Comments on the Draft Telecommunications Policy dated May 2007

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1. INTRODUCTION

This document has been prepared in response to a request from the Ministry of Mining and Telecommunications for the Fair Trading Commission's input regarding the amendment of the Telecommunications Act 2000. The paper addresses the request by examining, among other things, the following issues raised, under the May 2007 Draft Telecommunications Policy:

i. The role and relationship of the telecommunications regulator and competition authority in a liberalized telecommunications landscape.

ii. The best method and strategy to supervise a dominant carrier thereby

   a) Achieving the maximum rate of reduction of prices compatible with desired levels of service quality; and

   b) Preventing anti-competitive behaviour.

The Fair Trading Commission (FTC) believes that the development of effective competition following liberalization of the telecommunications industry depends on the creation of an efficient and effective regulatory regime which creates greater market certainty and more stable conditions for investment in the telecommunications sector. The FTC therefore welcomes the Draft Telecommunications Policy and supports the creation of a "converged regulator". Given that the Policy is to be implemented within the reality of a converged broadcasting and telecommunications sector this should be reflected in its title and content. There are inconsistencies throughout the Policy Document with respect to the terminology used to refer to the result of the "converged broadcasting and telecommunications sectors" and the services provided therein. Some sections of the Draft Policy refer to the "telecommunications and communications sectors" (e.g. policy issue (i) under Policy Element 5.1 and the policy issue under Policy

Element 7.3), while other sections refer only to the "telecommunications sector" (e.g. the policy objectives under Policy Elements 5.1 and 7.4).

These inconsistencies give the impression that there are gaps in the Policy and could create jurisdictional problems if carried over to the proposed legislation. For instance, the ordinary meaning of the word "telecommunications" excludes providers of stand-alone broadcast services. There seems to be an assumption that all free-to-air broadcasters and Subscriber TV operators will be providers of "telecommunications services" but this is not necessarily so. It is recommended that a single "all-inclusive" terminology be adopted and used throughout the Policy Document. The adopted terminology should be as broad as possible such that it embraces current technologies as well as future technological developments. Hereafter, this Paper will use the term "electronic-communications sector" when referring to the converged sector.[1]

2. COMMENTS ON SPECIFIC SECTIONS

Section 5.0: Institutional Framework

The Roles of the Single Regulator and the FTC

The passage of the Telecommunications Act of 2000 brought with it debates about the jurisdictional limits of the Office of Utility Regulation (OUR, the industry-specific regulator) and FTC (competition authority) in the telecommunications sector. Policy Element 5.1 seeks to differentiate between the jurisdiction of the "single regulator" and that of the FTC. The Policy proposes that the FTC "maintains responsibility for the adjudication or resolution of competition and consumer protection matters that properly falls (sic) within its jurisdiction under the Fair Competition Act (FCA)". The single regulator is expected to defer to the Commission on matters relating to competition. However, Policy Elements 7.4, 9.1 and 11.4 seem to give the single regulator jurisdiction over matters which also fall under the FCA. This suggests that the FTC and the single regulator will have concurrent jurisdiction over competition matters. In other countries jurisdictional conflict over which authority has the right to regulate which area has led to tedious battles over procedural matters, thus preventing the regulators from dealing with substantive issues. To guard against this happening in Jamaica, the FTC would like to propose the following concurrency model.

Concurrency Model

The substantive issues addressed in this section draws on positions developed in greater details by the FTC in two previous publications: (i) FTC (2008), *Comments on Jurisdictional Issues in the Telecommunications Sector* and (ii) FTC (2007),

[1] As defined in the European Union's Electronic Communications Framework Directive of 2002 an electronic communications network means "*transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed*".

Telecommunications Sector Review. For your convenience, the relevant sections of the documents are reproduced in Appendices A and B.

The industry-specific regulator should have primary jurisdiction for access-related matters in the electronic communications sector. The FTC will retain jurisdiction over non-access competition protection matters such as cartel behaviour and merger reviews. This demarcation of roles takes account of the institutional characteristics of each agency.

