United Kingdom*;

(b) body corporate not (i) formed under the law of a Member State, with its registered or head office or principal place of business in the EC or (ii) incorporated under the law of the Isle of Man or the Channel Islands;

(c) a body corporate in which a body falls within (a) to (e) has no more than 5% interest;

(d) a body controlled by a person falls within (a) to (g) or by two or more such persons together; or

(e) a body corporate in which a body within (i), other than a body controlled by a person within (a), (b) or (2) or more such persons together, is a participant with a greater than 5% interest.

Telecommunications Act - no sector specific controls. Government policy in relation to LDS has been to encourage foreign investment.

Cross-ownership

Broadcasting Act 1996 (Pt III of Schedule 2) sets out the rules on the accumulation of licences and Pt IV contains the cross media ownership rules. The accumulation rules prevent an entity from acquiring licences covering more than over 15% of total audience time. The cross media ownership rules essentially provide that all newspaper groups with not less than 20% national newspaper circulation can control a television licence (although the 15% total market share accumulation limit continues to apply). This 20% figure does not apply to LDS licences to the extent that the cable operator is responsible for editorial content (*i.e.*, in this context cable is treated as a delivery method only). Award of broadcasting licences is also subject to a Public Interest Test. The ITC must consider whether the award would be expected to work against public interest factors (*i.e.*, plurality of ownership and sources of information).

There are no Telecommunications Act cross-ownership limits. However, BT cannot use its main licence to supply cable TV services.

Note that the 1995 White Paper refers to a possible shift to control both cross-ownership and accumulation by reference to a "total media market". Such an approach will clearly require the development of a mechanism to weigh the different media sectors.

Duration and Termination

Telecommunications Act licences are of varying lengths, but are no longer than 25 years. Procedures for termination, variation and modification are set out in Sections 12 to 15.

On breach of a licence condition the Director General issues a compliance order under Sections 16-18 *Telecommunications Act*. If the order is not complied with the Director General may revoke the licence or request the Court to grant a mandatory injunction (so that a non-complying licensee is in contempt of Court). Only if the licensee fails to comply with an Order, and the breach is not rectified within three months of the Secretary of State giving notice does the licence become revocable (on 30 days written notice).

The Broadcasting Act procedures for termination, variation or modification of licences are set out in Sections 40 to 42. Financial penalties can be imposed, licence periods can be shortened or licences can be revoked for breach of a condition, for non-provision of services or for the provision of misleading information.

In addition, where it appears to the ITC that a change in control will be prejudicial to the quality or range of programming it may vary the term of the licence.

F. Pricing and Tariffing

(1) Pricing obligations (or restrictions) imposed on the incumbent TO.

Since October 1996 BT's licence condition 24A has controlled General Prices (*i.e.*, essential voice telephony over residential exchange lines). BT must take all reasonable steps to ensure that general prices remain:

(a) at less than the Controlling percentage increase for the year (*i.e.*, RPI-4.5%); or
(b) unchanged if RPI is negative or is zero.

The requirements for publication of charges are set out at D(3). BT's licence condition 24 B controls Private Circuit Prices. They must not increase by more than RPI. Licence condition 24 C controls pricing for Packages.

BT licence condition 24 D sets out the Residential Low Users Scheme. However, OFTEL's proposals to redesign the USO involve the abolition of this scheme, and the introduction of a more targeted alternative.

(2) New pricing principles for the competitive market environment.

In its February 1997 statement OFTEL indicated that its long term goal (moving beyond cost-based changes for interconnect) is to ensure that prices for access to, and use of, BT's network do not depend on the identity of the customer but on the nature of product or service purchased. OFTEL is aiming for this change of approach by 2001. Preferential pricing for ISPs, because of role they play in innovation and the stimulation of competition, is also canvassed (*i.e.*, charging at wholesale rather than retail rates).

(3) Control of tariff packages which can be offered to customers.

Special tariffs and packages can be offered to customers, such as the Residential Low User Scheme and Volume based discounts. However, licensees must not engage in predatory pricing or undue discrimination. In determining whether prices are discriminatory or predatory OFTEL will look at the fair distribution of the costs of supply between different classes of users.

