Telecommunications Services Liberalization in Ethiopia: Implications for Regulatory Issues

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Introduction

Beginning from the 1980s and 1990s almost all nations have abandoned monopoly practices in the supply of telecommunications services. Nations have long started reaping the benefits of competition delivered through privatization and liberalization. Ethiopia has, however, remained to be one of the only few countries where monopoly of telecommunications services is forced to trek. And apparently there may not be a change in policy any time soon for the official narrative dubbed telecommunication 'cash-cow' to be milked only by the state,[1] signifying the intention to comfortably ride on the monopoly. Whether this stance is tenable, and if so, for how long, is debatable, though, especially in view of Ethiopia's impending accession to join the World Trade Organization (WTO). It is widely expected that some WTO Members will mount negotiation pressure on Ethiopia to open her telecommunications market to foreign competition. Will Ethiopia give in to such pressure? Officials vow not to bow at all, but we cannot be certain about that at this stage of the accession negotiation. However, in view of existing accession experiences, we can validly maintain that Ethiopia may embrace some degree of liberalization in the telecommunications sector as a concession to join the world trading club.

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[1] E.g., Prime Minister Hailemariam Desalegn's'interview with'*Financial Times* Ethiopia's leader aims to maintain tight reign on key business (http://www.ft.com/cms/s/0/c0985378-c5ef-11e2-99d1-00144feab7de.html#axzz2dUwHRdnM) last accessed on August 30, 2003. See also his address to National Forum for Business in June 2013 in Addis Ababa "Ethiopia telecom to remain state-monopoly," (http://www.africareview.com/Business---Finance/Ethiopia-telecom-sector-to-remain-a-stat e-monopoly/-/979184/1896796/-/9hitv4/-/index.html) last visited on August 30, 2013.

The author argues that a closer examination of available legal and policy documents pertaining to telecommunications Ethiopia has put in place since 1996 suggests liberalization is possible, if not probable. This evidence points, if not conclusively, in the direction of Ethiopia liberalizing her telecommunications sometime in the future.[2] Liberalizing telecommunications services hitherto under public monopoly certainly rasies important issues of regulation.The purpose and tools of regulating monoply are different from those of competiton. Experineces show that the transition form monoploy to competiton in the secor requires effective regulation. This article analyzes the efficacy of Ethiopia's telecommunications regulatory framework to manage a smooth transition from the entrenched monopoly to a working competiton if and when Ethiopia decides to open the sector to competiton. The focus in this regard is on major regulatory principles. The analysis is made against the backdrop of global telecommunications services reform and Ethiopia's policy in the sector. Inevitably, however, the analayis is far from complete. Identifying the latest policy stance of the Ethiopian government on telecommunications liberalization remains a difficult exercise while explaining such stance also requires cross-cutting interdisciplinary approach. Although the article has tried to be as comprehensive as possible, it still does not cover all regulatory issues (e.g. financial and technical aspects of regulations are not addressed). The analysis of regulatory issues, for obvious reason, is also purely theoretical.

The article has two Sections. Section I summarizes the factors behind the global reform of telecommunications leading to liberalization, and discusses telecommunications services reform in Ethiopia. It highlights the arguments raised by the Ethiopian government in defense of its monopoly and investigates available evidence pointing to liberalization. In view of Ethiopia's impending accession to the WTO, the Section also analyzes whether the multilateral forum helps drive telecommunications liberalization in Ethiopia. Section II takes up regulatory issues of telecommunications liberalization in Ethiopia and makes a

[2]There is no official schedule but the late Prime Minister in 2009 said that liberalization could be postponed for a significant time; see his "Interview with" *Reuters* in 2009 as quoted in Ethiopia Would Resist Pressure from the Rich World to Fast-track Liberalization, (http://www.ethiopianinvestor.com/index) last visited on March 25, 2013.

normative assessment of the legal and regulatory framework Ethiopia has put in place since 1996. The article closes with a conclusion.

I. General Overview of Telecommunications Services Reform and Ethiopia's Approach

1. General Overview: Shifting Grounds

Telecommunications (herein after 'telecom') services have been undergoing reforms since the 1980s and the 1990s. This sub-section discusses two of the major reforms: a) the shift from natural monopoly to market competition, and b) the emergence of a multilateral regime governing international trade in telecom services that impacts national regulatory framework.

A. From Natural Monopoly to Market Competition

The supply of telecom services through state-owned operators has been subject to challenge and re-examination since the last decades. This phenomenon, described as a 'wave of institutional reform sweeping the world'[3] has led to the shift away from monopoly to competition.This shift has been induced generally by the strong currents of pressure from business demands and advances in technology.[4] Economic integration increased businesses' reliance on efficient and reliable telecom services,[5] but state-owned monopoly operators failed to meet these demands.[6]As telecom services became one of the determinant factors affecting competitiveness, businesses could no longer disregard the quality, price, variety and cost of telecom services they could obtain.[7] The advent of modern telecom technology has lowered the costs of services and improved the

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[3]R. Samarajiva, "The Role of Competition in Institutional Reform of Telecommunications: Lessons from Sri Lanka," Telecommunications Policy, Vol. 24(2000), p.699.

[4]For additional forces, see A.Buckingham *et el* "Telecommunications Reform in Developing Countries," in I.Walden (ed.), Telecommunications Law and Regulations (2009), pp.767-777.

[5]P.Low and A.tya Matto, Reform in Basic Telecommunications and the WTO Negotiations: The Asian Experience, WTO Staff Working Paper (February 1998), p.8 (http://www.wto.org/english/res_e/reser_e/pera9801.pdf) last visited on April 5, 2013.

[6] S.J. Wallsten,"An Econometric Analysis of Telecom Competition, Privatization, and Regulation in Africa and Latin America," Journal of Industrial Economics, Vol. XLIX, No.1 (2001), p.2.

[7] L.Tuthill, "Users' Rights? The Multilateral Rules on Access to Telecommunications," Telecommunications Policy, Vol. 20, No.1 (1996), p.89.

quality of services.[8] Technology has also made it difficult for governments to defend the long-held assumption that telecom is best supplied through natural monopoly.[9] Modern technology has also armed consumers with the technical ability with which they beat domestic regulations.[10] Pressure from international financial institutions and debt crisis were also responsible for telecom reform in certain developing countries. [11] The WTO Agreement on Basic Telecommunications has also significantly contributed to the liberalization of telecom services.[12]

Finally it should be noted that the transition from monopoly to competition has been made possible by the careful choice and implementation of a series of policy measures and instruments. These include adopting a telecom sector policy, liberalization of the sector and adopting a new pro-competitive regulatory framework implemented by an independent regulatory body; modernizing the incumbent (including corporatization and privatization) and attracting new entrants are also part of the reform.[13] But one can hardly find a country that has taken all the measures and adopted all the instruments at once, and/or applied a given instrument to its maximum limit; sequencing and progressiveness characterize the reform of telecom.[14]

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[8]P. Low and A. Matto, Cited above at note 5 and S.J. Wallsten, Cited above at note 6

[9]Ibid.

[10]Call-back service and the Internet are good examples.

[11]See generally, C. Djiofack-zebaze and A.Keck, "Telecommunications Services in Africa: The Impact of WTO Commitments and Unilateral Reform on Sector Performance and Economic Growth," World Development, Vol.37, No.5 (2009), and J.C. Ratto-Nielsen, "A Comparative Study of Telecommunications Reform in East Asia and Latin America," International Journal of Public Administration, Vol. 27, No.6 (2004).

[12] M. Fredebeul-Krein and A. Freytag, "Telecommunications and WTO Discipline: An Assessment of the WTO Agreement on Telecom Services," Telecommunications Policy, Vol.21. No.6 (1997), p.477.Some 69 countries representing 90% of world trade in telecom services have agreed to liberalize their telecom markets at the adoption of the Agreement on Basic Telecommunications. Ibid.

[13]For detailed analysis of these measures, seeA.Buckingham *et el,* Cited above at note 4, pp.781-787.

[14]C. Fink A.Mattoo and R.Rathindran, Liberalizing Basic Telecom: The Asian Experience, World Bank Working Paper No. 2718(2001), p.2, (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=634429) last visited on April 5, 2013.

B. The Emergence of Multilateral Regime on International Trade in Telecom Services

Dwelling on WTO's General Agreement on Trade in Services (GATS) governing international trade in telecom services, a well explored subject[15] is not the objective of this sub-section. Nonetheless, a brief description of some of its features as they pertain to telecom services is imperative in view of Ethiopia's impending accession to the WTO.The GATS framework governing telecom services consists basically of the General Obligations,[16]the Schedules of Specific Commitments, [17] the Annex on Telecommunications and the Reference Paper. We briefly look at the Annex and the Reference Paper which are specific to the telecom sector.

i. The Annex on Telecommunications (AT)

The AT contains obligations which kick in only when there is specific commitment in a service sector other than telecom.[18] Section 5(a) of the AT obliges a WTO Member to make sure that suppliers of scheduled service of other WTO Members are allowed access to and use of public telecom transport networks and services on terms and conditions which are reasonable and non-discriminatory.The AT guarantees effective use of telecom services to the supplyof scheduled services other than telecom so that trade concessions negotiated at the WTO may not be frustrated due to lack of access to and use of telecom services.[19] The AT does not also contain or lead to any market-access

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[15]For a detailed account of negotiating history and outcomes see, M.C.E.J. Bronckers and P. Larouche, "Telecom Services and the World Trade Organization," Journal of World Trade, Vol.31, No.3 (1997); M. Bronckers and P. Larouche, "A Review of the WTO Regime for Telecom Services," in K.Alexander and M.Adenas(eds.), The World Trade Organization and Trade in Services, (2008).

[16]The most-favored-nation principle (Article II (1) is one of the most important general obligations under the GATS.

[17]The schedule of commitments forms an integral part of the GATS ((Article XX (3)). It contains market access and national treatment obligations as well as additional obligations, if any, of a member (Article XVI-XVIII).

[18]Section 5(a) of the AT

[19]See L.Tuthill, Cited above at note 7 and Marco C.E.J. Bronckers and P. Laouche, Cited above at note 15 and Marco C.E.J.Bronckers and P. Larouche, Cited above at note 15. Section 5(b) of the AT lists certain rights of use and access the exercise of which can also be subject to

or national treatment obligations.[20] Thus in the absence of any specific commitment in the telecom sector by Ethiopia, a firm from a WTO Member cannot invoke the AT to commercially supply telecom services in Ethiopia.

ii. The Reference Paper (RP)

The RP contains a set of regulatory principles aimed at addressing the fear that domestic telecom regulatory regime could be used for trade distorting purpose.[21]The RP is optional for WTO Members to adopt althugh all acceeding countries had to adhere to the RP, and it seems to be almost a mandatory part of accession package. It is meant to guide national telecom regulation. Anti-competitive practices, interconnection charges, universal service obligations, transparency in licensing, independence of a regulatory authority, and allocation and use of scarce resources are the major issues covered by the RP.[22] The regulatory principles of the RP are to be translated into domestic law safeguards to ensure market access and foreign investment commitments.[23]

2. Telecom Services Reform in Ethiopia

A. The State of Telecom Services in Ethiopia

If telephone were invented in 1876, Ethiopia (with a history of establishing the first telephone network in 1894!) would not only 'plume' herself to be one of the 'first'nations to receive the technology but also 'comfort' herself when currently left behind her African peers.Although improvements are visible[24],

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conditions and limitations under Section 5(d-f). Under Section 5(g) developing countries have the right to take exceptions to the AT (Section 5(g).

