

Convergence of communications - Sri Lanka's Regulatory Approach.

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Convergence of Telecommunication and Broadcasting has produced a new kind of interconnectivity between two separate industries. Entrepreneurs have come forward to accept the technological advancement or the digital take over of communications, whilst regulatory authorities in Sri Lanka are grappling with laws which were enacted long before the digitalization of communication. The Author will be examining the recent closure of DTH (Direct To Home) Television broadcasting stations and the approach adopted thereafter by the regulators.

I. Regulation of Telecommunication Industry in Sri Lanka.

An Important milestone in the liberalisation of the Telecommunication industry of Sri Lanka was achieved with the enactment of the Sri Lanka Telecommunications Act no 25 of 1991, which established Telecommunication Regulatory Authority of Sri Lanka by Parliament in year 1991. In terms of sec.65A of the above Act, all duties performed by the office of the 'Director General of Telecommunication' was transferred to the Authority.

The Government of Sri Lanka (GOSL) introduced an amendment in year 1996 to the Telecommunication Act no 25 of 1991, which paved the way for the establishment of the Telecommunication Regulatory Commission of Sri Lanka (TRCSL). In this article the author will be examining the regulatory approach adopted by Sri Lanka which is one of the first signatories to the Basic Agreement of Telecommunications of WTO¹, which emphasises the liberalisation of Telecommunication networks.

TRCSL is the recommending authority in terms of the above Act; enabling to the Minister in charge of subject of Telecommunications for issuance of licenses to Telecommunication companies to operate basic telecom services, for importation and sale of telecom apparatus. The Sri Lanka Telecommunications Act further authorises to regulation of the telecommunication industry, in order to achieve the objects set out in section 4 of the said Act. In addition, the management of the radio spectrum frequency in Sri Lanka is entrusted to the TRCSL in terms of the Telecommunication Act no 25 of 1991 as amended².

Presently the Telecommunication industry is inundated with new technological advancements and therefore, demands new regulations. This phenomenon has burdened the Regulator in maintaining a 'level playing field', where some licence holders maintain a monopoly in the telecom market of Sri Lanka.

** The helpful comments of

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¹ [Fourth Protocol to the General Agreement on Trade in Services.](#)

² Section 22 of the Telecommunication Act No.25 of 1991 as amended

ii. Regulation of Broadcasting Industry in Sri Lanka

In terms of Section 44 of the Sri Lanka Broadcasting Corporation (SLBC) Act no 37 of 1966 the Minister in charge of the subject is authorized to issue licenses for the establishment and maintenance of private broadcasting stations.

Sri Lanka Rupavahini Corporation (SLRC) Act no 6 of 1982 primarily provides for the establishment, constitution and operation of the corporation.

Section 28(1) of the SLRC Act provides, that no person other than the Corporation established under the said Act shall maintain a television broadcasting station unless such person has obtained a license from the Minister.

Primarily radio and television broadcasting in Sri Lanka is regulated by the afore-mentioned SLBC and SLRC Acts, under the direction of the Minister in charge of the subject.

The radio frequency required for broadcasting is governed by TRCSL in terms of section 22 of the Telecommunications Act no 25 of 1991 as amended. In addition all broadcasters are required to obtain the licenses for radio frequency after obtaining the necessary licenses under SLBC or SLRC Acts.

3. Definitions of Telecommunication and Broadcasting in Sri Lanka

Without the merger of TRCSL and broadcasting regulators (SLBC and SLRC) , unlike in the other developed countries, it appears that Sri Lanka's approach in regulating the major areas of the communication industry is to retain separate regulators.

The Telecommunications Act no 25 of 1991, as amended defines '**telecommunication network**' as follows

“a set of nodes and links that provide connections between two or more defined points to accommodate telecommunication between them using dedicated or switched connections established at the nodes via a combination of the links proper to the connections” .

