

3.6

Authorization Practices & Procedures

While ICT authorization practices vary from country to country, there are frequently common features in licensing regimes. The following sections review practices and procedural approaches that are commonly employed to improve the effectiveness, efficiency and transparency of authorization processes.

Reference Documents

- [Africa Public Service Charter](#)

3.6.1 TRANSPARENCY

Procedural transparency is one of the hallmarks of a good authorization process. Transparency increases the confidence of service providers, investors and other stakeholders in the authorization process. Accordingly, transparency reduces investment risk and increases the attractiveness of investment in national ICT markets. This in turn stimulates the expansion of the ICT infrastructure and ICT services.

The importance of transparency in the authorization process is emphasized in the WTO Regulation Reference Paper. Section 4 of this Paper specifically applies to transparency. This section provides that, where an authorization is required, the following information must be made publicly available: all of the licensing criteria; the period of time normally required to reach a decision on an application for an authorization; and the terms and conditions of individual authorizations. Section 4 also states that the reasons for the denial of an application for an authorization must be made known to the unsuccessful applicant upon request.

As suggested by the provisions of the *WTO Regulation Reference Paper*, in transparent authorization processes, ICT authorizations are generally issued, amended or revoked based on criteria published in advance. Specific practices that enhance the transparency of the authorization process are discussed throughout this module and particularly in the section on competitive authorization processes. As discussed in the Practice Note, "Using the Web to Increase Transparency (a link to which is set out below), some of the most common means of increasing transparency used by virtually all regulators today involve effective use of the Internet.

RELATED INFORMATION

[Competitive Licensing Processes](#)

Practice Notes

- [Using the Web to Increasing Licensing Transparency](#)

Reference Documents

- [Finland- Guidelines for the General Authorisation Regime](#)
- [Jordan -- Instructions Regarding the Application Procedures and Criteria for the Award of Public Telecommunications Individual and Class Licenses](#)
- [Malaysia- Ministerial Guidelines on Class Licences for Network Services](#)
- [Norway- Questions and Answers Related to the Licensing Process](#)
- [Singapore- Guidelines for Submission of Application for Facilities-Based Operator Licence](#)
- [St. Lucia -- Application and Licensing Processing](#)
- [St. Lucia -- Guidance Notes for Application Processes](#)
- [Switzerland -- Guide to the "Registration Form for Providing Telecommunications Services"](#)

- [Trinidad & Tobago -- Eligibility and Evaluation Criteria for Concessions](#)
- [Uganda- Licence Process Flow Chart](#)
- [World Trade Organization - Reference Paper](#)

3.6.2 PUBLIC CONSULTATION

It is good practice to engage in public consultation before and during an authorization process. Consultation with ICT sector stakeholders reinforces the perception of a transparent process. Consultation also allows the regulator to directly receive the views of consumers, existing service providers and prospective applicants on a proposed authorization initiative. Receiving feedback from these stakeholders assists the regulator to fine-tune the proposed authorization procedures and the proposed authorization terms and conditions in order to maximize the prospects for a successful authorization process. Indeed, consultation is often the least expensive form of ‘research’ a regulator can use to improve the information base on which its decisions are made.

Even where regulators choose, for commercial or other reasons, to conduct some discussion with potential applicants out of the public eye, it is useful to conduct public consultation early in an authorization process. This improves the design of the authorization process. Consultation can be particularly important where a general authorization is to be issued. Advance publication of proposed conditions of general authorizations provides an important opportunity for public comment –especially comment by interested service providers.

3.6.2.1 THE PUBLIC CONSULTATION PROCESS

This section provides further information on the public consultation process, a subject introduced earlier in this module.

Public consultation may occur both before and during the authorization process. It can be formal or informal. In the context of any major authorization initiative, it is generally advisable for the regulator to establish a formal and transparent consultation process.

A good approach for a more formal consultation process involves publication of a notice or public consultation paper that states the regulator’s intention to launch an authorization process and that invites comments on the proposed approach. The notice should set forth reasonable details of the proposed authorization approach and any specific issues on which comments are sought. Where the regulator is unsure of the best approach, comments may be invited on different options.

Notices of this kind should be sent to all interested parties, including prospective applicants, existing licensees, and consumer and industry interest groups. Notices are sometimes also published in official gazettes or the popular business press. Such notices may be in a short form that invites interested parties to request copies of a more detailed notice or consultation paper.

