

Convergence legislation and its impact in the European Union, the United Kingdom and South Africa

Master Dissertation in electronic law

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Convergence legislation and its impact in the European Union, the United Kingdom and South Africa

Introduction

There has been a different approach to press and broadcasting regulation.

Printed newspapers, books and magazines are not subject to any licence; Freedom of expression is a basic right in every democratic society. The press is basically only limited by the general law: criminal law – defamation, hate speech, obscenity, blasphemy etc. comes here for example into account- and civil law. It is not under an obligation to write about special topics.

In contrast to this freedom, broadcasters are subject to a licence and many other restrictions. They are closely regulated in terms of who can broadcast (structural regulation) and what can be broadcasted (content regulation).¹ Programme restrictions include that some channels must show serious programmes and news, all broadcasters must show “due impartiality”². However the press is under no obligation to write about a particular topic. A justification for this is that spectrum is a scarce and finite resource.

Regulation for telecommunications is also different from regulating broadcasting and that of the press. Most countries adopted regulation in form of a common carrier model; the carrier acts as a distributor of the data and does not exercise editorial control over its contents.³ As opposed to the special regime for broadcasting, legal control over content is mainly subject to the general law.⁴ It is a worldwide trend that public telecommunication monopolies are taken away; the market gets liberalized and ruled by competition.

The separate regulation of broadcasting and telecommunications made sense because there was not much overlap between the industries:

Broadcasting provided sound in the case of radio, and in the case of television it also provided image from one point to many points simultaneously.⁵ Telecommunication provided the opportunity for one to one communication e.g. via voice telephony.

The computing industry including the internet seemed far removed from broadcasting and has only been subject to regulation by the general law.⁶

The telecommunications and broadcasting sectors as well as the computing industry have developed separately and been regulated by different laws. All this was an established pattern for ages⁷.

With the digitalization in the wake of convergence everything changed. Firstly different sectors converged on a technical base. The different sectors technically converged into what can also be called multimedia.⁸ By means of digitalized telecommunications, computer data and broadcasting can now share a transmission technology.⁹ The means of delivery is no longer bound to content in a particular form; a television set, a computer and a telephone network is capable of delivering any type of content in digital form be it sound, picture, text or data.¹⁰

¹ Eric Barendt and Lesley Hitchens, *Media Law, cases and materials*, 2000, p. 287.

² E. Barendt p. 9

³ E. Barendt p. 9

⁴ E. Barendt p. 9

⁵ E. Barendt p. 9

⁶ E. Barendt p. 9

⁷ E. Barendt p. 9

⁸ E. Barendt p. 287

⁹ E. Barendt p. 287

¹⁰ E. Barendt, *ibid*, p. 287

The old service and technology specific approach of legislation (like the South African Telecommunication Act) artificially divides markets that nowadays are converged and prevents service providers from utilizing technological change to cater for broader markets niches.¹¹ New convergence legislation should seek to move regulation away from a service- and technology specific approach.

After broadly defining convergence and giving examples of converging technologies this paper will examine how selected forms of convergent technologies work. An examination of how the different countries, South Africa in particular and the European Union, have responded on a legislative level to the convergence phenomenon is consequently preceded by some insight into the underlying techniques of convergence. Some benefits and disadvantages of the two different approaches will also be examined. This might be of interest to countries that have not yet decided on which approach to follow. *Is convergence legislation really required and how far would it benefit the country? Has the South African convergence legislation been intelligently thought through?* A large part of the telecommunications industry feels that the answer to these questions is in the negative.¹² This paper seeks to give some guidelines in pondering on these issues.

Part one- **Convergent technologies**

What is Convergence?

In the absence of a more specific context, Convergence denotes the approach toward a definite value, as time goes on; or to a definite point, a common view or opinion, or toward a fixed or equilibrium state.¹³ “If there is a convergence of things or systems they become more and more alike until there is no difference between them”.

In a technical sense convergence refers to the trend for some set of technologies initially having distinct functionalities to evolve to having those that overlap.¹⁴ In the modern presence many different types of technology can perform very similar tasks¹⁵

The International Telecommunication Union (ITU) defines convergence as technological, market or legal/regulatory capability to integrate across previously separated technologies, markets or politically defined industry structures.

There is also a legal dimension of convergence. While earlier there were different regulatory authorities dealing with the different media, convergence now implies the creation of a single regulatory authority, which will be responsible for this convergence in the media.¹⁶

Convergence in the context of this paper relates to the convergence of the broadcasting, telecommunications, and IT (Information technology) industries.

In the modern presence many different types of technology can perform very similar tasks¹⁷ For instance in today’s society one cannot only communicate with a friend per mail or telephone via landline as in the old days, but nowadays there is also e-mail, cellular phone with sms and mms, VoIP, instant messengers (online chat), and many other forms of new technologies. Though these forms of technologies are all different

¹¹ D. Cull, Overview of the Convergence Bill [B9-2005], Presentation at UCT convergence conference on 26 & 27 May 2005

¹² http://www.financialexpress.com/fe_full_story.php?content_id=18273

¹³ online encyclopedia “Wikipedia” <http://en.wikipedia.org/wiki/Convergence>

¹⁴ wikipedia, http://en.wikipedia.org/wiki/Convergence#Computing_and_technology

¹⁵ wikipedia, http://en.wikipedia.org/wiki/Technological_convergence

¹⁶ L. Liang , *Whose convergence is it anyway,*

http://www.nwmindia.org/Law/Commentary/convergence_bill.htm

¹⁷ Wikipedia, http://en.wikipedia.org/wiki/Technological_convergence

they essentially provide the same service: person to person communication.¹⁸ Convergence also refers to the underlying communication infrastructure e.g. communication services can be packed so that in one subscription a consumer can purchase TV, internet and telephony.¹⁹ Networks that were built for voice communications carry data, Internet services are offered over cable television networks, wireless communication networks carry video images, all this is what convergence is about.²⁰ Technological progress and the information revolution have set off and will still continue to advance. In the years to come a single wire or even a wireless connection will deliver data, voice and video into the home.²¹ It is difficult to put the phenomenon of convergence in one single all comprehending definition; neither the South African nor the Indian Convergence Bill gives a definition of the underlying subject matter.

The benefits of convergent technologies

Convergence brings benefits for the industry (the providers) as well as for the end user.

Example:

Some years ago you could only get to know about what was going on in the world by reading the newspaper, watching the news on TV or listen to the news in the radio. Because of convergence today one can not only make use of these conventional matters, in order to get informed one can inter alia

- subscribe to a newsletter that contains daily news and get them vial e-mail
- read the news on the website of a newspaper or TV broadcaster in html format
- subscribe to a website where the same content of the print version of a newspaper is available in html
- purchase an electronic version(s) of a newspaper on CD rom
- download the news on a handheld device or on a Computer
- access a news website via cell phone
- listen to the news published by a webcaster (live streaming)

And the user benefits in many differnet ways:

Compared to the purchasing price of a printed newspaper, there are usually no costs involved for reading the news online (except for the internet connection).

There might be an enhancement of quality: the news in electronic version can come with links, video and sound.

The user can adapt the news to his habits and does not have to adapt to the news. There is no need to be in front of the TV or switch on the radio at a special time. Online news are accessible around the clock and updated continuously. They do not get old like yesterdays newspaper.

Compared to TV and traditional radio the user of online news can himself easily select topic (be it e.g. political news, economic news or only the weather), language, format and source the news come from. It is so easy to access the news of another country. The internet as pool to select from is much bigger as every paper based newspaper or even newspaper shop could ever be.

¹⁸ Wikipedia, *ibid.*

¹⁹ Wikipedia, *ibid.*

²⁰ V. Gombar, *A Questionable Act On The Verge Of Convergence*, http://www.financialexpress.com/fe_full_story.php?content_id=18273

²¹ V. Gombar, *ibid.*

Also the publisher of the news benefits tremendously. For instance if the same article is published online the publisher saves printing costs, delivery costs of the newspaper to bookstores all over the country, costs for storage of printed newspapers and costs for withdrawing unsold copies from the vendors. An electronic version of the article can also be updated much more easily.

Why is regulation necessary?

Proper regulation of the phenomenon of convergence provides for high standards, quality, availability and consumer protection.²² Regulation is necessary to ensure that the benefits of convergence are realised. The players on the market need to be monitored.

New convergence regulation moves regulation away from a service and technology specific approach since this divides the markets artificially and prevents operators to offer their services on a broader market when technology allows it.²³

An example for this is that under modern convergence legislation the owner of a licensed network facility can sell related communication services and thus focus on providing infrastructure which results in greater efficiency of the industry and on the whole in less duplication of infrastructure and lower prices to the end user.²⁴

Examples of convergent technologies

Digital broadcasting

When digital television is introduced in a country it is one of the most significant broadcasting developments for some time. Transmission of terrestrial, cable or satellite broadcasting services has traditionally used an analogue system but in the future it will be entirely replaced by digital broadcasting transmission.²⁵ Voice, sound, picture and data are converted into digital bits which is a series of zeroes and ones (binary coding system) and then a receiver reconverts (/decodes) it into a broadcasting programme. Thus broadcasting can be transmitted now in exactly the same way as telecommunication and computer data at a much faster and more efficient i.e. you can broadcast information in bigger batches just like quanta of data on the internet.

Digital technology increases the reception quality resulting in better sound and picture as well as the number of available channels considerably. It can provide interactive services and it facilitates the convergence of telephony, computer and broadcasting systems²⁶.

An important question for the future of each country is when does it completely switch to digital broadcasting.²⁷ Only then spectrum that had been used for analogue broadcasting is released for other uses including digital broadcasting signals.²⁸

However when analogue broadcasting is switched off, equipment manufacturers and service operators will benefit as the previous or rather current systems becomes obsolete. This forces the consumer to throw away the old equipment if he/she is to

²² *Convergence Bill 2005-Special Guide*, Buys IT Law consulting (PTY) LTD
http://www.buys.co.za/download2_registration.asp

²³ D. Cull, Overview of South African telecommunications law, convergence and the Convergence Bill, prepared for UCT e-law postgraduate class 2005

²⁴ D. Cull, *ibid*.

²⁵ E. Barendt and Lesley Hitchens, *Media Law, cases and materials*, Longman Law Series, 2000, p. 104

²⁶ E. Barendt p. 104.

²⁷ E. Barendt p. 113.

²⁸ E. Barendt p 113.

enjoy the benefits (speed, better picture/sound) derived from the new 'invention'. It is also vital to note that these are mere transition cons but the whole switch will later reap economies of scale i.e. lower service costs per unit produced as more and more will be made in time. Thus once the infrastructure foundation is laid and the *total* digitization point is reached, even more technological advancements will be made. It is my view that at the pace things are going, all the distinct traditional sectors will eventually converge in order to avoid them from operating independently which is more costly.

The number of channels that terrestrial, cable or satellite TV can provide differs:

Digital terrestrial TV can provide about 20 channels, Satellite television about 200 channels²⁹

Digital cable services can particularly be used for interactive services and offer access to the internet. One of Digital terrestrial services main components are multiplexes carry the programme services. The programme services are licenced separately, multiplexes can also carry services as Teletext, interactive services as home shopping and banking.

The equipment for digital Television is an ordinary TV with a set-top box or a decoder or a modern integrated digital TV set that is not yet generally available.

Digital television licences distribution and content separately.³⁰ This is different from say a South African resident watching any of the local channels off his TV set without a satellite decoder system. He/She will only need a local TV licence but if He/She intends to watch German TV from a digital television set, one needs to also acquire another licence for the digital decoding itself. Hence the set and the content have separate licences.

“The transition to digital is most obvious in television, bringing with it high definition and interactivity: and where, increasingly the user rather than the broadcaster is in control.”³¹ This transition/convergence from analogue to digital allows undistinguished binary codes comprised of zeroes and ones to represent high resolution data from voice, pictures, figures, audio and visuals in one form or another though coming from the same source. A good example to illustrate this in present day television is the fact that using the same decoder and satellite we can watch two different television channels in different rooms of the same house. Thus there exists a source of information and/or data from which the user has various choices in what best suits his needs. The user can shop online due to the fact that digitization is far integrated in vast networks just like the internet.

To understand the digital television aspect of broadcasting, we need to understand the three main areas of digital television namely: Digital Satellite TV; Digital Cable TV and Digital Terrestrial TV. All these make the multicasting concept much easier to comprehend. The other question to ponder on is “How will the public benefit or let alone pay for the shift towards digitization?” Already digital TV sets are advantageous above the normal analog standard TV sets in that they display pictures with high definition or resolution (one might say) and wide screen with six point Dolby surround channel sound!

In a nutshell, public television will have the qualities of multicasting i.e. several channels broadcasted and viewed through the same TV such that remote rural areas

²⁹ E. Barendt p. 105

³⁰ E. Barendt p. 112.

³¹ Stephen A. Carter, *OECD* [Organisation of Economic Cooperation and Development] *Roundtable on Convergence*, 2 June 2005
<http://www.ofcom.org.uk/media/speeches/2005/06/oecd#content>

without any internet access will be able to attain services online by using the diverse interactivity option derived from digital TVs. One might also add that we can send video over the net easier because we can send real-time video in a more compressed format (MPEG-2). This takes up smaller bandwidth but requires both encoding and decoding points to stream the video at the same speed and time. However, digital television broadcasting does not require the receiver to be viewing at the same time. That is to say you don't have to necessarily use real-time streaming. The TV broadcasters merely put a storage space where anyone can download the programs whenever they want and at different streaming speeds, at varying qualities but still using smaller bandwidth. In all, the consumer will have much more options available to him at the touch of a button!

Live Streaming³²

In former times you could only listen to radio with a radio. Now technique makes it possible to get streaming audio via the Internet and listen to a radio station using a computer.³³

Media Streaming is the transmission of AV media over IP (Internet Protocol). Usually it is not stored on client's side. It is transmitted (almost) in real time i.e. on a "just in time basis". This is made possible through high compression. In short a server compresses contents (AV media) that are transmitted in IP-packets in real time to a client who decompresses the contents again and creates AV output so that the user can enjoy. Initially real time transmission was not the original purpose of an internet connection via TCP/IP. However in the late 1990s it was made possible by buffering TCP packets and using RTP, RTSP, or RTCP on top of UDP. Nowadays there are different codecs (*compression-decompression*) on the market such as MP3, Real, Windows Media.

An example for media streaming is web casting. The technical equipment to provide internet radio is server software which is available for free (Shoutcast, Windows Media Encoder). Thus from a financial point of view it is practically possible for anybody to provide web radio. However the listener/viewer needs a lot of bandwidth. Streaming has got the potential of substituting traditional radio broadcasting because streaming technology via Internet solves the problem of scarcity of radio spectrum as a resource.

The issue of a licence requirements for a web caster according to the South African Convergence Bill is described below.

Video on Demand (VOD)

TV stations have a server where they store all their programmes and Video on Demand function allows them to download various images through available networks. Customers can also selectively download contents of a programme using the virtual VCR function which allows them to play and stop programmes whilst playing from the source server. VOD relies on the broadcasting and telecommunication technology and thus is a function derived from convergence.

Data broadcasting service

The data broadcasting service is basically the functionality concept of interactive TV. This makes email, e-commerce and other digital multimedia services possible which

³² source: Presentation by S. Rabenstein, *Livestreaming and the Convergence Bill*, Presentation at UCT convergence conference on 26 & 27 May 2005

³³ D. Cull, *Overview of South African telecommunications law, convergence and the Convergence Bill*, prepared for UCT e-law postgraduate class 2005, April 2005, p. 14.

is definitely beneficial as compared to the analogue broadcasting which does not provide for the above mentioned services due to its 'vertical blanking interval'.³⁴

VoIP (also called IP Telephony, Internet telephony, Internet voice)

Voice over Internet Protocol (VoIP) is a technology that allows the user to make a call using a broadband Internet connection instead of a regular (or analog) phone line.³⁵

The new networking technologies, in particular VoIP, have resulted in a convergence the content is delivered.³⁶ It is independent from how far the users are distant from each other.

After digital TV and before hand-held devices, VoIP is the second major growth area and going to be of enormous future economic importance.³⁷ It is already available in many medium and larger businesses. Globally there were 16 million of users at the beginning of the year 2005 and it is estimated that there will be 200 millions of VoIP consumers by 2008.³⁸ One of the biggest advantages for the user of VoIP is that it has become much cheaper than traditional phone offerings while quality and reliability are still improving.³⁹ Six million of the nine million paying customers are in Asia. Millions of users now use Skype, a website that allows phone calls from and to computers for free.⁴⁰ And the market is still not fed since it could bear a few more Skype.⁴¹

Jeff Pulver is a pioneer of Voice over Internet Protocol (VoIP) technology and is a co-founder of a fast growing VoIP provider as well as founder of a six other VoIP firms.⁴² VoIP technology allows voice data to flow over a general-purpose packet-switched network i.e. the Internet or any other IP network, instead of the traditional, circuit-switched voice transmission lines.⁴³ An example for one of the other networks VoIP can be developed on, is a building-wide LAN (Local Area Network) even without Internet connection.⁴⁴

VoIP converts the voice signal from your telephone into a digital signal that travels over the internet and then converts it back at the other end.⁴⁵ Some of the available services using VoIP only allow the user to call another user who uses the same service but with other services the VoIP user can call anyone on a telephone number be it local, international or mobile.⁴⁶ Some services on the market only work over a computer or VoIP phone, for others a traditional phone equipped with an adapter is sufficient.⁴⁷

³⁴ Dong Hee Shin, *Technology, Convergence and Regulatory Challenge: A Case form Korean digital and Media Broadcasting*, C.T.L.R; Computer and Telecommunications Law Review, 2005, 11(4), 105-112.

³⁵ Website of the Federal Communications Commission, *VoIP*, <http://www.fcc.gov/voip/>

³⁶ *Convergence Bill 2005-Special Guide*, Buys IT Law consulting (PTY) LTD
http://www.buys.co.za/download2_registration.asp

³⁷ Stephen A. Carter, *OECD Roundtable on Convergence, 2nd June 2005*
<http://www.ofcom.org.uk/media/speeches/2005/06/oecd#content>

³⁸ S. A. Carter, *ibid*

³⁹ J. Pulver, *VoIP pioneer aims for end of regular phone networks*, June 16, 2005,
<http://insight.zdnet.co.uk/0,39020415,39203959,00.htm>

⁴⁰ J. Pulver, *ibid*

⁴¹ J. Pulver, *ibid*

⁴² J. Pulver *ibid*

⁴³ Online encyclopaedia ; *Wikipedia*, <http://en.wikipedia.org/wiki/VoIP>

⁴⁴ *Wikipedia*, *ibid*

⁴⁵ Federal Communications Commission <http://www.fcc.gov/voip/>

⁴⁶ Federal Communications Commission, *ibid*

⁴⁷ Federal Communications Commission, *ibid*

Advantages of VoIP protocol over traditional telephony are inter alia⁴⁸:

- Lower costs per call (see above) as the user pays for the network connection and a phone call may not have additional charges
- Freer and quicker innovation at market rates as opposed to the rather slow pace of the
- Lower costs for infrastructure
- A higher degree of reliability and resilience may be possible as the network improves
- Since VoIP is software based so that data upgrades can be done when system requires enhancement or repair without necessarily having to manually remove and replace transmitters as in the traditional telephony scenario where you need to shut down the system.