The objective of access regulation is to promote competition in certain situations where access to a portion of a vertically integrated incumbent firm's assets is vital to the development of a satisfactory level of competition. Competition law with the exception of merger control and authorizations (notifications) is chiefly ex-post, that is, it is applied only after a complaint is made or when it is believed that the law has been breached. Sector-specific access regulation on the other hand is ex-ante, that is, it is generally prospective and is aimed at preventing harmful business practices. It is likely that a firm seeking access from a dominant operator will be better served through ex-ante instructions rather than through ex-post enforcement through which it could be surprised by unexpected requirements and delays after it has made sunk cost investments. Further, ensuring a level playing field requires processing a large volume of cost data in order to set access terms, and then following up with continuous monitoring to ensure compliance with those terms. These are functions that seem more in tune with what industry-specific regulators normally do.

Compared with sector-specific regulators, competition agencies probably enjoy an overwhelming comparative advantage in competition protection, based on their accumulated expertise, experience and basic institutional characteristics. This is especially true in the assessment of non-access vertical agreements, the investigation and prosecution of other anti-competitive conduct such as cartel behaviour and reviewing mergers. The FTC would also be extensively involved in dominance determinations as well as periodic reviews of whether ex-ante regulation is justified by continued market power. Competition agencies are better placed than regulators are to answer this question and have no interest in unnecessarily protracted regulation. It follows that they should play an important role in administering any sun-setting provisions established by the regulator. In fact, the proposed legislation should include an explicit requirement for the regulator to forbear from regulation in markets where there is effective competition.

The separation of competition protection from access regulation will require co-operation and co-ordination in order to avoid inconsistent, investment discouraging application of the two sets of policies. It is proposed that a formal structured approach to co-operation and co-ordination be adopted. The proposed legislation should provide for the development of formal memoranda of cooperation between the FTC and the electronic communications regulator. Such memoranda should include an explicit requirement for the FTC to opine on proposed regulations and market definitions in the electronic communications sector and for the single regulator to be consulted prior to the issuance of general competition guidelines that may affect the sector.

Section 7.0: Regulatory Framework

Licensing

Consideration should be given to removing the individual licence requirement for Internet Service Providers (ISPs) in order to facilitate increased entry into the ISP market. Individual licensing can restrict the market access of Internet Service Providers. This can limit the growth of a country's information and communications services by keeping costs high. Research has shown that jurisdictions which require individual licensing for ISPs have fewer Internet users and hosts than those with open-entry regimes such as Germany and the United States.[2]

Section 9.0: Competition

Mergers and Acquisitions

Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services and innovation. It is therefore necessary that firms' activities which are likely to deprive consumers of these benefits be prohibited. We note that the issue of abuse of dominance is explicitly addressed in the Policy but there is only a passing reference to mergers in the policy issue statement under Policy Element 7.4. The creation or strengthening of a dominant position held by a single firm due to a merger could result in increased prices, reduction in output, choice or quality of goods and services and diminished innovation thus depriving consumers of the benefits of competition. Merger control provisions allow for the assessment of mergers and the prevention of those which are likely to significantly impede effective competition. Currently the sector-specific and generic competition legislations do not contain merger control provisions. However, given recent developments in the cable market it is evident that it is time to address the issue of merger control provisions.

Strengthening and Expanding the Access Regime

As stated under Policy Element 9.1 there continues to be an issue regarding access arrangements between the dominant fixed carrier and other providers. In sectors such as telecommunications, an ex-ante access regime which addresses market structure issues can better limit/reduce the sources of market power and the consequent anti-competitive behaviour. It is therefore proposed that access obligations, beyond the current interconnection requirements be placed on dominant network operators. The establishment of an access regime and the subsequent "declaration of services/facilities" remove entry barriers and facilitate entry by service-based operators, thereby providing end-users with additional services. By facilitating competition in retail markets, the access obligations can improve productive and dynamic efficiency in these markets. It does this by giving service providers (both access providers and access seekers) an incentive to find cheaper ways of producing services and by encouraging investment and innovation which will ensure better quality services at lower prices. The access

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Center for Democracy and Technology. (2002). *Licensing options for internet service providers*. http://www.internetpolicy.net/practices/licensing_options.pdf

obligations will provide access seekers with access to particular facilities on reasonable terms and conditions, and in doing so, place competitive pressure on a dominant operator, which will ensure that all operators have an incentive to price their services in a manner which reflect the most efficient use of the underlying network.