In some cases, the notices may advise interested parties of the regulator’s intent to publish a consultation paper on a particular topic in the near future. Informing stakeholders of an upcoming consultation provides them with extra time to conduct their own research into the subject matter of consultation and thus allows stakeholders to participate more meaningfully in the process. This, in turn, improves the quality of the submissions received by the regulator in the consultation.

The Telecommunications Regulatory Commission (TRC) of Jordan published an Advance Notice of its intention to conduct a formal consultation on the transition of non-Class licences to the Integrated Licensing and Regulatory Regime. The stated purpose of the advance notice was “to assist stakeholders to prepare themselves adequately for that process (i.e., the upcoming consultation process)”. This notice set out a brief background to the upcoming consultation, a time frame for the consultation, and a summary of the issues that would be considered in the process. A link to a copy of this advance notice is set out below.

In formal consultation processes, most regulators publish a detailed consultation paper at the outset of the process. This paper frames the issues raised for consultation and sets out a list of questions or issues for stakeholders’ consideration. In consultation processes involving complex issues or significant changes to the regulatory regime, the process may have several phases. The regulator may publish consultation papers at various stages of the process. In Hong Kong, China, for example, the consultation on unified licensing had several phases. Both the Minister and the regulator published consultation papers at each stage of the consultation.

In some cases, one or more public meetings may be held to obtain input on the issues. These public meetings may occur at different phases of the consultation. For example, the regulator may commence the public consultation with an open meeting to present key issues for consideration and the regulator’s proposed response to these issues. The regulator may then host a subsequent public meeting in which the regulator summarizes the submissions received during the

consultation and outlines its response to these submissions.

A good example of this approach is the Kenyan consultation on the implementation of a unified licensing regime. In February 2008, the Kenyan regulator, the Communications Commission of Kenya (CCK), invited stakeholders to comment on the proposed framework for the unified licensing regime and the related principles and guidelines. In March 2008, the CCK followed up this initial consultation with stakeholders with a second industry consultation on the proposed unified licensing framework. The CCK held a Unified Licensing Stakeholders Forum to discuss issues related to the proposed unified licensing framework. During this Forum, the CCK delivered presentations on the general framework for the unified licensing regime and on related frequency issues. These presentations highlighted the feedback that the CCK had received earlier in the consultation process and also outlined the CCK's response to this feedback.

Copies of written comments may be published to foster greater transparency. The CCK published a summary of the comments of individual industry participants during its consultation on the implementation of a unified licensing regime, for example. The CCK also has published the submitted responses of participants in various public consultations on its website. Similarly, the TRC summarized the responses received from stakeholders to its Advance Notice of the consultation on the transition of non-Class licences to the Integrated Licensing and Regulatory regime. Some of these responses raised further issues and questions that the stakeholders felt should be addressed during the consultation process.

An opportunity is sometimes provided for a round of reply comments. This keeps parties more honest and accurate in making their initial submissions, and assists the regulator in assessing the merits of positions taken or information supplied in parties' comments. In the Jordanian consultation on the transition of non-Class licences to the Integrated Licensing and Regulatory regime, for example, the TRC advised parties that it would post the comments of all parties on its website once the deadline for making submissions had passed. Parties were then given ten days to provide input on any issues by other parties.

It is good practice to issue a final report at the end of a consultation process. The final report typically summarizes the process itself, the issues raised for consideration, the submissions received, the regulator's response to these submissions, and the regulator's final determinations or recommendations. The final report provides a good record of the process that led up to the regulator's final determinations and the reasons for the regulator's decision. It thus enhances the credibility and perceived fairness of the regulator's determinations. The final report also enhances the transparency of the consultation process and the decision-making process. We have included several good examples of the final reports of public consultation processes in this Module. Links to these documents are set out below.

A pre-authorization consultation process increases the likelihood that the regulator's approach to authorization will be based on a good understanding of all relevant considerations. Consultation also helps to ensure that even those who may disagree with the regulator's approach will believe that their views have been considered. This module contains a number of good pre-licensing consultation documents on the authorization of different types of services. Links to these documents are set out below.