[20]See Section 5(a) of the AT and M.C.E.J. Bronckers and Pierre Laouche, Cited above at note 15, p.19

[21] W.J. Drake and E. M. Noam, "Assessing the WTO Agreement on Basic Telecommunications," in G.C. Hufbauer and E.Wada (eds.), Unfinished Business: Telecommunications after the Uruguay Round (1997), pp.41-44.

[22] The text of the RP is available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm. For further analysis of the principles vis-à-vis Ethiopia's telecom regime, see Part III of this article. All countries that have acceeded to the WTO have adopted the RP; see their accession protocols at www.wto.org.

[23]M. C.E.J. Bronckers and P. Laouche, Cited above at note 15, p.23.

[24]According to a 2010 study subscription in the mobile sector grows at a compound annual growth rate of almost 90% since 1999 and more than 100% in the past six years although it is

telecom sector performance measured in terms of penetration, quality, and price is low even by African standard. A country of more than 80million people has a teledensity (i.e. number of subscribers per hundred persons) of 0.9 for fixed line; 23.7 for mobile cellular phone and 1.5 for the Internet[25] far less than neighbouring Kenya and Uganda where telecom is fully liberalized.[26] Poor quality, limited service variety, unreliable Internet and higher costs are also 'flagships' of telecom services in Ethiopia.

Poor sector performance is not the only feature that telecom in Ethiopia shares with pre-reform history of telecoms in other countries.[27] It also shares mode of administration, nature of ownership and market structure. Telecom and postal services in Ethiopia were originally combined and provided by the same body operating under the then Ministry of Posts, Telegraphs and Telephones (PTT) until a separate enterprise called the Ethiopian Telecommunications Board (ETB) was established in 1952.[28] Thus, we may say that the yet unfinished business of telecom reform in Ethiopia began half a century ago when telecom and postal services were separated. However, it took more than four decades to introduce the next reform in which the functions of operating and regulating telecom services traditionally undertaken indistinctly and simultaneously by the same body were separated.This happened only in 1996 when these two functions were separated and became the mandates of two different institutions. The operational function was entrusted to a limited liability company named the Ethiopian Telecommunications Corporation (ETC) re-

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also said that the incumbent is unable to satisfy the ever growing demand. Improvements are said to be picking up following massive investments in fixed wireless and mobile network infrastructure, including 3G mobile technologies and a national fiber optic backbone. See D. Baron, The Impact of Telecommunications Services on Doing Business in Ethiopia, (Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, PSD Publications Series No.15 2010),p.7; Tables 4 &6, pp.16-19.

[25] International Telecommunication Union (hereinafter ITU) database for 2012 (http://www.itu.int/net4/itu-d/icteye/CountryProfile.aspx)last visited on July 23, 2013

[26]Ibid. The corresponding figures for Kenya respectively are 0.6, 71.9 and 32.1 while for Uganda the numbers 0.9, 45.9, and 14.7.

[27]On the pre-reform histories of telecom, see A.Buckingham *et el*, Cited above at note 4, pp.765-766.

[28]See Postal Service Proclamation,1942, Proc.No.17, Neg.Gaz.Year1,.no.4 and Establishment of the Imperial Board of Telecommunications Proclamation, 1952, Proc.No.131, Neg.Gaz. Year 12, no.5

named in 2010 Ethio-Telecom.[29] The regulatory function was given to the Ethiopian Telecommunications Agency (ETA) up until 2010 when ETA, a legally distinct federal body outside of but reporting to the ministry responsible for communication, was abolished and its powers transferred to the Ministry of Communications and Information Technology (MCIT) which is also responsible for the telecom sector.[30] The 1996 reform also introduced a new regulatory framework that enshrines pro-competition principles (more in Section II).But attempts at partial liberalization of the incumbent did fail twice.[31]

Telecom service has been under the firm grip of the monopoly of successive Ethiopian governments ever since its introduction into the country.Some blame this monopolistic market structure for the stunted telecom in Ethiopia.[32] But government officials dismiss such critics simply as misplaced on the ground that the sector's poor performance is associated not with the nature of ownership or the market structure but with corporate management.[33]No wonder corporate management reform has been a constant telecom sector policy direction in Ethiopia.[34] Themanagement contract-out to France Telecom, a foreign company that managed Ethio-Telecom for a period of two years, can be a good example in this regard.

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[29]Ethiopian Telecommunications Corporation Establishment Council of Ministers Regulations, 1996, Art.2(1) Reg.No.10, Neg.Gaz.Year 3.no 6 (Hereinafer Telecom Reg. No.10)and Telecommunications Proclamation, 1996, Art.2(3), Proc.No.49, Neg.Gaz. Year 3, no.5(Hereinafter Telecom Proc.No.49), as amended, Telecommunications (Amendment) Proclamation, 2002, Art (2(1)), Proc. No.281(Hereinafter Telecom Proc.No.281), Id, Year 8, no.28. We in fact know also of the "Ethiopian Telecommunication Authority" that preceded the ETC but this author could not find a legal text that established it

[30]Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2010, Arts. 24 and 36(5), Proc.No.691, Neg.Gaz. Year 17, no.1.

[31]D. Baron, cited above at note 24, pp.9-10. It is reported that 30% and 49% of the stake were offered for sell in 2002 and 2005 respectively. Ibid

[32]See for instance, Lishan Abay, Ethiopia ICT Sector Performance Review 2009/2010: Towards Evidence-based ICT Policy and Regulation, Vol. 2, (2010), p.3.

[33]For example, see Girma Biru's (former Trade Minister) interview to the media on February 17, 2009 (http://www.bloomberg.com/apps/news?pid=newsarchive&sid=adot_hJ.1pyc) last visited on April 22, 2013.

[34]See the Industrial Development Strategy (2002), the Plan for Accelerated and Sustained Development to End Poverty (ASDEP) (2005-2010) and the Growth and Transformation Plan (GTP). They all talk about improving corporate management of the state-owned telecom operator in Ethiopia.

B. Ethiopia's Approach to Telecom Services Liberalization

i. In Defense of the Monopoly

Ethiopia is one of the few countries of the world teetering on monopoly, and the only country in Africa where all forms of telecom services are held by public monopoly.[35]The Ethiopian government raises two major arguments in defense of its monopoly. The first argument is that the government is more efficient than the private sector. The justification for this is the low level of telecom network development in Ethiopia which, according to the government, necessitates monopoly until conditions become favourable for the private sector.[36] One such condition is the completion of a nationwide basic telecom infrastructure.[37]This, for example, explains the recent $1.6 billion vendor-financing agreement between Ethio-Telecom and Chinese telecom companies[38]although such significant investment in network is said to further delay liberalization.[39]

The second major argument of the Ethiopian government is universal access.The government believes that it will not achieve universal access using the private sector because the latter is interested only in 'cream skimming' by confining itself to urban and high income areas.[40] Thus, the only viable option is the back of the incumbent monopoly operator that finances universal access through cross-subsidization.[41]In the final analysis the Ethiopian government maintains that universal access must be achieved before liberalization.The question is whether universal access should always have to be achieved before

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[35]ITU (http://www.itu.int/net4/itu-d/icteye/CountryProfile.aspx) last visited on July 23, 2013. Incredibly some level of competition has been introduced even in Eritrea since 2005.Ibid.
D. Baron, cited above at note 24,p. 69

[36]Industrial Development Strategy, p. 145.

[37] R.Self *et el*,"Impact of WTO Accession on Ethiopia's Telecommunication Services Sector:Revised Final Report(November 14, 2007), (unpublished, on file with the author), p.37.

[38]The project is supposed to cloth Addis Ababa with a 4-G broadband network and the rest of the country with 3-G networks.

[39]Galperin, quoted in L. Hartley and M. Murphree, "Influences on the Partial Liberalization of Internet Service Provision in Ethiopia,"Journal of Politics, (Fall 2006),p.101.

[40] See Industrial Development Strategy, pp.146-147. see also R. Self et el, cited above at note, 37, p.37

[41] Industrial Development Strategy, p.148.

liberalization.Can't liberalization itself be used to advance the goal of universal access?[42]

Of late, the most explicit defense of the monopoly in Ethiopia is offered in the form of retaining the monopoly price to finance the Ethio-Djibouti railway project. [43] Political /security concern may also justify the reluctance of governments to allow foreign control of essential services like telecom. We do not hear the Ethiopian government publicly invoking this defense; we cannot also bet that security concern is out of the equation.[44]

ii. Some Evidence Towards Liberalization

Whether the driving forces behind the global telecom liberalization are relevant in the context of Ethiopia cannot be an issue. The question is rather whether these forces are strong enough to exert sufficient pressure on the government and compel it to liberalize. Businesses in Ethiopia have suffered the impact of weak and unreliable telecom; bad telecom is reducing competitiveness and impeding access to foreign markets.[45] The country is also foregoing the real or perceived benefits of liberalization, such as revenue and business opportunities as well as reduced prices, increased penetration, improved quality and variety of telecom services. [46]We have already witnessed some individuals going around telecom regulations through the use of technology.[47]Call back service

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[42] See generally J.Mpha, "Tradable Universal Service Obligations," Telecommunications Policy, Vol. 23, No. 5(1999)

[43] Prime Minister Hailemariam Desalegn's interview, cited above at note 1.

[44]*The Economist* has made this explicit. See "Ethiopia and Kenya: Doing it my way: An Ideological competition between two diametrically opposed economic models" The Economist (http://www.economist.com/news/special-report/21572379) last visited on March 15, 2013. The perceived need to protect incumbent operators as infant industries or to facilitate orderly privatization also explains the reluctance of governments to liberalize; see C.Fink, A.Mattoo, P.Rathindran, Cited above at note 14, p.16. But we don't hear the Ethiopian government invoking this protectionism.

[45]See generally, D. Baron, Cited above at note 24.

[46]R. Self *et el,* cited above at note 37, p.38.