Condition 17A (removed from BT's licence with the introduction of Condition 18A, but equivalent conditions remain in other PTO licences) dealt with differential charging. BT and the Director General agreed that BT's charges would be not less than the highest standard price for service less 80% of the difference between that highest standard price and the fully allocated costs of providing the service. Any combination of charges offered as package must:

(a) be designed to appeal to a reasonably broad section of customers;
(b) be available to all customers that meet specified conditions;
(c) not include eligibility criteria that unfairly discriminate against a class of customers who might otherwise be eligible; and
(d) achieve greater uniformity between revenue ratios from different classes of customers.

Condition 18A will now be the relevant constraint.

(4) Tariff basis - usage time or flat rate off-peak rates; and other relevant pricing practices which increase pricing flexibility.

Services (other than the supply of leased lines) are charged on a time base. Restrictions on charging off-peak rates result solely from the need to avoid anti-competitive or discriminatory supply.

SPS are being specifically provided for by OFTEL. In its February 1997 Statement "Promoting Competition in Services over Telecommunications Networks" it proposes licence modification designed essentially to have BT reduce the costs of network service provided to ISPs. OFTEL expects BT to charge less than it charges end-users because it need not supply some elements of the services

that are provided to end-users (*e.g.*, billing). BT is expected to reduce its wholesale charges, but not to price below cost. OFTEL will also scrutinise the rates charged by BT's SB to its SSB to ensure that it is not discriminating against SB's to SSB's benefit.

(5) Tariff packages for Internet access (differing from those allowed/prescribed for voice telephony) and proposals to regulate Internet access and on-line services.

OFTEL's February 1997 paper regulates access tariffs to the extent that it forces BT to make Internet access and routing services available as part of its system business. Enhanced net services (*e.g.*, content, e-mail, usenet and high level support) must be provided through its supplementary services business. Effectively, BT is being forced to unbundle.

Otherwise, Internet access is not regulated differently from other services.

G. Network Interconnection and Access to Service Providers

(1) Interconnect arrangements and charges - express regulation or individual negotiation.

OFTEL has recently completed a long-term review of interconnection (and interoperability). In its findings statement of December 1997 it states that it believes that the *United Kingdom* interconnect regime conforms with Community law requirements.

BT's Licence Conditions 13 to 15 deal with interconnect. Condition 13 confers a right on other PTOs (if they provide Relevant Connectable Services) to require an interconnection agreement with BT. Governing principles are any-to-any connectivity and customer choice.

Condition 13.1 only operates if BT is requested to:

(a) connect its systems to those of the operator and establish and maintain the points of connection; and

(b) establish points of connection that enable customers to exercise freedom of choice as to which system conveys their messages (if the operator is a long line PTO).

The Director General can only determine permitted terms and conditions if the elements of Condition 13.1 are present. Note that only relevant connectable systems interconnect. Operators without major infrastructure cannot therefore

interconnect. They are service providers, and are entitled only to supply BT at the wholesale rates referred to above in F(4).

Interconnect Agreements are freely negotiated in 2 senses:

- the parties may choose to negotiate entirely outside Condition 13 (unusual, since they then lose the benefit of having recourse to the Director General if they fail to reach agreement); and

- Condition 13 itself makes it clear that the parties may negotiate terms (without referral to the Director General).

Condition 12 of Mercury's licence and Condition 5 of the "new style" PTO licences have the following key elements:

- oblige operators to provide connection and message connection service on terms parallel to those offered by BT;
- set out the "permitted terms and conditions" to be agreed; and
- set out the financial terms of interconnect.

(2) Regulatory intervention regarding interconnection in relation to the networks of "dominant" operators or operators with "significant market power".

The obligation is currently imposed on all PTOs. The terms differ between PTOs (see G(1) above for detail).

(3) Precise obligations currently placed on interconnecting operators.

Locations in the network at which interconnection with the incumbent carrier and other entrants is permitted (or mandated).