It is not yet clear whether regulation for conventional telephone services also apply to VoIP. In any case the existing provisions need to be amended to adapt to the special issues arising from the new technology. The challenge to VoIP in particular is regulation in respect of how it is adopted by governments protecting (telecom) incumbents.⁴⁹

Effects of the Convergence on the end user/consumer

Convergence will affect us in many different ways -be it our social or working live or the way we get entertained. Inter alia convergence affects our workplace life by using cell phones, electronic mail, wireless communication, web-based interaction. We socialize through chat rooms, special-interest web forums, Internet telephony, video phones, web casting and so forth. Convergence affects the way we entertain and get entertained now through interactive television sets, multimedia content and programmes, virtual and experiential modes of entertainment, etc.⁵⁰ Every aspect of our lives will be transformed by the power of convergence.⁵¹

Other implications of convergence

According to the OECD there are 4 implications flowing from the changes in economies of scope arising from convergence.⁵²

1. Change of market structure: existing firms in a converging market seek to enter the other markets and new firms seek to enter the converged market through mergers or investment.
2. Enhanced competition: with low barriers to entry in the converging sectors, firms can enter from one market to another
3. The regulatory regime changes: convergence puts pressure on existing regulatory structures to change
4. Convergence leads to new products and services.

Why is Convergence of interest to South Africa?

There are several reasons why South Africans should take interest in convergence.

⁴⁸ Wikipedia ibid

⁴⁹ J. Pulver, *VoIP pioneer aims for end of regular phone networks*, June 16, 2005, <http://insight.zdnet.co.uk/0,39020415,39203959,00.htm>

⁵⁰ S. Vutha, *Decoding the convergence bill (I)*, http://www.tata.com/0_knowledge_centre/other_articles/20020422_net_effects17.htm

⁵¹ S. Vutha, ibid

⁵² Biggar, Darryl R., OECD Roundtable, *Regulation and Competition Issues in Broadcasting in the Light of Convergence*, <http://ssrn.com/abstract=185089>.

South Africa is now a democratic society providing freedom and theoretically unlimited possibilities for everyone. Its demographic profile with the high population of youth has got the necessary human resources to become a service power under the condition of course that the necessary education is accessible for the big masses. While other highly industrialized countries in the world have an edge in manufacturing (e.g. China), South Africa could become a services power. The Internet provides the best environment for such services⁵³ and convergence is the key to it.

Conclusion

There are many more examples of convergent technologies than the ones that could have been mentioned within the scope of this paper. And yet Communication Convergence developments have not been fully covered due to its vast and ever-changing fast pace. With the invention and market introduction of new technologies it will rapidly increase in the future. Communications convergence is an evolving process rather than a completed fact.⁵⁴ Modern society is more and more turning into an information society. The arrival and use of modern communications is the key to progress and well-being of a society.

The law must keep pace with technology. On the one hand it would be problematic to maintain traditional approaches to regulation when technological convergence opens up the scope to bypass regulation.⁵⁵ If there applies another law for webcasters on the Internet than to traditional television or radio broadcasting, webcasters could bypass the law just by choosing another means of communication and publicize on the net. *Should internet broadcasting therefore be regulated in exactly the same way as conventional television or radio broadcasting?* But the Internet is not a scarce resource as spectrum is and bandwidth is only used on a demand basis. For this reason imposing regulation could be regarded as an unjustified restriction of freedom of expression just as if such rigid regulation would have been imposed on the press.⁵⁶ The question is what kind of regulatory regime should be adopted to regulate the rapidly converging sectors to achieve maximum social, cultural and economic benefits for the society.⁵⁷ *And which regulatory model enables best a healthy growth of convergent technologies?*

Now we will examine some different regulatory models in response to technical convergence.

There are countries with strong regulatory control to address a converged scenario with Malaysia being the forerunner. With the Indian Communication Convergence

⁵³ S. Vutha, *Decoding the convergence bill (I)*, http://www.tata.com/0_knowledge_centre/other_articles/20020422_net_effects17.htm

⁵⁴ Prof. R. Jakhu, *A Brief Analysis of the Indian Communication Convergence Bill (2000)*, <http://www.law.mcgill.ca/institutes/csri/paper-jakhu-analysis.php3>

⁵⁵ Eric Barendt and Lesley Hitchens, *Media Law, cases and materials*, Longman Law Series, 2000, p. 288

⁵⁶ E. Barendt, *ibid*, at p. 288

⁵⁷ Prof. R. Jakhu, *ibid*.

Bill and the South African Convergence Bill, India and South Africa are on the way to follow the Malaysian model.

Also the European Union and the United Kingdom have embarked on convergence legislation but they follow a somehow different approach.

Part two -“Convergence legislation” in the European Union and in the United Kingdom

The European Union

A. Introduction

Different pipes have traditionally been regulated differently⁵⁸ (vertical regulation). The fact that we have arrived in the age of convergence brings with it the question of how regulation should look like. In this part we examine how the law making bodies of the European Union have reacted to convergence of technologies.

B. History of telecommunications and broadcasting regulation in the EU

a. The telecommunications sector

The long lasting national monopolies on telecommunications by the member states worked against the spirit of an internal market. Originally the treaty of Rome had not granted the European Commission competences respective the telecommunications sector.⁵⁹ In line with the abolition of the State monopolies the EU developed a telecommunications policy that was based on competition and was later on linked with the creation of the internal market⁶⁰ i.e. an inner EU market providing for free trade also on the communications sector. In 1987 the Commission produced “towards a dynamic economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment” to outline the regulatory framework mainly concerning liberalization. In 1990 the Open Network Provision Directive was adopted to provide open and efficient access to and use of telecommunications networks and services based on non discriminatory and transparent criteria.⁶¹ In 1990 already most telecommunications services were liberalized and by 1998 the rest of the exclusive or special operator rights had to be abolished.

b. The broadcasting sector

As it is the case concerning telecommunications, the treaty that founded the EU, the Treaty of Rome, has not accorded explicit powers concerning broadcasting to the European commission. The difficulty about developing a European broadcasting policy has been that broadcasting has traditionally been under the control of the

⁵⁸ S.Carter, OECD Roundtable Convergence,

<http://www.ofcom.org.uk/media/speeches/2005/06/oecd#content>

⁵⁹ Alan McKenna, *Emerging issues surrounding the convergence of the telecommunications, broadcasting and information technology sectors* Information & Communications Technology Law; June 2000, Vol. 9, Iss. 2, p. 3 of the article, further references there,

<http://search.epnet.com/login.aspx?direct=true&db=ufh&an=3347345>

⁶⁰ Mc Kenna, *ibid*, p. 3 of the article.

⁶¹ M. Michalis, *European Union broadcasting and telecoms: towards a convergent regulatory regime?*, European Journal of Communications, 1999, 14, p. 151,152.

member states with different regulation concerning cultural, social and political matters.⁶² However the legitimacy of the EU can only be based on economic provisions of the Treaty. In 1992 the Commission produced the Green Paper on media concentration and pluralism. However EU Intervention in media ownership could only be based on securing the proper functioning of the internal market but it could not be justified with the protection of pluralism, since this is not within the power of the EU.⁶³ It followed a directive on media ownership.

C. The European Union's early vision for an information society

In 1993 the European Council requested a panel of experts to report into the specific measures to be taken into consideration by the Community and the member states for the necessary infrastructure needed in the management of information. The underlying philosophy of the "Bangemann report"⁶⁴, that was created, is the vision of the creation an information society. One of the messages of the report was that the first countries that enter into the information society will reap the greatest rewards and set the agenda for all who must follow.⁶⁵ Europe should now turn its back to principles that belonged to a time before the advent of the information revolution. A more equal and balanced society with fair access to the infrastructure for all and the provision of universal service should be created. The key issue for the emergence of new markets was seen in the need for regulatory reform that allows full competition.⁶⁶ Therefore the report recommended amongst others to open up for competition concerning infrastructure and services still under a monopoly, a review of the European standardization process, the interconnection and interoperability of networks, services and applications, the opening up of the European market and its replication worldwide.

a. The Convergence green paper 1997

The actual convergence debate in the EU started in December 1997 with the Convergence Green Paper⁶⁷ by the European Commission. A Green Paper is a document designed to stimulate public discussion.⁶⁸ The Green Paper invited the public to discuss convergence and launched a Europe-wide debate on how the new generation of electronic media should be regulated in the next century.⁶⁹

⁶² Michalis, *ibid*, p. 51.

⁶³ McKenna, *ibid*, at p. 4 of the article.

⁶⁴ Bangemann report, 26 May 1994, *Recommendations to the European Council Europe and the global information society*,

<http://europa.eu.int/ISPO/infosoc/backg/bangeman.html>

⁶⁵ A. McKenna, *Information & Communications Technology Law*; June 2000, Vol. 9 Iss. 2, p. 3 of the article, *Emerging issues surrounding the convergence of the telecommunications, broadcasting and information technology sectors*,

<http://search.epnet.com/login.aspx?direct=true&db=ufh&an=3347345>

⁶⁶ Mc Kenna, *ibid*, p. 3; Bangemann report, *ibid*.

⁶⁷ Green paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulations towards an information society approach, accessible in different languages under:

<http://europa.eu.int/ISPO/convergencegp/greenp.html>

⁶⁸ Additional information about White and Green Papers,

http://europa.eu.int/documents/comm/index_en.htm

⁶⁹ See for example the Consultation Responses to the Convergence Green Paper by the UK,

<http://www.dti.gov.uk/converg/>

The Green Paper is divided into five chapters and is consciously interrogative, analysing issues and options and posing questions for public comment.⁷⁰ It analyses issues, it identifies options and poses questions for public comment.⁷¹

In Chapters I and II, the Green Paper analyses the multiple technological and market aspects of the convergence phenomenon and their possible impact on the telecommunication, media and information technology sectors.

Chapter III identifies the actual and potential market, industrial and regulatory barriers which may impede these technological and market developments.

Chapter IV provides a detailed discussion on existing and possible future regulatory frameworks or approaches on issues like definitions, market entry and licensing, access to networks, conditional access systems and content, access to frequency spectrum, standards, pricing and individual consumer interests together with the international dimension

Finally, Chapter V proposes a set of principles for the future regulatory policy in the sectors affected by convergence.⁷²

b. The key messages⁷³ emerging from the Public consultation are:

- “With regard to regulation, affirmation of the continuing need to meet a range of public interest objectives whilst recognising the need to promote investment, in particular in new services.
- The need for transparency, clarity and proportionality with regard to rules and to distinguish between:
 - o regulation imposing positive and negative obligations in the public interest,
 - o sector-specific regulation complementing case-by-case application of competition rules,
 - o promotional measures ensuring outcomes according to specific policy objectives.
- Separation of transport and content regulation, with recognition of the links between them for possible competition problems. This implies a more horizontal approach to regulation with:
 - o homogenous treatment of all transport network infrastructure and associated services, irrespective of the types of services carried;
 - o a need to ensure that content regulation is in accordance with the specific characteristics of given content services, and with the public policy objectives associated with those services ;
 - o a need to ensure that content regulation addresses the specificity of the audiovisual sector, in particular through a vertical approach where necessary, building on current structures;
 - o application of an appropriate regulatory regime to new services, recognising the uncertainties of the marketplace and the need for the large initial investments involved in their launch while at the same time maintaining adequate consumer security

⁷⁰ Gateway to the EU, Convergence green Paper, “news”,
<http://europa.eu.int/ISPO/legal/en/news/9712/chapter6.html#61>

⁷¹ Executive summary of the green paper,
http://www.itb.hu/dokumentumok/green_paper/greenpaper_1.htm

⁷² Gateway to the EU, Convergence green Paper, “news”, ibid

⁷³ *Results of the Public Consultation on the Green Paper on the Convergence of the telecommunications, Media and Information Technology Sectors*,
<http://europa.eu.int/ISPO/convergencegp/ip164en.html>

- A balanced solution as to how public broadcasting can be best integrated into the new environment, which should:
 - o respect Member State's competence by defining the remit of public service broadcasting in accordance with Protocol 9 to the Amsterdam Treaty⁷⁴;
 - o encourage those organisations vested with public broadcasting obligations to exploit new technologies and new ways of reaching their audiences;
 - o require such broadcasters to distinguish clearly between defined public broadcasting activities and those lying in the competitive domain.
- Effective application of the competition rules; an increased reliance on those rules, accompanied by gradual phasing-out of sector-specific regulation, as the market becomes more competitive.
- Actions aimed at promoting premium European content.”

D. The new telecommunications regulatory framework

The existing legal framework in the EU had to be adapted to-

- technological progress in form of convergence between information technology, telecommunications and the media; and
- the full liberalisation (opening up) of the telecommunications market in 1998.⁷⁵

The aim of the new framework is to strengthen competition by making it easier for new entrants to enter the electronic communications market and stimulate investment.⁷⁶ Europe's decision making bodies wanted to ensure that the benefits of the arrival of convergent technologies were spread consistently and evenly across the EU⁷⁷ and that the new regulatory package was so flexible that it could evolve with rapid changes of technology and the market.⁷⁸

Therefore, in response to the green paper on convergence, several directives were enacted in 2002. They are described after first having a look at their legal basis.

The legal basis of the European Union's policy for the information society rests on the following main policy components:⁷⁹

1. the telecommunications policy, which is itself based on:
 - Art. 95 TEC⁸⁰ (Internal Market⁸¹ harmonization),
 - Art. 81, 82 (competition rules) of the TEC and
 - Art. 47, 55 (right of establishment and services) of the TEC

⁷⁴ The TCE is the treaty establishing the European Community. The Protocol on the system of public broadcasting in the Member States is accessible under:

<http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0109010012>

⁷⁵ *regulatory framework for electronic communications*,

<http://europa.eu.int/scadplus/leg/en/lvb/l24216a.htm>

⁷⁶ <http://europa.eu.int/scadplus/leg/en/lvb/l24216a.htm>

⁷⁷ <http://europa.eu.int/scadplus/leg/en/lvb/l24100.htm>

⁷⁸ <http://europa.eu.int/scadplus/leg/en/lvb/l24100.htm>

⁷⁹ Gateway to the EU, *Information Society; Introduction*,

<http://europa.eu.int/scadplus/leg/en/lvb/l24100.htm>

⁸⁰ The TCE is the Treaty establishing the European Community

⁸¹ Internal market: In 1993, the single market, as it is also called, was the EU's greatest achievement.

Barriers between the member states were abolished so that people, goods, services and money can move around Europe as freely as within one country. For further information:

http://europa.eu.int/pol/singl/index_en.htm

2. the support to technological development in information and communication technologies (ICT), based on articles 163 through 172 (research and development) of the Treaty of the European Community (TEC);
3. the contribution to creating the necessary conditions for the competitiveness of the Community's industry, in line with article 157 of the TEC;
4. the promotion of trans-European networks (TEN) in the transport, energy and telecommunications sectors, as stipulated in Articles 154, 155 and 156 of the TEC

The new regulatory framework promotes access to the Internet and e-commerce, sets common technical standards in the cell phone industry (e.g. GSM and UMTS), in digital television and radio.⁸² It aims at coherent and consistent application funding, regulations and technology take-up across the EU.⁸³

The new unified regulatory framework for electronic communication networks and services in the EU is also referred to as “**Telecom Package**”. It consists of the following five harmonisation directives, one decision and one regulation:

- There is the general Framework Directive,⁸⁴ plus four specific directives:
 - The Authorisation Directive,⁸⁵
 - The Universal Service Directive,⁸⁶
 - The Access Directive⁸⁷ and
 - The Directive on privacy and electronic communications.⁸⁸

To these should be added:

- The radio spectrum policy Decision⁸⁹ of 2002 and
- the Regulation on unbundled access to the local loop which was adopted in December 2000.⁹⁰ A local loop is the wired connection from a telephone company's central office in a locality to its customers' telephones.⁹¹

This new regulatory framework had to be transposed into the national laws of the Member States by July 24th, 2003.⁹²

⁸² Information Society, Introduction, <http://europa.eu.int/scadplus/leg/en/lvb/l24100.htm>

⁸³ <http://europa.eu.int/scadplus/leg/en/lvb/l24100.htm>

⁸⁴ 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]

⁸⁵ 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]

⁸⁶ 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]

⁸⁷ 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]

⁸⁸ 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]

⁸⁹ 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].

⁹⁰ Accessible (pdf) under: <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/regullfin-en.pdf>

⁹¹ http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212497.00.html with further information

To get more insight into the European “convergence legislation” the different parts of the so called “Telecom Package” will be summarized i.e. firstly we are going to have a look at the five directives, then the regulation and the decision.

a. Summaries of the new directives

1. The electronic communications networks and services framework Directive (FD)

The FD provides for an overall harmonized framework for the regulation of electronic communication networks and services. It sets objectives and principles which the national regulatory authorities (NRAs) have to follow when making regulatory decisions.

As a principle, regulation can only be imposed after a market analysis has found that a market is not sufficiently competitive; that is, where an undertaking has Significant Market Power (SMP).⁹³ The notion of SMP has been newly defined so that it is equivalent to the EU competition law concept of dominance⁹⁴: undertakings are considered to have significant market power if they can behave independently of competitors, customers and the consumer.

The notions of electronic communication networks and services are crucial. They are defined by the FD as follows:

“Electronic communications networks” means a transmission systems which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed and mobile terrestrial networks, networks used for radio and television broadcasting and cable television networks.

“Electronic communications service” is a service, normally provided for remuneration, which consists in the conveyance of signals on electronic communications networks. Services providing, or exercising editorial control over, content transmitted using electronic communications networks and services are excluded.

Technical convergence calls for horizontal regulation of infrastructure: thus the new regulatory framework covers not only telecommunications network but all electronic communication networks and services including:

- Fixed and mobile telecommunication networks;
- Cable and satellite television networks; and
- Electricity networks when used for electronic communication services.⁹⁵

Excluded from the scope of the directive is content as for example broadcasting content, financial services and also terminal equipment.