Sri Lanka Rupavahini Corporation Act No 6 Of 1982 defines '**television broadcasting**' as follows,.....***“includes cable television but excludes the broadcasting of radio programme.³”***

Sri Lanka Broadcasting Corporation Act no 37 of 1966, which was enacted by Parliament in year 1966, has a limited definition for the term '**broadcasting**'; that is***“includes the broadcasting of television programmes;”***. Both SLRC and SLBC Acts have avoided giving a broader definition to television and radio broadcasting.

Even though, these two organizations are empowered to regulate under the supervision of the Minister in charge of the subject, the respective laws only state the functions of the corporations. Therefore it is important to note that the regulating of television and radio broadcasting is permitted by license conditions which will be imposed by the said licensing authority .

In terms of Section 3 of the Sri Lanka Broadcasting Act⁴ the function of the corporation is to exercise supervision and control over programs broadcast by the said corporation. Definition of

³ Sri Lanka Rupavahini Corporation Act No 6 of 1982

⁴ Sri Lanka Broadcasting Corporation Act no 37 of 1966

programs in the said Act states as follows.....*“includes any signal, announcement, item, communication, picture or other matter broadcast or intended to be broadcast from a broadcasting station for reception by the public.”*

In terms of Section 7 of Sri Lanka Rupavahini Act⁵ authority of control and supervision of the programs are vested with the corporation. The said Act has defined “program”⁶ in the same manner as in the SLBC Act. Therefore both television and radio broadcasting Acts of Sri Lanka, defines programs as ‘any item broadcast from a broadcasting station for reception by the public’. On the other hand **Telecommunication network** is define “a set of nodes and links that provide connections between two or more defined points to accommodate telecommunication”. Unlike telecommunication, broadcasting has been developed as a means to reach an unspecified number of people at the same time.

Telecommunication was developed as means of personnel communication. Interception and disclosure of contents of a Telecommunication message is an offence in Sri Lanka⁷. The Telecommunication Regulator is the guardian, entrusted to protect contents of telecommunication messages. On the other hand broadcasting does not emphasize in protecting contents, since it is for reception by the public.

In Sri Lanka up to date **telecommunication** and **broadcasting** are regulated as separate sectors, even though in communication technologies elimination of borders in these two sectors have been taking place at a rapid pace. The Author will be discussing convergence phenomena and its impact in Sri Lanka .

SLBC and SLRC are State owned commercial entities under the supervision of the Minister in charge of Media and a role as a transparent Regulator has been questioned due to their dual role.

Non existence of a merged regulator has paved way for a number of disputes which have ended up in litigation in Courts of Sri Lanka.

Convergence of Communications

With the advancement of the communication industry, convergence of Telecommunications, broadcasting and IT has created a new challenge for regulators.

The term convergence is often used loosely to denote changing trends in technology, services, industry structures, and government policies affecting the telecom and audio visual sectors⁸.

The information and communication technologies and services (ICTS) sector is the most visible outcome of technological convergence but this phenomenon should not be perceived as a single dimension technological issue.⁹ Melody commenting on convergence states that *‘Technological convergence has in turn, spawned changes in industries, markets ,policies and regulations and it*

⁵ Sri Lanka Rupavahini Corporation Act No 6 of 1982

⁶ “television programme " or " programmes " includes any signal, announcement, item, communication, picture or other matter broadcast or intended to be broadcast from a television broadcasting station for reception by the public”

⁷ sections 52,53 and 54 Telecommunication Act no 25 of 1991, as amended

⁸ see CR Blackman, ‘Convergence between telecommunication and other media’ 1998 22 ‘Telecommunication Policy’ page 163 at 164

⁹ Angeline Lee – ‘Convergence in Telecom, Broadcasting and IT’ , Singapore Journal of International & Comparative Law(2001) page 675

is the combination of all these changes and the differences amongst them which makes discussions of this complex topic¹⁰.

Milton L. Mueller¹¹ states that *'Convergence, the digital takeover of communication and information, produces a new kind of interchangeability and interconnectedness among different media forms'*. Data in different formats, such as video, voice and text converted in to digital format, which is a large volume of data can be transmitted through broadband telecommunications networks.