Condition 13.1(a) requires points of connection to have sufficient capacity and be numerous enough to enable messages to be carried. Condition 13.1(b) imposes additional obligations where long-line PTOs are interconnecting. They must have a choice as to the extent to which messages are conveyed over BT's system, and in the routing of messages.

Unbundled access to internal network functions.

See below.

Unbundled access to the local loop.

OFTEL's Policy on Equal Access (July 1996) indicates that it requires only Indirect Access to be provided (within the local loop). OFTEL concluded that

direct connection to BT's Access Network would adversely affect the development of competition and would not be in the interests of *United Kingdom* consumers.

However, in December 1997, the *United Kingdom* voted in support of the amendment to the Interconnection Directive, which requires carrier pre-selection across Europe by 1 January 2000. This reflects a significant change of approach. In a practical sense, it is highly unlikely that the *United Kingdom* could convince the Commission to allow it not to require pre-selection by 2000, despite the qualifier to the amendment which allows for deferral if a Member State can demonstrate that preselection would impose an excessive burden.

Equal Access.

Condition 13A requires the Director General to do a cost benefit analysis before requiring BT to make equal access available. In its Policy Statement of July 1996, OFTEL indicated that it would not require equal access at this stage. The *United Kingdom*'s support for the amendments to the Interconnection Directive suggest that a change of approach is imminent. See above.

Technical requirements and standards.

Technical and quality elements are mandated by the interconnecting operator's licence, under Section 27A of the *Telecommunications Act. R*egulations may be used to prescribe the standard of performance. Section 27B *of the Telecommunications Act* provides that the Director General may determine overall standards and publish them.

Interconnect tariffs.

Interconnect charges have been based on fully allocated costs. They are changing to LRIC (June 1996 Statement OFTEL). OFTEL considers that LRIC better reflects the basis on which competitive markets make investment decisions. OFTEL plans to adopt a charging-basket mechanism, similar to that used for retail charges. It has set the following four categories of services divided by their relative competitiveness:

(i) fully competitive - no price control. BT is free to set prices;
(ii) prospectively competitive (*e.g.*, IDD) - BT may not increase prices by more than RPI;
(iii) not fully competitive services - RPI-X price cap to be imposed; and
(iv) bottleneck, interconnect specific, services (*e.g.*, call termination). They will never be truly competitive. A cap is therefore necessary to provide an incentive for BT to lower these costs.

Information disclosure obligations.

Section 101 of the *Telecommunications Act* imposes a general prohibition on information disclosure. BT's Licence Condition 38 requires it to produce a Code of Practice on confidentiality of customer information. Employees in the Systems Business are bound by the code which must specify the people to whom information can be disclosed without the customer's consent and regulate the information that can be disclosed.

Effectively "Chinese Walls" must be established between Systems Business and Supplement Services (and marketing) Business. (See G(3)(h) above).

H. "Resource" Issues

(1) Frequencies.

The Radio Communications Agency is responsible for most allocations. In addition to individual allocations it also makes block allocations to BT, Mercury and some others. However, a number of other organisations allot frequencies. The MoD allots frequencies for military uses, the Home Office allots frequencies for National Air Traffic Control and the Emergency Service (police, fire, and prisons). The ITC allots broadcasting frequencies (which are initially allocated to it by the RCA).

The DTI is currently reviewing frequency allocation procedures. In its White Paper it raises a number of alternative methods of allocation (*e.g.*, tender and auction).

(2) Numbering.

BT's Licence Condition 34B provides that the Director General is to determine the numbering scheme and conventions. BT and the other PTOs develop a numbering plan in accordance with conventions published by the Director General. OFTEL has published conventions, and has produced a geographic and special use numbering plan.

Condition 34C provides for number portability. The issue of charging was referred to the MMC. On the basis of its report BT is to pay the network configuration costs, while the other providers pay only the costs of porting individual numbers. The portability rollout is continuing. The geographic roll out is complete. Freephone, local rate and national rate numbers will be included in the system in 1997. OFTEL is currently looking at numbers for specially tariffed services. High priority is also being given to mobile numbers. The policy for allocation is premised on the key role of numbers in competition; the fact that no "property" rests in customers; and the view that the numbers are a resource to be

managed. A Numbers Advisory Group was established under Section 54(3) of the *Telecommunications Act*.