Member States must guarantee the independence of National Regulatory Authorities (NRAs). The NRAs must exercise their powers impartially and transparently and consult the interested parties before taking market significant measures. In order to promote competition tasks of the NRAs are:

- ensuring that users benefit in terms of quality, price and choice;
- encouraging investment in infrastructure
- promoting innovation;

⁹² Gateway to the EU, *Ninth report on the implementation of the electronic communications regulatory package*, <http://europa.eu.int/scadplus/leg/en/lvb/l24217d.htm>,

⁹³ Ofcom website, *Imposing Access Obligations under the new EU Directives*, Sept. 13, 2002, http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/acce0902.htm

⁹⁴ Ofcom, *ibid*.

⁹⁵ Ofcom, *ibid*.

- encouraging efficient use and management of radio frequencies and numbering resources.⁹⁶

Additionally the NRAs must contribute to develop the internal market for examples by:

- encouraging the establishment and development of trans-European networks; and
- encouraging the interoperability of pan-European services;
- prevent the discrimination in the treatment of undertakings providing electronic communications networks and services⁹⁷;

In order to achieve consistent regulatory practice and application of the new telecommunications regulatory framework in the internal market, the NRAs are to cooperate with each other and with the European Commission.

Finally the NRAs have to promote the interests of the citizens of Europe for example by:

- ensuring that all citizens have access to a universal service,⁹⁸
- simple and inexpensive dispute resolution procedures;
- a high level of protection of personal data and privacy⁹⁹

The NRAs also manage the radio frequencies for electronic communication services. The frequencies must be assigned on the basis of objective, transparent, non-discriminatory and proportionate criteria.

Member states may allow transfer of rights to use spectrum but must ensure that competition is not distorted as a result. Member states must also provide for the assignment of adequate numbers for all electronic communications services and they manage the national numbering plans.

The European Commission had to make a recommendation on product and service markets in the electronic communications sector. It identifies markets on which the regulatory obligations are imposed according to the specific Directives.

The European Commission also published guidelines for the assessment when an undertaking has significant market power accordant to the European Competition law. It is then the task of the NRAs to conclude that a particular market is not competitive enough and to identify the undertaking with significant market power. Strict regulatory obligations can then be imposed on these undertakings.

In order to promote the free flow of information, media pluralism and cultural diversity, the interoperability of digital television services is encouraged. For this purpose providers of digital interactive television services and providers of enhanced digital television equipment are encouraged to use and comply with an open application program interface (API). "API" means the software interfaces between applications and the resources in the enhanced digital television equipment for digital television and radio services.¹⁰⁰

Disputes between providers within a Member State are to be resolved by the NRA.

⁹⁶ Ofcom, *ibid.*

⁹⁷ Ofcom, *ibid.*

⁹⁸ as specified in Directive 2002/22/EC ("Universal Service Directive").

⁹⁹ see "Directive on Privacy and Electronic Communications".

¹⁰⁰ Gateway to the EU, *Regulatory framework for electronic communications*, March 11, 2004, <http://europa.eu.int/scadplus/leg/en/lvb/l24216a.htm>

If there is a cross border dispute the party may refer the dispute to the national regulatory authorities concerned, which must coordinate their efforts in order to settle it.¹⁰¹

Each Member States has to adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive not later than 24 July 2003.

2. The Universal Service Directive (USD)

People in the European Union have the right to universal service at the same level to the same price. The USD sets out a procedure for designating providers of universal service and a minimum set of services that these operators must provide.¹⁰² Diverse obligations can be imposed on providers with significant market power (SMP) in retail markets. The Directive also deals with contracts between consumers and telecoms providers as well as alternative dispute resolution for consumers

The USD might be revised soon to include mobile services and broadband technology.

3. The Authorisation Directive

The Authorisation Directive is all about limiting regulation to the necessary minimum.

The aim of the directive is to establish a harmonized internal market for electronic communication networks and services.¹⁰³ No undertaking may provide electronic communication networks or services without authority in form of a licence. The directive also applies to the granting of rights to use radio frequencies when the use involves an electronic communication network or service.¹⁰⁴

The main innovation is that the directive replaces the individual licences by general licences; but there is still a special scheme for assigning frequencies and numbers¹⁰⁵ In order to exercise the rights derived from a general licence the undertaking does not need to obtain a decision from the NRA or any other administrative act. It is sufficient for the undertaking to notify the NRA.

Whenever possible the use of radio frequencies should not be subject to the grant of an individual right of use. Member states should already include the conditions of usage in the general authorization. The general authorisation and the rights of use may be subject only to the conditions listed in the Annex to the Directive relating to:

- financial contributions to funding of the universal service;
- interoperability of services and interconnection of networks;
- accessibility and portability of numbers- portability means that users have the option to keep their telephone number when they change operator;
- rules on privacy protection and the protection of minors;
- obligation to transmit certain television and radio programmes ("must carry");
- environmental and town and country planning requirements;
- possible imposition of administrative charges on undertakings;
- restrictions concerning the broadcast of illegal content¹⁰⁶

¹⁰¹ Gateway to the EU, *Regulatory framework for electronic communications*, ibid.

¹⁰² Ofcom website, *Imposing access obligations under the new EU directives*, Sept. 13 2002, http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/acce0902.htm

¹⁰³ Gateway to the EU, *Authorisation of electronic communication networks and services*, 5 Oct. 2002, <http://europa.eu.int/scadplus/leg/en/lvb/l24164.htm>

¹⁰⁴ *Authorisation of electronic communication networks and services*, ibid

¹⁰⁵ *Authorisation of electronic communication networks and services*, ibid

¹⁰⁶ *Authorisation of electronic communication networks and services*, ibid.

Non-compliance with conditions of a general authorization or of specific rights of use may result in a financial penalty. In serious breaches the NRA can forbid an undertaking to provide electronic communication networks and services or to suspend or withdraw rights of use.

The NRA may charge administrative fees on providers of electronic communications networks and on service providers and for the rights of use of radio frequencies as well as for the rights to install facilities. The charges include costs for international cooperation, harmonization and standardization, market analysis and regulatory work.¹⁰⁷

Member States must adopt legislation to comply with the Directive by 24 July 2003 at the latest.

4. The Access and Interconnection Directive (AID)

The directive's aim is to promote the opening of monopolistic networks.¹⁰⁸ It only applies to wholesale relationships between providers of electronic communication networks and services; their relationship should result in sustainable competition, interoperability and user benefit.¹⁰⁹ The directive does expressly not apply to access by end-users.

There are two major aspects of the Directive¹¹⁰:

1. It provides for rights and obligations for undertakings seeking access or interconnections.
2. It imposes obligations on undertakings with Significant Market Power (SMP). For this purpose the Directive contains provisions about analyzing markets in order to designate undertakings with SMP.

Undertakings with SMP are prevented to block access to and interconnection with electronic communications networks and services. Conditions must be non-discriminative, transparent and fair.

5. Directive on privacy and electronic communications (DPEC)¹¹¹

Data protection is traditionally a big concern in Europe. The new DPEC compliments the existing Data protection Directive raising the level of data protection.

This was necessary in so far that with convergence of technology, data can be transferred more easily than ever. The more convergence advances on a technical level, the more there is need for data protection in respect of processing personal data in the electronic communication sector. New cross border electronic communication systems can only develop successfully if the users can be confident that the right to privacy is protected.¹¹²

The DPEC's aim is to take into account the arrival of new technologies and to create a technological neutral piece of law. It harmonizes the provisions of the member states in order to achieve an equivalent level of the right to privacy across the EU and it

¹⁰⁷ *Authorisation of electronic communication networks and services*, *ibid.*

¹⁰⁸ T. Shinohara, *Convergence and its rule governance in the ubiquitous network Age*, 24,25 Jan. 2005, http://www.tcf.or.jp/data/20020124-25_Takeshi_Shinohara.pdf

¹⁰⁹ Ofcom website, *Imposing access obligations under the new EU directives*, Sept. 13, 2002, http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/acce0902.htm

¹¹⁰ [www.packetfront.com/doc/New_EU_Directive_summary_web\(1\).pdf](http://www.packetfront.com/doc/New_EU_Directive_summary_web(1).pdf)

¹¹¹ The directive is online accessible under europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf

¹¹² Information is available under: *Cyber-Rights & Cyber-Liberties (UK)*, *Interception of Communications*, August 2002, at <http://www.cyber-rights.org/interception>.

safeguards the free circulation of electronic communication services, of technical equipment and of data.¹¹³

The Directive also contains provisions about “non requested communications” (including so called “Spam”). Under Article 13 of the DPEC the use of automated calling devices, facsimile or e-mail for direct marketing purposes is generally prohibited unless the recipient had consented to receive the advertisement before it was sent (opt –in principle). This creates a strong level of protection since many other countries including South Africa follow the opt-out principle; this means in short that unsolicited communications are legal as long as the sender stops sending further advertisement on request of the recipient.

The issue of interception is also covered by the DPEC:

According to article 5 Member States “shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorized to do so”.

Article 15 (1) of the Directive contains several exceptions to the prohibition of interception regarding-

- national and public security,
- defence and
- the prevention, investigation, detection and prosecution of criminal offences;
- or
- unauthorized use of the electronic communication system.

For this purpose member states may amongst others require Internet service providers to retain data for a limited period. All measures that restrict personal rights must be necessary, appropriate and proportionate to their purpose.

b. The radio spectrum policy decision¹¹⁴

The radio spectrum policy decision is addressed to the Member States (art. 12). The Decision was made after and according to the Green Paper on radio spectrum policy. Radio frequencies are a finite resource; the background of the decision is that there was a boom in demand for use of frequency spectrum by mobile applications. This is because more and more people possess cell phones and in the age of convergence they are by far not only used for calling somebody but also for sending SMS, MMS, surfing the net and much more. For all this, radio spectrum is needed and management of the radio spectrum has become more difficult.

There is already a single market for radio equipment which shall meet the same essential requirements in all the member states.¹¹⁵ However frequency planning is still managed on a national level with the potential of being a barrier to the single market¹¹⁶. The Decision therefore proposes establishing general methods to harmonise the use of the radio spectrum within the European Union.¹¹⁷

¹¹³ *Interception of communications*, ibid.

¹¹⁴ the radio spectrum policy decision is online accessible under.

http://europa.eu.int/information_society/policy/radio_spectrum/docs/policy_outline/decision_6762002/en.pdf

¹¹⁵ R&TTE Directive 1999/5/EC (Radio and Telecommunications Terminal Equipment Directive)

¹¹⁶ M. Sharpe, ppt presentation on the radio Spectrum Decision,
<http://www.tsacc.ic.gc.ca/content/documents/gsc/GSC-8-065.ppt#4>

¹¹⁷ Gateway to the EU, *Regulatory framework for the radio spectrum policy*, Oct. 8th, 2002,
<http://europa.eu.int/scadplus/leg/en/lvb/l24218a.htm>

The Decision governs the allocation of radio and wireless communication frequencies including GSM, UMTS (universal mobile telecommunications system) etc.¹¹⁸. Its aim is to establish a policy framework for the use of radio spectrum. Economic, cultural, scientific and social aspects of Community policy as well issues of security, public interest and freedom of expression must be taken into account.¹¹⁹ A legal framework is established to insure that the conditions for availability and effective use of radio spectrum are harmonized.¹²⁰ Another aim is to protect the interests of the European Community concerning the use of spectrum in international negotiations.¹²¹

The Decision allows for the Radio Spectrum Policy Group (RSPG). It is a Committee of the Member States that identifies community policies where radio spectrum harmonization measures may be necessary; an example would be encouraging access to broadband measures.¹²²

The Decision also allows for the Radio Spectrum Committee (RSC). It is a Committee of the Member States that identifies community policies where radio spectrum harmonization measures may be necessary; an example would be encouraging access to broadband measures.¹²³

The RSC provides mandates to CEPT (European Conference of Post and Telecommunications Administrations) for spectrum harmonization recommendations and decisions.¹²⁴ Furthermore The RSC creates Commission Decisions based on CEPT measures.¹²⁵

To put it all in a nutshell the decision now links Spectrum management to EU public interest policy initiatives. Another benefit is that community-wide spectrum allocations now have a legal certainty under the law.¹²⁶

c. The Regulation on unbundled access to the local loop¹²⁷

The subject matter this regulation deals with does not fall under the scope of convergence in the narrower sense. But since it is a part of the “Telecom Package” that was enacted as a whole in response to the convergence phenomenon, this regulation is briefly described.

As opposed to EU directives, that need to be transposed into the domestic law of the member states, EU regulations pass directly into Community law and do not need to be transposed by the member states in order to be directly enforceable in all member States. The regulation on unbundled access to the local loop passed on 31 December 2000 directly into Community law without the involvement of the national Parliaments.

A local loop is the wired connection from a telephone company's central office in a locality to its customers' telephones.¹²⁸ New optical fiber loops are not within the

¹¹⁸ *Regulatory framework for the radio spectrum policy*, *ibid.*

¹¹⁹ *Regulatory framework for the radio spectrum policy*, *ibid.*

¹²⁰ *Regulatory framework for the radio spectrum policy*, *ibid.*

¹²¹ *Regulatory framework for the radio spectrum policy*, *ibid.*

¹²² *Regulatory framework for the radio spectrum policy*, *ibid.*

¹²³ *Regulatory framework for the radio spectrum policy*, *ibid.*

¹²⁴ M. Sharpe, ppt presentation on the radio spectrum decision,

<http://www.tsacc.ic.gc.ca/content/documents/gsc/GSC-8-065.ppt#4>

¹²⁵ M. Sharpe, *ibid.*

¹²⁶ M. Sharpe, *ibid.*

¹²⁷ Regulation on unbundled access to the local loop,

<http://europa.eu.int/ISPO/infosoc/telecompolicy/en/regullfin-en.pdf>

¹²⁸ SearchNetworking.com Definitions, powered by whatis.com,

http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212497,00.html with further information

scope of the directive for the reason that the market is much more competitive in that field.¹²⁹

The EC regulation mandates the provision of full unbundling and shared access to the local loops by operators with significant market power.¹³⁰ Incumbent operators must provide competition with full and shared access to the local copper loop under conditions that shall be transparent, fair and non discriminatory.¹³¹ Thus there is not only one but there are different operators that are enabled to provide data and telephony services. The National regulatory authorities may impose changes on the reference offer including prices. The regulation's aim is to promote fair and sustainable competition; excessive pricing is only prevented where competition is insufficient to permit self regulation.¹³² It is a principle of the EU law dealing with convergence that regulation is only passed in order to protect competition from operators with significant market power who would otherwise try to rule the market alone to the disadvantage of consumers. If there is sufficient competition, the regulator displays a hands-off policy and lets the market regulate itself.

Amongst the motives for enacting this regulation was the difficulty for operators to offer pan-European services when every member state had its own regime for unbundling.¹³³ Therefore there was a need for harmonisation.

Furthermore unbundling the local loop brings a substantial reduction in the costs of using the internet; and only where there is access to an inexpensive communication infrastructure and a wide range of services, Europe can achieve the growth and job potential of the digital knowledge based economy.¹³⁴ Opening up the local loop is crucial for development and success of convergent technologies.

d. Implementation of the new regulatory framework in the member states

This new regulatory framework provides for clear and stable rules creating certainty for investors.¹³⁵ It helps to create a competitive and innovative market as well as price reductions and more choice for consumers.¹³⁶

Several committees and procedures have already been established to facilitate the uniform application in the Member States who had to transpose the directives into their domestic law until 24 July 2003.¹³⁷

In Great Britain it is mainly the Communications Act that implements the new regulatory package (for details see below: Convergence in the UK). However in a number of Member States the implementation is far from complete.

Another problem putting pressure on the Member States is that several market and technology developments could not have been foreseen when the directives were drafted.¹³⁸ Remaining questions are for instance: how to regulate VoIP in respect of

¹²⁹ Gateway to the EU, *Unbundled access to the local loop*,

<http://europa.eu.int/scadplus/leg/en/lvb/l24108j.htm>

¹³⁰ *Local loop access services in the EU member states*,

<http://www.analysis.com/atlas/FindAndShowArticles.asp?strKeys=34,30>

¹³¹ *Local loop*, *ibid*

¹³² *Local loop*, *ibid an INTUG Europe position paper, July 2000*,

http://www.intug.net/views/europe/local_loop_regulation.html

¹³³ INTUG group, *Unbundling the local loop- an INTUG Europe position paper, July 2000*,

http://www.intug.net/views/europe/local_loop_regulation.html

¹³⁴ INTUG group, *ibid*.

¹³⁵ Gateway to the EU, *Electronic communications; The road to the knowledge based economy*, June

20th, 2003, <http://europa.eu.int/scadplus/leg/en/lvb/l24216b.htm>

¹³⁶ *Electronic communications; The road to the knowledge based economy*, *ibid*

¹³⁷ *Electronic communications; The road to the knowledge based economy*, *ibid*

¹³⁸ S. Carter, OECD Roundtable on convergence, June 2nd, 2005,

<http://www.ofcom.org.uk/media/speeches/2005/06/oecd#content>

consumer protection, how to provide for interconnection between new IP networks, how to treat technologies that blur the distinctions between mobile and fixed (e.g. Wi-Max) and much more.¹³⁹ Although the regulatory framework has undoubtedly been well considered at the time of its draft, the regulator struggles to keep pace with market and technology development.¹⁴⁰

Now we are going to have a look at the emergence of “convergence law” in the UK and how the EU directives that were described above were implemented in the UK.

The United Kingdom

A. History of telecommunications

Here again an understanding of how the different sectors that are affected by convergence have been operated historically provides for a deeper understanding of the main issue that will be treated subsequently. Since the broadcasting and telecommunications sectors have historically developed separately, their development has to be regarded separately too.

a. The telecommunications sector

As in most other industrialized countries except the United States, telecommunications were provided by a government department or a state enterprise.¹⁴¹ In the United Kingdom the state had a monopoly, the British Telecom (BT) to provide telecommunications services. In 1982 the first licence was granted to a private company to compete with BT. Then, in 1984 BT was privatized and the Office of Telecommunications (OFTEL), a new regulatory body was created to promote competition and to ensure the protection of consumers. After the government issued a white paper “Competition and Choice: Telecommunication Policy for the 1990s” in 1991, the telecommunication market was opened up; mobile operators were allowed to run fixed services using radio networks, cable operators were allowed to offer voice telephony, restrictions in the provision of international services were made not so strict any more.¹⁴²

b. The broadcasting sector

There are two reasons for regulating broadcasting: firstly to ensure universal coverage because of scarcity of frequency and secondly the need to regulate content because broadcasting does not work on a demand basis but content is broadcasted continuously and “straight into the face”.

