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LAW

REGULATING MARKET ENTRY IN THE
TELECOMMUNICATIONS SECTOR IN AN
INTEGRATED EAST AFRICA:
TOWARDS A COMMON LICENSING FRAMEWORK

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DEDICATION

This book is dedicated to my dear daughter **DENISE GASWAGA**.

To A Daughter-A Mother's Wish and Prayer
Gift! '*Kirabo*'! '*Zawadi*'! '*Sipho*'! '*Gaver*'!

What a year it has been!

Many moments that we could have shared have been lost, what a sacrifice!

Yet in the hands of surrogate 'mothers' you did thrive and gave me hope.

Life's situations demand making tough choices and sacrifice.

In your journey through life may you be able to thrive, achieve and excel.

'You've got to search for the hero (ine) inside yourself until you find a key to your life' -*M People*

E.M. Bakibinga,
Oslo, Norway.
August 2004.

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CHAPTER ONE

REGULATING MARKET ENTRY –AN INTRODUCTION

This chapter discusses the background to the regulation of the telecommunications sector in East Africa as well as the justification of the study.

1.0 Introduction and Background to the Study

The last decade of the 20th century saw unprecedented changes in the global telecommunications industry with the privatisation of a number of state-owned operators, the introduction of market-based approaches to the supply of telecommunications services as well as the evolution of pro-competitive and deregulation policies.¹ All these changes culminated in the demand for markets to open up. Liberalisation has spilled over into international trade putting growing pressure for global or regional rules for competition to facilitate market access.² These changes affected all countries including those in the East African region (Kenya, Uganda and Tanzania). In today's post-industrial economy, the importance of immediate communications, information management, the rise of international travel and global business has caused an explosion in the international trade in services.³ Telecommunications plays a vital role in the organisation and operation of the modern global economy as it has internationalised markets, reduced transaction costs, expanding productivity and directly increasing economic well-being.⁴

The liberalisation of telecommunications markets was motivated by: increasing evidence that more liberalised markets were growing faster and serving customers better; the need to attract private sector capital; growth of the internet; growth of mobile and other wireless services; and the development of international trade in telecommunication services.⁵

The need to control public spending and the seeming inability of state-controlled industries to innovate and respond to the needs of the marketplace has prompted a wave of privatisation and

¹ M. Tétrault and H. Intven; Overview of Telecommunications Regulation, Telecommunications Regulation Handbook, World Bank, Washington, D.C. 2002, p1-1

² V. Cable and C. Distler; *Global Superhighways: The Future of International Telecommunications Policy*, The Royal Institute of International Affairs, International Economics Programme, p.30

³ S. Black; Telecommunications Law in the Internet Age: The World Trade Organisation and its Telecom related Agreement, Morgan Kaufmann Publishers, London, 2002, p.153

⁴ J. Haring; *Telecommunications: The Concise Encyclopaedia of Economics*, The Library of Economics and Liberty, viewed 28/05/ 2004.

⁵ M. Tétrault and H. Intven; Supra Note 1, p1-1

introduction of competition.⁶ This joined with the driving forces of liberalisation, privatisation, regional integration and globalisation calls for appropriate regulatory frameworks to manage that change.

Regulation is regarded as part of the traditional role of government in which public officials set standards and rules to guide the operation of private business.⁷ Telecommunications liberalisation can be a complicated matter and definitely requires a careful approach and regulation, as market forces left on their own are not fully dependable in all circumstances. Choices have to be made regarding privatisation of state-owned operators, introduction of competition, opening of markets to foreign investment and establishment of pro-competitive regulations.⁸ Telecommunications regulation demands serious consideration as major public policy issues are involved such as; provision of public goods and externalities; rules for enlarging market access and the broad issues of consumer protection.⁹

Privatisation involves the transfer from public to private hands of the ownership of productive assets, decision-making powers and the entitlement to residual profit flows-objective being maximisation of profit and not social welfare.¹⁰ Liberalisation involves the lowering of entry barriers to all or part of a market, allowing third parties to compete with established and generally monopoly providers of goods and services and currently most countries have a combination of liberalised and monopolistic service.¹¹ Despite all these, barriers to market entry still exist some by design, others a natural consequence of forces prevailing in the economy. A barrier to entry, a structural feature of a market, places a new entrant at a significant disadvantage compared to a market incumbent. Forms of barriers include: regulatory barriers such as using individual licensing if new licenses are not being issued in certain markets which increases the importance of

⁶ P. Tarjanne; 'The Limits of National Sovereignty: Issues for the Governance of International Telecommunications', in pp.37-45, in W. Melody (ed.); *Telecom Reform - Principles, Policies and Regulatory Practice*, Technical University of Denmark, Lyngby 1997.

⁷ P. Osei; 'Regulation in a Flux: The Development of Regulatory Institutions for Public Utilities in Ghana and Jamaica' (mimeo, SALISES, University of the West Indies, Mona Campus, Jamaica).

⁸ Ibid.

⁹ V. Cable and C. Distler; *Supra*, Note 2, p. 26.

¹⁰ C. Fink, A. Mathoo and R. Rathindran; 'Liberalising Basic Telecommunications: The Asian Experience', HWWA Discussion Paper 163, HWWA-Institut für Wirtschaftsforschung-Hamburg, 2002.

¹¹ B. Petrazzini; *The Political Economy of Telecommunications Reform in Developing Countries: Privatisation and Liberalisation in Comparative Perspective*, Westport, London, 1995, p.17.

considering the number of licences in the market and the likelihood of new licences being issued when assessing the structural barriers to entry in a particular market.¹²

Monopoly or exclusivity rights are granted and the justification is; to allow governments to maximise revenues from sale; to attract private investors and to help countries without regulatory capacity to prepare for market entry.¹³ While some contend that an exclusivity period is necessary to encourage investment, the only reasonable explanation is to increase the government's revenues from the sale.¹⁴

Telecommunications traditionally is an industry with high upfront costs for infrastructure and low variable costs and with the rise of competitive and partially de-regulated markets, investment is riskier.¹⁵ If entry is costly, then the incumbent may be able to completely deter entry so that the outcome is a much more concentrated market structure and in situations of market externalities, entry deterrence could also be through the choice of a standard that is incompatible with that of potential entrants.¹⁶ It is such reasons that the need for regulation arises. Policy-makers worldwide have successfully used sector reforms to improve the performance of markets.¹⁷

The most critical complementary change for liberalisation of telecommunications is in the regulatory framework as regulation of market behaviour can help stimulate a more competitive outcome and ensure terms of access to the network for entrants, all necessary for competition.¹⁸ For a regulator to be very effective, it is important that key regulatory responsibilities fall within its mandate.¹⁹

¹² Malaysian Communications and Multimedia Commission, 'Guidelines on Dominant Position in a Communications Market,' posted at http://www.mcmc.gov.my/mcmc/facts_figures/codes_gl/guidelines/dp/dp.doc viewed on 25/05/2004.

¹³ M. Shirley; 'The Effects of Regulation and Competition on Telecommunications in Africa', World Bank, Washington D.C. 2001.

¹⁴ S. Wallensten; 'Privatising Monopolies in Developing Countries: The Real Effects of Exclusivity Periods in Telecommunications', AEI- Brookings Joint Center for Regulatory Studies, May 2003.

¹⁵ R. Entman; 'Balancing Policy Options in a Turbulent Telecommunications Market-A Report of the Seventeenth Annual Aspen Institute Conference on Telecommunications Policy' with D. Hatfield, The Current Status of Spectrum Management, Washington D.C., 2003 posted at <http://www.aspeninstitute.org/AspenInstitute/files/CCLIBRARYFILES/FILENAME/0000000717/Telecom2003.pdf> viewed on 10/06/2004.

¹⁶ C. Fink, *et al*; Supra, Note 10

¹⁷ S. Beardsley, I. Beyer von Morgenstern, L. Enriquez and C. Kipping; 'Telecommunications Sector Reform-A Pre-requisite for Network Readiness', McKinsey & Co. Inc, pp 118-136, p.118 posted at http://www.cid.harvard.edu/cr/pdf/gitrr2002_ch11.pdf viewed on 25/05/2004.

¹⁸ Ibid.

¹⁹ C. Fink, *et al*.; Supra, Note 10.

With globalisation, foreign investment is common and foreign investors emerge as clear favourites for different market segments. Foreign ownership has coincided with significant concessions to the incumbent in terms of ease of entry, interconnection and other regulation all aimed at attracting foreign direct investment (FDI).²⁰ Licensing arrangements are key to the success in attracting investment in the sector so the licensing regime should not constitute a barrier to market entry.

The East African region has also been affected by the current trend of regional integration and the need for adjustments in political and legislative approaches to issues so to meet the challenges presented by globalisation. The Partner States seek to establish a Customs Union so as to strengthen trade among themselves and are to abolish barriers thus creating the most favourable environment for the development of regional trade and investment - both FDI and investments generated regionally.²¹ A critical assessment of the EAC countries indicates that the region is largely characterised by pervasive poverty demonstrated in low levels of per capita income, human development and productivity; un-diversified economic structures dominated by agriculture, modest growth rates and a host of other challenges and constraints.²²

The sustainability of both high economic growth and efficiency in operations of private and public institutions are dependent on the adoption and effective utilisation of Information and Communication Technology (ICT) and the need to have an effective regulatory regime to ensure a secure and conducive policy environment.²³

1.2 The East African Community

The East African Community (EAC) is the regional intergovernmental organisation of the Republics of Kenya, Uganda and Tanzania, with its headquarters located in Arusha, Tanzania.²⁴ The EAC countries cover an area of 1.8 million square kilometres and have a population of 82

²⁰ M. Taka; 'The Internationalisation of the South African Telecommunications Sector', 2001 Annual Forum, University of Witwatersrand, Johannesburg 10-12 September 2001, posted at <http://www.tips.org.za/f2001/taka.pdf> viewed on 25/05/2004.

²¹ Ben Naturinda, Ag. Director, Management Information System Division; 'Overview of the Draft Protocol on the Establishment of the East African Community Union', posted at <http://www.ugandaexportsonline.com/eac.htm> viewed on 01/07/2004.

²² East African Community Online Discussion Forum on the Private Sector Development Strategy; 'Private Sector Development Strategy for the EAC-October 2003', posted at www.eacpsd.org viewed on 25/05/2004.

²³ Government of Uganda, National ICT Policy, July 2002, p.6, posted at <http://www.undp.or.ug/documents/ictpolicy.pdf> viewed on 29/04/2004.

²⁴ The East African Heads of State signed the Treaty for the Establishment of the East African Community (the Treaty) in Arusha on 30th November 1999.

million who share a common history, language, culture and infrastructure which are advantages for a unique framework of integration.

Prior to re-launching the EAC in 1999, the three countries had enjoyed a long history of co-operation under successive regional integration arrangements: the Customs Union between Kenya and Uganda in 1917, which the then Tanganyika later joined in 1927; the East African High Commission (1948-1961); the East African Common Services Organisation (1961-1967); the East African Community (1967-1977), and the East African Co-operation (1993-1999).

The objectives of the EAC include to: strengthen and consolidate co-operation in the agreed fields with a view to bringing about equitable development among the member states and establish an internationally competitive single market and investment area in the region.²⁵

The institutional framework includes a Legislative Assembly, a Court of Justice, the Summit of Heads of State, the Council, Committees and a Secretariat. The EAC Secretariat as the main co-ordinating body seeks to promote a people-centred economic, political, social and cultural development on the basis of balance, equity and mutual benefit for Partner States.

The EAC operates on the basis of a five-year Development Strategy that contains policy guidelines, priority programmes and implementation schedules. The strategy emphasises economic co-operation and development with focus on the social dimension. The Heads of State launched the first Development Strategy (1997-2000) in April 1997, followed by the second Development Strategy (2001-2005), in order to achieve economic and social integration. The new strategy emphasised the role of the private sector and civil society unlike the defunct EAC, which centred on the joint ownership and management of common services.

ICT programmes in Africa are moving to the dynamic phase as its role in development is recognised. National and regional development agenda have been developed through ICT policies and plans, aiming at creating the necessary economic, institutional, social, legal and physical environments²⁶ but more is required.

²⁵ East African Community Secretariat; 'EAC in brief', posted at <http://www.eachq.org/eac-in-brief.htm> viewed on 20/11/2003.

²⁶ *ibid.*

The role of ICTs in regional integration has gained considerable attention so regional economic communities are taking a leading role in consultations and studies such as harmonisation of policies, regulatory frameworks, and infrastructure.²⁷

Inadequate telecommunications reduces efficiency throughout the economy, diminishes the effectiveness of investment in priority sectors and development programmes, causes a comparative disadvantage in trade and investment and lowers the quality of life.²⁸ The EAC will not be left behind and therefore has to develop programmes to harness the benefits of ICT for the people of the region.

The proponents of the EAC seek to develop a common market for telecommunications services and each of the institutions established under the EAC have a role to play in the development of such a market. There is need for a number of legislative developments to be undertaken at the EAC level, as the example of the European Union (EU) illustrates. These developments should be reflected in the market performance and regulation. Market entry is a very crucial aspect in the development of competition in telecommunications markets. Current legal provisions require all prospective market entrants to acquire licences or authorisations to operate-which conditions if not suitably designed, deter entry.

The telecommunications sector in the EAC has performed well, contributing to national revenues, providing employment, improving the lives through corporate social responsibility and contributing to development. Reports from the EAC Secretariat indicate that there are a number of programmes planned and one of the priority areas is the development of a single licensing regime for the EAC.

Currently each Partner State implements divergent sector policies and if this is not addressed, the development of a common market will be hindered. An enabling policy and regulatory framework is essential to provide the sense of security required for investment. Regulation encourages investment by providing fair rules, which allows investors a profit, inspires confidence in the

²⁷ M. Chetty; NEPAD Ministerial Conference on Science and technology for Development, 'Information and Communications Technologies for Africa's Development', posted at http://www.nepadst.org/publications/docs/doc08_112003e.pdf viewed 21/05/2004. Also see UNECA - http://www.uneca.org/eca_programmes/it_for_development/default.htm

²⁸ B. Wellenius; 'Beginnings of Sector Reform in the Developing World', in B. Wellenius, P. Stern, T. Nulty and R. Stern (eds.); *Restructuring and Managing the Telecommunications Sector*, World Bank, Washington D.C., 1989 pp. 89-98, p.90.

stability of the business environment, and supports efficiency, by encouraging competition and market-based pricing and requiring efficient pricing where competition alone is inadequate.²⁹

The EU, with the most developed regulatory regime for a common market in telecommunications under a regional integration framework serves as the best example. It best illustrates the need for supranational regulation of the sector in light of globalisation- a proposal put forward in this study. In 1988 a study found the EU single market a challenge and in the sphere of telecommunications, it will offer a new framework of regulation and management, favouring the establishment of high capacity networks which will be an essential dynamic element of the productive capacity.³⁰ This should be the case for the common market in the EAC.

1.3 Statement of the Problem

Globalisation, WTO agreements and ITU recommendations have forced African regulators to restructure and design new communication modes as well as to reorient regulations towards competitiveness, capital investment and technological innovation.³¹ While models have been developed at global level, the need for more suitably adjusted regulatory regimes remains. The historical roots of today's regulatory regimes, lie in the social, economic, political and legal foundations of their respective states and so, the regulators evolving in the developing countries will also reflect their own historical roots from these perspectives.³² This explains the need to examine the main issues surrounding telecommunications regulations and necessary reforms at the EAC level before identifying suitable options.

As telecommunications becomes a regional industry in the EAC, there is need for a harmonised regulatory regime to ensure that competition is not distorted as the market opens up to foreign and cross-border investment. At global level, one of the potentially most serious constraints on the development of new communication systems is the lack of governance; systems of rules law and

²⁹ B. Levy and P. Spiller; Regulation, Institutions, and Commitment in telecommunications- A Comparative Analysis of Five Country Studies, World Bank, Washington D.C., 1994.

³⁰ J. Dellors in Telecommunications in Europe (Ungerer and Costello 1988), quoted in K. Button, European Telecommunications policy, in European Transport and Communications Networks: Policy Evolution and Change, in D. Banister, R. Capello and P. Nijkamp, *European Transport and Communication Networks: Policy Evolution and Change*, John Wiley & Sons, 1995 p.301.

³¹ M. Faye; 'Telematics Policies in the African context', posted at http://www.unesco.org/webworld/build_info/rinaf/docs/telematics_policies_makane_faye.html viewed on 01/07/2004.

³² International Telecommunications Union; 'The Need for Regulation', posted at <http://www2.itu.or.th/Coe/handbook/3RegGuideNoTC.html> viewed on 12/07/2004.

dispute settlement which all players can accept as efficient and equitable.³³ There is need to find a way in which the existing institutions under the EAC arrangement can implement this regime.

1.4 Justification of the study

The study sought to provide an in-depth understanding of the critical issues and options surrounding telecommunications regulation and reform at the EAC level. It improves on existing studies and the body of available literature in several ways: providing an insider's scholarly perspective of the legal issues relating to market entry. In light of many forces, the need to harmonise arrangements towards global level agreements such as the WTO Agreements considering the dynamic nature of technological developments in the electronic communication sector, remains critical. Telecommunications is of great importance to regional economies and the development of the common market, which warrants a suitable policy.

This study aimed at making a contribution to the general hypothesis that the development of an adequate legal regime for ICTs generally will enhance their ability to positively affect the governance process in East Africa. By easing market entry, it is presumed that access to telecommunications services will improve and with the proper regulatory framework in place, programmes such as e-Commerce, e- Democracy/Governance and e Learning and their consequential benefits can be made publicly available.

1.5 Objectives of the study

The overall objective was to examine the regulatory framework concerning market entry within the EAC, with a view to proposing a single approach for a common EAC market in telecommunications.

The specific objectives of the study are:

- i. To examine the current regulatory framework for licensing market entry into the telecommunications sectors of the three countries and any joint activities under the EAC.
- ii. To examine the possibility of a common regulatory regime for market entry into the EAC telecommunications sector.
- iii. To propose a way forward.

³³ V. Cable and C. Distler; Supra, Note 10, p.45.

1.6 Hypothesis

The lack of a common licensing framework for the EAC telecommunications sector will affect the development of a common market and sector performance in light of challenges such as globalisation and the need to attract investment.

1.7 Scope of the study

The scope of this study was limited to market entry (licensing and authorisation). While there are two aspects of licensing in telecommunications namely spectrum licensing and the grant of operating licenses, this study focused on the grant of operating licences for telecommunications services providers, only addressing regulation through licensing and not pricing. The geographical scope of the study is the East African region comprising of Kenya, Tanzania and Uganda. GATS/WTO obligations were discussed summarily only to the extent of their relevance to the study.

1.8 Synopsis

Chapter One consists of the introduction and background to the study comprising of a brief history of regional integration efforts in East Africa; regulation of the sector in the three countries including general facts and figures about the sector including its contribution to the EAC economy and prospects of a common market.

Chapter Two covers a discussion of principles, objectives and procedures of licensing and regulation and the role of the National Regulatory Authorities (NRAs) in determining market entry.

Chapter Three deals with a review of the telecommunications sector in East Africa plus legal, policy and institutional framework and joint activities under the ambit of the EAC all concerning market entry and licensing in particular.

Chapter Four includes a comparative analysis of experiences from the EU to determine what EAC can learn from the common regulatory framework for market entry.

Chapter Five consists of a summary of the findings and recommendations on the way forward.