OFTEL allocates numbers (in blocks) to PTOs, who allocate to customers (no fee is payable). Charging for secondary allocation is not precluded.

(3) Rights-of-Way.

There are no statutory or licensing requirements to share ducts, poles etc. In fact, the *Telecommunications Code* is interpreted in such a way that sharing is not authorised. BT is more flexible about access to buildings and on-site sharing. However, this is still limited in a practical sense. BT's concern is over security and network integrity. In its February 1990 Consultative Document "*Duct and Pole Sharing*" OFTEL flagged the need for primary legislation if the Government wants to mandate shared access to facilities. The *Broadcasting Act 1990* allows operators to provide or convey cable programmes to share facilities.

PTO licensees with Section 8 conditions have the right, under Section 10 *Telecommunications Act*, to exercise the rights contained in Schedule 2 of the *Telecommunications Act* (*i.e.*, the Telecommunications Code"). *The Code* deals with issues including listed buildings and ancient monuments, highways, and construction. Operators must give notice to occupiers or owners. They must also pay reasonable compensation. BT's Licence contains additional qualifications to Schedule 2.

The *New Roads and Street Work Act 1991* and the *Town and Country Planning General Development Order 1988* are also relevant to operators entering onto, or constructing over, land.

(4) Access to Content.

Content types with respect to which exclusive national rights prevent access to all interested market actors (for example, certain sporting events).

Licensing requirements for certain types of content that may restrict market entrants. National standards for exclusivity (for example, two year periods subject to renegotiation).

Sections 97 to 102 of the *Broadcasting Act* (1996) deal with Exclusive Agreements to show sporting events. For these purposes broadcasting services are divided into 2 broad categories:

- free to air (*i.e.*, Channels 3,4, 5 and BBC); and
- all others (*i.e.*, satellite, cable).

Section 99 provides that contracts conferring the exclusive right to the whole or part of an event listed by Secretary of State is void. Under section 101 no broadcasting service in either category may show a listed event unless the other category had an equal opportunity to show it on one of their services. The list of events listed by the Secretary of State is not particularly wide (*e.g.*, 5 Nations Rugby is not on the list).

It is arguable that the narrowness of list restricts market entry. It may be that the best solution is to expand the list. However, the two broad categories of broadcasters means that satellite and cable are in the same "class". Accordingly, cable bids directly against BskyB. It may be that this element of the scheme should also be reviewed.

"Must carry" obligations (on local cable TV companies, broadcasters or TOs which can provide entertainment services).

"Local content" or "independent content" obligations on cable TV operators (see also section E above).

There are no must carry obligations under the 1990 *Broadcasting Act* on cable TV. Under the 1990 *Broadcasting Act* other broadcasters (excluding non-domestic satellite providers) must programme news, regional content, current affairs, religious material, children's shows, and meet a 25% independent production requirement. There is no local or regional content requirement for the 1990 *Broadcasting Act* LDOs. There are European and independent production requirements similar to those imposed on the terrestrial licences. Under the 1996 *Broadcasting Act* the must carry obligation is reintroduced for digital LDS. It will essentially require LDOs to carry terrestrial services on their systems. Old cable licences under the *Cable and Broadcasting Act* have a must carry obligation.

The ITC may give a direction to cease relaying foreign television programmes to all broadcasters (*i.e.*, cable TV and free to air).

(5) Gateway" Issues - Technologies for Open Access.

National legal requirements, standards or court practices (existing or planned) for the regulation of equipment such as set-top boxes and decoders.

The *Advanced Television Standards Regulations* (SI 95/3151) went before Parliament on 17 December, 1996. OFTEL's *guidelines on Conditional Access* are contained in its Consultation Document of December 1996. The *Conditional Access Service Class Licence* (following regulations) is in force.