Practice Notes

- [Belgium – Public Consultation on Mobile Telephony- 1999](#)
- [France- 3G Licensing Consultation Document- 1999](#)
- [Greece – 2G and 3G Licensing Consultation](#)
- [Hong Kong, China – Consultations on the Licensing Framework for Unified Carrier Licences](#)
- [Hong Kong, China- Liberalization of Fixed Networks Consultation Document- 2001](#)
- [India – Unified Licensing Regime Consultation Paper](#)
- [Jordan – Mobile Operator Licence Consultation](#)
- [Kenya -- Consultation on the Implementation of a Unified Licensing Framework](#)
- [Public Consultation Processes](#)
- [Saudi Arabia – Data Services Licensing Consultation](#)

Reference Documents

- [Barbados: Voice over Internet Protocol Policy \(Draft Second Circulation for Comments\)](#)
- [France- Public Consultation on the Introduction of UMTS- February 1999](#)

- [Hong Kong, China -- Consultation Paper on Licensing Framework for Unified Carrier Licence](#)
- [Hong Kong, China -- Consultation Paper on the Creation of a Unified Carrier Licence under the Telecommunications Ordinance](#)
- [Hong Kong, China -- Executive Summary, Consultation Paper on the Licensing Framework for Unified Carrier Licence](#)
- [India- Consultation Paper on the Unified Licensing Regime \(March 2004\)](#)
- [India- Consultation Paper on Unified Licensing for Basic and Cellular Services \(July 2003\)](#)
- [India- Preliminary Consultation Paper on Unified Licensing Regime \(November 2003\)](#)
- [Ireland- Consultation Paper – Future Regulation of Electronic Communications Networks and Services: Arrangements for General Authorisations](#)
- [Ireland- Public Consultation Webpage](#)
- [Jordan- Mobile Operator Licensing Public Consultation FAQs](#)
- [Jordan- Notice Requesting Public Comment on the Licensing of a New Mobile Operator](#)
- [Jordan- Notice Requesting Public Comment on the Licensing of a New Mobile Operator](#)
- [Jordan- Presentation for the Mobile Operator Licensing Public Consultation Forum](#)
- [Jordan- Webpage Concerning Mobile Operator Licensing Public Consultation](#)
- [Kenya -- Implementation of a Unified Licensing Framework & New Market Strategy](#)
- [Saudi Arabia- Licensing of Data Services Public Consultation Document](#)
- [Saudi Arabia- Licensing of Data Telecommunications Services: A Public Consultation Document](#)

3.6.3 AUTHORIZATION RENEWAL, AMENDMENT AND RENEGOTIATION

This section deals with a number of issues related to the renewal, amendment and renegotiation of authorization conditions – particularly conditions established in individual licences. The issues discussed in this section involve both renewals and amendment at the end of licence terms and amendment of licence conditions before the end of a licence term

Individual licences have normally been granted for fixed terms, and thus issues arise regarding how to handle renewals at the end of a licence term. Licences may be renewed, renewed with amendments, or simply terminated at the end of a licence term. The latter option is extremely rare, since it would deprive customers of service. It is seldom used except in the case of non-operational licensees or serious and continuous breaches of licence conditions, laws or other regulatory instruments.

The legal framework for licence renewals and amendments is normally prescribed in national ICT laws or regulations. Sometimes it is found in the conditions of the licence itself, or in the terms of privatization-related agreements, such as shareholders agreements between governments and strategic investors.

Many countries have introduced reforms in their authorization regimes, such as the move from individual licensing to general authorizations or the introduction of unified or multi-service authorization regimes. Such reforms raise the issue of how to treat authorizations granted under a previous regime. In some cases, existing or new laws grant regulators the right to amend licences unilaterally under the new regime. In others, incentives are provided to continue authorizations under the new regime or to amend licence conditions to harmonize with the new regime. A variety of approaches have been taken to the continuation of licences to reflect changing authorization regimes. Perhaps the most difficult issues are those involving the termination of monopoly or exclusive rights that have been granted under previous regimes, but that are no longer consistent with market opening policies of the new regimes that have been adopted around the world today.

Reference Documents

- [Mobile License Renewal: What are the Issues? What is at Stake?](#)

3.6.3.1 TRANSITION TO NEW AUTHORIZATION REGIMES

Over the past five to ten years, a number of countries have introduced large-scale reform of their authorization regimes. In the E.U., for example, the 2003 Authorisation Directive has brought major changes to the authorization practices of member countries. Compliance with the Authorisation Directive required some E.U. member countries to make major

changes to their authorization regimes. New legislation or regulations have been enacted to transition the member states' regulatory frameworks to a general authorization regime.