1.9 Research Methodology

The researcher applied the problem-solving methodology limitedly: describing the difficulty addressed, defining whose and what behaviours constitute the difficulty, specifying the causes of

the problematic behaviours before identifying proposed solutions.³⁴ The researcher employed the qualitative research method. There was a historical-critical analysis of facts to determine the social and political challenges. A lot of emphasis was on secondary resources. The research involved:

- i. Desk review of relevant literature from distinguished research centres worldwide such as the Norwegian Research Centre for Computers and Law, Parliament of Uganda Library, a variety of Communications Law Centres and Universities, Internet resources and parliamentary debates. This literature included legislative and policy documents and analyses by various academic scholars from Africa, the United States and Europe.
- ii. Structured and unstructured qualitative interviews with professionals and public and private sector practitioners involved in the telecommunications sector in East Africa (NRAs and EAC Secretariat) and different parts of the world.

1.10 Conclusion

Having highlighted the general aspects and provided a discussion of the background to the issue of licensing and market entry to the telecommunications sector in East Africa, it is pertinent to delve into a more detailed discussion of market entry and the role of regulation.

³⁴ A. Seidman, R. Seidman and N. Abeysekere; *Legislative Drafting for Democratic Social Change-A Manual for Drafters*, Kluwer Law International, Boston, 2001 p.176.

CHAPTER TWO

MARKET ENTRY AND THE ROLE OF REGULATION

This chapter consists of a review of entry into telecommunications services markets and the role of regulation with a focus on licensing and the national and international legal regime governing it.

2.0 Market Entry and the Role of Regulation

Barrier to entry focuses on the ease that a new supplier can get into the market³⁵ and operate effectively.³⁶ More subtle policy-based ‘behind-the-border’ barriers can derive from differences in national regulatory systems, licensing of service providers or government procurement practices that discriminate against foreign suppliers.³⁷

To promote the required FDI, there is need for regulation. Gaining full benefit from private sector participation and liberalisation requires the regulatory environment to be conducive to a well-functioning competitive market. This can be achieved through legal and regulatory mechanisms and recourse to a strong and truly independent regulator capable of enforcing the rules.³⁸

One of the tools for telecommunication regulation is market structure regulation, which includes:

- i. Entry control through licensing of operators and spectrum,
- ii. Exit control to ensure continuity of service-carrier of last resort,
- iii. Control of collaborations among competitors,
- iv. Control of vertical and horizontal integration,
- v. Market boundary definition and limitation (geographic territories, service sectors and type of transmission medium),
- vi. Restrictions on the number of licences that may be held by one company.
- vii. Market structure strategies of liberalisation, devolution or consolidation.³⁹

³⁵ In telecommunications, ‘market’ is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximising firm, not subject to price regulation, that was the only present and future producer or seller of these products in that area likely would impose at least a small but significant and non-transitory increase in price, assuming the terms of sale of all other products are held constant.

³⁶ Eric Lie; Competition Policy in Telecommunications-Background Paper, International Telecommunications Union posted at <http://www.itu.int/osg/spu/ni/competition/Presentations/BackgroundPaper.pdf> viewed 26/05/2004.

³⁷ M. Brahmhatt; Measuring Global Economic Integration: A Review of the Literature and Recent Evidence, World Bank, November 1998.

³⁸ C. Kenny, J. Navas-Sabater and C. Qiang; *Information and Communication Technologies*-Chapter 24. Vol.2-Macro Economics and Sectoral Approaches posted at <http://www.worldbank.org/poverty/strategies/chapters/ict/ict0409.pdf> viewed on 01/12/2003.

³⁹ E. Noam and A. Singhal; *Supra-National Regulation for Supra-National Telecommunications Carriers?* SNF Report Number 51/96, Bergen, August 1996, p.1.

The deregulation of telecommunications has obviously contributed to reducing barriers to entry.⁴⁰ Entry regulation directly affects the market structure as free entry can generate too many firms within the market.⁴¹ Inevitably, liberalisation has spilled over into international trade and there is growing pressure for global or regional rules for competition to facilitate market access. The characteristics of contestable markets are: relatively easy market entry and exit with low barriers; for investors, easily understood rules and ease of investment or dis-investment; consumer choice and easy ability to switch between service providers, and transparent, easily understood market information relating to price and quality of service.⁴² One way of cultivating competition is to reduce barriers to entry and facilitate investment and dis-investment as investors bring new business models. The competitive position of firms is naturally affected by the telecommunications regime of the country within which they operate.⁴³

Time is of essence and the physical or geographical location of a business is dependent on how attractive the regime governing investments generally and the telecommunications sector specifically is. For investors, an early entry into a new market is profitable because it yields a strategic advantage in the market regardless of capital costs.⁴⁴ Operators are increasingly involved in international business and available evidence shows that such companies direct their efforts to countries which are closest in terms of psychic distance- a concept which covers physical distance, cultural similarities, incorporating language, legal systems and methods of doing business among others.⁴⁵ Regulators have to put in place conditions that encourage competition because for investors, a necessary condition for direct investment is the expectation of the investing firm to have monopolistic or oligopolistic advantage.⁴⁶

⁴⁰ M. Possas and J. Fagundes; 'Relevant Markets and Conditions of Entry in Telecommunications Services in Brazil: Implications for Antitrust and Regulatory Analysis', posted at <http://www.itu.int/osg/spu/ni/competition/resources/telecommunication/>, viewed on 19/07/2004.

⁴¹ J. Kim; 'Excess Entry, Entry Regulation and Entrants' Incentive', Discussion Paper Series A No. 402, Institute of Economic Research, Hitotushbashi University and School of Management and Economics, Handong University, January 2001.

⁴² P. Tarjanne, Secretary General-International Telecommunications Union; 'How would we recognise a competitive telecommunications market if we saw one?' posted at www.itu.int/ITU-D/ict/papers/competition/aei_r1.pdf, viewed on 14/07/ 2004.

⁴³ V. Cable and C. Distler; Supra Note 10 p.31.

⁴⁴ S. Holden and C. Riis; 'Entry into a new market- A game of Timing', *International Journal of Industrial Organisation*, 12 (1994) pp 549-568, p549.

⁴⁵ S. Young, J. Hamill, C. Wheeler and J. Davies; *International Market Entry and Development-Strategies and Management*, Harvester Wheatsheaf, Prentice Hall, 1989, p.9.

⁴⁶ See S. Lall and P. Streeten; *Foreign Investment: Transnationals and Developing Countries*, Macmillan Press Ltd, London, 1977, p.18.

Unless all regulatory barriers to entry and competition are dismantled at the outset, someone must decide how many competitors, under what conditions and who are next allowed into the market.⁴⁷

Market entry into the telecommunications sector is regulated because of its importance to investment decision-making and also given peculiarities such as network requirements and interconnection issues aspects, which should not be left to market forces. Left to market forces, interconnection would be used by the incumbent to ensure weak competition.⁴⁸ Critically, the danger is that there is no clear end in sight for government regulation, which distorts the market.⁴⁹ The regulator's role is seen to involve maintenance of an environment conducive to the efficient supply of services to the public but should not be in excess of what is necessary as stricter regulation raises barriers to entry.⁵⁰ Market forces should be allowed to play a key role though market regulation is still required not only where there is monopoly but also partial competition.

Regulatory intervention is required namely: to authorise or licence new operators; to remove barriers to market entry by new operators; to oversee the interconnection of new entrants with incumbent operators; and to ensure that competitive markets do not fail to serve high cost areas or low income subscribers.⁵¹

Regulatory objectives vary depending on the particular needs and aspirations of a society. However generally acceptable objectives, often reflected in policy documentation, have evolved. The most widely accepted are to: promote universal access to basic telecommunications services; foster competitive markets by licensing new competitors and existing operators so as to attract investment; prevent abuses of significant market power (SMP); create a favourable climate to promote investment to expand networks; promote public confidence in markets through transparent regulatory and licensing processes; protect consumer rights; promote increased connectivity for all

⁴⁷ P. Smith and B. Wellenius; *Strategies for Successful Telecommunications Regulation in Weak Governance Environments*, World Bank, March 1999.

⁴⁸ W. Melody; 'Interconnection-Cornerstone of Competition', Chapter 5, *Telecom Reform - Principles, Policies and Regulatory practice* 1997, p.53.

⁴⁹ H. Shooshan and P. Temin; 'Telecommunications in the 20th Century,' Strategic Policy Research Institute, posted at www.spri.com viewed on 26/05/2004.

⁵⁰ S. Djankov, R. La Porta, F. Lopez de Silanes and A. Shleifer; *The Regulation of Entry*, June 2001 posted at <http://rru.worldbank.org/Documents/PapersLinks/551.pdf> viewed on 20/06/2004.

⁵¹ See A. Baudrier; 'Independent Regulation and Telecommunications Performance in Developing Countries', University of Paris Pantheon-Sorbonne and Autorite de Regulation des Telecommunications, prepared for the Annual ISNIE Conference: Institutions and Governance, Berkeley, California, September 13-15 2001.

users through efficient interconnection arrangements; and optimise use of scarce resources such as radio spectrum, numbers and rights of way.⁵²

To ensure that these objectives are met, in light of current trends, market forces are expected to play a major role and ease of market entry is a compulsory requirement in this process. The government as custodian of public and national interest has a duty to ensure that operations and market developments are not contrary to its policy objectives and to maintain a regulatory role to guarantee that the provision of services is in line with national perceptions of the public interest

With the introduction of competition in the newly privatised markets, regulators provide the required balance by mediating and playing a facilitative, adjudicative or determinative role depending on the circumstances. The regulator has an important role in controlling competitive entry by granting operating licences and the criteria for the licences include: technical, financial and management capabilities; and ownership criteria such as limiting foreign ownership. NRAs have a duty to implement government policy in an objective and impartial way towards all market participants, to boost market confidence; encourage increased foreign and domestic investment and promote compliance with international trade obligations.⁵³ Such independence depends on the legal, political and institutional structure in place.

2.1 Licensing and Market Entry

The removal of barriers to international trade in telecommunications aims at encouraging investment, improving competition and global communications.⁵⁴ A licence is an administrative and unilateral grant by a public authority of a right to operate a service, subject to the terms and conditions specified in the licence or other regulatory instruments and presents contractual obligations of governments, regulators and operators and this is useful in countries where the legal and regulatory framework is less developed and therefore perceived as high risk for investment.⁵⁵ There are three approaches to authorising telecommunications: individual operator licences; general authorisations and no licensing requirements/open entry and these are applied in varying degrees depending on prevailing circumstances.

⁵² E. Lie; Supra, Note 36.

⁵³ M. Tétrault and H. Intven; Supra, Note 1, p1-6.

⁵⁴ See S. Stephenson; 'Non-Tariff Barriers and the Telecommunications Sector,' Paper written for Project on 'Trade, Investment and Competition Policies in the Global Economy: The Case of the International Telecommunications Regime', Institute of International Affairs, Rome Conference 18-19 January 2001 posted at http://www.sice.oas.org/tunit/STAFF_ARTICLE/steph01%20ntbtel.doc viewed on 19/06/2004.

⁵⁵ M. Tétrault and H. Intven; Supra, Note 1, p2-9.

General authorisations/class licences allow an entity that meets the basic terms and conditions of entitlement to provide telecommunications services without the need for an individual licence. The authorisation usually involves the definition of eligibility criteria and conditions with prior public consultation and all eligible operators are licensed.⁵⁶ Spectrum licences are issued for the services that require an authorisation to use radio frequencies.

Market entry is much determined by the licensing regime and regulators that impose strict local regulatory burdens or more costly requirements than other countries can handicap players in the national markets. Similarly, regulators protecting national operators from international regulatory disciplines will retard competition, service innovation and possibly economic growth by failing to implement the same competitive regimes as neighbouring countries.⁵⁷ Easier market entry leads to increased competition and the consequential benefits. Licensing of competitive operators aims at: expanding range of services to un-served markets; increasing sector efficiency through competition; decreasing prices, improving range and supply of services; stimulating innovation and introducing advanced services and generating revenues.⁵⁸

Licensing provisions that affect investor confidence are barriers to market entry because they prejudice investment decisions. Competition is likely to be the most effective method of promoting improvements in the sector.

Apart from licensing conditions, other laws affecting investment conditions determine market entry.

Given the role of regulation in service provision, licensing is an important regulatory tool. Licensing and authorisation are legal impediments to market access. A telecommunications licence authorises service provision or network operation and defines the terms, conditions major rights and obligations of such authorisation.⁵⁹

The licensing process is one of the most important processes undertaken in the course of reforming the sector as it determines the structure of markets⁶⁰, the number and types of operators (entry and exit), the degree of competition between them, the revenues earned by governments in opening the

⁵⁶ M. Tétrault and H. Intven; Supra, Note 1, p2-12.

⁵⁷ Ibid p1-22.

⁵⁸ ibid. p1-4.

⁵⁹ ibid, p2-1.

⁶⁰ See S. Verhulst; 'Introduction to Telecom Reform and Liberalisation: Policy and Regulatory Tools', Markle Foundation, August 2003, posted at <http://www.stanhopecentre.org/ict/materials/IntroTelecomReform.ppt> viewed on 16/06/2004.

markets and ultimately the efficiency of the supply of services. Licensing determines whether entry in different market segments should be limited or open and terms of entry, thus creating market forces.⁶¹ Licence payments, which are independent of the customer base, constitute an endogenous sunk cost of entry, which can deter market entry.⁶² Space limitations arise if geographical delimitations are marked out in the licence. Providing government regulation permits, licensing and franchising arrangements are space limited, enabling the regulator to segment the market nationally and internationally.⁶³

In many countries the balance between regulatory certainty and flexibility is achieved using regulatory instruments other than licences as the main elements of the regulatory framework but if the regime is not well developed then there is need to comprehensively codify the basic regime in the licence so as to provide the certainty required to attract new entrants and substantial investment to the sector.⁶⁴ Such licences should define exclusivity rights but this should not limit sector growth, reduce operator efficiency and competition.

Licensing is a relatively new development in many telecommunications markets, as in the past, with monopoly operators had a mandate stipulated in the law and therefore there was no need for licences.

2.2 WTO Obligations affecting Licensing

The General Agreement on Trade in Services (GATS) and the 1997 WTO Agreement on Basic Telecommunications (ABT) include trade rules applicable to telecommunications regulation and licensing and which members must comply with. WTO agreement was aimed at creating a competitive global telecommunications market. GATS sought to create a credible and reliable system of international trade rules to ensure among others fair and equitable treatment of all participants. The Fourth Protocol to GATS sought to liberalise trade in basic telecommunications services and taken with the dispute resolution mechanisms available through the WTO, creates an embryonic world regulatory system at the global level.⁶⁵ The basic GATS principles of Most

⁶¹ P. Smith, 'What the Transformation of Telecommunications Markets means for Regulation', Note No. 121, Public Policy for the Private Sector, The World Bank Group, Washington D.C., July 1997.

⁶² P. Bijl & M. Pietz; *Regulation and Entry into Telecommunications Markets*, Cambridge University Press, London p.27.

⁶³ S. Young, J. Hamill, C. Wheeler and J. Davies; *Supra*, Note 45.p.25.

⁶⁴ M. Tétrault and H. Intven; *Supra* Note 1, p2-18.

⁶⁵ P. Strivens and R. Bratby; 'International Regulatory Framework', *Telecommunications Laws in Europe*, J. Scherer (ed.) 4th edn. Butterworths, London, 1998.p.449.

Favoured Nation treatment, market access and national treatment are to apply to the sector. With regard to market access, each member undertook not to continue to use or create quantitative restrictions on market access by foreign suppliers, save for restrictions that are expressly listed in that member's Schedule of Specific Commitments.⁶⁶ Licensing is one of the identified mechanisms of a liberalised telecommunication regulatory environment.⁶⁷ The WTO has been given some uncontrolled regulatory powers in the area of basic telecommunications.⁶⁸ The number of service suppliers allowed and foreign equity participation or investments is the most crucial for the opening of telecommunications markets where restrictions to entry essentially come from exclusive rights or limitative licensing policies and investment restrictions.⁶⁹

2.3 Conclusion

The role that regulation plays in determining market entry has been highlighted since the licensing process affects the number of players allowed into the market. WTO sector specific obligations have to be taken into consideration before allowing entry. Having dealt with these key issues, it is significant that the next chapter delves even deeper into the regulation of the sector in East Africa.

⁶⁶ The restrictions to market access that are listed are on: the number of service suppliers; the value of service transactions or assets; the quantity of service operations or service output; the number of employees employed in a particular service sector; and on the types of legal entity through which a service may be supplied and on foreign investment.

⁶⁷ The WTO Reference Paper 1996 makes reference to public availability of licensing criteria.

⁶⁸ C. Von Engel; 'European Telecommunications Law: Unaffected by Globalisation?' Max-Planck Project group, posted at http://ssrn.com/abstract_id=311981 viewed 21/07/2004. See Annex III for the relevant WTO rules relating to telecommunications.

⁶⁹ M. Bronckers and P. Larouche; 'Telecommunications Services and the WTO', Journal of World Trade, p. 15. For historical developments on the same see C. Primo Braga, 'Liberalising Telecommunications and the Role of the WTO', World Bank, Private Sector Note No. 120, Washington, D.C., July 1997.

CHAPTER THREE

REGULATING MARKET ENTRY IN EAST AFRICA

This chapter concerns examination of the historical development of the telecommunications sector in East Africa right through to the current developments under the revamped EAC.

3.0 Historical Background

The regulation and administration of the sector in East Africa dates back to the pre-independence days when Uganda, Kenya and Tanzania (then Tanganyika and Zanzibar) were under British colonial administration.⁷⁰ When the British established firm administration over Kenya and Uganda, they recognised the advantages of jointly administering certain services within the region.⁷¹ Communications and other infrastructural services were under common administration for ease of governance, which provided the background for the joint administration of these services later on. Economic integration in East Africa developed without the benefit of theory having been a pragmatic response to administrative and commercial needs⁷² and was through different arrangements under several legal instruments.⁷³

The common approach for telecommunications developed as follows:

- i. The amalgamation of the Posts and Telegraphs Departments of Kenya and Uganda in the 1920s and in 1933, with that of Tanganyika providing an East African administration for both postal and telecommunications services which were financially dependent on the territorial governments.
- ii. The establishment of a self-contained, self-financing organisation, the East African High Commission (EAHC), in 1949 to provide for the control and administration of matters and services of common interest with the East African Central Legislative to pass legislation on a wide range of subjects, including inter-territorial communications.⁷⁴ The EAHC consisted of the governors of the three territories.⁷⁵ Emphasis was on the management of common services and matters of common interest.

⁷⁰ After World War I, Tanganyika was made a Mandate territory under the League of Nations and put under the charge of Britain and this automatically placed it under the arrangements previously made for Kenya and Uganda.

⁷¹ G. Kanyeihamba; *Constitutional Law and Government in Uganda*, East African Literature Bureau, Nairobi 1975. p.350.

⁷² A. Hazlewood; *Economic Integration: The East African Experience*, Heinemann, London, 1975 p.10.

⁷³ East Africa (High Commission) Orders in Council (1947 to 1961), East African Common Services Organisation Agreements (1961 to 1966) and the Treaty of the East African Community (1967 to 1977).

⁷⁴ E. Bakibinga; *The Legal and Institutional Framework for Achieving Regional Co-operation: A Study of the East African Legislative Assembly*, Unpublished LL.M Thesis, Makerere University, Uganda, 2003.

⁷⁵ East Africa (High Commission) Orders in Council Section 4(1).