[47] See, for example, Anti-Corruption Prosecutor vs Kebede Tefesework & Berhanie Tafesework, Federal High Court, 15th Criminal Division, File No 113227(Yekatit 8, 2005). The Court found both defendants guilty under Articles 14(4) and 24 of Telecom Proc.No.49 and Articles 10 and 11(4) of the Telecommunications (Amendment) Proclamation No. 281/2002 and sentenced the first defendant to 3 years of rigorous terms while the second defendant was sentence to 7 years terms with a fine of Birr 10, 000. Defendants were found guilty of

and voice communication through the Internet are prohibited under the law.[48] But Internet cafés offering cheap voice telephony over the Internet are not uncommon in Addis Ababa.The Ethiopian government may not be in a debt crisis that compels it to sell the national operator. But a new, pro-liberalization pressure (i.e. WTO accession) is in the making (see iii, below).

There are also some indications that the government will embrace liberalization of telecom services. The Telecommunications Proclamation No. 49/1996 (hereianfter Telecom Proc.No.49) and the Council of Ministers Regulations No. 47/1999 (hereinafter Telecom Reg.No47) can be cited as major examples in this regard.They contain core regulatory principles that address issues of liberalization as we shall see the details in Section II. The government has also declared that it will liberalize downstream activities and value-added services while retaining its monopoly over networks.[49]It is in this vein that MCIT has issued the Value-added Services License Directive No.3/2011.[50]The other evidence pointing in the direction of liberalization is the change the government has introduced to its investment law since the pro-competitive telecom regulatory framework was put in place in 1996. Originally telecom was exclusively reserved for government but since 2002 the sector has been opened for joint investment by government and private investors.[51]

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providing call back service by bypassing the incumbent operator's network using a telecom technology alleged imported without the approval of the incumbent operator.

[48] Telecom Proc.No.49, cited above at note 29, Art.24 (3&4) as amended by Telecom Proc.No.281and Articles 8 and of the Telecommunications Fraud Offence Proclamation, 2012, Art. 10(2-4), Proc.No. 761, Neg.Gaz.Year 18,.no61.

[49]Industrial Development Policy, pp.145-146; Plan for Accelerated and Sustained Development to End Poverty (PASDEP), p. 140. The Growth and Transformation Plan (GTP) makes no mention of telecom liberalization or private sector investment.

[50]*Reuters* reported that MTN, the South African-based foreign telecom firm has been granted value-added license in 2012; see A.Maasho, Ethiopia signs $800 million mobile network deal with China's ZTE (http://www.reuters.com/article/2013/08/18/us-ethiopia-china-telecom-idUSBRE97H0AZ20130818) last visited on March 15, 2013. Per Article 3 (4) the Value-added Services License Directive No.3/2011 licensees can only use Ethio-Telecom's network or infrastructure.

[51] Contrast Investment Proclamation,1996, Art.4(5), Proc. No.37, Neg.Gaz. Year 2, no.25(repealed) with Investment Proclamation,2002, Art.5(2),Proc No.280, Neg.Gaz.Year 8, no.27(repealed) and Article 6(2) (b) of the current Investment Proclamation, 2012, Art.6(2)(b),Proc.No.769, Neg.Gaz.Year 18, no.63(hereinafter Investment Proc.No.769). The repealed Investment Proclamation No.280/2002 did not expressly exclude foreign investors

iii. Choosing WTO-driven Liberalization

Whether Ethiopia will follow autonomous/unilateral liberalization or adopt the multilateral approach under the GATS if and when she joins the WTO is an issue far from settled.The GATS is said to serve, among other things, as a forum for reciprocity-based market access negotiation and effective catalyst for domestic reform.[52] Will it also help drive telecom reform in Ethiopia?

i. The GATS as a forum for reciprocity-based market access negotiation

One reason governments participate in the multilateral liberalization is to benefit from the reciprocity-based market access negotiation.[53] Ethiopia does not have export interest in telecom service. And she is not under any pressing need for more and/or new foreign market for her goods and services to the point where she must 'sacrifice' telecom to get such market access. Alternatively she can also reciprocate by opening other sectors (than telecom) of export interest to her trading partners. Thus, the possibility of Ethiopia using her telecom as a bargaining chip to obtain *more* and/or *new* foreign market access concessions through the forum of GATS is, in my opinion, far fetched.

The reciprocity-based market access negotiation becomes rather a sticky issue if the export interests of some of Ethiopia's trading partners turn out to be the very telecom market Ethiopia wants to keep it closed to foreign firms.Some WTO Members may want market access concession from Ethiopia in the telecom services in return for accepting her as a member. And that is expected:

> If we take WTO accessions over the last decade as a guide, it is certain that Ethiopia will entertain numerous requests from WTO

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from investing in the telecom service jointly with the government.One may wonder whether foreign investors are allowed to jointly invest with the government under the current investment law. The joint reading of Article 4(2) of the Investment Incentives and Invest Areas Reserved for Domestic Investors Council of Ministers Regulation, 2012,Art.4(2), Reg.No.270, Neg.Gaz, Year 19, no.4 Council of Ministers Regulations No.270/2012 and Article 6(2)(b) of Investment Proc.No. 769 does not suggest that the areas is open for joint investment with foreign investors.

[52]For additional benefits of the GATS as a catalyst for domestic, see generally C.Fink, A. Mattoo, and R.Rathindran, cited above at note 14, pp.13-17

[53]P. Low and A. Matto, Cited above at note 5,p.20 and C.Fink, A.Mattoo, P.Rathindran, Cited above at note 14, p.14

> members to open up a significant portion of its system of telecom to competition.... a number of countries are likely to request that Ethiopia include all value-added and basic telecom (including Internet services)...Countries are almost certain to request that Ethiopia assume additional commitments under the Reference Paper.....[54]

Some WTO Members, such as the U.S.A and Canada have already requested Ethiopia to open up her telecom.[55] Experiences suggest that negotiation pressure from WTO Members in and by itself may not force a country to liberalize in the absence a policy to liberalize.[56] Ethiopia's late Prime Minister stated that the country would resist any such pressure from the rich world. Conceding the ultimate inevitability of liberalization, he hoped that liberalization could be postponed for a significant time.[57] Whether Ethiopia will subscribe to the strategy of resisting pressure, and if so, whether she will succeed, remains to be seen.But the country is warned against the cost of a stubborn resistance: Ethiopia could simply risk delaying her accession,or at the worst, her accession could even be blocked.[58] The question is how far WTO Members would go in delaying or blocking Ethiopia's accession or how far sympathetic would they become to Ethiopia as a Least Developed Country (LDC).[59]

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[54]R. Self *et el*, cited above at note 37, p. xi

[55]Lisanework Gorfu, Director of Multilateral Trade Relations and Negotiations at the Ministry of Trade, "Interview with" the weekly *Addis Fortune*, (July 14, 201, Vol.14, No.689) Ethiopian World Trade Accession to See Service Offer in September (http://www. addisfortune.net/articles/ethiopian-world-trade-accession-to-see-service-offer-in-september) last visited on August 30, 2013

[56]P.Cowhey and M. M. Klimenko, "The New International Regime for in Telecommunication Services and Network Modernization in Transition Economies," Emerging Markets Finance and Trade, Vol.40, No.1 (2004), p. 60.

[57]Prime Minister Meles Zenawi's "Interview with" *Reuters* in 2009 as quoted in Ethiopia Would Resist Pressure from the Rich World to Fast-track Liberalization, (http://www.ethiopianinvestor.com/index) , last visited on March 25, 2013.

[58]R. Self *et el*, cited above at note 37. Accession terms have to be approved by two-third majority vote of WTO's Ministerial Conference (Article XII of the Agreement Establishing the WTO). Although there is no veto system, the vote of a single country might be indispensable without which the required two-third majority might not be obtained, giving that country the opportunity to block accession.

[59]Mercantilist and hard bargaining approaches always determine outcomes at WTO negotiation despite the system's rosy ideals catering for the interests of LDCs; see Krishanan Venugopal,

ii. Using the GATS to lend credibility to current and future policy

The GATS flexibility can help Ethiopia overcome her reluctance or ambivalence to commit to telecom liberalization despite policy intentions and legal and institutional framework since 1996. Ethiopia can benefit from GATS recognition of a 'promise to future liberalization' as a binding commitment which is more credible than unilateral declaration of the intention to liberalize and also ensures that current reforms will not be reversed while future reforms will be executed.[60] This is true if the country has to avoid the twin risks of having to honor commitments (implementing liberalization) before being ready for it,or defaulting in her obligations under the GATS and compensating trading partners who lost the benefits of their concessions. However, her promise to future liberalization has to be *weak* enough not to hobble her immediately upon accession to the WTO but *strong* enough to pose the risks she must avoid. Because the promise to future liberalization is time bounded, Ethiopia will not be able throw liberalization into the indefinite future. A*weak* promise to future liberalizationcan also help Ethiopia avoid the risk of delayed or complete denial of accession to the WTO but the promise should not be a derisory one.[61] For example, Ethiopia may accept commitments in value-added services and allow foreign firms to provide such services in two phases. In the

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"Telecom Sector Negotiations at the WTO: Case Studies of India, Sri Lanka and Malaysia," ITU/ESCAP/WTO Regional Seminar on Telecom and Trade Issues, 28-30 October 2003, Bangkok, Thailand, pp.52-53, (http://www.unescap.org/tid/mtg/ituwtoesc_s51b.pdf), last visited on September 21,2013.

[60]P.Low and A.Matto, Cited above at note 5, Pp.23-.24 [They also argued that inability of governments to threaten incumbent monopoly operators with credible future liberalization is said to have contributed their poor performances and perpetual infancy] andCarsten Fink, Aaditya Mattoo, and Randeep Rathindran, cited above at note 14, pp.15-16.Several Asian countries have taken advantage of GATS flexibility by making weaker promises to review their policy at a future date. Ibid; see alsoMarchetti as quoted in C. Djiofack-zebaze and A.Keck, "Telecom Services in Africa: The Impact of WTO Commitments and Unilateral Reform on Sector Performance and Economic Growth," WTO Staff Working Paper (February 1998), p.23, note 9.

[61]According to R. Self *et el*, Cited above at note 37, Pp,xii-xiii and pp.68-70,Ethiopia has six scenarios to commit her telecom: *Scenario 1-Satus quo*: Ethiopia retains her monopoly right, makes no commitment under the GATS, but agrees to review the situation within 4 years of accession. *Scenario 2-Partial liberalization (value-added services); Scenario 3-Partial liberalization (multiple mobile operators*); *Scenario 4- Immediate partial liberalization (one mobile operator);Scenario 5- Partial liberalization (privatization)*; *Scenario 6- Full liberalization.*

first phase foreign firms provide services jointly with Ethio-Telecom after a fixed period (e.g., 5 years) following entry into the WTO. In the second phase they provide services directly on their own again 5 years after lapse of the first period. Ethiopia also needs to adopt the RP.