More recently, a number of countries have transitioned from service- and technology-specific licensing regimes to more neutral frameworks that feature unified or multi-service authorizations. Hong Kong China, Jordan, South Africa, Botswana, Uganda, Kenya, Nigeria, Tanzania, India, and Trinidad and Tobago are among the countries that have recently adopted new unified or multi-service authorization regimes. In some cases, the transition to a unified or multi-service authorization regime is accompanied by the introduction of a general authorization framework.

Countries have taken different approaches to introducing changes to the authorization regime. However, one common practice is the use of public consultations. The introduction of new authorization regimes is almost always preceded by a public consultation on issues related to changing the regime. Regulators seek feedback from industry stakeholders on a variety of matters, including:

- the proposed licensing framework;
- the types of authorizations to be issued in the new regime;
- the terms and conditions of the proposed new authorizations;
- the proposed process for issuing authorizations;
- the schedule for implementing the new regime; and
- the transition to the new licensing regime.

In a number of cases, including Hong Kong China, Kenya, and India, for example, the public consultation had more than one phase. Different issues were tackled at different stages of the consultation process. A multi-stage consultation process has several advantages. The introduction of a new authorization regime raises many complex issues; conducting the consultation in several stages allows the regulator to manage the issues better. A multi-stage consultation also avoids overwhelming the regulator and industry stakeholders with information, data, and proposals. Finally, in a multi-stage consultation process, the regulator can better focus the consultation at each stage. For example, once the regulator has received feedback on the basic structure of an integrated licensing regime and has made a determination about the structure, subsequent consultations can focus on how this particular structure should be implemented. Stakeholders do not have to address the implementation of various proposed frameworks; they can focus their comments on the framework that has been tentatively adopted.

Regulators have taken different approaches to transitioning existing licensees to a new authorization regime. In some cases, existing licensees are required to migrate to the new authorization regime. This migration may occur automatically, by deeming that existing licensees have complied with all necessary requirements to obtain a new authorization (e.g., Estonia), through a conversion process led by the regulator (e.g., South Africa), or by requiring existing licensee to apply for a new authorization (e.g., Ireland).

In other cases, existing licensees have the option to continue to operate under the licence procured under the old regime until the end of the term of that licence or to transfer immediately to the new authorization regime. If licensees opt to continue to operate under their existing licence, they must convert to the new authorization regime when their existing licence expires. Botswana has taken this approach to the introduction of its multi-service authorization regime.

Where licensees have the option of migrating to the new authorization regime immediately or at the end of the term of their existing authorization, regulators may provide incentives for early migration. Incentives include the reduction or waiver of initial authorization fees and the grant of the new authorization on the basis of a full term rather than a term adjusted to reflect the years that the licensee has already held the existing authorization. In some cases, the opportunity to obtain a multi-service or unified authorization may be sufficient incentive in and of itself since such an authorization enables the licensee to provide a broader range of services.

Regardless of what approach is ultimately adopted to manage the transition to the new authorization regime, it is common (and advisable) for regulators to provide ample information to industry stakeholders about the transition process. By maintaining open and clear communication about the transition, regulators can ensure that the new regime is implemented in a transparent manner that bolsters the confidence of investors in the ICT sector.

Regulators have provided stakeholders with information in a variety of ways. Many regulators hold public meetings in which they explain the key features of the new authorization regime and outline the process of transition. Regulators also issue media releases to increase awareness of the transition. In addition regulators publish information on their website in order to facilitate the implementation of the new regime. Examples of information that regulators have published include: short summaries of the new authorization framework; guidelines to the new licensing process; instructions for applying for

authorizations under the new framework; instructions to existing licensees for how to migrate to the new regime; flow charts that illustrate the application process under the new regime; summaries of the terms and conditions of the new forms of authorization; copies of presentations and speeches about the new regime that were given at public meetings; and answers to commonly asked questions about the new regime and the process of transition.