The access obligations will be grounded in the "equality of access" principle. Equality of access requires that a dominant operator's wholesale customers "have access to the same or a similar set of wholesale products, at the same prices and using the same or similar transactional processes" as the dominant operator's retail arm has and does. Ofcom in its Strategic Review of Communications noted that equivalence of access has three key dimensions[3]:

a) Product dimension: This dimension refers to the functionality, features and the quality of the wholesale product.
b) Price dimension: This dimension covers the charges for all the various aspects of the product.
c) Process dimension: This dimension covers the transactional process such as forecasting, ordering and provisioning of the wholesale product. It also covers the fault repair of the product and any related systems upon which the product depends.

Functional Separation

It would be extremely difficult for regulators to monitor the equality of access along the three dimensions specified above as only the incumbent vertically integrated operator could know, say, whether quality of service it offers to its rival is comparable to that offers to its internal division. In implementing the equality of access principle, therefore, one is challenged to overcome this asymmetric information problem since there will always be an incentive for the vertically-integrated operator to offer its services in terms which are more favourable to its internal division than they are to its competitors. This challenge can be resolved, however, by using a model which attempts to realign the interest of a dominant vertically-integrated operator more closely with those of the end-users. Such a model would require an extension of the current accounting separation model to create a more effective "functional (or operational) separation" of a vertically-integrated operator. While accounting separation may be able to deter price discrimination it is less likely of acting adequately as a deterrent for the non-price types of discrimination. This is due to the fact that accounting separation does not remove the incentive for a vertically-integrated firm to discriminate against competitors, but merely makes such discrimination more difficult. Functional separation, however, removes this incentive by making sure that decisions regarding terms of access are neutral with respect to whether the entity requiring access is a competitor or an internal division of the integrated company.

Functional separation is defined by the OECD as the "separation of different services into different divisions of the same firm, possibly with different management".[4] The

[3] http://www.ofcom.org.uk/consult/condocs/statement_tsr/statement.pdf
[4] http://www.crf.dcita.gov.au/papers02/henderson%20dounoukis%20wijewardena.pdf

implementation of functional separation will require that the division of the incumbent which is responsible for the sale of access to the declared services and facilities become a separate business arm from its other divisions. The functionally separate business will be obliged to strictly maintain the principle of equality of access among all its various wholesale customers (including between the company which it is part of and competing companies).Operational rules will be imposed to control the flow of information between the newly created business unit and the other arms of the dominant operator and to establish new management processes and modes of corporate governance within this new business unit. For instance the operational rules should require that the new entity has a separate board and that the bonus of managers in the unit be a function of the profit made by that unit rather than by the profit made by the entire company.

Section 10.0: Universal Service and Access

Funding of Universal Service Obligations

Any universal service funding mechanism established under this Policy should be non-discriminatory, transparent and competitively neutral. The mechanism should treat all market participants fairly and avoid unfair advantages to any operator over another. It should be technologically neutral in that operators should not be favoured or penalized for their choice in technology. The per-minute levy under the current Universal Service Directive has been criticized for placing some operators at a competitive disadvantage. Under a per-minute levy regime the technology used by an operator must be able to count toll minutes. This mechanism is therefore not applicable to modern converged networks where traffic is carried over packet-switched networks and is not measured in minutes. Any operator using such a network would be able to "avoid" the universal tax levy.

3. CONCLUSION

In concluding the FTC is imploring policy makers to take the necessary steps to ensure that the new legislation is able to support the socio-economic potential of the electronic communications sector. It is our view that any legislation that is being considered for promulgation should be guided by the following principles:

i. The achievement of Jamaica's communication policy objectives should rely on market forces as much as is possible.

ii. Regulatory measures should be imposed only where market forces are unable to achieve policy objectives within a reasonable time-frame.

iii. Regulatory measures should be proportionate to their objectives and should be efficient such that their interference with the operation of market forces is kept to a minimum.