- iii. The establishment of a common services organisation in 1961 on recommendation of the Raisman Commission that it was in the best interest of all the territories that the common services continue to be provided on regional basis.⁷⁶ The East African Common Services Organisation (EACSO) undertook the administration of the common services; the responsibility for policy rested with the Authority consisting of the principal elected ministers of the three territorial governments and later to the three Heads of State.⁷⁷ The EACSO was controlled by triumvirates of Ministers (Communications triumvirate consisted of Ministers for communications).⁷⁸ The EACSO was found to be structurally weak and this led to some of the stresses and strains that developed between EACSO members after 1961.⁷⁹ At independence, transport and communications infrastructure were administered at the regional level.⁸⁰
- iv. The establishment of the East African Posts and Telecommunications Corporation (EAPTC) with headquarters in Kampala, Uganda on recommendation of the Philip Commission in 1966. The East African Ministers responsible for Communications replaced the triumvirate.⁸¹ A Communications Council, responsible for controlling the EAPTC, was established and provided a consultative forum on communications.

EAC, plagued with many problems (ranging from ideological differences, lack of strong political will by the heads of state, lack of adequate institutional support, national problems, lack of strong participation of the private sector and civil society, the continued disproportionate sharing of the benefits, lack of adequate policies, breakdown of the rule of law, to lack of harmonisation of policies and law)⁸² collapsed in 1977. The Partner States incorporated national corporations to fill the vacuum created when EAPTC ceased to exist. The colonial powers left inadequate telecommunications hardware, infrastructure and an obsolete organisational structure which was

⁷⁶ A. Hazlewood; Supra, Note 72, pp 27-36.

⁷⁷ See Colonial Office, *The Future of East Africa High Commission Services, Report of the London Discussions*, June 1961, Cmnd 1433, London, HMSO, 1961.

⁷⁸ A. Hazlewood; Supra, Note 72 p. 36.

⁷⁹ See A. Hazlewood; Supra Note p. 37.

⁸⁰ S.K. B. Asante & D. Chanaiwa, 'Pan-Africanism and Regional Integration' in M. Mazrui & C. Wondji (eds.), *General History of Africa VIII- Africa since 1935*, (Oxford, UNESCO, 1999) pp 724-743 at p.730.

⁸¹ A. Hazlewood; Supra, Note 72 p. 85.

⁸² The Preamble to The Treaty for the Establishment of the East African Community signed in Arusha, Tanzania on November, 30th 1999(hereinafter referred to as the EAC Treaty) p.1 Paragraph 4.

ineffective in meeting the demands of an information-based economy and high technology industries⁸³ which structures, the corporations inherited.

The rapid spread of regionalism is one of the most important recent developments in the global trade system that resulted in the revival of the EAC. There is a lot to learn from the experience of EACSO though its relevance is limited by the fact that there was no private sector ownership in the provision of telecommunication services then.

3.1 Current Developments and Sector Analysis

The current status of the EAC telecommunications sector reveals a dynamic increase in investment and utilisation of ICT in the region.⁸⁴ There has been a steady growth in the number of mobile and fixed line usage over the years as tables 3.2 and 3.3 in *Annex VII* illustrate. These developments are due to regulatory changes in response to globalisation and demands from international organisations. Spurred by changes in technology, the abysmal performance of incumbent providers and prodding by international organisations, developing countries are privatising state-owned telecommunications providers, opening up portions of their markets to competition and building regulatory institutions.⁸⁵

To make the case for a common licensing regime, requires analysis of the relevant regulatory set up in each Partner State- examining: the effectiveness of the regulator; powers and mandate; terms and conditions; enforcement; exclusivity periods; fees; the judicial review process and interconnection issues at regional level. This analysis focuses on the capacity of key players in regulating market entry; the legal and policy regime within which they operate; human and other resources available and other issues relevant to the process.

3.1.1 General Overview and Sector Performance

Kenya

The sector was liberalised to attract private capital and increase efficiency by allowing competition in crucial areas, which would be fostered with the licensing of new players thereby increasing consumer choice and accelerating investment.⁸⁶ By clearly outlining the market structure, the

⁸³ E. Noam; *Telecommunications in Africa*, Oxford University Press, New York, 1999, p.3.

⁸⁴ See indicators in the Tables 1 and 2, Annex VII. Table 5 *Annex VII* shows the chronology of reforms.

⁸⁵ S. Wallesten; *An Empirical Analysis of Competition, Privatization and Regulation in Africa and Latin America*, World Bank, Washington D.C., May 1999, p.1.

⁸⁶ Communications Commission of Kenya; 'Telecommunications Sector Policy', posted at <http://www.cck.go.ke/policy/Structure.pdf> viewed on 23/06/2004.

licensing requirements and procedures would result in an environment where there is a significant level of regulatory certainty in the market, an attribute desired by investors and consumers alike.⁸⁷

The enactment of the Kenya Communications Act (KCA) in 1998 led to the split of Kenya Posts & Telecommunications Corporation (KPTC) into three separate legal entities including; Telkom Kenya Ltd (telephone services) and the CCK (regulatory authority).

The KCA provides for the establishment of a National Communications Secretariat (NCS) to serve as government policy advisory arm on all issues pertaining to the info-communications sector and the functions include formulation of policies and recommendations.⁸⁸

Telkom Kenya Ltd. was licensed as sole provider for fixed local, national long distance and international telecommunications services.⁸⁹ In 1999 a second GSM cellular licence was successfully auctioned and eight regional telephone-operating licences were sold to 3 Kenyan firms.⁹⁰ The sale was delayed in 2000 after the highest bidder failed to pay up the \$ 305 million purchase price, forcing revival of the bidding process.⁹¹

Safaricom, a subsidiary of Telkom, and Kencell Communications Limited operate national cellular mobile telecommunications services and CCK is in the process of licensing a Second National Operator (SNO) and plans to licence another mobile telephone provider.

In 2001 CCK reviewed and segmented the market into various service streams that are licensed separately. The market is structured as follows with: full competition in leased lines, data, paging and ISP; partial competition in local services, mobile analogue, mobile satellite and GMPCS and monopoly in domestic long distance, international long distance, VSAT and Fixed Satellite.

The cellular market segment recorded high growth rates of 23% per year from 1999 however; Kenya has not been able to achieve all policy goals.⁹² The sector was described in 2001 as

⁸⁷ Communications Commission of Kenya, 'Telecommunications Market Structures and the Licensing Procedures- The New Telecommunications Market Structure, December 2001', posted at <http://www.cck.go.ke/policy/Structure.pdf> viewed on 23/06/2004.

⁸⁸ Section 84 KCA.

⁸⁹ Plans are in place to privatise the incumbent by sale of 49% of equity to a strategic investor and CCK invited bids for the sale.

⁹⁰ Safitel, Telair Communications Ltd and Bell Western.

⁹¹ C. Ryan; 'Africa reluctantly begins to liberalise Telecoms', posted at <http://www.centerdigitalgov.com/international/story> viewed on 21/06/2004.

⁹² M. Mureithi; Kenya Telecommunications Sector Performance Review 1999-2003, Summit Strategies Ltd, Nairobi, 2003 posted at http://www.researchictafrica.net/images/upload/Kenya%2013_04_04%20MM%20v2.pdf viewed on 26/06/2004.

suffering from under-investment, political interference and unreliability.⁹³ The mobile operators have exceeded the rollout targets in the licences. The fixed operator however has not been able to meet set targets so the regulator had to impose fines.

Tanzania

Telecommunications sector reform was launched in 1993 and since 1995 a comprehensive privatisation programme has been in force permitting foreign investment and participation.⁹⁴

The Government's mission is to develop a stable regulatory environment to facilitate and attract investors in the sector. The government intends to license a SNO (fixed line) by February 2005.⁹⁵

The liberalisation schedule was: mobile-1995, local-2005; national and long distance-2005. Local services, domestic long distance, international long distance, wireless local loop and leased lines are still monopolies. There is full competition in mobile, private VSAT licences, terminal equipment trade, cyber cafés, telecentres, Data and ISP. Payphone services are not yet liberalised and public Voice over Internet Protocol (VoIP) is not allowed.

The main operator is Tanzania Telecommunication Company Ltd (TTCL) [70% market share now]⁹⁶, which operates fixed line basic telephony services enjoying a monopoly on mainland Tanzania, and a duopoly on Zanzibar. The TCRA has licensed: 2 basic telecommunications operators with TTCL throughout Tanzania and Zantel for Zanzibar (regional licence) using GSM fixed wireless⁹⁷; 5 land mobile cellular telephone operators; 8 public data network operators; 22 ISPs registered and 4 closed group data communications licences.⁹⁸

There is considerable foreign investor participation in the sector. Vodacom Tanzania was granted an operational licence in December 1999.⁹⁹ Detecon/MSI¹⁰⁰ Consortium hold 35% shareholding of

⁹³ D. Kimutai; 'Information Technology Landscape in Kenya: Telecommunications Infrastructure and Regulation', posted at <http://www.american.edu/initeb/dk1540a/Telecommunication%20Infrastructure%20and%20Regulation.htm> viewed on 14/07/2004.

⁹⁴ US Government; Foreign Trade Barriers-Tanzania, posted at <http://www.ustr.gov> viewed on 24/06/2004.

⁹⁵ According to Acting Director of TCRA, Abihudi Nalingigwa, plans for the SNO licence were to be issued by July 2004 and government to sell part of its 65% in TTCL to private investors, quoted in 'Tanzania: Second Fixed Line operator in the works', posted at <http://www.regulateonline.org/intelecon/2004/May/Tanzania> viewed on 14/07/2004.

⁹⁶ Section 12 vested in the TCRA the power to designate a telecommunications successor company to be a public telecommunications licensee to perform all or any of the functions relating to the operation and provision of telecommunications systems and services in Tanzania.

⁹⁷ African Connection Centre for Strategic Planning; Tanzania Rural ICT Market Opportunity, Final Report-October 2002 posted at www.infodev.org/projects/telecommunications/35/africa viewed on 27/06/2004.

⁹⁸ UNDP and Markle Foundation; Creating a Development Dynamic-Final Report of the Digital Opportunity Initiative-Appendix 3 National ICT Approaches: Selected Case Studies -Tanzania posted at <http://www.opt-init.org/framework/pages/appendix3case7> viewed on 24/06/2004.

⁹⁹ Caspian Construction and Planetal Consortium Tanzanian based-investors own 35% of the shares and Vodacom Group 65% Vodacom Group's shareholders include Telkom SA Ltd (50%), VenFin Ltd (15%) and Vodafone Group plc

TTCL with a four-year exclusivity period for fixed lines with an obligation to expand the fixed line network from 162,000 lines to 800,100 and pay USD 120 million for the concession to boost capital for expansion. The mobile operators in Tanzania, have met their targets easily but not the fixed operator.

Uganda

The Uganda Posts and Telecommunications Corporation (UPTC) under the auspices of the sectoral ministry, was established to provide telecommunications and radio communications services; to regulate telecommunications sector and grant licences to other operators.¹⁰¹ In 1994, Celtel was granted a licence for mobile cellular operations with the expectation of rapid sector development.¹⁰² However by 1995, Celtel was still having problems raising funds, was cream-skimming the market and had not expanded significantly.¹⁰³

The government implemented sector reforms given that telecommunication availability has a direct bearing on economic development.¹⁰⁴ Previously the sector had been run down as a consequence of the country's political and economic difficulties.¹⁰⁵

The reforms included separating the UPTC into different entities. Uganda Communications Commission (UCC) was established to independently regulate the industry and tender policy advice. In the absence of an appropriate legal regime, a comprehensive licensing process was adopted. A 'pre-package regulatory rules' approach where a moderately pro-competitive policy coupled with specification of initial rules into the licences of the main operating companies added up to a fairly robust regulatory framework.¹⁰⁶ Prices for most services were substantially re-balanced and liberalised prior to the award of the SNO licence, thereby increasing investment.

(35%) Vodacom, 'Introduction', posted at http://www.vodacom.co.za/about/corporate_profile/introduction.asp viewed on 30/June/ 2004.

¹⁰⁰ It is a German and Dutch Consortium.

¹⁰¹ Uganda Posts and Telecommunications Corporation Act 3/ 1983, Cap 107 Laws of Uganda.

¹⁰² Celtel Uganda with an investment of US \$ 35 million is backed by Mobile Systems International Cellular Investments (MSI) which owns 89.5 per cent shareholding and 10.5 per cent owned by the International Finance Corporation, the private sector arm of the World Bank. See 'Uganda Transport and Communication Profile', posted at <http://www.ugandainvest.com/transport.pdf> viewed on 24/06/2004.

¹⁰³ C. Mutalya; 'Status of the Telecommunications Sector in Uganda', Regional Workshop on the SISEL Program 22-26 September 2003, posted at <http://egov.unitar.org/spip/IMG/ppt/uganda-telecom.ppt> viewed on 14/07/2004.

¹⁰⁴ See Annex IV for details of Uganda's sector policy.

¹⁰⁵ B. Wellenius, P. Stern. R. Nulty and R. Stern; *Restructuring and Managing the Telecommunications Sector*, World Bank, Washington D.C., 1989.

¹⁰⁶ P. Smith and B. Wellenius; *Strategies for Successful Telecommunications Regulation in weak Governance Environments*, World Bank, Washington D.C. 1999.

Uganda's approach was to introduce immediately some competition in all services by authorising a SNO to provide local, cellular, domestic long distance and international telephone services both supplementing and competing with Uganda Telecoms Ltd. (UTL) the incumbent fixed line operator. Amendment to the Uganda Communications Act (UCA) separated licensing of SNO from the privatisation process to enable faster action on the licensing of the SNO and the winning bidder was the MTN/Telia Consortium.¹⁰⁷ UTL got its licence upon incorporation as a successor company.¹⁰⁸

Before the bidding process, licences were prepared for both UTL and MTN¹⁰⁹ and this was aimed at providing certainty for all parties involved and the issues covered included network roll-out, price control, interconnection, monopolistic prices and resale.¹¹⁰

The number of telephone lines, including cellular increased by more than 35% in the year after the SNO licence was awarded and by 1999, Uganda had more mobile subscribers than fixed line subscribers.¹¹¹ Uganda's teledensity has increased from 0.27% to 0.87%.¹¹²

Detecon/MSI won the bid for 51% stake in UTL, Telkom SA having pulled out of the race on the grounds that the operating terms and conditions stipulated were not considered sufficiently flexible in terms of its investment objectives.¹¹³

Foreign investor participation has been high and one of the emerging issues is that local participation in ownership of licensed telecommunications service providers is low.¹¹⁴

The Ugandan market has grown dynamically since 1996 when sector reform was initiated.¹¹⁵ The transport and communications sector has increased its contribution to GDP from 5.9% in

¹⁰⁷ It comprised of MTN South Africa, Telia Overseas AB, Tristar and Investco based in Uganda and Rwanda respectively with an initial investment programme of US\$ 75 million. MTN in a bid to ensure network quality introduced the first 1800 MHz network in Africa culminating in quality services and being voted Investor of the Year 2000 by the UIA and named Leading Telecommunications Communications Company in East Africa in PriceWaterhouseCoopers Most Respected Company survey.

¹⁰⁸ Section 83 UCA

¹⁰⁹ Both UTL and MTN are licensed to make available a range of communications services including international voice telephony services.

¹¹⁰ The SNO licence document contained a detailed default interconnection agreement to be imposed by UCC if negotiation of interconnection arrangements is not successful.

¹¹¹ C. Fink et al; Supra, Note 10. Uganda was the first country in Africa (and third in the world after Finland and Cambodia) to have its mobile subscribers exceed the fixed line.

¹¹² Of the 330,000 mobile phone subscribers, MTN has 200000, UTL has 85000 and Celtel has 45000.

¹¹³ A. Singleton, Executive for Corporate Communications quoted in S. Bridge; 'Telecommunications: Telkom seeks new lines after Uganda', posted in www.btimes.co.za/98/0726/comp/comp9 viewed on 24/06/2004.

¹¹⁴ Government of Uganda, National ICT Policy. Supra, Note 104.

¹¹⁵ There is a significant improvement of service delivery, tariffs have dropped by 70% and connection costs have fallen also see Uganda Communications Commission; 'Request for Applications to Pre-qualify to provide Universal Access Telecommunications Services' Kampala March 2004, posted at www.ucc.co.ug viewed on 21/06/2004.

2002/2003 to 6.3% in 2003/2004 especially due to new investments in telecommunications.¹¹⁶ The licensed operators in Uganda easily met most of their rollout obligations though some failed to meet sub-county presence and were relieved of their protection there. Mobile operators exceeded their targets and have been allowed to convert the extra lines into equivalent fixed ones which targets are pending.

3.1.2 Legal, Policy and Institutional Framework for Licensing

3.1.2.1 Mandate over Market Entry and Regulatory Effectiveness

All the NRAs regulate market entry through the issuance of licences and determine the number of market players. The NRAs licence and regulate telecommunications services using the law that sets out the rights and obligations of licensees for service provision,¹¹⁷ the Regulations¹¹⁸ and licensing agreements with operators. NRAs ensure the maintenance and protection of effective competition and encourage private investment. CCK has the mandate to enable persons providing services to compete effectively in markets outside Kenya.¹¹⁹ NRAs can use any regulatory tool to ensure competition in the sector. Persons seeking to operate telecommunications services apply for licences.¹²⁰ Uniquely, in Kenya, the renewal process is licence-specific so it varies according to the terms the parties can negotiate for, which reduces certainty and predictability.

The appointment process differs with CCK and TCRA¹²¹ board members being presidential appointees while for UCC, the board members are ministerial appointees but with Cabinet (chaired by the President) approval. Presidential appointments indicate sanction by and approval of the highest executive office, which is good but limitations of such appointments apply. In Tanzania, the Chairman and Vice Chairman of the board are appointed on the basis of place of origin (mainland Tanzania or Zanzibar). The President can remove the Board members from office after consultation with the relevant sector minister on stipulated grounds.¹²²

¹¹⁶ Government of Uganda, Ministry of Finance, Planning and Economic Development, Background to the Budget, July 2004, posted at www.finance.og.ug viewed on 22/06/2004.

¹¹⁷ Kenya Communications Act, Tanzania Communications Regulatory Authority Act, Tanzania Communications Commission Act and Uganda Communications Act.

¹¹⁸ Kenya Communication Regulations 2001, Tanzania Licensing Guidelines, Uganda Licensing Regulations (Draft of 2004).

¹¹⁹ Section 23(e) KCA.

¹²⁰ Sections 24 & 25 KCA, Regulations 9, 13 & 31 Kenya Communications Regulations 2001; Sections 25 & 27 Uganda Communications Act.

¹²¹ Section 12 TCRA Act.

¹²² Section 12.

In Kenya and Tanzania¹²³, the NRAs issue all licences for basic fixed telecommunications services and land mobile cellular services and not by the Minister, which presupposes less interference from politicians. TCRA cannot award or cancel a licence with exclusivity periods or universal service obligation or with a term of 5 years or more without prior consultation with the Minister and the relevant sector.