Practice Notes

- [Approaches to Transitioning to New Authorization Regimes](#)
- [Hong Kong, China – Transition to the Unified Carrier Licensing Regime](#)
- [India – Transition to the Unified Authorization Regime Chronology](#)
- [Ireland – Transition to the General Authorisation Regime](#)
- [ITU Case Study: India’s Unified Authorization Regime](#)
- [South Africa – Individual Licence Amendment Provisions in the Electronic Communications Act](#)
- [Summary of EU Authorisation Directive](#)
- [UK- Continuation of Licence Conditions](#)

Reference Documents

- [India- Consultation Paper on the Unified Licensing Regime \(March 2004\)](#)
- [India- Consultation Paper on Unified Licensing for Basic and Cellular Services \(July 2003\)](#)
- [India- DOT Guidelines for the Unified Licensing Regime \(Phase I\) \(November 2003\)](#)
- [Ireland- Consultation Paper – Future Regulation of Electronic Communications Networks and Services: Arrangements for General Authorisations](#)
- [Ireland- Guidelines on the New General Authorisation Regime](#)
- [South Africa -- Electronic Communications Act, 2006](#)
- [UK- Continuation Notice Issued to British Telecommunications plc Under Paragraph 9 of Schedule 18 to Communications Act of 2003](#)
- [UK- Director’s Statement, “Continuing Licence Conditions after July 25”](#)
- [UK- Explanatory Memorandum Related to Continued Conditions in Class Licences](#)
- [UK- Information Concerning Continuation Notices](#)

3.6.3.2 TERMINATION OF MONOPOLIES

Renegotiation of Licences

Practice Notes

- [Jamaican Agreement to Terminate CWJ Monopoly](#)
- [OECS Agreement to Terminate C&W Monopoly](#)

Reference Documents

- [Jamaica- Heads of Agreement between Jamaica and Cable & Wireless Jamaica Limited](#)
- [OECS- Memorandum of Understanding between Cable & Wireless and OECS Contracting States](#)
- [US Telecommunications Act of 1996](#)

3.6.3.3 RENEGOTIATION OF LICENCES

This section provides further information on a subject introduced earlier in this module, namely the renegotiation of licences as regards exclusivity or other licence conditions.

In some cases, governments or regulators have the clear legal authority to make changes to the terms of existing ICT

authorizations. Where this is the case, it is best to do so in consultation with the licensees and other stakeholders.

In other cases, licensees have existing rights, such as monopoly rights based on contracts, such as privatization agreements or concessions, that require the government or regulator to enter into negotiations to amend the authorizations. In such cases, it is often wise to base authorization renegotiations on sound, generally accepted principles used in other negotiations. These principles have been widely documented in books and articles on negotiation, including the books and other materials produced by Roger Fisher, William Ury and the Harvard Negotiation Project.

The following basic principles of good negotiation strategy are worth keeping in mind:

- Focus on the parties' long term Interests, not on Positions
- Develop Options for Mutual Gain
- Use Objective Criteria to assess Options

Each of these principles is discussed briefly below.

Focus on the parties long term Interests, not on positions

Many negotiations fail because parties disregard this principle. When parties establish firm positions early on in negotiations, lines are drawn in the sand. Success is then measured by which party 'wins' on most of its positions. In licence renegotiations it is best to avoid firm starting positions, such as: 'the monopoly must end on x date', 'the company must receive a 25% rate of return', 'the company must be 'compensated' for an early end to its licence rights', etc. If parties commence their negotiations by tabling such firm 'positions', success is less likely.

If governments and incumbent operators take a long run perspective, many of their interests can be viewed as being quite close. For example, these might include:

- A healthy, growing ICT sector
- Financial health of the country's main ICT service provider
- Development of a clear and predictable national ICT policy, consistent with international practice, and with fewer disputes and uncertainties

It is often best to develop options to help achieve such common interests. Each party will have to be flexible on some positions to develop such options.

Develop Options for Mutual Gain

It is often possible to develop various 'win-win' options that meet the long run interests of both parties to a licence renegotiation. One example is a reasonable rate-rebalancing program that brings local rates to economic levels and eliminates the need for cross-subsidies from other services. Governments sometimes avoid this option because of perceptions that there will be negative consumer or voter reactions. However, such reactions are often overestimated. Rate rebalancing can improve an incumbent operator's financial prospects while creating an economic environment that make it attractive for the incumbent and competitors to expand investment, particularly in local access networks. Investors will not be attracted to enter a market where they must subsidize services and where there is no prospect for profit. Thus the rate rebalancing option can benefit both the incumbent licensee and the government or regulator.

Early in any negotiations, the parties should develop a list of issues to be resolved. Both parties should then focus on developing options for mutual gain. However, parties may put forward any options they wish to put forward to deal with the issues. But all options should be assessed based on objective criteria. To avoid 'negotiation gridlock,' outside parties and expert advisors may be consulted to help develop options.