The British Broadcasting Corporation (BBC) had a monopoly until 1955. Then the first commercial TV broadcaster was granted a licence. Commercial broadcasters are regulated by Independent Television Commission (ITC) and must comply with public service broadcasting obligations. The broadcasting content, the programme, of every broadcaster is tightly controlled. The BBC must educate, entertain and inform the

¹³⁹ S. Carter, *ibid*

¹⁴⁰ S. Carter, *ibid*

¹⁴¹ B. elenius, P. Stern, P. *Implementing Reforms in the Telecommunications Sector: Lessons from Experience*, p. 3, Avebury IBRD, World Bank

¹⁴² Alan McKenna, *Information & Communications Technology Law*; June 2000, Vol. 9 Issue 2, p. 4 of the article, *Emerging issues surrounding the convergence of the telecommunications, broadcasting and information technology sectors*, <http://search.epnet.com/login.aspx?direct=true&db=-ufh&an=3347345>

public”.¹⁴³ Other Public Service broadcasting requirements are to inform the public with local, national and international news, provide for regional, children and religious programmes.¹⁴⁴

In December 1998 the White paper CM 4176 “Our Competitive future: Building the knowledge driven Economy” was issued. It acknowledges that in an increasingly global market, the UK cannot compete in the old way. Therefore the UK government is committed to modernize and open up the markets and adapt them to new technologies.

In July 1998 the Green paper CM 4022 “*Regulating Communications: Approaching Convergence in the Information Age-July 1998*” followed. Since the technology driven Communications sector can not be imitated this easily by competitors this sector is of vital importance for the UK. Therefore the government is committed to ensure that the UK becomes a world leader in this field. Social and economic aims are access, universal service, choice, competitiveness, investment and competition.¹⁴⁵

But the government only intends to regulate where it is necessary in the consumer interest and regulation will not be more than is required to achieve this. Wherever possible the operation of the market is supported to encourage investment and new services. Thus it relied on competition in the market as a regulator as well as on general competition law except on the fields that are beyond the scope of competition law such as bottleneck control, universal access, public service broadcasting (where the UK has got a strong history) and consumer protection.¹⁴⁶

Compared to the other European countries the United Kingdom was the first country to achieve liberalization of telecommunication policy.¹⁴⁷

In order to bring the UK in line with the competition law of the European Community the Competition Act was enacted in 1998.¹⁴⁸

In short the UK was embarking on a de-regulatory market based policy.¹⁴⁹

Pre 2003 - Five different regulatory bodies

Before they were replaced by the single regulator OfCom there were five bodies and office holders with regulatory control in the communications sector.¹⁵⁰

1. The **Broadcasting Standards Commission** with responsibilities for standards and fairness in broadcasting. It is a non- departmental public body

2. The **Office of telecommunications** (OfTel) run by the Director General of Telecommunications with its main task under the telecommunications act of 1984 is to administer the telecommunication licences but also to ensure related consumer protection as well as adequate provision of telecommunications services for everyone. It is a non-ministerial government department.

3. The **Independent Television Commission** which licenses and regulates independent television services and has responsibilities including programme standards, public service obligations, research, TV advertising and technical quality; It is a statutory body with powers derived from the Broadcasting Acts 1990 and 1996

¹⁴³ Mc Kenna, *ibid* p. 4 of the article, with references.

¹⁴⁴ Mc Kenna *ibid*, p. 4, with reference to J. Landau, *the future regulation of broadcasting and telecommunications in the United Kingdom, communications Law*, 1998, p. 3.

¹⁴⁵ Communications green paper

¹⁴⁶ Mc Kenna, *ibid* p. 7 of the article.

¹⁴⁷ T. Shinohara, *Convergence and its rule governance in the ubiquitous Network age*, paper prepared for the Tokyo club Foundation for Global Studies meeting, Paris, 24-25 January 2002.

¹⁴⁸ Mc Kenna, *ibid* p. 8 of the article with reference to Turner, J. (1999) The UK Competition Act 1998 and Private Rights, *European Competition Law Review*, 2, p. 62 for more details.

¹⁴⁹ Mc Kenna, *ibid*, at p. 8 of the article.

¹⁵⁰ Official explanatory note Communications Act 2003.

4. The **Radio Authority** to licence all non BBC radio services as well as frequency planning, regulation of programming and advertising, and the supervision of the radio ownership system. It is a statutory body with powers derived from the Broadcasting Acts 1990 and 1996

5. The **Radiocommunications Agency** exercising the role of the Secretary of State with responsibilities concerning the allocation, maintenance and supervision of non-military radio spectrum. The Radio Communications Agency is an executive agency of the Department of Trade and Industry.¹⁵¹

B. The Communications White Paper- Regulation at the minimum necessary level

A White paper is a document presenting a detailed and well-argued policy for discussion and political decision.

With the communications white paper “*A New Future for Communications*” (Cm 5010), published on 12th December 2000, the government responds to the new communications environment.

*“Our world is changing, and communications are central to this change. Digital media have revolutionised the information society. Multi-channel television will soon be available to all. More and more people can gain access to the Internet, through personal computers, televisions, mobile phones, and now even games consoles. The choice of services available is greater than ever before. High-speed phone lines give households access to a whole new range of communications services and experiences. Using their TV sets people are able to email, shop from home, and devise their own personal viewing schedules. The communications revolution has arrived.”*¹⁵²

The paper is the joint work of two departments proposing reform for the regulatory framework of the communications sector in the 21st century with the aim to bring forward legislation to implement the policy proposals. The Communications act, which we are going to have a look at below, is based on it.

The White paper announced the Government's proposals for the reform of the regulatory framework for the communications sector. At the centre of it were proposals for the creation of a **unified regulator for the communications sector**.¹⁵³

The government's aims are stated:

- We will make the UK home to the most dynamic and competitive communications and media market in the world.
- We will ensure universal access to a choice of diverse services of the highest quality.
- We will ensure that citizens and consumers are safeguarded.¹⁵⁴

¹⁵¹ Official explanatory note *Communications Act 2003*,3

<http://www.legislation.hmso.gov.uk/acts/en/2003en21.htm>

¹⁵²foreword to the communications white paper by the government:

http://www.communicationswhitepaper.gov.uk/by_chapter/foreword/index.htm

¹⁵³ official explanatory note to the Office of Communications Act,

<http://www.opsi.gov.uk/acts/en2002/2002en11.htm>

¹⁵⁴ UK Department of Trade and Industry website,

www.communicationswhitepaper.gov.uk/by_chapter/ex_summ/index.htm

In the communications White paper the government strongly supports regulation at the minimum level necessary.¹⁵⁵

The government wants to impose a duty on Ofcom to review the market and enacted legislation regularly in order that regulation can be rolled back to a minimum level when there is enough competition to make regulation unnecessary.

Alternative regulation in form of co-regulation between the regulator and industry and self-regulation by trade associations and professional bodies are encouraged where they can best achieve the regulatory aims.

The borders between co-regulation and self-regulation are blurred. Generally speaking in co-regulation the regulator is more involved than in self-regulation, though the regulator is involved to some extent in self-regulation.

There is an example of well working self-regulation: The Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS). In this example the industry leads the regulation of premium telephone lines. Formal legislation only supports it. Oftel and ICSTIS are working together and plans are to give ICSTIS responsibilities in respect of the licencing regime.

Benefits of self-regulation are that the experience and sector-knowledge of those that are regulated is used. As a form of regulation by the people/sector for the people/sector its approach is very close to the regulated subject matter, self-motivating and can result in a very fair and flexible regime. However the communications sector needs the regulator to at least monitor the progress and effectiveness in achieving the goals of any self-regulatory regime in the sector. The public also needs to have confidence in self-regulation to work.

In co-regulation, the other proposed form of regulation, the regulator for example sets the objectives to achieve or supports enforcing the sanctions.

Ofcom is expected to consider all the different regulatory approaches and then adopt the most suitable. This comprises alternative regulation to the conventional formal regulation especially when competition is pervasive. Where alternative regulation is used Ofcom should review its effectiveness regularly in order to achieve maximum benefits for the public.

The aim to be kept in mind is to adopt only the minimum necessary level of regulation to achieve maximum benefits for consumers and society. Therefore Ofcom has to keep the market under review.

When full competition is developed and expected to stay Ofcom is to taken away regulation to achieve this objective immediately. So-called 'sunset clauses' as a means of removing regulation when it is no longer needed is to be considered. However when new technologies access the market Ofcom is to enact regulation quickly in order to make competition possible. All regulation that is enacted must be proportionate to its purpose (principle of proportionate regulation). In this context this means especially that regulation must be the mildest means to achieve a regulatory goal. From several regulatory options that interfere in personal freedoms to different degrees it is always the regulation that interferes least to achieve a goal that must be enacted.

Ofcom is expected to ensure that its regulation of communication networks is not "framed in terms of particular technologies" and is not a hindrance to technical innovation but is technological neutral.¹⁵⁶ The aim is that regulation only addresses

¹⁵⁵ executive summary, chapter 8,
http://www.communicationswhitepaper.gov.uk/by_chapter/ch8/8_11.htm

¹⁵⁶ http://www.communicationswhitepaper.gov.uk/by_chapter/ch8/8_11.htm

key issues for consumers and citizens¹⁵⁷ and should therefore be at the minimum necessary level.

C. The Office of Communication Act 2002 and the Communications Act 2003

The Office of Communications Act¹⁵⁸ was enacted in 2002 and created a single regulator for the media and communications industries and reformed the broadcasting and telecommunications regulation. At its centre were proposals for the creation of a unified regulator; Ofcom. It is the new communications sector regulator with wide-ranging responsibilities inheriting the duties of the five existing regulators it replaces: The Broadcasting Standards Commission (BSC), the Independent Television Commission (ITC), Oftel, the Radio Authority and the Radiocommunications Agency (see their description above). Ofcom is also the competition authority for the communications industry responsible for telecommunications, wireless communication, television and radio.¹⁵⁹

The Office of Communications Act empowers the Secretary of State to create Ofcom before the Communication Bill, that transfers powers on Ofcom, was enacted so that Ofcom was ready to be transferred its regulatory powers more quickly.

Ofcom is a statutory corporation with its Board having 6 non-executive members and 3 executive members including the Chief Executive. The Secretary of State has got the power to appoint Ofcom's members. The Chairman, a non-executive member runs the Board. The establishment of the office of Chair and Chief Executive of OfCom is an important step to make detailed policies and key strategic decisions.¹⁶⁰

The powers transferred to Ofcom in respect of the Communications sector are set out in the Communications Act. A substantial policy review is encompassed and a framework for further reform is set up. The aim of the Communications Act is to create a less complex system that is so flexible that it can adapt to technological changes.

The Ofcom Act contains seven sections and one schedule whereas the Communications Act is a monster considering its deregulatory nature and consists of 610 pages.¹⁶¹ The Communications Act 2003¹⁶² provided Ofcom with the basis of all of its powers to regulate the airwaves and replaces some parts of the Broadcasting Acts 1990 and 1996, although other parts of these Acts still remain active.¹⁶³ The Communications Act gives effect to the Government's proposals for the reform of the regulatory framework for the communications sector, as set out in the Communications White Paper - A New Future for Communications (Cm 5010).¹⁶⁴ The aim of the Communications Act is to creates a less complex system that is so flexible that it can adapt to technological change

According to the official explanatory notes to the Communications Act 2003¹⁶⁵ the main provisions of the Act provide for:

- the transfer of functions from the 5 bodies and office holders (see above) to the new regulator Ofcom;

¹⁵⁷ Communications white paper, *ibid*.

¹⁵⁸ Office of Communications Act 2002, <http://www.opsi.gov.uk/acts/acts2002/20020011.htm>

¹⁵⁹ Ofcom website, www.ofcom.org.uk/

¹⁶⁰ Explanatory Notes to Office of Communications Act 2002, para 6.

¹⁶¹ Ofwatch <http://www.ofwatch.org.uk/legal/LWcomact01.htm>

¹⁶² Communications Act 2003, <http://www.opsi.gov.uk/acts/acts2003/20030021.htm>

¹⁶³ Ofwatch, *ibid*.

¹⁶⁴ Explanatory Notes to Office of Communications Act 2002.

¹⁶⁵ explanatory notes to the Communications Act 2003,

<http://www.legislation.hmsso.gov.uk/acts/en/2003en21.htm>

- the duties of Ofcom;
- a new licencing framework;
- provisions for making spectrum trading possible and a scheme for recognized spectrum access;
- the possibility to appeal decisions concerning the provision of networks and services and the use of spectrum;
- rationalization and adaptation of broadcasting regulation to technological changes and facilitation of the switchover to digital broadcasting;
- the establishment of a Consumer Panel (for details see below);
- the establishment of a Content Board (for details see below) ;
- the concurrent exercise by Ofcom of powers under the Competition Act 1998 and the Enterprise Act 2002 across the entire communications sector; and
- the application of the general merger control regime under the Enterprise Act to mergers of media enterprises are

These topics are taken up in a six part layout;

Part 1 - Functions of Ofcom

Part 2 - Networks, Services and the Radio Spectrum

Part 3 - Television and Radio Services

Part 4 - Licensing of TV Reception

Part 5 - Competition in Communications Markets

Part 6 - Miscellaneous and Supplemental

D. Points of special interest:

a. Duties for the purpose of fulfilling Community obligations

Many provisions of the Communications Act relate to the four EC Communications Directives (see above under Convergence in the EU). Section four of the Communications Act refers especially to obligations derived from membership in the EU:

4 (2) It shall be the duty of Ofcom, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly).

(3) The first Community requirement is a requirement to promote competition- [.....]

(4) The second Community requirement is a requirement to secure that Ofcom's activities contribute to the development of the European internal market.

(5) The third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union [....]

(6) The fourth Community requirement is a requirement to take account of the desirability of Ofcom's carrying out their functions in a manner which, so far as practicable, does not favour-

(a) one form of electronic communications network, electronic communications service or associated facility; or

(b) one means of providing or making available such a network, service or facility, over another

(7) The fifth Community requirement is a requirement to encourage, [...] the provision of network access and service interoperability.

(8) The sixth Community requirement is to encourage compliance with international standards in order to facilitate interoperability and to grant freedom of choice to consumers

b. Powers of Ofcom

Communications regulation is now based on modern Competition Act principles. In respect of regulating competition, Ofcom has got concurrent powers with the Office of Telecommunication Regulation (OFT) in exercising the Competition Act as well as sector specific powers. Restrictive powers of Ofcom derived from the Competition Act are only related to providers with significant market power on the communications sector. Other operators are only regulated by Ofcom in terms of ensuring consumer protection, access and interconnection according to the Communications Act. Ofcom has also got powers to levy financial penalties for infringements of sector specific requirements.

According to subsection 3 (1) of the Communications Act further duties include ensuring the optimal use of spectrum, ensuring the availability of quality communication, television and radio services everywhere in the UK, maintaining plurality in broadcasting services, protection against harmful material and infringement of privacy.

Generally speaking according to s. 3 (1) the principal duty of Ofcom is:

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition"

c. Funding for Ofcom

Ofcom receives a grant-in-aid from the Department of Trade and Industry, it also receives funds from licence fees and charges

d. The general authorization regime

Prior to 25 July 2003 companies had to apply for a Telecommunications Act licence at the Department of Trade and Industry before operating and supplying services.

This was replaced by a **general authorization regime** under the Communications Act i.e. electronic communications networks and electronic communications services providers are "generally authorized" by law and do not need a special licence in form of an individual administrative act.

Definitions

In short an Electronic Communications Network is a transmission system for conveying messages (signals).¹⁶⁶

An Electronic Communication Service is in short a service conveying messages by an Electronic Communication – Content services are excluded.

However the general authorization is always subject to general conditions of entitlement applying to all, and in some cases it is additionally subject to specific conditions.

Specific conditions are exceptional and apply for instance to operators with significant market power and to universal service providers and they include access related conditions.¹⁶⁷ Only providers who are subject to individual conditions are notified individually of the conditions of entitlement.

There are three main types of electronic communications network or services that are determinative for which of the 21 general conditions apply to their providers:

1. providers of Electronic Communications Services or Networks

¹⁶⁶ Ofcom, *ibid*.

¹⁶⁷ website of Ofcom, http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/gce/gcoe/?a=87101

2. providers of Public Electronic Communications Services or Networks
3. providers of Publicly Available Telephone Services or Public Telephone Networks

The following table is from the Ofcom website¹⁶⁸:

Summary of which General Conditions apply to which types of provider			
Condition	All providers of ECNs and ECSs	Providers of public ECNs and ECSs	Providers of publicly available telephone services or public telephone networks
1. General access and Interconnection obligations	Paras 1.2 and 1.3 only	Yes (network providers)	Yes (network providers)
2. Standardisation and specified interfaces	Yes	Yes	Yes
3. Proper and effective functioning of the network			Yes (but excludes mobile networks)
4. Emergency call numbers			Yes
5. Emergency planning			Yes
6. Public pay telephones	Providers of public pay telephones		
7. Must carry obligations	Providers of "Appropriate networks" used for receiving TV		
8. Operator assistance, directories and directory enquiries			Yes
9. Requirement to offer contracts with minimum terms		Yes	Yes
10. Transparency and publication of information			Yes
11. Metering and billing		Paras 11.1 and 11.2 only	Yes (subject in part to turnover threshold)
12. Itemised bills			Yes
13. Non-payment of bills			Yes (but excludes mobile services)
14. Codes of practice and dispute resolution		Yes	Yes
15. Special measures for end users with disabilities			Yes
16. Provision of additional facilities			Yes
17. Allocation, adoption and use of telephone numbers	Yes	Yes	Yes

¹⁶⁸ http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/gce/gcoe/?a=87101

18. Number portability	Yes	Yes	Yes
19. Provision of directory information	Yes	Yes	Yes
20. Non geographic numbers	Yes	Yes	Yes
21. Quality of service		Yes	Yes

e. Radio communications licences

Primary legislation relevant to the radio spectrum is the Communications Act 2003 amending and updating the Telecommunications Act 1948, the Broadcasting Act (1990 and 1998) and the Wireless Telegraphy Act (1949, 1967 and 1998).¹⁶⁹

Since radio spectrum is a finite resource for which demand greatly exceeds supply, the use of frequencies needs careful planning to make best use of the spectrum. With providers being required to obtain a licence, Ofcom can control the spectrum and make sure that as little as possible interference is caused to authorized radio users.¹⁷⁰

All licences are issued by Ofcom.