Numerous technological solutions have come forward to accelerate the convergence of broadcasting and telecommunications. The author will not discuss different technological advancements made in this regard but the regulatory issues faced in Sri Lanka due to the convergence of communications.

'A Sri Lankan research agency has said that future growth in the media market in Sri Lanka in the next decade will be driven by Cable and Satellite based pay TV services¹²'. Provisions of pay TV services through Cable and Satellite are a direct result of convergence broadcasting and telecommunications.

Cable and Satellites used to provide point to point telecommunications and are utilized to make available a host of services for reception by the public. Are all these services, broadcasting or telecommunication?

Changes in information and communication industry

The phenomenon of convergence has not only affected changes in the sphere of technology but in the sphere of economics of the industry. Entrepreneurs have closely observed the necessity of having integrated media and communication industries with the emergence of convergence of communications. As the content delivery market expands its boundaries with out distinctions of wired or wireless, acquisition of media platforms by telecommunications giants are progressing at a rapid speed.

OECD has identified at least four implications flowing from the changes in economies of scope arising from convergence.¹³

"As in other Asian countries the market for pay –TV in Sri Lanka is entering a phase of convergence, driven by rapid technological change; increasing investment in both content and distribution; and growing competition and consolidation as aptly manifested by Dialogs acquisition of Asset Media and now CBNSat. The need to add a critical customer base quickly may have prompted Dialog to acquire CBNSat so soon after the Asset Media acquisition¹⁴". It is important to note that Dialogtelekom acquired CBNSat; a pay TV service provider after the Criminal Investigation Department sealed its equipment for operating without a valid license under the law.

¹⁰ *ibid*

¹¹ Digital Convergence and its consequences

¹² Cable, Satellite TV to drive media sector in next decade Financial Times –Sunday Times December 10,2006 page 14

¹³ Angeline Lee – 'Convergence in Telecom, Broadcasting and IT' , Singapore Journal of International & Comparative Law(2001) page 677

¹⁴ As above - Financial Times –Sunday Times December 10,2006 page 14

In the recent years Sri Lankan commercial entities CBNsat, LBN Networks (pvt) Ltd, Sri Lakvahini commenced the provision of digital pay TV services (Direct To Home –DTH) through satellite and cable networks as a result of convergence of communications.

Capitol Maharaja Group entered into partnership with Tokyo based Newmedia Group¹⁵ to deliver Sri Lankan TV contents using IPTV to mainly the Sri Lankan Diaspora in Japan and Korea.

Even though Sri Lankan entrepreneurs continued to venture into commercial activities with new technological developments, the Regulators preparedness to meet the challenge in discussed in the following manner.

4. Closure of DTH TV operations in Sri Lanka.

The Criminal Investigation Department (CID) having obtained a search warrant from the Magistrate of Colombo inspected the premises of CBNsat/Sonicnet Technologies (pvt) Ltd for operating a Telecommunication system without a valid license¹⁶ and thereafter sealed the equipment on 6th June 2006. Few days thereafter CID acting on a search warrant issued by the Magistrate's Court sealed the equipment of LBN Networks (pvt) Ltd¹⁷ for violating the Telecommunications Act and SLRC Act.

Operation of CBNsat

CBNsat entered into agreement with Sri Lankan and overseas TV operators to obtain their programs for distribution. Thereafter CBN having encrypted these programs to data packets transmitted it to their affiliate company Sonicnet Technologies (Pvt) Ltd who is an External Gateway Operator (EGO), a licensee in terms of section 17(2) of the Telecommunications Act No 25 of 1991 as amended. Sonicnet uplinks encrypted data to 'Pas12 Satellite' and they in turn transmitted it back to Sri Lanka in coded data messages. CBNsat provides Set to box (STB) /decoders to subscribers who downlink the signals and encrypt the same. Subscribers of CBNsat viewed a large number of channels in DTH Television program with the convergence of Telecommunication and broadcasting.

Sonicnet Technologies (Pvt) Ltd (Sonicnet) , a licensee in terms of section 17(2) of the Telecommunication Act no 25 of 1991 as amended was authorised to, up link and down link data and voice only up to their International gateway. Clause 1.2(c) of the said license¹⁸ prohibited communications between satellites and VSAT or any earth station or direct connection to a customer.