Use Objective Criteria to assess Options

Too often, negotiations fail because parties assess options in terms of their personal perspectives or 'will', rather than by objective criteria. It is a basic principle of good negotiations that options to resolve outstanding issues should be assessed based on objective criteria.

Objective criteria are available to assess the options for resolving many of the issues facing the parties. These include:

- Precedents – for example, the settlements reached by the governments and companies that have reached agreements to terminate monopolies and establish new policies in other countries;
- International Practices – regarding the treatment of ICT regulatory and policy issues;

- International Trade Rules – regarding expropriation and termination of concessions; and
- Transparent Financial Analysis – to calculate and assess the impact of licence changes, and value ICT businesses, currently and in the future under a liberalized ICT regime.

The prospect of success of licence renegotiation is often increased by appointing experienced negotiating teams and advisors that are capable of properly assessing objective criteria for resolution of the issues.

Preparation for Licence Renegotiation

Government and regulatory negotiators are often poorly prepared for negotiations to renew licences, particularly where the incumbent operators are well-financed and understand the financial and strategy implications of changes in their monopoly or other licence rights.

From the outset, a government negotiating team should prepare and analyze a complete set of relevant documentation on the issues between the parties, including all licence, contractual and legal conditions at issue, and any relevant materials prepared at the time the licence or contract was first negotiated.

All necessary background research should be conducted. Normally a legal opinion should be prepared on the legal rights of licensee. This work should ideally be done in advance, and not after the negotiations have commenced.

Research and analysis should be conducted to develop and assess both parties' best option if negotiations fail. In the Harvard Negotiation Project, this is referred to as the 'Best Alternative to a Negotiated Agreement' (BATNA). In some cases, the Government's BATNA involves legislation to terminate a monopoly. However, such an alternative should be carefully analyzed so that the government is fully aware of its implications. Such analysis would include assessment of the legal, trade, and political remedies that could be resorted to by the other party, including any relevant foreign investment guarantees or insurance and possible international trade repercussions (e.g. under multilateral agreements, such as the GATS or bilateral and regional investment agreements).

Appropriate professional resources should be retained for the negotiation and related advisory work. In addition to retaining an experienced negotiator, parties should make certain that they have available, on reasonably short notice, other skills or resources that may be required. These resources may include a financial analyst to assess claims regarding the impact of the proposed licence changes, and access to experienced 'insiders' in other licence renegotiations.

The parties should contact each other early on to establish an agreed process and schedule for negotiations. Neither party should impose a negotiation process or schedule on the other. Consistent with good faith negotiations, the parties should consult with each other to develop the process and schedules.

Negotiation Guidelines

Adherence to the following guidelines can increase the prospects for success of the negotiations:

- The parties should negotiate in good faith, and should be seen to be doing so, by adhering to an agreed negotiation process.
 - The parties should agree to the process for negotiations at the outset, and both parties should adhere to this agreement, unless changed after mutual consultation.
 - Each party should designate one official representative ('negotiator'), who should be fully authorized to negotiate, although not to agree to the settlement of any issues.
 - Communications between the parties should flow between the negotiators.
 - The negotiators should be selected on the basis of an ability to develop a good working relationship. Efforts should be taken to maintain that relationship.
- Parties should encourage their negotiators to comply with the negotiation guidelines set out in this document (e.g. negotiators should reconcile interests, not positions; they should brainstorm to develop 'win-win' options; and to apply objective criteria for assessing them). Negotiation teams should be given reasonable leeway, and not be undermined by their principals (e.g. the president of the licensee's parent company or the Minister responsible for ICT) providing conflicting or unreasonable demands.
 - Negotiations should be conducted face to face or by exchange of correspondence between the authorized negotiators – not in the press. Representatives of the parties can easily 'poison' the atmosphere by gratuitous negative comments to the press or other third parties.
 - If possible, the negotiations should be held on "neutral ground" or alternate between locations selected by

each of the parties.

- The designated negotiators should present the terms of proposed settlements back to the final decision-making authority of each party.
- Insofar as possible, the parties should try to achieve a comprehensive settlement of outstanding issues. Settlement of some issues may involve delegation of technical implementation tasks to designated persons, committees or organizations, who may have to continue their work after an 'agreement in principle' has been reached.
- Parties should not, directly or through related entities, take steps that materially worsen the position of the other party – at least not without consultation.
- In general, the parties should maintain an open dialogue with each other, and not spring other 'surprises' on each other, that would undermine good faith negotiations.