A licence only allows the authorised person to install or use radio equipment according to the way defined by the licence and its schedules and according the general terms and conditions of the licence.¹⁷¹

The Wireless Telegraphy Act requires a licence for the use of radio equipment unless regulations exempt the equipment from the licence requirement. Installation or use of a radio service without a licence is an offence under the Wireless Telegraphy Act 1949. Only Crown bodies and some kinds of equipment are exempt from the licence requirement.

Ofcom also issues Broadcasting licences that are needed by independent television and radio stations and restricted radio and TV services.¹⁷²

Telecommunication service providers do not need to be licenced any more but have to comply with the provisions of the Communications Act setting up the framework for telecommunication services.

Amongst others Ofcom made the important Licence exempt regulations as well as Licence Charge Regulations under the Wireless Telegraphy Act.¹⁷³

Ofcom issues about thirty different kinds of licences under the Wireless Telegraphy Act. Licences generally refer to the equipment that is licenced e.g. “Ship’s radio licence” or “Satellite Network Licence”.¹⁷⁴

f. Community radio licences

So far there have only been two tiers of radio broadcasters in the UK: the BBC (British Broadcasting Corporation) and commercial radio stations.¹⁷⁵

¹⁶⁹ Ofcom website “Managing the Radio Spectrum”,

http://www.ofcom.org.uk/radiocomms/ifi/licensing/licensing_policy_manual/ofcom_role?a=87101

¹⁷⁰ website of Ofcom,

http://www.ofcom.org.uk/radiocomms/ifi/licensing/licensing_policy_manual/what_is_licence?a=87101

¹⁷¹ http://www.ofcom.org.uk/radiocomms/ifi/licensing/licensing_policy_manual/what_is_licence?a=87101

¹⁷² Ofcom website “Managing the Radio Spectrum”, *ibid* .

¹⁷³ Ofcom website “Managing the Radio Spectrum”, *ibid* .

¹⁷⁴ <http://www.ofcom.org.uk/radiocomms/ifi/licensing/?a=87101>

¹⁷⁵ “News” on the Ofcom website, http://www.ofcom.org.uk/media/news/2005/03/nr_20050311

Now Ofcom also awards community radio licences. They are available on FM or AM waveband frequencies that would generally not be viable to support commercial broadcasters.¹⁷⁶

As opposed to commercial radio, community radio does not work for profit covering only a small geographic area with the aim of meeting the needs of a small community of interest. These new community licences will be of benefit for the protection of the cultural heritage of the UK and suitable to protect languages and dialects that are only spoken in small parts of the country like in Wales.

g. Trading of spectrum licences

Since 23rd December 2004 Ofcom allowed that licences granted under the Wireless Telegraphy Act may be traded i.e. parts of rights and obligations of a licence can be transferred to another party. Since January 26 2005, licencees can also request a variation to certain conditions of their licence (spectrum liberalization).¹⁷⁷

h. Content Board

The Communications Act requires Ofcom to establish a Content Board whose key functions are broadcast content regulation and media literacy.

The content Board decides all content related matters unless they are reserved to the Ofcom Board. In cases where the Ofcom Board decides on content related matters the Content Board advises and makes recommendations. The Content Board must safeguard the interests of the broadcast recipients/viewers by:

- Ensuring the provision of high quality broadcast services, that appeal to a wide range of interests and tastes.
- Protection from offensive and harmful broadcasting content
- Protection of privacy and
- Protection from other unfair treatment by broadcasters

i. Consumer Protection

To ensure consumer sovereignty just like in all other kinds of competitive industries, Ofcom ensures that certain codes of practice are enforced. It uses Committee of Advertising Practice (CAP) and Advertising Standards Authority (ASA) for instance, to ensure the codes that govern TV and radio advertising are enforced.

For the protection of consumers concerning other communication contents than advertising and programming the Communication Act establishes a Consumer Panel. This panel advises Ofcom but is organized and operated independently from Ofcom and has also got its own budget. The Consumer panel informs Ofcom about the interests of consumers in general, of the elderly, the disabled, low income groups etc.¹⁷⁸

j. Customer codes of practice for handling complaints and resolving disputes

Ofcom published guidelines for public electronic communication service providers seeking Ofcom's approval¹⁷⁹:

The general Conditions made by Ofcom in fulfillment of section 52 of the Communications Act require Electronic Communication Service Providers to produce a code of practice for their domestic and small business customers. It must set out

¹⁷⁶ "News" on the Ofcom website, *ibid*.

¹⁷⁷ <http://www.ofcom.org.uk/radiocomms/ifi/trading/>

¹⁷⁸ Parliament of Australia, Committee report, *The UK communications regulator OFCOM*, http://www.apf.gov.au/senate/committee/ecita_ctte/acma/report/c04.htm

¹⁷⁹ http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/gce/ccodes/?a=87101

information for accessing and using publicly available telephone services: Clear Information must be given about standard terms and conditions, prices and tariffs as well as in respect of a **Complaints Code of Practice** i.e. the procedures of bringing disputes to an alternative dispute resolution scheme.

This Complaints Code of Practice must be-

- provided free of charge;
- written in plain English;
- easily understandable to consumers;
- easily accessible;:
- published on the provider's website where available;
- approved by Ofcom

Ofcom will only approve the Code of Practice if the electronic communications service provider also provides for an **alternative dispute resolution** scheme.

In case the provider does not comply with the stated obligations, Ofcom can impose a maximum penalty of ten percent of the provider's turnover.

k. Fines

Under the new Communications Act operating a telecommunications system without a licence is no longer a criminal offence. To enforce its provisions the Act now establishes a civil penalty regime which is designed to deter and to punish. If a licensee infringes the conditions of a licence they may be subject to a financial penalty of up to 10 % of the turnover of their business.¹⁸⁰

l. Access to Broadband Campaign

The Access to broadband campaign (ABC) promotes universal access and affordability of broadband in the UK.¹⁸¹ In 2003 it received the CNET Networks Award where it was rewarded for its promotion of licence-exempt wireless as a first mile broadband solution in rural and remote areas.¹⁸²

E. Conclusion

Communication legislation regulatory issues such as the provision of universal service, consumer protection, spectrum assignment and tradability, competition regulation, regulatory forbearance and the increasing role of class licence become significant after the liberalization process.¹⁸³ In the UK this problem was solved with enacting new legislation and not by changing enacted legislation every time when a change is needed. This is a good start for addressing a converged environment.

In the words of S. Carter; "Although the Communications Act is a fairly thick document, the legislator has in the main done a good job."¹⁸⁴ It is a flexible piece of legislation that gives clear directions. It is going to be an "effective steward of the transition from analogue to digital in the interest of consumer and citizen together

¹⁸⁰ Parliament of Australia, Committee report, *The UK communications regulator OFCOM*, http://www.aph.gov.au/senate/committee/ecita_ctte/acma/report/c04.htm

¹⁸¹ Website of the Access to Broadband Campaign, <http://www.abcampaign.org.uk>

¹⁸² Website of the Access to Broadband Campaign, *ibid*.

¹⁸³ Angeline Lee, *Convergence in Telecom, Broadcasting and IT: A comparative analysis of regulatory approaches in Malaysia, Hong Kong and Singapore*, Singapore Journal of International and Comparative Law, ,2001, p. 681.

¹⁸⁴ S. Carter, OECD roundtable on Convergence, 2. June 2005, <http://www.ofcom.org.uk/media/speeches/2005/06/oecd#content>

with a recognition of the importance of investment and innovation; with a clear separation of powers between democratically elected government and an independent regulator; and importantly one that - unusually for most public sector organisations - gives the regulator a very large degree of operational freedom.”¹⁸⁵

Of further benefit is the establishment of a converged regulator that oversees both broadcasting and telecommunication replacing five “overlapping and sometimes feuding”¹⁸⁶ authorities. The costs of maintaining many different authorities are higher than operating a combined regulator.

In Great Britain broadcasting and communications regulation is now re-based upon modern Competition Act principles.

Part three- Countries with (intended) strong regulatory control with special regard to the South African Convergence Bill

A. Introduction

Countries have disparate regulatory structures and legislations to deal with convergence of networks and services.¹⁸⁷ An exception is the Multimedia law of Malaysia to address a converged scenario as well as the Convergence Bills of South Africa and India for the telecommunications, internet and the broadcasting industry. Also the United Kingdom has embarked on convergence legislation¹⁸⁸ as it was described above.

As we are going to see Malaysia, South Africa and India follow the model of strict regulatory control.

The question is whether the converged industry should be best regulated by strong regulatory control with and emphasis on licencing like in Malaysia and as it is aimed at in South Africa and India or by the different approach the EU has taken with putting emphasis not on licencing but on competition law where only providers with significant market power are controlled very strictly and otherwise the regulator displays a hands-off policy letting the market regulate itself whenever possible.

Now we are going to have a look at what path Malaysia, India and especially South Africa have taken in order to regulate convergence.

B. The forerunner of the South African Convergence Bill: **Malaysian convergence legislation**

Malaysia is the forerunner of implementing convergence legislation. The South African Convergence Bill is mainly based on the Malaysian Communications and Multimedia Act (CMA) whereof a brief overview will be given.

a. The CMA and the CMCA

In response to convergence and two implement the government’s Multimedia Super Corridor Project¹⁸⁹ two acts were passed in 1998:

¹⁸⁵ S. Carter, *ibid.*

¹⁸⁶ S. Carter, *ibid.*

¹⁸⁷ V. Gombar, *A Questionable Act On The Verge Of Convergence*, e-financial express, http://www.financialexpress.com/fe_full_story.php?content_id=18273

¹⁸⁸ V. Gombar, *ibid*

- The Malaysian Communications and Multimedia Act (CMA) replacing the Broadcasting Act 1988 and the Telecommunications act 1950; and
- The Malaysian Communications and Multimedia Commission Act (CMCA) that came into effect on 1 November 1989.

Prior to this, the Ministry of Energy, Telecommunications and Posts and the Ministry of Information regulated the telecommunication and broadcasting sectors separately. The CMA introduced the Malaysian Communications and Multimedia Commission (CMC, “the Commission”) as the new combined regulator for telecommunications, broadcasting and information technology industries. Both pieces of legislation do not refer to telecommunications, broadcasting or information technology industries but define instead the market as “communication and multimedia industry” to which the legislation applies.¹⁹⁰ This is because the government was convinced that differentiating the telecommunications, broadcasting and information technology sector would do more harm than good since technological advance is blurring the boundaries between the three sectors.¹⁹¹

b. Basic principles of the CMA

According to the official website of the Commission, basic principles of the Communications and Multimedia Act are:

- transparency and clarity;
- more competition and less regulation;
- bias towards generic rules;
- regulatory forbearance;
- emphasis on process rather than content;
- administrative and sector transparency;
- and industry self-regulation.¹⁹²

c. The Communications and Multimedia Commission and the Ministry of Communications and Multimedia

The powers of the Commission are set out both in the CMA and in the MCMA. Besides the Commission the newly created Ministry of Communications and Multimedia oversees the new regulatory framework and appoints the members of the Commission. The role of the Ministry of Information is now limited to Radio, Television Malaysia and the national broadcaster.¹⁹³ In short the Minister of Communications and Multimedia makes the policy decisions and the commission implements the government’s national policy aims.¹⁹⁴

¹⁸⁹ By this project the Malaysian government tried to create an information superhighway worth 20 US \$ billion, see A. Lee, *Convergence in Telcom, Broadcasting and IT: A Comparative Analysis of Regulatory Approaches in Malaysia, Hong Kong and Singapore*, Singapore Journal of International and Comparative Law (2001) p. 682 with further references

¹⁹⁰ A. Lee, *ibid* p. 682 and SM Hussein, *The Malaysian Communications and Multimedia Act 1998-its implications on the Information Technology (IT) Industry*, 2000, 9, Information and Communication Technology Law

¹⁹¹ S.M. Hussein, *Service Provider Licensing System in the Malaysian Communications and Multimedia Industry*, 2004 (3) The Journal of Information, Law and Technology (JILT).
< http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_3/hussein/>

¹⁹² website of the Commission http://www.cmc.gov.my/the_law/legislation.asp

¹⁹³ A. Lee, *ibid*, p 682

¹⁹⁴ A. Lee, *ibid*, p. 682

From 1st November 2002 also the Postal Services were regulated by the CMC and it became the Certifying Agency under the Digital Signatures Act 1997.

d. The new licencing framework

The licencing regime is set out in Part IV of the CMA and is formulated to be technology and service neutral.¹⁹⁵ Thus licensees are able to undertake activities that are market specific. This provides for a more effective utilization of network infrastructure and opportunities for expansion.¹⁹⁶

e. The four categories of licensable activities

There are four categories of licensable activities provided for in the CMA:

- network facilities providers,
- network service providers,
- applications service providers and
- content applications service providers.

According to the official website of the Commission-¹⁹⁷

Network facilities providers are:

“the owners of facilities such as satellite earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radiocommunications transmission equipment, mobile communications base stations, and broadcasting transmission towers and equipment. They are the fundamental building block of the convergence model upon which network, applications and content services are provided

Network service providers :

“who provide the basic connectivity and bandwidth to support a variety of applications. Network services enable connectivity or transport between different networks. A network service provider is typically also the owner of the network facilities. However, a connectivity service may be provided by a person using network facilities owned by another.”

Application service providers:

“who provide particular functions such as voice services, data services, content-based services, electronic commerce and other transmission services. Applications services are essentially the functions or capabilities, which are delivered to end-users.”

According to section 192 of the MCA the Minister may also determine a list of required application services as for example emergency services, directory assistance services, operator assistance services and services for disabled consumers.¹⁹⁸

Content Applications service provider:

“who are special subset of applications service providers including traditional broadcast services and newer services such as online publishing and information services.”

S. 207 exempts closed content application services from the licence requirement. Closed content application services are for example content application services that

¹⁹⁵ website of the Commission,

http://www.mcmc.gov.my/mcmc/what_we_do/licensing/cma/framework.asp

¹⁹⁶ website of the Commission. Ibid.

¹⁹⁷ website of the Commission, ibid.

¹⁹⁸ S.M. Hussein, *Service Provider Licensing System in the Malaysian Communications and Multimedia Industry*, 2004 (3) *The Journal of Information, Law and Technology (JILT)*.

are provided only to the employees of an office. The Minister can determine other closed content application services.

Limited content applications service providers are exempted from an individual licence but are subject to a class licence.

Section 208 exempts any content incidental to the service completely from the licence requirement.

f. Individual and class licences

Just as in the South African Convergence Bill there are **individual** and **class licences** that can be granted within these broad categories. According to section 6 of the CMA an individual licence is a license for a specified person to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject to. Individual licences are granted for activities requiring a high degree of control. It means that the individual has to apply in writing to the regulator to be granted the licence.

Providers with significant market power are subject to an individual licence. Criteria for significant market power are inter alia a significant economic impact, being highly influential on the community or the provision of a network that is available to the general public.¹⁹⁹

Examples for individual licence holders providing services like earth stations, public payphone facilities, radio communications transmitters and links, satellite hubs, cellular mobile services and IP telephony are Digital Telecommunications, Telekom Malaysia Bhd., Celcom (Malaysia) and Maxis International.²⁰⁰

Class licences were introduced for small businesses providing a minor service without significant market power. In this field regulatory control and procedural requirements are minimal.²⁰¹ According to section 6 of the CMA *a class license is a license for any or all persons to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject.* The Minister generally defines these conditions. He/she lists which services fall under the different types of class licences so that a business only needs to check whether the service falls within the listed activity.²⁰² If the service is listed the business must send a registration notice to the Commission. If it is not listed then it can apply for an individual licence. Class licences have to be entered in registers administered by the MCMC and must be renewed annually, section 131.

Standard and special licence conditions are set out in the Communications and Multimedia (Licensing) Regulations 2000. They contain tight restrictions for foreigners and foreign companies to register a class licence.

According to section 126 of the CMA any person is prohibited from owning or providing any network facility, network service or applications service except with an individual or class license.

Any conduct by a licensee which has the purpose of substantially lessening competition in a communication market is prohibited as well. To this end the Commission has got the power to issue guidelines when a substantial lessening of competition takes place.

¹⁹⁹ SM Hussein *ibid.*

²⁰⁰ S.M. Hussein, *Service Provider Licensing System in the Malaysian Communications and Multimedia Industry*, 2004 (3) *The Journal of Information, Law and Technology (JILT)*.

²⁰¹ S.M. Hussein, *Service Provider Licensing System in the Malaysian Communications and Multimedia Industry*, 2004 (3) *The Journal of Information, Law and Technology (JILT)*.

²⁰² SM Hussein, *ibid*

g. Regulating competition

Despite the emphasis on the importance of competition after privatization in the telecommunications sector, the government did not subscribe to a totally *laissez faire* approach.²⁰³ The Malaysian government is still empowered to allow for the number of competitors in certain telecommunication system services.

In Malaysia there is traditionally no general national competition law applying to all sectors as there is in the European Union. According to Cassey Lee competition policies and laws are virtually non existent in Malaysia.²⁰⁴ Therefore many prohibitions of anti competitive behaviour had to be incorporated in the Communications and Multimedia Act. However since there is this lack of tradition and experience it is difficult for the regulator to address anti competitive conduct in the sector.²⁰⁵ And it is certainly not favorable to have an regulatory authority in all the different sectors (telecommunications, power, ports...) to deal with anti competitive conduct.

Another country with a very similar approach to the Malaysian approach is India which also intends to impose strong regulatory control.

C. India-

a brief introduction to the Indian Communication Convergence Bill

a. Background

In the new millennium the Indian government is going forward in giving legal recognition to new technologies and regulating them.²⁰⁶

The first step was the passing of the Indian Information Technology Act, 2001 on 17th May, 2000

The Indian Communications sector was liberalized so that a number of private players entered the market and technologies advanced

There were several drafts of a Convergence Bill that were open for public debate and finally the Communications Convergence Bill 2001 (Bill No 89/2001)²⁰⁷ was introduced in response to convergence of technologies. According to an Indian leading authority on Cyber law the Bill has got many shortcomings but it provides at least for “conceptual clarity to a landscape previously defined by licencing agreements, telecom policies, recommendations, judgements and undertakings.”²⁰⁸

b. Overview of the chapters of the Bill

Chapter 1 contains preliminary provisions.

Chapter 2 deals with the use of spectrum, communication services, network infrastructure facilities and wireless equipment.

Chapter 3, 4 and 5 provide for the establishment of the Communications Commission of India, its objectives, powers, duties and functions.

Chapter 6 regulates the frequency spectrum management.