APPENDIX A

Comments on Jurisdictional Issues in the Telecommunications Sector

FAIR TRADING COMMISSION

March 2008

Executive Summary

It is the Staff's position that the industry-specific regulator should have primary jurisdiction for <u>all access-related matters</u> in the telecommunications sector and not just interconnection matters. The FTC will retain jurisdiction over non-access competition matters.

It is proposed that a formal structured approach to co-operation and co-ordination be adopted. The telecommunications legislation should provide for the development of formal memoranda of cooperation between the FTC and the telecommunications regulator.

Introduction

1. This document has been prepared in response to a request from the Ministry of Industry, Investment and Commerce for our input regarding the roles of the FTC and OUR in regulating telecommunications sector. The paper addresses the request by examining the following issues raised, under the 2006 Telecommunications Policy:

   iii. The role and relationship of the telecommunications regulator and competition authority in a liberalized telecommunications landscape.

   iv. The best method and strategy to supervise a dominant carrier thereby

      c) Achieving the maximum rate of reduction of prices compatible with desired levels of service quality; and

      d) Preventing anti-competitive behaviour.

2. The Staff of the Fair Trading Commission (FTC) considers an efficient and effective access regime to be an essential element in ensuring the ongoing development of a competitive and innovative telecommunications industry in Jamaica. The resolution of access disputes under this regime in a thorough, effective and timely manner is in the interest of all parties involved in the telecommunications industry.

3. The passage of the Telecommunications Act of 2000 brought with it debates about the jurisdictional limits of the Office of Utility Regulation (OUR, the industry-specific regulator) and FTC (competition authority) in the telecommunications sector. In some countries jurisdictional conflict over which authority has the right to regulate a particular area of the sector has led to tedious battles over procedural matters, thus preventing the regulators from dealing with substantive issues. The Jamaican telecommunications industry has not yet reached a state of sustainable competition where new entrants are able to act independently of dominant operators.

4. It is therefore obvious that ex-ante industry-specific regulation will need to be retained. Ex-ante regulation should, however, be sun-setting in nature and limited to what is absolutely necessary to secure competition and economic efficiency.[5] In Jamaica, by virtue of Section 27 of the Telecommunications Act, the dominance criterion which is applied to regulation is already in line with the dominance criterion applied for competition law. This will make the transition from asymmetric industry-specific regulation to general competition rules easier whenever that time comes.

The role and relationship of the telecommunications regulator and competition authority in a liberalized telecommunications landscape

Types of Regimes

5. In a regime of private ownership in telecommunications sectors the legislative framework regarding anti-competitive activity can take three main forms. In the first variant, both the sector-specific regulator and the competition agency will have concurrent jurisdiction for competition matters under the generic competition law. In the second variant, the telecommunications sector is exempt from the "generic" competition legislation and the sector-specific regulator has jurisdiction over all competition matters in the sector. The third variant sees the competition agency having sole jurisdiction over competition matters in the sector.

6. The first regime can be found in the UK, where the Office of Communications [OFCOM] (sector-specific regulator) and the Office of Fair Trading (competition agency) has concurrent powers under the Competition Act. The second regime can be found in Trinidad and Tobago; Section 3 of that country's Fair Trading Act exempts all companies which fall under the purview of the Telecommunications Authority Act (2001). There is only one pure exponent of the third regime, New Zealand. In that country, after liberalization of its telecommunications sector, all competition issues in the telecommunications industry were resolved under the Commerce Act. Jamaica's telecommunications regulatory framework is closest to the third variant in that, save for interconnection matters, the Fair Trading Commission has sole responsibility for competition matters in the telecommunications sector. One such matter concerns access to unbundled network elements. Section 5, of the Telecommunications Act, requires that the OUR refer to the FTC, matters that are of substantial competitive significance and which fall within the functions of the FTC under the FCA.