Legal Position of CBN sat

Both CBN (pvt) Ltd and LBN Networks (Pvt) Ltd operated Direct To Home (DTH) TV services utilizing satellite and Cable TV broadcasting service. It is noteworthy to mention that these two operators utilized a Telecommunication system but failed to obtain the necessary licenses in terms of Section 17(2) of Telecommunications Act No 25 of 1991 to operate a telecommunication system in Sri Lanka.

¹⁵ Financial Times – Sunday Times December 4,2006page 7

¹⁶ Case no.B/3151/03/06 Magistrate Court-Colombo

¹⁷ Case no B3369/03/2006- Magistrate Court-Colombo

¹⁸ EGO Licence - www.trc.gov.lk/pdf/egol

Sonicnet invoked the jurisdiction of the High Court of the Western Province¹⁹ and stated that they entered into an agreement with another affiliate Comminique Broadband (pvt) Ltd to provide business process out-sourcing and IT enabled services such as teleporting data lines using existing local telecom operators. The Petitioner (Sonicnet) further stated that encrypted data they received were decoded and thereafter re-encrypted and transmitted to transponders in the satellite in space. The data which was transmitted to the aforesaid satellite was re-transmitted back to earth and with a foot print over Sri Lanka²⁰.

Legal position of the Petitioner was that in terms of EGO license they possess, said services are permissible. The High Court refused interim relief prayed for by the Petitioner. Thereafter Sonicnet petitioned the Supreme Court that their fundamental rights were violated by the action of CID.

Supreme Court on 11th November 2006²¹ granted interim relief in favour of the petitioner permitting to recommence operation to transfer of shares /ownership of equipments to a licensee in terms of section 17(2) of Telecommunications Act no 25 of 1991.

Video on Demand

Is Video on Demand (VOD), which is a communication between two defined points is broadcasting or telecommunication? In this regard, High Court of Hong Kong decided that Cable TV operator providing VOD requires a license as specified in the Telecommunication Ordinance of Hong Kong.

Sears J held that VOD could not be 'subscription television broadcasting service' because in VOD, unlike traditional passive broadcasting, there was no *simultaneous* transmission to the general public as transmission occurred only when a customer receives a programme requested by him. The judge also went on to hold that even if VOD was such a service, the exclusion in Schedule I above for programmes 'point to point' basis applied²².

LBN Networks (pvt) Ltd, a cable TV operator in Sri Lanka informed customers the Provision of VOD among the new services they provide with effect from 1 June 2006²³. But they did not have license in terms of section 17(2) of Telecommunication Act no 25 of 1991, as amended at the time CID sealed their equipment as result of search warrant issued by the Magistrate Court of Colombo.

Issuance of licence for DTH services

As discussed above both operators Sonicnet/CBN (pvt) Ltd and LBN Networks (pvt) Ltd, invoked the jurisdiction of the Supreme Court and the Court of Appeal of Sri Lanka, against TRCSL, Ministry of Media and CID, seeking redress and challenge the search warrant issued by the Magistrate of Colombo.

¹⁹ Provincial High Court (Colombo) Revision Application no 113/06

²⁰ *ibid*

²¹ Supreme Court of Sri Lanka – SC FR No 236/2006

²² Angeline Lee – 'Convergence in Telecom, Broadcasting and IT', Singapore Journal of International & Comparative Law(2001) page 687

²³ Document P25 – CA/982/2006 – The Court of Appeal of Sri Lanka

TRCSL having considered the steps taken by the industry to provide converged communications, utilizing telecommunication networks and the pending judicial review of the closure of DTH services, called for application to grant license to provide non voice telephony services²⁴.

It is note worthy to mention that Minister in charge of telecommunications granted licenses in terms of section 17(2) of the Telecommunication Act no 25 of 1991 as amended terms of section 17(2) of the Telecommunication Act no 25 of 1991 as amended to provide non voice telephony services to some applicants inclusive of LBN Networks (pvt) Ltd²⁵. Salient feature of said license is provision of services was limited to Data communication service and Cable Television service subject to the issuance of license from the Ministry of Media²⁶.