²⁰³ Cassey Lee, *Telecommunications reforms in Malaysia*, 2001

²⁰⁴ C. Lee, *ibid*.

²⁰⁵ C. Lee, *ibid*.

²⁰⁶ P. Duggal, *Indian Convergence Law*,

<http://www.cyberlawindia.com/cyberindia/convergencearticle.htm>

²⁰⁷ The Bill can be found at <http://www.indiantelevision.com/indianbroadcast/legalreso/ccb2k1.htm>

²⁰⁸ P. Duggal, *ibid*

Chapter 7 deals with licences and registration of service providers.
Chapter 8 regulates the licencing of possession of wireless equipment.
Chapter 9 contains provisions for live broadcasting of certain events.
Chapter 10 provides for the consequences of breach of terms and conditions of a license or registration, civil liability and adjudication.
Chapter 11 establishes a Communications Appellate Tribunal and provides for its powers.
Chapter 12 provides for officers and employees of the Commission and the Appellate Tribunal
Chapter 13 deals with Finance, Account and Audit
Chapter 14 grants a right of way for laying cables and erection of posts
Chapter 15 regulates interception of communications and punishment for unlawful interception a li
Chapter 16 establishes offences and provides for the punitive measures for unlicensed services, the possession of wireless equipment without licence, for sending offensive material etc
Chapter 17 regulates the transfer of proceedings to the Commission or to the Appellate Tribunal
Chapter 18 contains miscellaneous provisions
Chapter 19 repeals certain Acts, regulates the saving of licences and registrations and dissolution of certain authorities.

c. Objectives of the Bill

The Bill seeks to regulate:

1. Carriage of communications (infrastructure etc)
2. Content of communications

The Convergence Bill aims to systematically promote, facilitate and develop the carriage and content of communications including broadcasting, telecommunications and multimedia. The proposed Bill is a significant step towards revolutionizing telecommunications in India.

Chapter 4 section 17 of the Bill reads as follows:

Objectives and guiding principles

“The Communications Commission of India while exercising its functions shall be guided by the following principles governing the administration of this act namely:

- (i) that the communication sector is developed in a competitive environment and in consumer interest;
- (ii) that communication services are made available at affordable cost to all, especially uncovered areas including the rural, remote, hilly and tribal areas;
- (iii) that there is increasing access to information for greater empowerment of citizens and towards economic development;
- (iv) that quality, plurality, diversity and choice of services are promoted;
- (v) that a modern and effective communication infrastructure is established, taking into account the convergence of information technology, media, telecom and consumer electronics;

- (vi) that defence and security interests of the country are fully protected;
- (vii) that introduction of new technologies, investment in services and infrastructure, and maximisation of communications facilities and services (including telephone density) are encouraged;
- (viii) that equitable, non-discriminatory interconnection across various networks are promoted;
- (ix) that licensing and registration criteria are transparent and made known to the public;
- (x) that an open licensing policy allowing any number of new entrants (except in specific cases constrained by limited resources such as the spectrum) is promoted; and
- (xi) that the principle of a level playing field for all operators, including existing operators on the date of commencement of the Act, is promoted so as to serve consumer interest.”

There again a Bill contains very noble objectives but it is very questionable whether they can be reached by the regime the Bill introduces.

d. The Communications Commission of India

The Bill is going to create a single statutory authority; the Communications Commission of India (CCI). The Commission is responsible for granting licences, has to balance public and private interests in the converging media, monitors changes in the mediascape and has got many other responsibilities.²⁰⁹ In short the CCI is India's proposed new super regulator with immense powers.

In more detail the specific tasks of this commission include amongst others:

- *“Carrying out management, planning and monitoring of the spectrum for commercial usage.*
- *Granting licences, determining and enforcing licence conditions and fees.*
- *Determining appropriate tariffs and rates for licensed services.*
- *Ensuring that there is competition in the market, and that some service providers do not become dominant players to the detriment of other service providers or consumers.*
- *Promoting competition and efficiency in the operation of communication services and network infrastructure facilities.*
- *Formulating and determining conditions for fair, equitable and non-discriminatory access to a network infrastructure facility or network service such other related matters in respect thereof.*
- *Taking measures to protect consumer interests and to enforce universal service obligations.*
- *Formulating and laying down programme and advertising codes in respect of content application services.*

²⁰⁹L. Liang, Network of women in India, *Whose convergence is it anyway?*, http://www.nwmindia.org/Law/Commentary/convergence_bill.htm

- *Formulating and laying down commercial codes in respect of communication services and network infrastructure facilities.*
- *Taking steps to regulate or curtail the harmful and illegal content on the Internet and other communication services.*
- *Formulating and laying down codes, technical standards and norms to ensure quality and interoperability of services and network infrastructure facilities.*
- *Carrying out studies on matters of importance to the consumers, service providers and the communications industry.*
- *Institutionalising appropriate mechanisms to interact on a continual basis with all sectors of industry and consumers.*
- *Making recommendations on matters that the central government asks it to”²¹⁰*

e. The licencing regime

Acting without a licence or registration when required by the Bill is illegal.

Section 3 of the Bill reads:

No person shall use any part of the spectrum without assignment from the Central Government or the Commission as provided for in this Act

Section 4 :

(1) No person other than a public service broadcaster shall -

- (a) own or provide any network infrastructure facility, or
- (b) provide any networking service, or any network application service or any value added network application service, or any content application service, without a licence or registration

Section 5

(1) No person shall possess any wireless equipment without obtaining a license in accordance with the provisions of this Act

Thus there are five categories of licensable activities:

1. Network infrastructure facilities are defined to include facilities for broadcasting distribution, earth stations, cable infrastructure, wireless equipment etc.

2. Networking services include for example band-width services

3. Network application services include amongst others public switched and public cellular telephony, voice over IP

4. Content application services include different types of broadcasting (e.g. satellite and subscription broadcasting).

5. Value added network application services are for example internet and unified messaging services. N:B: that information technology (IT) enabled services such as call centres, e-commerce and video conferencing are excluded so that they do not need to be licenced.

However the Bill also provides for exemptions to the licence requirement under special circumstances.

f. Points of criticism

1. No definition of convergence

²¹⁰ L.Liang, *ibid.*

Although the proposed law seeks to regulate convergence there is no legal definition of “convergence”.

2. Vagueness and unsatisfactory definitions

Many voices say that the definitions of the licensable activities are very vague. Particularly the definition of “value added applications service provider” has been said to have many shortcomings.

3. No independent regulator

The proposed Bill provides for immense control of the government.²¹¹ For instance, the government has got complete control of assignment of the spectrum.

The government has got the power to appoint the members and even the Chairperson of the Communications Commission on the recommendations of a search committee, that also consists of the Central Government members. Thereby, the government can assure that its favoured nominees find representation under the new statutory body.²¹² Additionally the Communications Commission must follow the policy directives by the Central government. This even includes policy directions concerning licencing procedures.

As a result, the intended autonomous and independent position of the Communications Commission cannot be achieved. “The proposed super-regulator CCI is “nothing but a glorified mouthpiece of the government. The same runs contrary to the objectives of the new proposed Bill.”²¹³

4. Freedom of speech and expression is endangered

The Communications Commission has got a wide range of powers to regulate content in any form since content is very widely defined as any sound, text, data, still or moving picture, other audio-visual representation, signal or intelligence, of any nature or any combination thereof, which is capable of being created, processed or stored, retrieved or communicated electronically. The Information Technology act and the Convergence Bill seek to put online content under the same laws as offline content. Consequences might be that areas that fled from the all encompassing arm of the law like the Indian online gay community are going to face difficulties.²¹⁴

In a state with the political culture of India clause 21 of the Bill grants too many uncontrolled rights to the Commission and therefore has got the potential to put freedom of speech and expression in danger²¹⁵:

The Commission shall by regulations from time to time specify program codes and standards which may include inter alia practices:

- (i) To ensure that nothing is contained in any programme which is prejudicial to the interests of the sovereignty and integrity of India, the security of state, friendly relations with foreign States, public order or which may constitute contempt of court, defamation or incitement to an offence,
- (ii) To ensure fairness and impartiality in presentation of news and other programmes,
- (iii) To ensure emphasis of promotion of Indian culture, values of national integration, religious and communal harmony, and a scientific temper,

²¹¹ P. Duggal, *ibid.*

²¹² P. Duggal, *ibid.*

²¹³ P. Duggal, *Indian Convergence Law*,

<http://www.cyberlawindia.com/cyberindia/convergencearticle.htm>

²¹⁴ See also L. Liang, *ibid*

²¹⁵ L. Liang, *ibid.*

- (iv) To ensure in all programmes decency in portrayal of women, and restraint in portrayal of violence and sexual conduct.
- (v) To enhance general standards of good taste, decency and morality.

For instance it is up to the subjective discretion of the government controlled Communications Commission what “fairness and impartiality in presentation of news and other programmes” (ii) means, since the Bill does not define standards of fairness and impartiality.²¹⁶ Therefore the Communications Commission has got the power to censor content.

5. No clear separation of powers

The Communications Commission is not only empowered to make regulations and policies but has also got judicial powers in dispute resolution. This is an infringement of an important constitutional and democratic principle of separation of powers.

g. Conclusion

Although the Bill is from 2001 it has not yet been transformed into law. There are many voices saying that there is no real practical need for a Communications Convergence Bill since India’s density level is well below the Asian and global average. The Bill was also planned to be passed at a time “when convergence is yet to effectively take off. And become a ground reality in India”.²¹⁷ India is currently facing many other pressing problems to be solved e.g. over-population, wide spread poverty, HIV/AIDS, political unrests created by fights between Moslems, Hindus and Christians, immense unstableness in the Kashmir region.

It is very doubtful whether this Bill is helpful in enabling the convergence industry to grow healthy. Probably India would do better without a law that requires licences for so many activities and a government that effectively keeps control and can censor all sorts of content whilst claiming that control is given to an independent and autonomous regulator.

D. South Africa

South Africa recently introduced a very similar Bill to the Indian Communication Convergence Bill. The forerunner to both Bills is the above described Malaysian legislation.

a. History of South African telecommunications and broadcasting regulation²¹⁸

To provide a better understanding of the intended new “convergence legislation” in form of the South African Convergence Bill, a basic description about the pre-convergence regulatory structure is helpful.

Before 1994 broadcasting and telecommunications were mainly regulated by two different acts: the Radio Act of 1952 and the Broadcasting Act of 1976. The

²¹⁶ Pavan Duggal, *ibid.*

²¹⁷ Pavan Duggal, *ibid.*

²¹⁸ D. Cull, *Overview of South African telecommunications law, convergence and the Convergence Bill*, prepared for UCT e-law postgraduate class 2005, p. 14, April 2005

government had complete control over telecommunications and broadcasting in South Africa.

After 1994 with South Africa on the way to a constitutional democracy the need to establish independent control over broadcasting in particular and also over telecommunications was raised. It resulted in a reformation of broadcasting regulation. In 1993 the Independent Broadcasting Authority Act created the Independent broadcasting Authority (IBA).

The Telecommunications Act of 1996 repealed the Radio Act and established the South African Telecommunications Regulatory Authority (SATRA), the new regulator for telecommunications matters. However SATRA was not yet really independent from the Minister of Communications.

The Broadcasting Act of 1999 created a new framework for the regulation of the broadcasting industry and supplemented the provisions of the IBA Act. The Minister of Communications is ultimately responsible for the development of broadcasting policy so that the original power of the Regulatory Authority to determine broadcasting policy was diluted. In 1999 the IBA Act was amended giving the Minister of Communications further powers over the regulatory authority although the Minister's policy directives to the regulatory authority from then on had to comply with certain general principles.

A major change came in 2000 with the establishment of the "converged" regulator Independent Communications Authority of South Africa (ICASA) by the ICASA Act. The two different regulatory authorities for broadcasting and telecommunications, IBA and SATRA, were dissolved and a new single regulator, ICASA created. This is the true beginning of the process of regulatory reform in response to converged technologies. Since the distinction between broadcasting and telecommunications is increasingly blurred (see above) and the respective roles and jurisdictions of SATRA and IBA had been overlapping, their existence could not longer be justified.

ICASA is required by law to function without political or commercial interference however in practice it is doubtful whether ICASA is truly independent. It is a state organ and its regulatory functions such as considering licence applications are administrative actions.

At the moment there is widespread uncertainty about the application of the Telecommunications Act that provides the current regulatory framework for telecommunications and broadcasting. There is also uncertainty about the liberalisation announcement²¹⁹ by the Minister of Communications as well as confusion about "self provision" of VANS (Value added Network Service Providers) meaning their ability to obtain telecommunication facilities from other entities than Telkom and SNO.

The origins of the Bills can be found in convergence of technologies and in the unsatisfactory nature of the Telecommunications Act (see above).²²⁰ This required the implementation of a new regulatory framework. Therefore the Department of Communications called for a Convergence Colloquium in 2003 and asked the industry to submit proposals for a new Convergence Act. However as implementation of new legislation was regarded to be urgent, the usual issuance of a green and a white discussion paper was left out.

According to the department of Communication's report the aim of the colloquium, from which the Bill arises, was "the need for policy makers to respond to ensure that old regulations and policies do not hinder the development of cross-sector applications, services and businesses"

²¹⁹ Liberalisation announcement on 30 September 2004, "clarified" on 31 Jan 2005

²²⁰ D. Cull, *Overview of South African telecommunications law, convergence and the Convergence Bill*, prepared for UCT e-law postgraduate class 2005, p. 14, April 2005

The first draft of the Convergence bill was released in December 2003 and sharply criticised. The latest draft of the Bill was released to the public in March 2005.²²¹ In case the Bill is going to be enacted it repeals the Telecommunications Act²²², the Independent Broadcasting Act²²³ and it fundamentally amends the Broadcasting Act of 1999.

It is a section 75 Bill, meaning the provinces are not affected by it. The bill must be introduced into the National assembly and afterwards be sent to the National Council of Provinces (NCOP). In case the NCOP rejects the bill or makes amendments it goes back to the National assembly that can thereafter enact it even without considering the proposed amendments by the NCOP.

Although it was aimed at passing the bill into law during the year 2005, this is not very likely since there are still lots of oral submissions to be made and the bill must still pass through the NCOP.

b. The Convergence Bill

-draft new framework for telecommunications and broadcasting

Since the Bill has not yet passed into law and it is possible that it is going to be amended again, at this stage there is no sense in describing and discussing the Bill in detail but only in its broad concepts.

Overview of the chapters of the Bill

1. The 1st Chapter sets out the **objectives** of the Bill (see below in more detail)
2. The 2nd Chapter assigns powers to the Minister of Communications and ICASA; The Minister formulates policy. ICASA implements the policy, issues licences and makes regulations. However the Chapter fails to provide for a neat separation of powers between the two bodies (see in more detail below).
3. The 3rd Chapter establishes **the licencing framework**, (for the details see below).
4. The 4th Chapter empowers communications network service licencees to enter on public and private premises in order to construct, maintain or remove their communication facilities.
5. The 5th Chapter provides for the management of the radio frequency spectrum by ICASA and the Minister of Communications.
6. The 6th Chapter deals with use of communications equipment and radio apparatus. It must be approved by ICASA
7. The 7th Chapter provides for **interconnection** by requiring communication network service providers to interconnect their networks and defines the principles to govern interconnection agreements to ensure the seamless switching between networks.
8. The 8th Chapter provides for **facility leasing** by requiring communication network services providers to lease their facilities and defines principles to govern facility leasing agreements. This Chapter also provides for the declaration of communication facilities that cannot be feasibly substituted as “**essential facility**” by ICASA in order to impose conditions to promote vital consumer and business interests.
9. The 9th Chapter regulates broadcasting services in a converged environment. It contains special conditions relating to priority carriage of South African

²²¹The Convergence Bill [B-9 2005] can be downloaded from:

http://www.isoc.org.za/documents/convergencebill_fromparliamentweb.pdf

²²² Act 103 of 1996.

²²³ Act 133 of 1993.

- programming, delivery of public services, party political broadcasts, adherence to codes of conduct
10. The 10th Chapter deals with ICASA's role to protect consumers by making regulations and adopting a code of conduct.
 11. The 11th Chapter assigns ICASA the role of a competition Authority under the competition act in order to ensure fair Competition on the Communications Sector. The Chapter also sets penalties and fines.
 12. The 12th Chapter contains provisions with regard to the Universal Service Agency whose aim is to promote **universal access** and **universal service** which is of particular importance for South Africa from the perspective of South Africa's history of apartheid.
 13. Chapter 12 and 13 contain transitional provisions including the conversion of existing licences and regulations into new ones, that are conform to the requirements of the Bill. The aim is to make the transition period smooth.

2. Objectives of the Bill

The Bill provides for a new framework for telecommunication and broadcasting and regulates all communications in the public interest.

Chapter one sets out 26 noble objectives of the act including:

- To promote and facilitate the convergence of telecommunications and broadcasting signal distribution;
- To promote the universal provision of communication networks and -services and connectivity for all;
- To encourage investment and innovation in the communications sector;
- To ensure efficient, equitable and proper use of the frequency spectrum;
- To promote competition within the communication sector;
- To ensure the provision of a variety of quality communications services at reasonable prices;
- To promote the interests of consumers with regard to the price, quality and variety of communications services;
- To promote an environment of open, fair and equal access;
- To develop and promote SMMEs.
- To promote the empowerment of historically disadvantaged persons;
- To safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa;
- To promote the growth and diversity of content services and access thereto;
- To ensure security and privacy of content;
- To encourage research and development;
- To stimulate and promote the provision of broadband services

3. The licencing regime

Chapter 3 of the bill provides for the licencing regime, including rights and obligations of holders of the different licences, therefore it is crucial to the Bill. It is one of the most delicate and controversial of the chapters.

Although it is very questionable whether the new licencing regime is beneficial to South Africa (see below under points of criticism on the Convergence Bill) it has at least got the advantage that it is activity based and technology neutral. This provides for longevity of the piece of legislation ensuring that it does not go quickly out of date when the same service is provided by a newly invented technology.²²⁴ Categorizing the licenses according to the technology used is no longer viable. The new licensing regime allows licensees to provide services that are market specific. This creates opportunities for expansion into the industry especially in the field of Applications Service Providers and provides for a more effective utilisation of Network Infrastructure.²²⁵ The old vertical licencing regime where one licence covers different permissions has turned into a horizontal system: different licences for different activities-allowing better partition of labour and more competition.²²⁶ The purpose of the licensing regime is to monitor the players in the industry.