Is Generic Competition Law Sufficient? - Lessons from New Zealand

7. The debate as to whether generic competition law in and of itself is sufficient to "regulate" network access is usually settled by examining the New Zealand model. The arguments in favour of generic competition law are based on the principle that market forces will erode market power, that markets work best when regulations are minimized and that generic competition law is better than industry-specific regulation. Although New Zealand's competition law was well established at the time

[5] Sun-setting is when, at the time a regulation is made, a specific date is set on which that regulation will expire unless it is re-made. This ensures that a regulation is formally reviewed at an agreed date in the future, to establish whether or not it is still valid, or if it could be improved, reduced or even revoked.

of liberalization, the issues arising in network utilities placed a great strain on the law. The process of resolving these issues has been lengthy and costly (both through litigation costs and costs of delays). This was illustrated by the protracted process in which the court engaged in order to resolve the interconnection dispute between Telecom New Zealand and Clear Communications. That process took more than two years from 1992 to 1994 with the first decision by the High Court overturned by the Court of Appeal, whose decision was ultimately overturned by the Privy Council. The decision by New Zealand, to create an Electronic Communications Commissioner has been widely viewed as proof that the model has failed.

8. The International Telecommunications Union has also pointed out that due to the limitations experienced in relying solely on an ex-post regime, such as competition enforcement, between 1995 and late 2000 more than 50 countries established ex ante access regimes, causing a doubling of the number of the countries with such sector-specific rules in 1995. In the EU, a lot of work has gone into clarifying the roles of both types of legislation and it has been clear from the very beginning that the application of competition law in the implementation of its telecommunications regulation policy was of primary importance. The relationship between EU sector-specific law and generic competition law is also defined in great detail in the EU's *"Notice on the application of the competition rules to access agreements in the telecommunications sector*[6]. In that Notice the European Commission noted that the generic competition rules were insufficient to remedy all the access problems in the telecommunications sector.

Proposed Roles for the OUR and the FTC

9. The following presents some proposals as to how the roles of the OUR, the telecommunications regulator, and FTC, the competition agency, may be demarcated. The separation of roles of equivalent agencies in some other jurisdictions is summarized in the Appendix. There are four tasks which need careful attention during and after the transition from state ownership or heavy regulation to much greater reliance on market forces:

   - "technical regulation" - setting and monitoring standards so as to assure compatibility among networks and to address privacy, safety, and environmental protection concerns;
   - "economic regulation" - adopting cost based measures to control monopoly pricing;
   - "access regulation" - ensuring non-discriminatory access to necessary inputs, especially network infrastructures; and
   - "competition protection" - controlling anti-competitive conduct such as cartels, and mergers.

6Commonly referred to as the Access Notice. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:c:1998:265:0002:0028:en:PDF

10. Economic and Technical regulation present quite a different set of tasks from those involved in access regulation and competition protection As such, they do not match particularly well with the kind of work that competition agencies might typically do and clearly should remain under the jurisdiction of a sector-specific regulator.

Access regulation

11. Things are not so clear when it comes to access regulation. The objective of such regulation is to promote competition in certain situations where access to a portion of a vertically integrated incumbent firm's assets is vital to the development of a satisfactory level of competition. An important distinction between the methods used by industry-specific regulators and those used by competition agencies, is the timing of intervention. Competition law, with the exception of merger control and authorizations (notifications) is **chiefly** ex-post, that is, it is applied only after a complaint is made or when it is believed that the law has been breached. Regulation on the other hand is generally prospective and is aimed at preventing harmful business practices. It is likely that a firm seeking access will be better served through ex-ante instructions rather than being surprised by unexpected requirements and delays after it has made sunk cost investments. Further, ensuring a level playing field requires processing a large volume of cost data in order to set access terms, and then following up with continuous monitoring to ensure compliance with those terms. These are functions that seem more in tune with what industry-specific regulators normally do. It is therefore being proposed that the access regulation become the purview of the sector-specific regulator.

Competition protection

12. Compared with sector-specific regulators, competition agencies probably enjoy an overwhelming comparative advantage in competition protection, based on their accumulated expertise, experience and basic institutional characteristics. This is especially true in the assessment of non-access vertical agreements, the investigation and prosecution of other anti-competitive conduct such as cartel behaviour and reviewing mergers. The alternative of separately developing similar expertise in industry-specific agencies involves an unnecessary duplication of resources. Competition protection should therefore be the responsibility of the competition agency.