Uganda has different categories of licences: national operator's licence and mobile cellular licence. UCC grants minor licences and only advises the Minister on the grant of major licences.¹²⁴ The Minister's approval must be obtained for any action to be taken on major licences. UCC is required to prescribe the terms and conditions of all operators including major licences. Whether the Minister's involvement does not introduce unnecessary political influence is debatable and the measures to safeguard against this remain to be seen. Since the terms and conditions are determined by UCC, ministerial involvement may be a hindrance. Probably, major licences are granted by the Minister to provide the certainty of political blessing that most investors desire before committing resources. The lack of an independent NRA resulted in the Minister issuing major licences for the duopoly yet that of UTL was issued by UCC.¹²⁵ UCC approves the terms of interconnection agreements and upon failure of the parties to agree, can impose an interconnection agreement.¹²⁶ Modification has to be based on guiding principles¹²⁷ and decisions to renew, suspend and revoke, transfer, or subcontract by licensee require consultations with the operator subject to appeal to the Tribunal.

While making decisions, the NRAs are required to take into account whether the conditions for effective competition exist in the market and to ensure that unless justified, competition is not reduced.¹²⁸

The Minister gives policy direction¹²⁹ to the NRA. In Kenya, the NCS conducts policy analysis and the Communications department of the sectoral ministry in Uganda has responsibility to evaluate

¹²³ Section 4 TCRA Act 12/2003 and Licensing Guidelines.

¹²⁴ Draft Licensing Regulations.

¹²⁵ Interview with officials in UCC Licensing Department, 30/09/2004.

¹²⁶ Section 63 UCA. Also see Note 41 on MTN default interconnection agreement.

¹²⁷ Stipulated in Section 36 UCA.

¹²⁸ sections 19 TCRA and 5(2) TCC Act.

¹²⁹ Sections 6(4) TCRA Act and 6(1)a-7 TCC Act. and Section 11 UCA.

the current policies and modify them according to international trends¹³⁰ though the Minister issues guidelines and policy after consultation with UCC.¹³¹

Ministerial involvement in the appointment, determination of terms and remuneration and issuance of licences can culminate in political interference in licence-decision making process and a violation of the policy requirement for the separation of roles.

3.1.2.2 Licensing Process

Licensing guidelines have been developed in each Partner State and these streamline the licensing procedures.¹³² In Kenya and Tanzania¹³³, the licensing procedure involves a 60-day notice given before a licence is granted while Uganda does not have a time limit. TCRA is required to inform the applicant within 28 days of the registration of the application.

The 60 days-limit is set to ensure timeliness in the decision-making process.¹³⁴

The duration for decision-making on an application is not determined in the Statute, which can lead to delays in the licensing process, which may deter investment. Uganda does not have a time limit stipulated.

3.1.2.3 Licence conditions

The duration of the licences varies -basic telecommunications services (25 years -Tanzania, 25 years [incumbent] 15[new entrants]- Kenya, 20 years -Uganda) and cellular mobile (15 years - Tanzania, Kenya and Uganda).

CCK prescribes the conditions for all licences granted in Kenya, including obligations under international conventions such as the WTO requirements.¹³⁵

The Minister, in Tanzania, may after consultation with the TCRA give directions with regard to conditions to be included in licences and guidelines relating to issuing, varying or cancelling of licences which increases possibility of political interference.¹³⁶

UCC prescribes the terms and conditions of all operators' licences in Uganda and these can include specifications of apparatus to be installed or used; location and personnel to use such apparatus;

¹³⁰ Government of Uganda-Ministry of Transport, Works and Communications, 'Communications', posted at www.miniworks.go.ug/commdept1 viewed on 26/06/2004.

¹³¹ Section 12 UCA.

¹³² Kenya Communications Regulations 2001, Draft Licensing Regulations for Uganda and Tanzania Licensing Guidelines.

¹³³ Tanzania Licensing Guidelines; posted at www.tcc.go.tz/Guidelines_telecom viewed on 04/10/04.

¹³⁴ Section 18(2) TCC Act.

¹³⁵ Regulation 10, 11 Kenya Communications Regulations.

¹³⁶ Section 7 TCC Act.

and the provision of services to rural and sparsely populated areas¹³⁷ and provision of the service for which the licence was obtained.¹³⁸ In addition, all licence holders are under obligation to comply with relevant international conventions, regulations and recommendations¹³⁹ such as the GATS ABT.

Additional conditions can be imposed on public operators such as interconnection obligations and others are statutory.¹⁴⁰ A public operator is required not to show undue preference to or exercise undue discrimination against any person¹⁴¹ so to promote competition and ensure interconnection¹⁴² the cornerstone of competition in the sector.¹⁴³ In 2000, Celtel Uganda indicated licence limitation as a problem.¹⁴⁴

3.1.2.4 Exclusivity Period

The law in Kenya does not specifically provide for exclusivity periods, which implies that the exclusivity periods vary depending on negotiations between CCK and operators. It is interesting that the Appeals Tribunal struck out Telkom Kenya's exclusivity to provide the Internet gateway.¹⁴⁵

TCRA defines exclusivity of licence as any condition granted to a licensee or operator to provide certain services thereby provided in the licence in exclusion of other operators for a number of years specified in the licence.¹⁴⁶

In Uganda, UCA is silent on the exclusivity period probably granted to operators just as one of the terms; however an explanation is available on the UCC website. UTL and the SNO enjoy duopoly exclusivity for 5 years upto 25 July 2005, restricting protected telephony services to them and those service providers licensed prior to the beginning of the exclusivity period to provide the same. Currently the exclusivity rights to the international super gateway through the satellite have

¹³⁷ Section 35 UCA.

¹³⁸ Section 35 UCA.

¹³⁹ Section 41.

¹⁴⁰ This was the case for MTN and UTL. S. 58 UCA precludes UTL and the SNO from holding or acquiring ownership interests in the other company or any of its affiliates.

¹⁴¹ Section 43.

¹⁴² Conditions being non-denial of service and equality of treatment of operators.

¹⁴³ Section 58 UCA. Other conditions are stipulated in the Fourth Schedule and the Licensing regulations.

¹⁴⁴ E. Bakibinga and J.M. Bagonza; Information on the Management and Operations of the cellular Phone Service Providers in the Telecommunications Subsector in Uganda, Uganda Parliamentary Research Service, April 2000.

¹⁴⁵ G. Opiyo; 'Internet Gateway thrown open as Tribunal revokes monopoly', posted at <http://www.eastandard.net/intelligence/intel31070423.htm> viewed on 04/10/2004.

¹⁴⁶ Section 3 TCRA Act.

deterred competition and resulted in high Internet charges in Uganda.¹⁴⁷ Exclusivity periods which are justified as monopoly rights and restricted entry lower the cost of capital and make financing easier make it difficult for upcoming competitors to exploit new technologies such as the use of VoIP.¹⁴⁸

3.1.2.5 Licensing Fees

CCK is empowered to charge licence fees in Kenya¹⁴⁹ and the application fees for licences to operate local, international, or cellular mobile systems is an annual licence fee of 125 USD and an annual operating fee of 0.5% of audited annual gross turnover of the company.

In Tanzania TCRA collects an initial licence fee of 10,000 USD and an annual fee of 0.8% of audited annual gross turnover of the company.¹⁵⁰

UCC determines and levies licence fees, which become part of its funds as revenue. These fees are determined by the UCC upon consideration of administrative charges operators pay a one-off negotiated amount and 1% annual gross turnover plus spectrum fees. MTN negotiated and paid an initial licence fee of USD 5.6 Million.¹⁵¹

3.1.2.6 Licensing Enforcement

CCK has established a number of licensing enforcement mechanisms and the Telecommunications Licence Enforcement Unit (TLEU) is responsible for: promoting and enforcing fair competition among operators by investigating complaints and reporting to the CCK which takes action ranging from cease and desist orders to payment of fines; enforcing the requirements for licensing by monitoring; enforcing licence conditions by designing and ensuring that all licences comply with the conditions; enforcing standards; conducting routine inspections of premises and facilities to determine compliance and conformity with recognised standards and implementing sanctions imposed by law.¹⁵²

TCRA can make a compliance order to a person to refrain from contravening conduct or to take actions necessary for compliance with the law, impose sanctions for violation of terms of licence

¹⁴⁷ Parliament of Uganda, Committee Report- Communications Sub-sector, posted at www.parliament.go.ug viewed on 24/07/2004.

¹⁴⁸ N. Klein and P. Gray; 'Competition in the Network Industries-Where and How to Introduce It', Private Sector, World Bank, Note No. 104, January 1997. See M. Mureithi; Summary Report of the Proceedings of the 4th Annual AITEC Summit.

¹⁴⁹ Regulation 4, Kenya Communications Regulations.

¹⁵⁰ Section 49 TCRA Act & Licensing Guidelines.

¹⁵¹ E. Bakibinga and J.M. Bagonza; Supra, Note 144.

¹⁵² Section 100 Kenya Communication Regulations 2001.

and to investigate compliance with licence conditions.¹⁵³ Contravention of a licence conditions can result in cancellation or suspension of the licence or imposition of fines.¹⁵⁴ Penalties can be imposed for operating without a licence.

In Uganda, every licensee is required to annually prepare and submit to UCC a report of operations and services and to the extent to which the conditions of the licence are followed.¹⁵⁵ UCC has investigative and inspection powers (can issue letters of inquiry to get information) that can be delegated to a Committee.¹⁵⁶ In case of breach, UCC can impose sanctions.¹⁵⁷ UCC upon its own motion or upon a complaint filed by another party conducts inspections of licensed facilities and takes necessary action. In case of breach, UCC may issue warnings, impose monetary fines, revoke licences, seize equipment or commence criminal proceedings. Regulations to ensure compliance spell out the tools for investigation and penalties for non-compliance.¹⁵⁸

The limitations to effective enforcement have been identified as: inadequate staffing, lack of necessary equipment, inadequate technical competence, interference by politicians and local government authorities, the lack of home-grown regulatory practices and absence of the necessary institutional framework such as the Appeals Tribunal which has not yet been appointed.¹⁵⁹

3.1.2.7 Judicial Review Process

Section 102 KCA establishes an Appeals Tribunal for purposes of arbitrating in cases where disputes arise in Kenya and this is in place.¹⁶⁰

In Tanzania, appeals from decisions made by the TCRA lie with the Fair Competition Tribunal whose decision shall be final.

Uganda's system provides for a Tribunal consisting of a judge and 2 other persons appointed by the President on the recommendation of the Judicial Service Commission.¹⁶¹ The tribunal can appoint technical advisors, identified by the Minister, to assist in the execution of its functions and has

¹⁵³ Section 45(3) TCRA Act.

¹⁵⁴ Section 20 TCC Act.

¹⁵⁵ Section 49 UCA.

¹⁵⁶ section 50 UCA. There is an enforcement unit.

¹⁵⁷ section 53 UCA.

¹⁵⁸ The Uganda Communications (Enforcement Procedures) Regulations 2004, SI No. 41/2004.

¹⁵⁹ ITU, 'Domestic enforcement of telecom laws and regulations and the limitations: Uganda's experience', posted at <http://www.itu.int/md/meetingdoc.asp?lang=e&type=sfolders&parent=D02-RGQ18.1-C&source=Uganda> viewed 19/07/2004.

¹⁶⁰ Under the Chairmanship of a retired Chief Justice, Majid Cockar.

¹⁶¹ Section 76 UCA.

jurisdiction to hear and determine all issues relating to the UCA including licensing matters. An appeal from the tribunal lies with the Court of Appeal, the second highest court of judicature.¹⁶² Financial constraints have stalled the appointment of the tribunal affecting the resolution of disputes as courts at times refer complainants back to UCC, which usually handles technical matters only and encourages arbitration.¹⁶³

3.1.2.8 WTO Obligations¹⁶⁴

Kenya has a number of obligations concerning market-access, resale of excess capacity, foreign investment and exemptions in the telecommunications sector.¹⁶⁵ For non-public use of telecommunications services, there are limitations on market access except through the incumbent's network. Competition is therefore inhibited as the incumbent is protected.

Tanzania has not established sector-specific commitments for the sector. Uganda adopted the regulatory guidelines under the WTO and undertook a number of specific commitments/limitations on market access pertaining to presence of natural persons, requirement of registration and other market access issues. Upto 2003 only 3 operators were to have cellular mobile licences and any operator would have to be registered in Uganda. These market access restrictions would deter market entry.

3.1.2.9 Investment Regime and Environment

The Kenyan government restricts foreign ownership in the sector to 40%. The equity participation requirements are that any firm seeking a licence to operate in the liberalised market segments would require minimum 30% of equity under Kenyan ownership and for listed companies, there is need to conform to the regime governing capital markets.¹⁶⁶

The Monopolies and Prices Commission Act allows the Commissioner to determine matters that may affect competition in the economy including companies in the telecommunications business.¹⁶⁷

¹⁶² Constitution of the Republic of Uganda and Judicature Act Cap 13 Laws of Uganda.

¹⁶³ Interview with officials in UCC Licensing Department conducted 30/09/2004.

¹⁶⁴ See Annex III for details on country-specific obligations.

¹⁶⁵ Details are available at the World Trade Organisation website at http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm viewed on 22/06/2004.

¹⁶⁶ In July 2002, the rules were amended to allow foreign ownership of up to 75% and investment could only be increased with prior written approval of the Capital Markets Authority.

¹⁶⁷ Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504 of the Laws of Kenya posted at http://www.treasury.go.ke/mon_law_part1.htm viewed on 14/07/2004.

Investment is regulated by a dated law, which sets out to protect certain approved foreign investments.¹⁶⁸ The Investment Promotion Centre (IPC) is a one-stop centre where potential investors can get clearance and licensing of their businesses.¹⁶⁹

All investment license applications in Tanzania are subject to 35% local participation for approval and this may be a barrier to entry for those unable to raise the percentage required.

Foreign investors can only employ a maximum of five expatriate workers, which is a limitation. Tanzania Investment Centre (TIC) the primary agency of Government coordinates, encourages, promotes and facilitates investment in Tanzania and advises Government on investment matters.¹⁷⁰ The Centre issues a formal Certificate of Incentives, which serves as the official recognition of one's investment status in the country.¹⁷¹

Uganda is an attractive investment location because of its strategic geographical location, a fully liberalised economy as well as a predictable and stable economic environment.¹⁷² Uganda provides a competitive incentive regime including activities aimed at lowering barriers to regional trade, removed all restrictions on international capital transactions and carried out privatisation exercises.¹⁷³ Telecommunications services take priority for investment and providers qualify for incentives.¹⁷⁴

The Uganda Investment Authority (UIA) issues investment licences and assists in securing other licences and secondary approvals for investors.¹⁷⁵ There are no restrictions on foreign ownership of investments and no barriers to remittance of dividends.

¹⁶⁸ The Foreign Investments Protection Act 1964, posted at <http://www.kenyalaw.com/mainpage.htm> viewed on 14/07/2004.

¹⁶⁹ Investment Promotion Centre Act Cap 485 of 1986, posted at www.ipckeny.org/docs/main.htm viewed on 23rd June 2004. The policy aims at the development of a comprehensive framework that creates an enabling environment for investment in Kenya and one of the strategies is to ensure speedy enactment of an investment code that brings stability and predictability in the investment environment.

¹⁷⁰ Tanzania Investment Act No. 26 of 1997.

¹⁷¹ Tanzania-Investor's Guide, posted at <http://www.unido.org/doc/8060> viewed on 14/07/2004.

¹⁷² 'Brief Guide to Investing in Uganda', posted at <http://www.unido.org/userfiles/GaveauG/InvestUganda.pdf> viewed on 14/07/2004.

¹⁷³ The Uganda Transport and Communications Profile at www.ugandainvest.com/transport.pdf viewed on 16/07/2004.

¹⁷⁴ Investment Code Act Cap 92, Schedule 2 Laws of Uganda.

¹⁷⁵ Ibid. Details on the regime are available in Annex VI.

3.1.3 East African Region

3.1.3.1 General Overview and Sector Performance

Telecommunications markets are increasingly opening up at regional level, necessitating service providers to widen their scope in terms of business and competitive strategies.¹⁷⁶ The sector, in EAC, has survived setbacks namely: the continuing rural-urban digital divide, high tariffs for various services, virtual stagnation of growth of fixed lines and discontinuation of the implementation of the Digital Transmission project.¹⁷⁷ Following liberalisation in the sector, a large number of investors have been attracted. The regulators have been quite effective in ensuring a level playing field in the new liberalised environment, making sure that the new actors meet their roll out objectives and that the services provided are of high quality and affordable.¹⁷⁸ However the regulators face difficulties in enforcing obligations and penalties on operators for non-compliance especially in case of the incumbent where government is majority shareholder.¹⁷⁹ Constraints to cross-border trade and investment are due to limited developments of communication networks in the region and the inadequacies in the rules and regulations governing trade, payments and investments in the different countries.¹⁸⁰

There have been numerous attempts to develop programmes and projects for a common market in telecommunications¹⁸¹, which activities aim at establishing a regulatory framework that will promote sectoral and general economic development.

3.1.3.2 Legal, Policy and Institutional Framework

The EAC seeks to ultimately establish an export-oriented economy allowing free movement of goods, persons, labour, services, capital, information and technology. EAC aims at achieving co-operation in infrastructure and services such as co-ordinated, harmonised and complementary communication services and involves.¹⁸² This co-operation involves the ministries responsible for communication, institutions responsible for telecommunications and the EAC secretariat and

¹⁷⁶ M. Tétrault and H. Intven; Supra, Note 1, p1-22.

¹⁷⁷ EAC Secretariat; Final Report Preliminary Study on Harmonisation of Regional Communications Strategy, Arusha, November 2003, P.4.

¹⁷⁸ Ibid., P.22.

¹⁷⁹ Ibid.

¹⁸⁰ J. Mwandosya, Minister for Communications and Transport, Tanzania; 'Trade Facilitation and Infrastructure Development: Tanzania and the East African Region', Commonwealth-Tanzania Investment Conference, Dar-es-Salaam, May 2003, posted at <http://www.cbcbelink.com/cbcbelink/events/Tanzania/AccessPresentations> viewed on 14/07/2004.

¹⁸¹ See Annex II.

¹⁸² Articles 89-101 and Chapter 15 EAC Treaty.

targets: adopting common policies; improving and maintaining interconnectivity; harmonising tariffs; co-operating in training and exchange of manpower; adoption of a common frequency management and monitoring scheme; and finalisation of the privatisation process of the telecommunications companies. The EAC seeks to develop a single investment area and remove obstacles to the development of a common market¹⁸³ and to adopt common telecommunication policies in collaboration with other relevant international organisations.¹⁸⁴

The Treaty provides for an institutional framework for the achievement of these goals. The Council¹⁸⁵ is the policy organ and its Regulations, Directives, Decisions and Recommendations are binding on the Partner States, all organs and institutions of the EAC except the Summit, the Court of Justice and the Legislative Assembly (enacts legislation).¹⁸⁶ The East African Court of Justice is mandated to ensure adherence to law in the interpretation and application of and compliance with the Treaty but can have other mandate as determined by the Council.¹⁸⁷

Sectoral committees are responsible for developing priorities in respect to the sector.¹⁸⁸ The Secretariat initiates studies and research related to, and the implementation of programmes for the most appropriate way for achieving the objectives of the Treaty.¹⁸⁹

The formulation of a common competition policy and law was identified as one of the activities aimed at operationalising a common market, which means that government regulation remains for sometime.¹⁹⁰ The Assembly is slated to enact the EAC competition law.

The Heads of State signed the protocol establishing the Customs Union, which aims at the faster socio-economic transformation of the region as a single market and investment area and creating a viable integrated East African market to stimulate production, investments and trade both regional and international.¹⁹¹ The union aims at eliminating non-tariff barriers on all goods imported; introducing national treatment for Partner States.¹⁹²

¹⁸³ Articles 80 & 82 EAC Treaty.