The five licensable activities are:

1. Communication network services
2. Communication services
3. Application services
4. Broadcasting services
5. Radio frequency spectrum licences (not including broadcasting service licenses, that are regulated under Chapter nine)

Section 85 of the Bill sets out which types of services fall under the different licences. The broad licensing categories can contain individual- and class licences as well as a licence exempt category. Individual licenses are granted for activities that require a high degree of regulatory control. Class license especially cater for the needs of small operators having a lighter form of regulatory control and minimal procedural requirements.²²⁷

According to the blanket prohibition in clause 7, no-one may provide one of the contemplated services without a licence.

Individual licences for **Communication network services** apply to:

- Broadcasting signal distribution,
- a telecommunication facility,
- a local exchange facility,
- a telecommunication system,
- a mobile cellular telecommunication network,
- a public switched telecommunication network,
- a radio apparatus,
- a radio station and
- any other similar facility identified in the related legislation, any regulation or licence as a telecommunication facility.

For these activities there are no class licences provided nor can they be licence exempt.

²²⁴ Safinaz Mohd Hussein, *Service Provider Licensing System in the Malaysian Communications and Multimedia Industry*, Journal of Information, Law and Technology, http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/hussein/

²²⁵ http://www.mcmc.gov.my/mcmc/what_we_do/licensing/cma/framework.asp

²²⁶ Guy Berger, Convergence: Two steps forward one step back, Mail & Guardian online http://www.mg.co.za/articlePage.aspx?articleid=200525&area=/insight/insight__converse/

²²⁷ S. M. Hussein, *ibid.*

A **Communication service class licence** is required for;

- Value-added network services;
- a multi-channel distribution;
- a carrier of carriers;
- common carrier services;
- international telecommunication services;
- local access telecommunication services;
- mobile cellular telecommunication services;
- multimedia services;
- national long distance telecommunication services

A **class licence** is required for **application services** providers who do: audiotext hosting services provided on;

- an opt-in basis;
- Directory services;
- Internet access services;
- Messaging services;
- Private payphone services; or
- Telegram services

Each **Broadcasting service** provider is required to obtain an **individual licence** for;

- Satellite broadcasting;
- Subscription broadcasting;
- Terrestrial free to air TV;
- Terrestrial radio broadcasting;

Providers of radio spectrum frequencies need to obtain an **individual radio spectrum frequency licence**.

4. A note of few benefits derived from the Bill

As already said an advantage of the licencing regime is that it is activity based and technology neutral. As in the other countries, licences are no longer issued for certain technologies but issued for major categories of activities.

Also the provisions for interconnection, facilities leasing and wholesale rates make the Bill progressive.²²⁸

Another major benefit is its reference to the need for interventions against monopolistic practices.²²⁹ This could open the vertical communications sector to horizontal competitions including that in future they could even provide their own infrastructure.²³⁰ There is now some potential for deregulation and increased competitions provisions about market dominant entities.²³¹ With its emphasis for the need of competition in the communications sector the Bill starts going in the right direction.

²²⁸ Guy Berger, *Convergence: Two steps forward one step back*, Mail & Guardian online http://www.mg.co.za/articlePage.aspx?articleid=200525&area=/insight/insight_converse/

²²⁹ Guy Berger, *ibid*.

²³⁰ Guy Berger, *ibid*.

²³¹ D. Cull, *ibid*.

Another welcome feature is the consumer protection provisions as well as the promotion of SMMEs.

It can also be said that the second draft is a substantial improvement on the original Bill in form of the first draft.

e. Points of **criticism** on the Convergence Bill

aa. No clear policy guidelines

The law stands without any explicit policy backdrop.²³² There were no Green and White discussion Papers but only an industry consultation and extensive lobbying. There are still no policy guidelines to inform the law and its interpretation.²³³

bb. No definition of convergence

It is striking that the Bill does not contain a definition of the underlying subject matter “convergence”. Although the Department of Communications held a colloquium attended by the broadcasting, telecommunications and internet industries who headed various definitions of the term “convergence” it eventually did not adopt any of them. The lacking definition is a weakness of the bill.²³⁴ Insofar the Bill is without proper foundation.

cc. Circular definitions of licencing categories

The definitions for the licensing categories are fundamental to the Bill. However these definitions are circular.²³⁵ For instance “application service” is defined as “a communications service provided by means of applications”. A “communications network service” is likewise defined as “a communication service whereby a communication network service licensee....”. Thus on the one hand “communication service” refers to the particular services for which a communications service licence is required. On the other hand, as we have just seen, it is used to help define the other services that require another license. Dominic Cull²³⁶ argues that “the (unintended) consequences of the use of “communication service” are potentially profound and contrary to any logical intention which can be discerned on the part of the drafters” Therefore he suggests that these definitions drop the reference to “communications service” in favour of a reference to “service”.

dd. Difficult language

Further Critique from a participant of a forum discussion about the benefits of the South African Convergence Bill:

*“why oh why can they never post rules we must follow in plain understandable English...why do we need to hire a lawyer to translate laws we as individuals must adhere to”*²³⁷

ee. Is ICASA an independent regulator?

²³² Guy Berger, *ibid*

²³³ Guy Berger, *ibid*

²³⁴ Guy Berger, *Confusing convergence*, Mail and Guardian online, http://www.mg.co.za/articledirect.aspx?area=mg_flat&articleid=40945

²³⁵ D. Cull, Overview of the Convergence Bill [B9-2005], Nicci Ferguson Incorporated, Presentation at UCT conference on 26 & 27 May 2005

²³⁶ D. Cull, *ibid*.

²³⁷ online-forum participant “ASnogarD “ on 24-01-2004, 11:05 PM, *ibid*.

South Africa has constantly had difficulties in establishing an independent regulator; neither SATRA, the former telecom regulator, nor its successor, ICASA, can be said to be truly independent.²³⁸ Not even ICASA's former chairman Mandla Langa believes in the independence of ICASA.²³⁹

There is currently no clear separation of powers between the Ministry of Communications and ICASA which also poses a constitutional concern. The Minister and ICASA have got joint-jurisdiction in respect of the prescribing of regulation and the granting of licences. For instance ICASA is required to submit proposed licence conditions to the Minister for approval. Without ministerial approval they cannot be enacted. However the Minister's work should better focus on policy change and not be responsible for regulation.²⁴⁰

Furthermore the Minister has suffered from a paralysing conflict of interest: The government is the major shareholder in Telecom with accompanying profit optimisation responsibilities on the one hand and the Minister as the state entity responsible for creation of fair competition on the other.²⁴¹

Worrying for the independence of ICASA is also the removal of the following clause from the bill:

*No policy made by the Minister [...] or policy directions issued by the minister [...] may be made or issued-
[...]
(b) if it interferes with the independence of the Authority [ICASA] or affects the powers or duties of the Authority in terms of this Act of the related legislation, except as permitted in terms of this section.*²⁴²

Further evidence for not existing independence of ICASA is the manner how the Minister overruled ICASA in respect of the meaning of the Ministerial determinations from September 2004²⁴³ (for the determinations in detail see below):

ICASA interpreted the determinations that VANS (Value Added Network Service Providers) licencees were allowed to self-provide i.e. for example that mobile operators are no longer forced to buy fixed-line backbone services from Telkom (often at horrendous prices!) but that they can lease from other companies or install their own lines. The ultimate impact would be that Telkom is forced to charge more competitive prices and that the consumer pays less for mobile services.²⁴⁴ However the Minister then explicitly "clarified" that VANS would not be allowed to self-provide. Since the regulations to implement the ministerial determinations need the approval of the Minister, ICASA will not be able to allow self-provision. This shows that ICASA is effectively not an independent body from the government. I also believe that the reforms South Africa urgently needs in order to enable true competition, lower prices for consumers, international competitiveness and a market

²³⁸ I. Vegter, *Telecommunications in Converging Communications*, South Africa's definite guide to the convergence of information and communication technologies, p. 50, June 2005.

²³⁹ Mandla Langa, African Broadband Revolution Conference in Johannesburg. (The current chairman of ICASA is Mr Paris Mashile, who was appointed on 1 July 2005.)

²⁴⁰ I. Vegter, *Telecommunications in Converging Communications*, South Africa's definite guide to the convergence of information and communication technologies, June 2005, p. 50.

²⁴¹ I. Vegter *ibid* at p. 50; ICASA is worried about this, see ICASA Presentation to Parliamentary Portfolio Committee on Communications, ppt slide No 8.

<http://www.icasa.org.za/Documents.aspx?Page=86>,

²⁴² I. Vegter, *ibid*, at p. 50, 51.

²⁴³ D. Cull, *Overview of South African telecommunications law, convergence and the Convergence Bill*, prepared for UCT e-law postgraduate class April 2005, p. 14.

²⁴⁴ I. Vegter in the Chapter *Landscape*, *ibid*, p. 33.

that is attractive for foreign investment, will be blocked as long as the government is a major shareholder of Telkom.

ff. General critique on the licencing regime

The major point of critique on the Bill refers to its licencing regime.

The Bill has been accused of over regulating especially since it can be interpreted as to regulate the content provision via Internet²⁴⁵ (details see below) It is also rather vague and unclear which licences are required by which entities.²⁴⁶

The licencing regime received a lot of critique from the public. There are some sharp comments in an online forum discussion about the convergence Bill. A participant of this forum posted this comment²⁴⁷:

Could somebody please tell me where in the Act these objectives [see above under objects of the Bill] are addressed. The Act is all about licencing and registering and recording - setting up the rules for greater control and new jobs for buddies. At the end of the day this Act will not improve anything at all."

There is a lot of truth in this comment: the bill is very vague and it is very doubtful that licences can achieve the stated goals (objectives of the bill; see above). Indeed there is a big difference between the objects of the Bill and what it is truly all about.

Professor Hoffman notes that the Convergence Bill puts too much emphasis on licencing rather than on how to standardise transactions, what is a big issue in Europe. This is, according to him, "another opportunity to be lost."²⁴⁸

M. Langa, ICASA's former chairman is also convinced that the licencing framework of chapter three is not workable. He says that the licencing regime is the engine driving the Bill and if the engine does not work, the rest of the Bill will not work either.²⁴⁹

gg. Content regulation and limitation of freedom of speech

The **first draft** of the Bill required a class licence for content services. On its front page on January 17 the Citizen claimed that the draft law, if promulgated will require all website owners or publishers to have a content applications service licence to operate.

An outcry was provoked in the content providing industry like web site owners who strongly opposed the vision of having to apply for a costly license to be allowed to operate their sites failing this getting a fine. In my view a licence requirement for content providers would infringe the principle of functional equivalence between the treatment of on-line and off-line content since there is no licence requirement for the printing press.

²⁴⁵ D. Cull *ibid.*

²⁴⁶ D. Cull *ibid.*

²⁴⁷ Online- forum Participant "microfast" posted this comment on 26-01-2004, 09:34 AM, <http://www.mybroadband.co.za/vb/archive/index.php/t-12534.html>

²⁴⁸ Prof. J. Hofman at a discussion about the convergence Bill, reported by Paul Vecchiatto, IT web, <http://www.itweb.co.za/sections/business/2005/0505201041.asp?S=IT%20in%20Government&A=ITG&O=SLF>

²⁴⁹ Mandla Langa on the African Broadband Revolution Conference in Johannesburg., see also I. Vegter, "Telecommunications" in *Converging Communications*, South Africa's definite guide to the convergence of information and communication technologies, p. 51, June 2005.

As an online- forum participant says, “*having to obtain a licence to run *any* website is totally contrary to the spirit of the web and smacks of state paranoia / media control --- the web was about free movement of ideas and information.*”²⁵⁰

Content licencing provisions could constitute a considerable intrusion on the freedom of speech that is enshrined in the constitution.²⁵¹ Since there is no technical need for content licencing provisions, it is not justifiable to impose licence obligations²⁵². The consequences of imposing a licence requirement that is unjustified and can not be understood by businesses could be fatal. Therefore another online-forum participant comments:

*All that would result from this is that local [...] sites simply move their hosting off shore which would hit the local economy. It may not be a huge amount but driving any revenue out of the local economy is not a smart move.*²⁵³

This is very true; it is not feasible to regulate the Internet by imposing licence requirements that cannot be enforced. “*Attempts to control the internet, its operation of content, have been notoriously unsuccessful. Its anarchy and resistance to regulation is, in the minds of many, its strength and attraction.*”²⁵⁴

Convergence should not be used by the lawmaking body to create a surveillance mechanism²⁵⁵ Intrusion into the lives and affairs of citizens can have a chilling effect on plans to harness the power of the net.²⁵⁶ Governmental moves to use the power of technology for excessive and oppressive surveillance should be opposed.²⁵⁷

The **current draft** does not contain an explicit content licence requirement. This implies that a close regulation of content providers was not wanted by the drafters.²⁵⁸ However the bill is still unclear about the licence requirement for content providers since it is unclear whether content services fall under the definition of application services or not.

Dominic Cull believes that in broad terms the Bill only intends to regulate content concerning broadcasting.²⁵⁹ ICASA should declare the provision of content services via Internet exempt from the (class) licence requirement according to section 6 of the Bill. This would be in line with the Malaysian Authorities under the Communications & Multimedia Act. He suggests amending the Bill to include another object saying “nothing in this Act should be interpreted as in any way limiting the right to freedom of expression”. Another possibility that provides for a more concrete solution would be to insert a clause stating that “no license shall be required to provide a content service” as suggested by The Internet Service Provider Association (ISPA).

hh. Unclear: Broadcasting licences for media streaming?

²⁵⁰ online forum participant “reech” , 29-01-2004, 04:40 PM, <http://www.mybroadband.co.za/vb/archive/index.php/t-12534.html>

²⁵¹ Prof. J. Hofman in a discussion at the University of Cape Town about the proposed Convergence Bill, <http://www.itweb.co.za/sections/business/2005/0505201041.asp?A=CEL&S=Cellular&O=E&CiRestriction>

²⁵² Prof. J. Hofman, *ibid.*

²⁵³ Online-forum participant “Perdition” 29-01-2004, 07:28 PM, *ibid.*

²⁵⁴ R. Wacks, *Privacy in Cyberspace: Personal Information, Free speech, and the internet* in P. Birks (editor), *Privacy and Loyalty*, Clarendon Press, 1997, p 95

²⁵⁵ S. Vutha , *Decoding the convergence bill (II)*, http://www.tata.com/0_knowledge_centre/other_articles/20020719_net_effects18.htm

²⁵⁶ S. Vutha *ibid.*

²⁵⁷ S. Vutha *ibid.*

²⁵⁸ D. Cull , Overview of the Convergence Bill [B9-2005], Presentation at UCT convergence conference on 26 & 27 May 2005.

²⁵⁹ D. Cull

Anyone providing broadcasting services must have a “broadcasting services licence” in terms of s. 5 (2) of the Bill (see above). In the Bill “broadcasting” is not defined as using radio frequencies but as covering all electronic transmissions except where sound or visual materials are incidental to the service.²⁶⁰ The problem is that online radio broadcasters or web casters that stream media (the technique is described in the first chapter) are not expressly excluded from the licence requirement of broadcasting services. There is the possibility to interpreting the relevant provisions of the Bill in the way that web casting is a kind of broadcasting so that the licence requirement applies.

However the licence requirement is only justified in respect of conventional content broadcasters; frequency is a scarce and finite resource and the content is pushed across continuously²⁶¹ and “straight into your face”. Key issues in the effective use of spectrum include the efficient allocation and sharing of frequencies channels and the need to ensure that radio signals from different users and services do not significantly interfere with each other.”²⁶²

As opposed to this, web content only uses bandwidth when requested and bandwidth is not a finite resource but can be bought freely. Just like the printing press, in order to be efficient it does not need management by the regulator. Therefore public interest and technical need only requires regulation by means of a licence in the case of conventional broadcasting via the radio spectrum. Thus it is justified that conventional content broadcasters are subject to a licence by ICASA as well as other forms of strict regulations e.g. concerning time limits for adult content, local content, electoral obligations etc. Newspapers and other content providers do not need a licence by ICASA but are subject to regulation like copyright law, the press ombudsman and the Film and Publications Board.²⁶³ To my mind it would not be justified that online content publishers are subject to a licence by ICASA whereas the printing press is not. A general licence requirement for web casters is in some cases also contrary to the objective of the Bill to promote South African content.²⁶⁴ Since server software is cheap and also storage requirements can be easily fulfilled, web radio now provides the opportunity for small providers to stream a specialized radio programme for a comparatively small audience.²⁶⁵ For example it would be possible to stream radio programmes in Ndebele, Zulu, Xhosa, Tswana etc. and thus promoting South African content, that is not of interest to commercial radio broadcasting that produces content following the taste of mainstream with the aim of benefiting financially. Technically the opportunity of making use of the Internet by web casting for the benefit of promoting South African content is there. However costly licences and long administrative procedures are artificial obstacles to small streaming providers.

Therefore the Bill should make it clear that broadcasting licences do not apply to traditional broadcasting services. This could be achieved either by generally excluding streaming from the licence requirement or by applying section 6 to small streaming providers.²⁶⁶

Otherwise it is very probable that existing web casters streaming radio as a hobby have to close down and new web casters are unlikely to provide for South African off-mainstream content since they cannot afford costly licences.

²⁶⁰ G. Berger

http://www.mg.co.za/articlePage.aspx?articleid=200525&area=/insight/insight__converse

²⁶¹ G. Berger, *ibid.*

²⁶² Official explanatory note to the Communications Act 2003, *ibid.*

²⁶³ Guy Berger, *ibid.*

²⁶⁴ S. Rabenstein, *ibid.*

²⁶⁵ S. Rabenstein, *ibid.*

²⁶⁶ S. Rabenstein, *ibid.*

6. The determinations of the Telecommunications Act of 1996

There are some ministerial determinations and regulatory initiatives that have got the potential of achieving the objectives the Bill struggles with.²⁶⁷

On 3 September 2004 some important ministerial determinations were made under the Telecommunications Act 1996:

From February 2005-

1. Mobile cellular Telecommunication Service licencees may utilize fixed lines that are required for the provision of their service. This includes Telecom's fixed lines as well as any other person's public switched telecommunications service.
2. Everybody may apply for licences to provide public payphone services everywhere in South Africa.
3. Value added network services may carry voice using any protocol
4. (a) Value added network services may also be provided by telecommunications facilities other than those provided by Telecom and the SNO (Second National Operator)
 - (b) Everybody providing a value added network service is entitled to cede of assign the right to use of the telecommunications facilities used for the provision of the value added network service.
5. Private telecommunications network operators are entitled to resell spare capacity and facilities or to cede or assign rights to use such facilities.