Conclusion and Recommendation

13. It is the Staff's position that the industry-specific regulator should have primary jurisdiction for <u>all access-related matters</u> in the telecommunications sector and not just interconnection matters. The FTC will retain jurisdiction over non-access competition matters such as cartel behaviour. The separation of competition protection from access regulation will require co-operation and co-ordination in order to avoid inconsistent, investment discouraging application of the two sets of policies. The current requirement in the Telecommunications Act that the dominance criterion

which is applied to regulation be in line with the dominance criterion applied for competition law should mitigate against the implementation of inconsistent policies.

14. It is proposed that a formal structured approach to co-operation and co-ordination be adopted. The telecommunications legislation should provide for the development of formal memoranda of cooperation between the FTC and the telecommunications regulator. Such memoranda should include an explicit requirement for the FTC to opine on proposed regulations and market definitions in the telecommunications sector and for the telecommunications regulator to be consulted prior to the issuance of general competition guidelines that may affect the sector. The FTC should also be extensively involved in periodic reviews of whether ex-ante regulation is justified by continued market power. Competition agencies are better placed than regulators are to answer this question and have no interest in unnecessarily protracted regulation. It follows that they should play an important role in administering any sun-setting provisions established by the regulator.

Sub-Appendix: The roles of a telecommunications regulator and a competition agency: Models from other countries

Canada

15. Canada has an industry-specific telecommunications regulator, which has a mandate to foster the development of competitive markets and the authority to forbear from regulation where competitive conditions warrant. The Canadian Radio-television and Telecommunications Commission ("CRTC") is an independent agency operating at arm's length from government and reporting to Parliament through the Minister of Canadian heritage. The objective of the CRTC is "to regulate rates and other aspects of telecommunications in Canada," so as to implement the policy set out in the *Telecommunications Ac*t, and to "balance the interests of consumers, the creative community, and distribution industries."

16. In contrast, the Competition Bureau is responsible for the enforcement of competition law. Unlike the CRTC, which has diverse economic and social policy goals not related to competition, the purpose of the Bureau is the promotion of efficient and competitive markets, and enforcement of the *Competition Act* to prevent anti-competitive behaviour in all sectors of the economy. Unlike economic regulation, competition law does not involve prior approval for a course of business conduct. The Bureau does not regulate levels of service, quality, prices or profits. Under the Competition Act, the Director of Investigation and Research is empowered to intervene in matters related to competition, before the regulatory authorities. There is uncertainty however regarding the relative jurisdiction of the regulators, the courts and the competition authority on competition issues.

United States of America

17. Within the United States, telecommunications regulatory agencies and antitrust enforcement agencies at both the federal and state levels have been working together, reviewing merger applications, requiring and evaluating interconnection agreements between incumbents and competitors, and enforcing regulations and statutes designed to ensure that markets remain open and competitive.

18. Section 11 of the Clayton Act entrusted enforcement of certain parts of the Act -- such as Section 7 regarding acquisitions – to specific-industry regulatory bodies [for example the Federal Communications Commission (FCC)] instead of the Federal Trade Commission (FTC). It should also be noted that the Federal Trade Commission Act itself imposes certain limitations on the FTC's antitrust jurisdiction. For example, Section 5(a)(2) of the FTC Act prohibits the Commission from exercising jurisdiction with respect to banks, savings and loan associations, federal credit unions, transport and telecommunications common carriers.

19. The Department of Justice's (DOJ's) enforcement authority is not affected by Section 11 of the Clayton Act. The Telecommunications Act of 1996 expanded the DOJ's powers in telecommunications by removing FCC's ability to exempt mergers of local telephone companies from antitrust review, thereby furthering the new US policy of

promoting local telecommunications competition. Although the US Congress wanted to allow the expert regulatory agency in telecommunications to review mergers in that industry, it did not want to give the FCC exclusive responsibility for such mergers. The Congress was of the opinion that the antitrust enforcers had considerable experience in dealing with that industry and that there was some value in having an independent examination of the antitrust consequences of mergers by an agency not linked to the industry in question.