¹⁸⁴ Article 99 EAC Treaty.

¹⁸⁵ The Ministers responsible for regional co-operation.

¹⁸⁶ Articles 14-16 EAC Treaty.

¹⁸⁷ Articles 23 and 27 EAC Treaty.

¹⁸⁸ Article 21 EAC Treaty.

¹⁸⁹ Article 71 EAC Treaty.

¹⁹⁰ EAC Secretariat; EAC Development Strategy (2001-2005).

¹⁹¹ EAC, 'Fifth Summit of Heads of State of the EAC-Joint Communiqué', posted at www.eac.int/news_2004_03_communique_sumit viewed 04/07/2004.

¹⁹² The Treaty provides for the establishment of a customs union, to be followed by a common market, then a monetary union and subsequently a political federation. The establishment of the union is considered a step towards the creation of a common market, which is basically the next stage in the East African regional integration process.

It is important to strengthen approaches at EAC level and establish regulatory procedures that permit an operator to be licensed only once for the entire region.¹⁹³ The development of a common market requires the opening up of markets to supranational carriers and ventures. Liberalisation leads to the emergence of global communications network alliances and carriers, to new types of service providers and to an end of the traditional notion of telecommunications as a national and territorial sector.¹⁹⁴ In this regard, market entry should be made possible on EAC-wide basis.

The East African Regulatory, Postal and Telecommunications Organisation (EARPTO) is a forum that seeks to harmonize and enhance development in the sector.¹⁹⁵ EARPTO promotes the improvement of postal and telecommunications services among the Member States. It works to harmonise regulations, share experiences on policy-making issues, and support training for personnel of the relevant government agencies. It also provides a forum for the EAC to formulate a unified position on the issues so that it can speak with one voice for the region at ITU meetings.¹⁹⁶ The need to harmonise policy at regional level and the enactment of legislations for the accelerated development of communications in the region has been emphasised at EARPTO meetings.¹⁹⁷ EARPTO looks forward to a common licensing platform to be achieved by identifying common aspects without changing policies then eventual harmonisation of policy.¹⁹⁸

The Preliminary study on Harmonisation of Regional Communications Strategy, commissioned by the EAC Secretariat, made a number of findings outstanding of which was that one of the persisting problems in the sector is the regulatory divergence, which creates a problem to investors and hinders co-ordinated development of the sector in East Africa. The communications regulatory regime though created from similar policies in the region has quite significant divergences as evident in the three laws-the differences being in aesthetic, structural and substantive nature necessitating harmonisation.¹⁹⁹

¹⁹³ F. Tusubira; Uganda: Challenges of the Digital Divide and Telecommunications Sector', posted at www.foundation-partnership.org/linchpin/Uganda.htm viewed on 14/07/2004.

¹⁹⁴ E. Noam and A. Singhal, Supra, Note 39.

¹⁹⁵ Bridges; 'Session: ICT policy institutions and key issues -- international, regional, and national', posted at http://www.bridges.org/resources/apc_training/ict_policy_primer.html viewed on 04/10/2004

¹⁹⁶ Ibid.

¹⁹⁷ Mr. E. Yonazi- East African Community (EAC) – Secretariat, Report of The 11th East African Regulatory, Posts and Telecommunications Organisations (EARPTO) Meeting held in Kampala, Uganda, 14th May 2002, posted at <http://www.ucc.co.ug/conferences/earptoReport.doc> , viewed on 14/07/2004.

¹⁹⁸ Interview with officials in UCC Licensing Department conducted 30/09/2004.

¹⁹⁹ EAC Secretariat; Supra ,Note 175, p. 22.

This study provides justification for the harmonisation of the regulatory framework for a number of reasons that are highlighted in *Annex V*.

With regard to licensing, the study recommends that: procedures for licensing should be singular and straight forward for both telecommunications and radio communication and licences be granted by one authority; and there should be uniform licensing procedures and conditions for all applicants-14 days in which to give reasons for refusal to issue licence and a right of appeal. The Communications laws should make reference to relevant provisions of national laws on competition for ease of reference.²⁰⁰ This study is very relevant because it provides a sound basis for any further attempts to examine the possibility of having a common regime at East African level and has managed to point out the divergences likely to negatively impact the development of a common telecommunications market.

3.1.3.4 General Observations on Licensing Regime in East Africa

The review of country sector performance has revealed that the sector is growing, contributing to the GDPs of Partner States and there is considerable effort to ease on barriers to market entry. Kenya started with a slow growth rate but has caught up and overtaken the other two although preliminary historical data indicates that the Kenya communications market has been larger than those of Uganda and Tanzania combined. Policy objectives are similar in all three countries with a few variations.

At the EAC level, telecommunications has attracted attention as evident from the projects and other proposed activities. However a number of differences stand out in licensing and in the investment regimes, all of which determine market entry.

3.1.3.5 Privatisation, Liberalisation and Market Structure

The market structure reflects full competition in some market segments, partial competition and full monopoly in others. There are different approaches to telecommunication service provision. Uganda used competition to drive development by licensing a SNO, while Kenya used Initial Public Offering (the first sale of stock whether debts and/or equity by a private company to the

²⁰⁰ Restrictive Trade Practices, Monopolies and Price Control Act, 1987-Kenya, Fair Competition Act 2003 Tanzania and Ugandan law on restrictive trade practices, monopolies and price control. See EAC Secretariat; Supra, Note 175, p. 28.

public) and Tanzania a combination of both licences in rural areas.²⁰¹ The effect of divergent approaches to liberalisation and privatisation in the sector is the development of limitations affecting the investment regime. Each of the Partner States has a different liberalisation schedule for the market segments. For example, Kenya has full competition for leased lines; partial competition in mobile while Tanzania has monopoly for leased lines and full competition in mobile.

Market entry is limited if for one Partner State, there is exclusivity for a particular service yet there is full competition in another. A company with interest in providing services across the region will have to reconsider the investment decision. Another critical aspect about privatisation is that Kenya Telkom was created as a result of corporation approach²⁰² so that for sometime the government of Kenya retained 100% ownership. The effect of this is that government and politicians will interfere unduly with the regulation of the sector usually to the detriment of new entrants. Reports from a number of studies illustrate that the problem with having a state-owned incumbent is that chances of political interference with the regulatory process increase. Worse still, Uganda does not have a law regulating monopolies.

3.1.3.6 Regulator's Mandate

The key players are NRAs, policy makers, including EAC institutions. The mandate of a NRA has a great impact on licensing decisions and enforcement of licensing conditions. Having divergences arises from the policy makers' intentions and sometimes how the draft-person reflects those intentions. CCK appears to have a broader mandate (ability to encourage cross-border operations), which TCRA and UCC do not expressly appear to have. What this means for a common market is to render some regulators helpless in the face of such transactions unless they depend on the incidental clause of the provision granting the mandate, that leaves more room for discretion. Whether this can have a negative consequence remains to be seen. In all Partner States, the regulatory authority grants operators licences and allocates and licences use of radio frequency spectrum which makes it easier on applicants to deal with one institution, limiting the possibility of frustration if one licence is granted and not the other.

²⁰¹ M. Mureithi, 'African Telecommunications Infrastructures for Information Access', UDT Occasional Papers IFLA UDT Core Programme Occasional Paper # 7 posted at <http://www.ifla.org/VI/5/op/udtop7/udtop7.htm> viewed on 19/07/2004.

²⁰² See Noam and Singhal; Supra Note 39 about types of privatisation in telecommunications.

Regulatory differences are often ascribed to differences in the legal, institutional, political or cultural framework of different countries, which differences are significant but do not justify substantial differences in technical or economic aspects of regulation²⁰³ and this is evident in the EAC region. UCC has a broad mandate to regulate market entry although a lot of ministerial involvement is permitted, which may be undesirable for decision making. The competence of the body is dependent on the resources available to the regulator which if not adequate affects the performance. The mandate may mean nothing much if the NRA is not facilitated with adequate resources to execute its functions.

The TCRA Act confers a lot of powers to the Minister, which may result in regulatory capture resulting in stifled competition and extensive disputes to the detriment of the sector.²⁰⁴ Experience shows that whether or not sector development is free from political interference largely depends on the personalities involved and not the legal provisions *per se*. The disadvantage of provisions that permit excessive involvement of politicians is that they provide an excuse for political interference. Ministers are bound by the doctrine of collective responsibility²⁰⁵ and in East Africa are elected representatives who may be re-called or voted out of office. In the circumstances, the involvement of politicians in the issuance of licences may not be a suitable option as political interests may ambush the decision-making process. Uganda appears to have the most independent regulator with the least ministerial oversight while Tanzania would appear to have the least independent regulator.²⁰⁶

UCC is expected to be more independent given the composition of the Commission (non-political persons who are appointed on basis of their professional competence) yet the CCK Board has Permanent Secretaries, usually next in line to Ministers, as Members which may increase possibility of political influence.

3.1.3.7 Ease of Interconnection at regional level

CCK has a duty to facilitate persons providing telecommunications services to compete abroad and interconnection is very crucial for this. MTN and UTL have interconnection agreements with Telkom, Kenya, which indicates that it is possible to have regional interconnection agreements –

²⁰³ M. Tétrault and H. Intven; Supra, Note 1, p1-22.

²⁰⁴ EAC Secretariat; Supra, Note 175, p. 27.

²⁰⁵ It is an administrative law principle. Collective ministerial responsibility means that as well as the individual responsibilities set out in law, members of the government must support agreed government policies and have a collective responsibility to carry out government policies decided by cabinet or resign.

²⁰⁶ EAC Secretariat; Supra, Note 175, p. 27.

how far is this from these companies actually being able to participate directly in markets in other Partner States. Operators are free to negotiate cross-border interconnection agreements.

3.1.3.8 Licensing Fees

The licensing fees vary especially with regard to the amount of the one-off payment and the percentage of the annual gross turnover.

3.1.3.9 Licensing Process

The licensing process can be described as more streamlined in Kenya and Tanzania where the process is clear but the regulators find the process easier in Uganda. There is need to speed up the licensing processes as slow and inefficient licensing procedures are some of the major barriers to investment.²⁰⁷

3.1.3.10 Investment Regime and Environment

Each Partner State seeks to attract investors in the different sectors and have competed for these for many years. For a common market, it will be interesting to see how the investment regimes are harmonised to be able to attract investment in the region. Kenya must reduce the cost of doing business to attract foreign investment and this requires comprehensive liberalisation of the sector.²⁰⁸

The main issue is that in fully liberalising markets, there is no restriction on the number of licensees wishing to participate and competition is on first come first serve basis and /or through beauty contest while in the partially liberalised markets there are restrictions with open competitive tendering process.

The incentive regime provided by the UIA is good but if what Kenya and Tanzania provide does not tally positively, market entry could be deterred by limited interest in investing.

Political stability is a crucial factor in influencing investment decisions and therefore the transition from the movement system of politics²⁰⁹ to multi-party politics will have a great impact on investment decisions not only in Uganda but also in the East African region, especially for investors interested in becoming regional operators. The current Heads of State are personally

²⁰⁷ F. Tusubira; Supra, Note 193.

²⁰⁸ J. Michuki, Minister of Transport and Communications quoted in C. Ryan, Supra, Note 91.

²⁰⁹ After 17 years of uninterrupted rule by President Yoweri Museveni, Uganda now faces a historic political test. It has to demonstrate that it has created the necessary institutions of government for a smooth power transfer from President Museveni and from non-party movement politics to multi-party democracy in 2006, posted at <http://www.crisisweb.org/home/index.cfm?id=2346&l=1> viewed on 27/06/2004.

committed to the regional integration effort and this commitment has been translated into timely decision-making and regular meetings of the Summit, the absence of which, as experience from the defunct EAC shows could have negative impacts on the development of a common market. Kenya and Tanzania on the other hand have had a relatively stable political environment since attaining independence, though corruption had reduced investor confidence in Kenya.²¹⁰

3.1.3.11 WTO obligations

Tanzania has not made any commitments under the sector with WTO, which means that NRAs and operators in Kenya and Uganda face more obligations than those in Tanzania, which will distort the market.

3.1.3.12 Exclusivity periods

The UCA and KCA do not contain definition or interpretation of exclusivity but the UCC website has an explanatory note about the meaning. The period is not fixed by law and is subject to negotiations, which explains the variations. If an upper limit is not set, licensees are able to get any period they bargain for. As long as exclusivity periods continue to run at non-coinciding times, this will affect operation at regional level because the fact that there is partial competition in some market segments in one country yet there is full competition in the same market segment in another country is bad for investors who seek to take advantage of the benefits of a regional market. The exclusivity period granted to operators is considered to be against the principles of competition but governments argue that exclusivity is aimed at safeguarding incoming investors because of small markets. With full competition these exclusive rights should cease to be.

3.1.3.13 Judicial Review

There are different judicial review processes involving different kinds of institutions with that of Uganda having the highest judicial authority being the second highest-ranking court of judicature.²¹¹ This should provide a boost for investor confidence. However, this Tribunal has not been established. The lack of a sector-specific body to handle appeals, in Tanzania, undermines the development of sector-rules as the competition authority may lack the competence required for

²¹⁰ Institute of Economic Affairs, 'Corruption in Kenya , A Call to Action' , posted at <http://216.239.59.104/search?q=cache:STev5CI2yMIJ:www.eldis.org/fulltext/corruption4.pdf+investment+and+effect+of+corruption+in+kenya&hl=en> viewed on 27/06/2004.

²¹¹ Constitution of Republic of Uganda, 1995, Judicature Act Cap 13 Laws of Uganda.

telecommunications matters. Competition policy is generic and cannot cater for sector-specific issues.²¹²

3.1.3.14 Institutional Arrangements

Save for the general institutional set up for the EAC, the sectoral committee on communications will be expected to do more for the achievement of a common telecommunications market. EARPTO definitely has a major role to play in the development of a common telecommunications market though there is need for concerted effort with an EAC institution, with ability to make bonding policy and legislative decisions to take the lead. Efforts like EARPTO are not a panacea to all problems.

3.2 Conclusion

In light of technological and financial strengths of foreign investors, NRAs may be overwhelmed and may not be able to adequately regulate the sector even negotiate the licence conditions as desired. Lord Denning's doctrine of unequal bargaining power continues to dog the negotiation of contracts for regulators in developing countries especially when foreign investors and international financial entities are involved.²¹³ The EU has developed a licensing regime for a single telecommunications market and an analysis of how the EU has handled the market entry issue in the next Chapter will shed light on what EAC can adopt.

²¹² P. Bijl and M. Pietz; Supra, Note 62.

²¹³ The doctrine states that English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infancy, coupled with undue influence or pressures brought to bear on him by or for the benefit of others *per* Lord Denning in *Lloyds Bank Ltd. v. Bundy (1975) Q.B. 326*.

CHAPTER FOUR

MARKET ENTRY IN EU: A COMPARISON WITH THE EAC

This chapter contains an analysis of the legal regime governing market entry in the EU telecommunications service sector and a comparison with what is prevailing in the EAC as seen in Chapter Three so as to best assess what the EAC can learn from the EU experience.

Much as there is a new regulatory package, in this study it is essential to examine the old regime which was designed to manage the transition from monopoly to competition with a focus to creating a competitive market and on the rights of new entrants as it is more relevant to the regulation of the telecommunications market in East Africa today.

4.0 Introduction

The European internal market, the world's largest in terms of the purchasing power,²¹⁴ contributes to the integration of the European economy: increasing intra-Community trade and productivity.²¹⁵ The EU is considered the best way to bring supranational market forces under control.

For telecommunications, the objectives of the EU include: to establish a Europe-wide integrated network; de-fragment national markets; and abolish regulatory inconsistencies among the Member States concerning tariffs, standards, access conditions, public procurement, among others.²¹⁶

In the late 1980s, the European Commission (EC) embarked on a liberalisation programme of the telecommunications market; opening and restructuring markets to enable the exploitation of a substantial demand and innovation potentials in the industry.²¹⁷ Focus has shifted from telecommunications services to electronic communication services as convergence makes the traditional separation of regulatory functions between the different components increasingly inappropriate.²¹⁸ The Internal Market requires the existence of advanced and sophisticated means of telecommunications and European planning and action in infrastructure policy, based on

²¹⁴ 370 million consumers (450 million after the enlargement).

²¹⁵ European Parliament; Principles and General Completion of the Internal Market, posted at http://www.europarl.eu.int/factsheets/3_1_0_en.htm viewed on 22/06/2004.

²¹⁶ Ibid.

²¹⁷ T. Kiessling and Y. Blondeel; The EU Regulatory framework in Telecommunications: A Critical Analysis, posted at http://itc.mit.edu/itel/pubs/kiessling_paper.pdf viewed on 22/06/2004.

²¹⁸ Under the new Directive the terms "electronic communications" and "electronic communications networks" include all electronic communications services and/or networks, which are concerned with the conveyance of signals by, wire, radio, optical or other electromagnetic means, including therefore, the broadcasting of radio and television programmes.

knowledge of past successes and failures in infrastructure planning and the future needs of the economy so that the value added of European integration be reaped.²¹⁹

It is important to consider the principle of subsidiarity,²²⁰ which determines the Commission and NRAs' actions and is intended to ensure that decisions are taken as closely as possible to the citizen.

Market entry is regulated by a number of legal instruments at EU and national level- a two-tier system, where NRAs and to a limited extent national competition authorities have a decentralised role but based on EC Directives and subject to Commission and Court of Justice review if necessary.²²¹

Entry restrictions should be based on objective, non-discriminatory, proportionate and transparent selection criteria relating to the availability of resources or on the basis of NRAs implementing award procedures on the same criteria.²²² The policy development behind the new regulatory regime aimed at reducing administrative barriers to market entry so as to promote a competitive European market. The EU telecommunications legislation is founded on two complementary principles: liberalisation under Article 100a EC Treaty (introduced by the Single European Act) and harmonisation under Article 86 EC Treaty.²²³

4.1 General Overview and Sectoral performance

The combined financial performance of the national markets of the 15 member states was estimated to be Euro 251 billion in 2003 up from Euro 211 billion in 2000²²⁴ though the level of investment in the sector varies country-wise as Table 6 illustrates.²²⁵

²¹⁹ D. Banister, R. Capello and P. Nijkamp; *European Transport and Communications: Lessons for the Future*, in D. Banister, R. Capello and P. Nijkamp (eds); *European Transport and Communications Networks: Policy Evolution and Change*, John Wiley and Sons Ltd. 1995 p.335.

²²⁰ It is the principle closely bound up with the principles of proportionality and necessity, whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level.

²²¹ J. Pelkmans; 'A European Telecommunications Regulator?' in P. Vass; 'Network Industries in Europe: Preparing for Competition', based on papers presented at a joint CEPS and Centre for the Study of Regulated Industries Conference held in Edinburgh 10-11 July 1997, pp.69-95, p.81.

²²² Commission Directive 90/388/EEC of June 28 1990 on competition in the markets for telecommunications services

²²³ C. Watson, T. Whealdon and the Communications Practice; *Telecommunications: The EU Law*, Palladian Law Publishers, Bambridge. 1999. p.xiii

²²⁴ European Commission; 9th Report on the Implementation of the Telecommunications Regulatory Package, p.25, posted at

http://europa.eu.int/information_society/topics/ecomm/all_about/implementation_enforcement/annualreports/9threport/index_en.htm viewed on 28/05/2004. (9th Implementation Report).