OFTEL's approach is to:

- ensure that control of conditional access technology is not used to distort, restrict or prevent competition in television and other content services (especially where access is provided to competitors);

- ensure that control of conditional access technology is not used to artificially constrain consumer choice (regarding equipment, range of services or service packaging);

- facilitate consumer access to services on no more than one delivery mechanism or where switching between mechanisms; and

- ensure that control of technology is not exploited anti-competitively (*e.g.*, excessive pricing).

The regulatory regime is part of an attempt to regulate communication networks in a technology neutral fashion. The Government's aim is to bring conditional access for digital broadcasting and services using switched telecommunications networks under a single framework before 1 April 1999.

(6) Internet Domain Names - Preferred regulatory approach.

The Trade Marks Registry has issued a statement outlining its current practice for registering internet domain names as trade marks. The Registrar takes the view that domain names are signs which may constitute trade marks, subject to the usual criteria. The sign must be distinctive (*i.e.*, the domain name endings ".com", "co.uk" etc. are not distinctive). An applicant can give evidence of factual distinctiveness and prominent use of the domain name. The approach concentrates on the use of geographic top level domain names. Trademark disputes can therefore be resolved according to ordinary principles of national law (in each domain), and consumer confusion is reduced.

I. Universal Service Obligations and Public Service/Public Interest Requirements

(1) The definition of "universal service" at national level in light of the definition at Community level, and the regulatory treatment of new interactive or audiovisual services.

BT (and Kingston) must provide to every person who requests both:

(a) voice telephony services; and

(b) other telecommunications services consisting of the conveyance of messages except to the extent that the Director General is satisfied that a reasonable demand is to be met by other means so that it would not be reasonable, in the circumstances, to require provision of the services requested.

The definition of "telecommunications services" includes services consisting of the conveyance by means of telecommunications systems of signals for the importation of any matter otherwise than in form of sounds or visual images; visual images; speech, music and other sounds. Therefore, it could catch new interactive or AV services. There is no provision for contribution to the USO costs of providers resulting from supply of such services.

In its February 1997 Consultative Document on Universal Telecommunications Services OFTEL sets out the following as the UTS that should be available on reasonable request by 2001:

- connection to a fixed network able to support voice telephony and low speed data or fax transmission;
- the option of a more restricted package at lower cost;
- reasonable geographic access to public call boxes across the *United Kingdom* at affordable prices;
- free access to 999 and 112;
- itemised bills;
- the choice of selective call barring; and
- access to operator assistance and directory information.

It also intends to require BT to offer a "Lifeline" service package allowing incoming calls and emergency outgoing calls.

OFTEL will review the issue of funding and the definition again in 1999. it does not believe that the current costs warrant establishing a special fund.

Both the existing and the proposed definitions differ from the European concept in a number of respects.

(2) Operators obliged to provide universal service and the basis on which others are excluded from providing universal service.

BT and Kingston must provide, under their licence conditions. Mercury must provide services to those making requests who are within 10 Km of one of its nodes. New PTOs have no obligation to provide until they become "well established" (*i.e.*, 25% market share) in relation to either a particular service or a particular area. Cable operators (supplying telecommunications services) must provide to those within the area through which they have undertaken to roll out.

(3) Operators liable to contribute to the provision of universal service (and the terms and conditions of contributions).

BT (and Kingston) carry the costs. There is no fund or payments by other PTOs. BT's licence conditions permit it to levy "access charges" to share costs. However, it has never exercised this right.

In its February 1997 Document OFTEL reviewed the costs and "benefits" (*e.g.*, life cycle effects, ubiquity, brand recognition) of USO provision. It concluded that the current net costs do not justify setting up a funding mechanism. It will review the issue again in 1999 and consider whether it would be appropriate to put a funding mechanism in place (it currently considers that the most efficient means of paying to be for the PTOs to settle accounts between themselves on the basis of rules set by OFTEL).

(4) "Must carry" obligations of broadcasters and cable operators (the nature of the obligation and the terms of carriage (see section E & H).

See H(4) above.

(5) Other public service specifications affecting the content or information provided to subscribers.

There are no other specifications affecting content provision.

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