20. The FCC and the antitrust agencies are usually able to avoid inconsistent decisions on telecommunications mergers because the agencies can informally share views in advance of a decision by either (though the antitrust agencies are limited in their ability to share confidential information they receive in an investigation). These discussions have been facilitated by special exemptions from FCC rules requiring public disclosure of ex parte communications, thus permitting discussions between the FCC and the antitrust agencies on mergers being reviewed by both.

United Kingdom

21. In the UK, there is an industry-specific telecommunications regulatory agency that is bound by competition regulation. The Office of the Telecommunications Regulator (Oftel) has responsibility for the regulation of telecommunications services. Competition policy is addressed by the Office of Fair Trading (OFT) and the Competition Commission (CC). When the Competition Act 1998 Act came into effect in March 2000, the Director-General of Telecommunications (DGT) was given 'concurrent powers' with the Director General of Fair Trading (DGFT) to enforce the new Act in the telecommunications industry. That is, the DGT has been given the same powers as the DGFT within its sector to obtain information, investigate anti-competitive behaviour and the same duty to provide a reasoned decision. They also have concurrent powers with the DGFT to levy penalties on telecommunication companies for breaches under the Act.

22. The DGT also retains powers to negotiate and enforce companies' operating licences within the industry. Where the regulator proposes licence changes that are disputed by a company, the matter would be reviewed by the CC to see whether the existing state of affairs in the absence of the licence modification would be expected to operate against the public interest. If the CC found that an adverse effect on the public interest could be remedied or prevented by a licence modification, the regulator would make the final licence revision. Appeals against the decisions of the Director-General of OFTEL concerning competition matters may be lodged with the Competition Commission under the Competition Act 1998.

23. The DGT will be able to use both licence amendments and the Competition Act to control prices that are not competitive and deal with anti-competitive behaviour in areas that are potentially competitive, including prizing open access to monopoly networks. At the present time the telecommunications regulator is expected to make good use of the Competition Act to police markets because of the extent of competition existing in the sector.

24. Given that the Act confers concurrent powers on the regulator and the DGFT it would be possible for a company to be investigated for the same action by both the regulatory office and the DGFT. Following meetings between the regulators and the OFT, however, a code of practice has been established to avoid duplication. Normally the sector regulators rather than the DGFT will apply the terms of the Act.

Australia

25. Australia has adopted a unique approach of creating a hybrid competition authority/ regulator. Technical regulation and some significant aspects of economic regulation are administered in Australia by industry specific bodies or more general government regulators. The Australian Consumer and Competition Commission (ACCC) consistently applies a national competition law [Trade Practices Act (TPA)] across all industries. Several functions of regulators have been transferred to the competition authority. Specific changes have been made in the competition law in relation to access and the powers of the competition authority to impose remedies. For example, the ACCC has various responsibilities in relation to the terms and conditions of access to certain essential infrastructure facilities such as telecommunications, gas and electricity and in monitoring prices in industries where competition is weak.

26. Australia has seen it advantageous to have industry-specific competition regulation in industries characterized by complex technology or having natural monopoly or other special elements. In the case of telecommunications, specific competition laws are contained in Part XIB of the TPA. These industry-specific provisions complement rather than replace the general competition law.

27. With the 'division of labour' between various regulators, there is potential for some degree of overlap of functions between the ACCC, and those technical and economic regulators that operate within specific industries. For this reason, a number of steps have been taken to minimize uncertainty regarding the jurisdiction of particular regulators and avoid confusion for consumers and the business community. For instance, the ACCC has frequent information exchanges with a variety of economic and technical regulators through regular meetings and the exchange of publications and other information.

28. The major criticism of this model is that a system of control based entirely on competition law, lacks industry specific expertise. Although expertise can be acquired, it has been argued that this action may not be taken in time to keep pace with changing technology. The ACCC has been vociferously accused by the Australian Telecommunications Group of a failure to address problems in the telecommunications industry. It has complained that the slow pace of intervention has led to industry confusion and frustration.