II. A Normtive Analysis of Ethiopia's Telecom Regulatory Framework

The transition from state-owned monopoly to market competition necessarily requires a new legal and regulatory framework capable of regulating the sector effectively. [62] Reforming governments acknowledged the significance of regulation the moment they began to introduce competition. "[T]hey....could not simply declare markets open and walk away...Simply declaring 'competitive' did not ensure that any new market entrants would, or could actually begin competing."[63] Evidently the transition required regulation to contain abuse of market power by the dominant incumbent operator vis-à-vis new market entrants, foster competition, create favorable investment climate, and narrow down development gaps.[64]

The new legal and regulatory framework for the telecom sector normally takes the form of a legislation that ushers in a new regulatory authority, addresses market liberalization, and contains core regulatory principles.[65] There is no single regulatory model that fits all and capable of easy transplantation by developing countries.[66] Thus,developing countries with a tradition of weak governance need to pay particular attention in designing the new legal and regulatory framework lest they run certain regulatory risks: permitting substantial regulatory discretion, government interference, arbitrary decision-

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[62] A. Buckingham *et al*, cited above at note 4, p. 785.

[63] ITU, Trends in Telecommunications Reform 2002: Effective Regulation (4th ed., 2002) [hereinafter ITU: Effective Regulation 2002) (http://www.itu.int/pub/D-REG-TTR.5-2002) last visitedon June 2, 2013.

[64] P. L.Smith and B. Welllenius , "Mitigating Regulatory Risks in Telecommunications," Public Policy for the Private Sector, Note No.189, (World Bank, Group, July 1999), (http://www.wto.org/english/tratop_e/serv_e/telecom_e/workshop_dec04_e/mitigating_regulatory_risk.pdf)last visited on May 6, 2013.

[65] A. Buckingham *et el*, cited above at note 4, p. 785.

[66] It is claimed that the EU model has emerged as the most popular model with reforming developing countries. Other competing models are the US model and the Australasia model of Australia and New Zealand. For more on the details of these models, see A.Buckingham *et el,* Cited above at note 4, pp.831-835.

making, unilateral licence modification and revocation, or draconian remedies, such as network asset confiscation.[67]Whatever model a country may choose, it has to adopt a regulatory strategy that aims at mitigating these regulatory risks. This strategy includes reducing agency discretion, enhancing regulatory credibility, and efficient and effective utilization of scarce resources.[68]

This Section examines Ethiopia'snew legal and regulatory framework for the telecom sector.It focuses on core regulatory principles of this new framework which are also enshrined in the WTO's Reference Paper discussed in Part I.These rules cover (a) regulatory authority;(b) licensing; (c) interconnection; (d) competitive safeguards; (e) allocation of scarce resources, and (f) universal access/service obligation.

A. Rules on Regulatory Authority

Establishing an effective telecom regulatory framework requires more than legislating substantive rules embodying core regulatory principles. It also presupposes putting in place an appropriate regulatory authority. Almost all governments that have reformed their telecom have established a regulatory authority responsible for the sector's day-to-day activities.[69]

A sound regulatory body needs to have a degree of independence, enforcement powers, neutrality, and mechanisms for resolving conflicts.[70]Reiterating the role of an independent regulatory process to achieving the goals of telecom reform and what that independence is all about,William H. Melody writes:

> It is absolutely essential that the 'competition' among the major industry players be moved from the arena of politics and bureaucracy to the marketplace, and to achieving the industry performance objectives of government policy. This will only happen if regulatory decisions are made on their substantive merits, not on the basis of political favoritism or the backdoor influence of the most

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[67]See A.Buckingham *et el,* cited above at note 4, p.785.
[68]P. L.Smith and B. Welllenius, Cited above at note 64.
[69]A. Buckingham *et el*, cited above at note 4, p.787.
[70] L. H. Gutierrez and S. Berg, "Telecommunications Liberalization and Regulatory Governance: Lessons from Latin America," Telecommunications Policy, Vol. 24(2000), p. 885.

> powerful industry players. Only an independent, transparent regulatory process that is seen to be so by all affected parties and the public can achieve this.[71]

There is no consensus on what constitutes regulatory independence. It is viewed mostly through the lens of political culture.[72] That the regulator should be independent of the regulated industry, i.e. the market participants, represents the international best practice.[73]The idea is to avoid the risk of 'industry capture' in which the regulator falls under the influence of the regulated industry. In the context of telecom reform, this is translated into the practice of dividing the regulatory and operational functions and mandating each function to different institutions. And the number of such independent regulators is rising in the world with Africa in the lead.[74] Ethiopia is no exception in this regard.Regulatory and operational functions are separate and remain the mandates of legally and factually distinct institutions, i.e., MCIT and Ethio-Telecom respectively (see Section I).

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[71] W. H. Melody, "Policy Objectives and Models of Regulation," in W. H. Melody (ed.) Telecom Reform, Principles, Policies and Regulatory Practices (1997), p.21.

[72]See ITU: Effective Regulation 2002, Cited above at note 63. See also B.Guermazi, Exploring the Reference Paper on Regulatory Principles, (http://www.wto.org/english/tratop_e/serv_.../guermazi_referencepaper.doc)last visted on May 6, 2014.Guermazi was referring to an ITU colloquium titled "The changing role of Government in an era of telecom deregulation: Report of the colloquium held at ITU Headquarters 17-19 February 1993." The literature also refers to *"Independence of abilities and capabilities"* to connote a "*regulatory authority that is confident of its abilities to fulfill its mandates, arbitrate disputes in the public interest, and help fulfill overall national goals in the telecom sector.*" See ITU: Effective Regulation 2002. We also find references to *'structural independence'* to cover separation of the regulator from the operator and/or executive branch of the government; *'financial independence'* and *'functional independence'*. See generally, ITU, Telecommunications Regulation Handbook (10th Anniversary ed., 2011) (http://www.itu.int/dms_pub/itu-d/opb/reg/D-REG-TRH.01-2011-PDF-E.pdf) last visited on June 22, 2013.

[73]See for example, Article 5 of WTO's Reference Paper which reads in relevant part "The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services." Same is true for the EU, see Article a §2 of Directive 90/387 as amended by Article 1§6 of Directive 97/51 quoted in L. Borissova, "Regulatory Policy and Creation of Regulatory Authorities in the Telecommunications Sector in Central and Eastern Europe," European Journal of Law Reform, Vol. 4 (2002), p.470, note 34.

[74]ITU, (http://www.itu.int/ITU-D/ICTEYE/Regulators/Regulators.aspx#) last visited on June 22, 2013.

The other component of regulatory independence is the relationship between telecom regulator and sector-policy makers.The regulator has to be independent of the government in its day-to-day activities.[75] Independence in this context does not connote the absence of any form of supervision from any branch of the government. Nor does it 'imply independence from government policy, or the power to make policy'; rather it refers to the power to 'implement policy without undue interference from politicians or industry lobbyists.'[76]In this context, independence has two interrelated elements: (a) the degree of autonomy the regulator enjoys from political influence and control, and (b) the safeguards in place to protect the regulator from political capture.[77]

Independence from political influence and control raises issues of the form and position the regulator takes within the executive branch of the government. There is no single model on regulator's structure, though. Experiences are diverse. At one end of the spectrum is a fully independent and rule-making body represented by the US model; at the other end we find the European model in which a distinct regulator is located within the ministry responsible for communications but separated from it by 'Chinese Wall.'[78] Between the two ends of the spectrum lie other models, such as the UK's model of a quasi-independent, issue-specific advisory, investigative and enforcement body with strong links to the government.[79]As for developing countries where risks of regulatory capture are high, a regulator located outside the ministry responsible for communications is prevalent and even prescribed.[80]

Ethiopia went from one extreme to the other in her approach to the design of telecom regulator. When regulatory and operational functions in the telecom sector were separated in 1996, the country established the Ethiopian Telecommunications Agency (ETA) responsible for regulating the

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[75] W. H. Melody, Cited above at note 71, Pp.19 *et seq.*
[76] Ibid.
[77] A.Buckingham *et el*, *Cited above at note* 4, p.789.
[78]Id,p.788
[79] Ibid
[80]Thus, the prescribed model for developing countries is believed to be a regulator totally separate from the line ministry responsible for communications and accountable to parliament or to a ministry responsible for economic development-a model said to be rare in practice; see Ibid.

sector.Mandated with a long list of regulatory powers, ETA was established as "autonomous federal agency,"a legally distinct body outside the structure of the then Ministry of Transport and Communications.[81] The leadership model adopted was a single-regulator, i.e. a general manager acting as a chief executive officer appointed by the government upon the recommendation of the minister (of Transport and Communications). He was to report to the minster. ETA's budget was to be drawn mainly from government-allocated funds and license fees.[82]

In 2010 the Ethiopian government abandoned the idea of a legally distinct telecom regulator located outside ministerial structure. ETA was formally abolished before it had the chance to flex regulatory muscles becasue of lack of competitition. Its regulatory powers and responsibilities have been transferred to the Ministry of Communications and Information Technology (MCIT).

Ethiopia's shift away from the model of a regulator located outside the structure of a line ministry to giving regulatory powers to the very ministry responsible for communication may not be criticized as a move necessarily in the wrong direction.Ethiopia's approach may not be in line with the so-called 'international best practice' usually prescribed for developing countries. But there is no single regulatory model that suits all developing countries. Each country is strongly advised to adopt a bespoke approach reflecting its specific market environment, legal system, institutional capacity, and political realities since developing countries themselves are not homogeneous.[83]In the absence of competitors in the Ethiopian telecom market, maintaining institutions like the ETA which was meant to regulate competition among multiple operators was only an unnecessary cost. Ethiopia had to cut on this cost by abolishing ETA and regulating her monopoly operator through MCIT. The other advantage of a regulator forming "a department within a ministry"is its

[81] Telecom Proc. No.49, Art. 3(1).
[82]Id, Art.7.
[83] A.Buckingham and M.Williams, "Designing Regulatory Frameworks for Developing Countries," in I.Walden(ed.) Telecommunications Law and Regulation(2009), p.830. It is also submitted that the form which regulatory authority takes, its jurisdictions, powers, resources, and the degree of autonomy it needs to enjoy from the executive department of the government, etc remain issues to be settled based on a country's objective realities including political culture. See A.Buckingham *et el*, *Cited above at note* 4.787.

convenience for implementing universal service policy since it allows the government to retain political control necessary to enforce difficult but socially sensible reforms.[84] Interestingly, Ethiopia's approach does not also offend WTO's Reference Paper if she opts to adopt it at the time of accession. The Reference Paper does not require national telecom regulators to be politically independent in the sense of locating them outside the structure of the line ministry responsible for communications to satisfy the independence requirement. It only requires their decisions and procedures to be 'impartial' with respect to all market participants.[85]

Currently, Ethiopia may not need an independent regulator whose decision is not influenced by political considerations in view of the fact that the incumbent telecom operator is a state owned monopoly, itself not free from political influences.But this may not be tenable if and when the country liberalizes her telecom to attract new market entrants because the present regulatory design is fraught with the high risk of political capture because it is just a department within MCIT. It is headed by a civil servant director accountable directly to the state minister who in turn reports to the minister. The regulator does not have the structural, financial, and decisional independence. Investors need a good measure of comfort that regulatory decisions will be impartial and that all market players will be treated fairly.A regulator lacking in independence is quite worrisome for investors.[86]

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[84] L. Borissova, Cited above at note 73, p.472

[85] See Article 5 of the Reference Paper. The *impartiality* requirement under the Reference Paper may be construed to mandate separation of policy and regulatory functions with a view to insulating the regulator's decision-making process from political influences. See also Angus Henderson, Iain Gentle, Elise Ball, "WTO Principles and Telecommunications in Developing Nations: Challenges and Consequences of Accession," Telecommunications Policy, Vol. 29(2005), pp.210-212.