²²⁵ See Annex VII

The initial reforms were directed toward market liberalisation and the extension of market services with the NRAs at the forefront.²²⁶ The 1987 Green Paper opened a Europe-wide debate on the telecommunications regulatory environment, so to adapt it to the requirements of a single European market.²²⁷ Licensing was crucial to Open Network Provision (ONP), permitting market entry for competition and the allocation of scarce resources.

For ease of the single market development, the law evolved from the requirement of licences, with a few exceptions, to general authorisations. The Bangemann report signalled the need for the establishment at the European level of an authority to be charged with the minimum of necessary regulation concerning licensing, network interconnection, the management of scarce resources and general advice to the NRAs.²²⁸

The new regulatory framework²²⁹, which aims at making competition rules the prime instrument for regulating the market although sector-specific rules remain applicable in some instances, reduced the number of legal texts from 28 to eight.²³⁰ The flexibility of conditions stipulated in the new framework, has occasioned positive developments stimulating increased sectoral participation. The liberalisation of most information society markets has, depending on the services, partially been achieved with the initial stage resulting in a massive entry into the telecommunication services sector for instance a 113% increase between 1998-2001 in fixed telecommunications.²³¹

²²⁶ W. Melody; 'Trends in European Telecommunication: 2002 Status Report of Denmark's progress in Telecommunication Reform'; September 2002, Technical University of Denmark, posted at http://www.itst.dk/static/publikationer/denmark_2002.pdf viewed 23/07/2004.

²²⁷ European Commission; Green Paper on the development of the common market for telecommunications services and equipment (COM (87) 290).

²²⁸ W. Sauter; The System of Open Network Provision Legislation, pp105-133, p.107 in W. Hadding & U. Schneider (eds); *The Future of EC Telecommunications Law*; Volume 19 Series of Publications by the Academy of European Law in Trier, Köln, Bundesanzeiger, 1996.P.116.

²²⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (**Directive on privacy and electronic communications**) [Official Journal L 201 of 31 July 2002], Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (**Framework Directive**) [Official Journal L 108 of 24.04.2002], Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (**Authorisation Directive**) [Official Journal L 108 of 24.04.2002], Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (**Universal Service Directive**) [Official Journal L 108 of 24.04.2002], Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (**Access Directive**) [Official Journal L 108 of 24.04.2002] and Decision 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (**Radio Spectrum Decision**) [Official Journal L 108 of 24.04.2002]

²³⁰ Freshfields Bruckhaus Deringer; 'The New EU Regulatory Framework for Electronic Communications', December 2001, posted at <http://www.freshfields.com/practice/corporate/publications/pdfs/2315.pdf> viewed 26/07/2004.

²³¹ 9th Implementation Report

The development of the sector in EU is a culmination of policy changes concerning the role of telecommunications in the development of an internal market in light of globalisation.

The debate whether to have a single regulator or to continue relying on the NRAs to implement the regulatory package continues.

4.2 Legal, Policy and Institutional Framework for Licensing

A broad range of legislative instruments regulates the EU sector and those with direct relevance to market access or entry are analysed here.

The legal basis for regulating telecommunications in the EU market derives from provisions of the EU Treaty.²³² The Single European Act,²³³ a revision of the Treaty of Rome aimed at incorporating the specific concept of the internal market in the Treaty defining it as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’.

The European Court of Justice has confirmed the authority of the Commission to use competition law to liberalise telecommunications markets.²³⁴

4.2.1 The Old Regulatory Framework

The Commission adopted the Services Directive 90/388²³⁵ to abolish the exclusive rights granted by the Member States in the telecommunications services sector; with the exception of voice telephony (was extended to mobile and personal communications through Directive 96/2). The Commission decided that the Directive take effect on the adoption of the ONP framework directive²³⁶ which laid down the ground rules for harmonisation of conditions of access to and use of public telecommunications networks. Council Resolution 18/9/1995²³⁷ recognised as a key factor, the establishment in accordance with the principle of subsidiarity, of common principles for general authorisations and individual licensing regimes.

²³² Articles 28-31 (ex 30-37) (free movement of goods), Articles 43-55 (ex 52-66) (freedom to perform services and the right of establishment), Articles 81, 82, 86 (ex 85, 86, 90) (competition), Articles 95 (ex 100a) (standardisation), Articles 154-156 (ex 129b, c, d) (Trans-European networks) and Articles 157 (ex 130) (industry). The provisions indicated in italics were the former references in the Maastricht Treaty.

²³³ Article 18 (8a) The Single European Act was signed in February 1986 and came into force on 1 July 1987

²³⁴ France v The Commission of the European Communities, Case C 202/88, Decision of 19 March 1991.

²³⁵ Commission Directive of 28 June 1990 on competition in the markets for telecommunications services (90/388/EEC) posted at <http://europa.eu.int/ISPO/infosoc/legreg/docs/90388eec.html> viewed 22/05/2004.

²³⁶ Council directive 90/387/EEC (amended later by the EP and Council Directive 97/51/EC for the purpose of adaptation to a competitive environment in telecommunications).

²³⁷ Council Resolution 18/9/1995 on the implementation of the future regulatory framework for telecommunications

Commission Directive 96/19/EC, opened up the telecommunications market (including voice telephony) was to full competition on 1 January 1998 with a few exceptions.

The Maastricht Treaty mandated the Community to help to establish and develop Trans-European networks of telecommunications infrastructures, to contribute to economic and social cohesion through the interconnection and interoperability of national networks.²³⁸ The requirements of European integration suggested that the internal market should eventually culminate in a fully integrated market on national lines: what might be termed the 'European home market'.²³⁹ In absence of an adequate regulatory framework at that level, intending entrants would be faced with barriers.

The Community's competition rules are a condition for achieving the internal market. The Commission is responsible for application of the competition rules. The Full Competition Directive²⁴⁰ applied. The abolition of exclusive and special rights as regards the provision of voice telephony was to allow national operators to directly provide service in other Member State.²⁴¹ National operators were considered to have exclusive or special rights to provide the underlying infrastructure, including the acquisition of indefeasible rights of use in international circuits.

The Licensing Directive (97/13) addressed the harmonisation aspects of licensing aiming at standardising procedures and requirements imposed on new entrants wishing to join the liberalised market. The guiding principles for licensing were proportionality, objectivity, non-discrimination and transparency. The intention was for the licensing regime to provide the lightest touch possible to be compatible and consistent with the general principles of freedom of establishment and freedom to provide new services quickly and to encourage the widespread application of technological improvements.²⁴² The Directive contributed significantly market entry by clarifying and publicising the necessary conditions to be attached to authorisations and licences to ensure compliance with essential requirements. States could only limit the number of individual licences

²³⁸ The Maastricht Treaty provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, 1992.

²³⁹ Decision No 1336/97/EC of the European Parliament and of the Council of 17 June 1997 on a series of guidelines for Trans-European telecommunications networks [Official Journal L 183 of 11.07.1997] amended by Decision No 1376/2002/EC of the European Parliament and of the Council of 12 July 2002 amending Decision No 1336/97/EC [Official Journal L 200 of 30.07.2002].

²⁴⁰ 96/19/EC Directive amending 90/388/EC with regard to the implementation of full competition in the telecommunications markets, posted at http://145.18.106.100/doc/telecomrecht/eu/en/96_19_EC.pdf viewed 26/07/2004.

²⁴¹ Recital 6, Ibid.

²⁴² C. Watson, T. Whealdon & the Communications Practice; Supra 223. P.xiii

for any category of telecommunications services only to the extent required for allocating scarce resources.

Member States were required to ensure that NRAs co-ordinate, where possible, their authorisation procedures at the request of an undertaking intending to provide service or operate a network in more than one Member State. The NRAs were to shorten time limits for taking licensing decisions and to implement procedures regardless of national provisions relating to language requirements.²⁴³

Conditions attached to authorisations had to be consistent with competition rules of the EU Treaty and those on individual licences had to be justified and proportionate. The Directive regulated enforcement of conditions, fees, licensing new services as well as a one-stop shopping procedure²⁴⁴ for issuance of individual licences to undertakings applying for such licences in more than one Member State and notifications of intention to operate under authorisations, which was crucial because of the role of licensing.

Member States were required in the formulation and application of their authorisation systems, to facilitate the provision of services between Member States.²⁴⁵ Interconnection was closely linked to the licensing process because the terms on which it is granted are key to the economics of competing operators and with the liberalised telecommunications market in the EU, cross-border interconnection became of increasing importance.²⁴⁶

The Licensing Committee (representative of Member States and Commission) specifically addressed development of regulatory activities.

The Fifth Report on the Implementation of the Telecommunications Regulatory Package found:

- (i). Considerable differences in licensing-time limits, validity periods, charges and the classification of operators.
- (ii). Member States used the wide margin left to issue licences and not authorisations; charged high fees; imposed cumbersome information requirements; implemented discretionary conditions as mandatory and used numbering schemes to defeat competition.

²⁴³ Recital 16 Licensing Directive

²⁴⁴ Article 13 Licensing Directive. The one-stop-shopping procedure is a procedural arrangement facilitating the obtaining of individual licences from or in the case of general authorisations and if required, the notification to more than one NRA, in a co-ordinated procedure and at a single location.

²⁴⁵ Article 3(4) Licensing Directive

²⁴⁶ C. Watson, *Supra* Note 223 xxii

(iii). The one-stop-shopping procedure failed.

4.2.2 The New Regulatory Framework

The Framework Directive (2002/21/EC) and the Authorisations Directive (2002/20/EC) are the most directly relevant to market entry.

The Competition Directive seeks to ensure that every undertaking has the right to provide electronic communications services or put in place, extend or exploit electronic communication networks without restriction.²⁴⁷ Five principles underpin the new regulatory framework at Community and national level providing that the future regulation should: be based on clearly defined policy objectives; be the minimum necessary to meet those objectives²⁴⁸; further enhance legal certainty in a dynamic market; aim to be technologically neutral²⁴⁹ and be enforced as closely as possible to the activities being regulated whether regulation has been agreed globally, regionally or nationally.

The Authorisations Directive proposed: using general authorisations as the basis for licensing communication networks and services, with specific authorisations reserved for the assignment of radio spectrum and numbers; ensuring that the fees for authorisations cover only justifiable and relevant administrative costs, drawing on the expertise of a new High Level Communications Group involving the Commission and NRAs to help improve the consistent application of Community legislation and maximise the uniform application of national measures; reviewing existing legal provisions with a view to strengthening the independence of NRAs, ensuring an effective division of responsibilities between the different institutions at national level, improving co-operation between sector-specific and general competition authorities, and requiring transparent decision-making procedures at national level.²⁵⁰

Only a reasoned opinion on the part of the competent regulatory authority within the framework of a general request for authorisation may prevent operation. The Directive aims at strengthening the internal market, by harmonising and simplifying rules and conditions so that operators do not face

²⁴⁷ The Commission Directive of 16 September 2002 on competition in the markets for electronic communication networks and services 2002/77/EC [Official Journal L 249, 17.09.2002].

²⁴⁸ For example by introducing mechanisms to reduce regulation further where policy objectives are achieved by competition

²⁴⁹ Not to impose, nor discriminate in favour of the use of a particular type of technology, but ensure that the same service is regulated in an equivalent manner, irrespective of the means by which it is delivered

²⁵⁰ Before 24 July 2003, each Member State was required to take the necessary measures to guarantee each undertaking the right to provide services or exploit networks, without discrimination, in accordance with a general authorisation regime, which replaces the licensing system.

widely divergent licence regimes or fees in each Member State. The Member State retained the right to assign frequencies although access conditions, procedures and usage could be harmonised.

4.2.3 Licensing Mandate and Regulatory Effectiveness

There are variations across the EU as to which body issues licences for telecommunications service operation and which body executes the oversight function as reflected in Table 7 *Annex VII*. The mandate to grant licences lies with the NRA or Ministry depending on what the national legislation provides.

The different approaches to legislative drafting and regulation specifically have affected the transposition as in some Member States, the objectives enshrined in the national law do not directly reflect the regulatory objectives provided in Article 8, Framework Directive. The question is whether this is occasioned by legal philosophical differences. Individual EU members have not adopted exactly the same stance regarding the development of telecommunications policy, with the Anglo-Saxon-type approach leaning more towards simple internal efficiency of an industry while the continental philosophy looks at regulation in a broader context placing regulatory controls closer to government.²⁵¹

Political influence is likely to increase when the government wholly or partially owns or controls the incumbent. However in most Member States, the independence of the NRA from all organisations providing services is assured.²⁵² It is expected that in cases where a number of key decisions require the consent of the NRA officials appointed by the Ministry; review of decisions by the Ministry or transfer of some tasks, independence or impartiality may be ensured by the general principles of administrative law or other legislative instruments. In some countries some powers to act have not been explicitly conferred on the NRA.

The NRAs have the mandate to impose sanctions and enforce decisions though some market players have complained of unnecessary intervention just to achieve a given vision of what the market should look like.²⁵³ This can hinder sector development.

²⁵¹ K. Button; 'European Telecommunications policy', in *European Transport and Communications Networks: Policy Evolution and Change*, D. Banister, R. Capello and P. Nijkamp, John Wiley and Sons Ltd. 1995 p.312. See S. Djankov, R. La Porta, F. Lopez de Sialnes & A. Shleyer; 'The Regulation of Entry', June 2001.

²⁵² 9th Implementation Report

²⁵³ Teligen Ltd.; 'Study on Market Entry Issues in the EU Telecommunications Markets after 1st January 1998-A Report for the European Commission', 26th July 2000.p.34 posted at http://www.researcha.com/pooled/articles/BF_WEBART/view.asp?Q=BF_WEBART_1243 viewed on 28/05/2004.

Some NRAs have been considered to lack technical skills to challenge the incumbent that has better trained human resources than the regulator or other operators have which places the NRA at the mercy of the incumbent.²⁵⁴

4.2.4 Licensing Process

Under the Licensing Directive, for authorisations, the operator had to notify the NRA. In the case of individual licences, the procedure was determined by the Member State. Where individual licences were granted in case of allocation of scarce resources, consideration had to be taken of a number of factors.

The speed of process and the existence of defined timeframes are both critical to encouraging investment and competitive market entry.²⁵⁵ Research shows that in the countries leading in sector investment such as UK, and Finland, it was relatively easy to obtain a licence to provide telecommunications services.²⁵⁶ The opposite is true in Member States such as France where there is a tedious licensing process.

4.2.5 Enforcement

Non-compliance with a condition attached to the licence, may lead the NRA to withdraw, amend or suspend the individual licence or impose compliance measures. The time frame is very elaborate. Proper implementation of the procedural requirements of the Authorisation Directive governing compliance with the conditions is in question as there are variations in national application.

4.2.6 Judicial Review

Member States are required to lay down an appropriate procedure for appeals against licensing decisions and appeals should be to an independent institution, not influenced by the NRA. Some Member States have provided that decisions stand pending appeal only if there is a specific order by the NRA to that effect yet the Framework Directive requires that decisions should stand unless the appeal body decides otherwise. The possibility of appealing decisions of the regulator and the way in which such appeals are implemented in practice can significantly impact the effectiveness of a regulatory regime.²⁵⁷

²⁵⁴ Ibid. p.33

²⁵⁵ ECTA, Jones Day & SPC Network; 'Regulatory Scorecard, Report on the relative effectiveness of the Regulatory frameworks in Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Spain, Sweden and the United Kingdom', posted at <http://www.spcnetwork.co.uk/uploads/Scorecard.pdf> viewed on 19/07/2004.

²⁵⁶ Teligen Ltd.; Supra Note 253. p.30

²⁵⁷ ECTA, Supra, Note 255.

4.2.7 Licensing Fees

The Licensing Directive required that fees only cover the administrative costs incurred in the issuance, management, control and enforcement of the applicable individual licences and these should be proportionate to the work involved and published.²⁵⁸ Charges were only to be imposed to ensure the optimal use of scarce resources. There are disparities in licence fees ranging from Germany, which has ‘one-off’ initial high licence costs, ranging between 1.5 to 5.4 million Euros; France, which has an annual fee of up to, Euro 762,000 to Ireland with fees fixed at 0.5% of turnover.²⁵⁹ High licence fees act as a barrier to market entry in some countries.

4.2.8 Institutional arrangements

The Framework Directive focuses particularly on the responsibilities and powers of the NRAs since they are the foundation of the new regulatory system.²⁶⁰

The Commission (Directorates General on Competition and Telecommunications monitors the implementation of telecommunications liberalisation.²⁶¹ The European Community stimulates research and development in the telecommunications sector to increase the sector's competitiveness.

The European Telecommunications Standards Institute (ETSI), founded in 1988, is now responsible for setting common standards, such as for ONP and mobile communications (GSM).

The European Parliament has attempted to strike a satisfactory balance between the liberalisation needed to promote market development and the regulation needed in order to protect consumers and has used the co-decision procedure to have its amendments accepted, for example in the application of ONP to voice telephony.²⁶²

The European Regulators Group for Electronic Communications and Network Services (ERG), composed of the heads of each relevant NRA in the Member State, established to provide an

²⁵⁸ Article 11, Licensing Directive.

²⁵⁹ Teligen Ltd.; Supra Note 253.p.28,

²⁶⁰ 9th Implementation Report.

²⁶¹ Currently the 9th Implementation Report is available. Directorates General IV and XIII deal with telecommunications.

²⁶² European Parliament; Fact sheets of the European Parliament, ‘Telecommunications’, posted at http://www.europarl.eu.int/factsheets/4_7_7_en.htm viewed on 22/07/2004.

interface for advising and assisting the Commission, allows co-operation and consultation with market operators, consumers and end users²⁶³

International Telecommunications Users' Group (INTUG) acts as a single voice for telecommunications users and its mission is to ensure that users access affordable, interoperable services and that their voice is heard and argued for the introduction of competition.

The Communications Committee has been established under the new framework with a view to replace the ONP Committee and the Licensing Committee, which are instituted under the old regulatory package.²⁶⁴ The Committee assists the Commission in carrying out its executive powers under the new regulatory framework. It exercises its function through advisory and regulatory procedures in accordance with the Council Comitology Decision and furthermore provides a platform for an exchange of information on market developments and regulatory activities.

There have been calls for the creation of a European regulatory authority and the question is whether the current decentralised system of ONP should be replaced by a centralised European telecommunications agency.²⁶⁵ The recommendation for a European Regulatory Authority was based on the consideration that some regulatory tasks would be better undertaken at Community level. Currently, the practice is to continue with NRAs as the implementing agencies for EU policy. The debate continues.

EU has many regulatory bodies in telecommunications, which requires a lot of co-ordination on policy formulation and implementation issues.

4.2.9 WTO obligations

EU participates in the WTO as an alliance (European Communities)²⁶⁶. The Council adopted a Decision in November 1997 approving the negotiation results on behalf of the European Community. The agreement in the form of an additional Telecommunications protocol to GATS entered into force with a few restrictions on transition periods for liberalisation in certain Member States (consistent with the internal EC liberalisation process) and direct foreign ownership

²⁶³ Decision 627/2002/EC establishing the European Regulators Group for electronic communications networks and services, posted at http://europa.eu.int/information_society/topics/ecom/useful_information/library/legislation/text_en.htm#dec_2002_627_ec viewed on 27/07/2004.

²⁶⁴ Communication and Information Resource Centre; INFSO Communication Committee, posted at <http://forum.europa.eu.int/Public/irc/infso/Home/main> viewed on 29/07/2004.

²⁶⁵ W. Sauter; Supra Note 228.