Materials on Dispute Resolution and Negotiation

There has been a growing interest in the subject of dispute resolution in the ICT industry. The World Bank Group and the International Telecommunications Union have collaborated in holding a workshop and commissioning research and reports on the subject. Those interested in dispute resolution in the telecommunications sector should consult the following resources:

- *Dispute resolution in the telecommunications sector: Current practices and future directions*, which is available in electronic format on the ITU web site at the following URL: http://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf

This document is also available in printed book form from the World Bank.

- ITU Seminar On Enforcing Telecommunication Law, Policy and Regulation materials, which are available on the ITU web site at the following URL: <http://www.itu.int/ITU-D/treg/Events/Seminars/2005/Enforcement/index.html>
- ITU's European Workshop on Dispute Resolution materials, which are available on the ITU web site at the following URL: <http://www.itu.int/ITU-D/treg/Events/Seminars/2004/Geneva/index.html>

3.6.4 BALANCING CERTAINTY AND FLEXIBILITY

ICT licensing should balance regulatory certainty with the flexibility necessary to address future changes in technology, market structure and government policy. This balance is never easy to achieve. Regulators in countries with higher ICT sector risks should generally favour regulatory certainty to attract investment. Those with more stable economic and regulatory environments normally have the luxury of increased flexibility to introduce reforms without undue market impacts.

3.6.4.1 MORE ON BALANCING CERTAINTY AND FLEXIBILITY

This section provides further information on a subject introduced earlier in this module, namely balancing regulatory certainty and the flexibility to address future changes in technology, market structure and policy.

There are a number of ways that a regulator can balance certainty and flexibility in the authorization process. In many countries, a balance between regulatory certainty and flexibility is achieved by using instruments other than authorizations as the main elements of the regulatory framework. For example, a country might adopt interconnection regulations rather than impose detailed terms and conditions concerning interconnection in service providers' authorizations. However, where a country's regulatory regime is not well developed, it has often been necessary to include a reasonably comprehensive codification of the basic regulatory regime in an authorization. This is necessary to provide the certainty required to attract new entrants and substantial investment to the sector.

A reasonable balance between certainty and flexibility must also be found in the terms and conditions of an authorization. The conditions must provide a reasonable degree of certainty to service providers in order to attract investors. On the other hand, such conditions should be sufficiently flexible to allow their integration into the general regulatory framework for the sector as it develops. The authorization of a particular service provider should not preclude future regulatory reform.

There are several approaches to providing such flexibility, including:

- permitting unilateral authorization amendment by the regulator;

- establishing short authorization terms;
- permitting authorization amendments with the mutual consent of the licensee and regulator; and
- permitting unilateral amendments by the regulator of specific types of authorization conditions considered key to the general regulatory regime, provided such amendments are made in a procedurally fair and competitively neutral manner.

The first two approaches are not consistent with regulatory certainty. They will generally make it difficult, if not impossible, to attract the investment and financing required for a major authorization, such as a fixed line or cellular authorization. The third approach increases regulatory certainty, but can constrain the introduction of regulatory reforms.

The fourth approach is more attractive as regards regulatory certainty. To implement it, a distinction can be made between authorization conditions that are of a regulatory nature and those which can only be amended with the agreement of the licensee. For example, authorization conditions on industry-wide universal service mechanisms or general terms of interconnection may be subject to amendment by the regulator.

Other conditions of a purely contractual nature or which are fundamental to the economic value of the authorization may be subject to modification only with the consent of the service provider. These would normally include conditions such as the term of the authorization and the authorization acquisition fee payable.

Where the regulator has the right to amend the general regulatory conditions of an authorization, such amendments should be made in a transparent and competitively neutral manner. Any amendments should be preceded by consultation with the licensee and other affected parties. In some cases, a right of appeal or review may be warranted.

The *Electronic Communications Act* of South Africa contains provisions designed to provide certainty to the holders of individual licences while giving the regulator the flexibility to respond to changes in technology, market structure, and policy. Section 10 of the Act allows the Independent Communications Authority of South Africa (ICASA) to make certain kinds of amendments to the terms of an individual licence after consultation with the licensee. Amendments permitted under section 10 relate to general regulatory and policy matters. Licensees are afforded certain procedural rights in the amendment process. The Practice Note entitled “South Africa – Individual Licence Amendment Provisions in the *Electronic Communications Act*” provides more information about the ICASA’s authority to amend individual licences. A link to this Practice Note is set out below.