[86] A. Buckingham *et al*, cited above at note 4, p.789. The risks of lack of independent regulator for the investor include: discrimination against new entrants in their dealings with the incumbent operator because the government is both the owner of the incumbent operator and its regulator; implementing interconnection policy in a manner that favors the incumbent operator (e.g., on determination of interconnection tariffs); failure to ensure equitable access to scarce resources such as numbering and spectrum allocation; politically motivated decisions that have a detrimental effect on the incumbent, such as a refusal to allow the incumbent to rebalance artificially low local call tariffs. See *Ibid*.

Ethiopia may have to reform her telecom regulatory design. Taking the regulator outside ministerial structure and re-establishing it once again as an "autonomous federal agency" could be one option. But structural independence alone does not guarantee functional independence of the regulator especially in a country of entrenched weak governance and no credible history of independent institutions. Another possible option for Ethiopia is to adopt a regulator which is a semi-autonomous entity within MCIT and headed by a director general. But this requires a careful and clear regulation of the relationship between the director general and the minister in order to avoid political interference of the latter as regards decisions of the former.[87]

The relative location of the regulator, though relevant, is not the major controlling factor in the equation of regulator's independence. The crucial thing is rather the political will of the government to have an effective telecom regulator that enjoys sufficient degree of autonomy from political influence and control with adequate safeguards protecting the exercise of such autonomy. Irrespective of the location of the regulator, Ethiopia should be ready to place the "Chinese Wall" between her telecom regulator and the government so as to keep political capture of decision-making at bay. She also needs to reinforce the 'Wall' with additional rules on composition and appointment of the regulator(s), on conflict of interest as well as on financing.

B. *Rules on Licensing*

Licensing as an aspect of regulatory process in the telecom sector is a relatively recent development.[88] But it has now become typical of any regulatory framework to require telecom operators to obtain some form of license prior to launching commercial service.[89] Its use as a regulatory tool has also increased in recent years leading, among other things, to increased attention to the

[87]It is reported that such model is not common but used to be the case in France; see L. Borissova, Cited above at note 73, pp.472-473.

[88]This has been attributed to the fact that in most markets telecom services were provided by state-owned monopolies and telecom operations were treated as public administration with other government services obviating the need for licences. See H. Intven, J.Oliver and E. SepÚlveda, ITU Telecommunications Regulation Handbook(Module 2): Licensing Telecommunications Services(http://www.itu.int/ITU-D/treg/Documentation/Infodev_handbook/2_Licensing.pdf) last visited on July 9, 2013.

[89]A.Buckingham and M.Williams, Cited above at note 83, p.851

reforms of licensing regimes.[90]Licensing does not have the same importance in all countries but it has certain common objectives to achieve.[91]It provides the necessary authorization for an operator to participate in telecom markets, often defines the rights and obligations of the operator, and enables the regulator to monitor market participants. [92] Investors in developing countries are also resorting to licensing to reduce risks of regulatory uncertainties.[93]

Ethiopia introduced a licensing regime in 1996. Thus, no person may operate a telecom service in Ethiopia without obtaining a licence.[94]Article 2(2)(j) of Telecom Reg.No.47 recognizes four different types of telecom service licences, namely public switched telecom licence, cellular mobile service licence, Internet service licence, and data communication service licence.[95]An entity which wants to provide local, national long distance or international telephony, for instance, has to obtain public switched telecom service licence.[96]All telecom licences are granted for a period not exceeding 10 years (except for public switched telecom service licence which may be granted for

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[90]P.Xavier, "The Licensing of Telecommunication Suppliers: Beyond the EU's Directive," Telecommunications Policy, Vol. 22, No. 6, p. 483.

[91]These objectives include: regulating the provision of an essential public service, expansion of networks and services (including universal services), privatization, regulating market structure, establishing a competition framework, allocation of scarce resources, generating government revenue, consumer protection and ensuring regulatory certainty. For the details on this see H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 88. For specific purposes for which licences have been actually used, see P.Xavier, Cited above at note 90, p. 483, note 1.

[92]A.Buckingham and M.Williams, Cited above at note 83, p.851

[93]Investors often seek detailed, self-contained licenses that purport to cover all key regulatory controls, and to secure limitations on the regulatory authority's freedom to amend those license terms. This approach is not without limitations, though.For more seeA.Buckingham and M.Williams, Cited above at note 83, pp.848-850.

[94]See Telecom Proc.No.49, Art.10(1). Only the police, the armed force and other services directly employed by the government for national security are exempt from licensing requirements. Ibid, sub-article 2.

[95]The disciplines on licensing are said to differ from country to country. Generally there are three approaches to licensing: individual licences (operator-specific licenses), general authorization (class licenses), and no licensing (open entry); for details see H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 88. There is also this emerging trend called 'unified licensing' regime in which case licenses are technology and service neutral in the sense that the licensee is not constrained as to the type of infrastructure it operates or the services it provides. See A.Buckingham and M.Williams, Cited above at note 83, p.854; pp.850-851.

[96]Telecom Reg.No.47, Art 2(2)(g &h)..

25 years) but can be renewed for successive periods provided that each renewal shall not exceed half of the initial period of licence.[97]

In 2011 the MCIT came up with a new rule, the Value-added Services License Directive No.3/2011. Article 2(6) of the Directive classifies value-added services into six sub-categories including Internet and data communications services. Article 6 of the Directive reduced the 10 year validity period of a value-added service license under Article 2(2)(j) of Telecom Reg.No.47 to only one year requiring renewal at the end of each fiscal year.The Directive also reduced the license fee for value-added services from Birr 100,000 under Article 4(1) of the Regulation to Birr 25, 000. But the licensee has to pay Birr 10,000 for each renewal.[98]

Currently the authority to license is vested in the MCIT[99]which grants license upon application. The applicant has to produce proof of its technical competency, financial capacity,and experience; it must also be eligible to invest in the telecom sector under the country's investment law.[100]The MCIT has to grant a licence within 90 days of the submission of an application and upon payment of the prescribed licence fee unless the application is rejected for want of material adequacy in respect of the applicant's technical competence, or financial capacity, or experience, or any information supplied.[101] The decision not to grant a licence has to be made in writing and must be reasoned out, naturally pinpointing the material inadequacy alleged to have impeded favorable assessment of the request for licence and invoked as a

[97]Renewal is subject to the conditions stated under Article 10(1-3) of Telecom Reg.No.47. These conditions are: the licensee has to apply for renewal together with its business plan at least six months before the expiry of its licence; it is not in breach of the grounds for revocation as defined under the relevant law; and agrees to upgrade its operation by replacing outdated technology with new ones.

[98] Ministry of Communications and Information Technology Value-added Services License Directive,2011, Art.6(2&3), Dir. No.3. The Ministry has reserved the right change the licensee and renewal fees. This Directive which has the effect of amending the Regulation of the Council of Ministers is not ultra-virus because the Ministry is empowered under Article 11(3) of the Regulation to modify any condition of license.

[99] Proc No. 691, cited above at note 30, Art.24(1&2)

[100]See Articles 3 and 4(1&2) of Telecom Reg.No.47

[101]Id. Article 4(1)

ground of refusal.[102]An applicant dissatisfied with the decision shall be given not less than 30 days to object the decision and seek consultation so as to improve its standing by providing additional evidence supporting its application,or amending its application. If the licensing body still believes that the applicant is unable to satisfy the material adequacy test, it shall deny licence and communicate such decision in writing.[103]

Ethiopia's approach to legally prescribing the criteria for licensing ensures transparency of the licensing process. This is commendable, but not sufficient to lend credibility and effectiveness to the regulatory process. The question, therefore, is whether Ethiopia's regulatory framework envisages limited discretionary powers and mechanisms restraining arbitrary exercise by the licensing body.

Eligibility to invest in the telecom market could be a simple issue of law that can be settled quickly and objectively by looking at the applicable investment law of the country. But other licensing criteria such as 'technical competence', 'financial capacity', and 'experience' are not clearly defined. As the requirements for each type of license are not necessarily the same it may not be important to specifically define these criteria. Presumably they are left for the determination of the regulatory body through relevant directives. MCIT's Directive No.3/2011 on value-added services license is a case in point.

The rule on 'Amendment of Licence' under Article 8 of Telecom Reg.No.47 gives a wide regulatory discretion to the licensing body.The said amendment relates to the "contents of a licence" [104](mainly the rights and obligation of a licensee) as specifically written in the licence document and defined under Article 6 of the Regulation.This amendment which we may understand as modifying[105]the original terms of a licence can be initiated in two ways: by the request of the licensee, or through the unilateral action of the licensing body. In

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[102] Id. Article 5(1)
[103] Id. Article 5(1-3)
[104] 'Contents of licence' specifies the identity of the licensee, the installation to which the licence applies and its location, the type of telecom service, roll-out and service targets to be met by the licensee.
[105] The Amharic version of the provision reads 'ፈቃድ ስለማሻሻል'which means'modifying license'.

the former case the request must be 'justifiable'[106],while in the latter case the regulator must deem it necessary for reason of 'public interest'provided that it'shall not substantially affect the operational and financial viability of the licensee'.[107] There is no specific guideline under the Regulation to determine whether a proposed change is justifiable or not; what sounds feasible from the business owner's perspective could be dismissed as unjustifiable from the regulator's angle. The concept of 'public interest' is also as wide as an ocean. It could mean anything for the regulator to justify its measure. One may contend that the regulator's discretion is curbed by the requirement that the proposed measure must not 'substantially' affect the viability of the business licensed as showing 'public interest' alone is not enough to take a measure. But the Regulation still leaves the determination of substantiality to the regulator itself. What is the threshold of this substantiality? It must require some kind of researching and analyzing the business cost of the measure to targeted licensees before implementing it. Whether Ethiopia's regulator is willing and capable of doing this arduous task with its attending regulatory cost is something to be seen.