²⁶⁶ Though the 25 Member States are WTO members in their own right.

limitations in some Member States (i.e. France and Portugal). The EC and its Member States undertook binding regulatory commitments on the basis of the full Reference Paper. From the different commitments made, there are considerable variations concerning the conditions that operators will find depending on the specific market access commitments undertaken.

4.3 Observations

The NRAs have a degree of discretion in implementing regulatory framework and are doing most of the implementation work.²⁶⁷ However, there are variations in the structural independence of NRAs and the regulatory mandate or responsibility across the EU Member States. These are variations that could have a great impact on the market. Diverse outcomes are possible from a completely harmonised legal framework due to differences in implementation and discretionary powers of NRAs to set conditions. It is very difficult to see how NRAs can be expected to achieve harmonised outcomes if the objectives, approaches and processes they employ are significantly different.

The regulatory regimes in Germany, the Netherlands and UK are usually viewed as relatively pro-competitive by exerting a lot pressure on incumbents yet the French regulator is biased in favour of the state-owned incumbent.²⁶⁸

There is great variation in the effectiveness of national regulatory regimes despite the fact that each Member State is supposed to implement a harmonised EU regulatory framework.²⁶⁹ These differences may appear negligible but negatively impact the development of the sector as for pan-European operators, the main barrier to entry and to competitive development is the inconsistency of regulations across Europe.²⁷⁰ A study in which the regulator's general functions²⁷¹ were assessed, revealed that UK and Denmark ranked first or second and Belgium and Germany ranked eight or ninth and that investment was higher in UK and Denmark than in the other two Member States.²⁷² The report concluded that the levels of total investment in telecommunications vary

²⁶⁷ Bijl & Peitz ; Supra, Note 62, P.17

²⁶⁸ Ibid. P.18

²⁶⁹ J. Byskata; 'A Single Market in Telecommunications?', posted at <http://www.ectaportal.com/uploads/3032singlemarketpr1.doc> viewed on 25/05/2004.

²⁷⁰ See Teligen Ltd.; Supra, Note 253.p.4

²⁷¹ Speed of process, transparency, effectiveness of sanctions and scale of resources, effectiveness of appeal procedure and independence; dispute settlement mechanism, application of access regulations, key access products and implementation of the new regulatory framework

²⁷² ECTA, Jones Day and SPC Network; Supra, Note 255.

significantly between Member States and that there is a strong and positive relationship between levels of investment and levels of regulatory effectiveness.

There is a lot of commitment, institutional co-ordination, political effort aimed at developing a single market, and research and development activities in the sector, which definitely provides a suitable backdrop for the development of the telecommunications sector in a single market.

Regulatory efficiency has resulted in increased investment in those countries with better implementation mechanisms while there has been low investment in those with poor regulation.

The common policy development from EU towards Member States has led to harmonization, which assists in reducing entry barriers.

The question remains what the Commission or other bodies can do when transposition is done in a way that results are contrary to the policy objectives and whether infringement proceedings are enough.

4.3.1 Weaknesses of the EU framework

The content of the new regulatory framework is to a greater extent adequate but there are deficiencies in implementation as Member States take liberties. The framework law remains exactly that- just providing directions and then reacting when these are not met. Implementation is the issue.

Reviews have revealed failures to transpose legislation and that a significant part of the adopted directives that formed the backbone of legislation on the internal market were not transposed into national law, or were badly transposed, in addition to failures in implementation.²⁷³ By November 1 2003 only 8 countries had taken action to incorporate the new regulatory framework into national law.²⁷⁴ Acts that had been properly transposed as scheduled were sometimes badly implemented by national administrations, either because some of their provisions were overlooked in administrative practice, or were differently interpreted from one country to another; moreover operators and consumers affected by these failures did not always have access to rapid and

²⁷³ Highlighted by the Sutherland report in October 1992, drawn up at the Commission's request. Europe Information Service; 'The Internal Market after 1992: Meeting the Challenge'-Report to the EEC Commission by the High Level Group on the Operation of the Internal Market presided over by Peter Sutherland, October 28/1992, posted at <http://aei.pitt.edu/archive/00001025/> viewed 28/08/2004.

²⁷⁴ 9th Implementation Report, p.3,

effective means of redress.²⁷⁵ While providing this impetus, the Commission also took repressive action by stepping up its powers under Article 226 (169) EC Treaty for prosecuting infringements by the Member States which were delaying transposition of directives, transposing them incorrectly, or implementing them badly.²⁷⁶

A main concern is that the aims of the framework could be put at risk if NRAs do not act in a timely manner at national level.²⁷⁷ The Commission's Internal Market Strategy points out that late transposition and ineffective enforcement remain a serious problem for the proper functioning of the single market. By opening infringement proceedings, the Commission plays a proactive role in relation to the new framework in order to achieve maximum legal certainty for market players and investors in this highly dynamic sector.

Competition law acts slowly, one example being a case on international mobile roaming which has been open for nearly five years without any resolution.²⁷⁸ Such delays are deterrents to market development and investor confidence.

Notwithstanding the extensive coverage of the licensing issue by the Commission, there is still a risk for diverging approaches on the national level-relying too heavily on a decentralised approach may detract from the creation of a clear and stable regulatory framework for the telecommunications sector.²⁷⁹ In addition, the growing involvement of the competition authority raises the issue of inconsistent jurisdiction in the sector, which may create problems for market participants in making market decisions, and the Member States are using various methods to avoid conflict in jurisdiction.²⁸⁰

²⁷⁵ A complaint raised by WorldCom against KPN and KPN Mobiel in 1998. See 'Anti-Competitive conduct and Competition Policy in Telecommunications', ITU, Geneva 20-22 November 2002, posted at www.intug.net viewed on 26/06/2004.

²⁷⁶ As a result, the number of 'default notices', the first stage of infringement proceedings, leading to a reasoned opinion and then referral to the Court of Justice, has consistently exceeded an annual figure of 200 since 1995 peaking to almost 400 in 1997 (276 for the period from March 1999 to March 2000).

²⁷⁷ 9th Implementation Report.

²⁷⁸ MCI WorldCom v KPN and KPN Mobiel

²⁷⁹ K. Sevinga; 'Problems of Implementing Infrastructure Liberalisation, in W. Hadding & U. Schneider; The Future of EC Telecommunications Law', Volume 19 Series of Publications by the Academy of European Law in Trier, Koln, Bundesanzeiger, 1996. p.146.

²⁸⁰ Organisation For Economic Co-operation And Development; Directorate For Science, Technology And Industry, Committee For Information, Computer And Communications Policy, Working Party On Telecommunication And Information Services Policies, 'Telecommunications Regulations: Institutional Structures and Responsibilities' May 2000, posted at [http://www.oecd.org/olis/1999doc.nsf/LinkTo/DSTI-ICCP-TISP\(99\)15-FINAL](http://www.oecd.org/olis/1999doc.nsf/LinkTo/DSTI-ICCP-TISP(99)15-FINAL) viewed on 25/07/2004.

4.4 Comparison between Licensing/ Authorisation Regimes in the EU and EAC

4.4.1 Licensing Mandate

There are variations with regard to which body has the mandate to issue licences in the EU while in the EAC, the NRA has a broader mandate in issuing licences save for Uganda, where there is greater ministerial involvement for the grant of a major licence. This means that for the EAC there is more predictability as independent regulators are in control of the licensing decision-making.

4.4.2 Institutional framework

The EU market still exhibits barriers to market entry but with a common policy framework, some issues are easier to address as compared to EAC that is still developing institutions. The EU has a wider array of institutions involved in implementing different policy aspects than EAC has. The EAC is yet to operationalise all relevant institutions. The EU has more consumer representation in line with the general EU policy goals. In EAC consumer involvement in market regulation is not directly at the forefront, yet consumer concerns help shape sector development. The financial and human resource requirements for setting up and maintaining all the required institutions should be taken into consideration. The EU has more financial and human resources at its disposal, which EAC will struggle to develop at national and regional levels. ICT indicators are also low for EAC as compared to the EU.

EU has a relatively effective competition policy and mechanism already in place, which the EAC is yet to develop. Plans are underway to develop a common competition policy.

4.4.4 Legislative developments

The EU has enacted many legislative instruments, which are implementable in varying degrees in the Member States. Though there are variations in implementation and even blatant failure to transpose as required, this is a better way in which the regulatory certainty required for a single market can be attained. The EAC is still in the initial stages of developing strategies and operationalising the institutional framework for the whole regional integration exercise. Sector-specific activities are conducted at a slower pace, though the study on harmonisation of a Communication Strategy reveals the possibility of having a common regime and eventually a single licensing authority.

The number of Member States (now 25) increases the probability of divergences, which may not be the case for the EAC. The EU has many Member States and so attaining a common approach to

anything has been challenging which may not be the case for the EAC where the common factors among the three Partner States far outweigh the differences.

The value system and regulatory culture in EU is very favourable for better regulation of the sector. Weak governance structures do not form a good basis for sector regulation yet in EAC; a region characterised by poverty, a history of bad governance in Uganda²⁸¹ and corruption in Kenya, establishing a favourable framework requires a lot more starting from the basics of democracy and promotion of consumer welfare.

4.5 Conclusion

The weaknesses of the EU framework illustrate the difficulty in developing and implementing a common regime for licensing. The EAC may face the same or more, so safeguards should be developed at the onset. The EU remains nationally fragmented but still has the best example to offer in the evolution of a single market in telecommunications and despite the weaknesses portrayed in the enforcement and implementation of the regulatory framework, it provides the best pointers to similar developments in EAC. The EU example remains a standard that the EAC can seek to emulate in order to reap the benefits that the EU has gained in developing a sectoral common market. It is important that the necessary adjustments be made to accommodate the differences brought about by the prevailing political and socio-economic factors. Having compared what EU has to offer, it is crucial to make recommendations on what the way forward is for the development of a common licensing regime in East Africa.

²⁸¹ See Wiebe, Paul D., and Cole P. Dodge (eds.); *Beyond Crisis: Development Issues in Uganda*, Kampala: Makerere Institute of Social Research, 1987.

CHAPTER FIVE

A review of the licensing regime in EAC and EU has revealed that there are divergences in the sector policies, which are likely to negatively affect the development of a single market and that EAC can learn from the EU.

5.1 Recommendations

In order to chart a way forward, it is important that a harmonised and simplified licensing regime for EAC develop with same conditions, procedures, charges, fees, timeframes and categorizations; taking into consideration these recommendations. The choice for any regulatory alternative is pre-conditioned by a number of factors, including not only the general institutional framework and the existing structure but also by choices regarding the scope of legislation within and outside the sector.²⁸²

Certainty and consistency are necessary to boost investor confidence. The ground rules should be clearly defined for the avoidance of doubt. If the final regime is not clearly defined, economic players and regulators face an additional uncertainty when taking strategic decisions. Firms cannot take adequate investment decisions without knowing whether and when they will be able to enter a certain market, which may prevent rapid development of the telecommunications industry.²⁸³ The re-regulatory decision on the national level requires an active Community telecommunications policy if a common market is to be established.²⁸⁴

A common licensing regime embracing the one-stop-shopping procedure should be adopted since EAC is smaller with fewer national interests and limited divergences. This procedure could be relevant to the single investment area and with the idea of political federation moving at fast-track, this is the way to go. A common licensing platform is desirable. Licences granted should only require notification and certification by other states on the basis of mutual recognition. Authorisations should be the goal but in the meantime licensing and asymmetrical regulation remain relevant as the markets are just opening up, competition regimes not yet mature and NRAs have to be in control. In the meantime, a single regulator for the EAC is not feasible now but in the

²⁸² W. Sauter; *Supra*, Note 228. p.125.

²⁸³ O. Stehmann; 'Strategy towards Network Competition in Europe', in *Network Competition for European Telecommunications*, Oxford University Press, Oxford, 1995, p.292.

²⁸⁴ J. Scherer; *Asymmetric Re-regulation of Telecommunications Under European Community Law*, in E. Noam and G. Pogorel; *Asymmetric Deregulation: The Dynamics of Telecommunications Policy in Europe and the United States*, Ablex Publishing Company, New Jersey, 1994, p.206.

meantime guidelines for national implementation of a common licensing framework are crucial to ensure that NRAs do not make optional conditions mandatory and co-ordinated policy implementation. Political will, a strong EACJ and a more aggressive EARPTO will be required. EAC to be able to achieve full regional integration requires a mature institutional framework encompassing political, legal, regulatory and commercial issues that will facilitate the smooth operation of a free market and boost investor confidence.²⁸⁵

NRAs discretion while implementing EAC legislation should be closely watched to avoid frustration of goal of harmonisation. There is need to ensure balance so that NRAs do not abuse the discretionary powers. It is not advisable to distribute the responsibilities of NRAs widely among different institutions, such as competition authorities as lack of co-ordination affects the whole exercise.²⁸⁶ In EU, NRAs have a certain degree of discretion while implementing EU legislation, which culminates in different speeds of effectiveness of liberalisation. Another alternative could be comprehensive licensing, which is mandatory to achieve regulatory certainty necessary for investor confidence and certainty by specifying rights and obligations of operators, licences provide investors and all stakeholders a clear understanding and certainty such as was done in Uganda.²⁸⁷

Divergences should be avoided so that there is a levelled ground for all operators across EAC. A model law and guidelines at EAC level could ensure that regulatory objectives are retained to avoid the introduction of divergences, which will affect sector regulation at that level. Divergence between member states was found to threaten European integration in the telecommunications sector.²⁸⁸ Increasing liberalisation and internationalisation of telecommunications services has led to increasing calls for supranational regulatory bodies to ensure that a consistent approach is taken across regional or global networks.²⁸⁹ Approximation of laws and policies relating to telecommunications is a must for the EAC. Approximation entails the adoption of standard setting directives at EU level and their compulsory implementation by Member States so as to combat

²⁸⁵ See R. Tomiak and J. Millan; 'Sustainability of Reform in Central America: Market Convergence and Regional Integration, Infrastructure and Financial Markets Division', Inter-American Development Bank, posted at http://www.iadb.org/sds/publication/publication_2796_e.htm viewed on 29/06/2004.

²⁸⁶ This has been pointed out in the EU market. See 9th Implementation Report p.25.

²⁸⁷ M. Tétrault and H. Intven; Supra, Note 1, p2-1.

²⁸⁸ O. Stehmann; 'Strategy towards Network Competition in Europe', Network Competition for European Telecommunications, Oxford University Press, Oxford, 1995, p.293.

²⁸⁹ A. Clegg; Who regulates the Regulators? *Utility Week*, 26 January 2000. p.17.

distortions in the single European Market.²⁹⁰ Uganda has to set a time limit for the licensing-decision making process to boost clarity.

There will be need for regulatory convergence for a common telecommunications market in East Africa. Regulatory convergence describes a process whereby national lawmakers adopt more or less similar regulations in order to respond to the challenges of a changing environment.²⁹¹ Tanzania will have to embrace the WTO regime for telecommunications and make commitments if the single market is to work. Participation in supranational law-making organisations entails the compulsory acceptance of norms accepted by those organisations.²⁹² Differing interests at WTO level do not augur well for the EAC as a single investment area.

The sector should be regulated independently at all levels to avoid political capture, which will inevitably hinder sector development. Political capture is where regulation is designed and promoted to meet the needs of the political elites and to preserve its power- this should be avoided in the EAC.²⁹³ Ministerial influence should be minimised. A regulatory solution must be found which allows the objectives of telecommunications policy to be pursued in an effective manner and with adequate legitimacy without undermining on the one hand, the independent regulatory capacities of the Partner State or on the other hand, the general process of integration.²⁹⁴

Competent manpower is crucial for sectoral development and EAC has to invest in manpower development. Given the dynamics of the sector, Africa needs to be proactive in developing high numbers and quality of skilled manpower to manage the technical, regulatory and other aspects of the ever-changing information technology sector.²⁹⁵

Participation of representatives of operators, users, consumers, manufacturers, private sector is important as part of a people-driven initiative. The activities of EARPTO and other common initiatives should be encouraged, as stakeholder participation is essential. A broad consultation

²⁹⁰ C. Stephanou; 'Regulatory Convergence in the Wider Europe Region: Goals and Means', Associazione Universitaria di Studi Europei, ECSA, Italy, January 2003.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ P. Cook, C. Kirkpatrick, M. Minogue and O. Parker; 'Competition, Regulation and Regulatory Governance in Developing Countries: An Overview of the Research Issues', Centre on Regulation and Competition, IDPM, University of Manchester, June 2003.p.13.

²⁹⁴ See W. Sauter; Supra, Note 228, p.124.

²⁹⁵ E. Ndukwe; 'Telecommunications Liberalisation in Africa: Problems, Progress and Prospects', posted at http://www.ncc.gov.ng/speeches_presentations/EVC's%20Presentation/Powerpoint/EVC%20PRESENTATION%20-%20%20July%202003.ppt viewed 03/07/2004.

process is essential in consensus building amongst political partners, operators and all market participants for any supranational process.²⁹⁶

EAC adopted the principle of subsidiarity and this should be abided with to ensure that country-relevant approaches are developed but this should not be at the expense of developing a coherent framework for the proposed single market. Subsidiarity should be applied rigorously so that an appropriate division is found between regulatory issues with an impact on cross-border markets (where EU level regulators should have authority) and predominantly national issues for which the Member States should have prime responsibility.²⁹⁷ The right balance of responsibility was a pre-condition for the desirable market structures in the EU to develop and the same applies to EAC.

The investment regime influences many activities in the region and there is need to harmonise it within the Customs Union if a single market is to develop.

EAC administrations should adopt market-driven, pro-competitive market entry policies so that the greatest number of providers can compete in the EAC region. Exclusivity should not continue as this sets back competition and its desired goals. The validity of rights that do not affect the interests of other undertakings under law could be extended in order to avoid claims on compensation and litigation on exclusivity as has been recommended in the EU. Regulation may strongly affect the incentive on whether and how to enter a market or market segment as entry decisions depend not only on regulation that applies at the moment of entry but also on the expected future regulatory policy until infrastructure investments become obsolete or contracts expire.²⁹⁸

The EAC regulatory system should be sector-specific as competition policy and institutions, where they exist, may not be able to cope with the challenges of a dynamic telecommunications sector as the example of the EU reflects. Competition policy ought to be directed pre-dominantly towards removing regulatory barriers to entry.²⁹⁹

The recommendations made in the preliminary study on a communications strategy reflected in greater detail in *Annex V* ought to be taken into account if the EAC is to develop as a single investment area for the telecommunications sector.

²⁹⁶ H. Ungerer & C. Berben; Europe's Green Paper on Telecommunications and its Relevance for Africa pp59-70, p.63, in B.A. Kiplagat & M. Werner (eds.); *Telecommunications and Development in Africa*, IOS Press, Oxford, 1994.

²⁹⁷ T. Kiessling & Y. Blondeel; Supra, Note 217.

²⁹⁸ P. Bijl & M. Pietz; Supra, Note 62, p.243.

²⁹⁹ P. Cook, C. Kirkpatrick, M. Minogue and O. Parker; Supra, Note 293.

EAC should seek to de-fragment national markets and aim at a single market for telecommunications which is not an easy feat but is possible.

5.2 Conclusion

Effort has been made to analyse the different aspects relating to licensing and market entry in the EAC telecommunications sector, and compare with developments in the EU before making recommendations. Regional integration is the way to deal with the challenges of globalisation and there is no way EAC can compete successfully but as a single market in the telecommunications sector. While considering the development of a common market for telecommunications services, it is important to ensure that factors in favour of market entry are in place. A common licensing framework, a common regulatory and investment regime as well as adequate institutional framework will all serve to ensure that EAC can compete favourably in the world market. The development of pan-EAC services should be the ultimate goal.