Form January 2005

6. Public education and training institutions are entitled to 50% discount on
 - a. calls to an ISP (Internet Service Provider)
 - b. connections or similar charges levied by an ISP for accessing, transmitting and receiving signals via the Internet.

However big parts of the regulation that is necessary to implement the determinations, have not yet been made, so that many operators do not yet comply with this reforming legislation.

The provision No three, providing that ISPs (Internet Service Providers) are now allowed to carry voice over their Internet networks is one of the most important ones. Together with ICASA's stated intent to force interconnection between fixed and mobile telephone networks, this is going to result in lower costs for consumers and businesses and has got the potential of easier provision of telecommunication services in poorer areas.²⁶⁸

7. Declaration of the under sea fibre- optic link as essential facility

Another major highly beneficial step would be the declaration of the under sea fibre-optic link as essential facility which is already intended by ICASA. The legal basis of a declaration of a communications facility as an essential facility is Chapter eight of the current draft of the Convergence Bill. ICASA has got the authority to declare a communications facility, that cannot be feasibly substituted as "**essential**" in order to impose conditions to promote vital consumer and business interests. If Icasa declared

²⁶⁷ I. Vegter, *Telecommunications in Converging Communications, South Africa's definite guide to the convergence of information and communication technologies*, June 2005, at p. 51, 52.

²⁶⁸ I. Vegter, *Telecommunications in Converging Communications, South Africa's definite guide to the convergence of information and communication technologies*, June 2005, p. 53

the undersea cable as essential facility Telkom could be forced to provide access to the cable at cheap wholesale rates.²⁶⁹ However Telkom is prepared to strongly oppose this by calling it an expropriation of assets that are the private property of Telkom's shareholders and that had been bought on the open market in good faith.²⁷⁰

8. The difficult implementation of the Bill

The success of the Convergence Bill depends very much on ICASA to regulate the sector according to the provisions of the Bill. However the weight of the work ICASA will have to do is immense, especially in the transition period so that it is doubtful that ICASA will be able to make all the necessary regulations within the time the market needs them.²⁷¹

In this context Mr. Langa, the former chairman of ICASA, said that Chapter 13 of the bill would entail a big licence and regulation convergence project absorbing a lot of financial and human resources whilst diverting ICASA's attention from the really important matters like opening new markets and licencing new entrants.²⁷² Additionally ICASA's work will also be difficult with respect to entrenched players, incumbents, who are willing to spend lots of resources to defend their positions and fight against actions that are contrary to their interests.²⁷³

The future will show whether the Bill really promotes convergence, which is very doubtful.

Conclusion

This conclusion briefly summarizes the main points that were said about the EU and the countries with strong regulatory control especially South Africa. It compares between the EU and South Africa and the other countries' laws that had been described and it also provides for an overall evaluation of the South African Convergence Bill as opposed to the approach taken by the EU.

It is evident that we are entering "a golden age of communication" with digital technology increased amounts of content can be transmitted globally over any medium and the consumer has the choice since the markets are also more and more liberalized for new entrants resulting theoretically in a decreased prices.²⁷⁴ However in practice only the biggest companies are able to compete on the international level. They seek to push away smaller competitors in order to dominate the market alone. As soon as a company dominates the market they can decide the prices more or less independent from the consumer since there are not many other competitors to offer the same service or infrastructure. They can then also decide which materials are broadcasted and who has got access excluding consumers without the necessary financial means to take part in the information society.²⁷⁵ This scenario is at least the case without imposing regulatory control over the converging communication

²⁶⁹ I. Vegter *ibid*, p.54.

²⁷⁰ I. Vegter *ibid*, p.54.

²⁷¹ D. Cull, *Overview of the Convergence Bill [B9-2005]*, Presentation at UCT convergence conference on convergence, 26 & 27 May 2005, at p. 14.

²⁷² M. Langa, when presenting the regulator's response to the Bill in the first public hearings before the Parliament portfolio Committee on Communications, 24 May 2005.

<http://www.icasa.org.za/Documents.aspx?Page=86>

²⁷³ D. Cull *ibid* at p. 14

²⁷⁴ R. Frieden, *with convergence legal, regulatory and trade opportunism in telecooommunications.*, Santa clara computer and high techbology law journal, May 2002, v 18 i 2.

²⁷⁵ R. Frieden, *ibid*.

industry.²⁷⁶ In order to find a just solution for regulating convergence, countries adapt their existing regulation or enact new legislation. The new convergence legislation of the contemplated different countries we looked at is in some aspects similar but in some other aspects the different approaches vary a lot.

All of the different law and policy makers were aware that they needed to ensure that old regulations and policies do not hinder what convergence makes possible: the development of cross sector applications, services and businesses.

We have seen that the EU and the UK, Malaysia, India and South Africa enacted totally new legislation and did not change enacted legislation on an as-needed basis as some other countries in the world chose to, that were not described earlier on.

The beginning of the process of regulatory reform by Malaysia, India, South Africa and the UK in response to convergence of technologies was that they dissolved the former different regulatory authorities and established a combined regulator to regulate broadcasting, telecommunications and information technology (in South Africa ICASA, in the UK Ofcom, in Malaysia the Communications and Multimedia Commission and in India the proposed Communications Commission). This is in line with a cross sector horizontal approach.²⁷⁷ Malaysia, India, South Africa and the UK have already introduced boldly or are at least attempting to (with the Convergence Bills in India and South Africa), an entirely new single piece of convergence regulation overhauling their outdated communication legislation. In the EU there are several pieces of regulation making up the “Telecom Package”.

All the described countries also introduced crucial new licencing systems that seek to be activity based and technology neutral. That means in all the countries licences are no longer issued for certain technologies but issued for major categories of activities.

For all countries this is in theory a healthy start to address a convergent environment. But if the Angel is in the concept then the devil is in the nitty-gritty of the details.²⁷⁸

Even if the intentions and objectives of a piece of regulation are the best sometimes their practical realization has got major shortcomings. I would say that the licencing system and the density of regulation is the point where regulation in the European Union countries as opposed to Malaysia, South Africa and India varies most. The licencing system that Malaysia, India and South Africa introduced/ seek to introduce encountered lots of criticism.

Now a summary of the approach the European Union is given.

In the European Union with convergence the focus of regulation is changing from direct control over content and advertising to concern over competition and the control of market power.²⁷⁹ Communication legislation regulatory issues such as the provision of universal service, consumer protection, spectrum assignment and tradability, competition regulation, regulatory forbearance and the increasing role of class licence became significant after the liberalization process.²⁸⁰

Characteristic for the EU is that it emphasizes on Competition law and on regulation to a necessary minimum. The European approach in respect of regulating convergence

²⁷⁶ R. Frieden, *ibid.*

²⁷⁷ Angeline Lee, p. 694, *ibid.*

²⁷⁸ D.L. Dougan, 1997, “*Globalizing Telecommunications services: Angel in the concepts, Devil in the Details*”, in the WTO Telecom Agreement: Engineering the Global Information Highway, conference Report, Global information Infrastructure Commission and CSIS International Communications Studies Programme

²⁷⁹ Darryl R. Biggar, OECD Roundtable on Regulation and Competition Issues in Broadcasting in the Light of Convergence, p. 65

<http://ssrn.com/abstract=185089>

²⁸⁰ Angeline Lee, *Convergence in Telecom, Broadcasting and IT: A comparative analysis of regulatory approaches in Malaysia, Hong Kong and Singapore*, Singapore Journal of International and Comparative Law, 2001, p. 681.

is: to let free and fair competition take place in open markets with general competition law as the main control mechanism.²⁸¹ Regulation is only to be passed to the minimum necessary. As a principle, regulation can only be exercised after a market analysis had found that a market is not sufficiently competitive; that is, where an undertaking has Significant Market Power (SMP, see above)²⁸² i.e. when it can behave independently of competitors, customers and the consumer. Also in the UK which had to transpose obligatory provisions of the Telecom Package into national legislation which was mainly done by the Communication Act 2003 market research and strict control of providers with Significant Market Power (SMP) are crucial.

The principle of limiting regulation to the minimum necessary level is clearly in the licencing regime introduced by the Authorization Directive. This directive replaces the former individual licences by general licences; but there is still a special scheme for assigning frequencies and numbers²⁸³. In order to exercise the rights derived from a general licence the undertaking does not need to obtain a costly decision from the National Regulatory Authority (NRA) or any other administrative act. It is sufficient for the undertaking to notify the NRA and thus keeping the administrative work to a minimum.

Whenever possible the use of radio frequencies should also not be subject to the grant of an individual right of use. Member states should already include the conditions of usage in the general authorization.

Another example showing that regulation is only passed to the minimum necessary level is that regulation dealing with convergence is only passed in order to protect competition from operators with significant market power who would otherwise try to rule the market alone. If there is sufficient competition, the regulator displays a *laissez-faire* policy and lets the market regulate itself.

Unbundling the local loop brought a substantial reduction in the costs of using the internet in the European Union. Only where there is access to an inexpensive communication infrastructure and a wide range of services, the growth and job potential of the digital knowledge based economy can be achieved.²⁸⁴ Thus opening up the local loop is crucial. This is still missing in South Africa.

In Great Britain it is mainly the Communications Act that implements the new regulatory package.

However in a number of Member States the implementation is far from complete although the member states had to transpose the directives into their domestic law until 24 July 2003.

Other problems are that several market and technology developments could not have been foreseen when the directives were drafted.²⁸⁵

Another problem putting pressure on the Member States is that several market and technology developments could not have been foreseen when the directives were drafted.²⁸⁶ Remaining questions are for instance: *how to regulate VoIP in respect of consumer protection, how to provide for interconnection between new IP networks,*

²⁸¹ Alan McKenna, Information & Communications Technology Law; June 2000, Vol. 9
Iss. 2, p. 5 of the article, *Emerging issues surrounding the convergence of the telecommunications, broadcasting and information technology sectors*,

<http://search.epnet.com/login.aspx?direct=true&db=ufh&an=3347345>

²⁸² Ofcom website, *Imposing Access Obligations under the new EU Directives*, Sept. 13, 2002,
http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/acce0902.htm

²⁸³ *Authorisation of electronic communication networks and services*, *ibid*

²⁸⁴ INTUG group, *ibid*.

²⁸⁵ S. Carter, OECD Roundtable on convergence, June 2nd, 2005,
<http://www.ofcom.org.uk/media/speeches/2005/06/oecd#content>

²⁸⁶ S. Carter, OECD Roundtable on convergence, June 2nd, 2005,
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how to treat technologies that blur the distinctions between mobile and fixed (e.g. Wi-Max) and much more.²⁸⁷ Although the regulatory framework has undoubtedly been well considered at the time of its draft, the regulator struggles to keep pace with market and technology development.²⁸⁸ It is not only an important question how to regulate convergence but also how regulation must change in the light of convergence emergence in the business arena.²⁸⁹

All in all this new regulatory framework of the EU and its transposition by mainly the Communications Act 2003 in the UK provides for clear and stable rules creating certainty for investors.²⁹⁰ It helps to create a competitive and innovative market as well as price reductions and more choice for consumers.²⁹¹

In South Africa there are some major problems with the convergence Bill. One of them is that there is a difference between the stated objectives and what it is truly all about.

Two of the main objectives of the Bill are

-To promote and facilitate the convergence of telecommunications and broadcasting signal distribution

-To promote the universal provision of communication networks and services and connectivity for all.

The Bill also emphasizes the need for competition in the communications sector which is already a step in the right direction but there is not yet enough competition

The problem is that the very noble stated objectives of the Bill are not really addressed by it. Some practical things urgently need to be done first in order that the Bill has got a good foundation and can be successful. How are previously disadvantaged people empowered by the Bill? A good step would be setting up computer centres in the poorer areas and help people to become computer literate so that they have got the necessary skills to get a job.²⁹² To put the notion of universal access into practice local broadband should be cheaper since prices in South Africa are much more expensive than for example in the EU although the standard quality in South Africa is still below the standard in the EU. This poses a big problem; if the internet connection is expensive the vast majority of people is practically excluded from using internet usage since they cannot afford it. If prices for an internet (broadband) connection were lower, South Africa would be much more competitive in relation to other countries. The use of the Internet is crucial for the spread of convergent technologies and the well being of the future economy.

Another example for a policy of the government which is not favourable for South Africa and somehow contradictive to the aims of the Bill are for example the high import charges on computer equipment²⁹³ which makes people not being able or only being able under comparatively high expenses to get the crucial equipment for applying convergent techniques and clearly dividing the have and have nots. Thereby the economy is hampered and financially less powerful people are held back from taking part in the new economy.

²⁸⁷ S. Carter, *ibid*

²⁸⁸ S. Carter, *ibid*

²⁸⁹ Prof. Ram Jakhu, *A Brief Analysis of the Indian Communication Convergence Bill (2000)*.

²⁹⁰ Gateway to the EU, *Electronic communications; The road to the knowledge based economy*, June 20th, 2003, <http://europa.eu.int/scadplus/leg/en/vb/124216b.htm>

²⁹¹ *Electronic communications; The road to the knowledge based economy*, *ibid*

²⁹² Online-forum discussion on the South African Convergence Bill, <http://www.mybroadband.co.za/vb/archive/index.php/t-12534.html>

²⁹³ This argument was also voiced publicly by Online-forum participant "MaD" 29-01-2004, 07:59 PM, <http://www.mybroadband.co.za/vb/archive/index.php/t-12534.html>

Especially in the case of South Africa before overregulating technology more emphasis should be put on the protection of human rights. The administration of a tight licencing system is very costly, financed by the tax payer with money that could be invested somewhere where it is of more benefit for the economy or the people.

The objectives of the bill stand in contrast to the market dominance by Telkom that is only partly privatized and has practically got a monopoly. The regulation of telecommunications until now was more about protecting the monopoly investments and shareholders of Telkom to the detriment of the provision of quality, cost-effective telecommunications to the people of South Africa, even if this was not the intention.²⁹⁴

Although Telkom is getting some concurrence now in South Africa it still has got monopoly power and far too much influence which can be seen from the comparatively higher prices for telecommunication. For example it would be a good start if Telkom provided lower prices for educational institutions so that bandwidth is not one of their biggest expense any more as it is for example for the Cape Peninsula Technikon.²⁹⁵

As opposed to the approach in the EU that seeks to regulate as little as possible a major point of criticism is that the Bill has been accused of over regulating. It has been voiced that it is all about licencing and registering and recording although there is no technical need for so many licence provisions. But why can Internet Service providers be required to store information just because it might at some stage be helpful to trace a criminal. There is a lack of functional equivalence between the regulation of real life as opposed to virtual activities. We also let people talk freely and do not install tape recorders on public places.

I would say the emphasis of the South African convergence Bill is on regulating the market by establishing licence requirements for all sorts of different services. As said above in the EU and in its member states the emphasis is not so much on licencing the players on the market, but the market is regulated by ensuring fair competition and mainly by only regulating providers with significant market power.

Why is this so? South Africa must have been aware that other countries like the member states of the EU follow another approach. Did South Africa and the other countries that enacted or are in the process of enacting strong regulatory control regimes for the sector do this because they have got a lack of experience on the field of general competition law compared to European countries? Consequently, do they feel the need to impose so much regulation on a single sector now? I had this impression especially in the case of Malaysia. Since South Africa and India overtook so many principles from the Malaysian Communications and Multimedia Act (CMA), it is probable that South Africa and India had similar motives as Malaysia for drafting their Convergence Bills. And in fact all the three countries Malaysia, India and South Africa are emerging economic powers. A possible explanation would be that these countries feel that the government needs to keep as much control as possible because otherwise they might not be able to protect their emerging economies from economic dominance and expansion of countries with economic superpower like the USA. And the three countries seek to protect their local culture against the cultural dominance of the United States. Therefore it is so difficult for them to allow for free and open competition in the sector. As opposed to this the economies of the member states of

²⁹⁴ D. Cull, *Overview of the Convergence Bill [B9-2005]*, UCT convergence conference on 26 & 27 May 2005.

²⁹⁵ online-forum discussion participant "MaD" 30-01-2004, 08:59 PM, and "Reech" 30-01-2004, 10:56 AM

the EU, that have been doing comparatively better, seem to be confident enough to display a hands-off policy and let the market regulate itself as much as possible.

As opposed to South Africa, Malaysia and India, in Europe freedom is a very deeply routed value of society. South Africa is a very young democracy and the notion of freedom has only been there for about 10 years. In the case of Malaysia a possible reason for its strong regulatory control of the sector might be that it is coming out of a civil war and therefore still somehow fears that the country falls apart and tries to oppose this by strong protection of local content and by tight regulation of content in general.

Extensive licencing provisions put a burden on the players on the market who have to pay for them and the administrative system is also very cost intensive. The result is that companies go offshore so that the objectives and ideals of the Convergence bill cannot be reached. Imposing extensive licencing provisions slows down things instead of creating an environment that helps convergent technologies and applications to grow in the own country.

The success of convergence legislation does not depend so much on tightly regulating and managing communication convergence but on introducing and maintaining healthy competition in a rapidly changing converging environment.²⁹⁶

But it has also truly been stated that however any convergence regulation looks like no matter whether it controls the sector tight or whether it rather displays a hands off policy as soon as there is sufficient competition it has been stated that “the impact of convergence upon regulation will be greater than the impact of regulation on convergence.”²⁹⁷

At least it is good that South Africa’s legislator now recognizes the fact of media convergence and is starting the necessary process to address issues. The first significant step in the regulatory reform was the establishment of the convergent regulator ICASA (see above). Then the heart of the problem was to make a piece of regulation that is technology neutral.²⁹⁸ This problem is addressed in the Bill. Licences can be issued for services that can now be distributed through a range of different technologies-some of them not yet invented. Although there is some progress with the Bill, it still contains very sizeable problems that need to be ironed out.²⁹⁹ In my view the Bill definitely needs some changes i.e. the underlying principles and the philosophy behind it must change. There is no technological nor an economic nor a cultural necessity for convergence legislation like the South African Convergence Bill and it is very doubtful whether it is going to be of benefit for South Africa. It is a choice to be made but the regulator should realize what it is doing. The future will show how the South African Convergence Bill -if enacted in the present state- will work. Other African countries that have not yet embarked on any special convergence legislation will have to decide whether they rather follow the European approach or the approach of Malaysia, South Africa and India in order to achieve the highest possible economic, social and cultural benefits in a quickly converging environment.

²⁹⁶ Prof. Ram Jakhu *A Brief Analysis of the Indian Communication Convergence Bill* (2000).

²⁹⁷ Prof. Ram Jakhu, *ibid.*

²⁹⁸ Guy Berger, *Two steps forward one step back*, Mail & Guardian online
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²⁹⁹ Guy Berger, *ibid*

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