Incredibly, the licensing body also has the discretion to modify any "Conditions of Licence"[108] expressly listed down under Article 11 of Telecom Proc.No.49, which later appeared as "Duties of Licensee"[109] under Article 7 of the Regulation. Here, unlike the requirements for amending the contents of a licence discussed above, consideration of 'public interest'[110]is the only test to take action. In other words, the licensing body does not have to show, or even believe, that proposed measures will not'substantially affect the operational

[106]Telecom Reg.No. 47, Art.8 (1)
[107] Id. Article 8 (2)
[108]"Conditions of licence" are in principle to be determined by the licensing body and must promote the economic and social objectives of the telecom sector. But the lawmaker has also specified certain conditions aimed at universal access (service to rural and other specified areas), transparency of operators (publishing service charges, and the terms and conditions of service), and priority of service to privileged customers (e.g. government or specified organizations, and compliance with technical and service standards; see Article 11(2) of Telecom Proc.No.49.
[109]The Regulation lists down some six duties of the licensee which are more or less similar with the 'conditions of license' under Article 11(2) of Telecom Proc.No.49.
[110]Article 11(3) of Telecom Proc.No. 49 expressly authorizes the licensing body to "modify any conditions of licence" if it considers it necessary in the public interest (emphasis supplied).

and financial viability of the licensee'.Under the Regulation, no amendment to contents of a licence can be ordered when the amendment causes substantial challenge to a particular licensee in question even if the amendment would have advanced public interest. But under the Proclamation the regulator can go ahead with its measure despite a proven cost to private business so long as it advances public interest. This makes it easier for the regulator to avoid the test of 'substantial cost' to a licensee under the Regulation by simply acting under the Proclamation which also serves the same purpose especially when the targeted'conditions of licence' are also already written as licence terms.

While change in content of a licence affects existing license holders, change in conditions of licence as a general measure is forward-looking, targeting only new entrants. These changes may affect conditions of competition between existing license holders and new entrants both competing in the same market segment. Thus, the regulator may have to compel/ or allow existing licence holders to comply with/adjust to the new conditions of licence within a reasonable transition period so as to make the playing field equally leveled for all market participants.

Wide regulatory discretions are not the only problems in Ethiopia's telecom service licensing regime. The regime does not put in place mechanisms by which businesses affected by regulator's decisions may have them reviewed administratively or through a judicial process although it can be taken to satisfy the reasonable period requirement of Article VI(3) of the GATS as the MICT has to make its decision to grant or to deny a license within 90 days of reciept of application.The regulator may refuse to grant licence, or to renew a licence, or may amend or refuse to amend the terms of a licence contrary to the expressed requirements of the law as discussed above. It can also revoke a licence.[111]The performance of any regulator may not be satisfactory if there are no substantive and procedural restraining mechanisms on its regulatory

[111]The grounds for revoking a licence under Article 11(1) of Telecom Reg.No.47are: failure of the licensee to fulfill its roll-out or service targets specified in the license, failure to comply with technical standards set by the regulator, violation of tariff regulation, provision of inferior service and violation of public interest-whatever it means in the eyes of the regulator! The only safeguard for the licensee under sub-2 of the same provision is that it should be given "adequate opportunity" to rectify the situations or correct its failures before its licence is revoked.

discretions and exercises.[112] In Ethiopia the wide regulatory discretions without effective review mechanism to check their exercise can also be fertile breedinggrounds for corrupt practices in addition to their potential for regulatory uncertainties and risks. MCIT should exercise its discretions wisely and judiciously. It should be guided by the country's objective in regulating her telecom sector when exercising its vast regulatory discretion.That objective is promoting the development of high quality, efficient, reliable, and affordable telecom services.[113]Thus, any exercise of regulatory discretion that does not serve this objective should be avoided or abandoned.

On the other hand, Ethiopia's telecom licensing regime sits well with Article 4 of WTO's Reference Paper, if not fully with the GATS on domestic regulation.[114] It requires a WTO Member to afford a service supplier injured by an administrative decision affecting trade in service a prompt review of the decision, and where justified, appropriate remedies. The review can be made by a body independent of the regulatory agency that took the measure. But a country is not bound to establish one merely because it joins the WTO and schedules a service sector. So the review can be made by the regulatory agency itself but the procedure for review by the agency has to be in fact objective and impartial. None of these two review mechanisms is in place in Ethiopia as the law currently stands. The Reference Paper's single concern in licensing[115] is ensuring transparency (where a licence is required) by requiring the public availability of all licensing criteria, the time required to reach a decision concerning application for licence, and the terms and conditions of individual licences.[116]As we saw above Ethiopia's licensing criteria and the terms and conditions of licences[117] as well as the length of time to decide on an

[112]B.Levy and P. T. Spiller, "The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation," Journal of Law, Economics & Organization, Vol. 10 (1994), p.202.
[113]See Article 4 ofTelelcom Proc.No. 49
[114]See Article VI (2) (a & b) of the GATS.
[115]The Reference Paper, for example, does not address when licensing is required, the nature of licensing criteria, what conditions could be attached to a given type of licence, the cost trends for licence, etc. Thus, the discipline is criticized as sketchy and weak; see, for example,B.Guermazi, Cited above at note 72.
[116]See Article 4 of the Reference Paper.
[117]Note that 'conditions of licence' under Article 11(2) of Telecom Proc.No.49 are not individualized, meaning the law does not separately talk about conditions of each individual

application for licence are all published as federal laws which can be purchased or freely available on the world wide web.[118]The Reference Paper also obliges a WTO member to notify, upon request, the applicant of the reason for denying a licence.[119] In this respect Ethiopian law has gone one step further, making it the duty of the regulator to notify the applicant of its decision in writing without waiting for the latter's request.[120]

C. Rules on Interconnection

Interconnection has never been a domestic regulatory issue in Ethiopia for the obvious reason of the monopoly, i.e., there are no other operators to interconnect.But if and when Ethiopia liberalizes her telecom market, interconnection will certainly become a key issue for regulation.Ideally, interconnection arrangements could be considered as business matters the terms of which operators negotiate.[121] But there is this risk of incumbent operator forcing new market entrants to accept unfavorable interconnection terms which frustrate competition.[122] New entrants may not have equal bargaining power with the incumbent operator while the latter may not normally have the incentive to make things easy for its new competitors. This calls for regulatory intervention of one or other form.Interconnection is also a consumer issue because in the absence of effective interconnection arrangements between telecom operators, subscribers of different telecom

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licence. It can be argued that they are applicable for all types of licences unless the regulator decides otherwise invoking its general power under Article 11(1) of the same Proclamation. See for example MCIT Directive No.3/2011 on Value-added service license.

[118] MCIT must make any new conditions of licence it introduces publicly available, for instance, by posting them on its webpage to satisfy the Reference Paper's requirement.

[119]See Article 4 of the Reference Paper.

[120]See Article 5(3) of Telecom Reg.No.47

[121] Peter L. Smith and Björn Wellenius, Cited above at note 64

[122]Interconnection terms which frustrate competition include: charging excessive rates for interconnection, delaying provision of equipment and facilities needed for interconnection, misusing of customer and competitive information, imposing limits on number of points of interconnection, imposing unnecessary stringent technical standards, supplying lower quality services to interconnecting parties, refusing to unbundle network elements. See Franco Papandrea,WTOTelecommunicationsReference Paper(http://www.acma.gov.au/webwr/_assets/main/lib310475/wto_reference_paper.pdf) last visited on August 6, 2013.

operators simply cannot communicate with each other or cannot connect with services they demand.[123]

Ethiopia's interconnection regime as provided under Article 56 of Telecom Reg.No. 47 is fairly general and far from complete. It covers only three issues of interconnection, namely the duty to interconnect, the duty to enter into interconnection agreement, and dispute resolution mechanism. It leaves financial, technical and operational matters of interconnection for future directive of the regulator[124]which is yet to come. Nor does it define or describe the elusive concept of interconnection.

The International Telecommunications Union (ITU) understands interconnection as a set of commercial and technical arrangements by which service providers connect their equipment, networks and services so that their customers can have access to the customers, services and networks of other service providers.[125] Under the WTO's Reference Paper interconnection is "linking with suppliers providing public telecoms transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier…."[126]For the European Union interconnection is the physical and logical linking of telecom networks.[127] The common element of all these definitions is that interconnection guarantees interoperability of networks and services of operators. Apparently this is also the case under Ethiopian law as we may gather from Article 56(2) of the Regulation which requires technical inter-operability and availability conditions to be fully conducive for interconnection.

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[123]H. Intven, J.Oliver and E. SepÚlveda, ITU, Telecommunications Regulation Handbook Module 3: Interconnection(http://www.itu.int/ITU-D/treg/Documentation/Infodev_handbook/3_Interconnection.pdf) last visited on August 7, 2013.

[124]Article 56(4) of Telelcom Reg. No.47

[125]H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123

[126]Article 2.1 of Reference Paper

[127] EC Directive quoted in H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123defines interconnection as the "physical and logical linking of public electronic communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with the users of the same or another undertaking, or to access services provided by another undertaking."

The preponderance of opinion maintains that the focus of interconnection regulation should be on dominant operators (as opposed to non-dominant ones)which have the ability to establish interconnection terms and conditions independently of competition.[128] This is also the view adopted by WTO's Reference Paper which requires interconnection with 'major supplier.'[129] The argument is that universal imposition of interconnection obligations on all operators, large and small, amounts to over-regulation while focusing on dominant operators has the added advantage of increased efficiency.[130]

Ethiopia's approach in this regard is not that plain or yet to be determined. Article 56(1) of the Regulations does not make any distinction between licensees (operators). It simply states that a licensee shall interconnect its telecoms system to the telecoms system of such other licensee. Taken as it is, this provision only establishes the duty of all telecom operators (including the incumbent, though not a 'licensee') to interconnect.Thus it is proper for the law to declare this mutual duty of operators in such general terms. The issue is whether we can/should extend Article 56(1) to cover interconnection terms and conditions which only the incumbent monopoly operator is capable of determining and manipulating independently of competition thus calling for regulatory intervention. Given the generality of the language of Article 56(1) one may hold the view that it extends to these matters, pointing to the conclusion that Ethiopia has adopted the principle of universal imposition of interconnection obligation unless we argue that such matters are among regulatory issues left for determination by future directive within the meaning of sub-4 of the same provision.

Article 56(3) of the Regulations provides that an agreement relating to interconnection shall be entered into by the licensees. Thus, in Ethiopia

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[128]H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123

[129]See Article 2.2 of the Reference Paper. The Paper defines major supplier as "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market." Essential facilities are also defined as "facilities of a public telecommunications transport network or services that (a) are exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a new service."