ABBREVIATIONS

ABT	AGREEMENT ON BASIC TELECOMMUNICATIONS
CCK	COMMUNICATIONS COMMISSION OF KENYA
EAC	EAST AFRICAN COMMUNITY
EACSO	EAST AFRICAN COMMON SERVICES ORGANISATION
EAHC	EAST AFRICAN HIGH COMMISSION
EAPTC	EAST AFRICAN POSTS AND TELECOMMUNICATIONS CORPORATION
EC	EUROPEAN COMMUNITY
EEC	EUROPEAN ECONOMIC COMMUNITY
ECTA	EUROPEAN COMMUNITIES TRADE MARK ASSOCIATION
EEC	EUROPEAN ECONOMIC COMMUNITY
EU	EUROPEAN UNION
FDI	FOREIGN DIRECT INVESTMENT
GATS	GENERAL AGREEMENT ON TRADE IN SERVICES
GMPCS	GLOBAL MOBILE PERSONAL COMMUNICATIONS BY SATELLITE
GSM	(GROUP SPECIAL MOBILE) GLOBAL SYSTEM OF MOBILE COMMUNICATIONS
ICT	INFORMATION AND COMMUNICATION TECHNOLOGY
IDPM	INSTITUTE FOR DEVELOPMENT POLICY AND MANAGEMENT
IFLA	INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS
ITU	INTERNATIONAL TELECOMMUNICATIONS UNION
KCA	KENYA COMMUNICATIONS ACT

KPTC	KENYA POSTS AND TELECOMMUNICATIONS CORPORATION
MTN	MOBILE TELEPHONE NETWORK
NCS	NATIONAL COMMUNICATION SECRETARIAT
NRA	NATIONAL REGULATORY AUTHORITY
OECD	ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
SNO	SECOND NATIONAL OPERATOR
TCC	TANZANIA COMMUNICATIONS COMMISSION
TCRA	TANZANIA COMMUNICATIONS REGULATORY AUTHORITY
TTCL	TANZANIA TELECOMMUNICATIONS COMPANY LIMITED
UCA	UGANDA COMMUNICATIONS ACT
UCC	UGANDA COMMUNICATIONS COMMISSION
UN	UNITED NATIONS
UNDP	UNITED NATIONS DEVELOPMENT PROGRAMME
UNESCO	UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANISATION
UNIDO	UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANISATION
UPTC	UGANDA POSTS AND TELECOMMUNICATIONS CORPORATION
USAID	UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT
UTL	UGANDA TELECOMMUNICATIONS LIMITED
WTO	WORLD TRADE ORGANISATION

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Single European Act was signed in February 1986 and came into force on 1 July 1987. OJ L 169, 29. 6. 1987.

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ANNEXTURES

ANNEX I

Conditions of the SNO Licence- Uganda

- i. Network roll-out: The SNO licence required both licence bid price and network rollout (the SNO was required to provide 89,000 lines in the first 5 years and it adopted a wireless approach as it was easier and convenient to meet network rollout requirements. Intervention would be limited to monitoring compliance and establishing approaches to service provision in un-served areas. The obligations included: universal access facilitation by meeting rollout obligations with a lower number of new lines but with a larger proportion of new capacity in rural areas and MTN agreed to connect a payphone to all the district and county headquarters that had electricity and road access to the site. MTN Publicom was established in 1999 to meet the obligation to roll out at least 2000 payphones and by 2001 over 2500 payphones had been installed.
- ii. Price control: the licences specify the details of a price-cap type price regulation which is to continue while the duopoly on basic services is in effect and no further regulatory decisions regarding prices will be made during the 5 years.
- iii. Interconnection: both licensees are required to negotiate interconnection agreements. Pending agreement, either licensee can request from the other the immediate application of prices and terms.
- iv. Monopolistic prices: licensees cannot unduly condition the provision of telecommunications services on purchase of terminal equipment and cross-ownership between both companies is not allowed.
- v. Resale: licensees are obligated to provide basic exchange services for resale of public pay telephone service.

ANNEX II

EAC Common Telecommunications Projects

- (i). The temporarily suspended East African Digital Transmission US \$60m project plan to install an optical fibre transmission system linking capital cities and a number of major towns in the three countries so as to improve trade relations.
- (ii). The EAC Telecommunications Trunking project for regional telecommunications networks (Land Based Trunk Network, East African Submarine Cable Network and Lake Victoria backbone Ring Network) targets the private sector as the driving force or some public-private sector partnership arrangement.
- (iii). Implementation of the Cross-Border Telecommunication Connectivity Project to facilitate direct links between border towns in the region and interactions across borders. There is also a project to build infrastructure to establish a regional carrier that could lease out services to other operators.
- (iv). East African Submarine system (EASSy), - this project involves nine eastern and southern African countries that are planning to install a submarine fiber cable off the east African coast to lower telecommunication costs in the area. Delegates from leading telecom companies in the nine countries signed a memorandum of understanding to develop the cable in Kampala, Uganda in June 2004 to consider implementation. The 8,840 km, 200 million-US dollar project will run from Djibouti through Somalia's Mogadishu, Kenya's Mombassa, Tanzania's Dar es Salaam and Zanzibar, then through Maputo in Mozambique with a link to Mahajanga in Madagascar and to the coastal town of Mtunzini in South Africa. The undersea fiber-optic cable project will be completed in 2006.³⁰⁰
- (v). A number of studies have been conducted such as that on the harmonisation of the EAC Communications Strategy which found that there are significant variations in the regulatory regime of the three East African states in, *inter alia*, the following areas: privatisation of incumbent, independence of regulators; services liberalisation; public VoIP; universal service fund; tariff regime; structure of the regulatory bodies; broadcasting; and postal

³⁰⁰ 'Nine African countries plan to install submarine fiber cable', posted at http://news.xinhuanet.com/english/2004-06/26/content_1547830.htm viewed on 29/06/2004.

reforms³⁰¹, which variations in one way or another affect the licensing activities of the regulator and subsequently market entry.

- (vi). EARPTO has been established and as a task force to study all matters; technical, legal, management and budgetary related to the communications regulation at the regional level with a view to establishing the basis for the harmonisation of the Communications Strategy in the East African region.

³⁰¹ EAC Secretariat; Final Report Preliminary Study on Harmonisation of Regional Communications Strategy, Arusha, November 2003, p.10

ANNEX III

WTO Rules and Telecommunications Sector Specific Commitments³⁰²

WTO Rules

These relevant rules are:

1. Most Favoured Nation treatment- a licensing regime must grant market access to operators from a WTO member country on terms no less favourable than the terms applicable to operators from any other country;³⁰³
2. Transparency- all laws and rules affecting trade in services must be published such as all notification, registration or licensing requirements as well as any other forms of recognition or approval needed for foreign services suppliers to do business lawfully in the telecommunications market of a country;³⁰⁴ and
3. Barriers to trade-licensing requirements must not constitute unnecessary barriers to trade.³⁰⁵

Telecommunications Sector Specific Commitments

KENYA

Voice telephone services are limited to international home country direct services. Market access is restricted to service suppliers operating direct voice communication routes otherwise there are no limitations. Resale of excess capacity and international call-back services are not permitted. Until 2003, there was monopoly on supply of services in Nairobi as well as on supply of international gateway facilities services and resale in monopoly areas only with permission of supplier of underlying services and facilities. Foreign investment is limited to 30% maximum.

UGANDA

The presence of natural persons is unbound except technical personnel unless Ugandans are or become available otherwise entry and temporary stay of foreign service suppliers has to be in compliance with immigration laws. There is a requirement for company registration.

International basic voice telephony traffic must be carried through networks of the duopoly major licence holders and other pre-existing licence holders according to the terms of those licences. The resale of excess capacity is prohibited. Mobile cellular voice and data roaming and paging services is allowed but cross-border access is permitted only via network of duopoly major licence operator.

³⁰² Details of Kenya and Uganda's Telecommunications Sector-Specific Commitments are available at http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm

³⁰³ GATS Article II

³⁰⁴ GATS Article III

³⁰⁵ GATS Article VI

ANNEX IV

National ICT Policies

TANZANIA³⁰⁶

The vision is for the accelerated development of an efficient telecommunications network, providing a national info-communication infrastructure and access to present day telecommunication technologies by all sectors of the economy and all segments of the population, including universal access. The policy objective is to ensure that telecommunication services are provided in a liberalized and competitive manner. The specific objectives are to: design a modern architecture of a telecommunications and broadcasting infrastructure covering the whole country, with an international gateway of sufficient capacity; promote ownership of computers, TVs, Radio and other ICT enabled receiving or user devices; ensure provision of adequate, sustainable and efficient telecommunication service in all sectors of the economy; and create a favorable environment for private sector participation in building a national ICT infrastructure. The overall target for the sector is to achieve a telephone density of 6 telephones per 100 people by 2020. Teledensity in 1997 was estimated as 0.32 telephones per 100 inhabitants.

UGANDA

The telecommunications sector policy aimed at increasing teledensity; improving facilities and services; and increasing geographical distribution of services, which points directly at the need for more operators or increased investment in the sector. The strategy for achieving the policy objectives culminated into the repeal of the UPTC Act; establishment of an independent regulator; licensing a SNO and fostering competition in the sector.

The National ICT Policy sets out strategies of meeting the objective of promoting competition, private investment and local participation, which is establishment and maintenance of a licensing and regulatory regime that promotes fair competition as well as encouraging joint ventures and private investment and these are through the promotion of competition in service delivery by licensing of several providers; a fully liberalised market for value added services; specification of network rollout obligations in major licences to ensure equitable geographical coverage; regular

³⁰⁶ More details are available at <http://www.moct.go.tz/ict/pre-zeroth.pdf>

monitoring of networks to ensure compliance with licence quality of service requirements and the adoption of technology-neutral regulatory policies.³⁰⁷

KENYA

The overall Government objective for the sector is to optimize its contribution to the development of the Kenyan economy as a whole by ensuring the availability of efficient, reliable and affordable communication services throughout the country. In the area of telecommunications services for instance, it is intended:

- (a) To improve penetration in the rural areas from the present 0.16 lines to 5 lines per 100 people by the year 2015.
- (b) To improve service penetration in the urban areas from the present 4 lines to 20 lines per 100 people by the year 2015.

Telecommunications and information infrastructures are vital for any country's economic productivity, competitiveness and national security. These sectors are experiencing rapid technological advances which make it imperative for the Government to maintain an effective and dynamic policy environment that will facilitate sustainable development and advancement of strategic interests.

³⁰⁷ P. Masambu-CEO Uganda Communications Commission , 'Uganda's Regulatory Innovations', presented at CTO Conference on Implementing WSIS Action Plan, Nairobi, Kenya 25-26 March 2004.

ANNEX V

PRELIMINARY STUDY ON HARMONISATION OF REGIONAL COMMUNICATIONS STRATEGY

This study provides justification for the harmonisation of the regulatory framework for a number of reasons namely that:

- The regulatory environment has changed dramatically in the recent years following liberalisation of the communications sector ushering in privatisation and competition.
- East Africa once had a common communications Act, the EAPTC Act 1967 that provides a sound historical basis for harmonisation.³⁰⁸
- A harmonised communications regulatory environment will enhance co-operation in the EAC and will be catalytic in the social and economic integration and possible future political union, which the three nations aspire to form. It will bring transparency, ease transborder implementation and increase FDI. The licensing of regional links needs to be examined by regulators to provide regional licensing or create a regional regulatory body.
- A harmonised environment will provide a transparent regulatory regime throughout East Africa which will boost investment in these countries as investors will not worry as to what surprise legislation may be applying next door and will accelerate investment and economic development.
- Global trends point at harmonisation at regional and sub-regional levels to facilitate and enhance trade and investment within such economic community.
- All possible steps should be taken to lower the communications tariffs.
- More competition should be permitted in the areas where there are no exclusivities applying.
- Regulators should ensure that the universal service obligation is respected and that there is a clear road map to achieve this.
- A harmonised ICT policy for East Africa and a common strategy for implementation will assist in the development of a harmonised regulatory regime.
- Institutional arrangements should be streamlined with all ICT issues at national level under one Ministry.
- Activities aimed at human resource management and development are a necessity.

³⁰⁸ EAC Secretariat; Final Report Preliminary Study on Harmonisation of Regional Communications Strategy, Arusha, November 2003, p. 5

ANNEX VI

Investment Regimes

KENYA

Doing business involves lodging an application with the IPC, engaging legal advice, registration of the company, submitting documents plus certificate of incorporation to IPC and issuance of an Investment Licence, which is a certificate of General Authority. The incentives are generous investment and capital allowance; remission for customs and VAT; manufacturing under bond status; export processing zones status; double taxation agreements; protection and promotion of investment agreements; bilateral investment treaties and trade agreements; liberal rates are allowed for depreciation of assets based on value; loss carried forward - business enterprises that suffer losses can carry forward such losses to be offset against future taxable profits; duty remission facility - material imported for use in manufacture for export or for the production of raw materials for use in export oriented manufacture or for the production of duty free items for sale domestically are eligible for duty remissions.

The Foreign Investments Protection Act (FIPA) (Cap 518) guarantees repatriation of capital, after tax profits and remittance of dividends and interests accruing from investing in the country.

TANZANIA

All Government departments and agencies are required by law to cooperate fully with TIC in facilitating investors. TIC is the focal point for potential investors and it is charged with the following functions: assist in establishment of enterprises such as incorporation and registration of enterprises; obtain necessary licenses, work permits, visas, approvals, facilities or services; sort out any administrative barriers confronting both local and foreign investments; promote both foreign and local investment activities; secure investment sites and assist investors to establish projects; grant investment guarantees and register technology agreements for all investments, which are over and above US\$ 300,000 and US\$ 100,000 for foreign and local investments respectively; and provide and disseminate up to date information on existing investment opportunities, and benefits or incentives available to investors.

UGANDA

Foreign investors require a minimum investment of 100,000 US Dollars in order to qualify for incentives and secure an investment licence and while local investors require a minimum investment of 50,000 US Dollars, but local investors can commence business without investment licences.

Investing in Uganda involves: registration of the company in Uganda; application for investment licence; obtaining of secondary clearances; and obtaining investment guarantee if desired from the Multilateral Investment Guarantee Agency (MIGA).

ANNEX VII

TABLES

Table 1: Chronology of Reforms in East Africa

Event	Kenya	Uganda	Tanzania
Adoption of telecommunications policy	January 1997	February 1996	N/A
Enactment of communications law	October 1998	26 th September 1997	1993
Separation of Posts from telecommunications	1 st July 1999	February 1998	January 1994
Establishment of regulator	1 st July 1999	August 1998	January 1994
Privatisation of incumbent	After 2005	July 2000	1997
Entry of 1 st mobile operator	1 st July 1999	1994	February 1994
Licensing of 2 nd mobile operator	September 1999	1994	November 1993
Licensing of 2 nd operator	28 th January 2000	15 th April 1999	1995

Table 2: Comparative Statistics for East Africa: June 2003

Type of service	Kenya	Uganda	Tanzania
Fixed line operators	1	2	2
Fixed line subscribers	331,000	60,000	151,000
Mobile cellular operators	2	3	4
Mobile cellular subscribers	1,600,000	600,000	647,000
Internet Service Providers	65	17	23
Internet Hosts	2,702	293	1478
Internet Users	500,000	60,000	300,000
Estimated no. of PCs	175,000	70,000	120,000
International VSAT Network Operators	1	8	6
Public Data Network Operators	4	N&A	16

Source: East African Regulators, ITU-CCK 3rd GSM Pre-bidders Conference, Nairobi 24th June 2003

Table 3: Fixed line telecommunication growth in East Africa between 1995 and 2002

Year	95	96	97	98	99	2000	2001	2002	CAGR (1995- 2002)
Kenya	239.6	256.4	266.8	270.3	288.2	304.6	321.5	328.1	3.4%
Uganda	39.0	42.3	45.9	49.8	54.0	58.6	63.6	69.0	8.5%
Tanzania	90.3	92.7	106.3	115.6	125.6	136.4	148.1	160.8	8.6%
East Africa	385.7	401.8	424.0	448.8	472.7	498.0	524.8	553.8	5.3%

Table 4: Mobile telecommunication growth in East Africa between 1995 and 2002

Year	95	96	97	98	99	2000	2001	2002	CAGR (1995- 2001)	As % of total (2002)	June 2003
Kenya	2.3	2.8	2.8	10.8	23.8	127.4	600	1325	146%	80	1700
Uganda	1.7	4.0	5.0	12.5	72.6	188.6	323	450	139%	84	550
Tanzania	3.5	9.0	20.2	37.9	51.0	180.2	427	637	123%	81	820
East Africa	7.5	15.8	28.0	61.2	147.4	496.2	950	2412	136%	82	3070

Table 5: East Africa ICT Indicators 2003: Year-end 2003 provisional estimates. Updated: 01.04.2004.

	Population	Main telephone lines		Mobile subscribers		Internet users	
	000s	000s	p. 100	000s	p. 100	000s	p. 100
Kenya	31'708	328	1.0	1'591	5.0	500	1.6
Tanzania	35'313	149	0.4	891	2.5	250	0.7
Uganda	25'599	61	0.2	776	3.0	125	0.5

Source: Telecommunication Development Bureau (BDT), International Telecommunication Union (ITU http://www.itu.int/ITU-D/ict/statistics/at_glance/af_ictindicators.html)

Table 6: Measures of Investment in Electronic Communications 2001³⁰⁹

Country	Investment as % of GDP 2001	Investment per capita 2001 US Dollars	Investment as % of Gross Fixed Capital Formation	Telecommunications Gross Fixed Capital Formation per capita (Euro)
Belgium	0.26%	58	1.24	45
Denmark	0.79%	239	3.77	186
France	0.49%	108	2.43	85
Germany	0.38%	86	1.90	67
Ireland	0.43%	115	2.03	90
Italy	0.49%	92	2.46	72
Netherlands	0.70%	167	3.20	130
Spain	0.53%	76	2.11	59
Sweden	0.56%	133	3.22	104
UK	0.99%	236	5.82	184

³⁰⁹ European Commission; 9th Implementation Report.

Table 7: Licensing in the EU

Country	Body issuing licence		Oversight of licence requirement
	Fixed	Mobile	
Austria	R	R	R
Belgium	M	M	M
Denmark	-No licence or registration is required for fixed operators.	R	R
Finland	M	M	M
France	M	M	R
Germany	R	R	R
Greece	M	M	R
Ireland	R	R	R
Italy	R	R	R
Luxembourg			
Netherlands	R (only registration)	M	R
Portugal	R	R	R
Spain			
UK			

Source: Organisation for Economic Co-operation and Development³¹⁰

³¹⁰ Organisation For Economic co-operation and Development; Directorate For Science, Technology and Industry, Committee for Information, Computer And Communications Policy, Working Party on Telecommunication and Information Services Policies, 'Telecommunications Regulations: Institutional Structures and Responsibilities' May 2000, posted at [http://www.oalis.oecd.org/oalis/1999doc.nsf/LinkTo/DSTI-ICCP-TISP\(99\)15-FINAL](http://www.oalis.oecd.org/oalis/1999doc.nsf/LinkTo/DSTI-ICCP-TISP(99)15-FINAL) viewed on 25/07/2004.