4. Conclusion

As discussed above even though, entrepreneurs provided technologically advanced products to the market, regulator was not prepared to govern this new segment. The *lacuna* in both Telecom and Broadcasting (SLBC and SLRC) legislations blocked the advancing path of some entrepreneurs who venture into converged area of telecom and broadcasting. The media in the recent past highlighted the necessity of a transparent and growth friendly regulator²⁷. The approach of the Government in issuing license after entrepreneurs commence converged broadcasting will not be advantageous in order to establish a competitive communications industry in Sri Lanka.

In order to facilitate the growth of convergence of communications the regulator should not only be transparent but should facilitate competition. Even though competition is limited to objects of TRCSL, as per the Sri Lanka Telecommunication Act no 25 of 1991 as amended²⁸, the general competition law²⁹ provides to regulate anti-competitive behavior. The question here is in order to provide growth friendly regulatory environment for the betterment of converged communication market; does Sri Lanka need sector specific competition code or law. On the other hand the contribution made by the general competition law to facilitate the growth of this industry which is propelled through technological developments is questionable. Whilst considering the necessity of sector specific competition code, the author will be examining, Whether Sri Lanka should adopt a single regulator or strengthened separate regulators.

Should Sri Lanka consider introducing a merged regulator to handle convergence of communications or link between TRCSL, SLBC and SLRC. On the other hand TRCSL has been created as a regulator, but SLBC and SLRC functions in a dual capacity of a broadcaster and regulator. Most developed countries have separated Government owned broadcasting entities which handled commercial and regulatory activities, in to separate entities. I am of the opinion Government of Sri Lanka should seriously consider the separation of regulatory activities of SLBC and SLRC, without further delay.

The Government of Malaysia, answer to convergence phenomenon was to establish a single regulator. In 1998, the Malaysian government passed two pieces of legislation: the

²⁴ http://www.trc.gov.lk/pdf/Invite_licence_trc.pdf - Applications to provide non-voice telephony services using cable distribution network and satellite communication network

²⁵ License issued on 22.12.2006 to operate a cable distribution network

²⁶ *Ibid*- schedule 3

²⁷ As above - Financial Times -Sunday Times December 10,2006 page 14

²⁸ Section 4 - Sri Lanka Telecommunication Act no 25 of 1991 as amended

²⁹ Part III – Consumer Affairs Authority Act no 9 of 2003.

communications and Multimedia Act 1998 (CMA) and the Malaysian Communications and Multimedia Commission Act 1998 (MCMCA), in response to convergence and to implement the governments Multimedia Super Corridor project³⁰.

Angeline Lee states that 'The Act makes no reference to telecom or broadcasting services ,but refers instead to markets such as' communications and multimedia industry' and 'communications market' and service providers such as' network facilities provider' 'network service provider',' applications service provider and' content applications provider'³¹.'

It appears that Malaysia has given broad definitions to facilitate the growth of multimedia. And author will not discuss the efficacy of the Malaysian regulator in this article,

The Hong Kong' approach to convergence was not to merge the two regulators for telecom and broadcasting into a single regulator³². Information Technology and Broadcasting Bureau (ITTBB) was created by the Government of Hong Kong to oversee and coordinate activities of Hong Kong Telecommunication Authority (OFTA) and the Broadcasting Authority (TBA)³³.

The challenge before the Government of Sri Lanka is not only to decide on the creation of a single regulator, but also to identify the necessity to create an environment for the growth of convergence of communications. my opinion is the necessity to develop a policy for Sri Lanka to meet the requirements of communications industry and thereafter the merger of TRCSL and broadcasting regulator or to create a link between TRCSL and broadcasting regulator.

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³⁰ Angeline Lee – 'Convergence in Telecom, Broadcasting and IT' , Singapore Journal of International & Comparative Law(2001) page 682

³¹ *ibid*

³² *ibid*-page 685

³³ www.hkba.org.hk