[130]H. Intven, J.Oliver and E. SepÚlveda, Cited above at note 123

interconnection is a commercial matter the terms of which interconnecting parties have to determine through negotiation. This is also the main approach in many countries. The assumption is that operators are better posited than regulators to understand operational requirements of interconnection and are well equipped with the technical information to implement interconnection arrangements.[131]

As discussed above, however,the negotiation of interconnection arrangements is not among equals, and incumbent operator is likely to resort to anti-competitive behaviors leading to delay and unfair outcomes. Or negotiations may even fail. This situation calls for effective regulatory intervention through appropriate tools that promote successful negotiation. These tools include:[132] establishing guidelines in advance of negotiations, setting default interconnection terms in advance of negotiation, establishing deadlines for various stages of negotiations, establishing industry technical committees, incentivizing the completion of successful negotiations, appointing mediators, or arbitrators. While variations or combination of these tools can be used by a regulator, the Ethiopian regulator's single tool is arbitration. Article 56(5) of the Regulations requires interconnection disputes that arise in the course of negotiation to be settled by the final and binding arbitration of the regulator. This can be a serious concern in Ethiopia. Lack of expertise in technical and financial issues of interconnection given the novelty of telecom liberalization, for example, may result not only in delay but also in unnecessary regulatory intervention. Default terms of interconnection by which all parties must abide by while they negotiate or if they fail to agree within a set deadline could be more effective than arbitration in the Ethiopia context.

Finally, the fact that Ethiopia's interconnection regime leaves much regulatory issues for future directives denies us the opportunity to test its compatibility to WTO's interconnection principles contained in the Reference Paper.[133]But we

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[131]Ibid.

[132]Ibid.

[133]Article 2.1-2.5 of the Reference Paper provides detailed guidelines on interconnection. It requires interconnection with major supplier at technically feasible point, under non-discriminatory terms, in a timely fashion and on cost-oriented rates. Interconnection service must be sufficiently unbundled to avoid payments for unnecessary components, procedures for

can still say that Ethiopia's law satisfies WTO's requirements of ensuring interconnection with a major supplier at technically feasible point.[134] It also satisfies the dispute resolution requirement for interconnection which has to be an independent domestic body (which could be the telecom regulator itself) within a reasonable period of time.[135]

D. *Rules on Allocation and Use of Scarce Resources*

Radio frequencies, numbering plan and right of way are usually considered scarce resources for the telecom sector. Thus, their allocation and use is subject to regulation. For example, WTO's Reference Paper under Article 6 openly recognizes the scarcity of these resources and calls upon national regulators to adopt a procedure that ensures their allocation and use to be objective, timely, transparent and non-discriminatory.With the abolition of ETA the regulation of radio frequencies is transferred to MCIT which is mandated to manage, authorize, coordinate and supervise the use of radio frequencies allotted to Ethiopia.[136]Except for the police, the armed force and other 'services directly employed' by the government the installation and utilization of radio frequency equipment is prohibited without holding a valid permit (license) for the use of frequencies.[137]MCIT also has to prepare a national frequency plan that aims at ensuring orderly, efficient and effective utilization of frequency spectrum and shall maintain a national register of frequencies.[138]

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interconnection with major supplier should be publicly available, and interconnection agreements of major supplier or its offers must be publicly available. Disputes have to be resolved by independent domestic body without delay.

[134]See Article 2.2 of the Reference Paper cum Article 56(1) ofTelecom Reg.No.47which cannot be understood to have excluded interconnection with incumbent operator which is the major supplier in Ethiopia. Read also Article 2.5 of the Reference Paper cum Article 56(2) of the same Regulation obliges operators to technical interoperability and its availability to be *fully conducive for interconnection*(emphasis). And to be fully conducive interconnection should be available at least at technically feasible point.

[135]See Article 2.5 of the Reference Paper cum Article 56(5) of Telecom Reg. No.47. The latter has not fixed a time within which the regulator has to give its arbitral award but we can assume that it has to make its decision within a reasonable time to avoid the cost of delay to operators.

[136]See Articles 6(7), 15(1), & 16(20 of Telecom Proc.No.49.

[137]Id. Article 15(2) and Article 53(1) of Telecom Reg.No.47.

[138]Id, Arts. 52(1) & 54

A license to use frequencies can be secured from MCITupon filing an application and payment of fee.[139]In making its decision MCIT shall take into account the 'present use and future needs' of the country.[140]This requirement serves the efficiency purpose of allocating frequencies as scarce resources. Yet it can also be abused by the licensing body exercising unchecked regulatory discretion. Frequency spectrum management may constitute a powerful regulatory tool to protect market, spectrum scarcity being invoked to restrict the number of new market entrants.[141]Moreover, the procedure for allocation of frequencies is not that elaborate.The scope of a license and licensing criteria are not clearly defined; the time within which MCIT has to make its decision upon receipt of application documents is not set; duration of a license and grounds of revocation, etc are not addressed.The separation of operational and regulatory functions in Ethiopia's telecom sector has resulted in the transfer of the ownership and management of numbering plan from the incumbent operator to a regulatory body under Article 7(6) of Telecom Reg.No. 47.For example, the current numbering plan was designed and introduced in 2004 by the then regulator (i.e. ETA). It was argued that the new numbering plan was designed to meet the challenges of multi-operators,support effective competition through fair allocation of numbering resources and has reserved blocks of numbers for new and innovative telecom service provisions.[142]

Numbering is another regulatory tool at the disposal of the Ethiopian telecom regulator the sacristy of which can be invoked to restrict new entry into the market thereby hampering competition. Commentators warn that mere transfer of management of numbering plan from incumbent to a regulatory authority is not enough to foster competition; the former might have already secured large numbering blocks for its own use leading to inefficient use of numbers as well as giving it a competitive advantage over new entrants.[143] Surprisingly, however, the Ethiopian law on numbering plan is far less than rudimentary;

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[139]Id. Article 53(1&2).

[140]Article 16(4) of Telecom Proc.No.49. The same range of frequency may also be assigned to different users on a time-sharing basis. Ibid.

[141]B.Guermazi, cited above at note 72

[142] New Numbering Plan for Telecommunications Services, (http://www.eta.gov.et/numbering%20plan%20(Implemented.pdf) last visited on August 14, 2013

[143]A.Buckingham and M.Williams, Cited above at note 83, p. 878

only a single sub-article is devoted to numbering plan. A number of critical regulatory issues are left unattended. For example, whether operators shall pay for number usage, number portability, and the procedures for allocation of numbers are not addressed at all.

Ethiopian law guarantees new entrants to the telecom market certain real property rights which they need to meet their roll-out and service obligations under their licences.Operators have right of way over any land to install, repair, improve, examine, alter or remove a telecom line including the right to fly telecom lines upon any building. They also have the right to cut down any tree obstructing telecom line as well as the right to compulsorily acquire any privately possessed land which they may need for network roll-out such as erecting microwave transmissions.[144]

The creation of a right of way over the property of others involves a very simple process in Ethiopia. A telecom operator should give only a ten-day written notice to possessors or owners of the property to be encumbered by the servitude.Any objection by the possessors or owners has to be filed with the telecom regulator within the same notice period.The regulator must afford both parties the opportunity to be heard before it reaches a decision sustaining the objection, or subjecting the exercise of the right to conditions it thinks fit.[145]The right of way over private property is free of charge; operators are liable to pay fair compensation only if they cause damage to the property in the course of exercising their right of way.[146]

E. Rules on Competitive Safeguards

The debate about the ideal regulatory model for the telecom sector is not limited to issues of how to design the regulatory authority. It also extends to designing the legal regime (sector-specific rules vis-à-vis generic competition law) governing competition once the sector is open for market.Generally there are three approaches to the issue:[147]The first approach is the exclusive use of

[144]Article 18(1-3) & Article 21 of Telecom Proc.No..49
[145]Id. Article 18(4-6)
[146] Id. Articles 18 20(1)
[147] See R. Alemu, Regulation of Competition in the Liberalized Telecommunications Sector in Sub-Saharan Africa: Uganda's

competition law enforced by regular courts. New Zealand was the only example until it abandoned the approach in 2001. The second approach is the exclusive use of sector-specific rules in which generic competition rules are incorporated into primary legislations governing telecom.Developing countries prefer this approach to overcome the gap created by the absence of antitrust jurisprudence and regulation.[148]Nigeria, Uganda and Ghana have also adopted this approach.[149] The third approach, common in the majority of countries that liberalized telecoms, is a co-regulatory approach in which competition law supplements and complements sector-specific rules.[150]

Ethiopia's regime of competition regulation for the telecom sector is a combination of sector-specific rules and generic competition law. The sector-specific rules regulate certain issues of competition, such as entry (licensing), interconnection, technical standards,scarce resources, charges and tariffs.The sector-specific rules, however, do not address other anti-competitive practices. For example, the incumbent operator, given its dominant position in the market, could pose a serious challenge to competition by engaging in anti-competitive behaviours such as refusal to deal, predatory and excessive pricing, tying and bundling of services, anti competitive cross-subsidization, etc. Thus, it is submitted these anti-competitive practices are subject to generic competition law in Ethiopia.[151]

In Ethiopia the regulation of competition in telecom is split not only between sector-specific rules and generic competition law but also between sector-specific regulator and generic completion regulator. Sector-specific rules are

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Experience,(http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/south-africa-conference-on-competition-law.pdf), last visited on September 17, 2013.

[148]A.Buckingham and M.Williams, Cited above at note 83,p.841

[149] See R. Alemu, Cited above at note 147

[150]This approach is also adopted by the EU where member states had a long history of public monopoly before liberalization. In the EU sector-specific rules were the trend especially during the early days of transition from monopoly to competition, but emphasis shifted to generic completion law when liberalization process was over around 2002, thus, national telecom regulators were authorized to 'roll back' their sector-specific rules as competition was maturing; see A.Buckingham and M.Williams, Cited above at note 83, p.840

[151] Generic competition rules are enshrined mainly in the Trade Competition and and Consumers' Protection Proclamation, 2013, Proc.No. 813, Neg.Gaz. Year 20, no.28

the jurisdiction of the telecom sector regulator, i.e., the MCIT. Generic competition law falls under the jurisdiction of the Trade Competition and and Consumers Protection Authority(which is accountable to the Ministry of Trade). While the two sets of rules may successfully operate simultaneously (supplementing and completing each other), their practical enforcement by two different federal institutions could pose a challenge. This 'split regulatory approach' of Australia is thought to be unsuitable for developing countries where coordination and coherency between government institutions is generally lacking.[152]

WTO's Reference Paper under Article 1.1 calls upon members to put in place appropriate measures that prevent anti-competitive practices of major telecom suppliers. It does not prescribe any specific measure as appropriate nor does it define anti-competitive practices. These matters are left for the determination of members. The generic competition law of Ethiopia defines and prohibits anti-competitive practices including abuse of dominance. Its disciplines are also applicable to telecom firms including the dominant incumbent operator and on all telecom services except to basic telephone.[153] Thus, insofaras Ethiopia's regime outlaws anti-competitive practices it sits well with WTO's requirement under Article 1.1 of the Reference Paper. But what the Reference Paper under Article 1.2(a) wishes to proscribe, i.e., anti-competitive cross-subsidization,[154] may not be acceptable to Ethiopia. Whether Ethiopia's competition law currently prohibits cross-subsidization itself is not clear; at least the law does not expressly prohibit cross-subsidization as an anti-competitive practice. Cross-subsidization has been Ethiopia's policy and practice to achieve its social objective of universal access in the telecom service. This has also been the industry norm both in developed and developing nations. Thus, at the time of her accession negotiation Ethiopia will certainly make a reservation with respect to binding herself to the prohibition of cross-subsidization.