Practice Notes

- [South Africa – Individual Licence Amendment Provisions in the Electronic Communications Act](#)

Reference Documents

- [South Africa -- Electronic Communications Act Regulations on Processes and Procedures](#)
- [South Africa -- Electronic Communications Act, 2006](#)

3.6.5 DISTINGUISHING AUTHORIZATION FROM PROCUREMENT

The act of authorizing an ICT service provider should be distinguished from the government procurement process. In many countries there has been confusion between the two types of processes, sometimes with adverse consequences for the authorization process.

3.6.5.1 MORE ON DISTINGUISHING AUTHORIZATION FROM PROCUREMENT

This section provides further information on a subject introduced earlier in this module, namely distinguishing the act of authorizing an ICT service provider from the procurement process.

There are important differences between the authorization of an ICT service provider by a regulator and the procurement of services by a government entity. Yet the distinction is not sufficiently recognized in some countries. The government procurement process involves the purchase by the government of goods or services using public money. These goods or services are sometimes used internally by the government and sometimes used by the government to fulfil its public duties.

By contrast, a regulator is not buying goods or services using public money when it licenses an ICT service provider. Authorization involves the granting of certain rights and obligations to an authorized service provider. It can be seen as the granting of a business opportunity to qualified investors who agree to comply with certain authorization conditions and

regulations. The regulator is more a seller than a buyer.

Two important recommendations for the authorization process flow from the recognition that authorization is, in essence, the offering of a business opportunity. First, the regulator must offer an opportunity that is financially attractive to experienced and competent ICT service providers. While some authorization opportunities sell themselves, others, particularly those in emerging and transitional markets, must be carefully structured and marketed to attract qualified applicants. Experience shows that almost any call for applications for ICT authorizations will attract some bidders. However, many are not financially or technically capable of meeting the regulator's objectives to expand and improve services.

Second, government procurement procedures are generally not suitable for an ICT authorization process. Many countries have bureaucratic, centralized procurement administrations. Detailed government procurement procedures are often developed for good reason - to reduce corruption. However application of these procedures can cause legal and administrative headaches, delay and confusion about the real goals of the authorization process.

The regulator in an authorization process is primarily concerned about results. What matters is whether, not how, authorization conditions are met. Thus, it is more important to ensure that potential licensees are able to meet clear qualification requirements relating to their competency than to micro-manage the business or operational plans of licensees. From this perspective, such issues as technology choices, management structures, and marketing strategies should not be the subject of authorization conditions or selection criteria; they should be left to market forces. Generally, it is best to avoid the application of general government procurement procedures and to use a simple and transparent competitive authorization process, based on internationally accepted ICT authorization procedures.

3.6.6 SPECTRUM AUTHORIZATIONS

The provision of ICT services that make use of radio frequencies generally requires two authorizations: one to provide the ICT service and a second authorization for the use of the radio frequency. It is necessary, for instance, to authorize cellular service providers to use the required spectrum as well as authorizing them to operate the cellular networks. Spectrum authorizations required to provide a service are often granted as part of an individual licensing process.

Authorizations to operate an ICT service and to use the required radio spectrum should be granted at the same time. There should be no delays or risks of inconsistent regulatory requirements as between the two types of authorizations. If two separate authorizations are issued, they should be issued simultaneously. A good approach is to attach a draft spectrum authorization as well as a draft service provider's authorization to a request for applications for authorizations.

One reason for retaining two separate authorizations is administrative convenience in the management of the spectrum. In most countries spectrum management is delegated to a different administrative group from the group that regulates other aspects of telecommunications operations, such as price regulation or anti-competitive conduct. By having a separate, consistent form of spectrum authorization, technical, reporting and compliance requirements can be standardized for all users of the radio spectrum.

There are a number of regulatory considerations that are specific to spectrum authorizations. These issues, along with a range of other matters, are canvassed in [Module 5, Radio Spectrum Management](#).

Practice Notes

- [Best Practice Guidelines for Spectrum Auctions](#)

[Next: 3.7 Special Authorization Situations](#) →

The ICT Regulation Toolkit is a joint production of infoDev and the International Telecommunications Union (ITU).



International
Telecommunication
Union



Innovate. Connect. Transform.



THE WORLD BANK

[About this Toolkit](#) | [How to Use the Toolkit](#) | [Authors](#) | [Frequently Asked Questions](#) | [Contact](#) | [Terms of Use](#)