APPENDIX B
[excerpt from FTC (2007), *Telecommunications Sector Review*]

5.1.1 Strengthening and Expanding the Access Regime

In sectors such as telecommunications, an ex-ante access regime which addresses market structure issues can better limit/reduce the sources of market power and the consequent anti-competitive behaviour, rather can than trying to directly regulate the behaviour which flows from its use as in the case of ex-post law. The establishment of an access regime and the subsequent "declaration of services/facilities" remove entry barriers and facilitate entry by service-based operators, thereby providing end-users with additional services. By facilitating competition in retail markets, the access obligations can improve productive and dynamic efficiency in these markets. It does this by giving service providers (both access providers and access seekers) an incentive to find cheaper ways of producing services and by encouraging investment and innovation which will ensure better quality services at lower prices. It is therefore proposed that access obligations, beyond the current interconnection requirements be placed on dominant network operators. The access obligations will provide access seekers with access to particular facilities on reasonable terms and conditions, and in doing so, place competitive pressure on CWJ, which will ensure that all operators have an incentive to price their services in a manner which reflect the most efficient use of the underlying network.

The implementation of such an access regime requires the development of a list of designated facilities/services to which these access obligations apply. One of the issues faced in the imposition of access obligations is the determination of which facilities/services should be provided on a mandatory basis. In countries such as Japan carriers with over 50% of subscriber lines are required to provide call origination and termination services to other operators. Some countries require that a dominant operator provide at minimum, access to services which competitors will need to provide any-to-any connectivity and end-to-end services. Other countries require the dominant operator to provide wholesale access parallel to all the retail services it provides as well as offer any wholesale service for which there is a demand. It is recommended that prior to imposing mandated access for a particular service/facility, a determination should be made as to the state of competition in the market for that service with and without mandated access. Where existing market conditions already allow for the competitive supply of services the access regime should not impose mandated access. This principle recognizes primarily the cost of providing wholesale access as well as potential disincentives to investment.

The access obligations will be grounded in the "equality of access" principle.[7] Equality of access requires that a dominant operator's wholesale customers "have access to the same or a similar set of wholesale products, at the same prices and using the same or similar transactional processes" as the dominant operator's retail arm has and does. Ofcom in its

[7] Equivalence models are discussed in Appendix I.

Strategic Review of Communications noted that equivalence of access has three key dimensions[8]:

a) Product dimension: refers to the functionality, features and the quality of the wholesale product.
b) Price dimension: covers the charges for all the various aspects of the product.
c) Process dimension: covers the transactional process such as forecasting, ordering and provisioning of the wholesale product. It also covers the fault repair of the product and any related systems upon which the product depends.

For an equivalent service, it would be a breach of the principle of equality if an access provider charges one access seeker, a higher direct or indirect price than the price charged to other access seekers. It would also be a breach of the principle to charge different prices for an equivalent service on the basis of use of the service. Equivalent service is being used here to mean costing the same to provide and having similar functionality. Equivalent services must be priced the same irrespective of the purpose for which it is being used or to whom it is being provided. In addition, a dominant provider must make available corresponding wholesale offerings at the same time that it launches new retail offerings. This principle should also extend to the communication of information on the launch of new retail products. The principle of “equality of access” can be undermined by providing notice of the retail product to the general public, in advance of notice to competitors, even in cases where the wholesale product is available at the same time as the retail product. Under the equality of access principle, the access provider must also take reasonable steps to ensure that the access seeker receive, fault detection and rectification services that are equivalent to that which the access provider gives to itself.

Ideally, commercial negotiations would be the preferred method for reaching agreement on the pricing and technical issues of wholesale access. Experience has shown however, that based on the imbalance in negotiating power between a new entrant and a dominant carrier, regulatory intervention is required. As long as the level of competition in local access is insufficient to constrain pricing, the regulator should specify the pricing methodology and relevant price-setting parameters. This will serve to prevent lengthy disputes which can delay the entry of competitors at the retail level of the market. One of the challenges to implementing the equality of access principle is designing appropriate access prices due to asymmetric information and the difficulty in effectively modeling the costs of a dominant operator. Notwithstanding those issues, access prices should be based on four broad principles: 1) They should be cost-based; 2) They should not discriminate in a way which reduces efficient competition; 3) They should not be inflated so as to reduce competition in a related market; and 4) They should not be predatory.

[8] http://www.ofcom.org.uk/consult/condocs/statement_tsr/statement.pdf