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[152]A.Buckingham and M.Williams, Cited above at note, 83, p.835.
[153]Ibid.
[154] Other anti-competitive practices under Article 1.2 of the Reference Paper are anti-competitive use of information obtained from competitors, and failure to make available to competitors on timely basis technical information about essential services and commercially relevant information which they need to provide services.

F. Rules on Universal Access/Service Obligation

The cost factor associated with rural, remote and low-income areas makes them commercially unattractive to telecom operators often accused of cream skimming.Thus, it takes regulatory intervention to extend telecom services to citizens in and around these areas where telecom operators will not be able to provide services on commercial terms. The twin concepts of universal service and universal access have been at the heart of governments'approaches in this regard.Universal service means every household in the country has telephone service (traditionally a fixed-line phone); it focuses on connecting households and more practical in developed nations.[155]Universal access, more practicable in developing countries, means everyone in a community can gain access to a publicly available telephone; its focus is connecting individuals through shared facilities although the growing mobile penetration rate delivered on the back of leapfrog technology can be invoked to question the continued relevance of this approach to universal access.[156] Despite differences, these two concepts are used interchangeably or combined as universal access/service because of their shared overriding goal of expanding and maintaining affordable telecom services to the public especially in rural, remote and low-income areas.[157]

Governments have used a wide range of instruments to finance universal access/service goals.Guermazi outlines the following instruments:[158] Cross-subsidization is a typical tool in a monopolistic market in which incumbent operator is required to subsidize local lines from the profits of long distance and international calls.With the introduction of liberalization new market entrants have been made part of the funding mechanism in more ways than one. For example, universal access/service obligation has become a market entry requirement i.e., a condition to obtain a license.This takes the form of a mandatory service obligation imposed on the licensee in which it is required to fulfill certain roll-out targets defined in its license document.The second

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[155]ITU, Trends in Telecommunications Reform 2003: Promoting Universal Service to ICTs: Practical Tools for Regulators (http://www.itu.int/pub/D-REG-TTR.6-2003) last visited on August 24,2013

[156]Shared facilities include payphones, telecenters and community centers. Ibid.

[157]Ibid.

[158]B.Guermazi, Cited above at note72

funding method that involves private operators is allowing the incumbent operator to collect access deficit charges from other private operators to subsidize the deficit it incurs in the course of provision of universal access. This payment is collected in the form of interconnection charges.The third funding tool is establishing universal access/service fund, an account to which all operators contribute, administered independently and supports service in a specified area.

Ethiopia's universal access goal as defined in the Growth and Transformation Plan (GTP) is the provision of basic telephone services within 5km radius of service for all rural areas. There is no comparable goal for low-income urban areas in the GTP although public and private payphones and telecentres are common in urban areas. Financing universal access in Ethiopia has been on the back of the incumbent operator which uses cross-subsidization, rural communications projects and rolling out of service stations in underserved areas.[159]

Ethiopia also contemplates to involve private telecom operators in the provision of universal access if and when she opens the market for private operators. Article 11(2(a) of Telecom Proc.No.49 states that a licensee may be required to provide telecom services to rural or other 'specified' areas (to be determined by the licensing body) as a condition of license. There is no doubt rural areas in Ethiopia are prime candidates for universal access. The licensing body can also designate low-income urban areas for similar purpose.Moreover, Article 7(1) of Telecom Reg.No.47 imposes on licensees the duty to fulfill roll-out targets as defined by the licensing body and specified in the license document. Roll-out target under Article2(2) (i) of the same Regulations means telecom service expansion target set by the regulator and includes public payphone target, underserved line target, priority customers target, and public call office target.

Ethiopia does not have universal access fund. But if she establishes one in the future, the telecom regulator can easily force telecom operators to contribute to such fund without even requiring the House of Peoples Representatives and the

[159]Lishan Abay, cited above at note 32

Council of Ministers to formally amend the existing legal regime. Contribution to universal access fund can be made a market entry condition without even amending Article 11 of the Telecom Proc. No.49. This is so because Article 11(3) of the same law expressly empowers the licensing body (MCIT) to modify any conditions of a license in the interest of the public which can also include universal access. Likewise MCIT can easily extend the obligation to contribute to universal access fund to telecom operators already in the market. This is because Article 8(2) of Telecom Reg.No. 47 authorizes the licensing body to modify the original terms of existing licenses for the sake of public interest (which includes promoting universal access) provided that the amount operators are required to contribute to the fund does not substantially affect the operational and financial viability of the operators (see above). The possibility of collecting access deficit charges from operators to finance universal access is not also out of option in Ethiopia. This is because access charges are included in interconnection charges. The fees and costs of interconnection are matters yet to be determined by future directive of the telecom regulator per Article 56(4) (c) of the Regulations. So it is still possible for the regulator to include such charges in interconnection fees and costs which other operators have to pay to the incumbent.

Article 3 of WTO's Reference Paper recognizes the right of a member to define any kind of universal service obligation it thinks fit to pursue its national policy objective. It also declares that maintaining any kind of universal service obligation is not an anti-competitive practice *per se*. What is prohibited under the Reference Paper is the trade-distorting effect of administration of universal service obligation. Thus, it requires the administration to be transparent, non-discriminatory, and competitively neutral and not more burdensome than necessary to achieve the particular kind of universal service already defined by the member. Testing Reference Paper-compatibility of Ethiopia's regime on the intended manner of administering universal access obligation is difficult because the regime lacks in details on the subject. One may be tempted to argue that Ethiopia's regime satisfies at least the transparency requirement of the Reference Paper because it is a matter of published law (which is also publicly available) for private operators to assume universal service obligation.

But this alone is far less than sufficient to make an informed decision to invest or not to invest in Ethiopia's telecom market.

On the other hand, the Reference Paper's discipline on universal service may have implication for Ethiopia's ability to pursue her universal access policy. Markus observes that telecom regulatory obligations which WTO members assume may affect the ability of governments to impose universal service obligation or to introduce a system that generates funds to finance universal service. [160] Normally the transparency obligation under Article 3 of the Reference Paper may not constrain Ethiopia's ability to pursue her universal access policy; nor does the prohibition against measures which are more burdensome than necessary to achieve a defined universal access goal. But the 'non-discriminatory' and 'competitively neutral' elements in Article 3 of the Reference Paper may constrain Ethiopia's ability to purse her universal access policy if, for example, the incumbent operator is subject to universal access obligation. Ethiopia may have to discriminate in favour of the operator that bears universal access obligation and/or allow cross-subsidization which is not necessarily competitively neutral.

One of the reasons why Ethiopia has been resisting liberalization of the telecom service and stubbornly defending her monopoly against all odds is her conviction that liberalization does not help her achieve universal access goal. She argues that private operators shay away from high-risk and low-return investments while competition eats away the revenue base of the incumbent to finance universal access through cross-subsidization.Thus in her accession bid to the WTO, she has the right to wholesale rejection of Article 3 of the Reference Paper on universal access.Alternatively, Ethiopia can still adopt the Reference Paper's discipline on universal access selectively by avoiding those elements of the discipline which constrain her choice of instrument(s) she thinks effective to pursue her universal access policy.This should also be her approach towards other disciplines of the Reference Paper that restrict her choice of universal access instruments. This may not be an easy task, though. The novelty of telecom liberalization is said to have made it difficult to

[160]M.Krajewski, National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy(2003),p.178.

determine exactly how GATS commitments restrict governments' choice of instruments.[161]

Conclusion

While national monopoly operators have been dismantled and liberalization has become the norm elsewhere in the world, Ethiopia is still allowing an age-old monopoly to reign over her. Regrettably, the monopoly has taken the nation hostage of its poor services. Whereas poor monopoly performance failing to meet unrequited demands was one of the driving factors behind telecom liberalization, the Ethiopian government is still in defense of its monopoly. It argues that the monopoly is more efficient and effective to achieve its economic and social objectives in the sector. This may be explained more by political ideology than conventional economic theories.Nevertheless, we may have to resist the temptation of making a sweeping conclusion that the Ethiopian government is ideologically opposed to telecom liberalization.It does not reject liberalization in absolute terms.

Available evidence indicates that the government seeks to subscribe to a gradual and cautious approach to telecom liberalization. But still there are two major uncertainties about telecom liberalization in Ethiopia. Firstly, there is no official timetable for liberalization in the sense of introducing competition to the incumbent operator. Secondly, we are not sure whether the liberalization is going to be autonomous/unilateral and/or through WTO's multilateral track. However, if Ethiopia 'loses' to the neo-liberals at WTO's negotiation table and agrees to open her telecom sector to foreign competition, Ethiopia needs to make a delicate balancing exercise in framing her schedule of commitments.

In view of her domestic policy of gradual and cautious approach to telecom liberalization, Ethiopia needs to avoid commitments that hobble her immediately upon accession. In this regard a weak promise to future liberalization can do the trick. For example, Ethiopia may accept commitments in value-added services and allow foreign firms to provide such services in phases: first jointly with Ethio-Telecom as of fixed date after accession, second

[161]Ibid.

directly on their own after lapse of the period in the first phase. Ethiopia also needs to adopt the Reference Paper, but must also be careful to avoid those elements of the Reference Paper that constrain her ability to choose instruments that help her pursue and achieve universal access goals. The transition from public monopoly to market competition involves changes in the focus of regulatory objectives from controlling a single operator to overseeing competition between multiple actors. This also requires introducing a new set of regulatory framework. In this regard Ethiopia has put in place rules and institutions that are emulated from global champions of telecom liberalization.They specifically address issues independence of the regulator from market participants, licensing, interconnection, competitive safeguards, the allocation and use of scarce resources and universal access obligations. Some of the rules on these regulatory issues are incomplete, ambiguous and confer wide regulatory discretion to the telecom regulator beyond administrative or judicial scrutiny, but overall they have the potential to comply with WTO's standards as set in the Reference Paper. However, the wide regulatory discretions conferred to the regulator without effective substantive and procedural mechanisms constraining their exercise coupled with the novelty of telecom liberalization could cast doubts on the efficacy of the system to smoothly manage the transition from monopoly to competition.